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Crl.A.No.517 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.04.2022
PRONOUNCED ON : 29.07.2022

CORAM

THE HONOURABLE MR.JUSTICE **M.NIRMAL KUMAR**

CRL.A.No.517 of 2018

Sadiq Basha

... Appellants / Accused No.2

Vs.

State by
The Intelligence Officer,
Narcotics Control Bureau
Chennai Zonal Unit
Chennai – 600 090.

... Respondent / Complainant

PRAYER: Criminal Appeal filed under Section 374 (2) of the Code of Criminal Procedure, to call for the entire records in connection with the impugned Judgment dated 24.07.2018 made in C.C.No.45 of 2015 by the learned Principal Special Judge, Principal Special Court under the EC and NDPS Act, Chennai and set aside the same as illegal.

For Appellant : Mr.Anand Grover,
Sr.Counsel
For Mr.R.Rajan

For Respondent : Mr.N.P.Kumar
Spl.Public Prosecutor



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J U D G M E N T

This Criminal Appeal arises out of the Judgment passed by the learned Principal Special Judge, Principal Special Court under the EC and NDPS Act, Chennai in C.C.No.45 of 2015, dated 24.07.2018.

2. The appellant/A2 is an accused in C.C.No.45 of 2015, on the file of the learned Principal Special Judge, Principal Special Court under the EC and NDPS Act, Chennai. The appellant / A2 stood charged for the offences under Sections 8(c) r/w 29, 8(c) r/w 22(c) and 8(c) r/w.28 of the NDPS Act. He was sentenced to undergo 10 years RI and pay a fine of Rs.1,00,000/- for each of the offences, in default, to undergo further one year rigorous Imprisonment. The sentences were ordered to run concurrently.

3. The case of the prosecution, in brief, is as follows:

(i) On 20.02.2015, at 20.00 Hrs, based on information received by P.W.1, Sanjai Kumar Acharya, the Intelligence Officer , over telephone that “One Javeed Basha and one Sadiq Basha, resident of Royapettah indulging in trafficking of



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Methamphetamine, Javeed Bash collected around 3 Kgs of Methamphetamine from Mumbai and trafficking it to Chennai by train, "Mumbai-Chennai Mail", reaching Chennai Central on 21.02.2015, his brother Sadiq Basha will receive him at Chennai and they are to deliver the said Methamphetamine for further sale. "If surveillance is mounted at Chennai Central Railway Station, the persons may be identified and the contraband seized". The Officers of Narcotics Control Bureau, Chennai, after procuring two independent witnesses, mounted surveillance at the starting point of Platform No.3 of Chennai Central Railway Station, Chennai.

(ii) Thereafter, P.W.1, on identifying the persons, informed them individually about their right under Section 50 of NDPS Act, 1985 to get themselves searched before a Magistrate or a Gazetted Officer, for which, both of them individually replied that the Officers present there can search them. Both Javeed Basha and Sadiq Basha opened the black colour backpack, took out three identical sized packets, wrapped with colorful gift wrappers, and some used cloths and handed over to P.W.1. Then, P.W.1 took out a pinch of white colored crystal from each of the three packets, tested with Testing Kit, all answered positive confirming presence of "Methamphetamine", a Psychotropic Substance, weighing 2.970,



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covered under NDPS Act, 1985. Took the accused to Bomb Detecting Squad office of RPF, seized the contraband in presence of Mahazar witnesses, served notice U/s 67, of the Act, recorded statement in the NCB office, on their admission arrested them. Both A1 & A2, produced on the same day along with contraband before Judicial Magistrate, Ambattur, who remanded them to Judicial custody, thereafter produced documents and contraband before the Special Judge NDPS Act, Chennai. Contraband sent for chemical analysis, Forensic Report confirmed the psychotropic substances, collected documents, on completion of investigation final report filed.

4. On completion of investigation, the prosecution filed the complainant against the accused, for the offence under Sections 8(c) r/w 29, 8(c) r/w 22(c) and 8(c) r/w.28 of the NDPS Act.

5. In order to prove the case, the Prosecution examined 6 witnesses as P.W.1 to P.W.6, 81, marked documents as Exs.P1 to P.81 and 6 Material Objects M.O. 1 To M.O.6 . On the side of the defence Ex.D1, certified copy of 'A' Register Extract, dated 19.05.2015 marked.



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6. On the basis of the oral and documentary evidence, the learned Principal Special Judge, Principal Special Court under the EC and NDPS Act, Chennai found the accused guilty, convicted and sentenced the accused, as stated above.

7. Aggrieved by which, the appellant / A2 preferred the present Criminal Appeal.

8. The Mr. Anand Grover, learned Sr. Counsel appearing for the appellant / A2 would submit that the learned trial Judge failed to consider that there was no fair investigation conducted by the prosecution, as the informant and the Investigation Officer are one and the same person, the trial is vitiated, in such a situation, the appellant is entitled to acquittal. Further, all the witnesses are official witnesses, no independent witness examined and no explanation offered by the prosecution for non-examination of independent witness. More so when the seizure made in Public Place, Central Railway Station. Further, except the statements recorded under Section 67 of the NDPS Act, no other materials available against the accused. P.W.1 not acquainted with English language, the information recorded and Mahazar drawn by P.W.1 in English Language, which create serious doubt on the case of



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prosecution. Prosecution failed to substantiate conscious possession of psychotropic substance by A2 under Sections 35 and 54 of NDPS Act. Further, there is no evidence to prove that A2 was present on the day of occurrence at Central Railway Station, Chennai. The weight of contraband differs. The evidence of independent witness P.W.6 / Ramar is not trust-worthy. Section 42(2) of NDPS Act not complied with by the respondent herein. The seized contraband not identified by the independent witness at the time of trial. Hence, violation of Section 52-A of NDPS Act, the trial Court failed to see the tampering of the seals by the prosecution, statement under Section 67 NDPS Act, are inadmissible, wrongly relied upon by the trial Court, thereby, committed a grave error in law.

