



Crl.A.No. 837 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.04.2022

PRONOUNCED ON : 29.07.2022

CORAM

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

CRL.A.No.837 of 2018

Shajakhan Niwas

... Appellant / Accused

Vs.

The Deputy Commissioner of Customs,
Prosecution Unit (AIR)
Custom House,
Chennai – 600 001.

... Respondent / Complainant

PRAYER : Criminal Appeal filed under Section 374 (2) r/w. Section 36-B of NDPS Act, 1985, to set aside the conviction and sentence rendered by the II Additional Special Judge for NDPS Act, Chennai, dated 27.11.2018 in C.C.No.14 of 2013 in R.R.No.26 of 2012 in O.S.No.53 of 2012-INT on the file of the Deputy Commissioner of Customs, Prosecution Unit (AIR) Chennai and acquit the accused.

For Appellant : Mr.T.S.Sasikumar

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



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JUDGMENT

This Criminal Appeal arising out of the Judgment passed by the learned Special Judge, II Additional Special Court under NDPS Act, Chennai, dated 27.11.2018 in C.C.No.14 of 2013.

2. On 15.10.2012, at about 00.015 Hrs., Intelligence Officer Sivakumar called upon two independent witnesses, informed them that they have to be present at the AIU Room to witness the examination of hand baggage of Sajakhan Nivas, under the provision of Narcotic Act. After the witnesses agreed to the same, in presence of the witnesses in the AIU room, the said Sajakhan Nivas questioned regarding possession of any contraband / prohibited goods. He replied in negative. Not convinced with his reply, Sajakhan Nivas found to be nervous, the Officers informed Sajakhan Nivas about Section 50 of the Act in Tamil, on search, the Officers found transparent polythene packets containing white colour granules in the sandals worn by him, the substance tested positive for Methaqualine, the total weight of the substance is 975 gms. Samples taken, marked, remaining substance as well as packing materials also marked. Personal belongings of the persons returned, signatures of the witnesses and passenger



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obtained in the seized properties, mahazar prepared and signatures were obtained. On 15.10.2012 voluntary statement of Sajakhan Nivas recorded, based on the seizure and statement he was arrested at 12.30 hours on 15.10.2012. On chemical analysis, the seized substance tested positive for Ketamine, after completion of investigation, complaint filed against the accused under Sections 8(c) r/w.21(c, 23 & 28 of NDPS Act and under Section 135 of Customs Act, 1962.

3. The prosecution, to prove the case examined P.W.1 to P.W.7, marked Ex.P1 to Ex.P.20 and M.O.1 to M.O.4. On the side of the accused, neither witnesses examined nor documents marked.

4. The contention of the appellant is that the mandatory provision under Section 50(1) not followed in this case. P.W.2, the Seizure Officer, took the appellant to AIU Room, made a search on the body of the appellant, since no recovery made, took the sandals worn by the appellant, after giving the option of search, cut open the sandals, found two packets of contraband, concealed in each of the chapels. The option under Section 50(1) was mere ritual and not substantially followed. Further, submitted that though P.W.1 may be a Gazetted Officer that will not automatically be a



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compliance to Section 50 of the NDPS Act.

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5. Further, in this case, the mandatory provision of Section 42(1) not complied. P.W.2 admit that the boarding pass (Ex.P6) stamped with security seal, name of the appellant found in the passenger manifest (Ex.P5) in which, the appellant shown as Passenger No.109 and off loaded by Customs. Thus, the petitioner, after boarding the Aircraft, the respondent on getting information forcibly brought down the petitioner from Aircraft and it is not a chance recovery, as projected. To get over the statutory obligation under Section 42(1), the case wrongly projected as chance recovery.

