



WEB COPY



Crl.A.(MD).No.503 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH Court

DATED: 04.06.2024

CORAM

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

Crl.A.(MD).No.503 of 2023
and
Crl.M.P(MD).No.9585 of 2023

Shebik

.. Appellant

Vs.

The State rep. by
The Inspector of Police,
B-1 Town Police Station,
Ramanathapuram
(Crime No.72 of 2022)

.. Respondent

PRAYER: Appeal filed under Section 374 (2) of the Criminal Procedure Code, to call for the records to set aside the judgment and conviction dated 05.05.2023 by the learned Additional District and Sessions Judge/Presiding Officer, Special Court for EC and NDPS Act Cases, Pudukkottai in C.C.No.245 of 2022 and acquit the appellant.

For Appellant : Ms.Devaki

For Respondent : Mr.B.Nambi Selvan
Additional Public Prosecutor

Page 1 of 52



Crl.A.(MD).No.503 of 2023

JUDGMENT

WEB COPY

The accused No.2 in C.C.No.245 of 2022 on the file of the Additional District and Sessions Judge/Presiding Officer, Special Court for EC and NDPS Act Cases, Pudukkottai, has filed this Criminal Appeal before this Court challenging the conviction and sentence imposed against him in the impugned judgment dated 05.05.2023. The conviction and sentence is as follows:

Conviction for the Offence under Section	Sentence of Imprisonment
8(c) r/w 21(C) of the NDPS Act	12 years R.I and to pay a fine of Rs.1,20,000/- in default to undergo 6 months S.I

2. On 02.04.2022 at about 15 hours, P.W.8 received the secret information about the illegal transportation of 1.030 Kgs of Hashish oil. Thereafter, he reduced the same in writing and sent the same to his superior under Ex.P.7 in compliance with Section 42 of the NDPS Act. After getting permission, he along with his team, namely, P.W.1 and P.W.2 went to the scene of the occurrence. The informer identified the accused



Crl.A.(MD).No.503 of 2023

Nos.1 and 2 and on seeing the team, the appellant and the other accused, Mohammed Javid Rahman were trying to escape from the scene of occurrence along with the contraband. At that time, the appellant alone was nabbed by P.W.8 and other accused fled away from the scene of occurrence. P.W.8 has informed about his right to be searched in the presence of the learned Judicial Magistrate or the gazetted officer as per Section 50 of the NDPS Act. He had no objection to be searched by the police officers themselves. Hence, they prepared the seizure Mahazar and also on search, they found that the accused No.2 was in possession of yellow-coloured plastic bag with Hashish oil. Hence, after ascertaining that the said contraband was hashish oil, P.W.8 arrested the accused at 6.30 pm and recorded his confession statement. After that, they recovered the hashish oil and weighed it and found it was 1.030 kilograms of hashish oil, and they took the samples as S1 and S2 and obtained the signature and completed the process. The independent witnesses did not come forward to be witnesses and the same was recorded in the presence of P.W.1 and P.W.2 and another witness, Anbarasan, namely, Grade 1 Constable of the Department. P.W.3, P.W.4 and P.W.5 were independent witnesses for



Crl.A.(MD).No.503 of 2023

observation mahazar and the rough sketch for which they subscribed their signature in the observation mahazar and the sketch. Thereafter, P.W.8 came to the police station and registered the case in Crime No.72 of 2022 and also handed over all the materials along with the accused. The accused was brought to the police station and he was produced before the learned Judicial Magistrate along with contraband. Further, the absconding accused was arrested in another case in Kerala and the same came to the knowledge of P.W.8 and on 15.05.2002, he was arrested and some recoveries were made. Thereafter, investigation was completed and the final report was filed upon receipt of the chemical analysis report to prove the content of the Hashish oil and the final report was taken on file in CC.No.245 of 2020.

3. After appearance of the accused, copies of records were furnished to them under Section 207 Cr.P.C. The learned Trial Judge, on perusal of records and on hearing both sides and being satisfied that there existed a *prima facie* case against the accused/appellant, framed charges under Sections 8(c) r/w 21(c) of the NDPS Act 1985 and the same was read over



CrL.A.(MD).No.503 of 2023

and explained to him and on being questioned, the accused/appellant denied the charges and pleaded not guilty and stood for trial.

4.The prosecution, in order to prove its case, had examined 8 witnesses as P.W.1 to P.W.8 and exhibited 20 documents as Ex.P.1 to Ex.P.20 and marked six material objects as M.O.1 to M.O.6.

4.1. M.O.1 and M.O.2 are the sample Hashish oil and M.O.3 is the remaining contraband.

5.When the accused was examined under Section 313(1) (b) of Cr.P.C., with regard to incriminating aspects against him, he denied the evidence as false and further stated that a false case has been foisted against him. The accused has neither produced any documents nor examined any witness on his side.

