



CRL.A(MD).Nos.783, 771 and 784 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved On	:	20.12.2023
Pronounced On	:	19.03.2024

CORAM

THE HONOURABLE MR.JUSTICE K.K.RAMAKRISHNAN

CRL.A(MD).Nos.783, 771 and 784 of 2023

and

CRL.M.P(MD).Nos.12542, 12405 and 12554 of 2023

Jesu Antony Vinod @ Vinod

... Appellant/Accused No.3

Marimuthu

... Appellant/Accused No.1

Johnpaul @ Balan

... Appellant/Accused No.2

Vs.

State represented by
The Deputy Superintendent of Police,
NIB-CID,
Thoothukudi,
Cr.No.40 of 2008

... Respondent/Complainant
(In all appeals)

Common Prayer : These Criminal Appeals are filed under Section 374(2) of Cr.P.C. to call for the records relating to the judgment and conviction and sentence passed against the appellants/accused passed in C.C.No.45 of 2009 dated 19.06.2023, on the file of the 1st Additional Special Court for NDPS Act cases, Madurai, and set-aside the same and acquit them from charges leveled against them.



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For Appellant : Mr.Gopala Krishna Lakshmana Raju,
Senior Counsel for Mr.S.G.L.Rishwanth
in Crl.A(MD)No.783 of 2023.

: Mr.Gopala Krishna Lakshmana Raju,
Senior Counsel for Mr.R.Venkateswaran
in Crl.A(MD)No.771 of 2023.

: Mr.Gopala Krishna Lakshmana Raju,
Senior Counsel for Mr.Y.Athiveerapandiyan
in Crl.A(MD)No.784 of 2023.

For Respondent : Mr.T.Senthil Kumar,
Additional Public Prosecutor
(in all cases)

COMMON JUDGMENT

These appeals have been filed by the appellants to set aside the conviction and sentence of 10 years Rigorous Imprisonment against each and the fine of Rs.1,00,000/- against each, in default, to undergo one year Simple Imprisonment for the offence under Sections 8(c) r/w 21(c) of NDPS Act imposed by the 1st Additional Special Court for NDPS Act cases, Madurai, in C.C.No.45 of 2009 dated 19.06.2023.

2. Since the appellants in all the appeals are arrayed as accused No.1 to 3 in the same crime number, these appeals are taken up together for hearing and disposed by way of this common judgment.



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3. The case of the prosecution is that on receipt of secret information on 25.08.2008 at about 04.00 p.m., the Sub-Inspector of Police (P.W.5) obtained permission from the Higher Officials and went to the place in front of the Government Tourist Bungalow on Beach Road in Tuticorin along with the informant and his team and P.W.1, who was VAO. At that time, they intercepted a two wheeler namely, TVS MAX 100 (Red Colour) bearing Reg.No.TN-69-J-3327, which was driven by A2 with A1 & A3 and found that the accused persons were in possession of 0.500 Kg of heroin worth about Rs.50,00,000/-. After complying the condition under Section 50 of the NDPS Act by giving offer to make the search in the presence of the learned Judicial Magistrate or the gazetted officer, P.W.5 made a search of the body of A1 and found that 1 powder pocket, which was hidden in his hip region and also found 1 black colour Nokia Cellphone. Then, P.W.5 tested the said powder with the help of Narcotic Detection kit and found the presence of heroine. Thereafter, they took the samples and sealed it and packed the remaining contraband. Then, P.W.5 arrested A1 to A3 and prepared attatchi and brought the appellants and the contraband to the police station and they registered the First Information Report in Crime No.40 of 2008 against the accused for the offences punishable under



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Sections 8(c) r/w 21(C), 25 and 29 of NDPS Act. After that, he prepared a detailed report under Section 57 of the NDPS Act and handed over the case file along with the report to P.W.6, the Inspector of Police. After obtaining the report, P.W.6 has taken steps to investigate the matter and on confession of A1, they arraigned A4 as accused. Thereafter, accused were produced before the Court along with the contraband and they were remanded to judicial custody. After completion of investigation, the respondent police filed a final report and the same was taken cognizance in C.C.No.54 of 2009, on the file of the 1st Additional Special Court for NDPS Act cases, Madurai.

4. The learned trial Judge summoned the accused and served the copies under Section 207 Cr.P.C. Then, he framed necessary charges and questioned the accused. The accused denied the charges and pleaded not guilty and stood for trial.