6. In this case, P.W.2 is the Seizure Officer as well as the Investigating Officer. Ex.P2 and Ex.P7 the alleged confession statements of the appellant. Both statements recorded by P.W.2. Though remand report prepared by P.W.6, he admits that all the particulars and details of the investigation provided by P.W.1 he is not aware of the same personally. Likewise, one Stanly / Intelligence Officer of the Customs produced the appellant before the remanding Magistrate. P.W.1 admits that Stanley, Preventive Officer received the accused along with the properties after



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remand. The said Stanley was not examined as witness. Further, the officer shown in the remand report, who received the contraband are only name sake person and it is P.W.2, who conducted the entire investigation. It is further confirmed by Ex.P8 / arrest memo; Ex.P9 / arrest intimation, Ex.P10 / forwarding memo for safe custody of the contraband in the Customs godown. Section 57 report submitted to C.P.Jawagar David, Superintendent, Air Intelligence Unit all prepared by PW2. Ex.P1 / Mahazar, prepared by PW2 after intercepting the appellant, questioned him, taken to AIR room, frisking him, search on him, thereafter, in presence of P.W.4 and P.W.1 recorded Ex.P1 / mahazar, seized the contraband, followed with confession statements / Exs.P2 and P7, seizure of Passport, Flight Ticket, Boarding Pass and all other documents. In the absence of non-examination of Stanley Preventive Officer, C.Jawahar David / Superintendent of Customs, the 57 report is not in compliance. P.W.1 and P.W.2 admit that there is no mention in Ex.P1, who gave option under Section 50 to the appellant.

7. Further, P.W.2 admit that boarding pass is in two parts. It is a known fact that one part would be detained by Airlines and the remaining would be with the passengers. In this case, confirming that the appellant already boarded the Flight. Since the boarding



pass torn P.W.2 gives an explanation that while handling Ex.P2 / boarding pass, it got detached from other part. It is only an after thought explanation. P.W.2 Admits that he done spot test using Test Kit, found the contraband answering for 'Methaqualone', recorded the same in mahazar Ex.P1 as well as test memo / Ex.P13. On the contrary, the evidence and report of P.W.3, the Chemical Examiner is that the sample, white crystalline powder, did not answer the test for the presence of Methaqualone, however, it answered the test for the presence of 'Ketamine Hydrochloride'. In view of the same, it would be appropriate for the respondent to send the second sample to another laboratory to confirm the report / Ex.P16, which is not done in this case. Further, P.W.3 admits that the melting point and composition differ for methaqualone and Ketamine Hydrochloride. The qualitative and quantitative examinations are totally different for both these psychotropic substances. On this score alone, the trial Court ought to have acquitted the appellant.

8. It is further submitted that the contraband seized on 15.10.2012, thereafter, the same produced before the Special Court for NDPS Act Cases only on 04.12.2012, as could be seen from Ex.P14. P.W.3 admits that the sample of white coloured



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granules received in the lab only on 04.12.2012, it is almost 1-1/2 months after the seizure. During this period whether it was in continuous possession, secured and properly stored, becomes questionable one, which is contrary to the Standing Order No.1/88 and 1/89, wherein instruction is that the contraband ought to be sent to the chemical examination within 72 hours of the seizure.

9. Further, drawing of sample is in violation of instructions and Section 52-A not followed. P.W.3 / Chemical Analyst, in his evidence admit that the melting point and characteristics are different for 'Methaqualone' and 'Ketamine'. P.W.5 / projected as independent witness, is a obliging witness, who is an employee in the duty free shop situated in the Customs area. P.W.7 examined at the stage of conclusion of arguments by the defence, when the defence raised the question of sanction and prosecution by the Customs Authorities. Thus, in this case, right from the inception, the Customs Authorities not followed, statutory provisions of NDPS Act, violated the same and as to their convenience, created antedated documents, projecting as though all compliance followed. Further, non-examination of Stanley Preventive Officer Customs, who received the contraband, Jawahar David, Superintendent, to whom 57 Report submitted to Stanly, the



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Inspector, who received the accused and properties after the remand, is fatal to the case of the prosecution. The chain of custody of the contraband not proved in violation of instructions and Act.

10. Non- examination of the Warehouse Officer or concern Officer of the Godown is fatal to the case of the prosecution. Above all, the contraband, is not Methaqualone, as projected by the prosecution. As per the chemical analysis report, it is Ketamine and the tests are different. PW.3 / Chemical Analyst admit that he had not furnished the details of chemical examination in his report. P.W.2 is the informant as well as the Investigating Officer in this case. Thus, the prosecution failed to prove the case against the appellant. Further, the petitioner placed reliance on the following judgments for the point of violation of Sections 42, and 50 of the NDPS Act and Standing Orders No.1/88 and 1/89.

(i) Chhunna Alias Mehtab Vs State of M.P [(2002) 9 SCC 363].