9. It is further submitted that despite the prosecution claiming to have conducted financial investigation against A2 and submitted orders for freezing and forfeiture of property under Section 68E and 68F of the NDPS Act along with the complaint, the learned trial Judge not framed charges against A2 under Section 27A of the NDPS Act. P.W.1 in his chief examination state that the information was received at 8.00 p.m., on 20.02.2015, through phone, kept the phone with support of his neck, directly typed in



the computer, print out taken, handed over to the Superintendent.

The trial Court held it to be a search under Section 42 of the NDPS Act, however, erroneously holds that as the typing of the information received under Section 42 of the Act, by P.W.1, is proved, in compliance to Section 42 of the NDPS Act. P.W.1 admits that information received was typed out in the computer, printed, not written by hand. The print out was exhibited and marked as Ex.P1, which is secondary evidence, can be admitted in evidence only in accordance with Section 65B of the Indian Evidence Act. Thus, ExP1, the purported record of compliance under Section 42 of the NDPS Act in the present case cannot be admitted in evidence. Compliance with Section 42 of the NDPS Act must be proved legally, but not done in the present case, the mandatory condition as per Section 42 of the NDPS Act violated and the appellant to be acquitted on this ground alone.

10. The learned Senior counsel further submitted that the contraband found in three separate packets, which were not weighed individually. The contents of each of three packet subjected to field testing, which answered positive for methamphetamine. The result of field-test is indicative and not conclusive of the chemical identity of the substance seized. To



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establish the guilt of the accused, it is necessary to conduct a chemical analysis of the substance in a certified Government Laboratory. The contents of each of the three packets were mixed and transferred to one polythene packet. Thus, the original identify of the substance containing each of the three packets got lost. The mixing resulted in breaking of the crystals, thus, physical integrity of the substance lost. Two samples were drawn from the packet containing the mixture and not from three packets separately. Thus, the chemical identity of the substance contained in the three separate packets not established.

11. The transfer and mixing of the contents of the three separate packet into one packet and drawing of samples from the said packet is contrary to the procedure established by law and caused serious prejudice to the appellant, since the contents of each of three packets not weighed independently, it cannot be ascertained that all the three packets contained the alleged psychotropic substances ie., Methamphetamine. The field detection test is only indicative, not admissible as legal evidence. The identify and quantity of the substance seized create serious doubt, the appellant deserves to be acquitted on this ground alone.



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12. The learned Senior Counsel would further submit that P.W.1 violated the procedure stipulated in the Standing Order 1/88 and Standing Order 1/89 – the latter being notified by the Central Government on 13.06.1989 under Section 52A of the NDPS Act. The stipulated procedure requires that two samples must be drawn from each of the packets seized. The contents of 'lots of packets' can be mixed, if the number of packets / container in which the contraband is found is sizeable. It is not so in the present case, where the number of packets was only three. P.W.3 admits that as per mahazar, sample was taken at the spot and not in the presence of Judicial Magistrate. This is contrary to the procedure laid down in Section 52A of the NDPS Act and non-compliance of the same is fatal to the prosecution.

13. Added further, the learned Senior Counsel submitted that it is settled law that the primary evidence in NDPS case is, the case property ie., the contraband. In the present case, the case property ie., Methamphetamine, weighing 2.970 Kgs, neither produced nor identified by the witnesses during the trial. The question of convicting A2 for the offence under Section 22(c) of the NDPS Act, for possession and under Section 28 of the Act, 'to



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commit an offence' does not arise. Further, there is no material to prove confirming under Section 29 of the Act. It is settled position in law that 'Question of Law' can be raised at any stage of the case, even in the final court of appeal, upon facts as admitted or proved beyond controversy. In the present case, the arguments raised before this Court are factually established through examination of witnesses and involve questions of law.

14. The learned Senior Counsel in support of his contentions relied on the following decisions of the Hon'ble Apex Court;

1. State of Rajasthan Vs. babu Lal
reported in (2009) 14 SCC 215;

2. Anvar P.V. Vs. P.K.Basheer and Ors
reported in (2014) 10 SCC 473;

3. Union of India Vs. Bal Mukund & Ors
reported in (2009) 12 SCC 161;

4. Union of India Vs. Mohanlal and Anr
reported in (2016) 3 SCC 379;

5. Union of India Vs. Jarooparam
reported in (2018) 4 SCC 334;

6. Jitendra & Anr. Vs. State of M.P.
Reported in (2004) 10 SCC 562;



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7. Ashok Alias Dangra Jaiswal Vs. state of Madhya Pradesh reported in (2011) 5 SCC 123;

