

1. a.Abdul Rahim Vs. State Represented By

1. a.Abdul Rahim Vs. State Represented By

SooperKanoon Citation : sooperkanoon.com/49014

Court : Chennai

Decided On : Mar-11-2015

Judge : M.Sathyannarayanan

Appellant : 1. a.Abdul Rahim

Respondent : State Represented By

Judgement :

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED :

11. 03.2015 CORAM THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN Criminal Appeal (MD)No.256 of 2013 1. A.Abdul Rahim 2. Sheik Babu @ S.K.Babu ... Appellants/ Accused Nos.1 and 2 Vs. State represented by The Intelligence Officer, Narcotics Control Bureau, South Zonal Unit, Chennai, O.R.NO.48/1/7/2006- N.C.B. Madras. ... Respondent/ Complainant Prayer : Appeal filed under Section 374(2) of the Code of Criminal Procedure, to call for the records relating to judgment in C.C.No.523 of 2006, dated 27.04.2013 passed by the learned Additional District Judge for Principal Special Judge for N.D.P.S. Act Cases, Madurai and to set aside the conviction and sentence passed by the trial Court. !For Appellants: Mr.M.Ramu for Mr.B.Pandiarajan ^For Respondent: Mr.C.Arul Vadivel @ Sekar Special Public Prosecutor for NCB :

JUDGMENT

The appellants are the accused in C.C.No.523 of 2006 on the file of the Court of the Additional District Judge for Principal Special Court for NDPS Act Cases, Madurai and they stood charged, tried, convicted and sentenced, vide judgment dated 27.04.2013, thus: Accused Conviction Sentence A-1 & A-2 U/s 8(c) r/w 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985, (in short 'NDPS Act'). To undergo rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/- in default to undergo rigorous imprisonment for one year. U/s 8(c) r/w 21(C) of the NDPS Act. To undergo rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/- in default to undergo rigorous imprisonment for one year. U/s 8(c) r/w 28 r/w 23(c) of the NDPS Act. To undergo rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/- in default to undergo rigorous imprisonment for one year. The trial Court has ordered the sentence of imprisonment shall run concurrently and the trial Court has also ordered set off under Section 428 Cr.P.C.

2. The facts briefly narrated necessary for the disposal of this Criminal Appeal, are as follows:

2. 1. Ex.P.33 is the complaint filed by P.W.6 for the offences under Sections 8(c) r/w 21, 28 and 29 punishable under Sections 21(c), 28 and 29 of the NDPS Act. The contents of the complaint read that the Narcotic Control Bureau (in short 'NCB'), South Zonal Unit, Chennai has received a specific information on 22.02.2006 that "one Farook Mohideen Sameer @ Camli Singhe @ Sameer @ Sami @ Smir Srilankan is indulging in drug trafficking between India and Srilanka through Pudumadam coast of Ramnad District, Tamil Nadu with the assistance of one Kuripatti Muniswamy of Rameswaram who is also involved in the recent seizure of 17 Kgs of Heroin by NCB, Chennai at Ramnad District; the said Samir has engaged one Abdul Rahim, a Chennai based film side actor to collect the Heroin from one Ashim @ Ashiq of Mumbai; the said Abdul Rahim has gone to Mumbai with one Sheik Babu @ S.K.Babu and procured about 1.5 Kgs of Heroin concealed in a water can and is bringing the same to Madurai by bus via Bangalore and expected to reach Madurai in the night of 22/23.02.2006 and will hand over the stuff to the said Muniswamy for smuggling out to Samir of Srilanka; the said Abdul Rahim is a film side actor who acted in the film Tirupachi and will be stout with belly, broad forehead and long hair in punk style". 2.2. Mr.K.Raghavan,

