

**K.Chandrabose Vs. State**

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**SooperKanoon Citation :** [sooperkanoon.com/964564](http://sooperkanoon.com/964564)

**Court :** Chennai

**Decided On :** Apr-26-2013

**Judge :** The Honourable Mr.Justice S.Palanivelu

**Appellant :** K.Chandrabose

**Respondent :** State

**Judgement :**

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED:

26. 04.2013 CORAM THE HONOURABLE Mr.JUSTICE S. PALANIVELU Criminal Appeal Nos.806 of 2011 & 415 of 2012 K.Chandrabose .. Appellant/2nd Accused [in Crl.A.No.806/2011] Khader Mohideen .. Appellant/1st accused [in Crl.A.No.415/2012] Vs State rep.by Intelligence Officer, Narcotics Control Bureau South Zonal Unit Chennai .. Respondent [in both Crl.Appeals] Criminal Appeals filed u/s.374 (2) of Cr.P.C. against the judgment passed in C.C.No.315 of 2004 dated 28.10.2011 on the file of Special Judge, I Additional Special Court under NDPS Act, Chennai-104. For Appellants : Mr.M.Shanmugavelu [for A2] [in Crl.A.No.806 of 2011] Mr.T. Muruganantham[for A1] [in Crl.A.No.415 of 2012] For Respondents : Mr. Kumar Special Public Prosecutor for NCB cases [in both appeals] COMMON JUDGMENT 1 The following is the graphical narration of the prosecution case:

1. (a) P.W.1 working as Intelligence Officer in the Nargotic Crime Branch, South Zonal Unit, Chennai, on 3.7.2004 at about 1.00 p.m.he received an information

over phone that one Khader Mohideen of Srilankan now residing at No.7/11 G, Viswanathan Koil Street, St. Thomas Mount, Chennai along with his confederate one Chandra Bose @ Bose both are indulging in drug trafficking and they have kept 1 kg of heroin in the above premises and that if the above premises is searched, the above said 1 kg of hereoin can be seized from the above two persons and that information was reduced by P.W.1 in writing on 3.7.2004 and sent the information sent to his immediae superior P.W.5 who called for his colleague Mr.Shankarkumar and P.W.1to his chamber and gave instructions to P.W.1, Chandrakumar and gave instructions for further action. Then the team led by P.W.5 including P.W.1, Shankarkumar proceeded to the house where A1 and A2 are living. P.W.1 approached two independent witnesses viz., Pappaiah P.W.6 and Ravikumar to be witnesses for which they are accepted. P.W.1 explained them about the purpose for which they came to there. They went to the house where A1 living and knocked the door. A1 opened the door. P.W.1 and others introduced themselves by showing their identity cards. The other person present there was A2. The police informed about the purpose for which they came to the house and they told them about their intention to conduct the search of the house and persons under NDPS Act and also informed him about Section 50 of NDPS Act that they have a right to be searched before a Magistrate or Gazetted officer. Both the accused told them it is enough for them to search by police alone and they told that they have above 1 kg of heroin and took them to the near by room and produced a polythene cover with contraband. The police found heroin in the polythene cover and they took small quantity and tested it with the field test kit brought by them which answered positive for heroin. 1.(b) Then as per procedure, the P.W.1 seized it and weighed it , it was found to be 1.275 kgs. They took 2 samples of 5 grams each and put them in two small polythene cover separately, heat-sealed and kept in a brown coloured paper cover and sealed with NCB seal No.11 and marked as P.1. The rexin bag M.O.1 in which contraband was kept, tied with white clothe tape, sealed with NCB seal No.11 and marked as P.2. 1.(c) The driving licence of A1 and A2 were recovered when they searched. They did not secure anything while the search from the house of the accused. Mahazar was prepared in the spot. In the Mahazar, seized contraband, Samples and documents, both the accused and independent witnesses, P.W.1 and P.W.5 put