5. To prove the case, the prosecution examined P.W.1 to P.W.7 and exhibited 10 documents as Ex.P.1 to Ex.P.16 and marked 4 material objects as M.O.1 to M.O.4. Thereafter, the accused were questioned under Section 313 Cr.P.C putting the incriminating evidence available against them and



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they denied the same as false and thereafter, the case was posted for defence evidence. On the side of the accused, no one was examined and no documents were exhibited.

6. On perusal of the oral and documentary evidence, the trial Court found the appellants guilty for the offences under Sections 8(c) r/w 21(c) of NDPS Act and sentenced them to undergo 10 years Rigorous Imprisonment each and to pay a fine of Rs.1,00,000/- each, in default to undergo one year Simple Imprisonment each. Aggrieved by the same, the present appeals have been filed.

7. The learned senior counsel for the appellants submitted that according to the prosecution, when P.W.5 was in station, the informant came to the station and gave an information at about 02.00 p.m. After receipt of information, P.W.5 got permission from his higher officials and proceeded to the spot along with the informant, Narcotic Kit and P.W.1, the Village Administrative Officer, Sankarapperi Village who was also in-charge of Meelavittan Village at around 01.30 p.m. In view of the above fact, before receiving the information, they met the Village Administrative Officer. Hence, the entire prosecution case, which proceeded on receipt of



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information, and visit to the occurrence place and the recovery of contraband are all suspicious. He specifically argued that P.W.5 recorded the information at 02.00 p.m is false. There is reasonable doubt over origin of prosecution case and consequently compliance under Section 42 of the NDPS Act is not established.

7.1.The learned senior counsel for the appellants further submitted that the occurrence place is a restricted area i.e., Harbour and the movement of the public is restricted. In the said place, the presence of the appellants by driving their vehicle is doubtful.

7.2. The learned senior counsel for the appellants further submitted that after seizure of the contraband, P.W.5 has taken two samples of the contraband for conducting test. Each sample weighing 0.005 gms. Thereafter, they packed and sealed the samples and packed the remaining contraband and put the seal on it. Admittedly, the occurrence area is a sea breeze area. The seized contraband is very fine powder. In the sea breeze area, the case of P.W.5 that they tested such fine powder is not probable one for the reason that the witnesses themselves admitted that the powder would easily evaporate in sea breeze. Hence, taking of the samples and testing the samples in the sea breeze area is doubtful.



7.3. The learned senior counsel for the appellants further submitted that as per the Hon'ble Constitution Bench Judgment, the compliance under Section 50 of the Act is mandatory one in the case of recovery from body of the appellants. In this case, P.W.1 never deposed about the compliance of Section 50 of the Act. On contrary, P.W.2 and P.W.5, stated that they complied the conditions under Section 50 of the Act. In the said circumstances, the compliance under Section 50 of the Act is not proved.

7.4. The learned senior counsel for the appellants further submitted that the appellants were arrested and produced before the Court along with the contraband. Thereafter, the same was returned to the custody of the respondent police with a direction to produce before the Special Court. In between, according to the evidence of the police officials, they tested the heroine in the presence of the Deputy Superintendent of Police. Hence, the seal of the samples might have been broken before producing the same before the Special Court on 29.08.2008. The same was corroborated by the samples sent by the prosecution agency for the second time on 28.10.2010. Because the contraband taken as sample is 10 gms. But, after conducting test, it contains only 2.4 gms. Therefore, the seal might have been tampered. In the said circumstances, there was doubt over the sealing of



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the samples and the remaining contraband. The specimen seal was not found place in the athatchi. But, in the requisition sent to the Chemical Analysis Office it was found with specimen seal. In the first report, there was no mentioning of the percentage of the Diacytal Morphine. In the subsequent report also marked under Ex.P.16, there was no mentioning of percentage and in the said report, it is stated that concentration of the Diacytal Morphine was too low to estimate. In the said situation, the recovery is not heroin and some other materials and recovered materials have not been produced before the Court. Considering all the above aspects, it comes to show that they have not recovered anything from the appellants at the occurrence place namely, in front of the Government Tourist Building on Beach Road, Thoothukudi.

7.5. The learned senior counsel for the appellants further submitted that the appellants' family members were illegally confined in the police station and there is pressure on the appellants to admit the above recovery and hence, the same was made by using the some other materials and hence, the material produced before the Court is not heroin. Two Chemical Analysis Reports were marked as Ex.P.16. In both reports, there is no percentage of the material content of Diacytal Morphine.



