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Crl.A.Nos.434 & 457/2020 and 1174/2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 26.04.2023

Pronounced on : 18.05.2023

CORAM

THE HONOURABLE Dr. JUSTICE **G.JAYACHANDRAN**

Criminal Appeal Nos.434 & 457/2020 and 1174/2022

K.Kumaresan ... Appellant in Crl.A.No.434/2014

Arun Divakar ... Appellant in Crl.A.No.457/2014

Chukwu Simon Obinna ... Appellant in Crl.A.No.1174/2022

/versus/

State rep.by

The Inspector of Police,

T-15, SRMC Police Station,

Porur, Chennai.

(Crime No.763/2018)

... Respondent / Complainant in all Crl.As.

Common Prayer:- Criminal Appeals are filed under Section 374(2) of Cr.P.C., praying to set aside the judgment passed against the appellant/accused 2 by the learned Special Judge, I Additional Special Court for Exclusive Trial of Cases under NDPS Act, Chennai by Judgment dated 08.10.2020 in C.C.No.77 of 2019 and acquit them from all the charges.



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For Appellant in C.A.No.434/2020 : Mr.K.Shanker

For Appellant in C.A.No.457/2020 : Mr.G.Murugendran

For Appellant in C.A.No.1174/2022 : Mr.R.Gopi

For Respondent in all Crl.As : Mr.R.Kishore Kumar
Government Advocate (Crl.Side)

COMMON JUDGMENT

The appellants herein are the accused, convicted by the I Additional Special Court for NDPS Act Offences, Chennai in CC No: 77/2019.

2. The case of the prosecution in brief is as under:-

On 16.12.2018 at about 22.00 hrs, Mr.Raja, Sub-Inspector of Police attached to SRMC Police Station received a secret information from his informant that narcotic drugs banned by the State is sold in front of the Multi-storied Residential Apartment at Porur by-pass Road. He reduced the information into writing. Informed his immediate superior-the Inspector of Police about the information received over phone and proceeded to the spot mentioned by the informant along with his team. On identification of the persons, who were selling



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narcotic drug near Osian Chlorophyll apartment, on seeing the police team, three persons tried to escape. They were apprehended and enquired. They disclosed their names as Chukwu Simon Obinna, a Nigerian national, Kumaresan, resident of Vanagaram and Arun Divakar, resident of Kannadapalayam, Avadi. After getting their names and address, they were told about the information received and was informed about the option to be searched before a Judicial Magistrate or a Gazatteed officer. They declined to exercise the option and permitted the Sub Inspector to proceed with the search. The substances carried by each of the accused were weighed and recovered contraband as below:-

In the computer bag carried by Kumaresan (A-2):

- 1) White colour small plastic Cover inside cocain Drugs-Total Weight-18.00 Grams
- 2) White Colour Small Plastic Cover inside MDMA Drugs Total Weight 8.00 Grams
- 3) White Colour Small Plastic Cover inside METH Drugs-Total Weight – 1.00 Grams
- 4) White Colour Small Plastic Cover inside Block METH Drugs-Total weight- 8.00 Grams
- 5) White Colour Small Plastic Covers inside Tablets ECSTACY pill Drugs- Total weight-17.00 Grams



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- 6) Small Electronic weigh Mechine-1
- 7) Apple lap top-1
- 8) Apple I Phone-2
- 9) Apple I pad-1
- 10)Cash Rs-42,000/- and
- 11)Small Size Empty Plastic Cover-3 bundles.

From A-1 Chukwu Simon Obinna:

- 1) Black colour small plastic cover inside tablet Ecstasy pill drugs-Total weight-200 Grams
- 2) International driving License Xerox-1
- 3) Samsung Cell Phone-1
- 4) Nokia Cell Phone-1
and
- 5) Cash-Rs.2450/-

From A-3 Arun Divakar:

White colour small plastic covers inside tablets ESCTACY pill drugs – total weight 20.00 grms.