6.The learned Trial Judge, considering the materials and circumstances found that accused No.1 in C.C.No.245 of 2022 was not guilty and acquitted him and the accused No.2/appellant herein alone was



Crl.A.(MD).No.503 of 2023

found guilty and passed the following conviction and sentence as against the appellant:

<i>Conviction for the Offence under Section</i>	<i>Sentence of Imprisonment</i>
8(c) r/w 21(C) of the NDPS Act	12 years R.I and to pay a fine of Rs.1,20,000/- in default to undergo 6 months S.I

7. Submissions of the learned counsel for the appellant:

7.1.In the seized materials, there was no SHO seal in the seized documents and no public witness was examined and in form 50 there was no signature of the officers and also there was no compliance of section 42 of the NDPS Act.

7.2.Apart from that, there was failure to follow Section 42(1) of the NDPS Act.

7.3.According to the investigating agency, the entire contraband was produced before the Malkana, but the Malkana Register was not produced.

7.4.The officer had not sent the contraband to the chemical lab within 72 hours as per the Notification 1 of 88 and same was sent with delay. The said delay caused prejudiced to him.



7.5. There was non compliance of section 52A of the NDPS Act and there is no destruction as per section 52A of the NDPS Act.

7.6. Finally, the Hashish oil was recovered and the weight was given in the final report as 1.030. Hence, the same was weighed along with the cover containing the contraband and hence, without cover, the said quantity comes below the commercial quantity, that is below 1 litre. In such circumstances, he seeks for the reduction of the sentence.

8. Submissions of the learned Additional Public Prosecutor:

The learned Additional Public prosecutor, on the other hand, submitted that P.W.8 upon receipt of the information reduced the same in writing under Ex.P7 and after obtaining the permission from the higher officials, he went to the occurrence place and seized the contraband and hence there is no violation of the section 42 of the NDPS Act. There is a specific claim by the recovery officer that the independent witness did not come forward to give the evidence and hence the same was recorded in the proceedings and the non-examination of independent witness is not fatal when the evidence of P.W.8, P.W.1 and P.W.2 are cogent and corroborated



Crl.A.(MD).No.503 of 2023

with each other. The entire contraband was produced from the Malkana and the same was marked as M.O.3 without any objection and hence there is no prejudice caused because of failure to produce the Malkana register. The delay in the receipt of FSL report is not within the domain of the investigation officer. They produced the entire contraband along with the accused at the time of the remand before the competent court and the said delay is not fatal when there was no case of tampering of the contraband. In this case, Section 52-A of the NDPS Act is not applicable when the entire contraband was produced before the learned Judicial Magistrate within the specified period and it is not the case of the prosecution, that there was a destruction of the entire contraband. Apart from that, the sample was properly taken and the same was produced before the learned Judicial Magistrate and remaining contraband was marked as M.O.3. In these circumstances, the argument of the learned counsel for the appellant relating to Section 52-A of the NDPS Act is deserved to be rejected. The quantity of the Hashish oil is concerned, actually, the recovered contraband is 1.300 ml. There was a omission while framing of charge, and it is just a mistake but the entire contraband is 1.330 ml. All the



Crl.A.(MD).No.503 of 2023

documents including the seizure document shows that 1.300 ml was seized. Hence, the case clearly comes under the commercial quantity. In the said circumstances, seeks for dismissal of the appeal.

9. This Court considered the rival submissions made by the learned counsel appearing on either side and perused the materials available on record.

10. *Compliance of Section 42-(1) of the NDPS Act:*

P.W.8 has deposed that he has received the secret information on 02.04.2002, relating to the illegal transportation of the Hashish oil by A1 and A2. The same was reduced in writing under Ex.P7. The higher official also received the said information and made the endorsement that he received and also they gave the permission to conduct search. In the said circumstances, there is compliance of the section 42-(1) of the NDPS Act.

11. *Compliance under Section 50 of the NDPS Act:*

As held above, in this case, yellow colored plastic bag with Hashish



oil seized by P.W.8 in the presence of P.W.1 and P.W.2 no contraband was recovered from the body of the appellant. Therefore, as held by the Hon'ble Three Judges Bench of the Supreme Court reported in **2005 (4) SCC 350**, under Section 50 of the NDPS Act, is not applicable. Apart from that, the evidence of P.W.1, P.W.2 and P.W.8 that they complied the requirement of Section 50 of the Act supported by material documents cannot be disbelieved. Hence, the argument of the learned counsel for the appellant that the appellant is entitled to acquittal for violation of Section 50 of the NDPS Act, cannot be accepted.

