Ramesh vs State Rep. By Its on 5 August, 2022

Author: D.Bharatha Chakravarthy

Bench: D.Bharatha Chakravarthy

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 12.07.2022

Judgment Pronounced on : 05.08.2022

CORAM :

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

Crl.A.Nos.829 and 898 of 2019

Ramesh,
Son of Rajendran ... Appellant in Crl.A.No.829 of 2019/
Accused No.4

Raja,
Son of Muthuswamy ... Appellant in Crl.A.No.898 of 2019/
Accused No.3

Versus

State Rep. by its
Deputy Superintendent of Police,
NIB CID, Chennai.
[Crime No.95 of 2017] ... Respondent
in both Appeals

Prayer in Criminal Appeal No.829 of 2019: Criminal Appeal filed under Section 374(2) of The Code of Criminal Procedure, 1973, against the Judgment dated 15.10.2019 by the learned Special Judge, I Additional Special Court for Exclusive Trial of Cases under NDPS Act, Chennai, in C.C.No.51 of 2018 convicting the appellant for offence under Section 8(c) r/w 20(b)(ii)(C) and 8(c) r/w 29(1) of NDPS Act and sentencing him to

undergo rigorous imprisonment for 10 (Ten) years and to pay a fine of

Rs.1,00,000/- in default to undergo rigorous imprisonment for 1 (one) year for offence under Section 8(c) r/w 20(b)(ii)(C) of NDPS Act and in default to undergo rigorous imprisonment for a further period of 1(one) year and undergo rigorous imprisonment for 10 (Ten) years and to pay a fine of Rs.1,00,000/- in default to undergo rigorous imprisonment for 1 (one) year for offence under Section 8(c) r/w 29(1) of NDPS Act.

Prayer in Criminal Appeal No.898 of 2019: Criminal Appeal filed under Section 374(2) of The Code of Criminal Procedure, 1973, against the Judgment dated 15.10.2019 by the learned Special Judge, I Additional Special Court for Exclusive Trial of Cases under NDPS Act, Chennai, in C.C.No.51 of 2018 convicting the appellant for offence under Section 8(c) r/w 20(b)(ii)(C) and 8(c) r/w 29(1) of NDPS Act and sentencing him to undergo rigorous imprisonment for 10 (Ten) years and to pay a fine of Rs.1,00,000/- in default to undergo rigorous imprisonment for 1 (one) year for offence under Section 8(c) r/w 20(b)(ii)(C) of NDPS Act and in default to undergo rigorous imprisonment for a further period of 1(one) year and undergo rigorous imprisonment for 10 (Ten) years and to pay a fine of Rs.1,00,000/- in default to undergo rigorous imprisonment for 1 (one) year for offence under Section 8(c) r/w 29(1) of NDPS Act.

For Appellants : Mr.R.Karthikeyan
for Appellant in Crl.A.No.829 of 2019

: Mr.R.Subramanyam
for M/s.K.Panjalakshmi

for Appellant in Crl.A.No.898 of 2019

For Respondent : Mr.S.Vinoth Kumar
Government Advocate (Crl. Side)
in both the Criminal Appeals

COMMON JUDGMENT

Crl.A.No.898 of 2019 is filed by one Raja (A3) and the Criminal Appeal No.829 of 2019 is filed by one Ramesh (A4) in C.C.No.51 of 2018 against the conviction and sentence imposed against them by judgment of the Special Judge, I Additional Special Court for Exclusive Trial of Cases under N.D.P.S Act, 1985, Chennai, dated 15.10.2019 and as such both the appeals were heard together and are being disposed of by this common judgment.

2. On 27.11.2017, on information through telephone at about 03.00 P.M from a secret informant that ganja is being illegally transported in a lorry bearing Registration No.TN-15-U-9515, surveillance was mounted at Nazarethpet Check-Post after informing the information to the

