



Crl.A.(MD).Nos.492 & 500 of 2022 and 347 & 577 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on : 27.09.2023

Pronounced on : 03.10.2023

CORAM

THE HONOURABLE MR.JUSTICE K.K.RAMAKRISHNAN

Crl.A.(MD).Nos.492 & 500 of 2022 and 347 & 577 of 2023

and

Crl.M.P(MD)Nos.9389 of 2022 and 6730 of 2023

Crl.A(MD)No.492 of 2022:

Mareeswaran

.. Appellant /Accused No.3

Vs.

The State of Tamil Nadu,
represented by
The Inspector of Police,
Karimedu Police Station,
Madurai.

(Crime No.1403 of 2020)

.. Respondent / Complainant

PRAYER: Criminal Appeal filed under Section 374 of Criminal Procedure Code, to call for the records relating to the judgment dated 22.07.2022 in C.C.No.267 of 2020 on the file of the learned II-Additional Special Court for EC and NDPS Act cases, Madurai and set aside the same.



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For Appellant : Mr.M.Jagadeesh Pandian

For Respondent : Mr.T.Senthil Kumar
Additional Public Prosecutor

Crl.A(MD)No.500 of 2022:

Balaji .. Appellant/Accused No.6

Vs.

The State of Tamil Nadu,
represented by
The Inspector of Police,
Karimedu Police Station,
Madurai.
(Crime No.1403 of 2020)

.. Respondent / Complainant

PRAYER: Criminal Appeal filed under Section 374 of Criminal Procedure Code, to call for the records relating to the judgment dated 22.07.2022 in C.C.No.267 of 2020 on the file of the Learned II-Additional Special Court for EC and NDPS Act cases, Madurai and set aside the same.

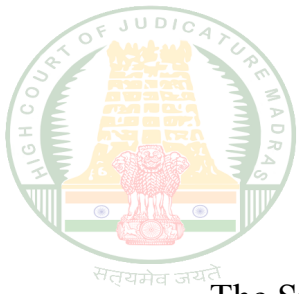
For Appellant : Mr.M.Jagadeesh Pandian

For Respondent : Mr.T.Senthil Kumar
Additional Public Prosecutor

Crl.A(MD)No.347 of 2023:

Kalimuthu @ Vellaikali .. Appellant/Accused No.1

Vs.



Crl.A.(MD).Nos.492 & 500 of 2022 and 347 &577 of 2023

The State of Tamil Nadu,
represented by
The Inspector of Police,
Karimedu Police Station,
Madurai City.
(Crime No.1403 of 2020)

.. Respondent / Complainant

PRAYER: Criminal Appeal filed under Section 374 of Criminal Procedure Code, to call for the records relating to the judgment and conviction dated 22.07.2022 in C.C.No.267 of 2020 on the file of the Learned II-Additional Special Court for EC and NDPS Act cases, Madurai and set aside the same.

For Appellant : Mr.R.Pon Karthikeyan

For Respondent : Mr.T.Senthil Kumar
Additional Public Prosecutor

Crl.A(MD)No.577 of 2023:

1.Karthick @ Ahori Karthick

2.Mari Muthu @ Dory Mari .. Appellant/Accused Nos.4 &5

Vs.

The State of Tamil Nadu,
represented by
The Inspector of Police,
Karimedu Police Station,
Madurai City.
(Crime No.1403 of 2020)

.. Respondent / Complainant



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PRAYER: Criminal Appeal filed under Section 374 of Criminal Procedure Code, to call for the records relating to the judgment and conviction dated 22.07.2022 in C.C.No.267 of 2020 on the file of the Learned II-Additional Special Court for EC and NDPS Act cases, Madurai and set aside the conviction and sentence imposed on the appellants.

For Appellant : Mr.J.Vijayaraja

For Respondent : Mr.T.Senthil Kumar
Additional Public Prosecutor

COMMON JUDGEMENT

Since these criminal appeals are arising out of the same crime, these appeals are taken up for hearing together and disposed of by way of common judgment.

The appellants are said to have committed the offence under Sections 8(c) r/w 20(b)(ii)(C), 25 and 29(1) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act') for the alleged possession of 25 kg of Ganja. The II Additional Special Court for NDPS Act Cases, Madurai convicted the appellants in



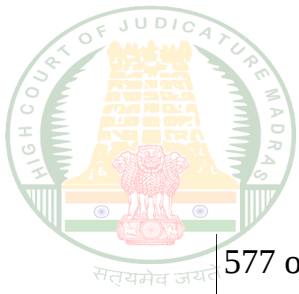
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Spl.C.C.No.267 of 2020 under Section 8(c) r/w 20(b)(ii)(C) of NDPS Act

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by its judgment dated 22.07.2022 and sentenced them to undergo 10 years Rigorous Imprisonment and pay a fine of Rs.1,00,000/- each, in default to undergo 1 year Simple Imprisonment each for the offence under Sections 8(c) r/w 20(b)(ii)(C) of the NDPS Act. Challenging the same, the appellants filed these criminal appeals.

<i>Crl.A. (MD)No.</i>	<i>C.C.No.</i>	<i>Rank of the accused</i>	<i>Conviction under Section</i>	<i>Sentence</i>	<i>Fine amount with default sentence</i>
499 of 2022	267 of 2020	Accused No-3	8(c) r/w 20(b)(ii)(C) of NDPS Act	10years Rigorous Imprisonment	Rs.1,00,000/- each, in default to undergo 1 year Simple Imprisonment
347 of 2023	267 of 2020	Accused No-1	8(c) r/w 20(b)(ii)(C) of NDPS Act	10years Rigorous Imprisonment	Rs1,00,000/- each, in default to undergo 1 year Simple Imprisonment
500 of 2022	267 of 2020	Accused No-6	8(c) r/w 20(b)(ii)(C) of NDPS Act	10years Rigorous Imprisonment	Rs1,00,000/- each, in default to undergo 1 year Simple Imprisonment



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577 of 2023	267 of 2020	Accused Nos-4 & 5	8(c) r/w 20(b)(ii)(C) of NDPS Act	10years Rigorous Imprisonment	Rs1,00,000/- each, in default to undergo 1 year Simple Imprisonment
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Brief facts necessary for disposal of this appeal, are as follows:

2. According to the prosecution, the appellants have conspired together to procure Ganja from Tenkasi District and transport the same in order to sell at Madurai. In order to execute the same, they had planned to transport the Ganja in the Maruti Alto Car registered in the name of the first accused's wife. The informer informed the same to the respondent police. P.W.7/the Sub Inspector of Police attached with the respondent police received the secret information on 20.09.2020, at about 14:00 hrs. Thereafter P.W.7 recorded the same, informed to his superior and proceeded with his team to the occurrence place after complying the procedure under Section 42 of the NDPS Act. When P.W.7 and his team were waiting along with the informer at Madurai – Theni main road near Mudakkusalai junction, the informer identified the Alto car in which the appellants were travelling with 25 kgs of Ganja. Thereafter, when P.W.7 and his team intercepted the vehicle at 15:30 hrs, the driver and the five other persons started to run in different directions. P.W.7 and his team

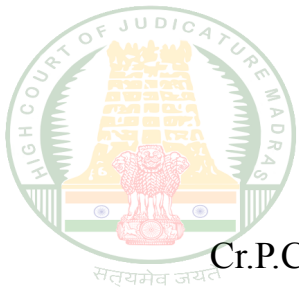


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could nab only four persons (A1, A2, A3 and A6) and the remaining 2

persons (A4 and A5) escaped from the scene of occurrence. P.W.7 after complying the procedures under Section 50 of the NDPS Act, found 2 bags with the contraband weighing of 25 kgs (one bag contains 10kgs of Ganja and another bag contains 15 kgs of Ganja), in the boot of the car. From each bag, P.W.7 took sample and prepared the seizure mahazar with photograph of the car. After that, he arrested the accused and brought the accused to the station and he registered a case in Crime No.1403 of 2020 for the offences under Sections 8(c) r/w 20(b)(ii)(C), 25 and 29(1) of the NDPS Act and submitted a detailed report to P.W.8-Inspector of Police under Section 57 of the NDPS Act. During the course of the examination, the arrested accused disclosed that the absconding accused are A4-Karthik @ Akori Karthik and A5-Marimuthu @ Tori Mari. P.W.8 arrested the said accused on 23.10.2020 on PT warrant. Thereafter, he completed the investigation and filed the final report before the Special Court. A5 was shown as absconding accused in the final report.

3. The learned trial Judge had taken cognizance of the case in C.C.No.267 of 2020. Thereafter, he split up the case against the absconding accused(A5) and assigned a separate number ie., Spl.C.C.No. 114 of 2022. The learned trial Judge served the copies under Section 207



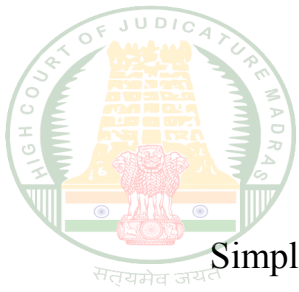
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Cr.P.C., to the accused Nos.1, 2, 3, 4 & 6 and framed the necessary

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charges and commenced the trial in Spl.C.C.No.267 of 2020. The learned trial Judge had examined P.W.1 to P.W.8 and the exhibited documents. At that stage, A5 was arrested in another case and produced before the trial Court under the PT Warrant. On 20.04.2022, the prosecution filed CrI.M.P.No.373 of 2022, seeking to conduct joint trial. A1 and A5 had no objection and hence, the learned trial Judge allowed the petition and served the copies under Section 207 Cr.P.C., and framed the charges and questioned A5. A5 pleaded not guilty and claimed to be tried.

4. The learned counsel appearing for A5 filed a memo stating that he adopted the chief-examination of all the witnesses and lengthy cross examination of all the accused. Therefore, the learned trial Judge continued the trial, from the stage of questioning under Section 313 Cr.P.C., against A5. After the 313 Cr.P.C questioning, the accused neither examined any witness nor any of the accused deposed before the Court. But they marked the Ex.D1 to D5 through the investigating Officer/P.W. 8. The Special Court, after considering the evidence of PW1 to PW8, Ex.P1 to Ex.P12, M.O1 to M.O.7 and Ex.D1 to Ex.D5, convicted the accused and sentenced them to undergo 10 years Rigorous Imprisonment and to pay a fine of Rs.1,00,000/- each, in default, to undergo 1 year



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Simple Imprisonment each, for the offence under Sections 8(c) r/w 20(b)

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(ii)(C) of the NDPS Act and acquitted the appellants under Sections 25 and 29 of the NDPS Act. The same was challenged by the appellants by filing the appeal before this Court.

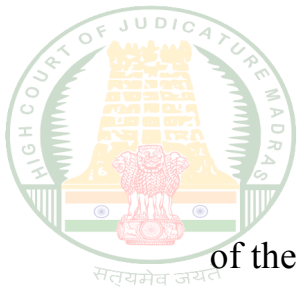
5. The learned counsel appearing for the appellants made the following submission:

5.1. The trial Court failed to consider the substantial non-compliance Section 50 of the NDPS Act.

5.2. The trial Court failed to consider the factual contradictions and the discrepancies regarding the compliance of Section 42 of the NDPS Act, preparation of seizure mahazar, injury on the accused No.1 and the place of occurrence.