12. Failure to Examine Independent witnesses:

In this case, recovery of the contraband has been clearly proved through the evidence of P.W.1, P.W.2 and P.W.8. The evidence of P.W.1, P.W.2 and P.W.8 are cogent and trustworthy. No circumstances were elicited by the defence to disbelieve their evidence and no motive is either attributed against them or proved to the satisfaction of the Court. The recovered articles immediately were produced before the Court at the time of the remand itself and there was no explanation on the side of the



appellant. Further, it is the specific case of the prosecution that in the spot, the independent witness did not come forward to subscribe to the preparation of recovery and other formalities. The Hon'ble Supreme Court in various precedents reiterated principle that the non examination of the independent witness is not a ground to disbelieve the case of the prosecution of recovery of contraband,. The Hon'ble Constitution Bench in the case of ***Surinder Kumar v. State of Punjab*** reported in 2020 (2) SCC 563 paragraph Nos.14 and 15 has held as follows:

14.Further, it is contended by the learned Senior Counsel appearing for the appellant that no independent witness was examined, despite the fact they were available. In this regard, it is to be noticed from the depositions of Devi Lal, Head Constable (PW 1), during the course of cross-examination, has stated that efforts were made to join independent witnesses, but none were available. The mere fact that the case of the prosecution is based on the evidence of official witnesses, does not mean that same should not be believed.

15. The judgment in Jarnail Singh v. State of Punjab [Jarnail Singh v. State of Punjab, (2011) 3 SCC 521 : (2011) 1 SCC (Cri) 1191] , relied on by the counsel for the respondent State also supports the case of the prosecution. In the aforesaid judgment, this Court has held that merely because prosecution did not examine any independent witness, would not necessarily lead to conclusion that the accused was falsely implicated. The evidence of official witnesses cannot be distrusted and disbelieved, merely on account of their official status.



Crl.A.(MD).No.503 of 2023

Apart from that, in the spot, the independent witness did not come forward to subscribe to the preparation of the recovery and other formalities, and hence, the recovery was made from the appellant in the presence of P.W.1, P.W.2. P.W.8's evidence is corroborated by P.W.1 and P.W.2. P.W.1, P.W.8 clearly deposed that he made a search of the appellant and the appellant had the cover containing the Hashish oil. In the said circumstances, Section 50 is not applicable and also there is no necessity to follow the condition stated under section 50 of NDPS Act.

Jeet Ram v. NCB, (2021) 14 SCC 592 : 2020 SCC OnLine SC

735 at page 600

17. The trial court acquitted the appellant mainly on the ground that prosecution case was not supported by independent witnesses; conscious possession was not proved; non-compliance of Section 50 of the NDPS Act; proper procedure was not followed in sending the samples for examination and the case of the prosecution was unnatural and improbable. As rightly held by the High Court, this Court in State of H.P. v. Pawan Kumar [State of H.P. v. Pawan Kumar, (2005) 4 SCC 350 : 2005 SCC (Cri) 943]



has held that Section 50 of the NDPS Act is applicable only in the case of personal search, as such, there is no basis for the findings recorded by the trial court that there was non-compliance of provision under Section 50 of the NDPS Act. Even with regard to the finding of the trial court that the case of the prosecution was not supported by independent witnesses, it is clear from the evidence on record that the incident had happened at about 10.30 p.m. in a dhaba which is away from the village site and all other persons who are found in the dhaba were the servants of the accused. It is also clear from the evidence on record that Suresh Kumar and Attar Singh examined on behalf of the appellant are closely related to the accused, as such, they could not be said to be independent witnesses. Pappu was the only other person who is none other than the servant of the dhaba and we cannot expect such a person to be a witness against his own master.

The recovery was proved through the evidence of the P.W.8, P.W.1 and P.W.2. After recovery, he was properly arrested and produced before the learned Judicial Magistrate for remand, along with the contraband.



WEB COPY

13.Plea of the non-compliance of Section 52A of the NDPS Act caused failure of justice.

The sample also was properly taken as per the evidence of P.W.8 and sample was taken as S1, S2 and the remaining contraband was intact and also all were produced before the learned judicial magistrate at the time of the remand. Form 91 also was marked before the court. In form 91, the learned Judicial Magistrate clearly stated that he verified form 91 and the same was marked as Ex.P20 and the learned Judicial Magistrate clearly made endorsement that the entire contraband was produced and directed to produce before the Special Court. The said document was marked and, there is no dispute relating to the preparation of the Ex.P.20. In view of the above, the argument of the learned counsel for the appellant that 52A is not complied, can not be accepted.

13.1.The conjoined reading of Sections 41 to 44, 55 and 57 of the NDPS Act, shows that every authorised officer from the jurisdictional Police Station, the department of Central Excise, Narcotic Customs, Revenue Intelligence or any other department of Central Government etc.,



Crl.A.(MD).No.503 of 2023

has reason to believe from personal knowledge or information given by any person and the same was reduced in writing that any Narcotic drug or Psychotropic substances or controlled substance in respect of which, offence punishable under this Act has been committed, they are entitled to search and seize the contraband. They are called “seizure officer”. They shall arrest the accused and produce the accused along with seized contraband to his immediate Superior of nearest police station or officer empowered under Section 53 of the Act. The said officers shall take necessary measure as may be necessary for the disposal, as per Section 52 of the Act. The said report shall be made within 48 hours from the time of either arrest or seizure. Under Section 55, the officer in charge of police station shall take charge of the contraband and keep in safe custody pending orders of the Magistrate. He also shall allow the said seizure officer to take sample of such contraband and seal the said sample with seal of officer in charge of Police Station. The Central Government issued a notification with guidelines to follow the procedure to take the sample from the recovered contraband and to keep the remaining contraband.