8. Vijay Jain Vs. Sate of Madhya Pradesh reported in (2013) 14 SCC 527;

9. Gorakh Nath Prasad Vs. State of Bihar reported in (2018) 2 SCC 305;

10. Vijay Pandey Vs. State of Uttar Pradesh reported in (2019) 18 SCC 215;

11. Directorate of Revenue and Another Vs. Mohammed Nisar Holia reported in (2008) 2 SCC 370;

12. SK.Raju Alias Abdul.Haque Alias Jagga Vs. State of West Bengal reported in (2018) 9 SCC 708.

15. Mr.N.P.Kumar, the learned Special Public Prosecutor appearing for the respondent would submit that in a case where the informant himself is the investigator, by that itself cannot be said that the investigation is vitiated on the ground of bias or the like factor. The question of bias or prejudice would depend upon the facts and circumstances of each case. Therefore, merely because the informant is the investigator, by that itself the investigation would not suffer the vice of unfairness or bias, therefore, on the sole ground that informant is the investigator, the



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accused is not entitled to acquittal. Further, in this case, after seizure, the diary was handed over to P.W.3, who conducted further investigation, filed the complaint. Further, it is submitted that a crowd gathered at the place of occurrence, when A2 was apprehended, since the crowd was swelling, both Accused along with contraband taken to the Bomb Detection Squad Office of RPF, where the contraband was seized in the presence of PW6: Head Constable RPF, an independent witness. The case of the prosecution does not deserve to get disbelieved simply because police officials themselves are the witnesses, nor there is any requirement in law that in every case an independent witness should be examined. The statement given by the accused under Section 67 of NDPS Act is voluntary. The evidence of officials is cogent, non-examination of independent witnesses is not fatal to the prosecution.

16. With respect to the contention that P.W.1 not acquainted with English language, the learned Special Public Prosecutor submitted that though P.W.1 is not fluent in 'Spoken English' he can read and write English. P.W.1 is a degree holder. Further, during cross examination of P.W.1 states that he studied B.Sc., Zoology in English Medium. Thus, P.W.1 is capable of writing and



reading English. Hence, the contention that the documents, not prepared by P.W.1 will not hold good. In support of his contention, he relied on the citations, which are discussed in the latter part.

17. Further, the learned Senior Counsel in reply submitted that Ex.P1, which is a print out of prior information received, typed out by P.W.1 in his office and submitted to P.W.5 is in nature of electronic evidence, which is not admissible, without complying the conditions set out in Section 65-B of the Evidence Act. P.W.1 and P.W.5 admit that they have not complied with the requirements of Section. 65-B of the Evidence Act in respect of Ex.P1. In view of the same, there is no records showing compliance of Section 42 of NDPS Act.

18. In response to the contention of the learned Special Public Prosecutor that P.W.1 is the creator of Ex.P1 and hence, there is no requirement to produce a certificate under Section 65-B of the Evidence Act is not proper. The conditions laid down for admissibility of electronic evidence, includes print of out of information contained in a computer. Section 65-B of the Evidence Act is to ensure the sanctity of such records. Further, Section 65-B of the Evidence Act is with a non-obstante clause. Unless this



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condition is complied, no electronic record to be taken as evidence.

In this case, Ex.P1 is an electronic record, hence, Section 65-B of the Evidence, not complied, which is fatal to the case of the prosecution. The analogy drawn by the Special Public Prosecutor that the computer was used only as typewriter cannot be accepted. The document created by the typewriter is not an electronic record cannot be accepted. In the present case, Ex.P1 is an electronic record, admittedly, a print out of information stored in the Office Computer. P.W.1 and P.W.5 admit that there are 12 computers in the Office and from one of the computers it was typed and print out taken.

19. The Apex Court time and again reiterated that Section 42 of the Narcotic Drugs & Psychotropic substances Act, 1985 (for short "NDPS Act"), is statutory, non-compliance of the same, is fatal. Further, Section 65-B compliance is a precondition as held by the Apex Court in the case of **Anvar P.V Vs. P.K.Basheer** reported in **(2014) 10 SCC 473**, which is further reiterated this condition in **Arjun Panditrao Kohtkar Vs. Kailash Kushanrao Gorantyal And Ors** reported in **(2020) 7 SCC 1**. Added to it, the trial Court not considered the contention of the appellant for non-compliance of Section 65-B of the Evidence Act and completely



glossed over the same.

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20. The alternative submission of the learned State Public Prosecutor that in the event of non-compliance of Section 42 of the NDPS Act, since search and seizure took place in public place ie., Central Railway Station, Chennai, and Section 43 would come into play, hence, the information forwarding to the superior officer under Section 42 of the NDPS Act, not required, is not proper on the evidence of the case. The Apex Court in the Judgment in ***Director of Revenue and anr Vs. Mohd Nisar Holia*** reported in ***(2008) 2 SCC 370*** clearly held that though the search could have been made in public place, but once the search is made on prior information, there would be enough time for compliance of reducing the information to writing, informing the same to superior officer and obtain his permission. The search and seizure taken place in the Office of Railway Protection Force, Bomb Squad Room, which is a secluded place, it is not open to public, though it is situated within Central Railway Station, a public place. Further, in this case, mere production of carton box M.O.1 or the bag in which the case property kept as M.O.2 is not proper. The witnesses to identify the contraband in open court in this case it is not so.



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21. Further, the Judgment relied on by the learned Special Public Prosecutor in ***State of Rajasthan Vs Udai Lal*** reported in **(2008 0 Supreme (SC) 814)** is not applicable to the facts of the present case, since therein the seized contraband was of huge quantity. But, in the case on hand, it is 3 small packets, which were mixed together, made into single pack. Further, in this case, the sample packets S1 and S2 not produced. The filed test done by using the kit is only a preliminary test presumptive in nature. P.W.1 in this case even without taking samples from three packets separately mixing 3 x 1 and taking S1 and S2 specimen is not proper. P.W.4 admits that the crystals found in 3 packets were of different in their physical appearance. In such circumstances, mixing the three and taking common sample is in violation of the Standing Order No. 1/89.

