



Crl.A.Nos.831, 900 & 909 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 26.07.2022

Pronounced on : **17.08.2022**

CORAM :

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

Crl.A.Nos.831, 900 & 909 of 2019

and

Crl.M.P.No.8458 of 2020 and Crl.M.P.No.12973 of 2021

In Crl.A.No.831 of 2019:

1.Mohammed Imran Mansoori, (M/A-28 years),
S/o. Late Ehsanullah Mansoori.

2.Akil Ahamad, (M/A-26 years),
S/o. Late Fakir Mohammed

... Appellants/A1 & A2

Versus

State by,
The Intelligence Officer,
Narcotic Control Bureau,
Chennai Zonal Unit.

... Respondent

In Crl.A.No.900 of 2019:

1.Nanthakumar, (M/A-51 years),
S/o. Late E.Rajadurai.

2.D.Pio, (M/A-43 years),
S/o. T.Devadass

... Appellants/A3 & A5



Crl.A.Nos.831, 900 & 909 of 2019

WEB COPY

Versus

State by,
The Intelligence Officer,
Narcotic Control Bureau,
Chennai Zonal Unit.

... Respondent

In Crl.A.No.909 of 2019:

Bright Fernando, (M/A-41years),
S/o. Joseph Fernando.

... Appellant/A4

Versus

State by,
The Intelligence Officer,
Narcotic Control Bureau,
Chennai Zonal Unit.

... Respondent

Common Prayer : Criminal Appeals are filed under Section 374(2) of the Code of Criminal Procedure, r/w Section 36-B of NDPS Act, 1985, prayed to set aside the conviction of the appellants in C.C.No.40 of 2014, dated 11.10.2019 by the Learned Special Court, under EC Act/NDPS Act, Coimbatore by allowing this appeal.

Mr.R.C.Paul Kangaraj : For Appellant in Crl.A.909/2019

Mr. Charles : For appellant in Crl.A.831,900/2019

Mr. N.P.Kumar,
Special Public Prosecutor
(NDPS Act) : For Respondent in all appeals



Crl.A.Nos.831, 900 & 909 of 2019

COMMON JUDGMENT

WEB COPY

On 24.03.2014, at about 23.00 hours, P.W.8/*Mr.Saravanan*, the Intelligence Officer, Narcotic Control Bureau (in short NCB), Chennai Zonal Unit, received information in the office of NCB, phone number viz., 044-26821481 that two individuals by name *Bright Fernando* and *D.Pio* of Tuticorin were engaged in trafficking of Heroin with the assistance of *Nanda @ Nandakumar* of *Thiruchendur*. The said *Nanda* had arranged the Heroin from the duo of *Rajasthan* namely *Mohammed Imran* (A1) and *Akil Ahammed* (A2). They brought approximately one kilogram of Heroin to the M.P.Lodge, in Room No.104 in *Udumalpet, Tiruppur* District at 08.00 hours on 25.03.2014. From there, *Bright Fernando* and *Pio* are further trafficking to *Maldives* through one *Francis* of Tuticorin. P.W.8, reduced the said information into writing vide Ex.P2 and submitted the same to the PW- 4, the Superintendent of NCB, Chennai.

2. Thereupon, P.W.4/*Santhanu Aich*, Superintendent of NCB, Chennai, directed P.W.2/*Mr.Aravind*, Intelligence Officer, NCB, Chennai to take necessary action. P.W.2, upon receiving the entire information over phone at 23.30 hours on 24.03.2014 and upon receipt of the information in