Assistant Director of NCB, has conveyed the said information to P.W.1 - Shri N.S.Dev, Superintendent RIU, Trivandrum camping at Madurai over phone. A team of Officers of the NCB, based on the said information, under the leadership of P.W.1 along with two independent witnesses (P.W.4 and another), went to Arapalayam Bus Stand, at Madurai and the team headed by P.W.1 mounted surveillance in that place from 22.00 hours on 22.02.2006 and at about 03.15 hours on 23.02.2006, a public Transport Bus belonging to Tamil Nadu State Express Transport Corporation plying between Bangalore and Nagercoil reached Arapalayam Bus Stand and one person, having appearance similar to that of the information received, accompanied by another person alighted from the said bus and they were in possession of baggage. 2.3. The Officers of the team identified themselves and disclosed the information and the purpose for which, they were present and commenced enquiry. The said two persons who had alighted from the said bus, disclosed their names as Abdul Rahim (A-1) and Sheik Babu @ Babu (A-2). The Officers expressed their intention to check the baggage brought by them under the provisions of NDPS Act and also explained to them their rights under Section 50 of NDPS Act by stating that if they wish, the search to be conducted in the presence of a Judicial Magistrate or a Gazetted Officer, they can do so. However, both the accused declined to do so and informed them that they themselves can search them. The Officers also told them before commencing the search that it is open to the accused persons to make a search of the Officials also and for that offer also, the accused had declined. 2.4. The Officers in the presence of P.W.4 and another, started the search. A-1 has handed over a carry bag containing one carton box and on opening the carton, it contained a large plastic water jug and when it was opened, it contained a plastic water bottle and when it was opened, a polythene cover containing brown colour powder was found. The Officers had also collected the bag from A-2, wherein it contained a plastic bottle, which, in turn, contained a plastic water bottle and when it was opened, a brown colour powder was concealed. Samples were drawn from each of the pocket and it was tested through the field test kit brought by the Officers and the substances were found to be "Heroin". Each bag was weighed separately and it contained 690 grams and 625 grams of contraband respectively. After samples were drawn, NCB seals were put and the remaining contraband were also sealed separately and the

NCB seal was put on it. A mahazar was also drawn in this regard and it was marked as Ex.P.2. In the mahazar, the Intelligence Officer - Arul Doss (not examined), P.W.1 and P.W.7 (Intelligence Officers) and the independent witness - P.W.4 and another witness, had also signed and the copies of mahazar were also supplied to both the accused. The driving licence of A-1 and the bus tickets were also seized from them and Ex.P.2, mahazar was also prepared in this regard. 2.5. Thereafter, the Intelligence Officer viz., Arul Doss has issued summons to A.Abdul Rahim (A-1) under Ex.P.6 and to Sheik Babu @ S.K.Babu (A- 2) under Ex.P.7 and P.W.1 directed P.W.7 to take further action. 2.6. A-1 and A-2, as per summons issued to them under Ex.P.6 and Ex.P.7 respectively, appeared before P.W.7, on 23.02.2006 in Karimedu Police Station and they voluntarily gave statements, which were recorded under Section 67 of NDPS Act and Ex.P.34 is the statement given by A-1 under Section 67 of NDPS Act and it was given by him in his own handwriting and as per the request of A-2, the statement given by him under Ex.P.35 was also written by A-1 and in each and every page of both statements, A-1 and A-2 had signed. 2.7. Thereafter, P.W.7 prepared arrest memos to the effect of arrest of A-1 and A-2. Arrest Memos were marked as Ex.P.37 for A-1 and Ex.P.36 for A-2 respectively and the reasons for arrest were also explained to them and the relatives of A-1 and A-2 were informed of their arrest through telegrams and the telegrams were also marked as Ex.P.38 and Ex.P.39 respectively. The case properties were also submitted to the jurisdictional Court under Ex.P.42. A request letter was also addressed to the Central Forensic Lab, Hyderabad for chemical analysis. The complaint further reads that P.W.3, the then Superintendent of NCB, Chennai has received a report under Section 57 of NDPS Act sent by the Intelligence Officer - Arul Doss (not examined) and P.W.7 under Ex.P.13 and Ex.P.14 respectively. The houses of the accused were also searched and the mahazars were also drawn thereafter. 2.8. During the course of investigation, Farook Mohideen, who was lodged in Central Prison, Trivendrum, has also come to Madurai and after obtaining permission, he was interrogated and pleaded innocence. The chemical analysis report of Chennai Customs House Laboratory was marked as Ex.P.11 and after completing the investigation, the final report has been filed. 2.9. The accused were summoned and were furnished with copies of the documents under Section 207 Cr.P.C. and thereafter, against the

accused the charges under Sections 8(c) r/w 29, 8(c) r/w 21(C) and 8(c) r/w 28 r/w 23(c) of the NDPS Act, were framed and the accused were questioned and they pleaded not guilty to the charges framed against them and prayed for trial of the case. 2.10. The complainant/prosecution in order to sustain their case, examined P.W.1 to P.W.8, marked Exs.P.1 to P.48 and also marked M.O.1 to M.O.6. 2.11. both the accused were questioned under Section 313(1)(b) of the Code of Criminal Procedure, 1973, with regard to the incriminating circumstances made out against them in the evidence tendered by the prosecution and they denied it as false. 2.12. On behalf of the accused, neither oral nor documentary evidence was let in. 2.13. The trial Court on consideration of the oral and documentary evidence, found both the accused guilty and convicted them and imposed the sentences as stated above and hence, this Criminal Appeal has been preferred.