22. Prosecution relying on the Judgment in ***Khet Singh Vs. Union of India*** reported in **(2002) 4 SCC 380**, which pertains to Standing Instructions 1/88 and 2/88, issued by NCB. The petitioner is relying on the Standing order No.1/89. In this case, Section 52A of the NDPS Act not complied. In the case of ***Noor Aga Vs. State of Punjab*** reported in **(2008) 16 SCC 417**, the Hon'ble Apex Court held that NCP Standing Instruction 1/88 are similar in



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material particulars to the Standing No.1/89. As per Standing Order No.1/89, the contraband are allowed to be mixed, when the contraband are identical in size and weight. Further, if the package seized are substantial, atleast more than 10, in this case it is not so.

23. Further, in this case, in view of the authority pronouncement in the case of ***Tofan Singh Vs. State of Tamil Nadu*** reported in ***(2021) 4 SCC 1*** statement recorded under Section 67 of the NDPS Act is inadmissible in evidence, except to the limited purpose of statement leading to any recovery under Section 27 of the Evidence Act. In this case, admittedly, the contraband was seized by the respondent before 6.30 a.m., thereafter, summons under Section 67 of the NDPS Act was issued, the accused were taken to the NCB Office, thereafter, Section 67 statement recorded. In view of the same, the statement of the accused ought to be rejected. Further, in this case, the recovery is prior to Section 67 statement, hence, has no relevance.

24. The contention of the learned Special Public Prosecutor that Section 52-A of the NDPS Act is not mandatory, not sustainable, in view of the Judgment of the Hon'ble Apex Court in



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Union of India Vs. Mohanlal and Anr reported in **(2016) 3 SCC**

379 in which it is held that the procedure for taking inventory sample under 52-A of the NDPS Act must be carried out before the Magistrate, but in this case, it is not so. Further, the Constitution Bench of the Hon'ble Apex Court in the case of **State of Punjab Vs. Baldev Singh** reported in **1999 (6) SCC 172**, held that the prosecution cannot be permitted to take advantage of its own wrong. Conducting a fair trial for those who are accused of a criminal offence is the cornerstone of our democratic society.

25. The learned Special Public Prosecutor by way of reply, submitted that P.W.1 stated that he received information through office phone, typed the information, placed the same to the Superintendent, PW5, who verified the information, made endorsement at 8.00 p.m., on 20.02.2015, which is marked as Ex.P4. Further, P.W.4 admits that he was informed by P.W.5, to accompany P.W.1, which would conclusively prove that compliance of Section 42 of the NDPS Act. Added to it, Ex.P1 the information was produced before the remand Magistrate, when accused produced for remand before the Magistrate on 21.02.2015. Hence, it is conclusively proved that Section 42 of NDPS Act complied with, without any violation.



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26. With regard to compliance of Section 65B of the Indian Evidence Act, it is submitted that “electronic record” means data, record or data generated, image or sound stored, received and sent in an electronic form or micro film or computer generated micro fiche. In the Judgment of the Calcutta High Court in **Anup Chada Vs. Kamini Sarin**, referred to the case of **Anvar**, and held that typed written by the typewriter does not require any certification under Section 65B(4) of the Information Technology Act, typed written does not mean that document stored in CD or in the Monitor process and held that Section 65B(4) of the Information Technology Act is not required. The above Judgment squarely applicable in this case as regard Ex.P1 and P2.

27. It is further submitted that search and seizure taken place in the Central Railway Station, which is a public place. In support of his contention, he relied on the decision of the Apex Court in **Girish Raghunath Mehta Vs. Inspector of Customs** reported in **(2016) 16 SCC 200** and the case of **Narayanaswamy Ravishankar Vs. Asst Director, Directorate of Revenue Intelligence** reported in **(2002) 8 SCC 7**. As regards drawing of samples from the seized contraband, P.W.1 clearly stated that 3 identical sized packets, wrapped with colourful gift wrappers,



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handed over to him by A1 and A2. He had taken pinch of white coloured crystals from each of the 3 packets and tested separately, with Test Kit, which answered positive for psychotropic substances.

28. Since all the white colour crystals found during test similar in all aspects, 3 packets were put in a polythene cover. After confirming that the 3 packets individually tested positive, thereafter only, it was put together made as one. Further, each packets contain around 1050 gms 'Methamphetamine', which is commercial quantity individually. Hence, no prejudice is caused to the accused. Even accepting the contention of the appellant, as per the Standing Orders, Mahazar has to be drawn on the spot and, samples drawn, which is followed. As per the Standing Orders, if more than 10 packets the drawing of samples are different, randomly to be selected from the 10 packets or more and thereafter combined the bulk materials to be homogenized. The procedure contemplated as per the Act and Standing Orders complied in this case. In the case of ***Khet Singh Vs. Union of India*** reported in ***(2002 4 SCC 380)*** it is clearly stated that even if there is any sort of procedural irregularity in conducting the search and seizure evidence collected thereby will not become inadmissible and Court would consider all the circumstances and

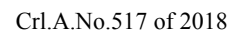


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find out whether any serious prejudice was caused to the accused.

The trial Court on the evidence found no prejudice caused.