5.3. The trial Court failed to consider the explanation given by the accused No.1 under Section 313 Cr.P.C in proper manner i.e, he was arrested at Courtallam and a false case was registered which has been amply proved.

5.4. The trial Court simply overlooked the fact that no explanation was given for the 15 days delay in producing the contraband before the concerned Court and failure of the prosecution to prove the safe custody



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of the contraband during the said period.

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5.5. The trial Court failed to consider the fact that there is a delay in marking of report under Section 57 of the NDPS Act, namely, after 2 years, and the same would vitiate the entire prosecution case.

5.6. The trial Court failed to consider the non-examination of the independent witnesses which would vitiate the prosecution case of recovery of contraband and arrest of the accused.

5.7. The jurisdiction exercised by the learned trial Judge in not recording the evidence afresh after the arrest of A5 is in contravention of the Section 273 Cr.P.C., and Rule 32 of Madras High Court Criminal Rules of Practice.

5.8. The trial Court failed to consider that the investigating agency prepared all the documents sitting at the Police Station and hence failed to prove foundational facts of recovery, arrest and hence presumption under Section 54 and 35 the NDPS Act never operates.

5.9. The trial Court failed to consider the fact that except the confession of the accused No.1, there was no other material to convict accused No.5 and hence the ratio laid down by the Hon'ble Apex Court in ***Tofan Singh*** case is applicable and the same was not considered.



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5.10. The learned trial Judge failed to consider the discrepancies relating to the documents furnished to the appellant under Section 207 Cr.P.C., and the documents furnished in the detention proceedings and the documents marked in the Court.

5.11. The learned trial judge committed error in considering the alleged bad antecedents of the appellants in deciding their culpability in the present case and the same is against law.

5.12. The trial court failed to consider the non-compliance of Section 52A of the NDPS Act.

5.13. To substantiate the above submissions, they relied on the following precedents.

1.State of Rajasthan vs. Paramanand and another – 2014 (5) SCC 345.

2.K.Kumaresan vs. State Inspector of Police, SRMC Police Station- 2023 (1) LW(Crl.) 904.

3.Danraj vs. State Inspector of Police, K6,T.P. Chatram Police Station – 2019 (1) MWN(Cr.) 524.

4.Tamilvel and Others vs. State Inspector of Police, K6,T.P. Chatram Police Station – 2018 (1) LW(Crl.) 353.

5.Babu and another vs. State Inspector of Police, Theni – 2022 (1) MLJ(Crl.) 467.



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6.State of Punjab vs. Baldev Singh – 1999 (6) SCC 172.

7.Ram Lakhan Singh and others vs. State of Uttar Pradesh – 1977 (3) SCC 268.

8.Narender Kumar vs. State (NCT of Delhi) 2012 (7) SCC 171.

9.Vijaysinh Chandubha jadeja vs. State of Gujarat – 2011 (1) SCC 609.

6. The learned Additional Public Prosecutor made the following submissions:-

6.1. Recovery was made in the car and hence Section 50 of the NDPS Act is not applicable and he placed reliance on the various judgments of the Hon'ble Supreme Court.

6.2. P.W.7 received secret information and he duly communicated the same to PW8, obtained permission and conducted the raid, arrested the accused and recovered the contraband and produced the same before PW8 on the date of the occurrence itself along with report and the same was proved through the Exs.P1, P2, P3, P4, P8, P10, P11. Therefore, there is strict compliance of Sections 42, 52, 55 & 57 of the NDPS Act. Hence, the submissions of the learned counsel for the appellants have to be rejected.



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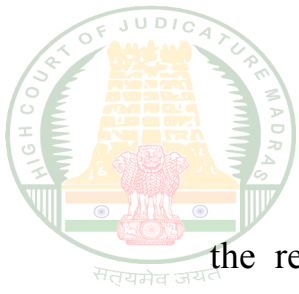
6.3. The discrepancies regarding the existence of two FIRs and

recovery mahazar cannot be accepted on the ground that no contra documents were marked.

6.4. The contradictory statement between PW.7 and PW.8 relating to the injury on the accused No.1 is misunderstood by the learned counsel for the appellants and the same was properly explained by the prosecution. i.e, PW.7 produced A1 before PW.8 along with contraband in the police station and PW.8 sent the accused No.1 to obtain the medical examination and found how the injury had been sustained. In the said circumstances, the same is not fatal.

6.5. PW.8 produced the arrested accused along with contraband and samples under Form 91 on date of occurrence itself before the learned Judicial Magistrate and the learned Judicial Magistrate verified the same and remanded the accused and directed to produce the contraband before the Special Court. In said circumstance, delayed production before the Special Court is no way affected the prosecution case regarding the recovery of contraband on the basis of the cogent and trustworthy evidence of PW.1, PW.2 & PW.7.

6.6. When the evidence of PW.1, PW.2 & PW.7 are cogent and trustworthy, non examination of the independent witnesses do not affect



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the recovery and arrest of the accused and he relied on the various judgments of the Hon'ble Supreme Court.

6.7. The appellants never took the plea under Section 52A of the NDPS Act before the trial Court and the prosecution took the samples at the occurrence place, packed and sealed them and the remaining contraband was also packed and sealed and all were produced before the trial Court and marked as material objects. Therefore, precedents relied on by the learned counsel for the appellants are misconceived.

6.8. A5 was an absconding accused. He was produced under the P.T.Warrant. Thereafter joint trial was ordered. The learned counsel for A5 filed a memo stating that he adopted the chief examination and cross examination of the remaining accused. Hence, there is no infraction of Rule 32 of Madras High Court Criminal Rules of Practice and Section 273 Cr.P.C. The learned Judge acted as per Sections 299 & 317 Cr.P.C. Therefore, no infirmities in the judgment.

6.9. Prosecution case is that all the accused travelled in the car along with contraband and the same was recovered and hence they are in conscious possession of the contraband and therefore, principles of **“Tofan Singh Case”** cannot be applied. Further, through the evidence of PW.1, PW.2 & PW.7 conscious possession of the contraband is proved



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beyond reasonable doubt and hence Sections 54 and 35 of the NDPS Act

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comes into operation. There was no contra evidence produced on the side of the appellants to dispel the presumption. Only explanation on behalf of A1 and A5 under Section 313 Cr.P.C., is that A1 was arrested at courtallam and a false case was foisted against him and A5 was brought from some other place and a false case was foisted. The same was contradicted by the statements made at the time of remand before the learned remand Magistrate. Therefore, they gave false explanation and the same may act as additional link to prove the charge against the appellants.

6.10. The submission of the learned counsel for appellants that the documents furnished under Section 207 Cr.P.C., detention proceedings and documents marked are different, is not legally correct when the alleged contra documents were not marked to contradict.

6.11. The learned Additional Public Prosecutor finally submitted that A1 has 23 previous cases and other accused also have previous antecedents before and after occurrence and he seeks for the confirmation of sentence.

6.12. To substantiate the above submission, the learned Additional Public Prosecutor relied the following precedents:-



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1. Madan Lal v. State of H.P. reported in (2003) 7 SCC 465.

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2. Gurmail Chand v. State of Punjab reported in (2021) 14 SCC 334.

3. *Khet Singh v. Union of India*, reported in (2002) 4 SCC .

4. *Latesh Vs. State of Maharashtra* reported in 2018(3) SCC 66.

**5. *Kallu Khan v. State of Rajasthan*, reported in 2021 SCC
*OnLine SC 1223.***

**6. *State of Punjab v. Makhan Chand*, reported in (2004) 3
SCC 453.**

**7. *Motiram Padel Joshi Vs. State of Maharashtra* reported in
2018 (9) SCC 429.**

**8. *Munna Pandey Vs. State of Bihar* reported in 2023 SCC
Online Sc 1103.**

**9. *State of Punjab Vs. Baljinder Singh* reported in 2019 (10)
SCC 473.**

**10. *Ragesh Dhiman Vs. State of Himachal Pradesh* reported in
2020 10 SCC 740.**



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6.13. The questions to be decided in these appeal are whether the

prosecution proved the case against the appellants for the charge under Sections 8(c) r/w 20(b)(ii)(C) of the NDPS Act beyond reasonable doubt? and whether the judgment of the Court below is sustainable?

7. Proof of Recovery of Contraband:

7.1. P.W-7 received secret information on 20.09.2020 at 14.00 p.m about the transporation of the Ganja by the appellants in the Alto Car bearing Registration No.TN 81 V 7674 from Tenkasi to Madurai via Theni-Madurai route and they were expected to reach the Madurai Mudukkusalai Junction around 14.30 hrs. He recorded the same under Ex.P8 and obtained the permission from PW.8 and proceeded towards the occurrence place with a team and reached the spot at 14.45 p.m and was waiting for the arival of the car.

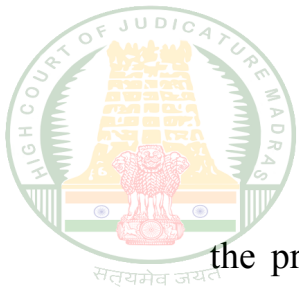
7.2. The informer at 15.30 hrs., identified the car to P.W.7 and his team. Then, while PW-7 was intercepting the said car, all the appellants started to escape and run in different directions. The team could nab four appellants only namely, A1, A2, A3, A6 and the remaining A4 & A5 escaped from the scene of occurrence. PW-7 informed to A1, A2, A3 and A6 about the right of examination before the Gazatted Officer/Judicial



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Magistrate. They gave consent to be searched by P.W.7 himself. From the

boot of the car, two bags were recovered. In one bag, 10kgs contraband Ganja was found and in the other bag 15 kgs contraband Ganja was found. Totally 25 Kgs of Ganja was found in the car. Hence, PW-7 arrested the accused No.1, 2, 3 & 6 at 16.00 hrs. A1 gave a voluntary confession around 16.00 to 17.30 hrs and disclosed about the illegal transporation of Ganja from Tenkasi to Madurai and also the name of the absconded accused A4 and A5. Thereafter, P.W.7, took the samples in S1, S2, S3 & S4 and packed them with seal. He also packed the remaining contraband and sealed in P1 & P2 and the car also was seized. He brought the same along with A1, A2, A3 and A6 to the police station and registered the case in Crime No.1403 of 2020 under FIR/Ex.P10. The said version of the PW.7 was corroborated with PW.1 & PW.2 without any material discrepancies and contradictions. Then he prepared the report under Section 57 of the NDPS Act and sent it to P.W8. PW8 remanded A6, A1, A2 and A3. The recovered contraband was produced before the learned Judicial Magistrate at the time of remand on the date occurrence itself. The learned Judicial Magistrate verified the same and directed to produce the same before the Principal Special Court (for NDPS Cases), Madurai. The expert opinion was obtained and the expert also affirmed



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the presence of “cannabis” in the sample. The prosecution marked the

samples as M.O.2, M.O.3, M.O.5 and M.O.6. The car was marked as

M.O.1 and the remaining contraband were marked as M.O.4 and M.O.7.

