

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 06/06/2002

Coram

THE HONOURABLE MR. JUSTICE M. KARPAGAVINAYAGAM

CRIMINAL APPEAL No.734 of 1999 and CRIMINAL APPEAL NO. 323 of 2000 and

Crl.M.P. No.1038 of 2001

C.A.No.734 of 1999

M.Nityanandam .. Appellant

Vs.

State by

The Intelligence Officer,

Directorate of Revenue Intelligence,

Chennai-17. .. Respondent

For Appellant : Mr.B.Kumar, Sr.Counsel

For Mr.R.C.Paul Kanagaraj

For Respondent : Mr.P.N.Prakash,

Spl.Public Prosecutor

C.A.No.323 of 2000

State by

The Intelligence Officer,

Directorate of Revenue Intelligence,

Chennai-17. .. Appellant

Vs.

Sadiq Mohamed .. Respondent

For Appellant : Mr.P.N.Prakash,

Spl.Public Prosecutor

For Respondent :

Criminal Appeals against the Judgment dated 31.8.1999 in C.C.No.159 of 1998 on the file of the Special Judge, Addl. Special Court under N.D.P.S. Act, Chennai.

:COMMON JUDGMENT

Nithyanandan (A1) and Sadiq Mohammed (A2) were tried for the offence under Section 8(c) r/w.22 and 29 of the N.D.P.S. Act. The trial Court convicted A1 for the offence under Section 8(c) r/w. 22 of the N.D.P.S. Act. Challenging the conviction Nithyanandan (A1) has filed the appeal in C.A.No.734 of 1999. Assailing the acquittal in respect of A2, the Intelligence Officer, D.R.I., Chennai, the complainant, has filed the appeal in C.A.No.323 of 2000.

2. Both these appeals are taken together and a common judgment is being delivered.

3. The prosecution case in brief is as follows:-

"(a) On 16.5.1998, P.W.2 Paul Mohamed, the Senior Intelligence Officer, D.R.I., Chennai, received an information about the involvement of A1 and A2 that both have indulged in trafficking of narcotic drugs and sent Ex.P-7 report to his Superior Officer.

(b) After obtaining permission from his Superior Officer, P.W.2 Paul Moahamed sent P.W.1 Mohammed Iqbal and P.W.4 Christy to go to Anna Nagar in order to fetch A1 to the office of the D.R.I. at T.Nagar. Accordingly, P.Ws.1 and 4 went to Anna Nagar along with the informant and took A1 to D.R.I. Office for interrogation.

(c) A1 gave Ex.P-1 confession statement to P.W.1 at the D.R.I. office stating that he had received a steel trunk box and a plastic suit case from one Lakshmanan containing narcotic drugs and kept those two boxes in the house of his friend P.W.11 Mahendroo at Egmore. On the basis of the above statement, P.W.1 prepared Ex.P-2 special report and sent it to his Superior Officer.

(d) Since Ex.P-1 confession statement would implicate A2 also, P.W.2 sent P.W.4 Christy with a team to conduct search in the house of A2. Ex.P-8 is the search warrant. At the same time, P.W.2 sent another team to conduct search in the house of P.W.11 M ahendroo at Egmore. P.W.3 Balakrishnan along with his team accompanied by A1 went to P.W.1 1's house at about 3.00 P.M. with Ex.P-17 authorisation obtained from P.W.12 senior Officer.

(e) When P.W.11 was identified by A1 as his friend, he was interrogated by P.W.3. P.W.11 had admitted that A1 gave two boxes to him on the earlier night stating that they contain "crab feed". In the presence of witnesses including P.W.10, one of the residents in the same apartment, the boxes were broken open as the keys were not available with both A1 and P.W.11 and the same were found to contain Methaqualone Tablets weighing about 72.755 kg. and Amphetamine Powders weighing about 0.90 kg. and Ex.P-18 is the mahazar.

(f) Simultaneously, P.W.4 Christy searched the residential premises of A2 Sadiq Mohammed at Anna Nagar and recovered some photos, telephone numbers and some incriminating documents and A2 was taken to the D.R.I. Office. On the same day, he was interrogated and a voluntary statement was obtained from him on 16.5.1998. The said statement was recorded by P.W.5 Gunabalan another Intelligence Officer. Ex.P-27 is the statement of A2.

(g) P.W.8 Ravichandran another Inspector of D.R.I. seized Ambassador Car bearing registration No.TMT 3180 from the house of P.W.11 belonged to A1.

(h) In pursuance of Ex.P-10 search warrant, P.W.7 Sankaranarayanan, another Intelligence Officer went to the house of A1 and conducted search, but could not seize any incriminating box or document connected with this case.

(i) After recovery, A1 was brought to the D.R.I. office. He gave another statement Ex.P-3 on the same day. P.W.11 Mahendroo was taken to D.R.I. Office on 16.5.1998. He gave statement Ex.P-37 stating that he received the said boxes from A1, but he did not know the contents, as the same was not divulged by A1, who happened to be his family friend.

(j) Next day, A1 gave additional statement Ex.P-4. Thereafter, A1 and A2 were arrested on 17.5.1998 and produced before the Court for remand. The contraband articles were sent to the Analyst through Court. P.W.9 Analyst analysed the same and found that they are Methaqualone Tablets and Amphetamine Powder, namely, psychotropic substance.

(k) On the basis of these materials, a complaint was lodged against both A1 and A2 and two others for the offence under Section 8(c) r/w. 22 and 29 of the N.D.P.S. Act."

4. Since two other accused persons were absconding, the case in respect of A1 and A2 was split up and the trial was conducted.

5. During the course of trial, on the side of the prosecution P.Ws.1 to 12 were examined and Exs.P-1 to P-37 were filed and M.Os.1 to 19 were marked. As Court documents, Ex.C-1, the order refusing to grant bail by the Special Court, and Ex.C-2, the letter by A1 to the Special Court retracting the confession statements were marked.