13.1.1. That being the arrangement of the Section and the scheme of the Act, the Government have brought amendment in the year 1989 vide Act 2 of 1989 with the following statement of objects and reasons:

Amendment Act 2 of 1989-Statement of Objects and Reasons- *In recent years, India has been facing a problem of transit traffic in illicit drugs. The spill-over from such traffic has caused problems of abuse and addiction. The Narcotic Drugs and Psychotropic Substances Act, 1985 provides deterrent punishments for drug trafficking offences. Even though the major offences are non-bailable by virtue of the level of punishments, on technical grounds, drugs offenders were being released on bail. In the light of certain difficulties faced in the enforcement of the Narcotic Drugs and Psychotropic Substances Act, 1985, the need to amend the law to further strengthen it, has been felt.*

2.A Cabinet Sub-Committee which was constituted for combating drug traffic and preventing drug abuse, also made a number of recommendations for strengthening the existing



law. In the light of the recommendations of the Cabinet Sub-Committee and the working of the Narcotic Drugs and Psychotropic Substances Act, in the last three years, it is proposed to amend the said Act. These amendments, inter alia, provide for the following:-

(i)to constitute a National Fund for Control of Drugs Abuse to meet the expenditure incurred in connection with the measures for combating illicit traffic and preventing drug abuse;

(ii)to bring certain controlled substances which are used for manufacture of Narcotic Drugs and Psychotropic Substances under the ambit of Narcotic Drugs and Psychotropic Substances Act and to provide deterrent punishment for violation thereof;

(iii)to provide that no sentence awarded under the Act shall be suspended, remitted or commuted;

(iv)to provide for pre-trial disposal of seized drugs;

(v)to provide death penalty on second conviction in respect of specified offences involving specified quantities of certain drugs;



- (vi) to provide for forfeiture of property and a detailed procedure relating to the same ; and*
- (vii) to provide that the offences shall be cognizable and non-bailable.*

13.1.2. Therefore, “to provide for pre-trial disposal of the seized contraband”, the 52 A was inserted on 29.05.1989, which reads as follows:

52A. Disposal of seized narcotic drugs and psychotropic substances.—

(1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time,



WEB COPY



CrL.A.(MD).No.503 of 2023

determine after following the procedure hereinafter specified.]

(2) Where any 4 [narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such 4 [narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the 4 [narcotic drugs, psychotropic substances, controlled substances or conveyances] or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the 4[narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application, to any Magistrate for the purpose of—

(a) certifying the correctness of the inventory so



prepared; or

(b) taking, in the presence of such magistrate, photographs of 5 [such drugs, substances or conveyances] and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1972) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of 1 [narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.]



CrL.A.(MD).No.503 of 2023

13.1.3.Section 52 A aims at “*pre trial disposal of seized contraband*” with the sole object of avoiding pilferage of contraband and returning to the marketplace for recirculation as it is vulnerable to theft and substitution, against the normal rule of destruction of the material after conclusion of the trial under Section 452 Cr.P.C., The said provision intends to authorise the post recovery procedure to dispose the seized contraband by the officer mentioned Section 52 to prove the case of the possession of the contraband by taking sample, by preparing inventory in the presence of the judicial Magistrate. Therefore, the prosecution is not prevented to prove the case of the possession of the contraband through legal evidence of the recovery witnesses. Once the possession of the contraband is proved, the legal presumption under Section 54 comes into play. Then, the culpable mental state on the part of the accused can be pressed into service under Section 35 of the Act. Therefore, in a similar contention raised before the Hon'ble Supreme Court in the case of ***State of Punjab v. Makhan Chand***, reported in ***(2004) 3 SCC 453***, the Hon'ble Supreme Court has rejected the same with the following findings:

“9. Learned counsel for the respondent-accused relied on certain standing orders and



WEB COPY



Crl.A.(MD).No.503 of 2023

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.

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*



CrL.A.(MD).No.503 of 2023

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.”

13.1.4.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 not even disputed, the entire contraband material need not be placed on*



WEB COPY



Crl.A.(MD).No.503 of 2023

*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



WEB COPY



CrI.A.(MD).No.503 of 2023

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 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



CrL.A.(MD).No.503 of 2023

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.

13.2. From the above discussion, it is clear that Section 52 A of the NDPS Act deals with disposal of the seized contraband and it is not related to the seizure from the scene of the occurrence. Therefore, this



Crl.A.(MD).No.503 of 2023

Court is unable to accept the submission of the learned counsel for the appellant that the failure on the part of the investigating agency to destruct the contraband as per the procedure contemplated under Section 52A of the NDPS Act is a ground for acquittal without going into the legal evidence available to prove the possession of the contraband, seizure of the contraband, the arrest of the accused, taking of the samples, forwarding of the samples and the remaining contraband along with accused immediately after the arrest to the Court and the production of the remaining samples, chemical analysis report and the remaining contraband physically as a material object. Once the above facts are proved through the evidence, the presumption under the Act gets attracted. Therefore, the interpretation to Section 52 A of the NDPS Act, is made to achieve the object of NDPS Act.

