

BAIL SLIP

The Appellant, viz., Selvaraj, aged about 43 years, S/o.Sengoda Gounder, was directed to be released on bail in CrI.M.P.No.1 of 2010 in CrI.A.No. 777/2010 vide order of this Court dated 07.02.2011.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 20.02.2018
DELIVERED ON : 13.12.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Criminal Appeal No.777 of 2010

Selvaraj Appellant

Vs

State Rep. By
Narcotic Investigation Bureau C.I.D.,
Nagapattinam District. Respondent
(Cr.No.5/2008)

Prayer: Criminal Appeal filed under Section 374(2) of the Criminal Procedure Code, to call for the entire records in C.C.No.52/2008 on the file of the learned Additional District and Sessions Judge cum Special Judge for Essential Commodities Act, Thanjavur and set aside the Judgment of conviction and sentence imposed on the appellant in C.C.No.52 of 2008 by the learned Additional District and Sessions Judge cum Special Judge for Essential Commodities Act, Thanjavur on 29.09.2010 and acquit the appellant.

For Appellant : Mr.M.K.Subramaniam
for Mr.A.Navaneethakrishnan

For Respondent : Mrs.T.P.Savitha
Government Advocate (CrI.Side)

JUDGMENT

This Criminal Appeal is filed against the judgment of the learned Additional District and Sessions Court cum Special Court for essential Commodities, Thanjavur wherein the learned trial Judge convicted the appellant/accused on 29.09.2010 under Section 8(c) r/w 18(c) of NDPS Act 1985 and sentenced to 10

years Rigorous Imprisonment and to pay a fine of Rs.1,00,000/- in default of payment of fine amount further to undergo of 1 year Rigorous Imprisonment in S.C.No.52 of 2008.

2.Brief case of the Prosecution:

PW1 Muniasamy, the Sub Inspector of Police attached to NIBCID, Nagapattinam, received information, Ex.P.1 (Page 26) from his Informer in person on 20.01.2008 at about 5.00 AM when he was in the office that A1 Selvaraj and A2 Muthukumar were going to smuggle the illegal contraband namely Opium from Puthur Anna Salai at Nagapattinam to Sri Lanka on 20.01.2008 at about 7.30 AM. The said information was recorded by PW3 Balasubramanian, Head Constable, NIBCID in the presence of PW1. After recording Ex.P1 Information, same was endorsed by PW5, Inspector of Police, NIBCID, Trichy incharge Nagapattinam, at about 5.30 AM when he was in his office at Nagapattinam and thereafter he had discussion with Deputy Superintendent of Police.

3.After that PW1 Muniasamy, PW2 Gurusamy Sub-Inspector of Police, PW3 Balasubramanian along with Police Party including Informer, reached the scene of occurrence at Puthur, Anna Salai, Nagapattinam at about 7.00AM on the same day and watched the movements by hiding themselves. At about 7.30AM, A1 and A2 came and stood there with two polythene bags. Both of them were identified to the Police Party by their Informer. PW1 and his police party surrounded the accused 1 and 2 and introduced themselves at about 8.00 AM and told about the information, Ex-P1 received by them. The accused 1 and 2 were apprised of their rights available under NDPS Act to search them but they did not avail their said rights and permitted the Police party to search them. In that effect a report Exhibit-P2 was prepared by PW1 in the presence of PW2 and 3 in between 8.00 AM and 9.00 AM and obtained signatures of A1 and A2 in Exhibit P2. Since no independent witness came forward for the said search. The search was proceeded by the police party on A1 and A2. During the search operation A1 Selvaraj was found in possession of contraband opium which was weighed as 2 Kgs. Two samples of each 20 gms were taken out of 2 kgs. And the samples and remaining contraband of 1.960 kgs were packed and sealed and the same were recovered under cover of Mahazar Ex-P3. The search of seizure of A1 was conducted in between 9.00 AM and 9.45 AM . The same kind of search and seizure were also conducted on A2 and he was also found in possession of 2 kgs opium. Two samples of 20 gms were taken and the same was packed and sealed. The samples and the remaining contraband were also seized under cover of Mahazar Exs.P8 & Ex.P4. The search and seizure of A1 was conducted in between 9.45 AM and 10.30AM.