(ii) Abu Thahir B. Vs Union of India, rep.by Mr. K.N. Mohan [(2019 SCC Online Karnataka 2026)].

(iii) Union of India Vs Abu Thayir B @



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Abdu Special Leave Petition (Criminal)
22749/2020 dated 07.01.2021

(iv) Sarija Banu Alias Janarthani Alias
Janani and another Vs State through
Inspector of Police [(2004) 12 SCC 266]

11. The learned Special Public Prosecutor would submit that it is not a case of prior information, but it is a case of chance recovery. P.W.2, who is an Officer in the AIU of Customs, keeping watch over in the Customs area, found the appellant carrying a black back bag, moving in a suspicious manner, after immigration clearance. Hence, he questioned the accused, at that time, the accused found nervous. He took the appellant to P.W.1, to his superior, informed about the appellant. P.W.1 / Superintendent instructed P.W.2 to fetch two independent witnesses P.W.2 went to the duty free shop, informed the Manager, from there brought two independent witnesses / P.W.5 and one Rajasekar. Thereafter, appellant questioned, not satisfied with his reply, he was frisked, which is a normal customs procedure. Further, finding the sandals worn by the appellant to be a peculiar with high heels, caused some doubt. P.W.1 questioned the same, at that time, the appellant admitted concealment of contraband in the heel, of 'Hus Puppy', sandals worn by him, Accused voluntarily removed the sandals and produced.



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12. It is further submitted that the appellant removed the sandals, handed over to P.W.1, sandals were cut open, found two packets of white crystal coloured powder, a psychotropic substance concealed in each chapels. Compliance of Section 50 followed, thereafter, mahazar prepared, signed by the witnesses, P.W.1, P.W.2 and the appellant. Thereafter, the appellant gave statement confirming, that he received the contraband from one Thameem to be smuggled and handed over in Malaysia, for which, appellant received Rs.10,000/-. Test samples taken from each of the packets, tested with Test Kit, all answered positive, thereafter, four packets were made into one, specimen samples drawn, contraband kept in a box, properly sealed with office seal. Thereafter, Air Tickets, Boarding Pass, Passport, Flight Manifest, and other articles seized from the accused. P.W.2 took the accused to Prosecution Unit at Customs House, again another statement recorded, thereafter, accused produced before E.O.1 Magistrate, at his residence on the same day at 10.30 p.m along with mahazars, documents and contraband. The contraband and samples handed back to the Customs Authorities, who deposited the same in the Customs Godown in a secured condition. Thereafter, the samples sent to the Customs Laboratory, who confirmed the specimen



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sample as 'Ketamine', a psychotropic substance. Thereafter, sanction from the Commissioner of Customs obtained, on conclusion of investigation, compliant filed.

13. During trial, P.W.1 / Superintendent present along with P.W.2 while the appellant was searched and contraband seized. P.W.3 Chemical Examiner; confirms the contraband a Psychotropic substance. P.W.4 is the witness to the mahazar; confirms search, seizure and Section 50 compliance. P.W.5 Superintendent customs, who obtained Sanction Order / Ex.P17; P.W.6 Superintendent Customs Prosecution Unit, who prepared remand report, handed over the same to P.W.1. P.W.7 Deputy Commissioner, Customs, who placed the file before the Commissioner, issued show cause notice.

14. Further, Prosecution 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. In this case, admittedly, the samples drawn at the spot, the test carried out in all the four



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packets individually, all confirmed positive. Contraband seized on the spot, and mahazar drawn. Further submitted that the reference made in ***Mohan Lal's Case*** with as regard to Section 52A of the Act, is to avoid theft / replacement of seized drugs etc. In this case, the seized drugs immediately produced before the remanding Magistrate, thereafter kept in safe custody in the godown of the Customs. Further submitted that in the case of ***Iqbal Moosa Patel Vs. State of Gujarat*** reported in **2011 (2) SCC 198** the Apex Court 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 and Another Vs. State of Uttrakhand*** reported in **(2016 (12) SCC 76)**. Thus, the trial Court, on the evidence of witness, documents produced, rightly convicted the accused and prayed for dismissal of the appeal.