CrI.A.Nos.831, 900 & 909 of 2019

WEB COPY

Ex.P-2 by email, took the printout of **Ex.P-2** and signed over the same. On 25.03.2014, P.W.2 along with the Team of NCB Officers proceeded to search at M.P.Lodge, in *Udumalpet* at 08.15 hours. He then contacted P.W.6/*Balamurgan*, P.W.7/*Thiyagarajan*, who were present at the reception of the hotel and they agreed to be independent witnesses. Thereafter, he verified with the Receptionist that Room No.104 was booked in the name of *Nandakumar*, and they went to the said Room and pressed the calling bell. The persons inside the Room, opened the door and upon confirmation whether they are in possession of Heroin, all the five accused persons in the Room, admitted to possessing one kilogram of Heroin as two slabs kept in an Air Bag in the Room. Thereafter, P.W.2 explained to each one of them their rights, under the NDPS Act, and they have the right to be searched before the Learned Judicial Magistrate or Gazatted Officer. He conveyed the said information in Tamil and Hindi, with the help of fellow officers. The accused offered themselves to be searched by the NCB Officers. Thereafter, all the five accused gave a gray colour Airbag, stating that Heroin was in it. P.W.2 upon receiving the Airbag found two black colour covered packets. After opening the polythene packings, he found brown colour powder, which was tested using a field detection kit and it



CrI.A.Nos.831, 900 & 909 of 2019

WEB COPY

answered positively for Heroin Narcotic Drug. On the reason of believing that brown colour powder was Heroin, P.W.2 had seized the entire brown powder and one sample each was drawn from both the bulk quantity of contraband and they were sealed and packed. P.W.2 also conducted a search in Room No.104 and recovered cash of Rs.3 Lakhs, which was the money brought to buy the Heroin, and that was also seized, and placed in paper covers according to the denominations. Thereafter, a personal search was made in respect of each of the accused and Mobile phone, Driving license, Pan Card, Bank debit cards, Ticket for travel, etc., were seized from the accused. All the seizures were made by preparation of due Mahazar and he also gave a detailed report to P.W.4/*Santhanu Aich*, Superintendent of NCB, as per Section 57 of the NDPS Act.

3.P.W.5/*Rajan Kumar*, the Intelligence Officer, NCB, reported the voluntary statements given by each of the five accused and they were arrested and sent for Judicial custody. P.W.5 was handed over all the relevant documents by the Seizing Officer. Thereupon, the Investigation was completed and the complaint was filed. After the appearance of all the accused and furnishing of copies, the Trial Court framed four charges



Crl.A.Nos.831, 900 & 909 of 2019

WEB COPY

against all the accused for the offences punishable under Section 8(c) r/w Section 21(c), Section 8(c) r/w Section 23, Section 8(c) r/w Section 25, Section 8(c) r/w Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985, (in short NDPS Act) and as against the accused No.3 to 5, charges were framed for the offenses punishable under Section 8(c) r/w Section 27(A) and Section 8(c) r/w Section 28 of the NDPS Act. Upon being questioned, the accused denied the charges and stood trial.

4.The prosecution, in order to bring home the charges, examined one *J.Appukuttan*, the Intelligence Officer as P.W.1, who deposed to the effect that he had sent the arrest information to the relatives of the accused No.3 & 4, and the postal covers were returned. The Seizing Officer was examined as P.W.2, who deposed that after receipt of the information, he went along with the team members and seized the contraband from the lodge Room. One *Sathish Nailkar*, the Officer of Central Forensic Science Laboratory, (in short CFSL), was examined as P.W.3, in respect of the receipt of the samples and it was sent back for non-availability of standard materials. The Superintendent of NCB, Chennai viz., *Mr.Santhanu Aich*, was examined as P.W.4, who deposed about sending of Ex.P2 and directing