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7.6. The learned senior counsel for the appellants further submitted that there are infirmities regarding the receipt of information. In Ex.P.9, it is stated that “ஆய்வாளர் ஆகிய நான் received the information” and there was no whisper about the driving of two wheeler by the accused in the restricted area. The said infirmities affected the case i.e., who received the information and who conducted the raid. There is contradiction regarding the time in receiving the information and hence, he submitted that Section 42 of the Act is not complied with. P.W.5 deposed that at 02.00 p.m, he received the information. The prosecution case that at 01.30 p.m, they left from the police station and picked up the Village Administrative Officer is an artificial and unbelievable one. Further, there was no documentary evidence to prove P.W.1 is the Village Administrative Officer of the Meelavittan Village.

7.7. The learned senior counsel for the appellants further submitted that according to the available evidence, it is clear that number of persons were present in the occurrence place and hence, the non-examination of independent witness affected the conviction and sentence passed by the Court. In this case, the independent witness has to be examined. In Ex.P.9,



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there is no mentioning of Narcotic kit. The samples taken was only 3.586 gms. The occurrence took place on 25.08.2008. The recovery was made on the same day itself. But, it was produced before the learned Judicial Magistrate on 26.08.2008 and there was no explanation for the said delay.

7.8. The learned senior counsel for the appellants further submitted that taking of second sample is unknown practice. It is seen from the records that after a lapse of two years from the date of occurrence, the police officer sent the second sample for analysis on 05.08.2010 without getting any permission from the authorities.

7.9. The learned senior counsel for the appellants further submitted that only drug alone was seized and no heroine was seized. According to the prosecution, the remaining heroine was packed in the same bag and the said bag was not produced before the Court.

7.10. The learned senior counsel for the appellants further submitted that A1 and A2 are living closely. The family members were illegally brought to the police station and nothing was seized from them.



7.11. The learned senior counsel for the appellants further submitted that Section 42 of the Act is not complied with and the compliance of Section 50 of the Act has not been spoken about by P.W.1. The seized contraband was not properly sealed. There is clear doubt over ***whether the recovery contraband was sent to the Court or not?*** A4 who is the supplier of the contraband was acquitted by the Court below. Hence, he seeks for acquittal of the appellants.

8.The learned Additional Public Prosecutor appearing for the State submitted that compliance of Section 42 is concerned, there is clear evidence of P.W.5 that he received the information from the informant and the same was recorded and the same was informed to the Higher Officials and they granted permission to conduct search. Therefore, the non-compliance of Section 42 of the Act is not correct.

8.1. The learned Additional Public Prosecutor appearing for the State further submitted that in Ex.P.5, the Athatchi for recovery of vehicle seized from A2, vehicle number was given. A2 drove the vehicle and A1 & A3 were the pillion riders and they were found in conscious possession of the contraband. Hence, as per Section 54 and 35 of the Act, the presumption arises that the appellants never dispelled the same.



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8.2. The learned Additional Public Prosecutor appearing for the State further submitted that P.W.1 is the recovery witness. He need not speak about the compliance under Section 50 of the Act. The learned trial Judge clearly stated that P.W.5 obtained consent letter from the accused and the said consent letters were not acknowledged by P.W.1. The absence of particular word by P.W.1 does not amount to non-compliance of Section 50 of the Act. In this case, P.W.1 and P.W.5 clearly deposed about the compliance of Section 50 of the Act. There was no challenge of their evidence and in their cross-examination. Hence, Section 50 of the Act is complied with.

8.3. The learned Additional Public Prosecutor appearing for the State further submitted that regarding the seal, on the basis of the evidence of P.W.2 that the Deputy Superintendent of Police conducted search is concerned, he was examined after a number of years from the date of the occurrence and the sweeping answer as if the Deputy Superintendent of Police conducted search cannot be taken into consideration when the seized contraband and seized other material objects were produced before the learned Judicial Magistrate along with the accused at the time of



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remand. The learned Judicial Magistrate, verified the same and directed to produce the same before the Special Court. It is not the case of the appellants that the same was not intact at the time of production before the learned Judicial Magistrate. In the said circumstances, the same cannot be taken into account.

