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Crl.A.No.1338 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.03.2024
PRONOUNCED ON : 3.09.2024

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

Crl.A.No.1338 of 2022 and
Crl.M.P.No.20175 of 2022

Mohideen

... Appellant

Vs.

State by
Intelligence Officer,
Narcotic Control Bureau,
Chennai Zonal Unit,
Chennai – 90.

... Respondent

PRAYER: Criminal Appeal filed under Sections 374(2) of Criminal Procedure Code, to set aside conviction and sentence passed in C.C.No.124 of 2018, dated 26.08.2022 pending on the file of the I Additional Special Court for Exclusive Trial of Cases under NDPS Act, Chennai.

For Appellant : Mr.V.K.Sathiamurthy

For Respondent : Mr.N.P.Kumar,
Special Public Prosecutor



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JUDGMENT

The appellant was charged for offence under Sections 8(c) r/w 22(c) and 8(c) r/w 28 of The Narcotic Drugs and Psychotropic Substances Act, 1985 (In short 'The Act') in C.C.No.124 of 2018. On conclusion of trial, the learned I Additional Special Judge, Court of the Special Judge, I Additional Special Court for Exclusive Trial of Cases under NDPS Act, Chennai acquitted from the charge under Section 8(c) r/w 28 of the Act but convicted the appellant for offence under Section 8(c) r/w 22(c) of the Act and sentenced to undergo Rigorous Imprisonment for ten years and to pay a fine of Rs.1,00,000/-, in default to undergo Rigorous Imprisonment for six months *vide* judgment, dated 26.08.2022. Challenging the judgment of conviction, present criminal appeal is filed.

2.The case of the prosecution is as follows:

(i)On 13.05.2018 at about 13.00 hours, Mr.Venkatesan, Intelligence Officer of NCB/PW1 received secret information that the appellant/Mohideen and one Razak of Saudi Arabia indulged in trafficking



of Methamphetamine from Chennai to Kerala and then to Saudi Arabia. The appellant was staying in Hotel Santhi Bhavan, Waltax Road, Park Town, Chennai. PW1 and his team along with Manager Ajmal and Receptionist/PW4 went to Room No.105, enquired its occupant confirmed his name as Mohideen and informed him about information that he is involved in smuggling of Methamphetamine and about the Section 50 of the Act, enquired whether the appellant is willing to be searched in presence of Magistrate or before a gazetted officer. The appellant refused for such search and informed PW1, the NCB official can search him. The appellant admitted he is in possession of 535 grams of Methamphetamine, kept in a transparent polythene cover and handed over the same to PW1.

(ii)After collecting the same, PW1 opened the transparent polythene cover containing white colour crystalline substance. PW1 took out a head size of match stick of white colour crystalline substance from the packet, tested with the drug detection kit which answered positive for Methamphetamine. On the spot, mahazar prepared using laptop and portable printer brought by them in Room No.105 and all the documents



and articles recovered from Mohideen annexed with mahazar. The appellant, witnesses viz., PW4 and Ajmal signed the mahazar. The appellant was handed over a copy of mahazar who acknowledged the same. The entire process ended at about 18.00 hours on the same day. On the next day i.e., on 14.05.2018 at about 11.00 hours, the appellant arrested and his arrest intimation (Ex.P20) informed through speed post to his wife Mubashira on the same day. The Remand Application (Ex.P21) under Section 167 Cr.P.C r/w 51 & 53 of the Act submitted before the learned Judicial Magistrate, Ambattur along with the appellant and seized properties. The learned Magistrate on satisfaction remanded the appellant and explained the grounds of his arrest. The appellant made no complaint against NCB officials and he was remanded till 17.05.2018.

(iii) On 15.05.2018, the properties produced before the Special Court for NDPS Act cases. The Samples S1 drawn from P1 was sent to the Joint Director, Customs House Laboratory, Chennai for qualitative and quantitative chemical analysis. PW3/Assistant Chemical Examiner received the samples on 15.05.2018, gave report (Ex.P33), dated 22.05.2018



confirming “*The sample is in the form of white crystals. It answers the tests for the presence of Methamphetamine hydrochloride.*”.

