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CRL.A(MD)No.35 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved On	:	15.12.2023
Pronounced On	:	12.03.2024

CORAM

THE HON'BLE MR.JUSTICE K.K.RAMAKRISHNAN

CRL.A(MD).No.35 of 2021

Manjula Arasupillai

.. Appellant/
Accused

Vs.

The Investigating Officer/Inspector,
Central Bureau of Narcotics,
Preventive & Intelligence Cell,
Chennai,
F.No.XV [11] 9/CHN/Zolpidem/2016-
[CBN Crime No.02/2016]

.. Respondent/
Complainant

PRAYER: Appeal filed under Section 374 (2) of the Criminal Procedure Code, to call for the records of the Court below and set aside the judgment and conviction in C.C.No.44 of 2017 on the file of the learned Additional District and Sessions Judge/Presiding Officer, Special Court for EC and NDPS Act Cases, Pudukkottai, dated 28.12.2020 and enlarge the petitioner/Appellant on bail.



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For Appellant :Mr.V.Kathirvelu
Senior Counsel for
Mr.K.Guhan

For Respondent :Mr.C.Arul Vadivel @ Sekar,
Special Public Prosecutor for NC Cases

JUDGMENT

The appellant, who is the accused in C.C.No.44 of 2017 on the file of the learned Additional District and Sessions Judge/Presiding Officer, Special Court for EC and NDPS Act Cases, Pudukkottai, filed this criminal appeal challenging the conviction and sentence imposed against him by the learned Additional District and Sessions Judge/Presiding Officer, Special Court for EC and NDPS Act Cases, Pudukkottai. The learned trial Judge has passed the impugned Judgment, dated 28.12.2020, holding the appellant guilty, and convicted and sentenced him as detailed below:

<i>Accused</i>	<i>Convicted under Section</i>	<i>Sentence of Imprisonment/ fine imposed</i>



Manjula Arasuppillai	Section 8(c) r/w 22(c) of Narcotic Drug Psychotropic Substances Act, 1985.	Rigorous Imprisonment for 10 years and to pay fine of Rs.1,00,000/- in default to undergo RI for one year.
	Section 8(c) r/w 21(c) of NDPS Act	RI for 10 years and to pay fine of Rs. 1,00,000/- in default to undergo RI for one year
	Section 8(c) r/w 23(c) r/w 28 of NDPS Act	RI for 10 years and to pay fine of Rs. 1,00,000/- in default to undergo RI for one year
		Substantive Sentence run concurrently

2. The brief facts of the case:

The appellant entered into conspiracy with the absconding accused namely jaleel to illegally transport huge quantity of Psychotropic Substances mentioned hereunder to Kuala Lumpur, Malaysia through the Trichy Airport by carrying with him in Malindo Airlines, on 04.12.2016, at 23.45 p.m.



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SL. No.	Name of the Psychotropic Substance/Narcotic Drug contained in the tablet/Syrup	Strength of the Psychotropic Substance/Narcotic Drug	Brand Name	Quantity of tablets/bottles
1.	Zolpidem Tartrate	10mg	Zolfresh	3450
2.	Zolpidem Tartrate	10mg	Restonite	640
3.	Alprazolam	0.5mg	Becalm	8400
4.	Codeine Phosphate	10mg/5ml, 100ml bottle	Eskuf	20

2.1. In pursuance of the conspiracy, she carried the said huge quantity of Psychotropic Substance in her hand luggage to the Trichy Airport. The same was informed by the informer to P.W.1. P.W.1, upon receipt of the secret information reduced it in writing as per Section 42 of the NDPS Act and submitted the same to the Head Quarters at Gwalior, on 04.12.2016, at 12.00 a.m. The said information has been marked as Ex.P.

