

(2002) 01 MAD CK 0077

In the Madras High Court

Case No : Criminal Appeal No. 417 of 1991

The Deputy Director, Narcotics Control Bureau, South Zone,
Madras

APPELLANT

Vs

Senna Kesavan and P.S.A. Charles

RESPONDENT

Date of Decision : 30-01-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Customs Act, 1962 — Section 108

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 23, 29, 35, 67

Citation : (2002) 2 ALT(Cri) 36 : (2003) 159 ELT 62

Hon'ble Judges : M. Karpagavinayagam, J

Bench : Single Bench

Advocate : P.N. Prakash, Spl. P.P, for the Appellant; S. Panneerselvam (Amicus Curiae), for the Respondent

Judgement

M. Karpagavinayagam, J.—The accused 1 and 2, the respondents herein were tried for the offences punishable under Sections 20 and 23 read with 29 of the Narcotic Drugs and Psychotropic Substances Act alleging that they exported 6 kilos of ganja by concealing the same in the Senna Leaves bags out of India. After trial, they were acquitted. Hence, this appeal by the Deputy Director, Narcotics Control Bureau, South Zone, Chennai.

2. The case of the prosecution is as follows:

"(a) Senna Kesavan, the first accused is a commission agent doing business in exporting Senna Leaves and Senna Pods in the name of M/s. Ramesh and Babu at Tuticorin. P.S.A. Charles, the second accused/second respondent is a Job Typist helping A1 in typing the correspondence between A1 and importers outside India.

(b) A1 got the orders for sending Senna Leaves and Senna Pods from a firm by name M/s. Tai Ping Trading Company in Hong Kong in the year 1987. Accordingly,

he sent 17 bales of Senna Leaves and 6 bales of Senna Pods to the Company at Hong Kong through shipment. While sending the said shipment, A1 kept concealed amongst Senna Pods 6 kilos of ganja in six bales.

(c) Thereafter, A1 sent a letter dated 8.6.1987 to the Hong Kong Company stating that along with the bales of leaves and pods he has sent a new special herb which can be sold at high cost and asking them to sell it and get the commission and send the balance amount to him.

(d) The Hong Kong Customs Authorities checked the consignment and recovered the 6 kgs. of ganja. They sent the same to the Laboratory and obtained the report stating that the same is Cannabis (ganja). On coming to know that the same was sent to the Hong Kong Company by the Indian Company situated in Tuticorin, the Hong Kong Customs Authorities sent a report to the Indian High Commission at Hong Kong. On receipt of this report, the Secretary of the Indian High Commission at Hong Kong addressed a letter on 16.9.1987 to the Director General of Narcotics Control Bureau, New Delhi informing the same and requesting to take action. The Director General forwarded the same to the Deputy Director of the South Zone to take action and conduct investigation.

(e) In pursuance of the same, the investigation was taken up by a team of officers comprising P.W.1, P.W.2, P.W.7 and P.W.8. The officers went and searched the office premises of the first respondent on 6.10.1987 and inspected in the presence of the son of A1 and recovered the incriminating documents. On 7.10.1987, A1 was interrogated at the Customs Office by P.W.1. During the course of interrogation, he gave voluntary confession Ex.P28 accepting that he only sent the 6 kilos of ganja concealed in the parcel containing Senna Leaves and Pods booked by the Hong Kong Company.

(f) On the information that the letters sent by the first accused to the Hong Kong Company with the help of the Typist, the second respondent, who knows English, he was interrogated. He also admitted in his confession Ex.P29 that he is a Typist and he helped A1 by typing the letters to the Hong Kong Company and got the typing charges from him.

(g) On coming to know that the parcels containing Senna Leaves and Senna Pods along with the concealed ganja parcels were packed by the Company called Dhanraj Company, one Palani Kumar working in that Company was examined and he gave a statement that he packed the parcels to be sent to the Hong Kong Company. Since A1 gave information that the said ganja was purchased from A3, the Officers went to the house of A3 and conducted search and recovered ganja packets. The same were sent for chemical analysis and the report was obtained stating that it was ganja. A3 also gave a voluntary confession stating that the ganja of 6 kilos was sold by him to A1. The said confession is Ex.P31.