(iv)PW5/Intelligence Officer of NCB took up further investigation on 18.05.2018, received chemical analysis report on 22.05.2018. PW5 sent a communication on 24.05.2018 to the Superintendent, NCB, Cochin to conduct house search of the appellant in Malappuram. PW5 issued summon (Ex.P37) to Ajmal, Manager of Hotel Shanthi Bhavan and PW4/Receptionist and addressed letters to Vodafone Service Provider; Idea Service Provider; The Bank Manager of South India Bank, Wandoor, Kerala; State Bank of Travancore; State Bank of India, Wandoor Branch; The Manager of Central Lodge Deluxe Chennai; The Manager of Kishore Inn Hotel, Chennai; Income Tax Officer, Malappuram, Regional Transport Officer, Thiruvanaikovil, Trichy, collected call detail records from the Vodafone and Idea Service Providers, Statement of Accounts, Vouchers and Bills from the Hotels and collected documents. On conclusion of investigation, PW5 filed the complaint along with annexures before the trial Court on 01.11.2018. The Trial Court during trial examined five witnesses



(PW1 to PW5) and marked seventy six documents (Exs.P1 to P76) and marked three material objects (MO1 to MO3). On conclusion of trial, the Trial Court convicted the appellant as stated above.

3.The submissions of the learned counsel for the appellant is as follows:

(i)The learned counsel for the appellant submitted that PW1/Intelligence Officer on 13.05.2018 at about 13.00 hours prepared information report (Ex.P1) and informed the same to his superior PW2 and went to Hotel Shathi Bhavan where the appellant was staying. Ex.P1 does not disclose any subjective satisfaction on the information received. PW1 along with NCB officials had gone to the Hotel Shanthi Bhavan informed Manager Ajmal and PW4/Receptionist and enquired about the appellant's stay. On verification, identified Room No.105. On plain reading of the mahazar (Ex.P2), it is seen that except for PW1, PW4/Receptionist, Ajmal/Manager, no officials of NCB team present during search and seizure. Hence, the entire case rest on the evidence of PW1, PW4 and the mahazar Ex.P2. It is seen from Ex.P2 Mandatory condition under Section



50 of the Act not complied. In Ex.P2, it is recorded that the Intelligence Officer Mr.N.Venkatesan/PW1 informed Mohideen/appellant about the provisions under Section 50 of the Act, his right to be searched before a Magistrate or before a gazetted officer and Mohideen politely denied. This is not in compliance to Section 50 of the Act.

(ii)He further submitted that there is no evidence or material to show whether any other gazetted officer available in the NCB team to atleast partly satisfying the mandatory condition. The Hon'ble Apex Court time and again held that Section 50 of the Act is a mandatory provision affecting the fundamental right under Article 21 of the Constitution of India and it cannot be diluted in any manner. The appellant not conversant with Tamil or English. Admittedly, in this case, there is no written communication under Section 50 of the Act. In Ex.P2, there is nothing to show that Section 50 of the Act substantially complied with. In Ex.P2, there is no recording to show the appellant on questioning took the polythene cover from behind the curtain and handed over to PW1. But in evidence, PW1 states so. PW1 confirms summon under Section 67 of the Act served to the appellant



directing him to appear on 13.05.2018 at about 20.00 hours. The seizure concludes at 18.00 hours. After seizure of the contraband, no arrest made.

On the other hand, it is shown that summon for appearance of the appellant at 20.00 hours served on the same day. PW4/Receptionist confirms PW1 and NCB Team took the appellant with them.

(iii)He further submitted that both in the mahazar (Ex.P2) and in the summon, the appellant singed in Kannada language which is the only language known to him. There is nothing in Ex.P2 and Ex.P16 to show that the contents of the same read over and explained in the language known to the appellant. The appellant's voluntarily statement (Ex.P17) under Section 67 of the Act recorded in Kannada and translated in English (Ex.P18) by one Mr.Ravikumar, Intelligence Officer. Thus, the appellant knew only Kannada language is not disputed. In this case, drawing of mahazar, informing the mandatory right of search under Section 50 of the Act not communicated to the appellant in the language known to him. In the statement under Section 67 of the Act (Ex.P17), the respondent projected the case that the appellant came in contact with one Aman, through Aman



one Rajak and through Rajak, the appellant came in contact with Chandru and Riyaz. The appellant called Riyaz and Chandru and both of them said to have handed over the contraband to the appellant on 13.05.2018 at Royapuram Railway Station. Pursuant to the statement, there is no recovery of any articles. In the case of “*Tofan Singh v. State of Tamil Nadu* reported in *(2021) 4 Supreme Court Cases I*”, it is held that the statement given under Section 67 of the Act is in nature of confession to the limited extent of recovery. Hence, Exs.P17 & P18 is of no consequence but Ex.P17 confirms the appellant conversant and knows only Kannada for that reason only Mr.Ravikumar, Intelligence Officer of NCB translated Ex.P17 to the English language (Ex.P18).