superior officer in writing. P.W.1 namely, Ms.Suguna, the Inspector of Police along with the inspection party intercepted the lorry and the driver of the lorry identified himself as Mathi, son of Perumal, a person aside him identified Crl.A.Nos.829 and 898 of 2019 himself as Selvakumar, son of Muniayappan and yet another person who identified himself as Ramesh, son of Rajendran, upon being informed of their rights under Section 50 of the N.D.P.S Act, 1985 offered themselves to be searched by P.W.1 herself and the general public in the vicinity declining to be the witness for search in the presence of P.W.2 namely, Babu, the Sub Inspector of Police and one Manikandan, a Grade-I Police Constable, obtained the signatures of the accused and conducted a search, it was found that among sacks of rubber, 11 sacks containing ganja were available. P.W.1 weighed all the 11 sacks and serialized them as P.1 to P.11 and the ganja was recovered under Exs.P-3 Mahazar and the said 3 persons were arrested. Upon their confession, the house of the owner of the lorry, was also searched and ganja was recovered in his house also and he was also arrested and remanded to custody. Upon registration of a case in Cr.No.95 of 2017 under Sections 8(c) r/w 20(b)(ii)(C), 25, 27A, 28 and 29 of the N.D.P.S Act, 1985, P.W.7 took up the case for investigation and on completion of the investigation, filed final report before the Special Court proposing all the 4 accused guilty of the offences. Thereafter, upon consideration of the materials on record, the Trial Court framed charges as detailed below:-

> Crl.A.Nos.829 and 898 of 2019 Charge Number Name and Rank of the Charged for offence Accused punishable 1st Charge A1 to A4 Section 8(c) r/w 29(1) of NDPS Act 2nd Charge A1, A3 & A4 Section 8(c) r/w 20(b)(ii)(C) of NDPS Act 3rd Charge A3 Section 8(c) r/w Section 20(b)(ii)(B) of NDPS Act 4th Charge A3 Section 25 of NDPS Act

3. Upon questioning, all the four accused denied the charges and stood trial. So as to bring home the charges, Suguna, the Inspector of Police, who conducted search and seized the contraband was examined as P.W.1; one Babu, the Sub Inspector of Police, who accompanied P.W.1 for the search and seizure and a witness for the seizure was examined as P.W.2; one Sivakumar, a Head Constable, who took the samples and handed over the samples for Forensic Examination, was examined as P.W.3; one Meenakshi, a Forensic Expert, who examined the samples and gave an opinion that the sample is ganja, was examined as P.W.4; one Nithin Paul, who is an employee of one Malaya Rub Tech Industries, Cochin, which transported the rubber in the lorry in which ganja was found, was examined as P.W.5; one Jaisingh Bermacha another employee from M/s.East India Crl.A.Nos.829 and 898 of 2019 Agency, which has booked the lorry for transportation of the consignments, was examined as P.W.6; and one Purushothaman, the Investigating Officer in this case was examined as P.W.7.

4. Further, on behalf of the prosecution, Exs.P-1 to P-38 were marked and M.Os.1 to 13 were produced. Upon being questioned about the incriminating circumstances and the material evidence on record as per Section 313 of Cr.P.C., accused Nos.1 to 4 denied the same as false. No evidence was let in on behalf of the defence. The Trial Court thereafter proceeded to hear the learned Special Public Prosecutor on behalf of the prosecution and the learned Counsel for the accused and by a judgment dated 15.01.2019 convicted and sentenced A1 to A4 as detailed below:-

Rank of	Penal	Penal	Quantum of Sentence

the Accused	provisions under which Charges were framed	provisions under which Accused were Convicted	Imposed by the trial court

Section 8(c) Section 8(c) r/w Rigorous Imprisonment for a r/w 29(1) of 29(1) of the period of 10 years and to pay a the NDPS Act NDPS Act fine of Rs.1,00,000/- and in A1- default thereof to further Selva- undergo Rigorous kumar Imprisonment for a period of one year Section 8 (c) Section 8 (c) Rigorous Imprisonment for a Crl.A.Nos.829 and 898 of 2019 Rank of Penal Penal Quantum of Sentence the provisions provisions Imposed by the trial court Accused under which under which Charges were Accused were framed Convicted r/w r/w 20(b)(ii)(C) period of 10 years and to pay a 20(b)(ii)(C) of of NDPS Act fine of Rs.1,00,000/- and in NDPS Act default thereof to further undergo Rigorous Imprisonment for a period of one year A2- Section 8(c) Section 8(c) r/w Rigorous Imprisonment for a Mani r/w 29(1) of 29(1) of the period of 10 years and to pay a the NDPS Act NDPS Act fine of Rs.1,00,000/- and in default thereof to further undergo Rigorous Imprisonment for a period of one year Section 8 (c) Section 8 (c) Rigorous Imprisonment for a r/w r/w 20(b)(ii)(C) period of 10 years and to pay a 20(b)(ii)(C) of of NDPS Act fine of Rs.1,00,000/- and in NDPS Act default thereof to further undergo Rigorous Imprisonment for a period of one year A3-Raja Section 8(c) Section 8(c) r/w Rigorous Imprisonment for a r/w 29(1) of 29(1) of the period of 10 years and to pay a the NDPS Act NDPS Act fine of Rs.1,00,000/- and in default thereof to further undergo Rigorous Imprisonment for a period of one year Section 8(c) Section 8(c) r/w Rigorous Imprisonment for a r/w 25 of 25 of NDPS period of 10 years and to pay a NDPS Act Act fine of Rs.1,00,000/- and in default thereof to further Crl.A.Nos.829 and 898 of 2019 Rank of Penal Penal Quantum of Sentence the provisions provisions Imposed by the trial court Accused under which under which Charges were Accused were framed Convicted undergo Rigorous Imprisonment for a period of one year A4- Section 8(c) Section 8(c) r/w Rigorous Imprisonment for a Ramesh r/w 29(1) of 29(1) of the period of 10 years and to pay a the NDPS Act NDPS Act fine of Rs.1,00,000/- and in default thereof to further undergo Rigorous Imprisonment for a period of one year Section 8 (c) Section 8 (c) Rigorous Imprisonment for a r/w r/w 20(b)(ii)(C) period of 10 years and to pay a 20(b)(ii)(C) of of NDPS Act fine of Rs.1,00,000/- and in NDPS Act default thereof to further undergo Rigorous Imprisonment for a period of one year Aggrieved by the above said conviction and sentence, accused Nos.3 and 4 have filed these appeals as stated above.