6. While questioning both A1 and A2 on the evidence available on record, both of them said that the confession statements were obtained from them under duress and a false case has been foisted against them.

7. After analysing the materials placed before the Court, as noted above, A1 was convicted for the offence under Section 8(c) r/w.22 of the N.D.P.S. Act and sentenced to undergo R.I. for 12 years and to pay a fine of Rs.1.50 Lakhs, in default to undergo R.I. for 18 months and acquitted A2 in respect of the charges framed against him.

8. Mr.B.Kumar, the learned senior counsel representing the counsel for the appellant (A1), while challenging the said conviction, would make the following contentions:-

"(1) Ex.P-7 report sent by P.W.2 to his superior Officer has not satisfied the requirement of Section 41(2) of the Act. Ex.P-7 would not have come into existence at any time earlier to 9.45 A.M. on 16.5.19 98 by which time A1 had been brought to the D.R.I. office.

(2) P.W.2 admits that when the information was given by the informant, he did not take it into writing. Ex.P-7 typed matter would not have been prepared in the early morning in the office, since the staff of the office would come only after 9.15 A.M. Therefore, there is non-compliance of the mandatory provisions under Section 41(2) of the Act.

(3) Admittedly, there is no detail about the residential address of A1 at Anna Nagar. When such being the case, there is no explanation as to how P.Ws.1 and 4 identified the house of A1 and brought him to the D.R.I. office. With reference to this ct of evidence, there are contradictions between the evidence of P.Ws.1 and 4 which make them unreliable.

(4) The search was conducted in P.W.11's house by P.W.3 under Ex.P-1 7 authorisation given by P.W.12. With reference to the obtaining of Ex.P-17 authorisation before conducting search in P.W.11's house, there is

vital contradiction between the evidence of P.Ws.3 and 12. Hence, their evidence is liable to be rejected.

(5) When A1 gave Ex.P-1 confession statement to P.W.1, there is no reference about the consignment of the steel trunk-box and the plastic moulded suit case. However, P.W.1 D.R.I. Officer stated in his report (Ex.P-6) sent under Section 57 of the Act that Ex.P-1 discloses receipt of consignment with the details of containers by A1 from one Lakshmanan and therefore, Ex.P-6 report and the evidence of P.W.1 cannot be acted upon.

(6) In Ex.P-1 confession statement, A1 stated that Lakshmanan, the co-accused, asked A1 to take his Fiat Car with the consignment to A1's house. There is no investigation as to what happened to the Fiat Car belonged to the said Lakshmanan. In this case, the consignment was taken from the house of A1 to P.W.11's house only in the Ambassador Car. According to A1, the said Ambassador Car was sold to P.W.11 by A1 about 15 years back. Therefore, there is no connecting link as to the consignment of contraband from A1 to P.W.11.

(7) Admittedly, the boxes containing the contraband were recovered from P.W.11's house and not from A1. Even assuming that the boxes were handed over to P.W.11 by A1, there is no acceptable material to show that A1 had knowledge about what the boxes would contain. Even according to the prosecution, the keys of the containers were not with either P.W.11 or A1. So, the lack of knowledge about the nature of the consignment as attributed to P.W.11 would apply to A1 also. Furthermore, Ex.P-37, the statement of P.W.11, is contradictory to Ex.P-1 statement given by A1.

(8) Ex.P-1, the statement of A1, would suffer from the fact that it is not only not voluntary, but also lack of corroboration. The confession statements of A1 have been subsequently retracted. The statement of A2 (Ex.P-27) also cannot be relied upon as against A1, as A2 has already been acquitted.

(9) A1 was kept in the D.R.I. office from 9.00 A.M. on 16.5.1998 till he was produced before the Court and remanded at about 7.15 P.M. on 17.5.1998. Even though Exs.P-1, 3 and 4 confession statements were obtained from A1 on 16.5.1998, there is no reason as to why the arrest was not shown at that time. It is admitted by the prosecution that the arrest was effected only on 17.5.1998 morning after getting Exs.P-1, 3, and 4 confession statements from A1. This would show that those statements obtained from A1 are not voluntary. Consequently, there is no sufficient evidence on record to hold the appellant (A1) guilty of the offence."

9. Mr.Prakash, the learned Special Public Prosecutor appearing for the other side, in reply to the above submissions, would refute each one of the contentions urged by the learned senior counsel for the appellant (A1) by pointing out various portions of the evidence and contend in justification of the reasonings given by the trial Court in finding the appellant guilty that the conviction is legal and may not be interfered with.

10. Before dealing with the respective points, it would be appropriate to refer to the materials on record on each and every aspect of the case with chronological details which are as follows:-

"(a) P.W.2 Paul Mohamed is the senior gazetted Intelligence Officer of D.R.I. Chennai. On 16.5.1998 at about 4.00 A.M. he received a phone call from the informant that he wanted to give an important information to him. Therefore, he rushed to his office at T.Nagar.

(b) The informant, who came to the D.R.I. office gave information that one Nithiyanantham (A1) of Anna Nagar had taken delivery of Mandrax tablets, stored it in his friend's house at Egmore and in trafficking the narcotic drugs, one Sahib Mohammed (A2) of Anna Nagar was also involved. Immediately, on receipt of the said information, P.W.2 prepared Ex.P-7 report and sent the same to his superior officer.

(c) On getting permission to take further necessary action, immediately, P.W.2 sent P.W.1 Mohamed Iqbal and P.W.4 Christy along with the informant to locate A1's place of residence at Anna Nagar and bring him to the D.R.I. office. On identifying the house of A1, P.Ws.1 and 4 met A1 and took him to the D.R.I. office at

about 9.00 A.M.

(d) Thereafter, A1 was interrogated at the D.R.I. office by P.W.1. He stated that he received one steel trunk box and a plastic suit case from one Lakshmanan containing the narcotic drugs, namely, Methaqualone tablets and Amphetamine powders and kept those boxes in the house of his friend P.W.11 Mahendroo. The statement of A1 written in his own handwriting is Ex.P-1. Then, P.W.1 prepared Ex.P-2 report and handed over the same to his superior officer.