1. Immediately, he informed the said intelligence to his subordinates namely P.Ws.2, 3 and 4 for taking necessary action. Based on the information, the said P.W.2 and his team proceeded to Trichy Airport and reached Trichy Airport in the evening. At about 09.00 p.m., P.W.2 arranged two independent witnesses namely L.G.Reegan and A.Layona Raj Kumar to stand as witnesses for search and seizure from the suspected person. In the Trichy airport, the appellant was suspected, they enquired



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her and also checked her Passport and boarding pass etc., and confirmed that she is Manjula Arasupillai. On enquiry, she replied that she has two checked-in-baggages and one hand baggage. The two checked-in-baggages were brought with the help of Malindo Airlines staff. P.W.2 requested the assistance of P.W.5 S.P.Radha, Superintendent of Customs and Akila Durairaj, Inspector of Customs to examine the three baggages of the appellant. When the two checked-in-baggages were opened and examined, it was found to contain only clothes. When black colour stroller “hand luggage” was opened, three boxes were found therein labelled as Fluconazole capsules, and two separate packets containing 10 bottles each of Codeine Phosphate. All are the Psychotropic Substance and Narcotic Drug. Then the officer seized the same.

2.2.P.W.1 informed the appellant that Zolpidem and Alprazolam and other tablets and Syrups are Psychotropic Substances and Codeine Phosphate is a Narcotic drugs and he enquired her as to whether she is having any drug licence to possess or any Export authorization issued by Central Bureau of Narcotics, for which, she replied in negative. Then, she was served with the notice under Ex.P.2 under Section 50 of the NDPS Act



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informing her right to be searched in the presence of the nearest Magistrate or Gazetted Officer. After receiving the said notice, she gave her consent for personal search by P.W.5, herself. Therefore, the search was conducted in the presence of P.W.5. But, nothing was found on her personal search. Thereafter, the appellant was informed that she has committed the offences punishable under NDPS Act and P.W.2 seized all the Narcotic Substances carried by the appellant. P.W.2 separated the drugs “brand wise” and two samples of 2 strips each were taken from Zolfresh and marked as A1S1 and A1S2. He has taken two samples of two strips each from Restonite Brand and marked as A2S1 and A2S2. Further, he has taken two samples of two strips each from Alprazolam with brand name Becalm and marked as A3S1 and A3S2. He has taken two samples of two strips each from Eskuf brand and marked as A4S1 and A4S2. Thereafter, he packed the remaining contraband with separate zip lock polythene cover and sealed separately, which were marked as A1, A2, A3, A4 and A5. Thereafter, P.W.2 seized the passport, boarding pass and two Nokia cell phones from the appellant. Then, he prepared Mahazar by using computer in the Customs office and recovered the drugs and other items from the appellant under Ex.P3.



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2.3.The signature of two independent witnesses, Customs Officials and the appellant were obtained in the Seizure Mahazar. Thereafter, P.W.2 issued summon to the appellant under Section 67 of the NDPS Act and her statement was recorded on 05.12.2016 in the Custom Office Airport. The copy of the summon is marked as Ex.P.6 and the statement given by the appellant is Ex.P.7. The appellant in her statement has admitted the commission of offences. Hence, P.W.2, after issuing the arrest intimation, arrested the appellant on 05.12.2016 at 1.00 p.m. The said arrest intimation is Ex.P.8. Thereafter, the appellant and the seized contraband were produced before the learned Judicial Magistrate, Trichy, along with remand application under Ex.P.9. He forwarded the seized materials to the Magistrate under Form 95 under Ex.P.10. The learned Judicial Magistrate accepted the remand and returned the seized properties along with Form 95 to be produced before the Special Court for NDPS cases. Thereafter, the seized properties were kept in the Customs office and the same was deposited in the Custom godown, Trichy. On 16.12.2016, after following procedure, the receipt for the deposit issued by the Customs godown, Trichy, is marked as Ex.P.11. P.W.2, based on the authorization given by



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the Superior, has made search of the residence of the appellant situated at Cholan Nagar, Pillaiyarpattai, Thanjavur, in the presence of two independent witnesses. During the said search, no contraband was recovered.