5. I have heard Mr.R.Karthikeyan, the learned Counsel appearing on behalf of the Appellant (A4) in Crl.A.No.829 of 2019 and Mr.R.Subramanyam, the learned Counsel appearing on behalf of the Appellant (A3) in Crl.A.No.898 of 2019 and Mr.S.Vinoth Kumar, the Crl.A.Nos.829 and 898 of 2019 learned Government Advocate (Crl. Side) appearing on behalf of the respondent/State and also perused the material records in this case.

6. As far as accused No.3 is concerned, the learned Counsel for the appellant (A3), after taking this court through the judgment of the Trial Court, would submit that the quantity of ganja seized from the residence of accused No.3 was not at all sent for chemical analysis. In the absence of confirmation that it was ganja, he was acquitted for the offence of possession of ganja. He was convicted only for the offence of conspiracy under Section 8(c) r/w 29(1) and 8 (c) r/w 25 of the N.D.P.S Act, 1985 for knowingly allowing the lorry of which he is having control to be used by the

other accused for transportation of ganja. In this regard, the contention of the learned Counsel is that even though for the offences under N.D.P.S Act, 1985, there is presumption of culpable state of mind against the accused under Section 35 of the N.D.P.S Act, 1985, still he would submit that the prosecution has to discharge its initial burden of bringing some material so as to pin point that the petitioner had knowingly allowed the lorry belonged to his wife to be used by the other accused for the purpose of transportation of ganja.

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7. The learned Counsel, placing strong reliance upon the judgment of the Hon'ble Supreme Court of India in Bhola Singh Vs. State of Punjab1, would submit that the prosecution has to establish that he had knowingly allowed the other accused to transport ganja and in this case, there is no such evidence available on record and the Trial Court assumed that merely because the accused Nos.1, 2 and 4, being the two Drivers and the Cleaner, were all natives of the same Taluk and nearby places as that of the owner of the lorry, the owner should have had the knowledge. This, according to the learned Counsel, is based on surmise and the appellant cannot be convicted for such a serious offence based on such presumptions and surmises.

8. As far as the other charge under Section 8(c) read with Section 29(1) of the N.D.P.S Act, 1985, he would submit that there is again absolutely no evidence whatsoever which was let in by the prosecution about the criminal conspiracy of the accused No.3 with the other accused and he would submit that the prosecution has not established any aspect of the conspiracy much less evidence was to satisfy the tests laid down by the Hon'ble Supreme Court of India in State (NCT of Delhi) Vs. Shiv Charan 1 (2011) 11 SCC 653 Crl.A.Nos.829 and 898 of 2019 Bansal and Ors.2. Therefore, he would submit that there is absolutely no basis whatsoever to convict the third accused and prays for allowing the appeal filed by the accused No.3.