(iv)The learned counsel further submitted that arrest of the appellant shown on 14.05.2018 at about 11.00 hours to project a case as though the appellant voluntarily gave statement (Ex.P17) and the same to be taken as admissible piece of evidence. It is admitted that the appellant was detained in custody by NCB from 13.05.2018 evening till the time of his arrest and remand. In such circumstances, Exs.P17 & P18 inadmissible in evidence.



In this case, PW1 admits that after the contraband and other articles were handed back by the remanding Magistrate to produce before the Special Court for NDPS Act Cases, PW1 forwarded the same to the Officer-in-Charge of Godown, NCB, Chennai on 14.05.2018 at about 20.15 hours. In Ex.P24, there is no acknowledgement of receipt of sealed container of contraband and other articles. Though an explanation attempted to be given by PW1 through Ex.P25 that he handed over the contraband and other articles to the Officer-in-Charge of Godown at about 20.15 hours on 14.05.2018, except for the receipt what are the articles and under what condition contraband received, number of packets, nothing recorded. In such circumstances, it cannot be said that the contraband was in safe custody.

(v)He further submitted that report under Section 57 of the Act submitted with a delay on 15.05.2018 at about 11.00 hours. In the test report conducted in Hotel Shanthi Bhavan, the crime number is found. Thus, the investigation conducted on a preconceived notion and the investigation is not fair and transparent.



(vi) The evidence of PW3/Assistant Chemical Examiner attached to the Customs House Laboratory, Chennai is that she received the paper envelope marked as S1 along with the Court Letter and test memo of PW1 on 15.05.2018 and she gave test report (Ex.P33) on 22.05.2018 that “*The sample is in the form of white crystals. It answers the tests for the presence of Methamphetamine hydrochloride.*”. In this case, Section 52-A of the Act not followed. The Hon'ble Apex Court in **Mohanlal** case held that Section 52-A is a mandatory condition, failing to follow the condition is fatal to the case of the prosecution. Admittedly, a petition in Crl.M.P.No.498 of 2018 (Ex.P31) under Section 52-A of the Act for pre-trial disposal of the contraband filed on 27.06.2018 and thereafter on 03.11.2018, the samples taken from P1 and marked as CS1 and order passed. Thus, it is in clear violation of the guidelines of the Hon'ble Apex Court in the case of “**Union of India v. Mohanlal and another** reported in (2016) 3 SCC 379” committed.

(vii) He further submitted that in this case, the statement of PW4 under Section 67 of the Act marked as Ex.P35 cannot be taken in evidence



and it is the statement given before the Court can be taken in evidence and not otherwise. Likewise, the statement (Ex.P39) of Ajmal, Manager of Hotel Shanthi Bhavan cannot be considered as evidence in the absence of his examination as witness. The call detail records received from Vodafone and Idea Service Providers and other computer generated documents cannot be taken in evidence in the absence of 65B Certificate as per *Anwar Case*. PW5/Intelligence Officer who concluded the investigation, filed the complaint before the trial Court states about investigation with regard to background of the appellant and steps taken to secure Aman, Rajak, Chandru and Riyaz, but failed to collect and produce any evidence. Thus, in the above case there is clear violation of Sections 42, 50 and 52-A of the Act.

(viii)The learned counsel for the appellant relied on the following decisions:

1. *Mangilal v. The State of Madhya Pradesh reported in 2023 LiveLaw (SC) 549.*
2. *Manoj v. State of Kerala reported in 2024 0 KER 15604.*



3. *Arif Khan @ Agha Khan v. State of Uttarakhand* reported in 2018 2 ACR 2082.
4. *Narcotics Control Bureau v. Kulwant Singh* reported in 2013 3 JCC (Nar) 81.
5. *Vijaysinh Chandubha Jadeja v. State of Gujarat* reported in 2011 97 AIC 236.
6. *State of Rajasthan v. Jag Raj Singh @ Hansa* reported in 2016 3 ACR 2869.
7. *Directorate of Revenue & Anr., v. Mohammed Nisar Holia* reported in 2008 1 SCC (Cri) 415.
8. *Simarnjit Singh v. State of Punjab* reported in 2023 LiveLaw (SC) 570.
9. *N.Uganchand Kumawat v. The Inspector of Police, NIB-CID, Dindigul* in Crl.A(MD).No.551 of 2021.
10. *Yusuf @ Asif v. State in Criminal Appeal No.3191 of 2023.*