8.4. Sending of the samples the first and second time is concerned, the learned Additional Public Prosecutor submitted that the Hon'ble Supreme Court judgment in ***E.Micheal Raj Vs. Intelligence Officer, Narcotic Control Bureau*** reported in ***(2008) 5 Supreme Court Cases 161*** stated that only actual content by weight of the content of Narcotic Drugs is relevant for the purpose of determining whether would constitute the small quantity or commercial quantity ie., neutral substance cannot be added. Therefore, the second sample was sent to the lab and report was obtained. In this case, the material chemical namely, Diacytal Morphine is available in the report. The percentage is some what less. In view of the decision of the Hon'ble Supreme Court larger Bench decision dated 22.04.2020 in the case of ***HIRA SINGH and Another Vs. Union of India and another*** reported in 2020 20 SCC 272 over ruling the ***E.Micheal Raj Vs. Intelligence Officer, Narcotic Control Bureau*** reported in ***(2008) 5***



Supreme Court Cases 161, the order of retesting cannot be found fault with and the same cannot be the ground for interference in the conviction passed against the appellant. Therefore, there is no question of disbelieving the version of the prosecution.

8.5. The learned Additional Public Prosecutor appearing for the State further submitted that in the entire cross-examination of witnesses, there was no question regarding the evaporation of the contraband due to the breeze of the sea. In the second Chemical analysis Report, it is clearly stated that the sample was with the Court seal in the outer pocket. After removal of the same, it was intact with the Station House Seal. Hence, there is no tampering at all and in the said circumstances, the submission of the learned senior counsel that there is tampering by the officer is not acceptable.

8.6. The learned Additional Public Prosecutor appearing for the State further submitted that in Ex.P.5, the Athatchi for the recovery of vehicle from A2, the number of the vehicle was mentioned. It is well settled that the examination of the independent witness is not necessary. In this case, P.W.1, the Village Administrative Officer clearly deposed before



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the Court about the recovery of the contraband from the possession of A1 to A3. The acquittal of A4 in this case is not a ground to acquit the appellants on the ground of principle of parity. Therefore, in all aspects, the conviction and sentence imposed by the learned trial Judge is conformity with the law laid down by the Hon'ble Supreme Court. Hence, he seeks for dismissal of the appeals.

9.This Court perused the records and the documents filed by the prosecution and the grounds raised by the appellants and also the argument by the appellants and the learned Additional Public Prosecutor and also considered the precedents relied upon by them.

10.Now, the question arising for consideration in this case is whether the conviction and sentence imposed by the learned trial Judge against the appellants is sustainable?

11.Compliance of Section 50 of the Act:

When A1 to A3 were travelling in a two wheeler bearing Reg.No.TN-69-J-3327 on 25.08.2008, at about 02.00 p.m, P.W.5 and P.W.2 and the other police officer intercepted the vehicle. After the compliance of



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Section 50 of the Act, P.W.5 made a search of the body of A1 and he found the possession of 500 gms of heroine in the hip of A1. A1 gave the confession regarding the source of the said contraband. On the basis of the confession, A4 was arrayed as an accused under Section 29 of the NDPS Act. The learned trial Judge considering the insufficiency of material, acquitted A4. The said acquittal is not a ground to acquit the appellants herein. The appellants travelled in the two wheeler and A1 has carried the contraband. In the said circumstances, the acquittal of A4 is not a ground to acquit A1 to A3.

12. P.W.1 is only the recovery witness. He was not the officer under Section 50 of the NDPS Act. P.W.2 deposed in his evidence before the Court about the compliance of Section 50 of the Act. P.W.2 as follows:-

“அந்த நேரம் வடக்கே இருந்து தெற்காக முன்று பேர் டி.எண்-69-டிஜே-3327 என்ற எண்ணுள்ள மோட்டார் சைக்கிளில் வந்தார்கள். அவர்களை சுற்றி வளைத்து பிடித்து உதவிஆய்வாளர் அடையாள அட்டையை காண்பித்து எங்களை அறிமுகம் செய்துகொண்டார். பின்பு, அவர்களிடம் உங்களை சோதனை செய்ய வேண்டும். அதற்கு அருகில் உள்ள நீதித்துறை நடுவர் முன்போ அல்லது அரசிதழ் பதிவு பெற்ற அதிகாரி முன்போ சோதனை செய்ய என்.டி.பி.எஸ் சட்டத்தில் உங்களுக்கு



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உரிமை உண்டு என்று தெரிவித்தார். அதற்கு அவர்கள் வேறு எங்கேயும் செல்ல தேவையில்லை. தாங்களே சோதனை செய்யலாம் என்று சம்மதம் தெரிவித்தார்கள். 16.15 மணிக்கு சோதனை சம்மத கடிதம் தயார் செய்து மாரிமுத்து என்பவருக்கு சார்பு செய்தும் அவரை சோதனை செய்ய அவர் இடுப்பில் இருந்த பாலிதின் பையில் ஒரு பொட்டலம் இருந்தது.