2.4. Thereafter, the investigation was conducted and continued by P.W.4 and he obtained Chemical report under Ex.P.37 and also examined number of persons to find out the absconding accused namely jaleel. P.W. 4 has also collected number of incriminating materials to show the conspiracy between jaleel and the appellant. He also examined a number of witnesses and finally filed this complaint against the appellant in CBN Crime No.2 of 2016, for the offence under Sections 8(c) r/w 22, 23, 28 and 29 of NDPS Act, r/w rule 53, 58 and 66 of NDPS Rules. The same was taken on file by the learned Additional District and Sessions Judge/Presiding Officer, Special Court for EC and NDPS Act Cases, Pudukkottai, in C.C.No.44 of 2017. The learned trial Judge issued summons to the accused and after her appearance, served the copies under Section 207 Cr.P.C. Thereafter, he framed necessary charges and questioned the accused. The accused pleaded not guilty and hence the trial



commenced against the accused.

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3.To prove the case, the prosecution examined P.W.1 to P.W.6 and exhibited 37 documents as Ex.P.1 to Ex.P.37 and produced 13 material objects as M.O.1 to M.O.13. The learned trial Judge thereafter questioned the accused under Section 313 Cr.P.C proceedings putting the incriminating evidence against her and she denied the same as false and thereafter, the case was posted for defence evidence. The accused neither produced any documents nor examined any witnesses on her side.

4.The learned trial Judge, on considering the evidences of witnesses, acquitted the appellant for the offences under Section 8(c) rw/ 29 of NDPS Act, and convicted and sentenced the appellant for the offence as stated supra. Aggrieved over the same, the appellant preferred this appeal.

5.Mr.V.Kathirvelu, learned Senior Counsel on behalf of the appellant made the following submissions:

5.1.The prosecution miserably failed to prove that the appellant was



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in conscious possession of the recovered Narcotic Drugs and Psychotropic Substances. Even as per the prosecution document, the appellant specifically stated that she was not aware of the presence of the Narcotic Drugs and Psychotropic Substances in the bag, which was handed over by jaleel, who is absconding accused. In the said circumstances, the foundational fact that the appellant was in conscious possession of the recovered Narcotic Drugs and Psychotropic Substances has not been proved. Hence, he seeks for acquittal.

5.2.The learned Senior Counsel further submitted that there was lacuna in taking the sample from the recovered Narcotic Drugs and Psychotropic Substances. In view of that lacuna, the prosecution miserably failed to prove the seized quantity is more than the small quantity.

5.3.The learned Senior Counsel further submitted that there was a discrepancy between the information received by the P.W.1 relating to the name of the airlines and there was no specific explanation on the side of the prosecution as to how the appellant was identified.



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5.4. The learned Senior Counsel further elaborated arguments stating that the petitioner is innocent person and she is said to have received parcel from absconding accused namely jaleel, without knowing the contraband contained in the box. She received the box as a medicine without knowledge about the contraband. He further submitted that the prosecution miserably failed to prove that the appellant carried the drugs, with the knowledge and criminal intent to transport the above said contraband from India to Malaysia. Hence, the prosecution miserably failed to prove the case beyond reasonable doubt to convict the appellant for the grave charge of possession of the commercial quantity of Psychotropic Substances. He also stated that as per the Judgment of the Honourable Supreme Court in the case of **Noor Aga Vs. State of Punjab and another** in **SLP.(Crl).No.5597 of 2006**, in view of draconian law, the prosecution must establish the case beyond reasonable doubt. In this case, there was total non compliance with any of the provisions and also guidelines issued by the Government. Hence, in all aspects, he seeks for acquittal. He also relied upon the following Judgment of the Honourable Supreme Court and this Court;



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(i) In the case of *Anandam Gundluru Vs. The Inspector of Police, NCB/MDS, Chennai*, reported in *(2023) 2 MLJ (Crl) 16*.

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(ii) In the case of *Noor Aga Vs. State of Punjab and another* in *SLP.(Crl).No.5597 of 2006*.