29. The contention of the appellant relying on the case of ***Hussein Ghadially Vs. State of Gujarat*** reported in **(2014) 8 SCC 425** is not applicable to the case on hand, for the reason that case was under TADA wherein prior approval is mandatory to file the case. Likewise, the appellant placing reliance on the Judgment of the Delhi High court in ***Amani Fidel Chris Vs. narcotics Control Bureau*** reported in **2020 SCC online Del 2080** is not applicable to the facts of this case. In this case the samples produced before the Court on the same day, which is marked as M.Os. P.W.2, the Scientific Officer clearly stated in evidence, the sample covers were verified and found seals intact, confirming with specimen seal sent by the Court. Hence, there is no infirmity or illegality in sending, receiving and testing of samples. The reference made in ***Mohan Lal's Case*** (*cited supra*) as regards Section 52A of the Act, is to avoid theft / replacement of seized drugs. In this case, P.W.1, P.W.2 and P.W.4 confirm that the seized specimen with seals, sent for chemical examination, seals found intact and proper. The Apex Court in the case of ***State of Rajasthan Vs. Sahi Ram*** reported in **(2019) 10 SCC 649** held



30. Further, recovery cannot be disregarded merely because it was not made before the independent witnesses, as held in ***Tofan Singh's*** case. In this case, P.W.6, though is from RPF, as regards this case, he is an independent person. He has nothing to do with the investigation by NCB. Further, submitted that as per the statement of A2 that he was receiving the contraband and used to sell to others, confirm that he made an attempt to sell after receiving the contraband. Hence, Section 28 of the NDPS Act gets attracted. P.W.3 is an Intelligence Officer, who is the authorized officer to file a complaint in this case. The Apex Court in the case of ***Iqbal Moosa Patel Vs. State of Gujarat*** reported in **2011 (2) SCC 198** has clearly held that though the prosecution is required to establish its case beyond reasonable doubt, but that does not mean that the degree of proof must be beyond a shadow of doubt, which is again reiterated by the Apex Court in the Case of ***Chaman***



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and Another Vs. State of Uttarakhand reported in **(2016 (12)**

SCC 76). Thus, from the evidence and materials, the prosecution proved the case against the accused and the trial Court by its well reasoned Judgment found the accused guilty. Hence, prayed for dismissal of the appeal. Further, the accused are involved in serious offence in drug case wherein the contraband seized is of commercial quantity intended for sale, drugs are lethal and deterrent to the health and wellbeing of the society.

31. Considering the submission of either side and on perusal of the materials, this Court is primarily now to find out ;-

(i) Whether Section 42 of the NDPS Act has been followed or violated?

(ii) Whether non-production of Section 65-B Certificate would render Exs.P1 and P2 inadmissible in evidence?

(iii) Whether the statement recorded under Section 67 of the Act is proper and admissible?

(iv). Whether Section 52-A, Standing Order Nos.1/88 and 1/89 followed?

32. The answer to the question whether Ex.P1 is in



compliance to Section 42 of the Act. P.W.1 in his evidence clearly confirm that on 20.02.2015, at about 8.00 p.m., when he was in office, he received specific information through office Telephone Landline, about A1 and A2, with their physical complexion giving details, informing that 3 Kgs., of 'Methamphetamine' is being smuggled and trafficked from Mumbai and A1 is travelling by Train No.11027, Mumbai – Chennai Mail, reaching Chennai Central on 21.02.2015 and his brother Sadiqu Basha will receive him at Chennai Station to deliver the said 'Methamphetamine', for further sale. This information was received by P.W.1, from his Office land line. He kept the phone in support of his neck, typed the information directly in the computer, thereafter, read the same to the informant, recorded the information, placed it before his superior PW5 who received the same, satisfied and acknowledged by signing the same.

33. P.W.5, his superior officer, authorized P.W.1 / Intelligence Officer to take necessary action. P.W.1, P.W.4 and P.W.5 confirm the same. P.W.1 is accompanied by P.W.4 and other 2 officials of NCB, formed a team, proceeded to Chennai Central. There, they approached the Inspector, RPF., to depute 2 witnesses. P.W.6 and one Damodaran, 2 Head Constables of RPF., deputed to



be along with NCB officials. At about 4.30 a.m., A1 alighted from the train. A2 met him and received the black back bag. At that time, P.W.1 intercepted both A1 and A2, questioned them. A2 admitted that the bag / M.O.2 contained M.O.1, 2.980 Kgs., of Methamphetamine. Thereafter, Section 50 of the Act was complied. By that time, there were large movement of passengers, crowd, swelled, hence, A1 and A2 were taken to RPF Bomb Squad Room, there, both A1 and A2 produced 3 identical packets, covered with gift wrappers. On opening the 3 packets, white crystal substances inside the packets found. A pinch of samples from all the 3 packets taken individually, tested independently by using the Test Kit, all three tested positive and the test report Ex.P79 confirmed the same. Ex.P1 initialled by P.W.5, confirming the same. P.W.4 was asked to accompanying P.W.1 by P.W.5, confirms information given to superior officer by P.W.1, thereby, complying Section 42 of the Act completed.