13. The said evidence corroborated with the following evidence of

P.W.5:-

“மேற்படி மூன்று நபர்களிடமும் எனக்கு கிடைக்கப்பெற்ற நம்பிக்கையான தகவலை அவர்களிடம் எடுத்துக்கூறி நான் உங்களை தனித்தனியே சோதனை செய்ய வேண்டும். அவ்வாறு சோதனை செய்யும் பட்சத்தில் நீங்கள் விரும்பினால் அருகில் உள்ள நீதித்துறை நடுவரிடமோ அல்லது அரசிதழ் பதிவுபெற்ற அலுவலரிடமோ அழைத்துச்சென்று சோதனை செய்யலாம் என கேட்பதற்கு என்டிபிஎஸ் சட்டத்தில் உங்களுக்கு உரிமை உள்ளது என தெளிவாக எடுத்துக்கூறினேன். அதற்கு, மேற்படி மூன்று நபர்களும் எங்களை வேறு எங்கும் கூட்டிச்சென்று சோதனை செய்ய வேண்டாம். கா.துறையினரான தாங்களே சோதனை செய்யலாம் என சம்மதம் தெரிவித்தனர். இதற்கு சாட்சியாக என்னுடன் இருந்த தனிநபர் சாட்சிகள் கிராம நிர்வாக அதிகாரி ரங்கராஜன், கிராம உதவியாளர் முருகன், த.கா. 917 நம்பிநாதன் த.கா.1711 செல்லப்பா ஆகியோர்களை சாட்சிகளாக சம்பவத்தன்று இருக்கசெய்து ஒரு சோதனை



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சம்மத கடிதம் 16.15 மணிக்கு தயார் செய்து 1வது நபர்
மாரிமுத்து என்பவருக்கு சார்வுசெய்து அவரை நான்
சோதனை மேற்கொண்டேன். சோதனையில்,
அவர் இடுப்பில் பிரவன் கலர் பையில்
மறைத்துவைத்திருந்த பவுடர் பாக்கெட்டும் சட்டை
முன்பையில் கருப்புநிற நோக்கியோ செல்போன் ஒன்றும்
கண்டுபிடிக்கப்பட்டது.”

14. From the above evidence, it is clear that option was given to the appellants under Section 50 of the Act and the same was not specifically questioned by the appellants during their cross-examination. They not even cross-examined that the appellants were never subjected to any body search. P.W.1 only acted attesting witness and hence, he also admitted the preparation of the consent letter. Hence, the absence of the particular word of '**consent**' from the evidence of P.W.1 has not affected the prosecution case. From that alone, it cannot be said that the requirement of Section 50 is not complied with. The Court cannot expect that the witnesses should depose particular word in the particular manner.

Section 50 of the Act, *only creates obligation upon the empowered officers and his duty before conducting search of person of a suspect, on the basis of the prior information, to inform the suspect that he has right*



to require his search being conducted in the presence of the Gazetted Officer or a Magistrate. However, as per the Hon'ble Constitution Bench dictum in 1996 6 SCC 172 in the case of State of Punjab Vs. Baldev Singh, “It is, however, not necessary to give the information to the person to be searched about his right in writing. It is sufficient, if such information is communicated to the person concerned orally and so far as possible in the presence of some independent and respectable persons witnessing the arrest and search. The prosecution must, however, at the trial, establish that the empowered officer had conveyed the information to the person concerned of his right of being searched in the presence of a Magistrate or a Gazetted Officer, at the time of the intended search. Court have to be satisfied at the trial of the case about due compliance with the requirements provided in Section 50. NO presumption under Section 54 of the Act can be raised against an accused, unless the prosecution establishes it to the satisfaction of the Court that the requirements of Section 50 were duly complied with”. In this case, the same was duly complied with. P.W.1 independent witness clearly deposed about the said compliance. P.W.2 and P.W.5 also corroborated the same. Apart from that, the prosecution produced Ex.P.1 to Ex.P.3 to prove the said compliance. In 313 Cr.P.C., questioning also they have not disputed the above said



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compliance through Ex.P1 to Ex.P3. They never disputed the signature in Ex.P1 to Ex.P3. Therefore, the contention of the appellant that Section 50 was not complied with cannot be accepted.