9. Mr.R.Karthikeyan, learned Counsel appearing on behalf of the accused No.4, taking this Court through the evidence of P.W.1 and the other witnesses, would submit that in this case, as far as the accused No.4 is concerned, he was not even the Driver and no specific knowledge on his behalf was established by any evidence of the prosecution. He would submit that the prosecution, in this case, has not adhered to any of the mandatory procedures prescribed in Chapter-V of the Act. He would submit that firstly, in this case, the search is carried out in a public place as per Section 43 of the Act and upon reading of the evidence of P.W.1 and cross- examination of P.W.7, Superior Officer, it would be clear that the Superior Officer has not noted down any time etc. The learned Counsel would submit that in this case, the alleged search and seizure took place on 27.11.2017 and relying upon Section 57 of the Act, in this case, he would submit even the report of search and seizure was not made within 48 hours. Further, he would submit that even though the search had taken place on 2 (2020) 2 SCC 290 Crl.A.Nos.829 and 898 of 2019 27.11.2017, the samples and the contraband reached the concerned Court only on 04.12.2017 and therefore, there is a serious doubt as to the reliability of the contraband produced as well as the samples drawn from the same.

10. The learned Counsel also submitted that weight of the alleged samples as mentioned in Ex.P-23 and the weight by P.W.1 in the seizure mahazar differs in respect of certain items. Similarly, the

weight of the samples taken, as mentioned in Ex.P-23 and the report of the expert in Ex.P-37, differs and therefore, the same raises a serious doubt as to the samples drawn and the purity of the seizure and proof that the tested contraband is the same as the one which is seized from the lorry. Therefore, he would submit that when the case of the prosecution suffers infirmities in respect of the material facts relating to the seizure, drawing of the sample and proving the sample to be the ganja, the benefit of doubt has to be granted to the accused No.4 and the appeal is liable to be allowed. He would submit that the accused No.4 was neither the driver nor the cleaner and therefore, even constructive possession is not attributable to him. Crl.A.Nos.829 and 898 of 2019

11. Per contra, the learned Government Advocate (Crl. Side), would submit that, in this case, a huge haul of contraband i.e., totally 264.420 gms of ganja was seized, of which, 249.200 Kgs was seized from the lorry in possession of accused Nos.1, 2 and 4 and 15.220 Kgs of ganja was seized from the house and premises of the accused No.3. As a matter of fact, the Investigating Officer, in this case, has given a request, which is also marked as Ex.P-34, in which, the request was made to send all the 12 samples drawn for chemical analysis, but, however, it is only the Court which had decided to send only 4 out of the 12 samples, namely CS2, CS4, CS6 and CS8 for chemical analysis vide Ex.P-24. But, for the oversight of the Court in not sending Ex.P-12, this is a clear and categorical case even as against the accused No.3, owner of the lorry, who was also possessing ganja in his house premises. He would submit that from the evidence of P.W.1, it would be clear that all the mandatory procedures of reducing the information into writing, submitting the same to the Superior Officer, giving an option to the accused to be searched by a Gazetted Officer or by a Magistrate, submitting a report of search and arrest to the Superior Officer, sealing the contraband and sending the same for analysis through Court, have been meticulously followed by the prosecution and therefore, there is no procedural violation Crl.A.Nos.829 and 898 of 2019 or lapse of investigation in this case. He would submit that as far as the accused No.3, the owner of the lorry, is concerned, firstly, the charge under Section 25 of the Act is that any person knowingly permitting his vehicle to be used for transport of the contraband, which reads as follows:-

> " 25. Punishment for allowing premises, etc., to be used for commission of an offence. Whoever, being the owner or occupier or having the control or use of any house, room, enclosure, space, place, animal or conveyance, knowingly permits it to be used for the commission by any other person of an offence punishable under any provision of this Act, shall be punishable with the punishment provided for that offence."

12. As far as the offences involving knowledge is concerned, the knowledge has to be presumed as per Section 35 of the Act. According to the learned Government Advocate (Crl. Side), as per Section 35 of the Act, for prosecution of offences, which require a culpable mental state of the accused, the Court shall presume the existence of such mental state, but, it shall be a defence for the accused to prove that he had no mental state with respect to the act charged. As far as the charge of conspiracy is concerned, the learned Government Advocate (Crl. Side) submits that from the facts and circumstances of this case and the quantity of the contraband involved, it will be very clear that it cannot be at the instance of the Drivers and Crl.A.Nos.829 and 898 of 2019 Cleaner alone, without the involvement of the owner of the vehicle. The circumstances clearly prove the offence of conspiracy also.

13. The learned Government Advocate (Crl. Side) would rebut the arguments of the learned Counsel appearing for the accused No.4 by relying upon Ex.P-1, Ex.P-2 and Ex.P-4 that the mandatory procedures prescribed under the Act have been complied with. Therefore, he would submit that there are absolutely no merits in the submissions made by the learned Counsel for the appellants.