34. Thereafter, the 3 identical packets containing similar crystals like substances were made into one packet harmonized, thereafter, samples S1 and S2, 5 grams each taken and sealed. The entire proceedings recorded in Ex.P2 / Mahazar. Exs.P1 and P2 typed and print out taken out simultaneously. Ex.P2 Mahazar



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prepared by P.W.1, in the presence of P.W.6 and one Damodar, Ex.P2 copy of the mahazar furnished to the accused, both A1 and A2 acknowledged, signed in each page of the mahazar Ex.P2. Not only that, these Exs.P1 and P2 produced before the remanding Magistrate, on 21.02.2015 at 10.35 p.m. In the remand report, Annexure-I, the list of original documents produced are listed, wherein, Item No.1 and 2 are the reports under Section 42 and the seizure mahazar. Further, in the mahazar, the seizure of contraband as well as other documents seized from both the accused A1 and A2 along with Test Memo / Ex.P79, confirming the contraband as psychotropic substances produced. In the remand report, there are three Annexures. In Annexure I, items 1 to 10 listed, in Annexure II, the personal particulars of the accused recorded and submitted, in Annexure III, the list of properties produced listed. In the list of the properties, the contraband seized of 2.970 Kgs of 'Methamphetamine', the black colour back bag, the mobile phones, the amount seized from the accused and 2 samples of white coloured crystals of 5 gms., each, S1 and S2, believed to be 'Methamphetamine', produced before the remanding Magistrate.

35. During remand, the remanding Magistrate records as



follows:-

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“Both accused produced before me at 10.30 p.m., in my residence, grounds for arrest verified and satisfied and grounds for arrest informed to both accused and arrest intimation to the family. Both the accused are brothers and their arrest have been informed to their families, no complaints against the NCB, materials produced and both the accused remanded to judicial custody till 06.03.2015. Office is directed to send the record to the Special Court for NDPS Cases, at Chennai. Both are to be produced before the Special Court on 06.03.2015”. Further, in the remand report, it is recorded that the remanding Magistrate, entrusted the properties to the safe custody of the respondent NCB, P.W.4, Intelligence Officer of NCB, received the properties listed in Annexure III, ie., the contraband samples and other materials.

36. P.W.4, Intelligence Officer of NCB produced and submitted in Malkana of NCB Office. P.W.4 submitted a report to P.W.5, Superintendent, his superior officer, by way of report under Section 57, informing the arrest, producing the accused before the remanding Magistrate, thereafter, producing the accused to the Central Prison, Puzhlal, depositing the case properties and samples



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in NCB godown, for safe custody, which is Ex.P.77. Thus, it is seen that right from receipt of information by P.W.1, he informs P.W.5, his superior officer, about the information, in compliance with Section 42 of the Act and subsequent events reported by P.W.4 by 57 report. P.W.1 is accompanied by P.W.4 and two other officials of NCB, formed a team, proceeded to Chennai Central, in presence of P.W.6 and one Damodaran, compliance of Section 50 of the Act followed, contraband seized, accused arrested, produced before the remanding Magistrate, Section 57 report submitted by P.W.1 and P.W.4 records all the events. Thus, the chain of events and custody of the properties well established by the evidence of P.W.1, P.W.4, P.W.5 and P.W.6 with relevant documents. In view of the same, the answer to the first question is that there is no violation of Section 42 of the Act.

37. With regard to second question for compliance of Section 65B of the Act, as could be seen from the evidence of P.W.1, as he received the message, typed the information in the computer, takes out a print simultaneously, place the information Ex.P1 to P.W.5 immediately without delay. P.W.5, Superintendent, his superior officer confirms the same. Thereafter, apprehension of A1 and A2, the search and seizure, follows. The typing and taking out a print



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copy are simultaneous. In presence of P.W.1, P.W.6 and other independent witnesses, mahazar drawn in the Bomb Disposal Squad Room, the same recorded using the Laptop, print taken from the portable printer, carried by P.W.1 and his Team, which is confirmed by P.W.1. The search and seizure confirmed by P.W.1. The copy of the mahazar furnished to accused, acknowledged by A1 and A2. Further, the signature of the remand Magistrate with date and time available in the remand report as well as in Ex.P1 and P2, which were produced along with remand report. The accused A1 and A2 made no complaint or objection, on the search and seizure. Ex.P2 Mahazar typed and print out taken simultaneously. The Laptop used only as a typewriter and the storage, if at all it is thereafter. In view of the print out taken simultaneously after completion of typing and all documents along with contraband produced before the Magistrate nothing to doubt the genuineness of the documents.

38.Further, Section 65-B of the Indian Evidence Act would be applicable in case of retrieval of documents stored in the computer system and print out taken at a latter point of time. In this case, typing and printing done simultaneously. Hence, the certificate of Section 65B of the Indian Evidence Act not required. The purpose



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of Section 65-B of the Act is to ensure that there is no tampering, deletion, inclusion, alteration, erasion happens in a stored information and documents, hence, certificate required to confirm soft copy in the system and hard copy are one and the same. In this case, Ex.P1 and Ex.P2 are print out documents immediately taken from computer and Lap Top. The process of typing and print out simultaneous, it is not retrival of any stored information. Further, the accused not questioned the authenticity and contents of the documents produced during remand. In view of the same, the genuineness of Ex.P1 and Ex.P2 proved. The seizure and recovery is proved on the evidence of P.W.1 and P.W.6 corresponding to Ex.P2. Similarly, Ex.P1 does not require Section 65B Certificate. In view of the same, Section 65 certificate not required to prove genuineness of Ex.P1 and Ex.P2. In view of the same, answer to the second question is that, there is no violation of Section 65B of the Evidence Act.