3. A mahazar was drawn recording the recovery of the above drugs and same got completed by 00.15 hours on 17.12.2018. All the three accused were



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arrested. The contrabands recovered from them was sent for chemical analysis and the report from the State forensic Lab confirmed they are cocaine a narcotic drug, methamphetamine a psychotropic substance, Pseudoephedrine a controlled substance covered under NDPS Act used as precursor for manufacturing Methamphetamine a phsyhotropic substance.

4. On completion of investigation, final report was filed before the Special Court for NDPS cases at Chennai. Based on the materials, the trial court framed charges against the accused as under:-

A-1: Mr. Chukwu Simon Obinna (The appellant in CA 1174/2022)

- i) Under Section 8 (c) r/w 29(1) of NDPS Act,
- ii) Under Section 8 (c) r/w 22(c) of NDPS Act and
- iii) Under Section 8 (c) r/w 28 of NDPS Act.

A-2: Mr. K.Kumaresan (The appellant in CA 434/2020)

- i) Under Section 8(c) r/w 29(1) of NDPS Act,
- ii) Under Section 8(c) r/w 22(c) of NDPS Act,
- iii) Under Section 8(c) r/w 28 of NDPS Act,



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iv) Under Section 8 (c) r/w 22 (b) of NDPS Act and

v) Under Section 8 (c) r/w 20(b)(ii)(B) of NDPS Act.

A-3: Mr.Arun Divakar (Appellant in CA 457/2020)

i) Under Section 8(c) r/w 29(1) of NDPS Act,

ii) Under Section 8(c) r/w 22(c) of NDPS Act and

iii) Under Section 8(c) r/w 28 of NDPS Act.

5. To prove these charges, the prosecution examined 7 witnesses.

Marked 15 documents and 15 material objects.

6. The trial Court held them all guilty of the charges framed and sentenced them as below:-

Name of Accused	Offences	Punishment
1.Chukwu Simon Obinna	1. Section 8(c) r/w 29(1) of NDPS Act	Rigorous Imprisonment for a period of 10 years and to pay fine of Rs.1,00,000/- and in default thereof to further undergo Rigorous Imprisonment for a period of one year.
	2. Section 8(c) r/w 22(c) of NDPS Act	Rigorous Imprisonment for a period of 10 years and to pay fine of



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Name of Accused	Offences	Punishment
		Rs.1,00,000/- and in default thereof to further undergo Rigorous Imprisonment for a period of one year.
	3. Section 8(c) r/w 28 of NDPS Act	Rigorous Imprisonment for a period of 10 years and to pay fine of Rs.1,00,000/- and in default thereof to further undergo Rigorous Imprisonment for a period of one year.
2.K.Kumaresan	1. Section 8(c) r/w 29(1) of NDPS Act	Rigorous Imprisonment for a period of 10 years and to pay fine of Rs.1,00,000/- and in default thereof to further undergo Rigorous Imprisonment for a period of one year.
	2. Section 8(c) r/w 22(c) of NDPS Act	Rigorous Imprisonment for a period of 10 years and to pay fine of Rs.1,00,000/- and in default thereof to further undergo Rigorous Imprisonment for a period of one year.
	3. Section 8(c) r/w 20(b)(ii)(B) of NDPS Act	Rigorous Imprisonment for a period of 5 years and to pay fine of Rs.50,000/- and in default thereof to further undergo Rigorous Imprisonment for a period of Six months.
	4. Section 8(c) r/w 22(b) of NDPS Act	Rigorous Imprisonment for a period of 5 years and to pay fine of Rs.50,000/- and in default thereof to further undergo Rigorous Imprisonment for a period of Six months.
	5. Section 8(c) r/w 28 of NDPS Act	Rigorous Imprisonment for a period of 10 years and to pay fine of Rs.1,00,000/- and in default thereof to further undergo Rigorous Imprisonment for a period of One year.