CrI.A.Nos.831, 900 & 909 of 2019

WEB COPY

the Seizing Officer to undertake the operation and also about the receipt of the report under Section 57 of the NDPS Act from the Seizing Officer as well as the other Intelligence Officer. The Intelligence Officer namely, *Mr.Rajan Kumar*, went to the spot and recorded the voluntary statement given by the accused and arrested them and sent the accused to Judicial custody, was examined as P.W.5. One *Balamurugan*, who was an independent witness for the seizure, was examined as P.W.6, but, however, even during the course of the Chief-examination, he becomes disoriented, illogical and admitted of having not eaten anything from the morning and the matter was adjourned. However, his evidence was not completed and he was not Cross-examined on behalf of the prosecution. One *Thiyagarajan*, was examined as P.W.7, who deposed about the factum of search and seizure of the contraband. The Intelligence Officer, *Mr.M.Saravanan*, who received the information and reduced the same into writing and passed it on to the Superintendent of NCB, who, thereafter, upon receipt of the contraband, sent it for Forensic analysis, was examined as P.W.8. The Director of Forensic Science Laboratory / *Mr.K.M.Varshney*, who conducted a qualitative and quantitative analysis of the samples and confirmed the same of being Heroin, was examined as P.W.9.



CrI.A.Nos.831, 900 & 909 of 2019

WEB COPY

5. On behalf of the prosecution, *Ex.P-1* to *Ex.P-55* were marked and the material objects *M.O.1* to *M.O.15* were produced. Upon being questioned about the materials and the incriminating circumstances on record under Section 313 of the Code of Criminal Procedure, all the accused denied the same as false.

6. Thereafter, on behalf of the defence, one *Sweeta Fernando*, wife of *Bright Fernando*, was examined as *D.W.1*, who deposed about the receipt of the letters from her husband from the Jail. one *Anandaraj*, an Advocate was examined as *D.W.2*, who deposed about the visiting the first accused in Jail and the first accused had disclosed to him about the physical torture and he obtained information under the Right to Information Act, 2005 regarding the injuries found on his person at the time of becoming inmate in the Central prison. one *Sarojini*, a retired head clerk of the Special Court for Essential Commodities Act Cases at Coimbatore, was examined as *D.W.3*, who deposed about the collection of the samples and M.O's and about the seal being half broken in Sample P2 and seal was not there in P3. One Doctor *N.Kumar*, who deposed about the treatment given to the first



Crl.A.Nos.831, 900 & 909 of 2019

WEB COPY

accused and upon his admission into the Jail, was examined as **D.W.4**.

7. Thereafter, the Trial Court proceeded to hear the argument advanced by the learned Special Public Prosecutor for the prosecution and the learned Counsel for the accused and by Judgment dated 11.10.2019, found all the five accused guilty of all the respective charges framed against them and imposed Rigorous Imprisonment for a period of ten years and to pay a fine amount of Rs.1 Lakh in respect of each of the offences.

8. Aggrieved by the same, the accused No.1 & 2 have filed Criminal Appeal No.831 of 2019, the accused No.3 & 5 have filed Criminal Appeal No.900 of 2019 and the accused No.4 has filed Criminal Appeal No.909 of 2019, as such, all these appeals are taken up together for disposal by this common Judgment.

9. Heard *Mr.M.S. Charles*, Learned Counsel for the Appellants in Crl.A.Nos.831 & 900 of 2019 and *Mr.R.C.Paul Kanagaraj*, Learned



CrI.A.Nos.831, 900 & 909 of 2019

WEB COPY

Counsel for the Appellant in CrI.A.No.909 of 2019, and *Mr.N.P.Kumar*,
Learned Special Public Prosecutor, appearing for the respondents.

10.Learned Counsel, taking this Court through the entire evidence on the record made the following submissions:-

(i) This is the case where admittedly a personal search was made against the accused. The procedure to give an option to the accused to be searched before the Gazetted Officer or Magistrate is mandatory. In this case, it has been stated by P.W.2 that they refused the offer and opted to be searched by NCB Officers themselves. However, there is no proof in respect of the same. Nothing specifically in writing and no signature was obtained from the accused No.1 to 5, that they waived their right to be searched before the Gazetted Officer/Magistrate. Mere statements in the Mahazar will not suffice. Admittedly, the Mahazar is in English and the accused No.1 & 2 knew only Hindi and the other persons Tamil. As a matter of fact, it was mentioned that only after P.W.5 came, he has explained them in Hindi language. Therefore, there was no occasion for P.W.2 to have complied with Section 50 of the NDPS Act.