39. As regards admissibility of Section 67 statement of A1 and A2, Ex.P.68, and Ex.P.70, the contention of the appellant is that in view of **Tofan Singh's** case, admissibility of Section 67 in entirety is not permitted, utmost it can be used only to the extent of recovery under Section 27 of the Indian Evidence Act. In this case,



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admittedly, even before arrest of A1 and A2, the properties M.O.1 to M.O.6 have been recovered, and seized by the respondent at Bomb Disposal Squad Room in Central Station at about 6.30 a.m. The arrest of A1 is about 12.00 Hrs., on 21.02.2015 (Ex.P69) and A2 is about 14.00 Hrs (Ex.P72). Prior to the arrest, Section 67 statement of A1 and A2 recorded. In this case, the recovery is well before Section 67 statement and arrest of the accused. Based on Section 67 statement nothing has been done. In view of the same, even without the aid of Section 67 statement, recovery made. Hence, Section 67 statement has no relevance to the facts of the case, answered accordingly.

40. As regards whether Section 52A of the NDPS Act, and Standing Orders 1/88 and 1/89 are followed, it is to be seen that Section 52-A is for the purpose of disposal of seized Narcotic drugs and psychotropic substances, in the event of the contraband seized is to be disposed of, in view of its vulnerability of theft, substitution, constraints of proper storage space, and any other consideration, Section 52A to be followed, wherein the inventory of such contraband with details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic



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substances to be recorded. By preparing an inventory certifying the correctness and the process to be done in the presence of Magistrate, photographs of the seized drugs to be taken.

41. In such cases, the representative sample to be prepared in presence of Magistrate certifying the correctness of the sample drawn and such certificate to be used as primary evidence. The seized contraband is not bulk in nature and susceptible to any theft, substitution or constraints of proper storage space. In this case, admittedly, such procedure not required, hence, not followed.

42. With regard to violation of Standing Order No.1/88 (instructions 1.5) and Standing Order No.1/89, 1/88 is the instructions for drawal of sample, storage, testing and disposal of samples from seized narcotic drugs and psychotropic substances. As per 1/88, it is stated that the samples of contraband must be drawn on the spot of recovery. In this case, it is done as could be seen from Ex.P2. As per Section 1.6, the quantity to be drawn in each sample for chemical test should be 5 grams in respect of all narcotic drugs and psychotropic substances to be taken, except in case of Opium, Ganja and Cheras/Hashish where a quantity of 24 grams in each case is required for chemical test. Further, the



seized drugs in the packages / containers should be well mixed to make it homogeneous and representative sample in duplicate is drawn.

43. In this case, this procedures not required and followed. The contraband tested using Test Kit from each of the 3 packets, which tested positive, each packets contained roughly around 1050 gms., not of bulk quantity, not in lots. Hence, 3 packets made into one homogenized and there after, specimen samples S1 and S2 drawn. Likewise, instructions 1.7, is for number of samples to be drawn. The Instructions is that when the package / containers seized together in are of identical size and weight and contents can be harmonized provided each package give identical results on colour test by U.N. Kit. In this case, all three packets tested positive, conclusively indicating that the packages are identical in all respect. Only in the event of packages are in lots, in such circumstances, 10 lots to be made of 10 packets and samples to be taken. In this case, admittedly, there are only 3 packets. The bunching of lots and taking of samples is only with regard to huge quantity in lots. In this case, it is not so, only 3 packets of identical packing. As per the instructions 1.8 numbering of packages and as per instruction 1.9 the seizing officer to prepare the Panchana on



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the spot in presence of the accused and witness and required to put his signature on the samples, which is followed. Thus, the Standing Order 1/88 is followed.

44. Further, as per Instruction 1/89 it is mentioned that in the case of seizure of single package / container one sample in duplicate should be drawn. Normally, it is advisable to draw one sample in duplicate from each package / container in case of seizure of more than one package / container. It is only a advisory. Further, in Instruction 3.3 it is mentioned that the seizing officer shall deposit the drugs fully packed and sealed in godown within 48 hrs of seizure. These instructions followed.

45. With regard to other guidelines pertains to disposal of seized contraband, in this case, the contraband is not of huge quantity it is not disposed, contraband produced before remanding Magistrate during remand initially, thereafter deposited in the godown on the orders of Magistrate, subsequently, produced before the Special Court for NDPS Cases, for forwarding the sample to the Scientific Officer, for chemical examination. P.W.2 / Scientific Officer confirms the receipt of samples from the Court, which seals intact. P.W.2 further confirms that the test report and



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remand report handed over to P.W.4 who produced the same before the Special Court. The evidence of P.W.3 and P.W.4 confirm that the contraband produced before the Special Court, only on the direction of the Special Court, the properties were kept in the godown of NCB. The said properties marked as M.O.1 to M.O.2. Thus, the guidelines of the Standing Order Nos. 1/88 and 1/89 followed in this case. In view of no destruction or disposal, the question of compliance to Section 52A of the Act does not arise. Thus, there is no violation and hence, the 4th question is answered accordingly.

46. Further, on the factual aspects, in this case P.W.1 is the Intelligence Officer of NCB, who received the message, takes down the same, produced the secret information to P.W.5, / Superintendent, his superior officer, about A1 carrying 3 Kgs of 'Methamphetamine', travelling from Train No.11027, Mumbai – Chennai Mail, reaching Chennai Central on 21.02.2015. This information / Ex.P1 submitted to P.W.5, who seen the same, satisfied, instructed to P.W.1 to proceed further. He also instructed P.W.4 to accompany P.W.1. The compliance of Section 42 complete. Thereafter, P.W.1, P.W.4 along with 2 other NCB officials went to the RPF office, asked to depute 2 witnesses. P.W.6



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and one Damodaran, deputed to be along with NCB officials. At about 4.30 a.m., A1 alighted from the train, A2 met him, received black back bag. At that time, P.W.1 intercepted both A1 and A2, questioned them, A2 admitted that the bag / M.O.2 contained M.O.1, 2.980 Kgs., of Methamphetamine.