Hence, the physical evidence of the entire contraband and the samples

are duly produced before the trial Court and the same was marked

without any objections on the side of the appellants. The evidence of

P.W.1, P.W.2 & P.W.7 is cogent and there is no reason to

disbelieve their version regarding the search, recovery and arrest.

Further, this Court does not find any infirmities in their evidence.

Therefore, the prosecution proved the possession and recovery of

contraband from the appellants in the car, in which they were travelling,

beyond reasonable doubt. Hence, this Court concurs with the finding of

the learned Trial Judge who has given elaborate reasoning that the

appellants transported Ganja in the car (M.O-1).

8. Conscious possession:

8.1. The Appellants travelled in the private car, belonging to

the wife of the first accused, with the contraband. At the time of

interception, the appellants tried to flee away from the occurrence place

abandoning the car with the contraband. Four of them were nabbed and



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contraband was recovered and same was deposited by PW-1, PW-2 and

PW-7 cogently and convincingly. From the sequence of the events narrated above, it is clear that the prosecution has proved conscious possession. The conduct of all the accused attempting to flee away from the occurrence place, abandoning the car with contraband is a relevant fact to presume their active participation of transportation of the contraband and possession of the contraband. A4 and A5 absconded from the place. The abscondance normally is not a material circumstance to prove the fact, but in this case it is relevant and their conduct is admissible under Section 8 of the Indian Evidence Act, to prove their conscious possession of the contraband. There was no explanation under Section 313 Cr.P.C., regarding their abscondance and also the attempt to escape from the scene of occurrence. In the overall circumstances, the prosecution clearly proved the conscious possession of the contraband. Hence, the culpable mental state has to be presumed. The

accused persons have not produced any documents to prove the contrary.

8.2. Under Section 35 of the NDPS Act, the burden is upon the accused to rebut the presumption of existence of the culpable mental state and under Section 35 of the NDPS Act, the culpable mental state



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includes intention, motive, knowledge of fact and belief, or reason to believe a fact. The fact is said to be proved only when the Court believes it to exist beyond reasonable doubt and not merely when its existence is established by prepondance of prabability. Section 35 of the NDPS Act reads as follows:

“Section 35 of the NDPS Act:

“(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation.-- In this section "culpable mental state" includes intention motive, knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section , a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.

8.3. In this case, the appellants travelled in the car along with the contraband. A2, A3, A4 and A6 never furnished any explanation when the incriminating circumstances were put to them and they were questioned under Section 313 Cr.P.C. A1 and A5 took a false plea as if



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they were arrested in some other place. To prove the same, no evidence was adduced. In such circumstances, there is no proof on the side of the accused that A2 to A6 had no knowledge about the concealment of the contraband in the boot of the car. They have sufficient knowledge about the gunny bags with the contraband. Hence, the prosecution has proved the conscious possession of the contraband by all the accused. Therefore, submission on behalf of the accused on the basis of **Tofan Singh's case**, is misconceived and the same deserves to be rejected.

8.4. In this aspect, it is relevant to note the principle laid down by the Hon'ble Supreme Court in **2013 (14) SCC 420 [Gian Chand Vs. State of Haryana]**:

“19. From the conjoint reading of the provisions of Sections 35 and 54 of the Act, it becomes clear that if the accused is found to be in possession of the contraband article, he is presumed to have committed the offence under the relevant provisions of the Act until the contrary is proved. According to Section 35 of the Act, the court shall presume the existence of mental state for the commission of an offence and it is for the accused to prove otherwise.

20. Thus, in view of the above, it is a settled legal proposition that once possession of the contraband articles is established, the burden shifts on the accused to establish that he had no knowledge of the same.

21. Additionally, it can also be held that once the



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possession of the contraband material with the accused is established, the accused has to establish how he came to be in possession of the same as it is within his special knowledge and therefore, the case falls within the ambit of the provisions of Section 106 of the Evidence Act, 1872 (hereinafter referred to as “the 1872 Act”).”

8.5. The Hon'ble Supreme Court further held as under in **Madan**

Lal v. State of H.P., (2003) 7 SCC 465.

“26. Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles.

27. ... It has not been shown by the accused-appellants that the possession was not conscious in the logical background of Sections 35 and 54 of the Act.”

19. From the conjoint reading of the provisions of Sections 35 and 54 of the Act, it becomes clear that if the accused is found to be in possession of the contraband article, he is presumed to have committed the offence under the relevant provisions of the Act until the contrary is proved. According to Section 35 of the Act, the court shall presume the existence of mental state for the commission of an offence and it is for the accused to prove otherwise.”

9. Compliance of Section 57 of the NDPS Act:



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9.1. The learned counsel for the appellants submitted that PW7

was examined on 30.03.2022 and on the same day, A1 and A2 cross-examined and due to the paucity of time, the same was adjourned for the cross-examination of A3, A5 & A6. On 01.04.2022, A3, A4 & A6 were cross-examined. On the same day, after completion of the cross-examination, the prosecution re-examined PW7 and marked Ex.P11, namely, the detailed report prepared under Section 57 of the NDPS Act, dated 20.09.2020. After marking the same, he specifically deposed that on the same day, he entrusted Ex.P11 to the Inspector of Police. All the accused were cross-examined on the same day. Their specific case is concerned, the said Ex.P11 is manipulated after the occurrence and hence, the same was marked belatedly. Based on the same, the learned Counsel for the appellant submitted that Section 57 report is doubtful and the same was not prepared as projected by the prosecution. The said submission is not accepted for the reason that in the document-Ex.P11, it is clearly stated that the Inspector of Police received the same on 20.09.2020 at 20.00 hours. In the said circumstances, the delay in marking the said document does not in anyway affect the prosecution case of recovery of the contraband from the appellant on the basis of the reliable evidence of PW.1, PW.2 and PW.7.



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9.2. Even otherwise as per the judgment of the Hon'ble Supreme Court, non-compliance of the Section 57 of the NDPS Act does not vitiate the prosecution case, and the same was fortified by the following judgment reported in **(2021) 14 SCC 334** in the case of **Gurmail Chand v. State of Punjab**

*10. Insofar as submissions on the basis of Section 57 of the NDPS Act are concerned, it has been held that the said provision is not to be interpreted to mean that in event the report is not sent within two days, the entire proceeding shall be vitiated. “The provision has been held to be directory and to be complied with but merely not sending the report within the said period cannot have such consequence as to vitiate the entire proceeding.” A three-Judge Bench of this Court in *Sajan Abraham v. State of Kerala* [*Sajan Abraham v. State of Kerala*, (2001) 6 SCC 692 : 2001 SCC (Cri) 1217] has held that “non-compliance of Section 57 would not vitiate the prosecution case.” In para 12 the following was laid down : (SCC pp. 696-97)*

12. The last submission for the appellant is, there is non-compliance with Section 57 of the Act. He submits under it, an obligation is cast on the



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prosecution while making an arrest or seizure, the officer should make full report of all particulars of such arrest or seizure and send it to his immediate superior officer within 48 hours of such arrest or seizure. The submission is, this has not been done. Hence, the entire case is vitiates. It is true that the communication to the immediate superior has not been made in the form of a report, but we find, which is also recorded by the High Court, that PW 5 has sent copies of FIR and other documents to his superior officer, which is not in dispute. Ext. P-9 shows that the copies of the FIR along with other records regarding the arrest of the appellant and seizure of the contraband articles were sent by PW 5 to his superior officer immediately after registering the said case. So, all the necessary information to be submitted in a report was sent. This constitutes substantial compliance and mere absence of any such report cannot be said to have prejudiced the accused. This section is not mandatory in nature. When substantial compliance has been made, as in the present case, it would not vitiate the prosecution case. In the present case, we find PW 5 has sent all the relevant material to his superior officer immediately. Thus, we do not find any violation of Section 57 of the Act.”



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9.3. Hence, any non-compliance of the Section 57, 52 & 55 of the NDPS Act does not affect the prosecution case, when the entire contraband and the samples are all produced before the Court along with the accused on the date of the occurrence itself.

9.4. PW8 is the immediate Superior of PW7. PW8 received the custody of the arrested accused and the sample along with the remaining contraband on the date of occurrence itself. He only produced the remaining contraband and the sample before the learned Judicial Magistrate at the time of remand of the accused. The same was also received by the learned Judicial Magistrate on the date of occurrence itself. As per Section 57 of the NDPS Act, a report is to be submitted within 48 hours to the immediate superior. It is not a requirement of the Act that the said report should reach the Court immediately. The delay in reaching of the document to the Court is not fatal to the prosecution when the contraband and the sample were produced on the same day. Further, the information was furnished to PW8 within 48 hours. In Ex.P11, there was an endorsement that he received the same on the same day. In this regard, there was a rambling cross-examination, but no



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favourable answer doubting the prosecution case was elicited. In the said circumstances, the said contention of the non-compliance of Section 57 of the NDPS Act is not accepted.

10. Plea of non-compliance of Section 52A of the NDPS Act:

10.1. It is not unusual on the part of the learned counsel for appellants to rely the recent decisions of the Hon'ble Supreme Court to suit their convenience without pointing any decision on law and also without pointing any factual foundation of the grounds of acquittal rendered by the following judgments of the Hon'ble Supreme Court. (i) *2023 Live Law (SC) 570* in the case of *Simarnjit Singh Vs. State of Punjab*, (ii) *2023 Live Law (SC) 549* in the case of *Mangilal Vs. The state of Madhya Pradesh*,

10.2. In the relied judgments of Hon'ble Supreme Court, it is found that the recovered contraband was not produced. Therefore, the Hon'ble Supreme Court acquitted the appellant considering other remaining circumstances also. In this case, the recovery was properly proved. In this case, contraband was produced before the remanding



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Magistrate during the remand initially, thereafter, it was produced before

the Special Court for forwarding the sample to the scientific officer for chemical examination. The scientific officer confirms the receipt of the samples from the Court with seals intact. The report also confirmed the presence of the “cannabis” in the samples and the remaining contraband was produced during the trial and marked as physical evidence. The same was identified and confirmed by P.W.1, P.W.2 and P.W.7. Thus, taking of sample in the occurrence place, production of the remaining contraband along with samples before the Court at the time of the remand and producing the same before the trial Court, during the trial and marking as material objects leaves no room for suspicion. Thus, guidelines of Standing Order 1/89 has been followed in this case. When there is no plea of destruction or disposal, the question of compliance Section 52A of the NDPS Act does not arise.

10.3. Further, the Hon'ble Supreme Court in the case of ***Khet Singh v. Union of India***, reported in (2002) 4 SCC has held as follows:

“10. The instructions issued by the Narcotics Control Bureau, New Delhi are to be followed by the officer-in-



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charge of the investigation of the crimes coming within the purview of the NDPS Act, even though these instructions do not have the force of law. They are intended to guide the officers and to see that a fair procedure is adopted by the officer-in-charge of the investigation. It is true that when a contraband article is seized during investigation or search, a seizure mahazar should be prepared at the spot in accordance with law. There may, however, be circumstances in which it would not have been possible for the officer to prepare the mahazar at the spot, as it may be a chance recovery and the officer may not have the facility to prepare a seizure mahazar at the spot itself. If the seizure is effected at the place where there are no witnesses and there is no facility for weighing the contraband article or other requisite facilities are lacking, the officer can prepare the seizure mahazar at a later stage as and when the facilities are available, provided there are justifiable and reasonable grounds to do so. In that event, where the seizure mahazar is prepared at a later stage, the officer should indicate his reasons as to why he had not prepared the mahazar at the spot of recovery. If there is any inordinate delay in preparing the seizure mahazar, that may give an opportunity to tamper with the contraband article allegedly seized from the accused. There may also be allegations that the article seized was by itself substituted and some other items were planted



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to falsely implicate the accused. To avoid these suspicious circumstances and to have a fair procedure in respect of search and seizure, it is always desirable to prepare the seizure mahazar at the spot itself from where the contraband articles were taken into custody.