For the principle that the intention of the legislature by incorporating Section 52-A in the NDPS Act is to see that the process of drawing the sample has to be in the presence and under the supervision of the Magistrate, and the entire exercise has to be certified by him to be correct. Sub-section (4) of Section 52-A says that every court trying an offence under the NDPS Act shall treat the inventory, the photographs of the



contraband substance and the list of samples drawn under sub-section (2) and certified by the Magistrate as primary evidence in respect of such offence. In *Vijaysinh Chandubha Jadeja* case, it is held that the requirement of Section 50 of the Act is mandatory and the provision of Section 50 of the Act must be strictly complied with. It is imperative on the part of the Police officer to apprise the person intended to be searched of his right to be searched only before a gazetted officer or a Magistrate and it is mandatory to make the suspect aware of the existence of his right to be searched before a gazetted officer or a Magistrate. The suspect person may or may not choose to exercise the right provided to him under Section 50 of the Act. But so far as Officer is concerned, an obligation is cast upon him under Section 50 of the Act to appraise the suspect of his right to be searched before a gazetted officer or a Magistrate. For the point that the place which is required to be searched is not open to public although situated in a public place as, for example, room of a hotel, whereas hotel is a public place but a room occupied by a guest may not be. Hence, there must be strict compliance of Section 42 of the Act. It is obligatory that the officers on receiving information should reduce the same to writing and also



record reasons for the belief while carrying out arrest or search as provided under the proviso to section 42(1).

4.The submissions of the learned Special Public Prosecutor appearing for the respondent is as follows:

(i)The learned Special Public Prosecutor submitted that in this case, all the mandatory provisions followed and complied with, considering the same, the trial Court convicted the appellant. PW1/Intelligence Officer received secret information through telephone, prepared information report (Ex.P1) under Section 42 of the Act, verified with the informant to be correct and placed the same before his superior officer/PW2 who after discussion gave approval for necessary action. Thereafter, PW1 along with his team had gone to the Hotel Shanthi Bhavan, made enquiry with the Manager Ajmal and Receptionist/PW4 whether a person in the name of Mohideen is staying. PW4/Receptionist and Ajmal, Manager on verification of Guest Registration Card (Ex.P14) confirmed that Mohideen (appellant) checked in on 13.05.2018 at 08.24 hours by paying advance and staying at Room No.105. PW1 along with NCB team, PW4 and the



Manager Ajmal entered the Room No.105 and PW1 disclosed his identity and enquired the appellant informing information received that the appellant is in possession and involved in smuggling of Methamphetamine. The appellant was explained his right under Section 50 of the Act and given option for search before a gazetted officer or before a Magistrate. The appellant denied such option and informed PW1 that he can be searched by PW1 and he voluntarily produced white colour transparent polythene cover containing white crystalline substance. PW1 took out a match stick head size of white colour crystalline substance from the packet and tested with drug detection kit brought by them and the test answered positive for Methamphetamine, a psychotropic substance.

(ii) Thereafter, the contraband weighed using the electronic weighing scale brought by the NCB team. In presence of NCB officials, PW4 and Ajmal, around 12 articles seized from the appellant like Aadhar Card, Debit Card of State Bank of India (3 Nos.), Debit Card of South India Bank, PAN Card, Receipt, dated 02.05.2018 of Kishore Inn, Advance Receipt of Central Lodge Deluxe, dated 06.05.2018, Hotel Santhi Bhavan Receipt, dated