CrI.A.Nos.831, 900 & 909 of 2019

WEB COPY

(ii) In any event, even as per P.W.2, he had shown the statements to all the five accused together and admittedly each of the accused were not personally put on notice of their rights individually in the language known to them. Therefore, in the absence of any document in writing, in view of the contradictory statements of P.W.2 & P.W.5, especially, when P.W.7, the independent witness says only three accused were present at the time of search, the prosecution in this case, miserably failed to prove the compliance of Section 50 of the NDPS Act.

(iii) The Learned Counsel further submits that as per the original version of P.W.2, and P.W.4, the accused handed over the contraband from an Air bag, which was grey in colour, and the one which was produced before the Trial Court was dark green in colour. Therefore, on the face of it, the entire seizure becomes doubtful.

(iv) He would further submit that in this case, D.W.3 has been examined to demonstrate that the seal was broken and the seized contraband was not also immediately produced before the Special Court. Therefore,



CrL.A.Nos.831, 900 & 909 of 2019

WEB COPY

whether the sample which was tested was from the seized contraband or whether the tested sample was one which was sent by the Court are all in doubt and the prosecution has strictly failed to prove the foundational facts of lifting and testing the samples was above board and is not susceptible to any doubt.

(v) He would further submit that the prosecution did not produce any call logs or tower location details, especially, when it is the case of the prosecution that the accused have contacted each other and conspired by the mobile phones and Sim cards which were seized. When the prosecution does not produce the best possible evidence then the adverse inference is to be drawn against the prosecution. He would submit that in this case, on account of the false implication, all the accused are in prison from the year 2014 and are suffering for the past eight years.

(vi) Learned Counsel would also submit that as far as the alleged statements given before P.W.5 is concerned, it may be seen that the voluntariness of the said statements recorded at the earliest point of time and



CrL.A.Nos.831, 900 & 909 of 2019

WEB COPY

coupled with the facts, there were injuries on the person of the first accused would clearly point out the coercion and physical torture at the time of alleged seizure and remanding to custody. Therefore, the said statements should not be taken into account by this Court.

(vii) In respect of his submissions, Learned Counsel would rely upon the Judgment of the Hon'ble Supreme Court of India, in ***Vijaysinh Chandubha Jadeja Vs. State of Gujarat***¹, morefully relying upon paragraphs Nos.29 & 32. The Constitutional Bench has held that the compliance under Section 50 of the Act is a mandatory safeguard.

(viii) In order to press home the importance and the purpose of Section 50 of the Act, the Learned Counsel also relied upon the Judgment of the Hon'ble Supreme Court of India, in ***S.Gurjani Singh Vs. State of Punjab***², morefully relying upon paragraphs Nos.15, 16, 17 and 21, 24 & 25 of the said Judgment.

(ix) Further, he would rely upon the Judgment of the Hon'ble Supreme

1 (2011) 1 SCC 609

2 2014(13) SCC 603



CrL.A.Nos.831, 900 & 909 of 2019

WEB COPY

Court of India, in *State of Rajasthan Vs. Paramanand & another*³, morefully relying upon paragraph No.17 to press home the point of the joint communications of the rights available under Section 50(1) of the NDPS Act, would frustrate the very purport of Section 50 and each of the accused should have been communicated individually.

(x) Learned Counsel would again rely upon the Judgment of the Hon'ble Supreme Court of India, in *Arif Khan Vs. State of Uthrakand*⁴, wherein a similar plea by the prosecution that the accused had waived their rights Section 50 was rejected.

(xi) For the proposition, that the delay in sending the contraband to the Court vitiates the case of the prosecution, he would also rely upon the Judgment of the Hon'ble Supreme Court of India, in *Rathinam Vs. State*⁵, morefully relying upon paragraph No.13 of the said Judgment.