16. Law on the point is very clear that even if there is any sort of procedural illegality in conducting the search and seizure, the evidence collected thereby will not become inadmissible and the court would consider all the circumstances and find out whether any serious prejudice had been caused to the accused. If the search and seizure was in complete defiance of the law and procedure and there was any possibility of the evidence collected likely to have been tampered with or interpolated during the course of such search or seizure, then, it could be said that the evidence is not liable to be admissible in evidence.”

10.4. In the case of ***State of Punjab v. Makhan Chand***, reported in **(2004) 3 SCC 453** it has been held as follows:

“9. Learned counsel for the respondent-accused relied on certain standing orders and standing instructions issued by the Central Government under Section 52-A(1) which require a particular procedure to be followed for drawing of samples and contended that since this procedure had not been followed, the entire trial was vitiated.



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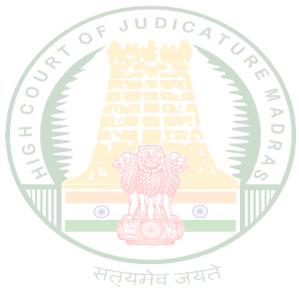


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10. This contention too has no substance for two reasons. Firstly, Section 52-A, as the marginal note indicates, deals with “disposal of seized narcotic drugs and psychotropic substances”. Under sub-section (1), the Central Government, by a notification in the Official Gazette, is empowered to specify certain narcotic drugs or psychotropic substances, having regard to the hazardous nature, vulnerability to theft, substitution, constraints of proper storage space and such other relevant considerations, so that even if they are material objects seized in a criminal case, they could be disposed of after following the procedure prescribed in sub-sections (2) and (3). If the procedure prescribed in sub-sections (2) and (3) of Section 52-A is complied with and upon an application, the Magistrate issues the certificate contemplated by sub-section (2), then sub-section (4) provides that, notwithstanding anything to the contrary contained in the Indian Evidence Act, 1872 or the Code of Criminal Procedure, 1973, such inventory, photographs of narcotic drugs or substances and any list of samples drawn under sub-section (2) of Section 52-A as certified by the Magistrate, would be treated as primary evidence in respect of the offence. Therefore, Section 52-A(1) does not empower the Central Government to lay down the procedure for search of an accused, but only deals with the disposal of seized narcotic drugs and psychotropic substances.”

10.5. In the case of ***Kallu Khan v. State of Rajasthan***, reported in ***2021 SCC OnLine SC 1223*** it has been held as follows:

*“13. At this state, the argument advanced by the appellant regarding non-production of contraband in the court due to which benefit of doubt ought to be given to accused, is required to be adverted to. In the case of *State of Rajasthan v. Sahi Ram*, (2019) 10 SCC 649, this Court held that when the seizure of material is proved on record and is*



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*not even disputed, the entire contraband material need not be placed on record. It is not a case in which the appellant has proved beyond reasonable doubt that while sending the samples for forensic tests, seals were not intact or the procedure has been materially not followed by protecting the seized substance or was not stored properly, as specified in the case of **Mohan Lal (supra)** in which case the directions were given to be followed on administrative side. However, in the facts of the case, the said judgment is not of any help to appellant.*

9.10. The Hon'ble Supreme Court held that even non-production of the entire contraband before the Court is not fatal when the seizure was proved and the sample taken from the said seized contraband is proved. In this aspect, it is relevant to the judgment of the Hon'ble Supreme Court in **Than Kunwar v. State of Haryana, (2020) 5 SCC 260: (30. The Court also went to hold in Sahi Ram [State of Rajasthan v. Sahi Ram, (2019) 10 SCC 649 : (2020) 1 SCC (Cri) 85] that if seizure is otherwise proved on record and it is not even doubted or disputed, it need not be placed before the Court. The Court further held that if the seizure is otherwise proved what is required to be proved is the fact that samples taken out of a contraband are kept intact. This Court held as follows : (SCC pp. 657-58, paras 15-16 & 18)**

*“15. It is true that in all the aforesaid cases submission was advanced on behalf of the accused that failure to produce contraband material before the court ought to result in acquittal of the accused. However, in none of the aforesaid cases the said submission singularly weighed with this Court to extend benefit of acquittal only on that ground. As is clear from the decision of this Court in **Jitendra [Jitendra v. State of M.P., (2004) 10 SCC 562 : 2004 SCC (Cri) 2028]** , apart from the aforesaid submission other facets of the matter also weighed with the court which is evident from paras 7 to 9 of the decision. Similarly in **Ashok [Ashok v. State of M.P., (2011) 5 SCC 123 : (2011) 2 SCC (Cri) 547]** , the fact that there was no explanation where the seized substance was kept (para 11) and the further fact that there was no evidence to*



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connect the forensic report with the substance that was seized (para 12) were also relied upon while extending benefit of doubt in favour of the accused. Similarly, in Vijay Jain [Vijay Jain v. State of M.P., (2013) 14 SCC 527 : (2014) 4 SCC (Cri) 276] , the fact that the evidence on record did not establish that the material was seized from the appellants, was one of the relevant circumstances. In the latest decision of this Court in Vijay Pandey [Vijay Pandey v. State of U.P., (2019) 18 SCC 215] , again the fact that there was no evidence to connect the forensic report with the substance that was seized was also relied upon to extend the benefit of acquittal.

16. It is thus clear that in none of the decisions of this Court, non-production of the contraband material before the court has singularly been found to be sufficient to grant the benefit of acquittal.

18. If the seizure of the material is otherwise proved on record and is not even doubted or disputed, the entire contraband material need not be placed before the court. If the seizure is otherwise not in doubt, there is no requirement that the entire material ought to be produced before the court. At times the material could be so bulky, for instance as in the present material when those 7 bags weighed 223 kg that it may not be possible and feasible to produce the entire bulk before the court. If the seizure is otherwise proved, what is required to be proved is the fact that the samples taken from and out of the contraband material were kept intact, that when the samples were submitted for forensic examination the seals were intact, that the report of the forensic experts shows the potency, nature and quality of the contraband material and that based on such material, the essential ingredients constituting an offence are made out.”

31. In the facts of this case, no doubt the contraband article weighed 6 kg 300 gm. A perusal of the judgment of the trial court does not appear to suggest that the appellant had taken the contention regarding non-production of the contraband before the trial court.



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10.6. In this case, prosecution never took plea that the recovered contraband are to be disposed without following the procedure as stated in the Mohanlal case and claimed any lame excuse for non-production of the contraband. Section 52A of the NDPS Act deals only with the disposal of the seized contraband and not related to the seizure from the scene of occurrence. The Hon'ble Supreme Court in Mohanlal's case issued directions to follow the procedure of disposal of the sized contraband by taking the inventory before destruction. The said directions were issued only on considering the submissions of the prosecution that the seized contraband were disposed off without taking the samples and preserving the remaining contraband as per the Central Government notification 1/89 on the basis of the specific observation in Paragraph 13 that *“except Directorate of Revenue Intelligence, most the States, however claim that no samples are drawn at the time of the seizure. The DRI alone claims that samples are drawn at the time of seizure.”* But in the State of Tamilnadu, the officers follow the Standing Order 1/89 of the Central Government taking samples with the proper packing and sealing and packing the remaining contraband also with seal. Thereafter they prepare the inventory under Form 91 and produce



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the samples as well as the remaining contraband at the time of initial

remand before the learned Judicial Magistrate without any delay and the learned Judicial Magistrate also verify the same and direct the prosecution to produce the same before the Special Court. After that, the sample is sent through the Special Court for chemical analysis and the remaining contraband is under the periodical supervision of the Special Court and the same is produced as physical evidence during trial and marked as Material Objects. The said Form 91 is also marked as inventory as contemplated under Section 52A of the NDPS Act. Further the material objects are also identified by the witnesses. Therefore, the Form 91 satisfied the “identity” of the contraband as per the Act. Section 52A of the NDPS Act deals only with the disposal of the seized contraband and it is not related to seizure from the scene of occurrence. When the prosecution has taken a stand that the samples were taken at the spot and the samples along with the remaining contraband were produced before the Court as physical evidence, Section 52A of the NDPS Act is not applicable. In this case as stated above, sample was taken at the spot and both samples and remaining contraband were produced before the learned Judicial Magistrate at the time of initial remand and the same was produced before the trial Court at the time of



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trial and same was identified by the witnesses. Therefore, Section 52A of the NDPS Act is not applicable to the facts of the case. Hence, this Court is not inclined to accept the plea of the violation of Section 52A of the NDPS Act.

11. Contradiction and Discrepancies:

11.1.(i). The learned Counsel for accused No.1 submitted that PW.7 deposed that he did not know about the injury sustained by the accused No.1. Contrary to this PW.8-Inspector of Police deposed that when he sent A1 to judicial remand, there was injury on A1. According to the appellant, the said contradiction is material one. Therefore, the search, arrest and recovery allegedly made by PW7 is not believable one. Therefore, he seeks for acquittal.

11.1(ii). Per contra, the learned Additional Public Prosecutor submitted that after arrest through the arrest memo, P.W7 produced the accused No.1,2,3 & 6 before the P.W8-Inspector of Police along with FIR and other incriminating materials. P.W8 as per the D.K.Basu guidelines, directed his subordinate to get the medical memo from the



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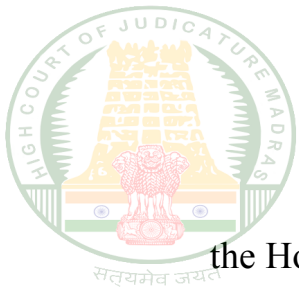
Government Hospital. Hence, A1 was produced along with other accused

before the Government Hospital. The Doctors noted the injury on A1.

Therefore, he had knowledge about the injury and hence, he affirmatively stated during the cross-examination that there was injury at the time of the remand. Hence, according to the learned Additional Public Prosecutor, the said contradiction does not affect the seizure of contraband made by P.W7.

11.1(iii). P.W7 arrested A1, A2, A3 & A6 in the occurrence place.

The seized contraband and the samples taken from the said seized contraband were packed and properly sealed and the same was produced along with the accused including A1, before P.W8, by P.W7. It is not the case of A1 that he sustained injuries and was unable to move from the place of occurrence. According to the evidence of P.W7 and Ex.P10, he produced A1 along with other accused before P.W8. Thereafter P.W8 directed his subordinates to get the medical memo as per the direction of the D.K.Basu guidelines. The subordinates produced A1 before the Government Hospital. In the Government Hospital, the doctors found that A1 sustained injury on his leg. Therefore, he requested the learned Judicial Magistrate to remand A1. The learned Judicial Magistrate visited



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the Hospital and recorded the following statement.