3. Mr.M.Ramu, learned Counsel appearing for M/s.B.Pandiarajan, learned Counsel for the appellants, made the following submissions:

3. 1. The boxes were carried by both the accused and were seized from their possession and hence, the procedure under Section 50 of NDPS Act ought to have been followed, but, admittedly it was not followed. 3.2. The prosecution has failed to produce any tenable evidence or materials to show that the accused were travelling in a public transport bus and reached Arapalayam Bus Stand on that day, on which, the contraband was alleged to have been seized. 3.3. The chemical analysis report given by Chennai Customs Laboratory was marked as Ex.P.11 and however, during the course of trial, Ex.P.24, the lab test result given by the Hyderabad Lab was marked under Section 293 Cr.P.C. and admittedly, at the time of furnishing the documents under Section 207 Cr.P.C., the said document was not furnished to the accused and only during the course of trial, it was produced and thereby, the appellants/accused were taken by surprise and denied a fair opportunity to say anything about the said document. 3.4. The prosecution has failed to follow the mandatory provisions, especially, Section 42(2) of NDPS Act, for the reason that admittedly, the secret information was received by the Assistant Director of NCB viz., Mr.K.Raghavan and he, in turn, passed on to P.W.1 and admittedly, the Assistant Director did not submit any report under Section 42(2) of NDPS Act to his immediate superior Officer and in the light of the said violation,

the appellants/accused are entitled to be acquitted.

4. Therefore, the learned Counsel appearing for the appellants/accused prays for setting aside the impugned judgment of conviction and sentence and for acquittal of both the appellants/accused.

5. Alternatively it is pleaded by the learned Counsel appearing for the appellants that the default sentence of one year rigorous imprisonment each, has also been imposed on both the appellants/accused and in the light of the unreported judgment dated 17.12.2014 made in CrI.A.(MD)No.263 of 2014, the period of default sentence may be reduced.

6. Per contra, Mr.C.Arul Vadivel @ Sekar, learned Special Public Prosecutor for NCB cases would contend that both the accused had carried two bags separately and on search, found to be contained contraband and since the seizure has been effected from the person of the accused, Section 50 of the NDPS Act has no application.

7. Insofar as the submission made by the learned Counsel for the appellants/accused that the prosecution did not collect any tenable material to show that both the accused travelled in a public transport bus on a particular time, the learned Special Public Prosecutor for NCB cases has invited the attention of this Court to Exs.P.4 and P.5 and would submit that the travelling tickets were seized from the possession of both the accused and though the concerned conductor of the bus and the Officials of the Transport Corporation have not been examined, the fact remains that they travelled in the bus as evidenced by the seizure mahazar which was marked as Ex.P.2.

8. As regards the non-compliance of Section 42(2) of NDPS Act, it is the submission of the learned Special Public Prosecutor for NCB cases that while P.W.1 was in the box, he was not at all questioned with regard to the non-compliance of Section 42(2) of NDPS Act and during the course of arguments before the trial Court also, the said point was not raised and even in the grounds of this appeal, the said point has not been raised and unless a specific question is put to P.W.1 and the answer is elicited, it may not be stated that Section 42(2) of

NDPS Act has not been complied with and hence, prays for dismissal of this Criminal Appeal.

9. This Court paid it's best attention to the submissions made by the learned Counsel appearing for the appellants as well as the learned Special Public Prosecutor for NCB cases and also considered the oral and documentary evidence and other materials and also the original records.

10. P.W.1, on receipt of the information from Thiru.K.Raghavan, Assistant Director, with regard to transportation of contraband, along with the Officials viz., Mr.Arul Doss (not examined), Intelligence Officer, P.W.7 along with two independent witnesses had gone to Aarapalayam bus stand and the Officials mounted surveillance and they saw the two accused alighting from the bus at about 03.15 hours and walking and after informed their rights under Section 50 of NDPS Act, made a search and found the contraband from their possession individually. After chemical analysis test, it was found to be the psychotropic substance viz., "Heroin" and after samples were drawn, the mahazar was prepared and thereafter, summons were issued to both of them to appear before the Officer of NCB and A-1 has in his own handwriting, submitted his statement under Section 67 of NDPS Act and it was marked as Ex.P.34 and as per the request made by A-2, he has also written the statement of A-2, which was marked as Ex.P.35.

11. A perusal of Ex.P.34 and Ex.P.35 respectively, would give a detail picture of the things that have been carried on by both of them. Since the Intelligence Officers, who have recorded the statements of A-1 and A-2 under Section 67 of NDPS Act are not police personnel, the statements given by both the accused under Section 67 of NDPS Act are not hit by Section 25 of the Indian Evidence Act.

12. No doubt, the witness to the seizure viz., P.W.4 turned hostile, but, he admits his signature in the seizure mahazar, marked as Ex.P.2 and also accepted his statement, which was marked as Ex.P.23.