13.3.The drugs are made to cure the illness and the diseases and to alleviate the pain during ailment. But, People misused the same for illegitimate purpose and therefore, drug abuse has become a social problem. The NDPS Act was originally brought in the year 1985.



Subsequently, to make it stringent, an amendment was brought in the year 1989 with the object stated supra.

13.4.According to the data, 1.58 Crores children aged between 10 to 17 years are addicted to drugs. The effect of the drug abuse includes disease transfusion, criminal behaviour, social disorder and even death and suicide. According to the data, the suicide as a result of a drug abuse has increased to unimaginable and alarming percentage.

<i>Year</i>	<i>Number of suicide due to drug abuse</i>
2011	3658
2016	5199
2017	6705
2018	7193
2019	7860
2021	10560

ie., As per the data available from the NCRB, death by suicide attributed to drug abuse and alcohol addiction continue to increase at the rate of atleast one death in every hour. Further, as per the data, in the year 2018, due to the drug over dose, 875 deaths have occurred and in the year



2019, 704 deaths. Therefore, there is an alarming situation, which required immediate action. Therefore, Government brought in Section 52A with object of disposal of a drugs immediately after the seizure. Therefore, Section 52 A should be so interpreted to avoid unworkable or impracticable results. The said principle was fortified in the case of ***Sheffield City Council vs. Yorkshire Water Services Ltd.***, reported in ***(1991) 1 WLR 58 : (1991) 2 All ER 280]***, ***WLR at page No.71***, which has held as follows:

“Parliament is taken not to intend the carrying out of its enactments to be unworkable or impracticable, so the court will be slow to find in favour of a construction that leads to these consequences. This follows the path taken by judges in developing the common law. ‘... the common law of England has not always developed on strictly logical lines, and where the logic leads down a path that is beset with practical difficulties the courts have not been frightened to turn aside and seek the pragmatic solution that will best serve the needs of society’.”



Crl.A.(MD).No.503 of 2023

13.4.1. The Hon'ble three benches of Supreme Court reiterated the said principle by interpreting Section 50 of the Act in the case of the *State of H.P. v. Pawan Kumar*, (2005) 4 SCC 350 : 2005 SCC (Cri) 943 : 2005 SCC OnLine SC 714 at page 363

18. There is another aspect of the matter, which requires consideration. Criminal law should be absolutely certain and clear and there should be no ambiguity or confusion in its application. The same principle should apply in the case of search or seizure, which come in the domain of detection of crime. The position of such bags or articles is not static and the person carrying them often changes the manner in which they are carried. People waiting at a bus-stand or railway platform sometimes keep their baggage on the ground and sometimes keep in their hand, shoulder or back. The change of position from ground to hand or shoulder will take a fraction of a second but on the argument advanced by learned counsel for the accused that search of bag so carried would be search of a person, it will make a sharp difference in the applicability of Section 50 of the Act. After receiving information, an officer empowered under



Section 42 of the Act, may proceed to search this kind of baggage of a person which may have been placed on the ground, but if at that very moment when he may be about to open it, the person lifts the bag or keeps it on his shoulder or some other place on his body, Section 50 may get attracted. The same baggage often keeps changing hands if more than one person are moving together in a group. Such transfer of baggage in the nick of time when it is about to be searched would again create practical problem. Who in such a case would be informed of the right that he is entitled in law to be searched before a Magistrate or a gazetted officer? This may lead to many practical difficulties. A statute should be so interpreted as to avoid unworkable or impracticable results. In Statutory Interpretation by Francis Bennion (3rd Edn.), para 313, the principle has been stated in the following manner:

“The court seeks to avoid a construction of an enactment that produces an unworkable or impracticable result, since this is unlikely to have been intended by Parliament. Sometimes, however, there are overriding reasons for applying such a



construction, for example where it appears that Parliament really intended it or the literal meaning is too strong.”

20. As pointed out in State of Punjab v. Baldev Singh [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] drug abuse is a social malady. While drug addiction eats into the vitals of the society, drug trafficking not only eats into the vitals of the economy of a country, but illicit money generated by drug trafficking is often used for illicit activities including encouragement of terrorism. It has acquired the dimensions of an epidemic, affects the economic policies of the State, corrupts the system and is detrimental to the future of a country. Reference in the said decision has also been made to some United Nations Conventions Against Illicit Trafficking in Narcotic Drugs, which the Government of India has ratified. It is, therefore, absolutely imperative that those who indulge in these kind of nefarious activities should not go scot-free on technical pleas which come handy to their advantage in a fraction of a second by slight movement of the baggage, being



WEB COPY



Crl.A.(MD).No.503 of 2023

placed to any part of their body, which baggage may contain the incriminating article.