(h) During the course of investigation, from the materials collected by the Officers of the Team, it came to light that A1 and A2 knowingly concealed ganja amongst Senna Pods sent the same to Hong Kong with the hope that they will

earn more money. After investigation, the complaint was filed against all the accused (A1 to A3) before the Court concerned."

3. During the trial, A3 died. Therefore, the case against him got abated. The trial went on only as against A1 and A2.

4. During the course of trial, P.W.1 to P.W.8 were examined, Exs.P1 to P57 were filed and M.Os.1 to 3 were marked.

5. During the questioning u/s 313 Cr.P.C., both the accused merely denied their complicity in the crime. The trial Court, ultimately, acquitted the accused. This is under challenge before this Court.

6. Mr. P.N. Prakash, the learned Special Public Prosecutor would argue at length by citing very many decisions and contend that every one of the reasonings given by the trial Court for acquitting the accused is not only against law but also perverse.

7. Mr. M. Chinnasamy, the learned counsel appearing for the respondents 1 and 2 would reply to the said contentions. But however, when the matter was adjourned to various dates for giving opportunity to make further submissions, the counsel on record M/s. Gopalakrishna Raju and M. Chinnasamy were not present. Thereafter, one Mr. Kasi Rajan, counsel entered appearance on behalf of the respondents 1 and 2. But, when the matter was posted, he was also absent. Therefore, this Court directed the Registry to appoint an Amicus Curiae counsel to appear for the accused. At the same time, fresh notice also was ordered. When the matter came up for hearing, it was pointed out that the first respondent, who is residing at Tuticorin, is evading service of the notice of this Court. Ultimately, Mr. S. Panneerselvam, Amicus Curiae counsel nominated by the Legal Aid was permitted to argue the matter.

8. Both the Prosecutor as well as the counsel for the respondents filed written submissions.

9. I have carefully considered the submissions and perused the materials available on record.

10. According to the prosecution, A1 sent 23 bales of Senna Leaves and Senna Pods along with 6 kilos of ganja concealed in the parcel to the Hong Kong Company and the same was found out by the Hong Kong Customs Authorities, who, in turn, reported the matter to the Indian High Commission and on the basis of the communication from the Indian High Commission, the N.D.P.S. officials took up investigation and collected the materials including the confession of the accused persons admitting the offence.

11. In the appeal against acquittal, it is settled law that the appellate Court would not normally interfere with the order of acquittal, unless the reasonings given by the Court acquitting the accused are perverse.

12. Let us now go into the reasonings given by the trial Court for acquittal:

(1)A1 as an Exporter first time sent the consignment to the Hong Kong Company. Therefore, such an Exporter will not dare to conceal ganja amongst the goods of consignment.

(2)Admittedly, A1 does not know English. Therefore, the letter Ex.P13 typed by A2 should have been written and sent to the Hong Kong Company by some one, who is inimical to A1.

(3)The packers of the Senna Leaves at Tuticorin, who packed the consignment before sending for shipment have not been examined.

(4)The confession statements made by the accused before the N.D.P.S. Officers are inadmissible and as they have been retracted, they have become invalid.

(5)Search and seizure was effected by the officials without getting warrant or permission from the Magistrate.

13. The above reasonings, in my view, are all quite irrelevant and perverse and as such, it has to be held that the trial Court due to the erroneous approach has misread the evidence causing flagrant miscarriage of justice.

14. When there are materials available to show that the consignment was sent by A1 and the same was found to contain ganja according to the report of Hong Kong Laboratory, and the same was admitted by the accused, it cannot be concluded that the accused would not have dared to conceal ganja and send it to the importer as the accused exported the same for the first time. This conclusion is without any basis. The materials available on record would show that A1 exported Senna Leaves and Senna Pods and intimated the same to Hong Kong party through two letters Exs.P13 and P21. Therefore, this finding is without basis. As a matter of fact, the trial Court found that M/s. Ramesh and Babu is a Company exporting Senna Leaves and Senna Pods run by A1. It is also found by the trial Court that the consignment in question was exported by the accused alone. Under those circumstances, the factum of recovery of 6 kilos. of ganja from the consignment can be held to be established by the documentary evidence.