15. The learned senior counsel for the appellant submitted that P.W.2 during the cross-examination admitted that the Deputy Superintendent of Police conducted the test to ascertain the recovered contraband is heroine or not. This Court examined the entire evidence of P.W.2. On going through the entire evidence, a sweeping statement has been made by P.W.2 that the Deputy Superintendent of Police conducted the test. On the basis of the said sweeping statement without any tempering of the seal, this Court could not doubt the recovery of the contraband from the accused. It is well settled principle that the entire evidence of the witnesses to be taken into consideration. Further, the witnesses examined after quite number of years and hence, the incisive cross examination of the defence counsel sometimes leads to these type of the sweeping statements and therefore, on reading the entire evidence along with the remaining evidence and the material documents prepared at the spot and considering that the same was produced without any delay even at the time of the remand of the accused this Court has no reason to doubt the recovery of the contraband. In this



aspect it is relevant to rely the following portion of the judgment of the

Hon'ble Supreme Court in the case of ***Rakesh v. State of U.P., (2021) 7***

SCC 188 at page 197

14... Mere one sentence here or there and that too to the question asked by the defence in the cross-examination cannot be considered stand alone...

16. There was no specific question put to P.W.2 and P.W.5 and the Investigating Officers regarding the tampering of the seal. It is clear from Ex.P.8 and Ex.p.16, that the seal was intact. It is the specific case of the Investigating Agency that after the seizure of contraband, both samples were separately packed and the remaining contraband was separately packed and the same were produced before the learned Judicial Magistrate at the time of remand of the accused. The learned Judicial Magistrate verified the same and thereafter, the same were produced before the Special Court. The Special Court also verified the same and repacked the same with the Court seal. Thereafter, the remaining contraband was produced before the Court at the time of trial and marked as MO.2 and the sample was taken for analysis which was marked as MO.1. There was no tampering of seal as per Ex.P.8 and Ex.P.16. In the said circumstances,



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there is no ground to accept the argument that there is violation of Section 55 of the Act.

17. The learned senior counsel further submitted that there is some discrepancy about the receipt of the information. In Ex.P.9, it is stated that the information received by the Inspector of Police i.e., “இன்று 25.08.2008 ம் தேதி 14.00 மணிக்கு தூத்துக்குடி என்ஐபி-சிஐடி ஆய்வாளராகிய நான் தூத்துக்குடி அலுவலகத்தில் இருந்த போது” Therefore, the learned Senior Counsel further submitted that there is some discrepancy about the receipt of the information. The Senior Counsel would submit that the information was not received by the Inspector of Police. To appreciate the same, this Court perused Ex.P.9 and finds that the said mistake was inadvertent mistake. In the bottom portion, it is clearly stated that தகவல் தருபவர் C/o.G பெத்துராஜ் உதவி ஆய்வாளர் and the consent was given by the ஆய்வாளர். Therefore, there was no infirmity in the said recording of the information under Section 42 of the NDPS Act. Further, it is the case of the prosecution that P.W.5 received the secret information and reduced into the writing and he obtained permission from the Inspector of Police and proceeded towards the place of the occurrence.



18. It is a common sense, that the police officer in such emergency situation alone can reduce the information into writing. In the said situation, that is the typographical mistake. Hence, it has not affected the entire prosecution case. They were in pressure to secure the miscreants before they would leave the place. The said contraband has to be recovered timely. In the said emergent situation, this type of mistake tend to occur. In the said situation, the said inadvertent mistake cannot be taken into account to disbelieve the recovery of the contraband made in the presence of the independent witness P.W.1

19. In this case, P.W.1 is an independent person. He has no motive to depose against the appellants and hence, his evidence to show the possession of recovery of the contraband has to be accepted. In the said circumstance, once the possession of the contraband is established, then the appellants should rebut the presumption under Section 54 of the Act. As per Section 35 of the Act, the appellant is duty bound to rebut the said presumption beyond reasonable doubt. Section 35 of the Act reads as follows:-

“35. Presumption of culpable mental state.:-(1) *In any prosecution for an offence under this Act which requires a*



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culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. Explanation. ?In this section ? culpable mental state? includes intention, motive knowledge of a fact and belief in, or reason to believe, a fact.