13.5.Before the implementation of the Narcotic Drugs and Psychotropic Substance (Seizure, Storage, Sampling and disposal) Rules 2022 which commenced from 23rd December 2022, not even Section 52A of the NDPS Act demanded taking of samples at the spot. The Notification No.1/1989 prescribed procedure to take samples, seizure and the disposal. The authorities have strictly followed the procedure during the course of taking samples, seizure and produced before the Court. Therefore, considering the drug menace which has been causing pernicious effect to large Sections of society namely, life of the youths and innocent persons, the unworkable interpretation has to be avoided. Hence, this Court holds that when physical production of the contraband and sealed samples are duly made before the Court, the Court has to take into account the same without going into the issue of the non-compliance of the post seizure procedure, which is intended for avoidance of re-circulation, in order to convict the accused for the possession of the contraband against the law.



Crl.A.(MD).No.503 of 2023

13.6.From the reading of the “*Mohanlal case*” I II III, it is clear that

Section 52 A prescribed procedure to be followed post seizure of the contraband to ensure prompt destruction of the contraband so that seized materials may not be misused. The said direction has been issued only on considering the submission of the prosecution that seized contraband were disposed of without taking samples and preserving the remaining contraband as per the Central Notification No.1/89 ie., on the basis of the specific observation in Paragraph No.13 of Mohanlal case III 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 sample are drawn at the time of seizure.*”

13.6.1.The Hon'ble Supreme Court in Paragraph No.12 of the *Mohanlal Case (mohanlal III- reported in 2016 (3) SCC 379)* has held as follows:

Seizure and sampling

12. *Section 52-A(1) of the NDPS Act, 1985 empowers the Central Government to prescribe by a notification the procedure to be followed for*



seizure, storage and disposal of drugs and psychotropic substances. The Central Government has in exercise of that power issued Standing Order No. 1 of 1989 which prescribes the procedure to be followed while conducting seizure of the contraband. Two subsequent standing orders one dated 10-5-2007 and the other dated 16-1-2015 deal with disposal and destruction of seized contraband and do not alter or add to the earlier standing order that prescribes the procedure for conducting seizures. Para 2.2 of Standing Order No. 1 of 1989 states that samples must be taken from the seized contraband on the spot at the time of recovery itself. It reads:

“2.2. All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot.”



13. Most of the States, however, claim that no samples are drawn at the time of seizure. Directorate of Revenue Intelligence is by far the only agency which claims that samples are drawn at the time of seizure, while Narcotics Control Bureau asserts that it does not do so. There is thus no uniform practice or procedure being followed by the States or the Central agencies in the matter of drawing of samples. This is, therefore, an area that needs to be suitably addressed in the light of the statutory provisions which ought to be strictly observed given the seriousness of the offences under the Act and the punishment prescribed by law in case the same are proved. We propose to deal with the issue no matter briefly in an attempt to remove the confusion that prevails regarding the true position as regards drawing of samples.

13.6.2.The original facts of Mohanlal Case (Mohanlal Case -I reported in 2012 (7) SCC 712), have made it clear that the Union of India has preferred appeal against the acquittal. The High Court dismissed the appeal on the ground that the prosecution failed to prove the seizure of the



Crl.A.(MD).No.503 of 2023

contraband beyond reasonable doubt and hence, the prosecution case of destruction of the contraband without taking sample as per Section 52A of NDPS Act, cast doubt over the prosecution case. In the said appeal, considering the re-circulation of the seized contraband, the Hon'ble Supreme Court called the States to furnish the details of the seizure, storage, disposal/destruction particulars. Before issuing the said direction, the Hon'ble Supreme Court has observed as follows in Paragraph No.11 of the judgment in the case of ***Union of India v. Mohanlal*** reported in 2012 7 SCC 712 at page 715

11. We find considerable merit in the submissions made by Mr Sinha. The problem is both widespread and formidable. There is hardly any State in the country today which is not affected by the production, transportation, marketing and abuse of drugs in large quantities. There is in that scenario no gainsaying that the complacency of the Government or the officers dealing with the problem and its magnitude is wholly misplaced. While the fight against production, sale and transportation of the narcotic drugs and psychotropic substances is an ongoing process, it is



CrL.A.(MD).No.503 of 2023

equally important to ensure that the quantities that are seized by the police and other agencies do not go back in circulation on account of neglect or apathy on the part of those handling the process of seizure, storage and destruction of such contrabands. There cannot be anything worse than the society suffering on account of the greed or negligence of those who are entrusted with the duty of protecting it against the menace that is capable of eating into its vitals. Studies show that a large section of the youth are already victims of drug abuse and are suffering its pernicious effects. Immediate steps are, therefore, necessary to prevent the situation from going out of hand.

