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CrI.A.No.118 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :26.08.2022

Pronounced on :01.09.2022

Coram:

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

Criminal Appeal No.118 of 2017

Anandam Gundluru

.. Appellant

/versus/

Inspector of Police,
NCB/MDS
Chennai

(On the file of the NCB/MDS, Chennai)

.. Respondent

Prayer: Criminal Appeal has been filed under Section 374(2) of Cr.P.C., r/w Section 36-B of NDPS Act, 1985 to set aside the conviction and sentence rendered by the II Additional Special Judge for NDPS Act, Chennai dated 09.01.2017 in C.C.No.15 of 2015 in NCB F.No.48/1/11/2014 on the file of the NCB/MDS Chennai and acquit the accused.



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For Appellant :Mr.T.S.Sasikumar
For Respondent :Mr.N.P.Kumar,
Special Public Prosecutor (NDPS Cases)

J U D G M E N T

The Intelligence Officer, Narcotic Control Bureau (NCB), Chennai is the complainant. The appellant, Anandam Gundluru is the accused. The complaint against the appellant alleging conscious possession of about 1½ kg of Heroin with intention to transport illegally to Kuwait, thereby committed offences under Sections 8(c) r/w 21(c), 22(b), 23(c) and 29 of Narcotic Drug and Psychotropic Substances Act, tried before the Special Court for NDPS Act Cases at Chennai in C.C.No.15/2015.

2. To prove the charges 8 witnesses, 47 documents and 10 Material Objects were relied on the said of the complainant. The Trial court found the accused guilty of offence under Sections 21 (c) and 23 (c) of NDPS Act. Found him not guilty of offence under Sections 22 (b) and 29 of the NDPS Act.

3. Aggrieved by the conviction and sentence of 10 years RI with



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fine of Rs.1,00,000/-, in default to undergo one year RI for each of the offence, the present appeal is filed.

4. The facts of the case as spoken by the witnesses:-

PW-1 (Mr.M.R.Aravind), the Intelligent Officer of NCB, Chennai while in Office on 15/09/2014 received an information through phone that one Venkateswara Rao of Chittor, Andra Pradesh (absconding accused) through Anandam Gundluru (accused/appellant herein) planning to send 1 ½ Kg of Heroin by Fly Emirates Flight, which leaves Chennai at 21.45 hrs that night. This telephonic information was reduced into writing (Ex.P-1) and placed before PW-7 (Mr.Dev Anand, the Superintendent, NCB). As per the direction of PW-7, he formed a Team and reached Chennai Airport. Got introduced to Mr.S.Kathiresan (Security Officer, Air India) and P.Muthu Selvakumar (Senior Ramp Service Agent) and requested them to be witnesses to the proceedings. They proceeded to the Custom Examination Area in the depature hall of Chennai International Airport. They started checking the passports of the passengers coming after

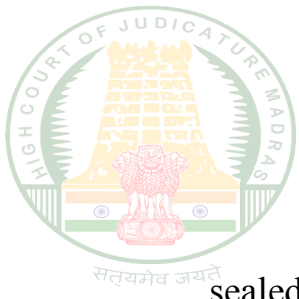


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immigration clearance. They identified Anandam Gundluru (accused) from his passport and interrogated him, after disclosing their identity. The intention to search him and his baggage was conveyed to the accused through PW-4 (A. Ravi Kannan, Surveillance Assistant, NCB). The right under Section 50 of the NDPS Act was explained to the accused. Through the Fly Emirates staff, the checked-in-luggage bags of the accused were brought and identified with the baggage tags. On examining the black colour Air bag, they found many packets of food items and at the bottom a black colour polythene packet wrapped with brown colour adhesive tape was found. On opening the packet, they found 3 Food Grade packets. In side the first food grade packet, they found brown colour powder, which tested positive to heroin, when tested with the field test kit. 958 grams of heroin was seized and sealed with NCB mark in separate packet after drawing two samples each 5 grams. The samples were marked as S-1 and S-2. The balance 948 grams packet marked as P-1. Inside the second food grade packet, they found brown colour powder, which tested positive to heroin when tested with the field test kit. 419 grams of heroin was seized and