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

To rebut the same, the appellants never gave any explanation and never adduced any evidence to prove his explanation.

20. A2 and A3 have the adequate knowledge about the possession of the contraband in the custody of A1. Hence, all were in conscious possession of the contraband. The circumstances also clearly established that A1 was in possession of the contraband on behalf of A2 and A3 and hence, the joint possession is clearly established. Hence, they are equally liable to be convicted under Sections 8(c) r/w 20(b)(ii)(B) of NDPS Act.

21. A detailed argument was made on the basis of two samples sent for Chemical Analysis. From the records, it is clear that A1 to A3 got bail



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on the ground that the Chemical Analysis Report could not specify the correct percentage of the Diacytal Morphine in the gross contraband. Hence, the second sample was sent to ascertain the fact. The second report also not specified the percentage. But stated the less quantity of Diacytal Morphine. The Hon'ble Supreme Court judgment in the case of **E.Micheal Raj** case, detailed guidelines were given regarding the percentage of the contraband. If the percentage of the material substance of less quantity, then the contraband cannot be treated as commercial quantity. On the basis of the guidelines, the second sample was sent for Chemical Analysis Report. According to the appellant, in both report, there was no percentage of the Diacytal Morphine. Therefore, he seeks for acquittal. In E.Micheal Raj case, it is stated that the percentage of the Nargotic Drugs or Psychotropic substance has to be identified to determine whether the recovered contraband comes under the small quantity or commercial quantity. The law laid down in the case of Micheal Raj reported in 2008 (5) SCC 161 is declared as not good law in the subsequent Hon'ble Three Member Bench of Supreme Court in the case of Hira Singh and another Vs. Union of India and another reported in 2020 20 SCC 272. As per the notification issued by the Government, the heroine is described as the Item.No.56. Item No.56 only stated about Diacytal Morphine. But, it has



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not specified about the extent of the percentage. In the said circumstances, in this case, both report contains the presence of the Diacytal Morphine. Therefore, the appellants are guilty of possession of the commercial quantity and liable to be punished under Sections 8(c) r/w 21(c) of the NDPS Act.

22. In the said circumstances, the submission of the learned counsel for the appellants is not acceptable.

23. The occurrence took place on 25.08.2008. P.W.1 was cross-examined on 07.06.2016, P.W.2 was cross-examined on 17.03.2017, P.W.3 was cross-examined on 05.04.2017, P.W.4 cross-examined on 26.02.2018, P.W.5 was cross-examined on 26.10.2018, 24.07.2019 & 10.04.2023, P.W.6 was cross-examined on 16.08.2022 and P.W.7 was examined on 14.12.2022.

24. In view of the above, examination of witnesses after a number of years, it is quite normal that there will be some discrepancies and contradictions. In the considerable view of this Court it is not a material one when P.W.1, the independent person clearly spoke about the possession and recovery of the contraband from the appellants.



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25. The stand that some other materials were recovered from them under the guise of threat over the family members is not proved through legal evidence. Once the possession is proved, then the presumption arises under Section 54 of the Act and the same should be refuted in compliance with Section 35 of the NDPS Act. Section 35 of the Act clearly states that it is not preponderance of the probabilities and it is beyond reasonable doubt.

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

25.1. 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., 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



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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.

26.1.1. 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



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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



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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.

26.1.2.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



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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, 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



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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



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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.]

26.1.3.Section 52 A aims at “*pre trial disposal of seized contraband*” with the sole object of avoiding pilferage of contraband and reentrance 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 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



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application, the Magistrate issues the certificate contemplated by sub-section (2), then sub-section (4) provides that, notwithstanding anything to the contrary contained in the Indian Evidence Act, 1872 or the Code of Criminal Procedure, 1973, such inventory, photographs of narcotic drugs or substances and any list of samples drawn under sub-section (2) of Section 52-A as certified by the Magistrate, would be treated as primary evidence in respect of the offence. Therefore, Section 52-A(1) does not empower the Central Government to lay down the procedure for search of an accused, but only deals with the disposal of seized narcotic drugs and psychotropic substances.”

26.1.4.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 record. It is not a*



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

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



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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



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of the relevant circumstances. In the latest decision of this Court in Vijay Pandey [Vijay Pandey v. State of U.P., (2019) 18 SCC 215] , again the fact that there was no evidence to connect the forensic report with the substance that was seized was also relied upon to extend the benefit of acquittal.