4.A1 and A2 voluntarily gave their confession statements

from 12.00 Noon to 1.00 PM and they were arrested by PW-1 in the presence of PW2 and PW3 . Arrest report is marked as Ex-P5. Arrest Memo of A1 is marked as Ex P6 and with respect to A2 is marked as Ex-P7. PW1 and his party brought the Accused 1 and 2 to the Police Station at about 1.00 PM with seized contraband.

5.A case in Crime No.5 of 2008 was registered against A1 & A2 for the offence under section 8(c) r/w 18 (c) of NDPS Act 1985. The First Information Report is marked as Exhibit-P8. PW1 prepared a detailed report under section 57 of N DPS Act to PW5 on the same day which is marked as Exhibit-P9. A1 and A2 were remanded to the Judicial custody and samples and seized contrabands were also handed over to the Judicial Magistrate through form 95. Form 95 for A1 is marked as Ex-P10 and with respect to A2 is marked as Exhibit-P11. PW5 Umashankar the Inspector of Police, attached to NIBCID Trichy, who was incharge at Nagapattinam took up the further investigation in the above case. He enquired the witness PW1, PW2 and PW3 and other witnesses and recorded their 161 statements. He went to scene of occurrence on 20.01.2008 and prepared a rough sketch which is marked as Ex P12. Since he was transferred to some other place, his successor conducted further investigation. PW4 Mathiaselvei Roselilne, Chemical Analyst, attached to Forensic Sciences Department, Chennai who analysed the samples received from the Trial court and on examination, she found that the samples contain opium. The chemical Analyst Report is marked as Exhibit P12.

6.After obtaining Exhibit P12 the respondent police filed the Complaint against the Accused 1 & 2 under Section 8(c) r/w 18 (c) of NDPS Act 1985.

7.The trial court Additional District and Sessions Court cum Special Court for essential Commodities, Thanjavur, framed charge against A1 & A2 under Section 8(c) r/w 18 (c) of NDPS Act, 1985 in S.C.No.52 of 2008. They denied the charges. Thereafter A1 and A2 were put on trial. During Trial A2 Selvaraj died. PW1 to PW5 were examined and Ex.P1 to Ex.P13 were marked and 5 material objects were also marked on the side of the prosecution.

8.When the appellant/accused was questioned under Section 313 of Cr.P.C. in respect of incriminating circumstances, he denied the same. No defence witness or Exhibit was marked.

9.Having considered the above materials, the trial court convicted the appellant/accused on 29.09.2010 under Section 8(c) r/w 18(c) of NDPS Act 1985 and sentenced to 10 years Rigorous Imprisonment and to pay a fine of Rs.1,00,000/- in default of payment of fine amount further to undergo of 1 year Rigorous Imprisonment. Aggrieved by the said Judgment of conviction and sentence, the appellant/accused has prepared this present appeal.

10.I have considered the rival submissions made on either side and perused the entire records.

11.The learned counsel for the appellant submits that the Lower Court failed to give any reasons for awarding the maximum sentence contemplated under section 18(3) of NDPS act. The sentence awarded by the Lower Court is not sustainable under law.