(iii) In the case of *Union of India Vs. Mohanlal and another* in *Crl.A.No.652 of 2012*.

(iv) In the case of *Simrnjit Singh Vs. State of Punjab* reported in *2023 LiveLaw (SC) 570*.

6. The learned Special Public Prosecutor submitted that the huge quantity of the Psychotropic Substances was recovered from the appellant in the presence of the independent witness P.W.5. Apart from that, the recovery was proved through the evidence of the P.Ws.1, 2 and 3 and all have cogently deposed before the Court below about the recovery. The appellant has also not specifically denied the recovery during the course of 313 questioning. In the said circumstances, the recovery was proved and possession was also proved. From the above, the presumption under Sections 54 and 35 of the NDPS Act would arise. Hence, it is the duty of the appellant to rebut the same beyond reasonable doubt as per Section 35 of the NDPS Act. He has not even stated any explanation relating to



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the above possession of the drugs during the course of 313 questioning.

Hence, he seeks confirmation of conviction and sentence passed by the learned trial judge.

6.1.The prosecution clearly proved that the recovered quantity is more than the small quantity. The following are Psychotropic Substances and Narcotic Drugs found in appellant's hand baggage in her possession under the provisions of NDPS Act;

SL. No.	Name of the Psychotropic Substance/Narcotic Drug contained in the tablet/Syrup	Strength of the Psychotropic Substance/Narcotic Drug	Brand Name	Quantity of tablets/bottles
1.	Zolpidem Tartrate	10mg	Zolfresh	3450
2.	Zolpidem Tartrate	10mg	Restonite	640
3.	Alprazolam	0.5mg	Becalm	8400
4.	Codeine Phosphate	10mg/5ml, 100ml bottle	Eskuf	20

6.2.The above items are large quantity of the Psychotropic Substances. They have taken the samples as per the procedure stated in the notification of the Central Government. The same was sent to the Chemical lab. P.W.5 also clearly stated about the contents of the Psychotropic Substances in the each tablets. Hence, the prosecution



clearly proved that the recovered items were more than the small quantity ie., above the commercial quantity. Hence, the conviction and sentence passed against the appellant under Sections 8(c) r/w 22(c), 21(c), 23(c) r/w 28 of NDPS Act, is in accordance with law.

6.3.The learned Special Public Prosecutor further submitted that the discrepancy relating to the airlines is not material one. It is source information. To ascertain the source information, he conducted search of that suspected lady and they found that she was carrying Psychotropic Substances as stated above. In the said circumstances, there was no material discrepancy in the prosecution case. The learned Special Public Prosecutor submitted that the recovery of the huge quantity of the Psychotropic Substances itself is a strong circumstances to show her conscious possession. He further submitted that she has not made any plea regarding the above fact either during the initial questioning or during 313 questioning. He further submitted that the explanation given by the appellant that she received the said contraband from the Rathimeena travels is false. Therefore, this is an additional circumstance to prove that the appellant is conscious about the huge quantity of Psychotropic



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Substances. In the said circumstances, the prosecution has clearly proved the case and hence, the Judgments relied upon by the learned Senior Counsel for the appellant is not applicable to the present case. Considering the huge quantity of contraband, the learned trial judge also showed leniency in granting concurrent sentence. But, as per law, there should be separate sentence for each items of the contraband. He also relied the following Judgments of the Honourable Supreme Court;

(i)In the case of ***Dharampal Singh Vs. State of Punjab*** reported in ***(2010) 9 SCC 608***.

(ii)In the case of ***State of Punjab Vs. Rakesh Kumar*** reported in ***(2019) 2 SCC 466***.

(iii)In the case of ***State of Haryana Vs. Jarnail Singh and others*** reported in ***(2004) 5 SCC 188***.

(iv)In the case of ***T.Thomson Vs. State of Kerala and another*** reported in ***(2002) 9 SCC 618***.

7.This Court has considered the rival submissions made by both parties and perused the records and also the precedents relied upon by them.



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8.Now the question is whether conviction and sentence imposed upon the appellant is in accordance with law?