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Name of Accused	Offences	Punishment
3. Arun Divakar	1. Section 8(c) r/w 29(1) of NDPS Act	Rigorous Imprisonment for a period of 10 years and to pay fine of Rs.1,00,000/- and in default thereof to further undergo Rigorous Imprisonment for a period of one year.
	2. Section 8(c) r/w 22(c) of NDPS Act	Rigorous Imprisonment for a period of 10 years and to pay fine of Rs.1,00,000/- and in default thereof to further undergo Rigorous Imprisonment for a period of one year.
	3. Section 8(c) r/w 28 of NDPS Act	Rigorous Imprisonment for a period of 10 years and to pay fine of Rs.1,00,000/- and in default thereof to further undergo Rigorous Imprisonment for a period of One year.

7. The learned counsels appearing for the appellants/accused submitted that the entire prosecution case throughout bristles with infirmities and contradictions violation of the mandatory provisions of NDPS patently seen and it is a case of gross abuse of law. Referring the secret information marked as Ex.P-1 they contended that, the information does not contain the name of the apartment or the identity or description of the accused, however the police team claims that they were able to locate the spot and the accused person with the help of the informant. In Ex.P-1, there is no mention about informant mentioning the physical identity of



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the drug peddlers or offering to identify them personally. If really what reduced into writing in Ex.P-1 is the actual information received, then with that vague information, the police team could not have located the apartment in the Porur bypass road where there are several multistoried residential apartments. Further, as per the evidence of PW-1, the sub inspector who recorded the information Ex.P-1 and proceeded to the spot after intimating his superior officer PW-7 over phone and obtaining his permission, whereas, PW-7 in his deposition had not said that he granted permission to proceed. In fact he had deposed that on 16.12.2018 at 22.00 hours PW-1 conveyed the secret information. Only on the next day i.e., on 17.12.2018 at about 4.00.a.m PW-1 submitted his special report under Section 57 of the NDPS Act to him. PW-1 had deposed that before proceeding to the spot he recorded the information in the GD. However, copy of the GD not produced to the Court.

8. Regarding the search and seizure, the counsels contended that, Section 50 of the NDPS Act not complied in this case. Ex P-2 is not in tune with the mandatory requirement under Section 50 of the Act. A joint notice under Section 50 to impermissible. Who explained the content of Ex P-2 written in tamil



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to the first accused, a Norwegian is not mentioned in Ex P-2. Only one witness has signed in it and the space for the second witness is left blank, which indicates that this document was not prepared in the spot in the presence of independent witnesses, but elsewhere.

9. Regarding the seizure, pointing out that, there is no evidence to show that the team headed by PW-1 went with field test kit or the material alleged to have been seized from them were tested to arrive at a *prima facie* satisfaction they are cocaine or MDMA drug or METH drug. In the recovery mahazar Ex.P-3, the accused have not signed. No facsimile of the seal affixed in the packets found in the recovery mahazar. The chemical analyst, who received the samples for chemical analysis has not mentioned about the seal of the police on those covers. Only the Court seal was found in it and therefore, there is a doubt whether anything was recovered from these accused and whether the same material recovered from them was sent to chemical analysis. To buttress this submission, the counsels also draw the attention of this court that the chain of custody of the contraband alleged to have recovered on 17.12.2018 at 00.15 hours not properly explained. The said contrabands were produced before the Special Court along



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with Form 95 only on 24.12.2018. The computer bag with contraband alleged to have carried by A-2 not produced before the Court.