12.The learned counsel for the appellant submits that the drawl of sample is not done in a fair manner. The proper packing was not done and the representative sample was not taken. The procedure contemplated in the Government notification 1/88 is not followed. As per the notification of the Central Government 1/88 as per as the opium is concerned, minimum quantity to be taken as a sample is 24 grams of opium are required for conducting the test, but in this case only 20 grams of opium was taken as sample. Hence insufficient quantity of opium taken for conducting the test vitiates the entire trial, conviction and consequently sentence. The alleged test conducted by the chemical examiner with the help of 20 grams of opium which is insufficient to find out whether the sample contains opium or not and it is denial of fair trial which violates Article 21 of the Constitution of India. The insufficient sample taken by the respondent caused prejudice to the appellant, which vitiates the laboratory report Exhibit P12 and findings given by the chemical analyst. So the insufficient quantity of sample taken vitiated the entire trial, conviction and sentence. The fair procedure to find out the guilty of the appellant is not followed. Hence, the conviction and sentence are not sustainable under law.

13.The learned counsel for the appellant submits that the contraband which is allegedly found in possession of the accused and the officer who allegedly seized the contraband created the records as if the procedure contemplated under section 50(5) of the NDAPS Act to conduct the search of the person was follows. As per Exhibit P2, it reveals that the search officer PW1 put to the appellant whether the appellant is agreeable to conduct the search in the presence of the Magistrate or Gazetted Officer for which the appellant gave reply that the search could be conducted by PW1 the search officer himself. To that effect, a written memo is also filed by the prosecution, which containing the signature of the appellant as well as the signature of the search officer PW1. So it is allegedly held by the appellant, the contraband was found and seized, but no intimation was given to the higher officials as contemplated under section 50(6) of NDAPS Act. So the mandatory provision of section 60(6) of NDAPS Act was not followed and violated.

14.The learned counsel for the appellant submits that as per the evidence of the Inspector of Police NDPS, Trichy PW5 that he received a phone call from PW1 the Sub Inspector of Police, Nagapattinam at 6'0 clock on 20.01.2008 conveying the

information that the appellant is in possession of the contraband. But in the above said written memo Exhibit-P1, the very same PW5 put an endorsement that he had received the information in person on 20.01.2008. PW1 the Sub-Inspector of Police, who conducted the search categorically says in his evidence that the Inspector of Police, Trichy was informed about the crime directly at Nagappattinam. This major contradiction between PW1 and PW5 would go to show that the receipt of information and recording of that information are not done in the manner known to law and in other words the alleged information and recording of the same are only stage managed and exhibit the recording of the information is concocted document for the purpose of filing of criminal case against the appellant. The recovery is not a true one. In fact no recovery of contraband was made from the appellant.

15. The learned counsel for the appellant submits that no independent witness have been examined to prove the alleged recovery of contraband. Though it was alleged on the side of the prosecution that since no independent witnesses were willing to come forward to witness for recovery of contraband, but that fact of refusal of public to come forward to be the witness for the recovery proceedings, was not recorded in the case diary which is admitted by PW5 in the course of his evidence. So this vital incident in the course of investigation was not reflected in the case diary. Hence the recovery is unbelievable and it is only on paper and no real recovery of contraband was made from the appellant. The appellant has been falsely implicated in this case. Further PW2 says that 2 kgs of opium alone was recovered from the two accused viz, the appellant and other accused who died pending trial. But the prosecution case is totally 4 kgs of opium is recovered from the two accused (each 2 kgs).

16. The learned counsel for the appellant submits with regard to the mode of transport from the Police Station to the scene of occurrence, there are two version are made available by the prosecution as per the one version open to the PW1 says that the Police Station in an auto rickshaw. Another version was spoken by PW3 to see that the police party went to the scene of occurrence by police jeep. From the contradictory version regarding the mode of transport, it is very clear that the recovery witness PW3 was not present at the time of alleged recovery. So the recovery is not believable on the following grounds:

i) Contradicted version of PW1 and PW3 regarding the mode of transport from Police Station to the scene of occurrence.

ii) Contradicted version of PW1 and PW2 regarding the quantity of contraband allegedly recovered from the appellant and another.

iii) The fact of unwillingness on the part of the general

public to be the witness for the recovery proceedings is not recorded in the case diary. Since there is no independent witness to the alleged recovery proceedings, the recovery proceedings cannot be believed and relied upon to come to the conclusion that alleged offence was not committed by the appellant.