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

18. If the seizure of the material is otherwise proved on record and is not even doubted or disputed, the entire contraband material need not be placed before the court. If the seizure is otherwise not in doubt, there is no requirement that the entire material ought to be produced before the court. At times the material could be so bulky, for instance as in the present material when those 7 bags weighed 223 kg that it may not be possible and feasible to produce the entire bulk before the court. If the seizure is otherwise proved, what is required to be proved is the fact that the samples taken from and out of the contraband material



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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.

26.2. 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 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 to 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



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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 will come. Therefore, the interpretation to Section 52 A of the NDPS Act, is made to achieve the object of NDPS Act.

26.3.The drugs are made to cure the illness and the diseases and to alleviate the pain during ailment. But, the 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.

26.4.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.

Year	Number of suicide due to drug abuse
2011	3658
2016	5199
2017	6705
2018	7193



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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 has 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***, and 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'."

26.4.1. The Hon'ble three judges bench 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



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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



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



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26.5. Before the implementation of the Narcotic Drugs and Psychotropic Substance (Seizure, Storage, Sampling and disposal) Rules 2022 which commenced from 23 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 has 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.

26.6. 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.*”

26.6.1.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



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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



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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.

26.6.2.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 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**



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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 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.



WEB COPY 26.6.3. 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.

26.7.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



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officer empowered under Section 53 of the Act.

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(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 Paras 15 to 19 of this order.

26.8. 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



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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 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.

26.9.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.

26.10. 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 ?

26.11. 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.



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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.

26.11.1.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 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.



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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.

26.12.In this case, the contraband was recovered on 25.08.2008 at 04.15 p.m. As per the above notification, the samples S1 and S2 also were taken. Remaining contraband also was packed as P1 at the occurrence place itself and Athachi was prepared. All the samples and the entire contraband were produced before the Court on the same day itself. Form 91 with the particulars of the recovered samples of contraband were also produced before the learned Judicial Magistrate, on the same day itself at the time of the remand of the accused. The learned Judicial Magistrate, after accepting the contraband and verification, directed it to be produced



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INSPECTION REPORT

INSPECTOR DE POLICE
M.B.L.D.
TUNIS

REMARKS

Taken produced in
Municipal Court

29/8/54

REMANDED
P.P.R. NO. 296

SPECIAL DEPT.
FOR E.C. ACT 6 AND
MADRID

29.8



26.13.The said contraband was produced during the course of the trial and marked as M.O.1 and M.O.2 and the same was identified by the witnesses. P.W.1and P.W.2 have cogently deposed about the above recovery and the taking of the samples and packing of the remaining contraband and identified the same before the Court at the time of trial. The learned trial judge also, in the final portion of the judgment in Paragraph No.49 has directed to take steps for the destruction of the contraband after the appeal period is over. Therefore, the argument of the appellant on the basis of the judgment of the Hon'ble Supreme Court reported in **2023 Live Law SC 549 and 2023 Live Law SC 570** is misconceived and the facts of the said case is entirely different from the present facts of the case. In the above cases, the specific stand of the prosecution is that the entire contraband was destructed and hence, the Court took a view along with the other circumstances that the prosecution has not proved the case beyond reasonable doubt.

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



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of the witnesses 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 entire course of the trial. But, the learned counsel argued that the non-compliance amounts to failure of justice, and this Court is duty bound to see any failure of justice has occurred.

27. In view of the above discussion, this Court is not inclined to accept the submission of the counsel for the appellant that the non compliance of the 52A of the NDPS Act vitiated the conviction of the appellant under Section 8(c) read with Section 20(b)(ii)(c) of the NDPS Act, 1985.

28. Accordingly, the conviction and sentence passed by the 1st Additional Special Court for NDPS Act cases, Madurai, in C.C.No.45 of 2009, dated 19.06.2023, is hereby confirmed and the Criminal Appeals are dismissed. Consequently, the connected miscellaneous petitions are closed.

19.03.2024

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



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To

1. The 1st Additional Special Court for NDPS Act cases,
Madurai.
2. The Deputy Superintendent of Police,
NIB-CID, Thoothukudi.
3. The Superintendent,
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.



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K.K.RAMAKRISHNAN,J.

dss/sbn

Order made in
CRL.A(MD).Nos.783, 771 and 784 of 2023

19.03.2024