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“A1 Kalimuthu right ankle, there was bandage when examined, stated he has fall down in Courtallam, and got injured no complainant against police.

11.1(iv). After noting the above statement, the learned Judicial Magistrate remanded the accused. Therefore, P.W8 noted the injury on A1. But it is not the case of A1 that he was not taken to the police station by P.W7 and he was directly admitted in the hospital. In the said circumstances, the deposition of P.W7 that he did not know about the injury sustained by A1 cannot be a ground to disbelieve his version of search, recovery and arrest for the reason that his evidence is unimpeachable and the same was also corroborated by P.W1 and P.W2.

11.1(v). Therefore, the said contradiction does not affect the seizure made by P.W7. The said submission of the learned Additional Public Prosecutor on facts deserves to be accepted.

11.2. Further, the argument of the learned Counsel for A1 that the contradiction between the evidence of P.W2 and P.W7 regarding the preparation of the rough sketch is not a material one on proper



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appreciation of the deposition of both the witnesses.

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11.2.1. In view of the above, the said contradiction is not material.

Considering the circumstances of the case that when P.W1, P.W2 & P.W7 and his team intercepted the car driven by A6 along with the remaining accused with contraband of 25 Kgs of Ganja and they fled away from the scene of occurrence and the team secured only four persons and in the said tensed situation, the said minor contradiction does not affect the case of the prosecution of recovery of contraband from the accused.

11.3. In this case, the learned trial Judge had held that the Inspector of Police-P.W8 had inadvertently signed in the arrest intimation which have been marked as Ex.D1 to D4. The learned counsel for the appellant/A1 submitted that the fact regarding the Inspector of Police-P.W8 had signed the arrest intimation, falsifies the entire case of the prosecution. The said submission of the learned counsel for A1 has no substance. The arrest memo is different from the arrest intimation. As per the NDPS Act, it is the duty of the recovery officer to produce the arrested accused and recovered contraband before the immediate Superior. The immediate Superior is the officer who remand the accused.

The Form prescribed as per the guidelines of D.K.Basu mentions



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“arresting officer”. At the time of preparation of the arrest intimation,

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accused were under his custody and he alone has to submit the remand requisition. The arrest intimation is aimed to inform the relative of the accused about the arrest. Therefore, the Inspector of Police signed in the said column of arrest intimation. He did not affix his signature in the arrest memo which has been prepared at the scene of occurrence. If the signature of the P.W8- Inspector of Police, is found in arrest memo, then there is some substance in the submission of the learned counsel for the appellant in raising doubts as regards the arrest made by the P.W7. But in this case, arrest memo was marked as Ex.P2 and it contains the signature of P.W7 alone, it does not contain the signature of P.W8. In the said arrest memo, all the accused have subscribed their signature and the same was witnessed by P.W1 and P.W2.

11.3.1. In the said circumstances, subscribing the signature of the Inspector of Police in the arrest intimation, viz., Ex.D1 to Ex.D4, cannot be a ground to hold that the arrest was made by the P.W8. In this regard, the learned trial Judge has given a different finding without realizing that it is only an arrest intimation and not the arrest memo. Hence, the findings of the trial Court cannot be termed as perverse. The learned trial



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Judge has answered each point raised by the learned counsel in an elaborate manner and addressed the issues with factual discussions on the basis of the precedents of the Hon'ble Supreme Court. Therefore, this Court does not find any reason to interfere with the same.

11.4. The learned counsel for the appellants submitted that there is a discrepancy between the evidence of P.W1 and P.W7. According to P.W1, he never spoke about the independent witnesses, but P.W7 specifically stated that when he called the independent witnesses, they refused to join. The said contradiction is not material when P.W7 has clearly deposed about the fact. When P.W1 is corroborated with the material particulars of the search, recovery of the contraband and the arrest of the accused, the minor contradiction regarding the above aspect does not render his evidence as false.

11.5. The above contradiction are not material contradiction and hence, as held by the Hon'ble Supreme Court in the following judgments, the same cannot be taken into consideration to disbelieve the evidence of PW.1, PW.2 and PW.7.

11.5.(i) Mritunjoy Biswas v. Pranab, (2013) 12 SCC 796:



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28. As is evincible, the High Court has also taken note of certain omissions and discrepancies treating them to be material omissions and irreconcilable discrepancies. It is worthy to note that the High Court has referred to the some discrepancies which we find are absolutely in the realm of minor discrepancies. It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. It needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission.”

11.5(ii) Shyamal Ghosh v. State of W.B., (2012) 7 SCC 646:

68. From the above discussion, it precipitates that the discrepancies or the omissions have to be material ones and then alone, they may amount to contradiction of some serious consequence. Every omission cannot take the place of a contradiction in law and therefore, be the foundation for doubting the case of the prosecution. Minor contradictions, inconsistencies or embellishments of trivial nature which do not affect the core of the prosecution case should not be taken to be a ground to reject the prosecution evidence in its entirety. It is only when such omissions amount to a contradiction creating a serious doubt about the truthfulness or creditworthiness of the witness and other witnesses also make material improvements or contradictions before the court in order



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to render the evidence unacceptable, that the courts may not be in a position to safely rely upon such evidence. Serious contradictions and omissions which materially affect the case of the prosecution have to be understood in clear contradistinction to mere marginal variations in the statement of the witnesses.

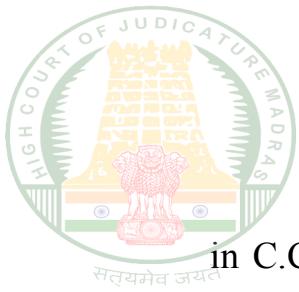
69. Another settled rule of appreciation of evidence as already indicated is that the court should not draw any conclusion by picking up an isolated portion from the testimony of a witness without adverting to the statement as a whole.

11.5(iii) S. Govindaraju v. State of Karnataka, (2013) 15 SCC 315:

23. It is well settled legal proposition that while appreciating the evidence, the court has to take into consideration whether the contradictions/omissions were of such magnitude so as to materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements in relation to trivial matters, which do not affect the core of the case of the prosecution, must not be made a ground for rejection of evidence in its entirety. The trial court, after going through the entire evidence available, must form an opinion about the credibility of the witnesses, and the appellate court in the normal course of action, would not be justified in reviewing the same, without providing justifiable reasons for doing so.”

12. Compliance of Rule 32 of Madras High Court Criminal

Rules of Practice: The learned counsel for A5 submitted that A5 absconded during the trial. Hence, non-bailable warrant was issued against A5. Therefore, the learned trial Judge split the case against him and assigned C.C.No.114 of 2022. He proceeded the trial in parent case



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in C.C.No.267 of 2020. After the completion of the examination of the

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witnesses, A5 was arrested and produced before the Court under the Prisoners Transit warrant. Thereafter, the prosecution filed Cr.M.P.No. 373 of 2022 seeking joint trial. The same was not objected by A5 and A1. Hence, the learned trial Judge considered the plea of joint trial and ordered accordingly. Consequently, the learned trial Judge framed the charges against A5 and questioned him and he pleaded not guilty and hence, the trial was commenced against him. At that time, the learned counsel for A5 filed a memo to adopt the chief examination and cross-examination of all the accused. The contents of the memo is as follows:

“The Parent case in C.C.No.267/2020 totally 8 witnesses were examined in chief and cross examination. The same evidence which includes the cross examination of all accused adopted in this case. The cross examination of all accused are adopted in this case.”

12.1. Thereafter, the learned trial Judge proceeded the trial further and questioned the accused under Section 313 Cr.P.C, by putting the incriminating materials available against them and they denied the same as false. A5 and his counsel never raised any plea of the non-recording of evidence as per Section 273 Cr.P.C and prejudice caused to him.



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12.2. From the above events, this Court finds no merit in the contention of the recording of evidence in the absence of the accused is not in conformity with the Rules of Practice framed by the Madras High Court which reads as follows:

“Rule 32. Cases of Absconding accused.— (1) Where the Court has issued process for the appearance of an accused and the same could not be served and if the Court is satisfied from the affidavit referred to in sub-rule (11) of rule 29 and/or report under sub-rule (7) of rule 31 that the accused is in abscondence, the Court may, after having waited for a reasonable time, proceed under section 82 of the Code, notwithstanding the power of the Court to record evidence under section 299 of the Code. Before recording evidence under section 299 of the Code, the Court shall record a finding that it has been proved that the accused person has absconded and there is no immediate prospect of arresting him. (2) If a case referred to under sub-rule (1) involves a single accused against whom proceedings have been initiated under section 82 of the Code, the Court shall shift the case from the relevant Register to the Register of Long Pending Cases in Administrative Form No.30 (Criminal Register No.30). (3) When there are two or more accused in a case and only some of



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them have appeared or have been produced before the Court and if the Court is satisfied that the presence of other accused cannot be secured within a reasonable time, having due regard to the right of such of the accused in attendance to have the case against them enquired into or tried without delay, the Court may split up the case if it is satisfied that such splitting up will cause no prejudice either to the prosecution or to the accused in attendance and proceed with the enquiry or trial as regards the accused who are in attendance. (4) While splitting up the case as referred to in sub-rule (3), the Court shall assign a fresh number to the split up case relating to the absconding accused and enter the same in the relevant register of the current year. The Court shall also indicate the number of the parent case in brackets wherever the fresh case number is mentioned. (5) The Court shall record the evidence of the witnesses in the split up case under section 299 of the Code simultaneously while The Criminal Rules of Practice, 2019 29 29 recording the evidence in the parent case. It is not necessary for the Court to complete the proclamation proceedings under section 82 of the Code for recording evidence under section 299 of the Code against the absconding accused. (6) While recording the evidence of witnesses under section 299 of the Code, the Court may take as many copies as it deems necessary for the purpose of furnishing to the



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absconding accused as and when they appear or are
produced before the Court. (7) The copies of the records
of the original case including depositions of the
witnesses and exhibits duly attested by the presiding
officer of the Court shall be filed in the split up case. (8)
When a Sessions Case is split up by the trial Court, the
same shall be immediately reported to the Court of
Session and the Court of Session shall assign a number
to the split up case, enter the same in the Sessions
Register and communicate the number to the trial Court
forthwith. (9) Sub-rules (1) to (8) shall apply, as far as
may be, to cases where an accused person has
appeared, but, has subsequently absconded.”*

12.3. Section 273 Cr.P.C is subject to Section 299 Cr.P.C. As per Section 299 Cr.P.C, in the case of an accused person who has absconded and his immediate prospect of arresting him is not viable, the trial Court may record the evidence in his absence. It is also provided that in the case of split up case, evidence may be recorded in the absence of the absconding accused. In this case, a non-bailable warrant was pending against A5 for more than a year. He was arrested in some other case and produced in this case under the Prisoners Transit Warrant. The learned counsel for A5 also filed memo adopting the chief examination and



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cross-examination. In the memo, it is also clear that all the questions

relating to the incident was already cross-examined. Therefore, the learned trial Judge proceeded with the trial and concluded the trial and neither the plea of prejudice was raised nor any prejudice is seen by this Court. Even during the 313 Cr.P.C questioning, no plea was raised about the non-recording of the evidence as per Section 273 Cr.P.C. Hence, this Court does not find any infirmity in the judgment of the learned trial Judge in proceeding with the trial and concluding the trial.