(e) In Ex.P-1 statement, A1 implicated one Sadiq Mohammed (A2), who introduced the other accused persons to get sufficient money to solve his financial constraints and to help them for arranging export of some banned items in a concealed form. P.W.2 Paul Mohammed formed two teams one under the head of P.W.3 Balakrishnan, the Intelligence Officer, and another under the head of one Terence Rodrigo and P.W.4 Christy.

(f) P.W.4 obtained Ex.P-8 authorisation from P.W.2 in order to search the house of A2 at Anna Nagar. P.W.3 obtained Ex.P-17 authorisation at 3.00 P.M. on 16.5.1998 from P.W.12 to search the house of P.W.11 Mahendroo.

(g) Then, P.W.3 Balakrishnan along with P.W.1 Mohammed Iqbal and Nithyanantham (A1) left the D.R.I. office at 3.45 P.M. and reached the house of P.W.11 Mahendroo, the friend of A1, at Egmore at about 4.15 P.M. P.W.3 secured three witnesses from the residential apartments in which P.W.11 was residing. One of the witnesses is P.W.10 Shamraj.

(h) After introducing himself to P.W.11, P.W.3 enquired him whether A1 gave any boxes to him. P.W.11 promptly replied that A1 handed over two boxes to him on the earlier night informing him that they contain "crab feed". Then, P.W.11 took the Officers to the balcony and produced both the boxes, one steel trunk box and another plastic suit case. The keys were not available with both P.W.11 and A1. Therefore, the steel trunk box was broken open and it was found to contain 50 plastic bags containing psychotropic substances. Out of 50 plastic bags, 47 bags contained tablets and 3 bags contained powder. Then, the plastic suit case was broken open and it was found to contain 26 plastic bags containing psychotropic substances, namely, methaqualone tablets and amphetamine powder. Then P.W.3 took samples and prepared Ex.P-18 mahazar attested by P.W.10 and signed by P.W.3 and other Officers. Then, P.W.3 prepared Ex.P-19 special report and sent it to his superior Officer (P.W.12).

(i) P.W.11 was taken to D.R.I. Office for further enquiry. When he was interrogated, he gave Ex.P-37 statement stating that two boxes were handed over to him by A1 on the earlier night informing him that it contained "crab feed" and asked him to keep the same in his house till the next morning and he would come and take them.

(j) In the meantime, P.W.4 Christy, who obtained Ex.P-8 search warrant from P.W.2, went to the house of A2 at Anna Nagar. In pursuance of the search warrant, the house of Sadiq Mohammed (A2) was searched. Ex.P-20 telephone directory, Ex.P-21 series Photos and Exs.P-22, 24 and 25 address cards of various persons were recovered under Ex. P-26 mahazar attested by P.W.6 Sachithanandan, a local witness, and D.R.I. Officers. P.W.4 prepared Ex.P-13 special report and submitted the same to P.W.2 Paul Mohammed. Sadiq Mohammed (A2) was brought to the D.R.I. office for further enquiry.

(k) P.W.5 Gunabalan, another Intelligence officer, was instructed to interrogate A2 at the D.R.I. office. A2 gave Ex.P-27 statement admitting his involvement in helping A1 to export the contraband items. Then A2 was arrested and the arrest card is Ex.P-28. A2 was produced before the remand Magistrate and P.W.5 sent Ex.P-11 special report under Section 57 of the Act to the superior officer.

(l) In the meantime, P.W.8 Ravichandran, another Inspector of D.R. I., seized the Ambassador Car, which was used for transporting the contraband from the house of A1 to P.W.11's house, on 16.5.1998 under Ex.P-30

mahazar. Then, he sent Ex.P-33 special report to his superior Officer.

(m) After seizure of the contraband from the house of P.W.11, A1 was brought back to the D.R.I. Office and P.W.1 again obtained another statement (Ex.P-3) from A1.

(n) On 17.5.1998, P.W.7 Sankaranarayanan, another Intelligence Officer, was sent by P.W.2 to go to the house of A1 and search the premises under Ex.P-10 search warrant. Accordingly, the house of A1 was searched by P.W.7, but no incriminating article was found. Ex.P-29 is the mahazar. He sent Ex.P-12 special report.

(o) Again on 17.5.1998, P.W.1 obtained another statement from A1 (Ex.P-4) and A1 was arrested and Ex.P-5 is the arrest memo. P.W.1 sent Ex.P-6 special report. Thereafter, A1 was produced before the remand Magistrate, who in turn sent him to judicial custody.

(p) After recovery of the contraband articles and samples, P.W.2 produced the same before the Court on 19.5.1998. The said contraband articles were directed to be kept in safe custody in the Custom Office Godown.

(q) In pursuance of the order of the Court in Ex.P-14, the sample articles were sent for analysis. P.W.2 applied for the custody of A2 and obtained an order on 1.6.1998. Accordingly, A2 was taken to D.R.I. office from Central jail and another statement (Ex.P-16) was obtained from him.

(r) P.W.9 Analyst analysed the samples and sent Exs.P-35 and 36 reports. According to the Analyst, the tablets answered the test for the presence of methaqualone and the powder answered the test for the presence of amphetamine covered under the N.D.P.S. Act. Then P.W.2 filed the complaint against the accused."

11. The above materials would give the following facts.

"On 16.5.1998, P.W.2 Paul Mohamed received information about the delivery of mandrax tablets by A1 to P.W.11. When A1 was brought to the D.R.I. Office, he admitted that he received the consignments containing mandrax tables from one Lakshmanan and handed over the same to his friend P.W.11 Mahendroo, who took the same in his Ambassador car to his house at Egmore to keep them for one day without divulging the contents of the container.