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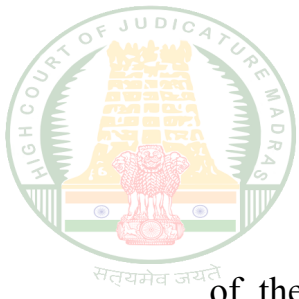
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sealed with NCB mark, in separate packet after drawing two samples each 5 grams. The samples were marked as S-3 and S-4. The balance 409 grams packet marked as P-2. Inside the third food grade packet, they found crystalline powder. When tested with the field test kit, it answered Methamphetamine. It weighed 10 grams. Two samples each 5 grams was drawn and packed with NCB seal. The samples were marked as S-5 and S-6.

5. Thereafter, personal search was conducted. Two boarding passes, 2 baggage tags, E-ticket to Kuwait, Passport, Kuwait Visa, cellphone, INR Rs.500/- were all seized under mahazar Ex.P-3 in the presence the independent witnesses S.Kathiresan (PW-6) and Muthu Selvakumar (not examined). The seized articles M.O-1 to M.O-10 along with the accused were brought to NCB office.

6. PW-2[Mr.N.Venkatesan], Investigating Officer, NCB, had recorded the Statement of the accused under Section 67 of the NDPS Act, which is marked as Ex.P-10. It was recorded in Telugu, the mother tongue

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of the accused.(English free translation of it is was done by PW-4 and marked as Ex.P-23). Being satisfied that the accused had conscious possession of contraband and had carried it intentionally to transport to Kuwait, he was arrested by PW-4 [A.Ravikannan], Investigating Officer, NCB. After informing the wife of the accused about the arrest, PW-3[Mr.D.Satish Kumar], Investigating Officer, NCB had produced the accused along with the seized contraband before the Judicial Magistrate for remand. The Remand Report is Ex.P-14. The accused was sent to Puzhal Prison. As per the direction of the Judicial Magistrate, the properties were taken back to be produced before the Special Court for NDPS Act Cases. The properties were deposited in the NCB Godown along with Forwarding Memo Ex.P-16. On 19/09/2017, PW-3, made a request to the Special Court to receive the properties and out of it, to send the samples marked as S-1, S-3 and S-5 for qualitative chemical analysis. Accordingly, the samples were sent to the Customs House Lab. On receipt of the samples, the Assistant Chemical Examiner, Mr.N.Ponnusamy (PW-5) submitted his report Ex.P-25 stating that the brown colour powder found in packets marked as S-1 and S-

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3 answered the test for the presence of Diacetyl morphine (Heroin), whereas the crystalline powder in the packet S-5 does not answers the test of Methamphetamine. However, the sample may be sent to Central Forensic Lab at Hyderabad for exact identification.

7. PW-7 [Mr.I.Dev Anand], Superintendent, NCB, Chennai after receiving the reports from the Investigating Officer's under Section 57 of the Act, regarding the arrest and seizure of contraband, entrusted the investigation to PW-8, Mr.P.Kratu Shukal. PW-8, through NCB, Hyderabad organised the house search of the accused. The search mahazar is Ex.P-29. The call details of the Phone No:9553063069 Ex.P-40 (user: Venkatesawara Rao, Subscriber-his brother Chitti Babu) was collected from the service provider. To Venkateswara Rao and to Chitti Babu, who is the brother of the absconding accused Venkateswara Rao, summons issued thrice, but returned. Steps to trace him taken but failed. Mr.P.Tathaiah, the father of Venkateswara Rao and Chitti Babu, was examined. In his statement (Ex.P-42) Tathaiah had stated that, his son Chitti Babu went to Kuwait two



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years ago, but he lost contact. When two of his villagers by name Suresh and Narayana came back from Kuwait, a month ago, they informed him that his son Chitti Babu is detained in Kuwait prison.