12.4. Looking from other angle, in this case, the split up petition was ordered recording the reason that A5 had absconded and the investigating agency was unable to secure the accused. In the said circumstances, the provisions under Section 299 (1) Cr.P.C is applicable. Since A5 fled away from the place of occurrence and final report was filed against him. The learned trial Judge, after the production of A5 under the Prisoners Transit Warrant and his appearance through advocate, furnished copies under Section 207 Cr.P.C and charges were framed and questioned him under Section 313 Cr.P.C, and he pleaded not guilty and he filed the memo to adopt the chief and cross-examination of the remaining appellants. The Criminal Rules of Practice, 2019 and Sections 317 and 299 Cr.P.C also provided to record evidence and proceed the



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trial in the case of absconding accused. Hence, there is no infraction of

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Section 273 Cr.P.C and Rule 32 of the Criminal Rules of Practice, 2019.

12.5. In the case of the absconding accused, the said procedure is followed all over the world. The Hon'ble House of Lords in **2002 (2)**

ALL ER 113 R v. Jones, held as follows:

“Where a criminal defendant of full age and sound mind, with full knowledge of a forthcoming trial, voluntarily absented himself, there was no reason in principle why his decision to violate his obligation to appear and not to exercise his right to appear should have the automatic effect of suspending the criminal proceedings against him until such time. If ever, as he chose to surrender himself or was apprehended. If he voluntarily chose not to exercise his right to appear, he could not impugn the fairness of the trial on the ground that it had followed a course different from that which it would have followed had he been present and represented. Moreover, there was nothing in the jurisprudence of the European Court of Human Rights to suggest that a trial of a criminal defendant held in his absence was inconsistent with the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). Accordingly, the Crown Court did have a discretion to conduct a trial in the



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absence, from its commencement, of the defendant. That
discretion should, however be exercised with the utmost
care and caution. If the absence of a defendant were
attributable to involuntary illness or incapacity, it would
very rarely, if ever, be right to exercise the discretion in
favour of commencing the trial, at any rate unless the
defendant was represented and had asked that the trial
should begin. The seriousness of the offence was not a
matter which was relevant to the exercise of the discretion.
The judge's overriding concern was to ensure that the
trial, if conducted in the absence of the defendant, would
be as fair as circumstances permitted, and lead to a just
outcome.”*

Further, it is the duty of the accused to be present during the trial. In spite of his knowledge about the trial, he did not appear and waived his right of presence during the trial, hence he cannot be allowed to turn around and say that the different procedure followed by the Court has affected his fair trial. The learned counsel stated that there was no incriminating materials available against the appellant/A5 to show his involvement and hence, he seeks for acquittal. The said submission was made supplementary to the plea of non-compliance of the Section 273 Cr.P.C. The said submission deserves to be rejected on the ground that PWs.1,2 & 7 clearly deposed that A4 and A5 absconded from the scene of



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occurrence and there was no cross-examination disputing the identity.

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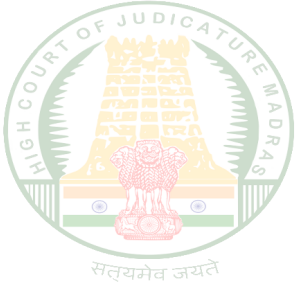
13. A1 stated in 313 Cr.P.C proceedings that he was arrested by the respondent police in Courtrallam and a false case was framed. The said answer is as follows:

“எனக்கு சட்டம் ஒழுங்கு வழக்கு உள்ளது. என்னை குற்றாலம் பிடித்து வந்து, என் மனைவியிடம் காரை வாங்கி வந்து பொய் வழக்கு போட்டு உள்ளார்கள். அதற்கு முன் நான் கஞ்சாவை பார்த்தது இல்லை. இந்த விபரத்தை ரிமாண்ட் செய்யும் போது நடுவரிடம் கூறியுள்ளேன்.”

13.1. The learned Judicial Magistrate visited the Hospital and recorded the following statement.

“A1 Kalimuthu right ankle, there was bandage when examined, stated he has fall down in Courtallam, and got injured no complainant against police.”

13.2. A5 stated that at the time of occurrence, he was residing in another village and he was illegally detained and his leg was broken thereafter, a false case was foisted against him. A5 stated as follows:



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நான் வெளியூரில் இருந்தேன். என்னை பிடித்து

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அடித்து காலை உடைத்து இந்த வழக்கில்
பொய்யாக சேர்த்து விட்டார்கள். என்னை வேறு
வழக்கில் உள்ளே அனுப்பிவிட்டு பிறகு *formal*
arrest செய்துள்ளார்கள்.

A5 did not produce any evidence to prove the above stand. The remaining accused did not speak anything about it. The explanation given by A5 without any supporting evidence or corroborating evidence, cannot be accepted.

13.3. Insofar as the evidence of A1 is concerned, he has stated that he was taken into custody at Courtallam and a false case was registered, but he has not proved the same by tendering legal evidence. It is a built up story by the learned counsel appeared on his behalf. Hence, the said explanation cannot be accepted and there was no material to consider the said explanation also. Mere explanation is not sufficient to disprove the presumption under Section 35 of the NDPS Act when the prosecution established the case of recovery of contraband cogently through the trustworthy evidence of the witnesses and producing the samples and the remaining contraband also before the Court. The remaining accused did



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not take any stand which is taken by A1 and A5, and in these circumstances this Court has no hesitation in disbelieving the version put forth by A1 and A5.

14. Non- mentioning of the absconding accused in column No.7 of FIR (Ex.P10).

14.1. The learned counsel for the appellants submitted that according to the prosecution, totally six persons were surrounded by the investigating agency and two persons were escaped from the custody of the investigating agency. Neither their names were mentioned in column No.7 nor any reference was made about the absconding two persons.

14.2. On reading the entire contents of the FIR, it is clear that the names of the absconding accused are clearly disclosed in the body portion of the FIR and it was omitted only in the front portion of the FIR i.e column No.7. P.W7 received information at 14.00 hours of 20.09.2020. He completed the search and seizure and arrest at 18.30 hours as per the procedure and thereafter, he produced the accused before the Police Station and registered the case at 19.00 p.m. The FIR reached the Court at 11.50 p.m on the same day. In the FIR, there is a clear description of all the accused, which reads as follows:

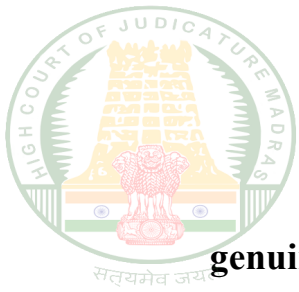


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அப்போது அவர்கள் அனாவரும் காரின் கதவினை திறந்து தப்பி செல்ல முயற்சித்ததாகவும், தாங்கள் தன்னை உட்பட முனீஸ்வரன், மாரீஸ்வரன் டிரைவர் பாலாஜி ஆகியோர்களை மடக்கி பிடித்து கைது செய்ததாகவும், தங்களுடன் காரில் வந்த அகோரி கார்த்திக் மற்றும் டோரி மாரி ஆகியோர்கள் காரில் இருந்து இறங்கி போலீசார்களாகிய தங்களிடம் பிடிபடாமல் தப்பி சென்றுவிட்டார்கள் என சொன்னார்.

கைது செய்த எதிரிகள் மற்றும் கைப்பற்றிய வழக்கின் சொத்துகளுடன் கரிமேடு காவல் நிலையம் 19.00-மணிக்கு வந்து, 1-வது எதிரி காளிமுத்து (எ) வெள்ளைகாளி, 2-வது முனீஸ்வரன், 3-வது மாரீஸ்வரன், 4-வது பாலாஜி மற்றும் தலைமறைவாக உள்ள 5-வது எதிரி அகோரி கார்த்திக், 6-வது எதிரி டோரி மாரி ஆகியோர்கள் மீது C.5 கரிமேடு (சரூ) காவல் நிலைய குற்ற எண்-1403/2020 U/s. 8(c) r/w 20 (b) (ii) (C) NDPS Act and 25, 29 (1) Act பிரகாரம் வழக்கு பதிவு செய்து, எதிரிகளை திரேக சோதனை செய்து காவல் நிலைய பாரா வசம் ஒப்படைத்தேன்.

14.3. No other document was produced on the side of the accused to contradict the contents of Ex.P.10. Without considering the entire evidence of P.W7 in his cross examination, merely relying on some stray portions of his deposition, **this Court is not inclined to doubt over the**



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genuineness of Ex.P10-FIR. It is a well settled law that failure to describe the name of the accused in the front portion of the FIR is not a ground to doubt the content of the FIR and the same is fortified by the following judgments of the Hon'ble Supreme Court.

14.4. 2018(3) SCC 66 – Latesh Vs. State of Maharashtra:

“ Merely because names of accused not stated and their names are not specified in FIR, that may not be a ground to doubt the contents of FIR and because of thier prosecution cannot be thrown out on such count”

14.5. 2018 (9) SCC 429. Motiram Padel Joshi Vs. State of Maharashtra:

“Omission as to the names of assailants may not all times be fatal to prosecution – unless there are indication of fabrication, Court cannot reject the prosecution case as given in the FIR merely because of omission. Object of FIR is to set law in motion. FIR registered without delay and prompt registration of FIR itself lends assurance to prosecution case.”

14.6. Applying the above principle, only on the basis of mere omission to note the names of the absconding accused in the front page



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of the FIR, namely, in column No.7, the doubt expressed by the learned

counsel for the appellant/A5 regarding genuineness of the FIR cannot be accepted, when their names are clearly mentioned in the body of the FIR.

15. Preparation of Two Athakshi:

15.1. The learned counsel for appellants made a submission that after the arrest in this case, preventive detention was passed against the appellants. In the preventive detention order, the appellants were served with relevant documents. The recovery mahazar (Athakshi) was also served. In the said documents, the signature of the accused were conspicuously absent. But in the Athakshi produced before this Court, the signature of A1-Kalimuthu @ Vellaikali is found. Athakshi is a basic document and hence, there is a serious doubt over the preparation of the said document. Therefore, the benefit of doubt is to be given to the accused.

15.2. The submission of the learned counsel for the appellants lacks merits for the simple reason that the contra Athakshi is not available before this Court.

15.3. The said Ex.P4-Athakshi has been prepared and produced before the learned Judicial Magistrate at the time of remand along with



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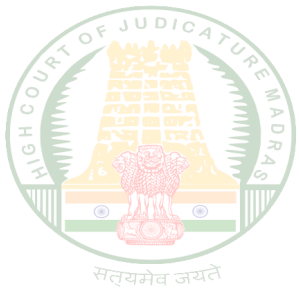
other documents on the date of occurrence (i.e. 20.9.2020) itself.