10. Per contra, the learned Government Advocate (criminal side) submitted that, there is no flaw in the information recorded under section 42(2) of the NDPS Act. On receipt of the information, the team headed by PW-1 proceeded to the spot and the accused persons were identified by the informant. The prosecution has right to withhold the identity of the informant. The search was in the public place and seizure not result of body search. Therefore, there is no violation of any mandatory provisions. Regarding the chain of custody of the contraband, the learned Govt. Advocate (Crl.Side) submitted that, the contraband was produced along with the accused before the Magistrate on 17.12.2018, who had made his endorsement to produce before the Special Court during the court working day. After the records forwarded to the Special Court on 20.12.2018, the property along with Form 95 was presented before the Special Court on 24.12.2018. Since 22nd and 23rd were public holidays (Saturday and Sunday), the contraband was produced before the Court on the next working day. This point has been considered by the trial court and after due consideration, rejected the plea of the accused.



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11. The point for consideration is whether the prosecution case suffers any violation of mandatory provisions contemplated under the NDPS Act. Whether the trial court erred in drawing presumption under section 35 and 54 of the NDPS Act in the absence of proof of recovery of the contraband ?

12. The evidence placed before the Court indicates that based on a secret information the police team headed by PW-1 proceeded to the spot mentioned by the informant. A-1 to A-3 were arrested for alleged possession of substances prohibited under NDPS Act. The search and seizure was between sun set and sun rise i.e., midnight of 16th and 17th of December, 2018.

13. Ex.P-1 is the secret information and in that PW-7, the inspector of Police had made an endorsement, “ verify the information and take action”. Below his signature, PW-7 has mentioned the date as 16.12.2018. In his chief examination, PW-7 had categorically stated that he saw the written information only on the 17.12.2018 at 4.00 a.m when PW-1 submitted his special report, marked as Ex.P-4. In Ex.P-4, there is an endorsement made by PW-7 indicating that it was received by him on 17.12.2018 and he had registered the FIR in

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Crime.No.763/2018 u/s 8(c) r/w 22(c) of NDPS Act and took up the investigation.

Therefore, it is obviously clear that PW-1 had proceeded to the spot without written permission of his superior, however to cover up this, PW-7 had made the endorsement in Ex P-1 'verify the information and take action' subsequent to arrest and seizure, but affixed the date as 16.12.2018.

14. In Ex.P-1 information, there is nothing to indicate that the informant will identify the persons selling the contraband. There is nothing to indicate the location of the apartment on the bypass of Porur, however PW-1 and his team claim that they were able to identify the persons (A-1 to A-3) selling the contraband near Osian Chlorophil Apartment during the midnight with the help of the informant.

15. In this connection, the contention of the learned Counsel for the 3rd accused Arun Divakar that, the wife of A-3 gave a complaint on 16th December 2018 to the Maduravoil Police that her husband is missing since 14.12.2018. Though not much of significance, it creates a doubt why a resident of Avadi should be in the company of a Norwegian and a resident of Vannagaram during



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the midnight in a public road. Was their congregation at that place was to sell the contraband to the public at that time or in the course of transit they were intercepted or whether they were apprehended elsewhere and the prosecution to avoid the rigor of Sections 41 and 42 of the NDPS Act had altered the SOC are the question naturally raise.

16. As pointed out by the learned counsels for the appellants, the notice under Section 50 of the NDPS Act found to be a common notice to all the accused and the recovery mahazar does not indicate specifically from where the I-pad, cell phone, cash, driving license, weighing machine and the contraband were recovered. The recovery mahazar is a computer print out and none of the accused have signed in it to acknowledge the list of articles found in Ex.P-4 were recovered from their possession.

17. PW-1, had been extensively cross examined. He had deposed that he went with equipments like weighing machine, papers, polythene cover, button seal, etc. He fairly admits that this is his first NDPS case and he came to know about the details of the contraband only from the information given by the accused



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persons and not by testing it with any testing kit. Though he had deposed that he had in his possession button seal, nowhere he has deposed that he affixed the button seal on the covers containing contrabands recovered from the accused persons. Neither in the mahazar the facsimile of the button seal affixed for verification of the seal by the court and the lab which received the samples for testing. The possibility of tampering or manipulation or substitution not ruled out in this case, in view of the absence of seal and failure to explain the chain of custody of the contraband alleged to have seized from the accused.