8. Finding of the trial Court:

Regarding the averment that the prosecution failed to comply the mandate of Section 50 of the NDPS Act, during the course of search and seizure, the trial Court has observed that, the contraband was recovered from the airbag of the accused, which was handed over by the accused to the staff of Flight Operator for loading after customs check. The bags were brought back by the staff to the examination hall and searched. Therefore, Section 50 of the NDPS Act, which is to be followed in case of search of the person does not apply. From the evidence of PW-1 to PW-4, though intimation about the option under Section 50 of the Act not necessary, the accused was informed about his right and he has declined to exercise the option to be searched before a Gazatted Officer or Judicial Magistrate.

9. For the plea that the accused was not conscious of the

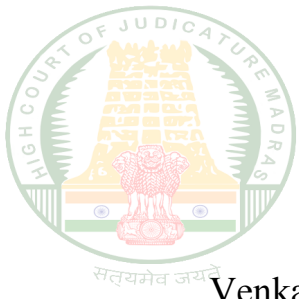


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contraband found in his possession, since it was given by the absconding accused Venkateswara Rao saying it contains wheat flour and tamarind. Innocently, the accused received it since few more villagers also gave eateries and snacks to be handed over to their relatives at Kuwait. The presumption of culpability rebutted through the statement of the accused, the trial Court, after considering the judgments in *Mohan Lal –vs- State of Rajasthan* reported in [(2015) 6 SCC 222]; and *Noor Aga –vs- State of Punjab* reported in [(2008) 6 SCC 417] relied by the learned counsel for the appellant/accused and *Dharmpal Singh –vs- State of Punjab* reported in [(2010) Supreme (SC) 839]; *Megh Singh –vs- State of Punjab* reported in [(2004) SCC (Cri) 58]; and *Madan Lal and another –vs- State of Himachal Pradesh* reported in [2003 (7) SCC 465] relied by the Special Public Prosecutor for NCB, held that the possession of the contraband by the accused with “*animus*”, custody and dominion by referring the statement of the accused that, initially, he was scared to receive the parcel given by Venkateswara Rao and refused, but he convinced him and assured nothing to get scared. The call details between the accused and

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Venkateswara Rao proves that the accused was in frequent contact on the day of his travel to Kuwait, carrying the contraband. He has received a sealed parcel with knowledge that it contains something not to be carried. Therefore, he cannot plead absence of culpable mental state.

10. As far as charge under Section 22 (b) of the NDPS Act, considering the chemical analyst report received from Hyderabad Central Forensic Lab, that the crystal power in S-5 does not answer positive to Methamphetamine or any other narcotic drug, the complainant failed to prove the charge under Section 22(b) of NDPS Act and hence, found the accused not guilty of offence under Section 22(b) of NDPS Act.

11. As far as charge under Sections 8(c) r/w 29 of the NDPS Act, the trial Court held that, since the case against the second accused Venkateswara Rao was not taken on file, the charge of conspiracy against sole accused not sustainable. Observing that there is no *iota* of evidence available in respect of the abetment and criminal conspiracy between the



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accused, acquitted the accused from the charge under Section 29 of NDPS Act.

12. Grounds of Appeal:

The Learned Counsel for the appellant submitted that, the appellant has been truthful in his statement and had disclosed the source of the contraband and his lack of conscious possession. The use of the expression that he was scared to receive the parcel given by Venkateswara Rao is taken adverse by the trial Court to infer his culpable mental state. The accused being the first time traveller to abroad, was scared of carrying things for others and had bonafidely expressed his apprehension, when Venkateswara Rao requested him to carry Wheat flour and Tamarind. Further, the alleged collection of call detail records (CDR) between the accused and Venkateswara Rao, during the relevant period was not proved through the manner known to law. Thathiah and the police constable who recorded his statement were not examined as witness before the Court by the prosecution. The Station House Officer K.V.Palle Mandal, Chittor District,

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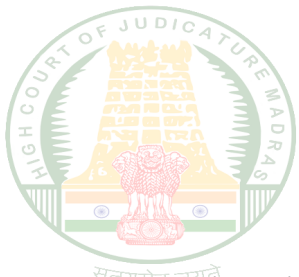
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Andhra Pradesh, who certified the translated version of Thathaiah statement was not examined. Despite that, the trial Court relied upon the statement of the Thathiah recorded by Police Constable as admissible piece of evidence and convicted the accused.