14. I have considered the rival submissions made on either side and perused the material records of the case. Upon considering, the following points arise for consideration in the appeals:-

(i) Whether the investigation was fair and proper following the mandatory procedures under the Act ?

(ii) Whether the conviction of the accused No.3 for the offence under Section 8(c) read with Section 25 of the N.D.P.S Act, 1985 is sustainable or not?

(iii) Whether the conviction of the appellants for the offence under Section 8(c) read Crl.A.Nos.829 and 898 of 2019 with Section 29(1) of the N.D.P.S Act, 1985 is sustainable or not?

Point No.1:-

15. In this case, the search and seizure was made by P.W.1, the Inspector of Police, Narcotic Intelligence Bureau of the Tamil Nadu State Police. There is no quarrel over the competency of such officer being empowered by the State Government for search and seizure as per Section 42 of the Act. She is said to have received the secret information and therefore, she proceeded on the basis of the said information. Section 42(2) of the Act requires that when such officer takes down any information in writing or records his belief, he has to send a copy of the written information to his immediate superior official within 72 hours. The prosecution has produced Ex.P-1, which is the information which is reduced into writing by P.W.1 that has been placed before P.W.7, her immediate superior on the same day and even an endorsement 'permitted and proceed' is also made in Ex.P-1. Therefore, to that extent, Section 42 of the Act is complied with.

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16. On a perusal of Ex.P-2, it clearly states that an option has been given to the accused Nos.1, 2 and 4 to insist upon seizure being effected before the Gazetted Officer/Magistrate, but, however, the accused Nos.1, 2 and 4 had expressly waived such a right and have duly signed such endorsement in Ex.P-2 notice and therefore, the procedure under Section 50 of the Act is also duly complied with. On a perusal of Ex.P-3 seizure mahazar clearly demonstrates the seizure of 11 gunny bags containing bundles of ganja totally weighing 249.700 Kgs and the seizure mahazar is duly signed by P.W.1, the searching officer, the accused Nos.1, 2 and 4 and the witnesses. After duly arresting and the registering a case in Crime No.95 of 2017 and sending the accused for remand, P.W.1 also submitted a detailed report to P.W.7, the immediate Superior Officer detailing about the entire aspects of investigation including proceeding to the spot, searching, sealing, drawing of samples and the same is sent to P.W.7, the Superior Officer. Therefore, the directive of Section 57 of the Act is also

complied with.

17. The proceedings of the learned Principal Special Judge, Chennai, dated 05.12.2017 is marked as Ex.P-23, by which, it is clear that totally, 12 Crl.A.Nos.829 and 898 of 2019 samples from all the 12 gunny bags, 11 bags which were seized from accused Nos.1, 2 and 4 and the 12th one, which is seized from the house of accused No.3 were drawn. Thereafter, Ex.P-34 requisition was given by P.W.1 to send all the samples CS1 to CS12 for laboratory analysis. The order of the Principal Special Court, Chennai in Crl.M.P.No.3189 of 2017, dated 05.12.2017, whereby, it is decided to send only 4 of the 12 samples, is also marked as Ex.P-24 i.e., the Court decided to send CS2, CS4, CS6, CS8 to the laboratory for chemical analysis, while retaining CS1, CS3, CS5, CS7, CS9 to CS12 in the Court itself. Unfortunately, the Special Court failed to apply its mind that the samples in CS1 to CS11, all belong to the lot which were seized from the lorry and therefore, it is not necessary to send every sample in CS1 to CS11, but, however, CS12, being the sample from the lot, seized separately from accused No.3, it was mandatory on the part of the Special Court to have sent the same for the laboratory analysis. Even after the erroneous order, the Investigating Officer also did not bring this flaw to the notice of the Court. To that extent, there was a grave procedural lapse on the part of the Trial Court in not sending the sample in CS12 for laboratory analysis and in view of the said lapse the accused No.3, the owner of the lorry, was acquitted by the Trial Court in respect of the offence Crl.A.Nos.829 and 898 of 2019 relating to Section 8(c) read with Section 20(b)(ii)(B) of the N.D.P.S Act for possession of the contraband. Thus, on a cumulative reading of the evidence on record, there is no procedural lapse or violation of the mandatory provisions of the Act. I hold that the investigation is fair and proper.