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9.P.W.1 received the information about the illegal transportation of the huge quantity of the Psychotropic Substances. He reduced it in writing and sent the same to the Head Quarters under Ex.P.1. Thereafter, P.Ws.1 to 3 reached the Trichy Airport in the evening. In the Trichy Airport, the appellant was suspected and intercepted by them and her bags were checked in the presence of the independent witness namely P.W.5. The said P.W.5, Superintendent, Central Excise and Customs, Trichy Airport, has no motive against the appellant and she clearly deposed about the recovery of contraband. The said evidence corroborated with the evidence of P.Ws.1 to 3, who clearly deposed that the recovery from the bags of the appellant. To prove the same, they marked the exhibit Ex.P.3. The said exhibits and also the recovered contraband had not been disputed by the appellant during the 313 questioning. Hence, testimonies of P.Ws.1 to 3 and 5 are cogent and trustworthy and they clearly deposed about the recovery of the said contraband namely huge quantity as stated above.



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10.From the above evidence, the prosecution clearly proved that the

contraband were recovered from the appellant. Even though the witnesses were cross examined intensively, there was no answer brought by the appellant's counsel to disbelieve their evidence. In the said circumstances, this Court finds that all the Psychotropic Substances were recovered from the appellant.

11.Now the remaining questions to be decided in this case is whether the appellant has knowledge about the contraband. Before going into the said question, it is relevant to note the Principle laid down by the Hon'ble Supreme Court relating to the “conscious possession” in the following judgement:

11.1.In *Madan Lal Vs State of H.P.* reported in **2003 7 SCC 465**, in Para 23, the Supreme Court held the meaning of the “conscious” as follows:

“The word conscious means awareness about a particular fact. It is a state of mind which is deliberate or intended.”



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11.2. In Mohan Lal Vs. State of Rajasthan reported in 2015 6 SCC 222, the Honourable Supreme Court observed the term “possession” could mean physical possession with animus; custody over the prohibited substance with animus; exercise of dominion and control as a result of concealment; or personal knowledge as to the existence of the contraband and the intention based on this knowledge.

12. According to the appellant, she received the said hand bag from one jaleel, who is the absconding accused. She contacted the said jaleel and the prosecution also produced document to show that she contacted the said jaleel. Further, she has not pleaded that she received the said bag without knowing the contents either during the 313 questioning or initial questioning while framing the charges. She disclosed that jaleel asked to hand over the medicine in the cover. She also made a false statement that he received the said box from the Rathimeena Travels. The investigating agency conducted investigation and produced the materials to show that there was no such receipt of the box from the said Rathimeena Travels. Adequate evidence also has been produced before the Court below to



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prove that there was no transportation of box through Rathimeena Travels.

Further, it is the duty of the appellant to verify the material of the medicine in the so called bags. It is not a case of the appellant that she is the first time traveller in the airlines. She is a frequent traveller. In the said circumstances, she knew that there is a restriction to transport the illegal contraband. In the said circumstance, this Court finds that the prosecution clearly proved that the appellant had conscious possession of the Psychotropic Substances. Hence, It is the duty of the appellant to disprove the same as per the Section 35 of NDPS Act, which reads as follows:

35.Presumption of culpable mental state.

(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



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its existence is established by a preponderance of probability.

13.From reading the above Section 35(2) of the Act, it is clear that the appellant should have proved beyond reasonable doubt that she carried the Psychotropic Substance without the required Culpability. ie., Once huge quantity of psychotropic substance is recovered, it is duty of the appellant to prove that it was not conscious possession as held by the Hon'ble Supreme Court in the following cases:

13.1.In the case of ***Meha Singh Vs. State of Punjab*** reported in ***AIR 2003 SC 3184***, reads as follows:

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 50 applies only in case of personal search of a person-it does not extend to search of a vehicle or a container or a bag, or premises.