15. Considering the submission of either side and on perusal of the materials, it is seen that in this case, the entire happenings taken place in the Customs Restricted Area. The appellant was travelling to Malaysia, not in dispute. P.W.2 is an Air Intelligence Officer and his job is to keep watch over the passengers movement



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in the Customs area and in case of any suspicion, question the passenger, verify his credentials for passengers travel. In this case, finding the appellant moving in suspicious manner after getting clearance from the immigration counter, PW1 questioned the appellant. Since the appellant found nervous, not behaving normally, creating doubt, taken to P.W.1, the Superintendent of Customs.

16. P.W.1 / Superintendent instructed P.W.2 to fetch two independent witnesses, who immediately went and brought P.W.5 and one Rajasekar, who are employee of the duty free shop. Thereafter, the Customs Official questioned the appellant, who became further nervous. On observation it was found by Customs Officials that the appellant was wearing a sandals with abnormal heal. Questioned the same, appellant admitted that he concealed two packets in each sandals, with psychotropic substance, handed over to him by one Tameem. Thereafter, test samples taken, tested with Test Kit, confirmed positive, thereafter, contraband seized, samples drawn.

17. All proceedings recorded in presence of P.W.5 /



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Independent witness and P.W.2. The accused signed in the mahazar, received the copy of mahazar. The belongings of the accused viz., Boarding pass, Air Ticket and Passport seized. Thereafter, accused gave a statement, which was recorded. The Flight manifest confirm the accused was travelling to Malaysia, the same also received. Thereafter, the accused taken to Prosecution Unit, again gave another statement, accused arrested, it is recorded in the arrest memo that wife of the accused informed about arrest, appellant produced before the Additional Chief Metropolitan Magistrate, (Economic Offences) Egmore, at his residence, at 10.30 p.m., The Magistrate questioned the accused, remanded him, in the remand report it is recorded as follows

“On 15.10.2012 10.15 p.m., accused is produced before me at quarters. No complaint of ill-treatment. Grounds of arrest is explained to him. Legal Aid facility is explained. Accused is remanded to judicial custody till 29.10.2012. Accused is directed to be produced before Principal Sessions Court NDPS Cases, City Civil Court, Chennai, for the next day ie., on 29.10.2012. Properties produced before me and returned to the complainant with a direction to produce the same before that Court. Send



records."

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18. Further, from the remand report it is seen that one Stanley, the Intelligence Officer of the Customs received the accused along with the properties and warrant. Thus, the properties produced before the remanding Magistrate, were handed over to the Customs Department on the orders of Magistrate. The properties safely kept in the Warehouse of the Customs with proper acknowledgement. The seized contraband deposited with the Detention Officer of the Customs, Anna International Airport, vide Forwarding Memo, dated 15.10.2012, for safe custody, which is confirmed in 57 Report / Ex.P11. Thereafter, there has been a delay in forwarding the sample to the Chemical Examiner. P.W.3 / Chemical Examiner examined and gave his analysis report / Ex.P16.

19. From the report it is seen that white crystalline powder did not answer the test for presence of Methaqualone, however, it answered the test for presence of Ketamine Hydrochloride, which is a banned psychotropic substance. Thereafter, sanction order issued under Section 137(1) of the Customs Act. The trial Court, on the evidence and documents produced, found the appellant



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guilty. Though there have been delay in sending the samples for analysis, that alone cannot be a reason to discard the prosecution case. From the evidence of P.W.1, P.W.2 and P.W.5, it is confirmed that the samples taken on the spot, packed, sealed with the customs seal, thereafter, the same produced before the remanding Magistrate, who authorized the respondent to retain the same, which kept in the Customs Warehouse. There is a chain of custody of contraband, thereafter sending for chemical analysis, some delay occurred, which is not seriously objected.

20. The Standing Instructions 1/88 and 1/89 followed substantially, except for the delay in forwarding the samples. P.W.3 confirm that the samples sent was not Methaqualone, but it tested and proved to be Ketamine, which is a psychotropic substance. In this case, seizure taken place in a restricted area wherein people who hold valid documents and tickets to travel to Foreign Countries have access. The appellant purchased the Air Ticket, checked in, received the boarding pass, crossed the Immigration point, thereafter, he was intercepted, questioned and latter the appellant admits concealment of psychotropic substance, contraband seized, samples drawn all articles seized which are chronologically recorded in the presence of P.W.5 / independent



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witness, accused signed in each pages, received copy of mahazar / Ex.P1 and produced before the remanding Magistrate, accused not raised any objection with regard to seizure of contraband from his sandals. Thus, the conscious possession of contraband and seizure proved in this case.

