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Court : Chennai

Decided On : Feb-06-2001

Reported in : 2001(77)ECC203

Judge : F.M. Ibrahim Kalifulla, J.

Acts : Narcotic Drugs and Psychotropic Substance Act, 1985 - Sections 8, 15 to 25, 29, 30, 42(1 and 2) and 50; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 236

Appeal No. : Crl. A. No. 372 of 1996

Appellant : Samsugai and Another

Respondent : State Rep. by the Intelligence Officer, Ncb Madras

Advocate for Def. : Mr. P. Rajamanickam, Special Public Prosecutor

Advocate for Pet/Ap. : Mr. C.J. Madanagopal, Adv.

Judgement :

ORDER

1. A2 and A3 are the appellants herein. The appellants have come forward with this appeal challenging the conviction and sentence imposed against them by the Court below in its order dated 6.1.1996, in C.C-No.3 of 1996 convicting the appellants under Section 30 of the Narcotic Drugs and Psychotropic Substances

Act, hereinafter called 'the Act' and sentenced them to undergo rigorous imprisonment for five years each and also to pay a fine of Rs.5000 and in default of payment of fine, to undergo further rigorous imprisonment for one more year.

2. The brief facts of the prosecution case are that on 20.8.1993, based on an information when an Ambassador car driven by A1 was intercepted in front of Dental Hospital and a search of the dicky of the car was made, a suitcase was found containing Heroin weighing about 5.3 kgs, that thereafter, A1 and the second appellant were taken into custody and on information furnished by them, the first appellant was apprehended on the same date, that thereafter, after two months, i.e. on 19.10.1993, fourth accused was also apprehended, that based on the investigation conducted, a complaint was lodged against all the accused 1 to 4 charging them with the offence falling under Sections 8, 23 and 29 of the N.D.P.S. Act. After trial, the Court below acquitted A1 and A4 of all the charges and A2 and A3, the appellants herein, were also acquitted of all the charges. However, the appellants were convicted for the offence falling under Section 30 of the Act. Aggrieved by the said conviction and sentence, the appellants have come forward with this appeal.

3. The learned counsel for the appellants would contend that there is gross violation of Section 42(1 & 2) as well as Section 50 of the N.D.P.S. Act and that the recovery alleged as against A1 not having been proved, there is no scope for the conviction imposed by the Court below, under Section 30 of the Act. The learned counsel would contend that violation of Section 42(1 & 2) as well as Section 50 of the Act having been construed as a violation of mandatory provisions of the Act, the trial Court was not justified in ordering the conviction of the appellants. The learned counsel also contended that when as per Ex-P17, the recovery of the dark blue black suitcase with letter inscribed there as 'President' with combination number lock, was made after 11-30 p.m. on 20.8.1993, and as per Ex-P17, the mahazar for recovery itself was recorded around 12-45 midnight of 21.8.1993. The contents of Ex.P14 stating that the said recovered suitcase was deposited with the Officer in charge of N.C.B. godown on 20.8.1993 at 22.00 hours as per Ex.P14 cannot be believed. The learned counsel would therefore contend that the whole case of the prosecution was untrue and based on such a false case

built up by the respondent herein, the trial Court ought not to have convicted the appellant.

4. The learned Public Prosecutor on the other hand would contend that the search and seizure from the car having been carried out in a public place. Section 42 of the Act was not attracted, that as per the statement of the first appellant under Ex.P19, he was involved in the trafficking of the narcotic psychotropic drugs Heroin and the said statement of the first appellant was also corroborated by the statement of the second appellant under Ex.P26 and therefore, there was every justification in convicting the appellants for having conspired for committing an offence punishable under Section 23 of the Act as contemplated under Section 29 of the Act and therefore the conviction and sentence imposed by the Court below can still be confirmed by this Court either for the offence punishable under Section 30 of the Act or for the one to be imposed under Section 29 of the Act.

5. Having heard the learned counsel for the appellants and considering their respective contentions, it would be worthwhile to refer to Section 30 of the Act under which the appellants have been convicted by the Court below. Section 30 contemplates punishment to be imposed against any person who makes preparation to do or omits to do anything which constitutes an offence punishable under any of the provisions of Section 15 to 25 (both inclusive) and from the circumstances of the case, it may be reasonably inferred that the said person was determined to carry out his intention to commit an offence, but had been prevented by the circumstances independent of his will. The sentence to be imposed is half of what has been provided for any punishment that could be imposed for which he would have been found punishable. As between Section 15 to 25, in the case on hand, the only provision under which the appellants could have been punished was Section 23 of the Act which is the penal provision for illegal import into India or export from India or transship of narcotic drug or psychotropic substance.

6. The Court below has found based on the evidence available on record that no offence was made out falling under Section 23 of the Act. In other words, the Court below has come to a categorical conclusion based on the evidence available on record that the appellants have not committed any offence of their involvement,

import into India or export from India or tranship of any narcotic drug or psychotropic substance. In fact, the only act of averment alleged as against the appellants was that the first appellant had in arrangement with A1 planned to tranship the seized Heroin through the second appellant to Colombo via Opila, for which, he also engaged the services of A4. It is the finding of the Court below that having regard to the evidence available on record, there is no scope for holding that A1 and A4 could be convicted of the offence falling under Section 8(c), 23 read with 29 of the Act. When the whole case built up by the prosecution was based upon the chain of events linking accused 1 to 4 and that as found by the Court below, A1 to A4 could not be convicted for the offence alleged against them, the question remains as to whether A2 and A3, the appellants herein, could be convicted in isolation of preparation of any offence falling under Section 30 of the Act based on very same set of events.