(xii) He would further rely upon the Judgment of the Hon'ble Supreme Court of India, in *Noor Aga Vs. State of Punjab*⁶, morefully relying upon paragraphs Nos.56 to 60 and 85 & 86, to press home the proposition that

³ (2014) 5 SCC 345

⁴ (2018) 18 SCC 380

⁵ CDJ 2018 MHC 4607

⁶ (2008) 16 SCC 417



CrI.A.Nos.831, 900 & 909 of 2019

inspite respect of contraband being recovered and the reverse onus on the accused, still it is for the prosecution to establish the foundation facts and compliance of safeguards and procedures so that the prosecution is a fair one;

(xiii) The Learned Counsel also relied upon the Judgment of the Hon'ble Supreme Court of India, in *Naresh Kumar vs. State of Himachal Pradesh*⁷, more specifically paragraph No.10, for the same proposition that the prosecution has to establish the foundational facts.

(xiv) For the proposition that it would not be prudent to place reliance on the version of the Seizing Officer, especially, when it contains infirmity he relied upon the Judgment of the Hon'ble Supreme Court of India, in *Union of India Vs. Leen Martin & another*⁸, more specifically paragraph No.13 of the said Judgment.

(xv) He would also rely upon the Judgment of the Hon'ble Supreme Court of India, in *Vijay Pandey Vs. State of Uttarpradesh*⁹, for the proposition that the prosecution should categorically relate the seized

⁷ CrI.A.No.1053 of 2016, dated 27.07.2017

⁸ (2018) 4 SCC 490

⁹ CrI.A.No.1143 of 2019, dated 30.07.2019



Crl.A.Nos.831, 900 & 909 of 2019

WEB COPY

samples with the quantity of the contraband seized from the accused and mere production of laboratory report, cannot be conclusive proof by itself.

(xvi) For the proposition that contraband and the collected samples were not kept in safe custody the learned Counsel relied upon the Judgment of this Court, in *Rangan Vs. State*¹⁰, and in *Dhanraj vs. State*¹¹, whereunder, detailed directions were given as to the necessity of safe custody of the contraband seized and also as to the need for producing the same along with the accused before the Magistrate immediately.

(xvii) The learned Counsel also relied upon the Judgment of the Hon'ble Supreme Court of India, in *S.K. Raju @ Abdul Haque @ Jagga Vs. State of West Bengal*¹², for the proposition that even if the alleged recovery is from an Air bag, if there is personal search also, then the compliance of Section 50 is mandatory.

11.Per contra, *Mr.N.P.Kumar*, Learned Special Public Prosecutor, would submit that in this case;

(i) The prosecution has proved all the foundation facts. Upon

¹⁰ Crl.A.No.331 of 2012, dated 11.01.2019

¹¹ Crl.A.No.319 of 2012, dated 13.03.2019

¹² Crl.A.No.459 of 2017, dated 05.09.2018



CrI.A.Nos.831, 900 & 909 of 2019

WEB COPY

receipt of the secret information, by following the due procedure, P.W.2, who was deputed as Seizing Officer has duly seized the contraband in the presence of the independent witnesses. The entire procedure has been detailed in Mahazar itself. He would submit that though the compliance of Section 50, informing the right of the accused to be examined before the Gazetted Officer or Magistrate were informed, in this case since the seizure was from the bag there was no necessity for the prosecution to comply with the Section 50 of NDPS Act.

(ii) As far as the delay in sending the samples to the Special Court is concerned, he would submit that evidence of P.W.5 read with the evidence of P.W.8, have clearly explained the course of events and there was no undue delay and the identity of the seized contraband and the samples drawn stand proved in this case. Once the samples drawn proved to be Heroin, which is a narcotic substance under the Act, then the prosecution had discharged its burden of proof. Thereupon, it is the onus of the accused to have proved, otherwise that they are not guilty. In this case, the quantity seized is commercial quantity. The accused have committed heinous offences. Since all the charges having been proved, the Trial Court had



CrL.A.Nos.831, 900 & 909 of 2019

rightly convicted and sentenced the accused.