13. The point for consideration in this case is whether the trial Court correct in holding the accused guilty of possession of heroin relying upon Sections 35 and 54 of the NDPS Act, which provides for presumption of culpable mental state and the *animus* to possess.

14. The seizure of 1.377 kgs of heroin at the Chennai International Airport Examination Area from the bag of the accused is well proved through Ex.P-2 seizure mahazar, Ex.P-3 Boarding pass, Ex.P-4 E-Ticket receipts, baggage tags with Airport Authority seals. The accused in this case admits the recovery of the contraband from his Airbag. According to the accused, it was given by one Venkateswara Rao. The case of the complainant also that Venkateswara Roa is not a fictitious person or an

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imaginary person invented by the accused.

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15. According to the prosecution, Venkateswara Rao is an absconding accused. The attempt to secure him had gone futile. The accused and the said Venkateswara Rao were in contact through phone. The Call Details record proves that for nearly 3 months the accused and Venkateswara Rao were in touch with each other and were frequently conversing over phone. Particularly, on the day before seizure and on the date of the seizure i.e., 14/09/2014 and 15/09/2014 several calls between the mobile number 9553063069 (used by Venkateswara Rao) and 8374877513 (used by the accused) recorded. The accused in his statement Ex.P-10 (English translation Ex.P-23) has informed to the Investigating Officer that the mobile number 9553063069 was used by Venkateswara Rao. From the statement of Thathaiah, it is proved by the complainant that Chittibabu in whose name the mobile number 9553063069 registered is confined in Kuwait prison and that SIM is used by his brother Venkateswara Rao.

16. The letter of Idea Cellular Pvt. Ltd., along with the annexures

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received by PW-8 is marked as Ex.P-39. The CAF & CDR (28 sheets), forms part of the annexure to this communication. During the trial, the Learned Counsel for the accused has raised objection for marking this document, since the author of the letter i.e., The Assistant Manager, legal, Regulatory & Alternate Nodal Officer of M/s Idea Cellular Ltd., not before the Court to testify the document. However, the trial Court has received the document recording the objection and relied upon the entries found in the print out of CDR, which is a secondary evidence and falls within the meaning of Electronic Evidence. The document received, despite objection, but not discussed about its admissibility in its judgment. Further, the electronic evidence was not certified by an Affidavit by the person, in whose custody and possession of the data was available.

17. The other document relied by the trial Court to presume culpable mental state of the accused under Section 35 of the NDPS Act is the statement of Thathiah. This statement is recorded by a police constable which is translated from Telugu to English by the Station House Officer.

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The previous statement of an witness to a police officer is admitted and marked as prosecution exhibit. The said document is marked through PW-8, who is not competent to speak about the content of the document. Nevertheless, the trial Court has admitted the previous statement of the witness given to the police contrary to the Law of Evidence and convicted the accused presuming that the accused had conscious possession of the contraband.

18. The trial Court for reasons not properly explained had failed to follow the dictum laid by the Supreme Court in *Mohal lal case* (cited supra), which has followed its earlier judgments in *Noor Aga and Bhola Singh* (cited supra). It has wrongly applied the dictum laid in *Madan lal and Megh Singh* judgments which are factually different from the case in hand.