After recording his statement, A1 was taken to P.W.11's house from there methaqualone tablets and amphetamine powder contained in steel trunk box and plastic moulded suit case were recovered. P.W.11 also gave a statement that he received the said consignments from A1, who informed him that they contain only "crab feed" and he kept the same in good faith, which he had on his friend A1. After obtaining statement from P.W.11, two additional statements were obtained from A1 admitting the contents of the statement of P.W.11.

On getting the particulars of Sadiq Mohammed (A2), his house was also searched and on obtaining statement, he was arrested along with A1. The articles were sent for analysis. The Analyst sent a report stating that the samples are mandrax tablets and amphetamine powder covered under the N.D.P.S. Act."

12. In short, the prosecution case is that A1 after receiving the consignment of two boxes containing psychotropic substance for the purpose of exporting to foreign country from one Lakshmanan for getting huge amount from the other accused, handed over the same to P.W.11 for keeping the same in safe custody for one day without divulging the contents of the said consignments.

13. Exs.P-1, 3 and 4, the statements of A1, and Ex.P-37, the statement of P.W.11, would clearly show that the consignments containing the contraband covered under the N.D.P.S. Act were handed over by A1 to P.W.11 knowing fully well about the contents of the consignments requesting P.W.11 to keep them in his custody for

one day in his house by making him to believe that they contain "crab feed" and the same were recovered from the house of P.W.11 only on the basis of the Ex.P-1 statement given by A1.

14. The evidence of P.Ws.1, 2 and 4 would point out that only on the basis of information received by P.W.2, A1 was brought to D.R.I. office and a statement was obtained from him. The evidence of P.Ws.3 and 10 would go to show that P.W.3 and other Officers went to the house of P.W.11 accompanied by A1 and recovered the contraband from the house P.W.11, who produced them taking from the balcony of his house to the D.R.I. Officer. P.W.11 also gave Ex.P-37 statement corroborating the statement of A1. Even after obtaining the statement of P.W.11, two further statements (Exs.P-3 and P-4) were obtained from A1 confirming his earlier statement.

15. As noted above, P.W.9 Analyst gave Ex.P-35 report stating that the samples taken from the consignment are the tablets and powder covered under the N.D.P.S. Act. Unless these materials are established to be not acceptable, it cannot be contended that the conviction imposed upon the appellant (A1) is illegal.

16. Now let us come to the various points raised by the learned senior counsel for the appellant one by one.

17. According to the learned senior counsel appearing for the appellant, Ex.P-7 report on receipt of information from the informant sent by P.W.2 to his superior Officer has not satisfied the requirement under Section 41(2) of the Act, as P.W.2 would admit that when the information was given by the informant, P.W.2 did not take it into writing.

18. In reply to the said contention, it is submitted by the learned Special Public Prosecutor that it is not an information under Section 41(2) of the Act, but it is only an intelligence collected through various sources. Therefore, it need not be taken down in writing as employed under Section 42 of the N.D.P.S. Act. In support of his submission, the learned Special Public Prosecutor would cite a decision in MAHENDRAN @ NITHIYA @ NIDHI v. STATE (2001 M.L.J. (CrI.) 680).

19. In the said decision, this Court would hold that it is not an information, but it is only an intelligence. A perusal of Ex.P-7 would show the caption as intelligence report. In subsequent report, namely, Ex.P-9 sent by P.W.2 under Section 57 of the Act also would show that P.W.2 received the intelligence report.

20. But, in the evidence, P.W.2 would specifically state that he received the telephone call from the informant on 16.5.1998 at about 4.00 A.M. and he was told that he would give a secret information and accordingly, the said informant was asked to come to D.R.I. office at T.Nagar and thereafter, he received the information about the involvement of A1's possession of the offending articles through his friend and the said information was reduced into writing, which is Ex.P-7.

21. A perusal of Ex.P-7 would also show that the superior Officer, on receipt of Ex.P-7 report from P.W.2, directed P.W.2 to deploy Officers to identify the connected places and persons and take further action immediately.

22. Under Section 41(2) of the N.D.P.S. Act, any gazetted Officer in the department mentioned under Section 42 of the Act, if he has reason to believe from the information given by any person and taken in writing regarding the offence, he may authorise any Officer subordinate to him to search the places concerned.

23. So, in this case, only on the specific information given by the informant, P.W.2, after obtaining permission from his superior Officer on the basis of Ex.P-7 report, deployed the Officers to go and search the premises of P.W.11 where the offending articles were said to have been stocked. Therefore, we need not go into the question as to whether it is an information or intelligence.

24. As a matter of fact, the information was received from the informant by P.W.2 in his office on 16.5.1998 and he in turn sent the said information in writing to the superior officer so as to enable him to get necessary direction. It is contended that the information given by that person to P.W.2 was not taken down in writing.

25. The word 'taken down in writing' as contained in Section 42 of the Act is not available under Section 41(2) of the Act. On the other hand, Section 41(2) of the Act would merely state that any gazetted Officer, on the information given by any person and taken in writing, may authorise the Subordinate Officers to search the building. In this case, even though the information was not obtained in writing, P. W.2 being the gazetted Officer took the information in writing and sent it to his superior officer.

26. While Section 42 would mandate that any competent officer on receipt of information given by any person should be taken down in writing and shall forthwith sent a copy to his immediate superior Officer, this mandate would not apply to the Officers coming under 41(2) of the Act. Even then, P.W.2, who is a gazetted Officer, thought it fit to send the information in writing to the Superior Officer and after obtaining his permission, he arranged to sent two teams to the places concerned. Therefore, it has to be held that there is no violation of Section 41(2) of the Act.

27. The next point urged by the learned senior counsel for the appellant (A1) is that Ex.P-7 would not have come into existence at any time earlier to 9.45 A.M. on 16.5.1998 by which time A1 had been brought to the office of D.R.I. As Ex.P-7 would not have been typed through Typist, since the office staff would come after 9.15 A.M. and leave by 5.45 P.M. and Ex.P-7 is a concocted document.