Point No.2:-

18. As far as the conviction of the accused No.3 for the offence under Section 8(c) read with Section 25 of the Act in 'knowingly' permitting the lorry to be used for transportation of the ganja, firstly, even though the lorry stands in the name of the wife of accused No.3, the accused No.3 admits that he is the person who was in control of the plying of the vehicle and therefore, there is no quarrel over the fact that he is the person in control of the lorry. As far as the second ingredient that whether he has allowed the lorry to be used knowingly is concerned, the learned Government Advocate (Crl. Side) would submit that whenever any knowledge is required in respect of any offence, Section 35 of the Act clearly prescribes that such culpable mental state has to be presumed. It is useful to extract Section 35 of the Act, which reads as follows:-

> Crl.A.Nos.829 and 898 of 2019 " 35. Presumption of culpable mental state.
>
> (1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation.?__In this section ?culpable mental state? includes intention, motive knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability."

Therefore, it is submitted that it is for the accused No.3, to have proved that he has not allowed accused Nos.1, 2 and 3 to do the acts and accused Nos.1, 2 and 4 did the transportation without his knowledge.

19. To the contrary to the learned Counsel for the appellants, relies upon the judgment in Bhola Singh (cited supra) and it is useful to extract the paragraph Nos.10 and 11 of the said judgment, which reads as follows:-

> " 10. While dealing with the question of possession in terms of Section 54 of the Act and the presumption raised under Section 35, this Court in Noor Aga Vs. State of Punjab and Anr. (2008) 16 SCC 417 while upholding the constitutional validity of Section 35 observed that as this Section imposed a heavy reverse burden Crl.A.Nos.829 and 898 of 2019 on an accused, the condition for the applicability of this and other related sections would have to be spelt out on facts and it was only after the prosecution had discharged the initial burden to prove the foundational facts that Section 35 would come in to play.
>
> 11. Applying the facts of the present case to the cited one, it is apparent that the initial burden to prove that the appellant had the knowledge that the vehicle he owned was being used for transporting Narcotics still lay on the prosecution, as would be clear from the word "knowingly", and it was only after the evidence proved beyond reasonable doubt that he had the knowledge would the presumption under Section 35 arise. Section 35 also presupposes that the culpable mental state of an accused has to be proved as a fact beyond reasonable doubt and not merely when its existence is established by a preponderance of probabilities. We are of the opinion that in the absence of any evidence with regard to the mental state of the appellant no presumption under Section 35 can be drawn.

The only evidence which the prosecution seeks to rely on is the appellant's conduct in giving his residential address in Rajasthan although he was a resident of Fatehabad in Haryana while registering the offending truck cannot by any stretch of imagination fasten him, with the knowledge of its misuse by the driver and others."

(Emphasis Supplied) Therefore, he would submit that it is for the prosecution to prove beyond reasonable doubt that such knowledge is existed with the accused No.3 and there is no evidence at all in this case to that effect. Crl.A.Nos.829 and 898 of 2019

20. In this regard, even in the passage Nos.10 and 11 of Bhola Singh (cited supra) as extracted above, the Hon'ble Supreme Court of India relied upon the judgment in Noor Aga Vs. State of Punjab3. The said judgment in Noor Aga (cited supra) considered in detail about the presumptions under the

N.D.P.S Act and has held that it is the basic human right of the accused to be presumed innocent at the beginning of any trial and wherever statutory exceptions to the rule of presumption of innocence are made and reverse onus is imposed on the accused, it should be taken as the shifting of the burden on the accused only after the prosecution discharges its initial onus.

21. As a matter of fact, the Hon'ble Supreme Court of India in Binoy Kumar Mishra Vs. State of Jharkhand and Anr.4 considered the judgments of Bhola Singh (cited supra), Noor Aga (cited supra) and Krishna Janardhan Bhat v. Dattatraya G. Hegde5 and held that the prosecution should discharge its initial onus. As a matter of fact, the judgment in Noor Aga (cited supra) as well as the Bhola Singh (cited supra) were followed by a three judge bench in Mohan Lal Vs. State of Punjab6. 3 (2008) 16 SCC 417 4 (2017) 13 SCC 636 5 (2008) 4 SCC 54 6 (2018) 17 SCC 627 Crl.A.Nos.829 and 898 of 2019

22. The onus of the prosecution and the reverse burden on the part of the accused in respect of the N.D.P.S Act cases is considered by the Constitution Bench in Mukesh Singh v. State (NCT of Delhi)7, in which, the Constitution Bench has specifically overruled the view taken in Mohan Lal (cited supra) It is useful to extract the paragraph No.11.3 which reads thus:-