17.The learned counsel for the appellant submits that the contradicted version of PW1 and PW5 regarding the mode of conveying the information under section 42(2) of NDPS Act that the appellant is in possession of the contraband.No intimation has been sent to immediate higher official as contemplated under section 50(6) of NDAPS ACT. So the officers conducted the search failed to follow the mandatory provision and also the evidence relating to the proceedings of recovery do not inspire confidence.The appellant also did not make any confession statement voluntarily. The confessional statement allegedly made by the appellant is inadmissible under law. Since the fact of unwillingness of the part of the general public to be the witness for the recovery proceedings is not recorded in the case diary.

18.The learned counsel for the appellant submits that PW1 did not send the report under section 57 of NDPS Act to PW5 within 48 hours from the alleged arrest and recovery. Since, there is huge delay in sending 57 report Exhibit P9 to the Court. It was sent to the Court only on 24.07.2008. It should have been sent to the court along with Exhibits-P1 to P8 on 21.01.2008 if it is prepared on 20.01.2008 as projected by the prosecution.

19.The learned counsel for the appellant cited the following decisions in support of his arguments advanced before this Court:

1. (2002) 1 SCC 606
2. (2003) 9 SCC 141
3. (2009) 12 SCC 161
4. 1999 SCC OnLine Mad 1130
5. 2011(1) MWN (Cr)591
6. CrI.A.No.304 of 2013 dated 20.11.2017

20.The learned counsel for the respondent cited the decision reported in CDJ 2010 MHC Page 2510 and filed their written counter.

21.The respondent submits in their counter that there are no grounds to set aside the judgment of conviction and sentence. As per Section 18(3) of the NDPS Act 10 years and fine of

Rs.1,00,000/- is not excessive, arbitrary and disproportionate to the offences against the appellant and the same has been ordered as per the settled principles of law drawal of a sample was done in a fair manner and that the proper packing was done and the representative sample was taken. The procedure contemplated in the Government Notification 1/88 was strictly followed it is false to state that insufficient quantity of Opium taken for conducting the test vitiates the entire trial, conviction and consequently sentence fair trial was conducted by the trial court which does not violate Article 21 of the Constitution of India. No prejudice was caused to the appellant. The Chemical Analyst had given a correct report which is Exhibit-P12 it is reiterated that the fair procedure as contemplated under Law to find out the guilty of the appellant was followed at all stages and hence the conviction and sentence are legally sustainable one. The contraband was found in possession of the accused only; the officer who seized the contraband will clinchingly prove that they are in order and that the procedure contemplated under section 50(5) of the NDPS Act to conduct the search of the person was followed. That there is no contradiction between PW1 and PW5 about the receipt of information and recording of the same, the documents seized are all genuine ones and no document was fabricated or concocted as falsely stated by the appellant in the appeal.

22.The learned trial court has rightly held that upon getting information as contemplated under Law PW1 had obtained necessary permission, identifying the accused through the informant, enquired him, confiscated the opium, registered the case and also had submitted a detailed report to the competent authority. The evidence of PW4 Scientific Analyst confirms the fact that the confiscated item is opium. The evidence of PW1 clearly establishes that he had initiated proceedings as contemplated under the relevant Law and the alleged irregularities pointed out by Accused No.1 does not affect the truth and genuineness of the case. The trial court in fine had rightly observed that the prosecution had proved the case beyond all reasonable doubt as per Section 8(c) r/w Section 18(c) of NDPS Act.