7. For reaching the conclusion that no offence could be made out as against all the accused under Section 8(c), 23 read with 29 of the Act, the Court below held that there was a violation of mandatory provision of Section 50 of the Act and apart from the fact that there was no clinching evidence to establish that what was seized was the material which was sent for chemical analysis under Exs. P30 and P31. As per the findings of the Court below, there is variation in the seal number as admitted by P.W.8, the chemical analyst and also disclosed in Ex.P30, while in Ex-D2-A, the property was covered with seal No. 12, the contraband tested by P.W.8 was in respect of material covered under E.X. P30 which carried seal No. 11. The Court below therefore concluded that the test report under, Ex-P31 cannot be correlated to the sample said to have been seized from the accused. It was on the basis of the above said finding, the Court below reached the conclusion that no conviction could be imposed against all the accused under Section 8(c), 23 and 29 of the Act.

8. A reading of Section 29 of the Act would show that whoever abets, or is a party to a criminal conspiracy to commit an offence punishable under this Chapter, shall, whether such offence be or be not committed in consequence of such abetment or in pursuance of such criminal conspiracy, be punishable with the abetment provided for the offence. The Court below having found that the offence charged

against all the accused including the appellants under Section 23 which provision falls under Chapter IV not having been established, the only other requirement was to find out as to whether the offence of abetment or criminal conspiracy was made out for convicting the accused under Section 29 of the Act. In that process, the Court below, on an analysis of confessional statement of A2 and A4 namely Ex.P25 and P26 respectively, and in the absence of the examination of one Thiru Murugan, the boat owner at Mukkayur, who according to A4 was stated to have arranged a boat at Mukkayur on 3.8.1994 and in the absence of such independent corroboration, it was highly risky to connect the alleged confession of A2 and A4 to deduce the theory of conspiracy against them. However, the Court below was of the view that having regard to the contents of the statements made by A3 and A2, the offence of preparation was made out punishable under Section 30 of the Act.

9. As contended by the learned Public Prosecutor for convicting a person under Sections 29 and 30 of the Act, it is not necessary that the offence alleged against the accused under Chapter IV of the Act should have been made out. Irrespective of the acquittal of the charges falling within Section 15 to 25 of the Act, there could still be a conviction either under Section 29 or Section 30 of the Act.

However, there should be acceptable legal evidence available on record for convicting a person under Section 29 or 30 of the Act independent of the offence charged against him under the penal provision of Section 15 to 25 of the Act. In the case on hand, the penal provision levelled against all the accused was Section 23 of the Act. namely, their attempt of trafficking in Herion. As found by the Court below, the said offence was not made out for more than one reason, namely for violation of mandatory provision of the Act and also for the missing link relating to the contraband seized and the contraband sent for analysis so as to reach a conclusion that what was seized was really contraband substance. In such circumstances, the question to be considered is as to whether it can still be held that the offences alleged against the appellants either under Section 29 or 30 of the Act was made out. The only piece of evidence relied upon by the Court below for convicting the appellants under Section 30 of the Act was the statements of the appellants and Ex.P9 which is stated to be railway tickets recovered from A3.

10. It is significant to note that the appellants retracted from their statements while recording their questioning under Section 313. Therefore, it remains to be considered as to whether there was any other independent evidence available on record to corroborate the stand of the prosecution about the alleged offence of preparation Bald to have been committed by the appellants. In that context, the Court below while discharging the appellants, as well as the other accused under Section 29 of the Act, was of the view that there was no independent corroborative evidence of other persons was available. The said reasoning of the Court below cannot be found fault with. If that be so, I am of the view that on the very same reasoning, in the absence of any other independent evidence to corroborate the statements of the appellants, it is quite unsafe to reach the conclusion that the offence of preparation under Section 30 of the Act was made out as against the appellants herein. Going by the confession of A2 and A3, namely, the appellants alone, without, any other acceptable corroborative evidence, it would be wholly unjustified in imposing a conviction under Section 30 of the Act.

11. Though as contended by the learned Public Prosecutor and as held by the Honourable Supreme Court, in the Judgment reported in G.P. Sharma & another v. The State of Uttar Pradesh, where the accused although charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of Section 236 of the Criminal Procedure Code can be convicted of the offence which he is shown to have committed, although he was not charged with it. Inasmuch as I have found that based on very retracted confessional statements of A2 and A3 alone, it would be unsafe to reach any conclusion for convicting them either under Section 29 or Section 30 of the Act, I am unable to confirm the conviction and sentence imposed by the Court below for an offence under Section 30 of the Act or to convict the appellants for an offence under section 29 of the Act.

In the result, the appeal is allowed and the conviction and sentence imposed on the appellants are set aside and the appellants are set at liberty forthwith unless liable to be detained in any other case. The fine amount imposed and paid shall be refunded to the appellants.