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15.4. Without producing and marking the contra documents, it cannot be pleaded that there are contradictions between the documents. The Hon'ble Three Judges Bench of the Hon'ble Supreme Court in ***Munna Pandey Vs. State of Bihar*** reported in ***2023 SCC Onlince Sc 1103***, stated that how contradiction shall be elicited. The relevant paragraphs as follows:

“49.In the aforesaid context, we may refer to and rely on a three-Judge Bench decision in the case of V.K. Mishra v. State of Uttarakhand,(2015) 9 SCC 588, wherein this Court, after due consideration of Section161 of the CrPC and Section 145 of the Evidence Act, observed as under:—

“16. Section162 CrPC bars use of statement of witnesses recorded by the police except for the limited purpose of contradiction of such witnesses as indicated there. The statement made by a witness before the police under Section 161(1) CrPC can be used only for the purpose of contradicting such witness on what he has stated at the trial as laid down in the proviso to Section 162(1) CrPC. The statements under Section 161CrPC recorded during the investigation are not substantive pieces of evidence



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but can be used primarily for the limited purpose : (i) of contradicting such witness by an accused under Section 145 of the Evidence Act; (ii) the contradiction of such witness also by the prosecution but with the leave of the Court; and (iii) the re-examination of the witness if necessary.

17. The court cannot suo motu make use of statements to police not proved and ask questions with reference to them which are inconsistent with the testimony of the witness in the court. The words in Section 162 CrPC “if duly proved” clearly show that the record of the statement of witnesses cannot be admitted in evidence straightaway nor can be looked into but they must be duly proved for the purpose of contradiction by eliciting admission from the witness during cross-examination and also during the cross-examination of the investigating officer. The statement before the investigating officer can be used for contradiction but only after strict compliance with Section 145 of the Evidence Act that is by drawing attention to the parts intended for contradiction.

18. Section 145 of the Evidence Act reads as under:

“145. Cross-examination as to previous statements in writing.—A witness may be cross-examined as to previous statements made by him in writing or



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reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.”

19. Under Section 145 of the Evidence Act when it is intended to contradict the witness by his previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. While recording the deposition of a witness, it becomes the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to the notice of the witness in his cross-examination. The attention of witness is drawn to that part and this must reflect in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and there is no need to further proof of contradiction and it will be read while appreciating the evidence. If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process the contradiction is merely brought on record, but it is yet



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to be proved. Thereafter when investigating officer is
examined in the court, his attention should be drawn
to the passage marked for the purpose of
contradiction, it will then be proved in the deposition
of the investigating officer who again by referring to
the police statement will depose about the witness
having made that statement. The process again
involves referring to the police statement and culling
out that part with which the maker of the statement
was intended to be contradicted. If the witness was not
confronted with that part of the statement with which
the defence wanted to contradict him, then the court
cannot suo motu make use of statements to police not
proved in compliance with Section145 of the Evidence
Act that is, by drawing attention to the parts intended
for contradiction.”

(Emphasis supplied)

50. What is important to note in the aforesaid decision of this Court is the principle of law that if the witness was not confronted with that part of the statement with which the defence wanted to contradict him, then the Court cannot suo motu make use of statements to police not proved in compliance with Section145of the [Evidence Act](#). Therefore, it is of utmost importance to prove all major contradictions in the form of material omissions in accordance with the procedure as



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established under Section 145 of the Evidence Act and
bring them on record. It is the duty of the defence
counsel to do so.”*

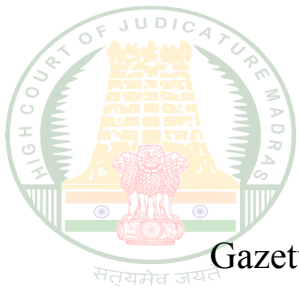
15.5. It is well settled principle that the preventive detention documents relied by the detaining authority are not relevant to decide the trial of the offence. Further, the said documents are also not marked here.

15.6. Hence, the submission of the learned counsel for the appellants cannot be accepted when the Athakshi-Ex.P4 with the signature of the appellants reached with the remaining contraband along with the samples at the time of remand of the accused on the date of occurrence itself, i.e., on 20.09.2020.

15.7. For the above reasons, the argument of the learned counsel for the appellants that two Athakshi are prepared cannot be accepted.

16. Compliance of Section 50 of the NDPS Act:-

16.1. The learned counsel made a lengthy submission that P.W7 and his team conducted search of the body and vehicle and hence, mandatory requirement of obtaining individual written consent letter has not been done to make search in front of the learned Magistrate or the



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Gazetted Officer. In this case, joint written consent letter was served and

hence, there was total violation of Section 50 of the NDPS Act and on this sole ground, all the appellants are entitled to acquittal and to fortify the same, they relied the following judgments, in the case of the ***State of Rajasthan Vs. Paramand*** reported in ***2014 (5) SCC 345 and 2023 (1) LW (Cri) 904 wherein it has been held as follows:***

“In State of H.P. v. Pawan Kumar (2005) 4 SCC 350 : 2005 SCC (Cri) 943, a three-Judge Bench of this Court held that a person would mean a human being with appropriate coverings and clothing and also footwear. A bag, briefcase or any such article or container, etc. can under no circumstances be treated as a body of a human being. Therefore, it is not possible to include these articles within the ambit of the word “person” occurring in Section 50 of the NDPS Act. The question is, therefore, whether Section 50 would be applicable to this case because opium was recovered only from the bag carried by Respondent 1 Parmanand.

13. In Dilip v. State of M.P. (2007) 1 SCC 450 : (2007) 1 SCC (Cri) 377, on the basis of information, search of the person of the accused was conducted. Nothing was found on their person. But on search of the scooter they were riding, opium contained in



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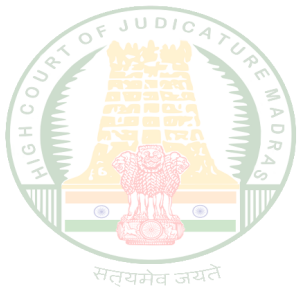


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plastic bag was recovered. This Court held that :
(SCC p. 456, para 16)*

“16. ... provisions of Section 50 might not have been required to be complied with so far as the search of scooter is concerned, but keeping in view the fact that the person of the accused was also searched, it was obligatory on the part of the officers to comply with the said provisions.”

14.In Union of India v.Shah Alam (2009) 16 SCC 644 : (2010) 3 SCC (Cri) 377, heroin was first recovered from the bags carried by the respondents therein. Thereafter, their personal search was taken but nothing was recovered from their person. It was urged that since personal search did not lead to any recovery, there was no need to comply with the provisions of Section 50 of the NDPS Act. Following Dilip(2007) 1 SCC 450 : (2007) 1 SCC (Cri) 377, it was held that since the provisions of Section 50 of the NDPS Act were not complied with, the High Court was right in acquitting the respondents on that ground.

15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the



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NDPS Act will have application. In this case, Respondent 1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of Respondent 2 Surajmal was also conducted. Therefore, in the light of the judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application.

16.2. The Hon'ble Three member bench in the *State of Punjab Vs. Baljinder Singh, 2019 (10) SCC 473* held that the principle laid down by the Hon'ble Two member Bench of Hon'ble Supreme Court in 2007 (1) SCC 450 is not correct. The relevant paragraph is extracted hereunder:

“15.As regards applicability of the requirements under Section 50 of the Act is concerned, it is well settled that the mandate of Section 50 of the Act is confined to “personal search” and not to search of a vehicle or a container or premises.

16. The conclusion as recorded by the Constitution Bench in para 57 of its judgment in State of Punjab v. Baldev Singh, (1999) 6 SCC 172 :



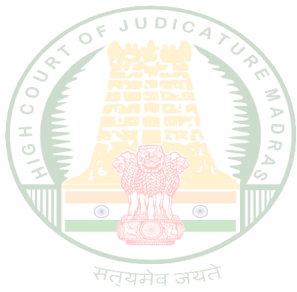
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1999 SCC (Cri) 1080 clearly states that the conviction may not be based “only” on the basis of possession of an illicit article recovered from personal search in violation of the requirements under Section 50 of the Act, but if there be other evidence on record, such material can certainly be looked into.

17. In the instant case, the personal search of the accused did not result in recovery of any contraband. Even if there was any such recovery, the same could not be relied upon for want of compliance of the requirements of Section 50 of the Act. But the search of the vehicle and recovery of contraband pursuant thereto having stood proved, merely because there was non-compliance of Section 50 of the Act as far as “personal search” was concerned, no benefit can be extended so as to invalidate the effect of recovery from the search of the vehicle. Any such idea would be directly in the teeth of conclusion as aforesaid.

18. The decision of this Court in Dilip v. State of M.P., (2007) 1 SCC 450, however, has not adverted to the distinction as discussed herein above and proceeded to confer advantage upon the accused even in respect of recovery from the vehicle, on the ground that the requirements of Section 50 relating to personal search were not complied with. In our



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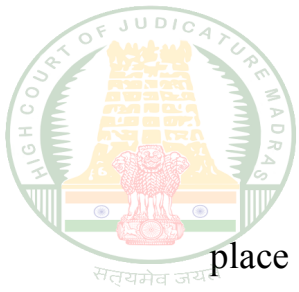
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view, the decision of this Court in the said judgment
in Dilip v. State of M.P., (2007) 1 SCC 450 : (2007)
1 SCC (Cri) 377 is not correct and is opposed to the
law laid down by this Court in State of Punjab v.
Baldev Singh, (1999) 6 SCC 172 : 1999 SCC (Cri)
1080 and other judgments.

19. Since in the present matter, seven bags of
poppy husk each weighing 34 kg were found from the
vehicle which was being driven by accused Baljinder
Singh with the other accused accompanying him,
their presence and possession of the contraband
material stood completely established.”

16.3. When PW.7 received information about the transportation and possession of huge quantity of Ganja in the car and **recovered the same from the car**, this Court has no hesitation to hold that Section 50 of the NDPS Act is not applicable. In said circumstance, any alleged infirmities in obtaining consent as envisaged under Section 50 of the NDPS Act does not affect the prosecution case of recovery when the evidence of prosecution is otherwise cogent and trustworthy.

17. Non-examination of the independent witnesses:

17.1. The learned counsel for A1 submitted that the occurrence



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place was a busy public place in the Madurai City. Therefore, non-

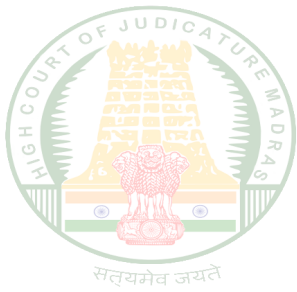
examination of the independent witnesses creates doubt over the recovery. The said submission cannot be accepted for the reason that it is the specific case of the P.W7 that he requested two independent persons to witness the recovery but they refused. According to the prosecution, four accused were chased and caught by the police and in the said tensed

scenario, it is common that no independent witnesses would come forward to witness the recovery. Apart from that the Hon'ble Supreme Court in the following Judgment stated that the non-examination of the independent witnesses is not a ground to disbelieve the evidence of the police witnesses when their evidence is cogent and trustworthy without any infirmity. In this case, this Court does not find any infirmity in the material portion of the evidence of all the witnesses, namely, P.Ws.1, 2 &7 relating to the recovery of the contraband.