13.05.2018, Cheque leaf of State Bank of Travancore, Wandoor Branch, another Cheque leaf of State Bank of India, Perinthalmanna Branch and Indian Currency of Rs.1,30,000/- denomination of Rs.2,000/- X 65. The Indian currency was placed in a transparent polythene cover, heat sealed and again placed in a light green cloth lined envelope, pasted and wax sealed with NCB Seal No.11 and marked as P2. All the seized articles sealed, put it in a cover, heat sealed, pasted and wax sealed with NCB Seal No.11. The entire happenings recorded in mahazar (Ex.P2) and the mahazar proceedings completed at about 18.00 hours. The summon under Section 67 of the Act served to the appellant who received the same and accompanied the NCB Team. The appellant was taken to NCB office where he gave voluntary statement (Ex.P17), took some rest and continued the statement on next day. The appellant wrote the statement in Kannada language, translated to English by one Mr.Ravikumar, Intelligence Officer. The translated version marked as Ex.P18. On 14.05.2018 at about 11.00 hours, the appellant was arrested, arrest intimation (Ex.P20) informed to his wife Mubashira through speed post. On the same day, the appellant produced before the Judicial Magistrate, Ambattur along with the



contraband and other articles. The Magistrate on satisfaction remanded the appellant, verified the contraband and directed the contraband to be produced before the Special Court for NDPS Act Cases by 17.05.2018. Thereafter, PW1 handed the contraband to the Officer-in-Charge of Godown, NCB, Chennai for safe custody and the appellant was lodged in Central Prison. After getting approval from the superior officer/PW2 on 15.05.2018, the contraband produced before the Special Court for NDPS Act cases along with memo and the samples S1 drawn from P1 was sent to the Joint Director, Customs House Laboratory, Chennai for chemical examination. PW3/Assistant Chemical Examiner received the samples on 15.05.2018 and gave report (Ex.P33), dated 22.05.2018 that *“The sample is in the form of white crystals. It answers the tests for the presence of Methamphetamine hydrochloride.”*

(iii)PW1 submitted a report under Section 57 of the Act to his superior officer/PW2. On 18.05.2018, the case handed over to PW5/Intelligence Officer who continued further investigation and received the report (Ex.P33) from the Joint Director, Customs House Laboratory,



Chennai. The respondent filed a petition (Ex.P31) under Section 52-A of the Act in Crl.M.P.No.498 of 2018 for pre-trial disposal of the psychotropic substance and the same was allowed by order (Ex.P32), dated 03.11.2018. On receipt of summons, PW4 appeared for investigation, gave statement under Section 67 of the Act confirming to the happenings on 13.05.2018 in conformity to the evidence of PW1.

(iv)He further submitted that the background of the appellant was checked through the jurisdictional Police of Kerala and the Superintendent, NCB, Cochin conducted search in the house of appellant in Malappuram. PW5 collected bank details from the South Indian Bank, Wandoor; State Bank of Travancore and State Bank of Inida, Wandoor Branch and CDR particulars from Vodafone and Idea Service Providers. PW5 had taken steps to secure the persons (Aman, Rajak, Chandru and Riyaz) disclosed by the appellant in his statement, but unable to be traced. On conclusion of investigation, PW5 filed complaint before the trial Court and taken on file as C.C.No.124 of 2018. The trial Court on the evidence and materials acquitted the appellant for the charge of conspiracy under Section 8(c) r/w



28 of the Act but convicted the appellant for possession of Methamphetamine for offence under Section 8(c) r/w 22(c) of the Act.

(v)He further submitted that in this case, the appellant is a Malayalee by birth but claims that he knows only Kannada to read and write. Even during the Court proceedings, the appellant able to understand what is communicated to him in Tamil, but for the purpose to create defence he claims to know only Kannada. From the appellant, 535 grams of Methamphetamine of commercial quantity seized which is confirmed from the evidence of PW1, PW4 and mahazar (Ex.P2). Ex.P2 prepared and contemporaneously produced before the remanding Magistrate along with the appellant. The contraband kept in safe custody in the godown of the NCB. In Ex.P2, the appellant's right of being searched by a Magistrate or by a gazetted officer recorded. No written notice given to the appellant but verbally the right communicated to the appellant who denied such search and agreed to be searched by PW1 which is explicitly recorded in Ex.P2. In view of the above, he prays for dismissal of the criminal appeal.



WEB COPY 5.This Court considered the rival submissions and perused the materials available on record.