28. It is to be stated that there is no basis to substantiate this submission. In fact, there is no specific challenge in the crossexamination of P.W.2 in respect of Ex.P-7. But, on the other hand, a general suggestion was put to P.W.2 that all the documents including Ex.P-7 were prepared at the office at the same time. Though P.W.2 would state that usually, the working hour is between 9.15 A.M. and 5.45 P.M., he would specifically state in his deposition that timing would not apply to his office as some of the employees used to be always available in the office.

29. According to P.W.2, on receipt of direction from his superior Officer on the basis of Ex.P-7, he called other Officers, namely, P.W.1 and 4 to his office. P.W.2 would state that when P.Ws.1 and 4 came to the office, the time was about 6.00 to 7.00 A.M. P.W.1 in the cross-examination would state that before he went to Anna Nagar to fetch A1, he went through Ex.P-7. Therefore, it cannot be contended that Ex.P-7 would not have been in existence before A1 was brought to the D.R.I. office.

30. Furthermore, it is noticed that P.Ws.1 and 4 were directed to go to Anna Nagar and locate the place of A1, as A1's address was not available. According to P.W.2, the informant was asked to give the details of address of A1, but he would state that he was not able to give the address of A1, but he would be able to identify the house of A1 . Accordingly, P.W.1 and 4 with the help of the informant went to Anna Nagar and identified A1's house and thereafter, A1 was brought to the D.R.I. office.

31. Had Ex.P-7 prepared after production of A1, the address of A1 would have certainly been mentioned in Ex.P-7. Ex.P-7 would merely indicate that P.W.2 got information that Nithiyanantham (A1) of Anna Nagar had taken delivery of mandrax tablets and stored the same in his friend's house at Egmore. Only after obtaining orders from the senior Officers in Ex.P-7, P.W.1 and 4 were deployed to locate A1's address and enquire him about the information with the help of the informant.

32. This would certainly show that Ex.P-7 must have been prepared and orders must have been obtained by P.W.2 from his superior Officer even before P.Ws.1 and 4 were sent to Anna Nagar to locate the house of A1 and bring A1 to the D.R.I. office.

33. As noted above, if all the documents including Ex.P-7 were prepared one and at the same time, the address of A1 mentioned in other documents would have been found place in Ex.P-7. Therefore, this contention of the learned senior counsel for the appellant (A1) would fail.

34. Nextly, it was contended that there are no details about the residential address of A1 and there is no acceptable explanation as to how P.Ws.1 and 4 identified the house of A1 and brought him to D.R.I. Office and there are contradictions between the evidence of P.Ws.1 and 4 with reference to the same.

35. On going through the evidence of P.Ws.1 and 4 in the light of the evidence of P.W.2, this Court is of the view that there are clear details available to show as to how the house of A1 at Anna Nagar was located.

36. According to P.W.2, the informant was not able to give the address of A1. Therefore, P.W.1 Mohamed Iqbal and P.W.4 Christy, the Intelligence Officers, were asked to take the help of the informant to identify the house of A1 at Anna Nagar, since the informant told them that he could identify the place of residence of A1. Both P.Ws.1 and 4 would state that they went to Anna Nagar accompanied by the informant and identified the house of A1 and after meeting A1, he was brought to the D.R.I. Office.

37. P.W.4 in cross-examination would state that he was directed to go to a particular place at T.Nagar and take the informant to A1's house to get the place located. P.W.1 stated that he was directed to go Anna Nagar and meet the informant and then go to A1's house.

38. The evidence of both P.Ws.1 and 4 would clearly indicate that both of them took the informant to Anna Nagar and located A1's house on the direction of P.W.2. This evidence has been supported by P.W.2 also. Therefore, the contention of the learned senior counsel for the appellant (A1) has no merits.

39. It is further contended that there are no acceptable materials to show that the search was conducted in P.W.11's house by P.W.3 after obtaining authorisation and with reference to the authorisation, there are vital contradiction between the evidence of P.W.3 and P.W.2 and therefore, the search cannot be said to be legal.

40. This contention also, in my view, would not deserve acceptance. It is the specific evidence of P.W.2 that two teams were constituted by him to go and search the house of P.Ws.11 and A2. P.W.3 Balakrishnan was asked to lead the team to go and search the house of P.W.11 with Ex.P-17 authorisation obtained from P.W.12.

41. P.W.3 also would state that he was directed to go and search P. W.11 place at Egmore on the strength of Ex.P-17 authorisation issued by P.W.12. According to P.W.3, he was accompanied by P.W.1 Mohamed Iqbal and Saikumar, another Intelligence Officer and went to Egmore along with A1 for searching the house of P.W.11.

42. P.W.12 Kumar, senior intelligence gazetted Officer, would state that he was asked to come to the office by his superior Officer on 16.5.1998 at about 8.00 A.M. After obtaining statement from A1 and on the basis of the information given by A1, he directed P.W.3 Balakrishnan and other Officers along with A1 to go and search P.W.11's house, as according to A1, the offending articles were stocked at P.W.11's house.

43. Ex.P-17 authorisation would also show that P.W.3 was specially authorised to search for the offending articles at No.27 Pantheon Road, Egmore, i.e., P.W.11's house. This was dated 16.5.1998. Ex.P-8 mahazar prepared while searching the house of P.W.11 would also reveal that the search warrant, namely, Ex.P-17 authorisation was shown to the mahazar witnesses. P.W.10 Shamraj, a local resident, who is one of the mahazar witnesses, would support this. He specifically stated that he saw Ex.P-17 and signed in Ex.P-18 which was prepared after the search was over.

44. That apart, P.W.3 sent Ex.P-19 report to P.W.12, who issued authorisation. In Ex.P-19 also, it is mentioned that he went and searched the premises only under Ex.P-17 authorisation issued by P.W.12. P.W.12 Kumar also would state that after issuance of Ex.P-17 authorisation, P.W.3 searched the premises and sent Ex.P-19 report and the same was signed by him. Therefore, it cannot be contended that the search was conducted without any authorisation.