47. Since, the Central Station became crowded by then, A1 and A2 were taken to the Office of RPF, Bomb Squad Room, there both A1 and A2 produced the contraband of 3 packets, packed in gift wrapper, they were identical, on opening the 3 packets, white crystal substances found inside the packets. A pinch of samples from all the 3 packets taken individually, all the 3 tested independently, by using the Test Kit, all three tested positive and the test report Ex.P79 confirmed the same. This happened in presence of P.W.6. Head Constable of RPF, an independent witness, nothing to do with NCB. Thereafter 3 packets were made into one, harmonized, specimen samples S1 and S2 drawn, sealed with official seal of NCB No.11. Thereafter, 67 summons served to A1 and A2, who accompanied the officials reached NCB Office, there 67 statement recorded and they were arrested, their arrest intimated to the family members.

48. The accused, seized articles, mahazar, as stated above



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produced before the Judicial Magistrate, Ambatur, the remanding Magistrate, on the same day, ie., on 21.02.2015, at 10.30 p.m., thereafter, the accused produced before the Central Prison, Puzhlal. Since the remand was at 10.30 p.m., on 21.02.2015, which was Saturday, 22.02.2015 Sunday holiday, on the next working day on 23.02.2015, P.W.4 produced seized articles including contraband and samples before the learned Special Judge, thereafter, on the orders of Special Court, the samples S1 was produced P.W.2. P.W.2 conducted Scientific examination, given a report, confirming the samples were psychotropic substances viz., 'Methamphetamine Hydrochloride'. The contraband handed over back to P.W.4, deposited in NCB godown. P.W.4 produced it before the Special Judge, thereafter, contraband kept in custody of NCB Godown with proper acknowledgement. Section 57 report submitted by P.W.1. P.W.4 produced the articles before the Special Judge, on 23.02.2015.

49. Though P.W.2 was extensively cross-examined on several dates, nothing could be brought out to disprove the chemical analysis report. P.W.3, received the case diary during March 2015, entrusted with further investigation of the case, conducted investigation, sent communication to the Banks, Mobile operators,



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collected the travel tickets from the Airlines and Railways, conducted house search of the accused, thereafter, on conclusion of investigation filed the complaint before the Special Judge. P.W.3 is an authorized person and empowered to file the complaint and there is no infirmity in P.W.3 / Investigation Officer filing the complaint in this case.

50. P.W.4 was part of the investigation along with P.W.1. P.W.5 is the Superintendent, superior officer of P.W.1 and P.W.4, who received the report under Sections 42 and 57 from P.W.1 and P.W.4. P.W.6 is the Head Constable from RPF, the witness to search and seizure and mahazar / Ex.P2. The witnesses during cross-examination, confirmed the role and participation of A1 and A2 and the seizure of contraband from A1 and A2. In this case, all the statutory compliance complied.

51. As regards the charge under Section 28 of the Act, there is no materials and evidence to show that there was any attempt, with whom the appellant to commit offence. Though the complaint filed against four persons viz., A1 to A4, the charge is that A1 and A2 procured and transported the contraband for A3 and A4. A3 and A4 not arrested, shown as absconding accused. Further, there



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is no materials and evidence to connect and prove that attempt was made by A1 and A2 with A3 and A4 to commit them under Section 28 of the Act. Absolutely, there is no evidence. In view of the same, the accused is acquitted, in respect of the charge under Section 8(c) r/w 28 of the NDPS Act.

52. The accused in his confession statement / Ex.P.70 and during 313 stated that he is living with his parents in joint family and doing the family business of embroidering with hand-to-mouth existence. He got married and has three daughters to be taken care of. Further, from the date of his incarceration, his family denied income and their very existence and survival has become a questionable one. Further, the appellant is merely a carrier and the main accused still at large. Hence, pleaded for leniency for the payment of fine, otherwise, he would be put further incarceration. In this case, A3 and A4 could not be apprehended and nothing progressed from 2015, for the past several years. The appellant acted on the direction and inducement of the absconding accused.

53. With regard to the charges for the offences under Section



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8(c) r/w 29 of the NDPS Act, the appellant conviction of 10 years and Rs.1,00,000/- fine is confirmed. Likewise, for the offence under Section 8(c) r/w 22(c) of NDPS Act, 10 years R.I. and fine of Rs.1,00,000/- is confirmed. The order for payment of fine of Rs.1,00,000/- for each of the offences upheld, but an order in default of payment, the appellant to undergo R.I for one year is reduced to R.I. for 1 month. The default sentence for all offences modified to one month alone. To that extent, the Criminal Appeal filed by the appellant is modified, allowed. If the appellant has undergone substantive sentence of R.I. for 10 years and default sentence for 1 month, the appellant shall be released, unless, required to be detained in connection with any other offence.

54. In the result, the Criminal Appeal is partly allowed.

29.07.2022

Index: Yes/No
Internet: Yes/No

MPK



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To

1. The Principal Special Judge,
Principal Special Court under the EC and NDPS Act,
Chennai
2. The Intelligence Officer,
Narcotics Control Bureau
Chennai Zonal Unit
Chennai – 600 090.
3. The Public Prosecutor,
High Court, Madras.



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M.NIRMAL KUMAR, J.

MPK

Pre-Delivery Judgment made in

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29.07.2022