their signatures. A copy of Mahazar was supplied to both the accused. Mahazar is Ex.P.2. By the orders of P.W.5, P.W.1 asked both the accused to appear before him, the investigating officer who gave summons. They are Exs.P.5 and P.6. A1 and A2 produced before the NCB office where P.W.1 examined them and also the other police personnel and recorded their statement. 1.(d) P.W.2 is also an Intelligence Officer he was directed by Superintendent of police to enquire second accused. At the time of enquiry second accused gave certain informations. At the behest the second accused gave a voluntary statement written by his hand under section 67 of NDPS Act. P.W.2 also put his signatures in that statement in all pages in addition to the signatures of second accused. The voluntary statement is Ex.P.12. He entrusted the second accused to P.W.4 for judicial remand. P.W.3 is chemical analyst in the laboratory situate in the premises of Customs Department. He got the samples of contraband from P.W.4 and found the Court seals in that. He opened the parcel and subjected the same for chemical analysis. He came to know the contraband is Diacetyl Morphine (Heroin). He also prepared a report that it is a narcotic drug as defined in NDPS Act. His report is Ex.P.17. 1.(e) P.W.4 is Mukundan. He was Intelligence Officer at the relevant point of time. He was directed by Deputy Superintendent of Police Gunabalan to enquire the first accused and record statement. At the time of enquiry the first accused in his own hand writing wrote voluntary statement Ex.P.18. He arrested and sent him to judicial custody. P.W.4 also gave special report under Section 57 of NDPS Act. He gave requisition to the Special Judge to despatch the contraband for chemical analysis. P.W.5 Gunabalan, Deputy Superintendent of Police, who received F.I.R., directed the officers to proceed to investigate the case. He was also present at the time of house search of the house belonging to P.W.6. 1.(f) P.W.6 is house owner in which first accused was tenant. He was residing in the ground floor while accused were living in the upstairs. He would say that on 30.06.2004 an advance of Rs.10,000/- was paid to him by the first accused and on that date itself he came to occupy the house. He was all along present during the house search and seizure of the contraband. He wrote by his own hand writing a statement Ex.P.11. P.W.7 was working as Intelligence Officer in respondent police. He was directed by P.W.5 to investigate the case. He prepared the complaint in Ex.P.39 for offences u/s 8(c) r/w 21, 25 and 29 of NDPS Act 1985 and filed the same before

the Court, wherein he has narrated all the events.

2. In the prosecution side 7 witnesses were examined, 39 documents and 4 material objects were marked. After the prosecution evidence were over, both the accused were questioned under Section 313 Cr.P.C.as to the incriminating materials available against them in prosecution evidence. Both of them denied complicity to the offences. On the side of the accused no witness was examined and no defence side exhibit was marked.

3. After analysing the evidence on record, the learned trial Judge has found both the accused are guilty of offences under Section 8(c) r/w.29, 21(c) & 25 of NDPS Act, 1985 as amended by Act 9 of 2001 and convicted and sentenced them to undergo Rigorous imprisonment for 10 years for each offence and to pay a fine of Rupees one lakh for each offence, in default to undergo further period of 6 (six) months rigourous imprisonment for each offence and ordered the substantive sentence of imprisonment imposed upon them shall run concurrently. Aggrieved at the conviction first accused has preferred Crl.A.No.415 of 2012 and the second accused has preferred Crl.A.No.806 of 2011 before this Court. Since both the appeals have arisen out of the same judgment, the common judgment is passed.

4. Point for Consideration: "Whether the prosecution has brought home the guilt of the accused under the charges framed beyond all reasonable doubt?" Point:

5. Mr.T. Muruganandam, learned counsel appearing for first accused would contend that in this case Section 50 of NDPS Act has been violated and the accused was detained in the office, that the officers should have taken the Magistrate or Gazetted officer as per this section and hence the seizure conducted in this case is illegal, but this contention is repelled by Mr.N.P. Kumar, Special Public Prosecutor for NCB Cases would submit that since the officer made search and arrest of the accused in addition to seize the contraband by himself is the Gazetted officer and hence the accused need not be taken to an another gazetted officer. In support of his contention he placed reliance upon a Judgment of the Honourable Supreme Court reported in 2003 (7) Supreme 61 [M. Prabhulal v. The Assistant Director, Directorate of Revenue Intelligence] in which Their Lordships have observed as follows: "A Gazetted Officer has been differently dealt with and

more trust has been reposed on him can also be seen from Section 50 of the NDPS Act which gives a right to a person about to be searched to ask for being searched in presence of a Gazetted Officer. The High Court is, thus, right in coming to the conclusion that since the Gazetted Officer himself conducted the search, arrested the accused and seized the contraband, he was acting under Section 41 and, therefore, it was not necessary to comply with Section 42." 6. It is also pointed out by the learned counsel for the first accused that according to the confession statement of accused No.1, the contraband was given by one Rajendran whereas the 2nd accused in his confession statement stated that one Ramachandran had given the parcel. There is remarkable discrepancy. But this Court is of the view that the said discrepancy with regard to the name of the person who gave the contraband may not affect the case. Hence, it is minor discrepancy. In this context, the learned Special Public Prosecutor would contend that once the confession statement given by the accused under Section 67 of the Act, it is enough for the Court to place reliance upon the same for recording conviction of the accused. For this proposition of law, the learned counsel strongly place reliance upon a decision reported in 2008 (1) Crimes 154 (SC) Kanhaiyalal v. Union of India] wherein it is observed as follows: "37. The law involved in deciding this appeal has been considered by this Court from as far back as in 1963 in Pyare Lal Bhargava case [1963 Suppl.1 SCR 969]. The consistent view which has been taken with regard to confessions made under provisions of Section 67 of the NDPS Act and other criminal enactments, such as the Customs Act, 1962, has been that such statements may be treated as confessions for the purpose of Section 27 of the Evidence Act, but with the caution that the court should satisfy itself that such statements had been made voluntarily and at a time when the person making such statement had not been made an accused in connection with the alleged offence." 7. As directed in the above said decision, the confession statement given by both the accused have satisfied the test as mentioned in the above said judgement, i.e., those statements have been voluntarily made, in the considered opinion of this Court. In view of the above, this Court is also of the opinion that both confession statements given by the accused are sufficient to hold that both the accused are guilty of charges as framed.

8. It is urged by the learned counsel for the first accused that the weight of the brown colour powder is 2.010 Kgs as mentioned in Ex.P.19 arrest memo of 1st accused, in fact the weight of the contraband is having different weight. Hence it is not made it clear as to weight of the contraband involved in this case. While this Court has scrutinised Ex.P.19 Arrest Memo, it is stated therein that first accused entered into a criminal conspiracy for trafficking of about 2.010 kgs of brown colour powder believed to be Heroin which came to be seized at No.7/11G, Viswanathan Koil Street, St.Thomas Mount, Chennai-16 on 3.7.2004. It transpire that even though criminal conspiracy was there for trafficking of about 2.010 Kgs of Heroin was to be seized, in fact at the time of search only 1.275 kgs of contraband was seized. In this regard, this Court does not smell rat in the case of prosecution.

9. It is also agitated on behalf of the first accused that though P.W.1 in his chief and cross examination that the search and seizures started by 3.00 p.m., there is no clear evidence with regard to the time of seizure. The answer for this question would be that no materials contradicting the above said time is indicated on behalf of the accused. Hence, it is not vital to the prosecution.

10. The learned counsel for the 2nd accused Mr.M.Shanmugavelu would contend that the trial Court was convicting A2 on the presumption that he has also a tenant along with A1 in the premises of P.W.6. It is also stated that it is the categorical deposition of P.W.6 that he did not see second accused, the he does not know who he was, that at the time of search, the second accused was inside the house and that whether second accused was present along with 1st accused. In Ex.A.18 voluntary statement of first accused he has stated that second accused was introduced by Rajendran one month back that the second accused belongs to Tuticorin. In this juncture, it is to be borne in mind, either the second accused was tenant along with 1st accused or not, he was present with first accused at the time of search and seizure and his involvement in the offence is admitted and hence, even though as stated by the second accused, he was convicted by the trial Court on the premises that he is co-tenant with 1st accused, it will not affect the prosecution case.