21. 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 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.

22. In such cases, the representative sample to be prepared in presence of Magistrate certifying the correctness of the sample



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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 case procedure not required, hence, no followed.

23. 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.P1. 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.

24. In this case, this procedures not required and followed.



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The contraband tested using Test Kit from each of the 4 packets, which tested positive, weighed around 975 gms., not of bulk quantity, not in lots. Hence, 4 packets made into one homogenized and there after, specimen samples 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 four 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 4 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 4 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 Panchanama on 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.

25. Further, as per Instruction 1/89 it is mentioned that in the



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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 hours of seizure. These instructions followed.

26. 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.3 / Scientific Officer confirms the receipt of samples from the Court, which seals intact. P.W.2 further confirms that the test report and remand report handed over to P.W.2 who produced the same before the Special Court. The contraband produced before the Special Court, only on the direction of the Remanding Magistrate, the properties were kept in the godown of Customs. The said properties marked as M.O.1 to M.O.4. Thus, the guidelines of the



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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.

27. The accused in his statements / Ex.P2 and P7 as well as during 313 question and at the time of question of sentence, consistently state that he hails from poor family, having aged parents to be taken care and he is only a carrier, his situation forced to take the offer of said Thameem. Admittedly, in this case, the said Thameem neither arrested, nor shown as accused, what follow up steps taken is not known, whether Thameen house was kept under surveillance. his mobile tracked, nothing is known. Admittedly, appellant is only a carrier, hails from a poor background.

28. It is worthwhile to refer the Judgment of the Hon'ble Supreme Court in ***Shantilal Vs. State of M.P.*** reported in **(2007) 11 Supreme Court Cases 243** wherein in para 39, it has been held as follows:-

"39. We are mindful and conscious that the present case is under the NDPS Act. Section



18 quoted above provides penalty for certain offences in relation to opium poppy and opium. Minimum fine contemplated by the said provision is rupees one lakh ("fine which shall not be less than one lakh rupees"). It is also true that the appellant has been ordered to undergo substantive sentence of rigorous imprisonment for ten years which is minimum. It is equally true that maximum sentence imposable on the appellant is twenty years. The learned counsel for the State again is right in submitting that Clause (b) of sub-section (1) of Section 30 CrPC authorises the court to award imprisonment in default of payment of fine up to one-fourth term of imprisonment which the court is competent to inflict as punishment for the offence. But considering the circumstances placed before us on behalf of the appellant-accused that he is very poor; he is merely a carrier; he has to maintain his family; it was his first offence; because of his poverty, he could not pay the heavy amount of fine (rupees one lakh) and if he is ordered to remain in jail even after the period of substantive sentence is over only because of his inability to pay fine, serious prejudice will be caused not only to him, but also to his family members who are innocent. We are, therefore, of the view that though an amount of payment of fine of rupees one lakh which is minimum as specified in Section 18 of the Act cannot be reduced in view of the legislative mandate, ends of justice would be met if we retain that part of the direction, but order that in default of payment of fine of rupees one lakh, the appellant shall undergo rigorous imprisonment for six months instead of three years as ordered by the trial court and confirmed by the High Court."

29. For the reasons aforesaid, the Criminal Appeal is partly



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allowed, the conviction recorded u/s 8(c) r/w 21(c) & 28 of NDPS and sentence imposed on the appellant to undergo 10 years R.I. is confirmed. The order for payment of fine of Rs.1,00,000/- for each of the offence upheld, but an order that in default of payment, the appellant shall undergo R.I., for 2 years is reduced to R.I. for 1 month. The default sentence for all offence modified to one month alone. To that extent, the appeal filed by the appellant is allowed. If the appellant has undergone substantive sentence of R.I. for 10 years and default sentence of R.I for 1 month, the appellant shall be released , unless required to be detained in connection with any other offence.

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Internet: Yes/No

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To

1. The Special Judge,
II Additional Special Court under NDPS Act,
Chennai
2. The Deputy Commissioner of Customs,
Prosecution Unit (AIR)
Custom House,
Chennai – 600 001.
3. The Public Prosecutor,
High Court, Madras.



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M.NIRMAL KUMAR, J.

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