13.6.3. Thereafter, after considering the data, the Hon'ble Supreme Court issued a direction in the case of ***Union of India v. Mohanlal***, reported in **(2016) 3 SCC 379**, which reads as follows:

31.1. *No sooner the seizure of any narcotic drugs and psychotropic and controlled substances and conveyances is effected, the same shall be forwarded to the officer in charge of the nearest police station or to the officer empowered under*



Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application under Section 52-A(2) of the Act, which shall be allowed by the Magistrate as soon as may be required under sub-section (3) of Section 52-A, as discussed by us in the body of this judgment under the heading “seizure and sampling”. The sampling shall be done under the supervision of the Magistrate as discussed in Paras 15 to 19 of this order.

13.7.The above direction contains two parts:

(i) No sooner the seizure of any narcotic drugs and psychotropic and controlled substances and conveyances is effected, the same shall be forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53 of the Act.

(ii) The officer concerned shall then approach the Magistrate with an application under Section 52-A(2) of the Act, which shall be allowed by the Magistrate as soon as may be required under sub-section (3) of Section 52-A, as discussed by us in the body of this judgment under the heading “seizure and sampling”. The sampling shall be done under the supervision of the Magistrate as discussed in Paragraph Nos.15 to 19 of this order.



WEB COPY

13.8.Both the directions relate to the procedure to be followed after the seizure. The said direction was issued on finding that there was no compliance of the procedure of taking sample at the occurrence place at the time of the seizure as per the Central Government Notification No. 1/1989. Therefore, the intention of the guidelines issued by the Hon'ble Supreme Court is that in case of failure to take sample and to prove the case of the seizure, the prosecution has final opportunity to produce the entire contraband and take the sample in the presence of the learned Judicial Magistrate upon making the application and cause destruction of the contraband. From the above, it is clear that the compliance of the above direction issued by the *Mohanlal Case No.II*, to take inventory is the post seizure procedure to prevent the recirculation of the contraband. In the said circumstances, in the case wherever the contraband was seized after taking the samples as per the Notification No.1/1989 and forwarded to the competent officer as per Section 52 and the accused along with the seized contraband are produced before the competent Court and the competent Court received the contraband and issued a direction to keep



Crl.A.(MD).No.503 of 2023

the contraband in proper custody and the same has been properly supervised and the same has been also produced before the trial Court at the time of the trial as a material object, as a physical evidence, the same cannot be brushed aside on the ground that the investigating agency violated the second part of the direction of the ***Mohanlal Case No.II***, by not disposing of the seized contraband by making the application under Section 52A of NDPS Act.

13.9.The Mohanlal Case, is applicable only to the cases where there is a failure of physical production of the contraband as a material object and not in all circumstances. The same was considered by the Hon'ble Supreme Court before and after the Mohanlal case and the Hon'ble Supreme Court has held that the said non-compliance is not fatal to the prosecution when the prosecution proved the factum of seizure of the contraband beyond reasonable doubt and also proved the seized materials by producing the same before the trial Court as a material object and identified the same, through the material witnesses as per law.



WEB COPY

13.10.Now this Court adverts to the facts of the present case whether the prosecution proved the possession of the contraband, seizure and production of the contraband before the Court in accordance with the provision of the NDPS Act and the Notification No.1/1989 ?

13.11.To address the issues, it is relevant to extract the various provisions of the NDPS Act:

Section 52 of the NDPS Act	Section 55 of the NDPS Act
Disposal of persons arrested and articles seized.—(1) Any officer arresting a person under section 41, section 42, section 43 or section 44 shall, as soon as may be, inform him of the grounds for such arrest. (2) <i>Every person arrested and article seized under warrant issued under sub-section (1) of section 41 shall be forwarded without unnecessary delay to the Magistrate</i> by whom the warrant was issued. (3) Every person arrested and article seized under sub-section (2) of section 41, section 42, section 43 or section 44 shall be forwarded without unnecessary delay to— (a) the officer-in-charge of the nearest police station, or (b) the officer empowered under section 53. (4) The authority or officer to whom any person or article is forwarded under sub-section (2) or sub-section (3) shall, with all convenient despatch, <i>take such measures as may be necessary for the disposal according to law of such person or article.</i>	Police to take charge of articles seized and delivered.— An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, <i>all articles seized</i> under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or <i>to take samples of and from them</i> and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station.



Crl.A.(MD).No.503 of 2023

From the reading of Section 52 of the NDPS Act, it is clear that the

Investigating officers shall arrest and seize the contraband. The arrestee and the seized contraband shall be forwarded to the Magistrate without unnecessary delay. The arrestee and the seized articles should also be forwarded to the officer in charge of nearest police station or the officer empowered under Section 53 of the NDPS Act. The said police officers to whom the arrestee and the seized articles are forwarded are the officers under Sub Sections 2 and 3 of Section 52 of the NDPS Act, who have to take charge of and take such measures as may be necessary for the disposal according to law of such persons or article. Disposal of the arrestee has been made through the remand by the Magistrate. The disposal of the seized article has been made through entrusting the custody to the officer mentioned in Section 55 of the NDPS Act.