15. The trial Court would strangely hold that some one inimical to A1 must have written letters. Ex.P20 is a letter written by the Hong Kong Importer to M/s. Ramesh and Babu. In that letter, they specifically stated that they do not need this special herb. In spite of the receipt of the said letter, A1 sent another letter Ex.P21 reiterating that he is sending the said herb. In such circumstances, there is no reason to come to the conclusion that some enemy to A1 must have done that.

16. The trial Court found fault with the prosecution for non-examination of the packers of the Senna Leaves. This also would not be a valid ground, since one of the packers gave a statement Ex.P34 to the Officers on 7.10.1987, wherein he stated that while packing was done, they could not find what it actually contained. Similarly, A1 also stated in his statement Ex.P28 explaining the entire

circumstances in which the packing was done. The packers merely press the material by a machine process so that the bundles are made compact for easy export as bales. When such was the case, the examination of one of the packers in the Court would not serve any purpose, especially when the statement of packer concerned is available.

17. One of the fallacious and erroneous reasoning is that Exs.P28 and P29, the confession statements given by A1 and A2 are not admissible. This finding is against the spirit of Section 67 of the N.D.P.S. Act and Section 108 of the Customs Act. In *RAJ KUMAR KARWAL v. UNION OF INDIA*, the Supreme Court would specifically hold that the confession statements made before N.D.P.S. Officers are admissible. Therefore, this finding is purely against the dictum laid down by the Supreme Court.

18. Yet another reasoning is that the confession statements have been retracted and hence, the same are invalid. This finding cannot be construed to be legally sound. In this case, A1's office was searched on 6.10.1987. At that time, A1 was not available. Thereafter, A1 was interrogated in the evening. His statement Ex.P28 was recorded under provisions of Section 108 of the Customs Act in the presence of the Superintendent of Customs, who is a Gazetted Officer. On the basis of his information, A2 was traced and from him, Ex.P29 confession was recorded. A1 also gave information that 6 kilos. of ganja was purchased from A3 in his confession. Therefore, on 7.10.1987, A3's house also was searched and the ganja was seized. From him, Ex.P31 confession was recorded. When they were produced before the Magistrate on 8.10.1987 for remand, the accused did not make any complaint of ill-treatment or retracted their statements. They retracted the statements only on 30.10.1987 belatedly.

19. Even though the said statement is retracted, the same can form the basis for conviction as laid down in *K.I. Pavunny Vs. Assistant Collector (HQ), Central Excise Collectorate, Cochin*, .

20. The reading of Ex.P28, the confession given by A1 would show that he gave details of wealth which are specially known to him and which are so connected with the consignment in question. Furthermore, on the basis of the said statement, the involvement of A2 and A3 were also detected. Under those circumstances, the confession cannot be ignored merely because they have been retracted.

21. In this case, the confession given by A1 not only would give the minute details about the act done by him but also is corroborated by the materials already available with the hands of the officials and other materials collected subsequent to the recording of confession.

22. Furthermore, the reading of the confession Ex.P28 which would disclose the detailed facts which are exclusively within the knowledge of the persons concerned, would show that the said confession was given voluntarily without threat or coercion.

23. As indicated above, the initial recovery made by the Hong Kong officials would also corroborate the confession of A1. Similarly, after the confession of A1, the premises of A3 was searched and 230 grams of ganja was recovered. Under those circumstances, as laid down by this Court in KOPAL GANI RAM AND OTHERS v. SUPERINTENDENT OF CUSTOMS AND CENTRAL EXCISE, C.I.U, TIRUCHIRAPALLI 1999 M.L.J. (Cri.) 387, the conviction can be imposed on the basis of the retracted confession, which has been corroborated by the other accepted materials.

24. Furthermore, Section 35 of the N.D.P.S. Act casts burden on the accused to prove that he had no intention or knowledge in respect of the concealment of ganja in the consignment sent by him. The said statutory burden has not been discharged by the accused in this case.