WEB COPY

(iii) In support of his submissions, the learned counsel would rely upon the Judgment of this Court, in ***Krishnan Sridaran Rajendran @ Krishnan Seedaran Rajendran @ Madan & another Vs. State***¹³. This Court considered in detail all the Judgments of the Hon'ble Supreme Court of India, where divergent views are taken as to whether Section 50 is applicable when the seizure is not from the person of the accused, but however the personal search is also made. In paragraph No.19 of the said Judgment, this Court had considered the Judgments of the Hon'ble Supreme Court of India, in ***Dilip and another Vs. State of Andhra Pradesh***¹⁴, in ***Union of India Vs. Shah Alam and another***¹⁵, and in ***State of Rajasthan Vs. Parmanand***¹⁶, which held that the compliance of Section 50 will have applicability. Thereafter, in paragraph No.20, it has considered the Judgments in ***Banobi and another Vs. State of Maharastra***¹⁷, ***Kalema Tumba Vs. State of Maharastra and another***¹⁸, ***Sarjudas and another Vs.***

13 CDJ 2018 MHC 1160

14 (2007) 1 SCC 450

15 (2009) 16 SCC 644

16 (2014) 5 SCC 345

17 (1999) 9 SC 174

18 (1999) 9 SC 179



Crl.A.Nos.831, 900 & 909 of 2019

WEB COPY

*State of Gujarat*¹⁹, *State of Punjab Vs. Baldev Singh*²⁰, *Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat*²¹, *Birakishore Kar vs. State of Orissa*²², *Gurbax Singh vs. State of Haryana*²³, *Kanhaiya Lal Vs. State of Madhya Pradesh*²⁴, *Madan Lal and another Vs. State of Himachal Pradesh*²⁵, *Saikou Jabbi Vs. State of Maharashtra*²⁴, *State of Himachal Pradesh Vs. Pawan Kumar*²⁵, *State of Rajasthan Vs. Daulat Ram*²⁶, *State of Rajasthan Vs. Babu Ram*²⁷, *Ajmer Singh Vs. State of Haryana*²⁸, *Makhan Singh vs. State of Haryana*²⁹, and held in paragraphs Nos.23 & 24 that Section 50 of the Act would not apply.

(iv) The Learned Special Public Prosecutor would further submit that even though the learned counsel for defence has produced the Judgment of the Hon'ble Supreme Court of India, in *S.K.Raju @ Abdul Haque @ Jagga* case cited supra, which was subsequent to the said Judgment, he would further submit that subsequent to the Judgment of *S.K.Raju*, the

19 (1999) 8 SC 548

20 (1999) 6 SCC 172

21 (2000) 1 SC 363

22 JT 1999 (10) SC 350

23 (2001) 1 SC 625

24 2000 (10) SCC 380

25 (2003) 6 SC 382

24 (2003) 8 SC 582

25 2005 AIR SCW 2154

26 2005 AIR SCW 4423

27 2007 AIR SCW 3799

28 (2010) 3 SCC 746

29 (2015) 12 SCC 247



Crl.A.Nos.831, 900 & 909 of 2019

WEB COPY

Hon'ble Supreme Court of India in *Dayalu Kashyap Vs. The State of Chhattisgarh*³⁰, has clearly held that Section 50 cannot be extended to the case of recovery which is not from the person of the accused. Therefore, he would submit that the learned Counsel for the appellants is not right in canvassing about the applicability of Section 50 of the Act and more specifically about the individual appraisal of their rights, etc.

(v) The learned Special Public Prosecutor has also relied upon the Judgment of the Hon'ble Supreme Court of India, in *State of Rajasthan Vs. Udai Lal*³¹, whereunder, the Hon'ble Supreme Court has held that minor contradictions in the evidence of the Official witness by itself, will not entitle the accused for an acquittal. Further, he would submit that the appellants have not demonstrated before this Court about any prejudice of their rights on account of any procedural lapse on the part of the prosecution and submitted that therefore, there is nothing for this Court to interfere with the Judgment under appeal.