17.2. Ram Swaroop v. State (Govt. of NCT of Delhi) 2013 (14)

SCC 235:

“7. We may note here with profit that there is



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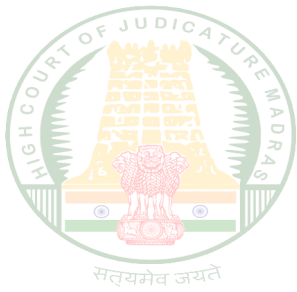


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no absolute rule that police officers cannot be cited as witnesses and their depositions should be treated with suspect. In this context we may refer with profit to the dictum in *State of U.P. v. Anil Singh* [1988 Supp SCC 686 : 1989 SCC (Cri) 48] wherein this Court took note of the fact that generally the public at large are reluctant to come forward to depose before the court and, therefore, the prosecution case cannot be doubted for non-examining the independent witnesses.

8. At this juncture a passage from *State (Govt. of NCT of Delhi) v. Sunil* [(2001) 1 SCC 652 : 2001 SCC (Cri) 248] is apt to quote : (SCC p. 662, para 21)

“21. .. At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law the presumption should be the other way around. That official acts of the police have been regularly performed is a wise principle of presumption and recognised even by the legislature. Hence when a police officer gives evidence in court that a certain article was recovered by him on the strength of the statement made by the accused it is open to the court to believe the version to be correct if it is not otherwise shown to be unreliable. It is for the accused, through cross-examination of witnesses or through any other materials, to show that the evidence of the police officer is either unreliable or at least unsafe to be acted upon in a particular case. If the court has any good reason to suspect the truthfulness of such records of the police the court could certainly take into account the fact that no other independent person was present at the time of recovery. But it is not a legally approvable procedure to presume the police action as unreliable to start with, nor to jettison such action merely for the reason that police did not collect signatures of independent persons in the documents made contemporaneous



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with such actions.”*

10. Keeping in view the aforesaid authorities, it can safely be stated that in the case at hand there is no reason to hold that non-examination of the independent witnesses affects the prosecution case.”

17.3. Kallu Khan v. State of Rajasthan, 2021 SCC OnLine

SC 1223:

“16. The issue raised regarding conviction solely relying upon the testimony of police witnesses, without procuring any independent witness, recorded by the two courts, has also been dealt with by this Court in

the case of Surinder Kumar (supra) holding that merely because independent witnesses were not examined, the conclusion could not be drawn that accused was falsely implicated. Therefore, the said issue is also well-settled and in particular, looking to the facts of the present case, when the conduct of the accused was found suspicious and a chance recovery from the vehicle used by him is made from public place and proved beyond reasonable doubt, the appellant cannot avail any benefit on this issue. In



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our view, the concurrent findings of the courts does
not call for interference.*

18. Submission regarding the previous antecedents :

18.1. The learned Additional Public prosecutor submitted that the learned trial Judge noted the previous antecedents and correctly appreciated the evidence and passed the conviction and sentence of imprisonment.

18.2. The learned counsel for A1 submitted that the previous criminal antecedents of A1 cannot be a ground for conviction in a criminal case. According to the learned counsel for A1, as per Section 54 of the Evidence Act the previous antecedents is not ground to convict without legal evidence in this case. Therefore, the finding of the learned trial Judge and the submission of the learned Additional Public Prosecution is contrary to Section 54 of the Evidence Act and also as per the law laid down by the Hon'ble Supreme Court in **2019 (12) SCC 460 [Rajendra Pralhadrao Wasnik v. State of Maharashtra]** and **1977(3)SCC268[Ram Lakhan Singh v. State of U.P.]**.

18.3. This Court has re-appreciated the evidence independently without being influenced by the claim of previous antecedents and comes to a conclusion that the prosecution proved the case against all the

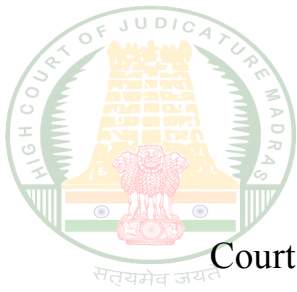


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accused that they transported the 25 kgs quantity of Ganja in the car and

the same was recovered as per the procedure and proper investigation was conducted and fair trial was concluded. The recovery of the contraband from the car in which all the appellants travelled is clearly proved through the cogent and trustworthy evidence of PWs.1, 2 & 7. The sample was properly taken and the same was properly sealed and the remaining contraband was also properly sealed and packed and the same was produced before the Court on the same day along with the accused at the time of the remand. The same was also verified by the learned Judicial Magistrate. In the said circumstances, this Court concurs with the finding of the learned trial Judge in convicting the appellant and imposing the sentence of imprisonment along with fine.

19. The learned counsel for the appellants submitted that the delay in producing the contraband before the Special Court is fatal to the prosecution. In this case, P.W8 produced the entire contraband and samples under Form 91 on the date of occurrence itself before the learned Judicial Magistrate. The learned Judicial Magistrate verified the same and directed to produce before the Special Court. P.W8 produced the same before the Special Court with delay. The said delay is immaterial when the contraband and the samples are produced before the Special



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Court with seal. It is not the case of the appellants that the seal was

tampered. In the said circumstances, the said delay is not fatal. The

Hon'ble Supreme Court in the judgment of ***Hardip Singh v. State of***

Punjab, reported in ***(2008) 8 SCC 557*** has held that delay in producing

the contraband and samples are not material when the samples are

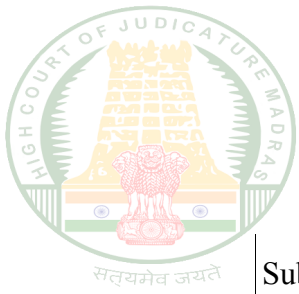
produced with seal intact. The relevant paragraphs are as follows:

“17. The then Station House Officer, Inspector Baldev Singh, who was examined as PW 1, was posted at Police Station Ajnala on the date of occurrence. He received the said samples of opium along with case material, being produced before him by PW 5. It has come on evidence that Inspector Baldev Singh kept the entire case property with him till it was deposited in the office of the Chemical Examiner, Amritsar on 30-9-1997 through ASI Surinder Singh (PW 3). It has also come on evidence that till the date the parcels of sample were received by the chemical examiner, the seal put on the said parcels was intact. That itself proves and establishes that there was no tampering with the aforesaid seal in the sample at any stage and the sample received by the analyst for chemical examination contained the same opium which was recovered from the possession of the appellant. In that view of the matter, delay of about 40 days in sending the samples did not and could not have caused any prejudice to the appellant. The aforesaid contention, therefore, also stands rejected.

20. In *Ouseph v. State of Kerala* [(2004) 10 SCC 647 : 2005 SCC (Cri) 595] it was held by this Court that under the provisions of Section 55 of the Act, the requirement may not be mandatory. However, in that case, in view of peculiar facts of the case and as the contraband articles were kept in totally unsealed condition for near about two months it was held that the same creates doubt.”

20. Summary of Discussion:

Finding	Paragraph Nos.
Brief facts	2-4
Submission of the learned Counsel for the appellants	5-5.13

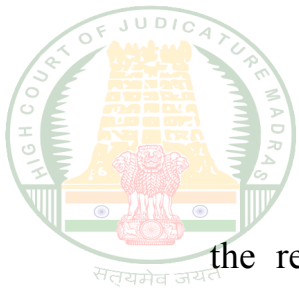


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Submission of the learned APP	6-6.13
Proof of Recovery of Contraband	7-7.2
Conscious possession	8-8.5
Compliance of Section 57 of the NDPS Act:	9-9.10
Plea of non-compliance of Section 52A of the NDPS Act	10-10.6
Contradiction and Discrepancies	11-11.5(iii)
Compliance of Rule 32 of Madras High Court Criminal Rules of Practice	12-12.5
Section 313 Cr.P.C proceedings	13-13.3
Non- mentioning of the absconding accused in column No.7 of FIR (Ex.P10)	14-14.6
Preparation of Two Athakshi	15-15.7
Compliance of Section 50 of the NDPS Act	16-16.3
Non-examination of the independent witnesses	17-17.3
Submission regarding Previous antecedents	18-18.3
Conclusion	20 -20.2 & 21

21.Conclusion :-

21.1. From the evidence, it is apparent that P.W7 received secret information and the said secret information received was duly reduced in writing and forwarded to the immediate Superior and on his instruction i.e., “Received and take action as per law”, the team has proceeded to the spot mentioned in the information and thereafter, search, seizure and arrest had been done. Samples were duly taken and packed with seals and the remaining contraband duly packed separately. The said samples and



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the remaining contraband were produced before the learned Judicial Magistrate on the date of occurrence itself. The learned Judicial Magistrate verified the same. The recovered contraband of 25kgs of Ganja is more than the commercial quantity i.e., 20 Kg. The said samples were subjected to analysis and the Report confirmed the presence of “cannabis”.

21.2. The entire seized contraband namely recovered Ganja was produced before the Court and marked without any dispute as M.O.4 and M.O.7. The prosecution witnesses viz., P.W.1, P.W.2 and PW.7, deposed before the Court in a cogent manner and their evidence is trustworthy and this Court finds no infirmities in their evidence either to disbelieve or discard the prosecution case that the appellants transported 25kgs of Ganja in A1's private car and the same was in their conscious possession. A2, A3, A4 and A6 never said anything in their 313 Cr.P.C questioning nor produced any evidence to disprove the case of the prosecution in compliance with terms of Sections 54 and 35 of the NDPS Act. A1 has taken a plea that he was arrested at Courtallam and a false case was registered. In view of the discussion made earlier, the said version is not a bonafide one. At the time of remand, he never disclosed the said fact and to prove the same, he never adduced any evidence. Similarly A5



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took a stand during Section 313 Cr.P.C proceedings that he was arrested

at some other place and a false case was registered. But to prove the same, he did not produce any evidence. Further their defence does not gain support from the remaining accused A2, A3, A4 and A6. The presence of minor discrepancy and contradiction is natural on the principle that without minor discrepancy, there cannot be a single true witness. Therefore, the prosecution has clearly proved their case beyond reasonable doubt and the accused never dispelled the presumption as required under Section 35 of the NDPS Act and this Court does not find any infirmities in the judgment of the trial Court. Thus, the questions are answered against the appellants. Therefore, all the appeals deserve to be dismissed.

22. In the result, all the Criminal Appeals stand dismissed.

Consequently, connected miscellaneous petitions are closed.

03.10.2023

NCC : Yes/No
Index : Yes/No
Internet: Yes/No
PJJ

Note: Issue order copy on 09.10.2023.



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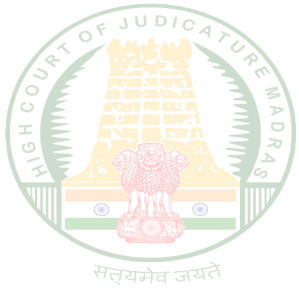
To

1. The Special Judge,
II-Additional Special Court for EC and NDPS Act cases, Madurai.

2.The Inspector of Police,
Karimedu Police Station, Madurai City.

3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.

4. The Section Officer,
Criminal Records, Madurai Bench of Madras High Court,
Madurai.



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K.K.RAMAKRISHNAN, J.

PJL

Judgment made in
Crl.A(MD)Nos.492, 500 of 2022 and
347 & 577 of 2023

03.10.2023