> " 11.3. Now so far as the observations made by this Court in para 13 in Mohan Lal [Mohan Lal v. State of Punjab, (2018) 17 SCC 627 :
>
> (2019) 4 SCC (Cri) 215] that in the nature of reverse burden of proof, the onus will lie on the prosecution to demonstrate on the face of it that the investigation was fair, judicious with no circumstance that may raise doubt about its veracity, it is to be noted that the presumption under the Act is against the accused as per Sections 35 and 54 of the NDPS Act. Thus, in the cases of reverse burden of proof, the presumption can operate only after the initial burden which exists on the prosecution is satisfied. At this stage, it is required to be noted that the reverse burden does not merely exist in special enactments like the NDPS Act and the Prevention of Corruption Act, but is also a part of the IPC — Section 304-B and all such offences under the Penal Code are to be investigated in accordance with the provisions of CrPC and consequently the informant can himself investigate the said offences under Section 157 CrPC."

7 (2020) 10 SCC 120 Crl.A.Nos.829 and 898 of 2019

23. On a survey of decisions of the Hon'ble Supreme Court of India, in respect of various enactments of reverse onus on the accused, it would be clear that broadly, the law laid down in Noor Aga case (cited supra) is being followed, which can be summarised as follows :

> (i) The accused shall be presumed innocent at the start of the Trail;
>
> (ii)The prosecution shall prove that by a fair investigation and procedure, the accused is made to stand trial;

(iii) The prosecution shall discharge its initial onus of proof on the charges;

(iv) Once the initial onus is discharged, the burden shifts and the presumptions and reverse onus come into play.

In this case, I have already held that the prosecution has established that the investigation was fair and proper.

24. The prosecution had established the following circumstances on record in this case. First, accused Nos.1, 2 and 4 are not strangers, but persons who are living in the nearby villages as that of accused No. 3, who are employed by him. Second, huge quantity of ganja was concealed and transported. Third, the accused No.3 also faced the trial for possession of Crl.A.Nos.829 and 898 of 2019 more than 15 Kgs of ganja also in his home and therefore he kept silent throughout the proceedings and did not even make a specific statement under Section 313 of Cr.P.C., to the effect that the transportation was made without his knowledge. It was a fortuitous circumstance for him as the sample in M.O.12 was not sent for analysis by oversight of the Trial Court. Failure to analyse and prove the sample to be a contraband though would be fatal for the offense of possession of ganja, the very seizure by mahazar Ex.P-4, would be a circumstance imputing knowledge about the transportation of ganja. Therefore, in the light of Section 34, the prosecution has placed the above circumstances on record to discharge its onus and therefore, the culpable mental state has to be presumed and unfortunately the defence has not done anything to prove otherwise and the point is accordingly answered against the accused/appellant No.3. Point No.3:-

25. As far as the charge relating to conspiracy is concerned, the learned Counsel for the appellant had relied upon the judgment in State (NCT of Delhi) Vs. Shiv Charan Bansal and Ors. (cited supra) and it is Crl.A.Nos.829 and 898 of 2019 useful to extract paragraph Nos.42 to 46 of the said judgment, which read as follows:-

" 42. The essential ingredients of criminal conspiracy as per judicial dicta are:

42.1. an agreement between two or more persons.

42.2. agreement must relate to doing or causing to be done either

(a) an illegal act; or

(b) an act which is not illegal in itself but is done by illegal means.

43. Reliance is placed on the judgment of Gulam Sarbar v. State of Bihar [Gulam Sarbar v. State of Bihar, (2014) 3 SCC 401 : (2014) 2 SCC (Cri) 195] on this issue, wherein it was held that what is necessary for the prosecution to show is the meeting of minds of two or more persons for doing or causing to be done an illegal act, or an act by illegal means.

> 44. A criminal conspiracy is generally hatched in secrecy, and it is difficult, if not impossible, to obtain direct evidence. Reliance is placed on the judgment of this Court in R. Venkatkrishnan v. CBI [R. Venkatkrishnan v.

CBI, (2009) 11 SCC 737 : (2010) 1 SCC (Cri) 164] . The manner and circumstances in which the offence has been committed, and the level of involvement of the accused persons are relevant factors. Each conspirator plays his separate part in one integrated and united effort to achieve the common purpose. Each one is aware that he has Crl.A.Nos.829 and 898 of 2019 a part to play in the general conspiracy, to accomplish the common object.

45. Conspiracy is mostly proved by circumstantial evidence by taking into account the cumulative effect of the circumstances indicating the guilt of the accused, rather than adopting an approach by isolating the role played by each of the accused. The acts or conduct of the parties must be conscious and clear enough to infer their concurrence as to the common design and its execution. Reliance is placed on the judgment of State (NCT of Delhi) v. Navjot Sandhu [State (NCT of Delhi) v.