Points for Consideration

23.It is seen that the Appellant has been arrayed as A1 out of 2 accused before the trial Court and A2 died during the pendency of the trial. The case of the prosecution is to the effect that the Appellant A1 was found to be in possession of 2 kgs of Opium in a white gunny bag as per the evidence of PW1 the Sub Inspector of Police who has effected the Seizure. Learned counsel for the Appellant also pointed out the material contradiction in respect of the weight of the contraband to the effect that PW2, another Sub-Inspector of Police has stated that each of the accused were found to be in possession of only 1 kg

of opium. At this stage, it is pertinent to note as per Item 92 of Table II of the Narcotic Drugs and Psychotropic Substances Act 1985 that the commercial quantity is 2.50 Kgs. But as far as the admitted case of the prosecution is concerned, the Appellant was found in possession of only 2 kgs and as per the evidence of the other witness, viz, P.W.2 he was found in possession of only 1 Kg. Considering all these factors, this court is of the considered view that that foundation of search and seizure becomes doubtful.

24.The learned Counsel for the appellant dislodged the substratum of the case by contending that Exhibit-P1 is stage managed and doubtful.

25.PW1 who recorded Exhibit-P1 Information states that after receipt of information, he met PW5 Investigation Officer in person when he was in his office at Nagapattinam and got approval and obtained endorsement of PW5. In the Ex P1 signature of the PW5 is available. Per contra, PW5 has categorically admitted that PW1 contacted through Phone and told about the said information Ex-P1 and he issued approval to PW1 through phone only. Further, PW5 has admitted that he was at NIBCID Trichy, when he received Phone call from PW1. The distance between Trichy and Nagapattinam is about 145 Kms. From the contradictory statements made by the PW1 and 5 would clearly show that the information Ex-P1 was not received and recorded as stated by the Prosecution. So there was no informer and information in this case which vitiates the entire prosecution Theory as alleged in the Complaint.

26.Exhibit-P1 is being the genesis of the entire case in which the prosecution failed to prove the information received on 20.01.2008. The said contradictory statements made by the PW1 and 5 clearly show that they have violated the provisions laid down under Section 42(2) of NDPS Act. PW1 has deposed that Exhibit-P1 was reduced into writing by PW2. But this version was not supported by the PW2 in his evidence and he further admitted that he did not know personally anything about the information and he was informed by PW1.

27.The Recovery of contraband and Arrest of accused are doubtful as rightly contended by the learned counsel for the appellant.

28.PW2 Gurusamy, Sub Inspector of Police who is the Recovery and Arrest witness of A1 and A2 has categorically stated that the recovery of contraband from the each Accused is only 1 kg and the total contraband recovered from the accused 1 & 2 is 2 kgs. He is one of the main official witness gave evidence that total recovery is 2 kgs. But the case of the prosecution is that the recovery contraband is 2 kgs each from the accused. So the evidence of PW2 creates serious doubts about recover of contraband.

29.No independent witness was examined by the prosecution. PW1 states that the independent witnesses who were all present in the scene of occurrence, were called by them and they refused to come forward to witness of the search and arrest of accused. But PW2 categorically admits that when the search and arrest of the accused, no independent witness was available at the scene of occurrence.

30.With respect of mode of transport from the Police Station to the scene of occurrence, there are two versions made available by the prosecution. One version is that PW1 says that Police party went to the scene of occurrence from the police station by an auto rickshaw and another version was spoken by the PW3 that the police party went to the scene of occurrence by Police Jeep which was drive by one Gnanaparaksam. From the evidences of PW1 to PW3 and PW5 clearly shows that search and arrest was not done as stated by the prosecution.

31.The PW 1 has deposed that after the arrest of the both accused, he prepared Arrest Memo in SOC, which are marked as Exhibits-P6 and P7 and after that they were brought to Police Station and then only he registered a case in Crime No.5 of 2008. But, both the Arrest memos contain Crime Number and offence which would go to show that the said Arrest Memos were prepared after the registration case only. So both of them were later creation, which would go to show that a false case is foisted against the appellant/accused.