19. In this case, the accused claims that he was not aware of the



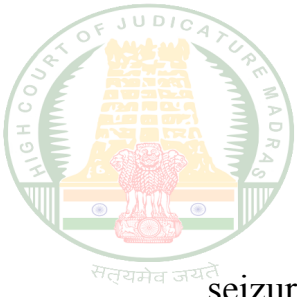
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content in the parcel given by Venkateswara Rao. He pleads innocence that like few other villagers, Venkateswara Rao came and gave the parcel saying it contains tamarind and wheat flour. He without any hesitation identified his bag and allowed the officials to examine his bag. Till the officials disclosed him the brown colour powder is heroin, he was not aware of the character of the powder he was carrying. The case of the accused consistently is that the possession of heroin was not conscious. By preponderance of probability, the accused has rebutted the presumption of culpable mental state. To establish that the possession was conscious, the prosecution relies on the Call Details Record Ex.P-39 and the Statement of Tathaiah Ex.P-42.

20. As pointed earlier, these two exhibits are not admissible. Ex.P-39 being an electronic evidence is not accompanied with the certified under Section 65 B of the Evidence Act, 1872. The person responsible for the custody of the electronic data remains not examined. No proof produced by complainant that cell number 837487513 belongs to the accused. The

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seizure of the Nokia Cell phone with SIM card, which is marked as M.O-10, is not a proof for the fact that the SIM Card in that cell phone is 837487513.

21. Ex.P-42, the previous statement recorded by Police Constable under Section 161(3) of Cr.P.C had been treated par with the statement recorded under Section 67 of the NDPS Act by the Empower Officer of NCB authorised to summon witnesses and record statements. The trial Court erred in referring this inadmissible document to presume culpable mental state of the accused. The complainant had failed to probe the case properly. To say the least, the perfunctory investigation noticed at all stage. Having shown Venkateswara Rao, an absconding accused in the complaint, no effort has been taken to proceed against him further. The information allegedly collected from Tathaiah the father of the accused that one of his sons detained in Kuwait prison and his cell phone was used by the absconding accused Venkateswara Rao, not further investigated to verify the statement. The author of the letter, who gave the CDR was not examined. Tathaiah was not examined and also the police constable, who

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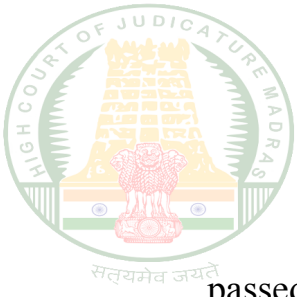
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alleged recorded his statement also not examined. The trial Court itself not convinced of the charge that this accused conspired with the absconding accused Venkateswara Rao to commit the crime of drug trafficking.

22. Though not in all cases, the carrier can plead absence of culpability, in the peculiar circumstances and facts of this case as narrated above, the knowledge of contraband in the Airbag cannot be attributed to the accused/appellant. Through his statement it is probablised that he had carried the parcel given by Venkateswara Rao, without knowing that it is a prohibited substance. By preponderance of probability, the accused had established the absence of knowledge, contrarily Ex.P-39 and Ex.P-42 relied by the complainant does not prove that the accused was conscious of the presence of heroin in the parcel given to him by Venkateswara Rao.

23. As a result, **this Criminal appeal is allowed.** The judgment

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passed by the II Additional Special Court under NDPS Act, Chennai made in C.C. No. 15 of 2015 dated 09.01.2017 is hereby set aside. Fine amount paid, if any, by the appellant shall be refunded to him. Bail bond executed, if any, shall stand cancelled. The accused is set at liberty in this case. The prison authority shall release him from the prison if his presence in jail is not required in any other case.

01.09.2022

Index:yes
speaking order/non speaking order
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To :

- 1.The Special Judge, II Additional Special Court under NDPS Act, Chennai.
- 2.The Inspector of Police, NCB/MDS, Chennai.
- 3.The Public Prosecutor, High Court, Madras.
- 4.The Central Prison for Men, Puzhal, Chennai.

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DR.G.JAYACHANDRAN,J.

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Delivery Judgement made in
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01.09.2022