6.In this case, the main point of attack by the appellant is that the mandatory provision of Sections 42, 50 and 52-A not followed, violated and the appellant is entitled for acquittal. In this case, PW1 and PW4 are the witnesses to the search and seizure. According to PW1, he received information at about 13.00 hours on 13.05.2018 which he recorded as per Section 42 of the Act (Ex.P1) and placed before his superior officer/PW2. PW2 noted and authorized PW1 to take necessary action as discussed. Thereafter, PW1 along with NCB Team went to the Hotel Shanthi Bhavan, disclosed his identity, enquired the Manager Ajmal and Receptionist/PW4 about Mohideen staying in the hotel. On verification of the guest registration card (Ex.P14), the Manager Ajmal and PW4/Receptionist confirmed that Mohideen staying at Room No.105. PW1 along with his Team knocked Room No.105 door. Mohideen (appellant) opened the door and PW1, his Team introduced themselves. PW1 informed the appellant



that credible information received about his possession of Methamphetamine a psychotropic substance and also informed the safeguard provided under Section 50 of the Act, whether the appellant is intended to be searched in presence of a Magistrate or before a gazetted officer. In the mahazar (Ex.P2), it is recorded that the appellant denied the same and agreed for PW1 to search him. It is also recorded that the appellant took a white colour transparent polythene cover containing white colour crystalline substance and handed over the same to PW1.

7.The contention of the prosecution is that it was the appellant who voluntarily handed over the contraband and no personal search made on him, hence, no written notice given. The procedure as per Section 50 of the Act complied with as recorded in Ex.P2. The Constitutional Bench of the Hon'ble Apex Court in *Vijaysinh Chandubha Jadeja* case held that the substantial compliance makes obligatory upon the Officer concerned to make the suspect aware of such right. In this case, the officer is expected to prepare for carrying out his duties of investigation in accordance with provision of Section 50 of the Act. Further, it had held that the prosecution



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has to establish that information regarding the existence of such a right had been given to the suspect and if such information is incomplete and ambiguous then it cannot be construed to satisfy the requirement of Section 50 of the Act. In this case, the recordings in Ex.P2 is that before search “IO N.Venkatesan (PW1) informed Mohideen (appellant) about the provisions under Section 50 of the Act and his right to be searched before a gazetted officer or a Magistrate for which Mohideen politely denied and asked IO N.Venkatesan that he can search him.” In this regard, the evidence of PW1 is that “I have also told him (Mohideen) his right available under Section 50 of the NDPS Act that he may be chosen to be searched before the Magistrate or a gazetted officer for that he politely offered and told that the officer present there can search him.” The evidence of PW4 is that “அந்த அதிகாரி நீங்கள் psychotropic substance வைத்துள்ளதாக தகவல் வந்துள்ளது சோதனை செய்யவேண்டும், மேஜிஸ்ரேட்டிடமோ, கெசட்டட் ஆபிசர் முன்போ சோதனை செய்ய வேண்டுமா என்று மொய்தீனை கேட்டார். அதற்கு அவர் வேண்டாம் நீங்களே செய்து விடலாம் என்று சொன்னார்.”



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8. Admittedly, there is no written notice prepared in this case and there is nothing on record to show the Team led by PW1 had any gazetted officer atleast to show partial compliance to Section 50 of the Act. Further the appellant knows only to read and write in Kannada language. In what language the right under Section 50 of the Act orally communicated, there is no recording in Ex.P2. Further PW1 on prior information proceeded to Hotel Shanthi Bhavan, hence written notice should have been complied. In view of no written notice given and non availability of gazetted officer in the team, it cannot be held that Section 50 of the Act substantially complied with by the prosecution. In ***Vijaysinh Chandubha Jadeja*** case, the Constitutional Bench of the Hon'ble Apex Court referred and followed the earlier Constitutional Bench decision in “***State of Punjab v. Baldev Singh*** reported in ***(1999) 6 Supreme Court Cases 172***” and held that “*We have no hesitation in holding that in so far as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate*



the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search.”.

Thus, the Hon'ble Apex Court clearly held that Section 50 of the Act safeguards the right under Article 21 of the Constitution of India, hence, the obligation cannot be replaced by substituting with oral statement, that too with partial compliance.

9.It is also to be seen that neither in the mahazar (Ex.P2) nor in the evidence of PW4, it is recorded that the appellant produced the contraband from behind the curtain of a window and handed over to PW1. For the first time, PW1 projected as though the contraband concealed behind the curtain of a window and produced. In this case, on production of contraband by the appellant, it was tested with the drug detection kit which confirmed the presence of Methamphetamine, a psychotropic substance. But no arrest made immediately rather a summon (Ex.P16) under Section 67 of the Act issued for appearance of the appellant at about 20.00 hours on the same day. The appellant said to have stated he accompanied NCB Team voluntarily. But PW4 evidence is that after search by the NCB team, they took the



appellant along with them to the NCB office. After the appellant was taken to the NCB office, statement under Section 67 of the Act recorded (Ex.P17).