32.In this case, the drawal of sample is not done in a fair manner. The procedure contemplated in Government Notification No.1/88 is not followed. As per the said Notification , as far as Opium is concerned, minimum quantity to be taken as a sample is 24 gms. of Opium in each bag. That minimum 24 gms of Opium are required for conducting the test. But, in this case, admittedly they have taken only 20 gms of sample. Hence, insufficient quantity of sample taken for conducting the test vitiates the entire prosecution case as laid down by the Hon'ble Apex Court in Union of India Vs Paul Mukund Case reported in (2009) 12 SCC 161.

33.The substratum of the case is further weakened by the delay in sending sample to the court as well as for chemical examination which affected the entire prosecution.PW5 has categorically admitted that sample did not produced before the concern court on the same day of remand of accused and it was handed over 3 days later i.e. on 24.01.2008. PW 4 has deposed that he received the samples only on 25.01.2008. As per standing order 1/88 the samples should have been sent for chemical examination within 72 hour from the seizure. But there was delay in sending sample to Court as well as chemical examination vitiates the prosecution case.

34.The questions considered above were not appreciated by the learned trial court. Therefore I find it necessary to set out the conclusions reported in the judgment rendered by the Hon'ble Apex Court in Criminal Appeal No.1480 of 2004 dated 24.11.2006 which are as follows:

(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of Cr.P.C. and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

(2-A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly authorized officers as enumerated in Sections 41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by anyone other than such officers, the same would be illegal.

(2-B) Under Section 41(2) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention, that would affect the prosecution case and vitiate the conviction.

(2-C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and

sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

(4-A) If a police officer, even if he happens to be an empowered officer while effecting an arrest or search during normal investigation into offences purely under the provisions of Cr.P.C. fails to strictly comply with the provisions of Sections 100 and 165 Cr.P.C. including the requirement to record reasons, such failure would only amount to an irregularity.

(4-B) If an empowered officer or an authorised officer under Section 41(2) of the Act carries out a search, he would be doing so under the provisions of Cr.P.C. namely Sections 100 and 165 Cr.P.C. and if there is no strict compliance with the provisions of Cr.P.C. then such search would not per se be illegal and would not vitiate the trial. The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case. (5) On prior information the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.

(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case."

This Court, therefore, clearly held as to what extent provisions of Sections 41 and 42 are mandatory and to what extent they would not be.

Indisputably, however, effect of a search carried out in violation of the provisions of law would have a bearing on the credibility of the evidence of the official witnesses, which would of course be considered on the facts and circumstances of each case.

In this case, the provisions of Section 50 might not have been required to be complied with so far as the search of scooter is concerned, but, keeping in view the fact that the persons of the appellants were also searched, it was obligatory on the part of P.W.10 to comply with the said provisions. It was not done.

In *State of Punjab vs. Baldev Singh* [(1999) 6 SCC 172], a Constitution Bench of this Court opined :

".....Thus, while conducting search and seizure, in addition to the safeguards provided under the Code of Criminal Procedure, the safeguards provided under the NDPS Act are also required to be followed. Section 50(4) of the NDPS Act lays down that no female shall be searched by anyone excepting a female. This provision is similar to the one contained in Section 52 of the Code of Criminal Procedure, 1898 and Section 51(2) of the Code of Criminal Procedure, 1973 relating to search of females. Section 51(2) of the Code of Criminal Procedure, 1973 lays down that whenever it is necessary to cause a female to be searched, the search shall be made by another female with strict regard to decency. The empowered officer must, therefore, act in the manner provided by Section 50(4) of the NDPS Act read with Section 51(2) of the Code of Criminal Procedure, 1973 whenever it is found necessary to cause a female to be searched. The document prepared by the investigating officer at the spot must invariably disclose that the search was conducted in the aforesaid manner and the name of the female official who carried out the personal search of the female concerned should also be disclosed. The personal search memo of the female concerned should indicate compliance with the

aforesaid provisions. Failure to do so may not only affect the credibility of the prosecution case but may also be found as violative of the basic right of a female to be treated with decency and proper dignity."