18. Section 42(1) of the NDPS Act requires the person receiving the information to record it into writing. Section 42(2) of the Act mandates that such information received by the police station has to be forwarded to the immediate superior of the officer receiving the information within 72 hours. The Hon'ble Supreme Court, in ***DRI –vs- Mohd. Nesar Holia*** reported in ***2008(2) SCC 370***, after considering the decision in Balbir Singh case, observed that in case of search and seizure in public place or a moving vehicle, provisions appended in Sub Section (1) of Section 42 of the NDPS Act would not be attracted. In such case even sub- section (2) of Section 42 of the Act need not be complied with.



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However, even if statute confers such power upon an authority to make search and seizure of a person at all hours at all places, the same may be held to be ultra vires unless the restrictions imposed are reasonable ones. What would be reasonable restrictions would depend upon the nature of the statute and the extent of the right sort to be protected sought to be protected. Although a statutory power to make a search and seizure by itself may not offend the right of privacy, but in the case of this nature, atleast the Court can do it to see that such a right is not a necessarily infringed. Right to privacy deals with persons and not places.

19. Before concluding, it is appropriate to refer the following judgments, which buttress the view of this Court regarding the failure to record the reason to believe the information, illegality in causing common notice under Section 50 and failure to explain the chain of custody regarding the contraband seized.

(i) ***Mohinder Kumar –vs- State of Panaji, Goa*** : reported in (1998) 8 SCC 655:

“42(1) proviso, if the search is carried out between sunset and sunrise, he must record the grounds of his belief. Admittedly, he did not record the grounds of his belief at any stage of the investigation subsequent to his



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realising that the accused persons were in possession of charas. He also did not forward a copy of the grounds to his superior officer, as required by Section 42(2) of the Act because he had not made any record under the proviso to Section 42(1). He also did not adhere to the provisions of Section 50 of the Act in that he did not inform the person to be searched that if he would like to be taken to a Gazetted Officer or a Magistrate, a requirement which has been held to be mandatory. In Balbir Singh case, it has been further stated that the provisions of Sections 52 and 57 of the Act, which deal with the steps to be taken by the officer after making arrest or seizure are mandatory in character. In that view of the matter, the learned counsel for the State was not able to show for want of material on record, that the mandatory requirements pointed out above had been adhered to. The accused is, therefore, entitled to be acquitted.”

(ii) *Vijaysinh Chandubha Jadeja –vs- State of Gujarat*: reported in (2011)

1 SCC 609:

“29. In view of the foregoing discussion, we are of the firm opinion that the object with which the right under Section 50(1) of the NDPS Act, by way of a safeguard,



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has been conferred on the suspect viz, to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that insofar as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision.”

(iii) ***State of Rajasthan –vs- Parmanand and another***: reported in (2014) 5

SCC 345:

“17. In our opinion, a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would frustrate the very purport of Section



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50. Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most of the offences under the NDPS Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. We are, therefore, of the view that the accused must be individually informed that under Section 50(1) of the NDPS Act, he has a right to be searched before the nearest gazetted officer or before the nearest Magistrate.”

(iv) K.Ranjithkumar –vs- The Inspector of Police, NIBCID, Chennai :

Crl.A. 324/2012, judgment dated 04/01/2019

“29. In the case of State of Rajasthan v. Gurmail Singh, the Hon'ble Apex Court in Appeal (Crl.) No.1179



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of 1999, by Judgment dated 23.02.2005 has given the following finding:

"Sri Ganganagar in Sessions Case No.15 of 1995. The Respondent preferred an appeal before the High Court which was allowed by the High Court by its impugned judgment and order. We have perused the judgment of the High Court. Apart from other reasons recorded by the High Court, we find that the link evidence adduced by the prosecution was not at all satisfactory. In the first instance, though the seized articles are said to have been kept in the malkhana on 20th May, 1995, the Malkhana register was not produced to prove that it was so kept in the malkhana till it was taken over by PW-6 on June 5, 1995. We further find that no sample of the seal was sent along with the sample to Excise Laboratory, Jodhpur for the purpose of comparing with the seal appearing on the sample bottles. Therefore, there is no evidence to prove satisfactorily that the seals found were in fact the same seals as were put on the sample bottles immediately after seizure of the contraband. These loopholes in the prosecution case have led the High Court to acquit the respondent. We find no error in the judgment of the High Court. This appeal is, therefore, dismissed.



Moreover when the remand Magistrate passes an order stating that, the property be produced before the trial Court, it should be treated only as an immediate production of the same, which means at least on the next working day. In this context, the prosecution always make a theory stating that, only on receipt of the case documents by the trial Court, the contraband can be produced through Form No.95 before the trial Court, for which there is no time limit prescribed.

38. This lacuna will always create a suspicion in the minds of the Court that, there is absolutely no fool proof system available to the prosecution to keep the contraband intact from the date of seizure till the date of production before the trial Court, assuming that it had been kept in between at the safety room or property room allegedly available in the police station itself.

39. In this context, it is further to be noted that, in the absence of any register to note down the date and time of keeping the contraband in the safe custody of the property room attached with the police station concerned and also in the absence of proof to show that, the property room attached with the police station is safely guarded round the clock by separate guard, the system claimed as fool proof one, by the prosecution, cannot be accepted.



20. In the light of the above discussion, this Court concludes that in this case the prosecution fail for the reasons stated under:

a) It is not proved that the based on the vague information Ex.P-1, the accused were apprehended with the alleged contraband marked as M.O. I to M.O VII. The manipulation and anti- date in Ex P-1 by PW-7, creates grave doubt about its genuineness.

b) The presence of crime Number in the packets containing the contraband alleged to have been sealed and labelled at the spot at about 00.15 hrs of 17.12.2018 nearly 4 hours prior to registration of the FIR not explained by the prosecution. This pave way to the suspicion that the records were prepared elsewhere and not in the place and manner spoken by the prosecution.

c) The recovery mahazar does not contain the signature of the accused to prove that they were recovered from the possession of the accused. The recovery mahazar does not have the facsimile of the seal



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alleged to have affixed by PW-1. From where each of these material objects kept and how it was recovered are facts not mentioned in the recovery mahazar Ex.P-4.

d) Admittedly, the recovery was after the notice under Section 50 of the NDPS Act, at least few of the materials such as cell phones, cash and driving license alleged to have been recovered must have been through search of the persons. Common notice to all the accused is bad in law and held by Supreme court such common joint notice will vitiate the trial being a violation of mandatory condition.

e) The contraband seized on 17.12.2018 reached the court only on 24/12/2018 and not on the immediate working day. The chain of custody of the contraband not explained. IO who had gone on leave after the registration of the case had not produced the document to show with whom the custody of the contraband was kept between 17.12.2018 to 24.12.2018.



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21. For the reasons stated above, the trial Court judgment is set aside.

The Criminal Appeals are allowed. The appellants are set at liberty. Fine amount paid, if any by the accused shall be refunded to them. Bail bond if any executed by the accused shall stand discharged. Consequently, connected MP is closed.

18.05.2023

Index : Yes

*Speaking order/Non-speaking Order
rpl*

To

1.The Special Judge, I Additional Special Court for Exclusive Trial of Cases under NDPS Act, Chennai.

2.The Inspector of Police,
T-15, SRMC Police Station,
Porur, Chennai.

3.The Public Prosecutor,
High Court of Madras,
Chennai.



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Dr.G.JAYACHANDRAN.J.,

rpl

Delivery Judgment made in
Criminal Appeal Nos.434 & 457/2020 and 1174/2022
and Crl.M.P.No.17280/2022

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