13.11.1.The officer who has received the seized article from the officer mentioned in the NDPS Act is to act as per Section 55 of the NDPS Act and should take charge of the said seized articles and keep in the safe custody either by affixing the seal to such articles or allow to take samples



Crl.A.(MD).No.503 of 2023

of and from them and all sample so taken shall also be sealed with a seal of office in charge of police station, till the orders of the Magistrate.

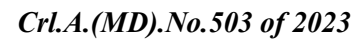
Therefore, from the reading of Sections 52 and 55 of the NDPS Act, the disposal of the seized articles by the ground level officers ends with entrustment of the same with the officer mentioned in Section 55 of the NDPS Act. The officer mentioned in Section 55 of the NDPS Act, is duty bound to keep safe custody of the properties till the orders of the Magistrate. This original position of the Act before the incorporation of Section 52A of the NDPS Act, ie., 29.05.1989, is that the Union Government had issued the notification No.1/1989, in the form of instruction to the investigating officer to follow the procedures during the course of the arrest and seizure of the articles with the accused person.

13.12.Since the question of the compliance of the procedure is factual aspect and only in the case of non compliance which causes failure of justice and creates doubt over the prosecution case over the recovery, this Court has to consider the same. On perusal of the entire material and other records and careful appreciation of the deposition of the witnesses



Crl.A.(MD).No.503 of 2023

and the explanation furnished by the appellant during the course of the questioning under Section 313 of Cr.P.C., this Court finds that the appellant never raised the said plea during the course of the trial. But, the learned counsel argued that non-compliance amounts to failure of justice, and this Court is duty bound to see any failure of justice has occurred. In this case, yellow-coloured plastic bag with the Hashish oil was seized by the police officers and they took the samples as S1 and S2 and packed the remaining oil. He also weighed the remaining contraband and packed it separately. Thereafter, they arrested the accused and the accused gave the confession and he admitted that he and his friend purchased the said contraband from unknown person and A2 was also implicated in this case. The said samples of the contraband was produced along with *“following Form 91 under Ex.P.9 before the learned Judicial Magistrate on the date of recovery itself”* and the same was verified by the learned Judicial Magistrate and directed to be produced before the Special Court without any delay. The same is as follows:-

Page 47 of 52



Crl.A.(MD).No.503 of 2023

CC: 1245/200
- C.S.C. MCOH. No. 1245/200
EXP. 20
P.W. 8
MAILED BY
11/13/20
V2

3/4/22
proposed not passed
proposed to be
passed out separately
country, subject to
3/4/22

[illegible]

Received and Remanded in
R.P.N.O. of 4. 22 of this
Court today on 11. 3. 12.

අග්‍රාමාත්‍ය

2
1274

True Copy

True
X- [Signature]
Herald Clark
Add'l Dir. and Supt. Judge
for E.C. and HOSP. Care
Production



14. Discussion on Quantity of contraband:

Apart from that, this court perused the entire documents. In Ex.Nos.P1, P2, P3, P11 and P19, the seized quantity of the Hashish oil is mentioned as 1.300 grams. After taking the sample, remaining contraband, only, has been stated. In the final report, the charge framed by the learned trial judge, it was mentioned as 1.030 kilograms. The, said typographical error cannot be taken as material, when the evidence of the entire documents, including the evidence of P.W.8, P.W.1 and P.W.2, clearly show that the recovered contraband is 1.300 kilogram. In view of the said circumstances, this Court is unable to accept the argument of the learned counsel for appellant that the contraband was, below the commercial quantity. In all aspects, the prosecution clearly proved the charge against the appellant and so far as other accused is concerned, there is no material except the confessional statement of the appellant and hence, the learned Trial Judge correctly acquitted him. In all aspects, this court finds no merit in the contention of the appellants and hence, the appeal deserves to be dismissed.



Crl.A.(MD).No.503 of 2023

WEB COPY

15. Accordingly, this Criminal Appeal stands dismissed and the judgment of the learned Additional District and Sessions Judge, Special Court for EC and NDPS Act cases, Pudukkottai in C.C.No.245 of 2022, dated 05.05.2023, is hereby confirmed. Consequently, connected miscellaneous petition is closed.

04.06.2024

Index : Yes/No
Internet : Yes/No
NCC : Yes/No
sbn



Crl.A.(MD).No.503 of 2023

To

WEB COPY

- 1.The Additional District and Sessions Court,
Special Court for EC and NDPS Act Cases,
Pudukkottai.
- 2.The Inspector of Police,
B-1, Town Police Station,
Ramanathapuram
- 3.The Superintendent of Prison,
Central Prison, Madurai.
- 4.The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.
- 5.The Section Officer,
Criminal Section(Records)
Madurai Bench of Madras High Court, Madurai.



WEB COPY



Crl.A.(MD).No.503 of 2023

K.K.RAMAKRISHNAN, J.

sbn

Crl.A.(MD).No.503 of 2023
and
Crl.M.P(MD).No.9585 of 2023

04.06.2024

Page 52 of 52