13. It is the vehement submission of the learned Counsel appearing for the appellants/accused that in the absence of examination of the driver or conductor of the bus, in which, they were said to have travelled and that the tickets marked as Ex.P.4 and Ex.P.5 respectively, were also not in the normal course of business, the seizure and the recovery is very much doubtful. The said submission lacks merit for the reason that P.W.4 has admitted his signature and so also, the statement marked as Ex.P.22 and Ex.P.23 respectively and also admitted that he has given the statement before the Officer of NCB. Therefore, the prosecution has proved that on a particular date of the seizure and recovery, both the accused travelled in a public Transport Corporation bus having the contraband in a separate box.

14. The chemical analysis report given by Chennai Lab was marked as Ex.P.11 and it did not contain the exact percentage of the psychotropic substance in the seized contraband and it was sent to Central Forensic Science Lab at Hyderabad and a report was received under Ex.P.24, dated 26.04.2006, wherein it contains the percentage of the psychotropic substance. The said document was not furnished to the accused under Section 207 Cr.P.C. and only during the course of trial, it came to be marked by invoking Section 293 Cr.P.C. The prejudice caused on account of the belated furnishing of the document has been urged before the trial Court and the trial Court in paragraphs 28 to 30 onwards, has extensively taken into consideration the scope of Section 293 Cr.P.C. that Ex.P.3 is also one of the documents under Section 293 Cr.P.C. and hence, it can be marked without examining the analyst. This Court is of the view that the reasons assigned by the trial Court with regard to the marking of Ex.P.24 are fair and proper one.

15. The learned Counsel appearing for the appellants/accused for the first time before this Court has stated that as per the evidence of P.W.1, he received the message of one Raghavan, Assistant Director of NCB, Chennai with regard to the smuggling/transportation of contraband by A-1 and A-2 and Mr.Raghavan ought to have reduced the information in writing and he in turn should have submitted the same under Section 42(2) of NDPS Act.

16. As already pointed out, the concerned witness, viz., P.W.1 was not cross-examined and it was also not raised before the trial Court and also not before this Court in the form of grounds.

17. Chapter V of the NDPS Act, speaks about the procedure and Section 42 speaks about the power of entry, search, seizure and arrest without warrant or authorisation and it is relevant to extract Section 42(1) of NDPS Act, thus: "42(1)..... Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,- (a) enter into and search any such building, conveyance or place; (b) in case of resistance, break open any door and remove any obstacle to such entry; (c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act; and (d) detain and search, and if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act: Provided that if such officer has reason to

believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief."

18. As per the said provision, any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act is kept or concealed in any building, conveyance or enclosed place 19. In the case on hand, the information passed on by Mr.K.Raghavan, Assistant Director of NCB, under Section 41(2) of NDPS Act was marked as Ex.P.32 and P.W.1 has acted on the said information.

20. That apart, Section 43 of NDPS Act speaks about power of the seizure and arrest in public place and it may be carried on by any Officer of any of the departments mentioned in Section 42 of NDPS Act.

21. In the light of the provisions of Section 41(2) of NDPS Act, this Court is of the view that the compliance under Section 42(2) of the Act is not necessary in the facts and circumstances of the case and as already pointed out, the said ground is urged for the first time before this Court. The Chemical Analysis report marked as

Ex.P.24 would also disclose that as per the quantification test, the quantity percentage of Narcotic Drugs Psychotropic Substance found in the contraband exceeds the commercial quantity.

22. The trial Court has properly analysed the oral and documentary evidence and reached the conclusion that the respondent/complainant has proved the guilt on the part of the accused beyond reasonable doubt.

23. This Court, on an independent application of mind to the impugned judgment and the materials placed before this Court in the form of typed set of documents, is of the view that there is no error apparent or infirmity in the reasons assigned by the trial Court for convicting both the accused.

24. In the result, this Criminal Appeal is dismissed, confirming the judgment in C.C.No.523 of 2006, dated 27.04.2013 passed by the learned Additional District Judge for Principal Special Judge for N.D.P.S. Act Cases, Madurai. However, in the light of the unreported judgment dated 17.12.2014 made in Crl.A.(MD)No.263 of 2014, the default sentence is reduced from rigorous imprisonment for one year each, to rigorous imprisonment for two months, each, and in other aspects, the judgment of the trial Court, is confirmed. 11.03.2015 Index :Yes/No Internet :Yes/No ssl To 1.The Court of Additional District Judge for Principal Special Judge for N.D.P.S. Act Cases, Madurai. 2.The Intelligence Officer, Narcotics Control Bureau, South Zonal Unit, Chennai, O.R.NO.48/1/7/2006- N.C.B. Madras. 3.The Additional Public Prosecutor, Madurai Bench of Madras High Court, Madurai. M.SATHYANARAYANAN,J.

ssl CRIMINAL APPEAL(MD)No.256 of 2013 11.03.2015

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com