11. It is also argued on behalf of second accused that no seizure of contraband was recovered from A2, that P.W.6 also did not speak anything about the presence of A2 and hence it is made clear that from the report of the prosecution that both the accused admitted the possession of Norgotic drug 1.275 kg only. Further P.W.6 would say that at the time of search, he could not remember whether anybody was with the first accused. Even though there was no seizure from A2, his involvement has been admitted and also stated by A1 in Ex.P.18. Further, merely because P.W.6 says that he could not recollect whether anybody was available with first accused, it could not be an embargo to reject the version of prosecution. It is also submitted on behalf of the second accused that in this case the alleged voluntary statements given by both the accused under Section 67 of the NDPS Act are unbelievable and by no stretch of imagination it could be sated that the oral testimony of P.W.6 as corroborated with the confession statement also as already pointed out, this Court has found on carefully analysing the circumstances that both the voluntary statements given by both the accused are genuine and they are really voluntarily given. To a greater extent the oral evidence of P.W.6 is lent corroboration to the voluntary statement of both the accused.

12. while adverting to the sentence part of the judgment, the learned counsel for the Appellants would submit that since the appellants have been in custody for a long time, the default sentences for non-payment of fine may be reduced to 10 days and even the default sentences for each count may be directed to be run concurrently. In support of their contention they placed reliance upon earlier judgments of this Court in CrI.A.No.395 of 2011 dated 11.07.2011 [C.Ponnusamy @ Ponraj v. Intelligence Officer, NCB South Zone Unit, Chennai] by T. Mathivanan.J., and CrI.A.No.720 of 2010 dated 8.9.2011 [Abdullah Abdul Salam v. Intelligence Officer, NCB South Zone Unit, Chennai] by K.B.K.Vasuki.J., wherein the default sentences of six months have been reduced to one month and the same have been directed to run concurrently. Accepting the considered view of this Court, I have also directed as such in judgment in CrI.A.No.391 of 2011 dated 04.01.2013 [S.Jaya @ Jayachandran @ Jaikumar and others v. Central Rep.by Intelligence Officer, Narcotic Control Bureau, South Zone Unit, Chennai].

13. But the learned Special Public Prosecutor for NCB Cases relies strongly a Full Bench decision of this Court in CrI.A.No.417 of 2012 dated 30.01.2013 [Donatus Tony Ikwansi v. The Investigating Officer, NCB South Zonal Unit, Chennai-90] wherein it is held that the default sentences for non-payment of fine cannot be ordered to run concurrently. Taking into account of the prevailing facts in this case, the default sentences are reduced to one month from 6 months. Following the view taken by the Full Bench of this Court, the default sentenced are directed to run consecutively.

14. In view of the above said observations, on carefully scrutinising the materials placed before the prosecution in the light of the oral evidence of prosecution witnesses this Court is of the firm view that the prosecution has established the charges beyond reasonable doubt and it was brought home the guilt of the accused also. There is no infirmity either by factually or legally found in the judgment of conviction passed by the trial Court which deserves to be confirmed and it is accordingly confirmed. The default sentences for non payment of fine ordered by the trial Court as 6 months for each offence is reduced to one month for each offence. The appeals are devoid of merits with reference to the conviction recorded by the trial Court. The point is answered accordingly.

15. In fine, both the criminal appeals in CrI.A.Nos.806 of 2011 and 415 of 2012 are partly allowed, confirming the judgment of conviction and imposition of substantive sentences imposed upon the accused by the trial Court. The default sentences alone reduced to one month from six months for each offence. ggs To 1. The Special Judge, I Additional Special Court under NDPS Act, Chennai-104.

2. The Public Prosecutor, High Court Madra

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