45. It is argued that P.W.1 sent Ex.P-6 report under Section 57 of the Act to his superior officer stating that A1 gave Ex.P-1 statement disclosing the receipt of consignment of steel trunk box and plastic moulded suit case containing the contraband articles, whereas the details of the containers were not mentioned in Ex.P-1.

46. It is true that in Ex.P-6 report under Section 57 of the Act, P. W.1 would state that on 16.5.1998, he recorded the statement of A1 which discloses that he received consignment of steel trunk box and plastic moulded suit case containing the narcotic drug in the previous night. But, in Ex.P-1, A1 mentioned only about two boxes without mentioning the form and nature of the containers.

47. The reference in Ex.P-6 that A1 stated about the nature and form of the container is purely a mistake. Furthermore, Ex.P-6 has been prepared by P.W.1 only after searching the house of P.W.11 and seizure of the boxes. In Ex.P-6, it is also mentioned that P.W.1 obtained further statements Ex.P-3 and P-4 from A1 on 16.5.1998 and 17.5.1998. In Exs.P-3 and P-4, there is a reference about the nature and form of the containers, (i.e.) one container is the steel trunk box and another is the plastic moulded suit case. Therefore, the evidence of P. Ws.1 and 2 cannot be rejected on this score.

48. It is further submitted that as per Ex.P-1 confession statement, Lakshmanan, the co-accused, asked A1 to take his Fiat car with the consignment to A1's house, but, the consignment was taken from A1's house to P.W.11's house only in ambassador car and there is no investigation as to what happened to the Fiat car belonged to the said Lakshmanan.

49. This contention would not relate to the issue raised in this case. According to the prosecution, the ambassador car which was used for transporting the contraband articles from A1's house to P.W.11's house, belonged to A1. It is the case of A1 that the Ambassador Car was sold to P.W.11 by A1 about 15 years back. But, the registration certificate Ex.P-31 would show that on the date of the occurrence, the car was still in the name of A1.

50. According to P.W.11, he was asked to take the Ambassador Car with the two boxes said to have been contained "crab feed" to keep them in safe custody for one day in his house. The said Ambassador Car was seized by P.W.8 Ravichandran under Ex.P-30 mahazar. Therefore, the failure to seize the Fiat Car which belonged to Lakshmanan would be of no use either to the prosecution or to the accused. Therefore, this contention also fails.

51. Another point raised on behalf of the appellant (A1) is that the boxes containing the contraband were not recovered from A1's house, but from P.W.11's house and even assuming that when the boxes were handed over to P.W.11 by A1, there is no acceptable material to show that A1 had knowledge about what the boxes would contain and admittedly, the keys of the containers were not with either P.W.11 or A1 and as such, the matter of knowledge as attributed to P.W.11 would also apply to A1 also.

52. In brief, it is his contention that there is no material to show that A1 had knowledge about the nature of the consignment kept in the boxes. This submission cannot be accepted for the following reasons.

53. Only on the basis of the information, as contained in Ex.P-7, A1 was brought to the D.R.I. office. On interrogation, A1 stated that he handed over two boxes containing the offending articles to P.W.11 without divulging the contents of the consignment. On the basis of the said statement, the offending articles in two boxes were seized from P.W.11's house.

54. Even as per Ex.P-1 statement given by A1, P.W.11 did not have the knowledge about the nature of the article contained in the boxes. This has been corroborated by Ex.P-37, the statement of P.W.11, stating that two boxes were handed over to him in the Ambassador Car to have custody for one day stating that the boxes contained "crab feed". On having good faith on A1, P.W.1 kept the boxes in the balcony of his house. So, lack of knowledge about the nature of consignment as attributed to P.W.11 would not apply to A1, as the consignment containing the offending articles were recovered only on the basis of the statement given by A1. Therefore, even though the contraband

articles were recovered from the house of P.W.11, the possession of the same by P.W.11 was only at the instance of A1 without having knowledge about the contents of the containers.

55. Under those circumstances, A1 cannot escape by merely saying that it was not recovered from him and he had no knowledge. Once there are materials to establish that the containers containing the contraband were handed over by A1 to P.W.11 without divulging the real nature of the offending articles to him, it would definitely show that the possession shall be construed to be of the appellant (A1.)

56. It is settled principle that the concept of possession involves two elements, namely, (1) animus possessendi and (2) corpus possessendi. Even if a person does not have physical custody of the contraband, and if it is shown that he has constructive possession through some other person, he cannot be let away.

57. In this case the appellant (A1) has animus possessendi, namely, knowledge that the boxes contained contraband and with the said knowledge, he made a false representation to P.W.11 about the contents of the boxes and shifted the same from his residence to the residence of P.W.11.

58. Possession implies dominion over an object and consciousness in the mind of the person that he can exercise it. It is not necessary that the physical power of dealing with the thing should be retained at every moment of time. It would be enough for the purpose of retaining possession if that physical power can be exercised at any movement the possessor wishes it.

59. Possession in order to justify a conviction need not necessarily be in one's exclusive possession. A person can be in possession jointly with others. If the contraband was found in the joint possession of two persons, it can be presumed that both are in possession of the article. The prosecution, no doubt, should prove that each of the accused had either physical or constructive possession of the property and that one or more of them had possession thereof either physical or constructive on behalf of themselves and the other accused to the knowledge of the latter. The presumption can be rebutted by the accused by establishing that he did not know about the presence of the article by showing that it was dumped there without his knowledge.

60. The above principles have been laid down by this Court in *STATE OF KERALA v. K.GOPALAN* (1963 M.L.J. (CrL.) 418).

61. If these principles are applied to the present facts of the case, the prosecution has produced materials to show that A1 had alone knowledge of the contents of the containers and not P.W.11. As a matter of fact, P.W.11 was made to believe through false representation by A1 that the boxes contained only "crab feed".