Requirements of law in this case had been giving a complete go bye. The prosecution story as to how the SHO found the appellants on the road near the police station is also not free from doubt.

The findings of the learned Trial Judge is legally not tenable.

35.It is well known that if two views are possible, benefit of doubt should be given to the accused. For the reasons aforementioned, the impugned judgment passed by the learned Additional District and Sessions Court cum Special Court for essential Commodities, Thanjavur in in S.C.No.52 of 2008 dated 29.09.2010 cannot be sustained which is set aside accordingly.

36.In the result:

(a) the appeal is allowed by setting aside the sentence and conviction imposed in C.C.No.52 of 2008, dated 29.09.2010, on the file of the learned Additional District and Sessions Judge-cum-Special Judge for Essential Commodities Act, Thanjavur;

(b) the accused/appellant is acquitted from all the charges;

(c) if the appellant/accused paid any fine amount shall be refunded to him.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

vs

To

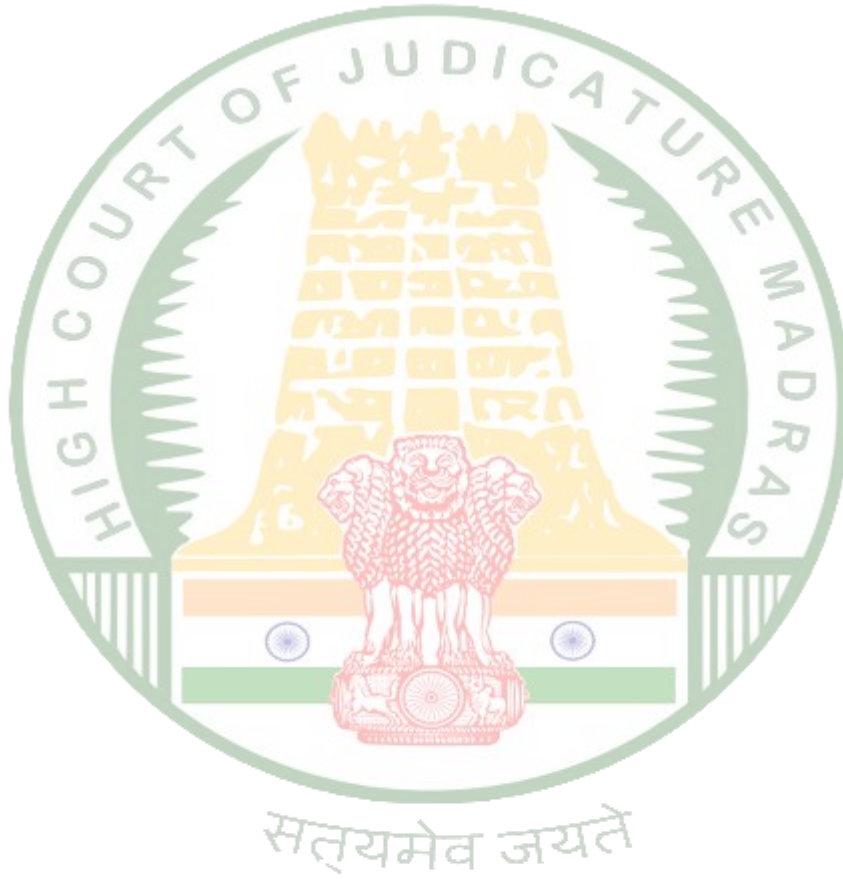
- 1.The Additional District and Sessions Judge
cum Special Judge for Essential Commodities Act,
Thanjavur.
- 2.The Superintendent,
Central Prison, Trichy.
3. The Public Prosecutor,
High court, Madras.

4.The Inspector, Narcotic Investigating Bureau CID,
Nagapattinam District.

+lcc to Mr.D.Vairamoorthy, Advocate, S.R.No. 87000

Criminal Appeal No.777 of 2010

PPA (CO)
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