This statement stretches from 13.05.2018 to 14.05.2018 and thereafter the arrest shown at about 11.00 hours on 14.05.2018 as per the arrest memo (Ex.P19). Admittedly, after the statement (Ex.P17), no recovery made.

10.It is pertinent to note that though the appellant is a Malayalee by birth, he knows only Kannada to read and write. His statement under Section 67 of the Act (Ex.P17) in Kannada language translated by one Mr.Ravikumar/Intelligence Officer in English (Ex.P18). The appellant signed Exs.P2 & P19 in Kannada. In this case, admittedly, Mr.Ravikumar neither listed as witness nor examined during trial. No reason given by PW1, PW2 and PW5, the officials from NCB for non examination of Mr.Ravikumar. Thus, Ex.P17 has got no relevance or significance in the absence of the examination of Mr.Ravikumar.



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11. In the case of “*Tofan Singh v. State of Tamil Nadu*” reported in **(2021) 4 Supreme Court Cases 1**”, the Hon'ble Apex Court held that the statement recorded under Section 67 of the Act is only to the extent of any recovery as under Section 27 of the Indian Evidence Act. In this case, prior to the statement (Ex.P17), the contraband recovered and seized from the appellant. Hence, on both score, the statement Ex.P17 and its translated version Ex.P18 has no evidentiary value and no relevance to the above case.

12. The other contention of the appellant is that in this case Section 52-A of the Act not followed which is in violation of the guidelines of the Hon'ble Apex Court in the case of “*Union of India v. Mohanlal and another*” reported in **(2016) 3 SCC 379**”. Admittedly, in this case, on 13.05.2018, information was received by PW1 at about 13.00 hours and recorded in Ex.P1. PW1 visits the Hotel Shanthi Bhavan along with NCB Team and enquired the Manager Ajmal and the Receptionist/PW4 about the appellant. Thereafter, PW1, his team, PW4 and Ajmal had gone to Room No.105, knocked the door, around 14.45 hours contraband produced by the appellant, mahazar (Ex.P2) drawn recording the happenings in Room



No.105. In Room No.105, the contraband P3 and samples S1 and S2 were drawn and Exs.P3 to P14 seized and the mahazar (Ex.P2) completed by 18.00 hours. In Ex.P2, it is recorded that *“Thereafter the seized substances believed to be Methamphetamine was weighed with the help of electronic weighing scale brought by the NCB Officers, and found to weigh 535 grams in net. Then two samples of 5 grams each was drawn, placed in separate polythene covers, heat sealed and again placed in separate brown colour paper envelopes, pasted and wax sealed with NCB seal No.11 and marked as S1 and A2. The remaining white colour crystalline substance in the polythene cover, weighing 523 grams was heat sealed and placed in a light green cloth lined envelope, pasted, wax sealed with NCB Seal No.11 and marked as P1.”*. The test memo (Ex.P15) prepared drawing samples at Room No.105 of Hotel Shanthi Bhavan. Ex.P21 is the remand application in which annexure No.3 is the list of properties 1 to 5. The property No.1 is the 525 grams of white colour crystalline substance marked as P1, the property No.4 is brown cover containing 5 grams of white colour crystalline substance marked as S1 and the property No.5 is the brown cover containing 5 grams of white colour crystalline substance marked as S2. All



sealed with NCB Seal No.11. PW1 produced the same to the remanding Magistrate viz., the Judicial Magistrate, Ambattur verified the samples and made an endorsement that *“properties handed over to I.O for production before NDPS Court, Chennai”*. Thereafter, PW1 received the same and made endorsement that *“Received all properties and accused for safe custody and depository the accused in prison.”* The forwarding memo (Ex.P24) confirms the contraband and samples taken by PW1 deposited in the Officer-in-Charge of Godown NCB, Chennai on 14.05.2018 at 20.00 hours. Ex.P25 is the Godown Receipt confirming the Forwarding Memo No.8 of 2018 with articles received. Ex.P27 is the memo for submission of five properties before the Special Judge for NDPS Act Cases, Chennai. The Special Judge on the request of the Intelligence Officer endorsed that Samples S1 to be submitted to the Custom House Laboratory for examination and rest of the properties to be handed back to the Intelligence Officer. Ex.P28 is the request for forwarding the samples for qualitative and quantitative analysis by the Customs House Laboratory, Chennai. Ex.P29 is the forwarding letter of Sample S1 from the Special Court to the Joint Director, Custom House Laboratory, Chennai, in which,