62. In that fact situation, it shall be stated that the knowledge on the part of A1 has been sufficiently established by the prosecution. Once it is established that the boxes were handed over by A1 to P. W.11 with the knowledge about the contents of the containers, the appellant (A1) has to discharge the burden based on Section 35 of the N.D.P.S. Act by establishing that he had no knowledge about the contents of the boxes.

63. On the other hand, A1 unfortunately has taken the stand in the trial that the boxes containing the contraband were not handed over by him to P.W.11, even though, it is the admitted case of the prosecution that both A1 and P.W.11 were not having keys. Consequently, there is no attempt made by the accused (A1)

to indicate that either the boxes were not handed over by him or there is no knowledge on his part about the contents of the consignment. Therefore, this point also would fail.

64. The next point is that Ex.P-1, the statement of A1 cannot be acted upon, as it lacks corroboration and the said confession statement of A1 was subsequently retracted and Ex.P-27, the confession of A2, cannot be relied upon as against A1, as A2 had already been acquitted.

65. As indicated earlier, the recovery of the contraband articles was made from P.W.11's house only at the instance of A1. In Ex.P-1, the confession statement of A1, the particulars are given in detail. He narrated as how he had the contact with the other accused persons and how he agreed for the transport or export of narcotic drugs from Chennai to Bombay or to other foreign countries. He had given further details stating that one of the other accused Lakshmanan handed over the Fiat Car with two boxes kept in the dicky containing the contraband articles which were taken to his house and thereafter, he handed over the same to P.W.11 without divulging the contents of the containers. Therefore, it cannot be said that this statement given on 16.5.1998 has no corroboration.

66. As a matter of fact, on the basis of Ex.P-1 statement, P.W.3 obtained Ex.P-17 authorisation from P.W.12 and went to P.W.11's house for searching the residential premises of P.W.11. At that time, A1 was also present. P.W.10 the local resident is one of the mahazar witnesses. He signed both in Ex.P-17 authorisation for having seen the same and in Ex.P-18 mahazar as attesting witness. In both Ex.P-18 mahazar and the evidence of P.W.10, the presence of A1 was mentioned.

67. This apart, P.W.3, who was authorised to search the premises of P.W.11, also would state in Ex.P-19 report under Section 57 of the Act sent to the superior Officer that he searched and seized the offending articles of A1 in the premises of P.W.11. Ex.P-37 also would clearly indicate that the containers were handed over to P.W.11 by A1 without disclosing the real nature of the contents.

68. Under those circumstances, it cannot at all be stated that the Ex.P-1 confession has no corroboration.

69. Even the decision cited by the learned senior counsel for the appellant in MUTHUSWAMI v. STATE OF MADRAS (AIR 1954 S.C. 4) in order to show that the confession should not be accepted merely because it contains wealth of detail would hold that no hard and fast rule can be laid down regarding the necessity of corroboration in the case of a retracted confession in order to base a conviction thereon.

70. It is held in K.I.PAVUNNY v. ASSISTANT COLLECTOR, CENTRAL EXCISE COLLECTORATE, COCHIN (1997 (3) S.C.C. 721) as follows:-

"If the court believes that the confession was voluntary and believes it to be true, then there is no legal bar on the court for ordering conviction. However, the rule of prudence and practice does require that the court seek corroboration of the retracted confession from other evidence. The confession must be one inculcating the accused in the crime. It is not necessary that each fact or circumstance contained in the confession is separately or independently corroborated. It is enough if it receives general corroboration."

71. In the context of the above observation of the Supreme Court, it can be safely held that Ex.P-1 statement given by the accused (A1) has been fully corroborated by his further statements Exs.P-3 and P-4, but also by Ex.P-27 statement of A2, recovery of articles from P.W.11's house, the evidence of P.W.3 the Searching Officer, and the evidence of P.W.10 mahazar witness. Therefore, Ex.P-1, the confession statement of A1, which has been retracted subsequently, as noted above, has been sufficiently corroborated. Therefore, this point also would fall to the ground.

72. Lastly, it was contended that the appellant was taken to the D. R.I. office on 16.5.1998 and produced before the Magistrate only on 17 .5.1998 at about 7.15 P.M. and as such, he was detained beyond 24 hours

and therefore, the detention is illegal and consequently, Exs.P-1 , P-3 and P-4, the confession statements obtained from A1 during that period, have to be held as not voluntary.

73. No doubt, it is true that A1 was brought to the D.R.I. office at about 9.00 A.M. on 16.5.1998. On that date, Ex.P-1 was recorded by P.W.1 and on the very same date, the contraband articles were seized from the house of P.W.11 in the evening. Thereafter, Ex.P-3 another confession statement was obtained from A1. Next day also, one more confession statement(Ex.A-4) was obtained from A1. Thereafter, the arrest was shown through Ex.P-5 arrest memo. The evidence of P.W.1 and Ex.P-6 report sent by P.W.1 to the superior officer under Section 57 of the Act would clearly indicate that he was arrested on 11.00 A.M. on 17.5.1998, after recording the last statement Ex.P-4.

74. It is argued on the basis of the decisions in (1) NATHU v. STATE OF UTTAR PRADESH (AIR 1956 S.C. 56) and (2) STANLEY v. STATE (1998 M.L.J. (Crl.) 706) that when the appellant was subjected to prolonged custody, it cannot be said that the statement given by the accused is voluntary.

75. The facts of those cases would not apply to the facts of the present case. In NATHU v. STATE OF UTTAR PRADESH (AIR 1956 S.C. 56), it is held that the prolonged custody immediately preceding the making of the confession is sufficient, unless it is properly established as involuntary. In that case, there is no explanation to keep the accused in prolonged custody of 14 days from 7th August to 20th August.

76. In STANLEY v. STATE (1998 M.L.J. (Crl.) 706, the accused was detained for three days from 19.7.1990 to 21.7.1990 and only on 20.7.1990, a statement was recorded from him and he was produced before the Court on 21.7.1990. Under those circumstances, there is an unexplained delay in both these cases, which made the Court to hold that the confession statement was involuntary.