13.2.In the case of ***Baldev Singh Vs. State of Haryana*** reported in ***2015 (3) MWN (Cr.) 321 (SC)*** , reads as follows;



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Once possession of contraband by accused established, Section 35 comes into play and burden shifts on accused to discharge onus of proof that he was not in conscious possession.

The accused, in instant case, in his statement under Section 313 not taken any plea that he was not in conscious possession-Accused only pleaded false implication and foisting of case against him by Police-Nothing stated as to why Police foisted false case-No previous enmity of Police with accused.

14.In this case, even she has not given any explanation in her 313 questioning and also initial questioning while framing of charges. Therefore, the prosecution proved the conscious possession beyond reasonable doubt.

15.The learned senior counsel for the appellant relied upon the 67 statements recorded under Section 67 of the NDPS Act and submitted that the appellant made the statement that she received the same without any knowledge about illegal transportation of the Psychotropic Substance. The said submission is not accepted on the ground that the said statement is neither admissible one nor can be used for any purpose as held by the



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Hon'ble Supreme Court in ***Topan Singh*** reported in ***2021 4 SCC 1***. The said 67 statement is neither admissible one nor used for any purpose.

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Therefore, the argument of the Senior counsel on the basis of the statement recorded under Section 67 of the NDPS Act has no legs to stand.

16.The learned Senior Counsel submitted that there was a contradiction relating to the airlines. According to this court, the said contradiction is not material. It is the case that information was received by the officer about the illegal transportation of large quantity of Psychotropic Substances. Therefore, they made search and also it is the specific evidence of P.W.1 and other officers that they initially checked the passport and travel documents, and thereafter, they enquired about the possession of the said contraband. In that process, there was no mistake on the part of the officer relating to the disclosure of the different airlines by conducting search. In the said circumstances, the said discrepancy is not material one to disbelieve the version of P.W.1, 2 ,3 and 4 more particularly the independent witness P.W.5, who is a Gazetted officer.

17.The learned Senior Counsel read the deposition of the expert.



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Even though the expert stated that he took measurement with the rope(attai), but he measured the individual tablets and furnished the report with the contents of the ratio of the Psychotropic Substances. The said submission cannot to be accepted in view of the law laid down in the case of *Hira Singh and Another Vs. Union of Indian and another*, reported in (2020) 20 SCC 272. The Hon'ble Supreme Court in the said judgment clearly stated that in the case of seizure of mixture of Narcotic Drugs or Psychotropic Substances with one or more neutral substances, the quantity of neutral substances is not to be excluded and to be taken into consideration along with actual content by weight of the offending drug, while determining the “small or commercial quantity” of Narcotic Drugs or Psychotropic Substances. In view of the above, this court finds no merit in the contention of the learned Senior Counsel for the appellant that the appellant's case does not come under the commercial quantity.

18.This Court is also duty bound to consider the submission of the learned Special Government Pleader for the Department that the appellant was also involved in three smuggling cases, for which, they also produced the materials. There is no denial on the part of the appellant. The same is



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a material to show that the conduct of the appellant. From the above document, it is clear that she is a frequent traveller in the Airlines. Earlier, she was also involved in some smuggling activities and her case is that she received the said box from the Rathimeena travels is a false one. This fact is material to presume that she took the Psychotropic Substance with knowledge. Further, the appellant is duty bound to know about the transportation of the Psychotropic Substance without licence. Hence, this Court considering all these aspects, confirms the conviction and sentence passed against the appellant.

19.Accordingly, the conviction and sentence passed by the learned Additional District and Sessions Judge/Presiding Officer, Special Court for EC and NDPS Act Cases, Pudukkottai, in C.C.No.44 of 2017, dated 28.12.2020 is hereby confirmed.

20.In the result, this Criminal Appeal is dismissed.

12.03.2024

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To

1. The Additional District and Sessions Judge/
Presiding Officer,
Special Court for EC and NDPS Act Cases,
Pudukkottai.
2. The Investigating Officer/Inspector,
Central Bureau of Narcotics,
Preventive & Intelligence Cell,
Chennai.
3. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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vsg

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