12.I have considered the rival submissions made on behalf of the

³⁰ 2022 Live Law (SC) 100

³¹ (2008) 11 SC 408



CrL.A.Nos.831, 900 & 909 of 2019

WEB COPY

either side and perused the material records of this case.

13.The Learned Counsel for the appellants had demonstrated that there was no individual appraisal and therefore, the right under Section 50 is not complied with and in this regard, he had also relied upon the Judgment in ***State of Rajasthan Vs. Paramanand***, the case cited supra, for such joint communications of the right would not amount to proper compliance of Section 50. There can be no quarrel about the said proposition, but the contraband was seized from the bag which was kept in the cupboard of Room No.104 and the accused have handed over the said bag containing contraband. It is clear that the same was not recovered from the person of the accused. It is also clear from the evidence of P.W.2 & P.W.4 that a personal search of each of the accused was also carried out on and number of other articles like Bank cards, Railway tickets, some documents, etc., were seized from the person of each of the five accused. In this regard, after considering all the relevant Judgments, this Court in ***Krishnan Sridaran Rajendran*** cited supra, has held that the mandate of Section 50 will not be applicable in such cases. It may be seen as stated supra, both three Judges and two Judges Benches have taken both views. In such a situation, this



Crl.A.Nos.831, 900 & 909 of 2019

WEB COPY

Court has to follow the law laid down by the Supreme Court of India in the later Judgment. The latest is the view taken in **Dayalu Kashyap**, cited supra, in which it has been held that the mandate of Section 50 will not be applicable in such cases. Therefore, I have no hesitation in holding the Section 50 of the Act, will not be applicable to the instant case. Accordingly, the submissions regarding the compliance of Section 50 are without any merits.

14. Now coming to the contention relating to the delay in the samples reaching the Special Court, P.W.5 has reported that at the time of remand itself, the seized property was produced before the Learned Judicial Magistrate and the Magistrate had refused to receive the same stating that there was no necessary facilities for safe custody to be made and directed to produce before the Special Court, Coimbatore. As a matter of fact, the said fact is also clearly mentioned in Ex.P-23, the report submitted by him to the Superior Officer under Section 57 of the Act. Thereafter, P.W.7 have spoken that on 31.03.2014, he handed over the case properties. Thereafter, P.W.8 has deposed that he was informed by P.W.4/the Superintendent of NCB, about the search and seizure of contraband on 23.05.2014. He was



Crl.A.Nos.831, 900 & 909 of 2019

directed to produce the properties. Accordingly, he collected it on 31.03.2014 and produced the same before the Court below, on 01.04.2014, vide a memo **Ex.P-46**. The samples were furnished and forwarded for analysis through the Court. During the interregnum, the Superintendent, had clearly spoken of the godown receipt, which is marked as **Ex.P-8** and perusal of the same, it would be clear that all the 19 numbers of sealed packets in serial No.12, were entered into in the godown register in serial No.09 on 27.03.2014 at 7.30 hours, upon being handed over by the Seizing Officer. Thus, it may be seen that there is no any undue delay or reason to suspect about the safe custody or the identity of the contraband seized or the sample drawn.

15. It may be further seen that the direction of this Court in Crl.A.No.319 of 2012, dated 13.03.2019, that the Magistrate to receive the contraband under Form 95, and under the supervision it has to be measured and the prosecution should be directed to produce on the very next day before the Trial Court, was not there at the relevant time and therefore, the said procedure was not followed. Under these circumstances, I am unable to accept the contention of the learned Counsel for the appellants and that the



CrI.A.Nos.831, 900 & 909 of 2019

WEB COPY

delay of the samples and the contraband reaching the Court raises doubt about the seizure or that it prejudiced the defense.