77. That is not the case here. On 16.5.1998 at about 9.00 A.M., the first statement Ex.P-1 was obtained and in pursuance of the same, the contraband articles were recovered from the house of P.W.11 and thereafter, he was interrogated at the D.R.I. office on 16.5.1998 evening and Ex.P-3 second statement was obtained. Thirdly, on 17.5.1998, at about 11.00 A.M., another statement Ex.P-4 was obtained. Only thereafter, P.W.1 thought it fit to arrest the accused after serving the arrest card on the accused and obtained a signature from his wife and sent the accused for remand on the same day itself. Thus, it is clear that there is explanation on the part of P.W.1 for the delay.

78. However, it is noticed that after showing the arrest, the accused was produced before the Court within 24 hours. When he was remanded by the Court at about 7.15 P.M. on 17.5.1998, the appellant (A1) never said that the statement was obtained from him under threat or coercion. Only on 29.5.1998, while he was in Central Prison, the appellant (A1) sent a letter to the Special Judge, N.D.P.S. Cases, Chennai stating that he was forced to write some statements. He further stated that he was unable to represent anything before the Magistrate while remanding, since he was feeling giddiness due to sudden shock and drop of B.P. as a diabetic patients. This has been marked as Ex.C-1.

79. Strangely, when A1 was questioned under Section 313 Cr.P.C., he stated that he was beaten and statements were obtained. He has further stated that he was asked to sign in the papers without allowing him to read the contents of the papers. According to him in his answer to the last question, he was taken from his house on 15.5.1998 and detained in the D.R.I. office upto

17.5.1998 and he was dictated to write something and thereafter, he was taken to P.W.11 Mahendroo's house and he was asked to put some signatures in some documents.

80. A1 has further stated in his answer that he did not tell anything to the Magistrate regarding the torture and the threat and coercion, as he was warned by the Officers that if he tells anything about the torture, his son and wife would be brought to the D.R.I. office and they would have also harassed. This answer is quite contrary to

the letter Ex.C-2 while retracting the confession.

81. There is no dispute in the fact that the statement recorded under Section 67 of the Act is admissible in evidence. Even though statements were obtained on 16.5.1998 and 17.5.1998, the appellant (A1) thought it fit to retract the confession only on 29.5.1998.

82. Furthermore, the reason given in the said letter for not mentioning about the torture before the Magistrate is quite different from the reasons given in his statement under Section 313 Cr.P.C. Therefore, the belated retraction, that too, by two different contrary reasons would not be of any use to hold that the confession recorded from A1 under Section 67 of the Act is not voluntary.

83. As indicated earlier, the materials referred to in the preceding paragraphs and the discussion made in respect of the points raised by the learned senior counsel for the appellant would clearly indicate that the appellant (A1) handed over the boxes containing the contraband articles to P.W.11 without divulging the contents of the same, even though he had the knowledge about the same and as such, he is liable to convicted for the offence with which he was charged. Consequently, the conviction imposed upon the appellant (A1) by the trial Court is confirmed and accordingly, the conviction is upheld.

84. In regard to sentence, something needs to be mentioned. The minimum sentence imposed as per the penal Section 22 of the N.D.P.S. Act is 10 years and a fine of Rs.1 Lakh. In this case, the appellant (A1) was sentenced to undergo R.I. for 12 years, and to pay a fine of Rs.1.5 Lakhs, in default to undergo R.I. for 18 months for the offence under Section 8(c) r/w. Section 22 of the N.D.P.S. Act.

85. The reason given by the trial Court for imposing the sentence more than the minimum is that he made his friend to believe that the containers contained "crab feed" without giving any respect for friendship. But, this may not be the reason for imposing the severe punishment, namely, 12 years and to pay a fine of Rs.1.5 Lakhs.

86. In the facts and circumstances of the case, it would be appropriate to reduce the sentence of R.I. for 12 years to R.I. for 10 years and the fine amount from Rs.1.5 Lakhs to Rs.1 Lakh, which is the minimum sentence, in default to undergo R.I. for 6 months and accordingly, reduced.

87. With this modification in sentence alone, the Criminal Appeal No.734 of 1999 filed by the appellant (A1) is liable to be dismissed confirming the conviction imposed upon him by the trial Court.

88. In regard to the appeal against acquittal in respect of A2 filed by the complainant-State, the learned Special Public Prosecutor, though mentioned about the materials available against A2, would not seriously challenge the reasonings given by the trial Court for acquitting A2.

89. On going through the records and the findings given by the trial Court in regard to A2, it is obvious that there is no sufficient material to connect A2 with the crime committed by A1. The only evidence available against him is the two confession statements (Exs.P-16 and P-27) obtained from him. Even

assuming that those confession statements can be acted upon, the details given in the said confession statements would not indicate that he was the party to the transaction in question.

90. Under those circumstances, I am unable to hold that the findings given by the trial Court in regard to the acquittal of A2 are not valid. Consequently, the Criminal Appeal No.323 of 2000 filed by the complainant-State is liable to be dismissed.

91. In the result, the Criminal Appeal No.734 of 1999 filed by the appellant (A1) is dismissed with the above modification in sentence alone and the Criminal Appeal No.323 of 2000 filed by the complainantState against

the acquittal of A2 is also dismissed. Consequently, CrI.M.P. No.1038 of 2001 is also closed.

Index: Yes

Internet : Yes

dpp

To

1. The Special Judge, N.D.P.S. Act, Madurai.
2. The Special Public Prosecutor (NDPS Cases),
High Court, Chennai.
3. The Intelligence Officer, Directorate of Revenue
Intelligence, Chennai-17.
4. The Superintendent, Central Prison, Bangalore.

M. KARPAGAVINAYAGAM, J.

dpp

Judgment in

CRL. APPEAL Nos.734 of 1999 & 323 of 2000