25. In view of the above discussion, I am of the considered opinion that none of the grounds for acquittal would be considered to be a valid ground and consequently, it has to be held that the materials available on record in abundance have been overlooked by the trial Court for acquitting the accused. Under those circumstances, the order of acquittal is liable to be set aside as regards A1.

26. In regard to A2, though there are some materials in the confession of A1 about the knowledge of sending the ganja along with Senna Leaves and Pods, the confession of A2 would show that he has merely done the job of Typist and typed the letters in the name of A1 and for typing work he used to get Rs.10/- or 20/- every day. Under those circumstances, in my view, the materials available in the co-accused confession against the second accused with reference to the knowledge of the concealment of ganja in the consignment may not be sufficient to impose conviction for the relevant offences as against the second accused.

27. Therefore, the acquittal in respect of the second accused is confirmed and the first accused is convicted for the offences under Sections 20 and 23 read with 29 of the N.D.P.S. Act, which deals with the punishment for contravention in relation to Cannabis and illegal export of the narcotic drugs from India.

28. With the above observation, the appeal is partly allowed and the order of acquittal is set aside in respect of A1 alone. The matter is remitted back to the trial Court for giving opportunity to the first accused in regard to the question of sentence. Therefore, the trial Court is directed to summon the first accused and question him before imposing sentence and after hearing pass an order in accordance with law. Even during the pendency of this appeal before this Court, as it is pointed out that the first accused was evading service, the trial Court may take suitable steps to secure the presence of the first accused for complying with the directions given by this Court.

Criminal Appeal No. 417 of 1991

M. KARPAGAVINAYAGAM, J.—The case in question was tried by the learned

Principal District Judge, Tirunelveli in S.C.No.245 of 1989 and the same ended in acquittal. As against the said judgment, the complainant filed an appeal before this Court in Crl.A.No.417 of 1991 and the said appeal was partly allowed convicting the first accused alone by the judgment, dated 30.1.2002 and remitted back the case to the learned Principal District Judge, Tirunelveli for giving an opportunity to the first accused in regard to the question of sentence.

2. Now, it is noticed that the learned Principal District Judge, Tirunelveli addressed the Registry through a letter dated 16.7.2002 seeking permission to send the records in S.C.No.245 of 1989 on his file to the Special Court for N.D.P.S. Act, Madurai, since he has no jurisdiction to try the N.D.P.S. cases. Under those circumstances, the Registry has placed papers before me as per the order of My Lord the Honourable the Chief Justice to decide as to whether permission can be granted to the learned Principal District Judge to transmit the records to the Special Court for N.D.P.S. Cases, Madurai.

3. I heard Mr. Prakash, the learned counsel for the appellant. According to him, an unamended provision of Section 36D would alone apply to the present case, since the offence had taken place in the year 1987 and it was tried in the year 1989 by the learned Principal District Judge, Tirunelveli and the judgment was delivered by the trial court on 5.4.1991. Now, the amended provision of Section 36D under Act 9/2001 came into force on 9.5.2001. As per the unamended provision of Section 36D, the offence committed under the N.D.P.S. Act shall be tried by the Court of Session only till the Special Court is constituted.

4. Section 36D Sub section (2) provides thus:

"Nothing in sub-section (1) shall be construed to require the transfer to a Special Court of any proceedings in relation to an offence taken cognizance of by a Court of Session under the said sub-section (1) and the same shall be heard and dispose of by the Court of Session."

5. On the basis of these wordings in the unamended provision, which would apply to the present case, it is contended by the counsel for the complainant that the Principal District Judge, who tried the case, alone will have power to question the accused with regard to the sentence.

6. On going through the unamended provision of Section 36D and the amended provision of Section 36D, which came into force on 9.5.2001, it is clear that the learned Principal District Judge, Tirunelveli, who tried the case, will alone have jurisdiction to question the accused. Therefore, permission need not be granted. The learned Principal District Judge, as ordered by this Court, will summon the accused and give an opportunity of being heard in regard to the question of sentence and pass orders in accordance with law.