Navjot Sandhu, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715] .

46. In Kehar Singh v. State (Delhi Admn.) [Kehar Singh v. State (Delhi Admn.), (1988) 3 SCC 609 : 1988 SCC (Cri) 711] this Court held that the most important ingredient in the offence of conspiracy is an agreement between two or more persons to do an illegal act. The prosecution will have to rely upon circumstantial evidence. The court must enquire whether the persons are independently pursuing the same unlawful object or whether they have come together for the pursuit of the unlawful object. The offence of conspiracy requires some kind of physical manifestation of the agreement.

However, the same need not be proved, nor is it necessary to prove the actual words of communication. It is sufficient if there is a tacit understanding between the conspirators for the execution of the common illegal object. In cases of criminal conspiracy, better evidence than acts and statements of co-conspirators is hardly ever available."

Crl.A.Nos.829 and 898 of 2019 Therefore, it is clear that in respect of the conspiracy, normally, the details of the communication between the accused will not be available for the prosecution by way of positive evidence. But, the tacit understanding between the conspirators for the execution of the common illegal object can be proved by the influence or the conduct of the parties and it can be interfered from the role played by each of the accused.

26. In this case, the circumstances are all the four of the accused are residents of Athur Taluk, Salem District. The accused No.3 is in control of the lorry, the ownership, being in the name of his wife, the other three accused, being the two Drivers and the Cleaner, have, in the guise of transporting rubber from Assam to Cochin, in the middle from Araku valley of Andhra Pradesh, loaded 11 gunny bags of ganja, hidden among the consignment of rubber. As a matter of fact, once the lorry is intercepted in the Nazrethpet check-post near Poonamallee, Chennai, the normal behaviour of accused Nos.1, 2 and 4 would be to immediately make a call to the owner of the lorry informing him that the vehicle

is being stopped and it is being checked upon. They absolutely refrained by doing so. Crl.A.Nos.829 and 898 of 2019

27. As a matter of fact, the learned Counsel for the accused No.3 submitted that there was no contact by accused Nos.1, 2 and 4 and therefore, the accused No.3 was there in his house itself until the early morning of 28.11.2017 and therefore, he would submit that that is a circumstance to interfere that the accused No.3 was not part of the conspiracy. On the other hand, I am of the view that the said circumstance is against the accused No.3 as it is a deviation from the normal behaviour, But for the understanding and conspiracy, they would have tried and called the owner of the lorry about the check and search. The other circumstance is that upon P.W.1 and his search team entering his house at 3.30 A.M by Ex.P-11 mahazar, the accused No.3 himself had handed over a gunny bag containing bundles alleged to be of ganja weighing more than 15 Kgs even though the same was not proved only because of the fortuitous circumstance as stated supra and the experience of P.W.1 in believing the same to be ganja, which is also photographed and the photographs being marked can also be taken as yet another circumstance of this case for proving the conspiracy and action between all the accused. Even in Section 313 Cr.P.C., questioning, the accused No.3 did not make any statement that the other accused had transported without his knowledge and all the accused stood together. Crl.A.Nos.829 and 898 of 2019 Thus, I am of the view that by virtue of the above circumstances, the understanding between all the four accused can be interfered by this Court and accordingly, no exception can be taken for the finding of the guilt for the offence under Section 8(c) read with Section 29 of the N.D.P.S Act by the Trial Court and accordingly, I answered this point in favour of the prosecution and against the accused.

The Result :

> 28. In view of the aforesaid findings, both the Crl.A.Nos.898 and 829 of 2019 are without any merits and the Trial Court has imposed only the minimum sentence for both the offenses and therefore, the judgment of the Trial Court does not call for any interference. The Criminal Appeals stand dismissed. Consequently, Crl.M.P.No.7429 of 2020 is closed.
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> 05.08.2022 Index : yes/no Speaking order/Non-speaking order kmk/grs Crl.A.Nos.829 and 898 of 2019 D.BHARATHA CHAKRAVARTHY, J., kmk/grs To
>
> 1. The Special Judge, I Additional Special Court for Exclusive Trial of Cases under NDPS Act, Chennai.
>
> 2. The Public Prosecutor, High Court of Madras.
>
> 3. The Deputy Superintendent of Police, NIB CID, Chennai.

Pre-Delivery Judgment in Crl.A.Nos.829 and 898 of 2019 05.08.2022