16.The other submissions made on behalf of the learned Counsel for the appellants is at best pointing out minor contradictions not having any direct bearing to the case. When the prosecution has proved the seizure of the quantity of the contraband the offence under Section 8(3) r/w Section 21(c) stood proved. In this case, by the conduct of all the accused in being together at the lodge, organising the procurement from *Rajasthan*, assembling for lodge along with money are all concrete circumstances which demonstrate the conspiracy, even in the absence of production of telephone call logs and details. Therefore, the prosecution has proved the offence under Section 8(c) r/w Section 29 of the NDPS Act, against all the five accused.

17.Since the prosecution has produced Ex.P-43, the hotel register, by which, the accused no.3 had booked Room and allowed it for storage of the contraband, the offence under Section 8(c) r/w Section 25 also stands proved as far as the accused No.3 is concerned.



CrL.A.Nos.831, 900 & 909 of 2019

WEB COPY

18. But, however in respect of illegally transporting the same to Maldives, except of the secret information, the only evidence is the statements of the accused themselves. However, in view of the Judgement of Hon'ble Supreme Court of India in *Tofan Singh -Vs- State of Tamilnadu*³², the same cannot be taken as admissible. Therefore, the offence under Section 28 of the Act, is not proved against the accused No.3 to 5. The Trial Court itself had found that all the ingredients in respect of charge under Section 8(c) r/w Section 27A has not been proved and acquitted the accused in respect of said charges.

19. Now coming to the sentence, the Trial Court had only imposed the minimum sentence of ten years Rigorous Imprisonment in respect of each of the counts which has to run concurrently and also imposed a minimum fine amount of Rs.1 Lakh, each, for each of the counts. Therefore, no exception can be taken regarding the award of the sentence. The Trial Court has ordered the period of remand shall be set off under Section 428 of Cr.P.C., which is also confirmed by this Judgment.

³² 2021 4 SCC 1



CrI.A.Nos.831, 900 & 909 of 2019

WEB COPY

20.The learned counsel for the appellants would submit that the accused are in Jail for eight years and in view of their detention, they are unable to pay the fine amount and prays for modification on the default of sentence. Following the dictum of the Hon'ble Supreme Court of India, in ***Dayalu Kashyap Vs. The State of Chhattisgarh***, case cited supra, and the Judgments of this Court, when the accused are unable to pay the fine amount, this Court can interfere and reduce the default sentence. Considering the overall facts and circumstances, I am of the view that in default of payment of fine in respect of each counts, instead of one year Rigorous Imprisonment, the accused/appellants shall undergo one month Rigorous Imprisonment, consecutively, in respect of each counts.

21.The Criminal Appeals are partly allowed on the following terms :-

(i) The accused are found not guilty of the Charge under Section 8(c) read with 28 of the NPDS Act, and the conviction and sentence imposed in respect of the said charge stands set aside;

(ii) The conviction and sentence imposed by the Trial Court in respect of the other charges are confirmed, except for the default sentence



CrL.A.Nos.831, 900 & 909 of 2019

WEB COPY

for non-payment of fine;

(iii) The accused shall undergo default sentence of one month Rigorous Imprisonment consecutively for each count of non-payment of fine after undergoing the period of substantial sentence of ten years rigorous imprisonment.

(iv) Consequently, the connected miscellaneous petitions are closed.

17.08.2022

Index : Yes/No
Speaking / Non-Speaking order

klt

To

- 1.The Special Court, under EC Act/NDPS Act, Coimbatore.
- 2.The Public Prosecutor, High Court of Madras.
- 3.The Intelligence Officer, Narcotic Control Bureau, Chennai Zonal Unit.

D.BHARATHA CHAKRAVARTHY. J.,

klt



WEB COPY



Crl.A.Nos.831, 900 & 909 of 2019

Pre- Delivery Order in
Crl.A.Nos.831, 900 & 909 of 2019
and
Crl.M.P.No.8458 of 2020 and Crl.M.P.No.12973 of 2021

17.08.2022