PW3/Assistant Chemical Examiner endorsed that the Sample S1 along with test memo received on 15.05.2015 from Mr.N.Venkatesan/PW1. On 15.05.2018, S1 was produced before the Special Judge, then it was forwarded to the Custom House Laboratory, Chennai on the same day. The entire process of taking samples and submitting to the Custom House Laboratory, Chennai was carried out by PW1 which is not in dispute.

13.It is seen that Ex.P33 is the report, dated 22.05.2018 submitted by the Joint Director, Custom House Laboratory, Chennai to the Special Court confirming the examination of Sample S1 received by them. Ex.P33 was received on 25.05.2018 by PW2. Thus, the test conducted by PW3 is on the sample S1 taken by PW1 in Room No.105 of Hotel Shanthi Bhavan which was forwarded to them and the destruction of contraband was six months thereafter during November 2018. Thus, there is clear violation of Section 52-A of the Act and the same is against the dictum of the Hon'ble Apex Court in *Mohanlal* case. The relevant portion in *Mohanlal* case is as follows:



“16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17.The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-sections (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of



handover P1 to the Drug Disposal Committee for destruction. The admitted portion is that in this case the samples taken before the Special Judge on 03.11.2018 is for the purpose of destruction. In this case, though the search conducted in a hotel which may be a public place, the room occupied by a guest may not be said so. Hence, the appellant is entitled to his right of privacy and nobody even the staff can walk into the room without his permission. In such circumstances, Section 42-A of the Act not complied with. In this case, PW1 received information, reduced the same into writing and forwarded the same to his superior officer/PW2, but there is no recording of reason for belief while carrying out search or arrest as per proviso to Section 42(1) of the Act. Since it is a prior information, Section 42(1) of the Act ought to be followed by PW1.

15.The specific case of the appellant is that he knows only to read and write Kannada. In such circumstances, recording Ex.P2 in English, serving a copy in English to the appellant will not satisfy compliance of mandatory provision under Section 50 of the Act. The consistent stand of the appellant is that he knew only Kannada, that is the reason in mahazar (Ex.P2),



summon (Ex.P16), statement (Ex.P17) and arrest memo (Ex.P19), written and acknowledged in Kannada. As stated earlier, the translator from Kannada to English viz., Mr.Ravikumar, Intelligence Officer neither shown as witness nor examined in this case.

16.In view of the above discrepancies and finding that there is non compliance of statutory provisions of Sections 42, 50 and 52-A of the Act, this Court comes to the conclusion that the prosecution case is not free from suspicion and the prosecution failed to establish the case beyond reasonable doubt.

17.In the result, the case as projected by the prosecution is not safe to sustain conviction of the appellant. In such view of the matter, the conviction and sentence imposed by the trial Court against the appellant cannot be sustained in the eye of law. As such, the conviction and sentence imposed on the appellant in C.C.No.124 of 2018 by the learned I Additional Special Judge, Court of the Special Judge, I Additional Special Court for Exclusive Trial of Cases under NDPS Act, Chennai is set-aside and this



Crl.A.No.1338 of 2022

Criminal Appeal is allowed. The appellant is acquitted of all the charges levelled against him and the fine amount, if any paid, shall be refunded to him. The appellant is directed to be released forthwith, unless his custody is required in connection with any other case. Consequently, the connected miscellaneous petition is closed. No costs.

3.09.2024

Speaking Order/Non Speaking Order

Index : Yes/No

Internet : Yes/No

vv2

Note: Issue Order Copy on 05.09.2024.

To

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

2.The Intelligence Officer,
Narcotic Control Bureau,
Chennai Zonal Unit,
Chennai – 90.

3.The Superintendent,
Central Prison, Puzhal.

4.The Public Prosecutor,
High Court, Madras.



WEB COPY



Crl.A.No.1338 of 2022

M.NIRMAL KUMAR, J.

vv2

PRE-DELIVERY JUDGMENT IN
Crl.A.No.1338 of 2022

3.09.2024