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Cr.L.A(MD)No.551 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on: 12.09.2023

Pronounced on:29.09.2023

CORAM:

THE HONOURABLE MR.JUSTICE **P.DHANABAL**

CRIMINAL APPEAL(MD)No. 551 of 2021
and
Cr.L.M.P(MD) No.6105 of 2022

N.Uganchand Kumawat

.. Appellant

Vs.

The Inspector of police
NIB-CID
Dindigul

...Respondent

PRAYER : Criminal Appeal is filed under Section 374(2) of Cr.P.C to allow this appeal and set aside the conviction and sentence passed by judgment dated 02.12.2021 in C.C. No.91 of 2019 on the file of the learned I Additional District and Judge for NDPS Act Cases at Madurai and acquit the appellant herein of all the charges .

For Appellant : Mr.Karuppasamy Pandian
for Mr. Na.Manimaran

For Respondent : Mr.S.Ravi
Additional Public Prosecutor



JUDGMENT

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This Criminal Appeal has been preferred as against the judgment of conviction passed by the I Additional Special Court for NDPS Act Cases, Madurai in C.C. No.91 of 2019, wherein the trial Court has convicted the accused for the offences under Section 8(c)r/w.20(b)(ii)(C)of NDPS Act and sentenced him to undergo 10 years rigorous imprisonment and to pay a fine of Rs.1,00,000/- in default to undergo six months simple imprisonment and acquitted the accused for the offence under Section 25 of the NDPS Act. As against the conviction the present appeal has been filed.

2. The case of prosecution is that on 30.09.2018 at about 20.00 hrs when the Sub Inspector of Police and Head Constable of Intellectual Property Enforcement Wing Dindigul were working in Dindigul wing, P.W. 3 received secret information from informer through phone. Immediately the same was recorded in the general diary and also informed to P.W.4, Inspector of Police, who is the superior officer. As per the instructions of the superior officer he formed a raiding party consisting of P.W.1, Special Sub Inspector of Police, Head Constable and thereafter at about 03.00 p.m., they reached the spot and involved in the vehicle check up near Dindigul to Kumuli Road, Athur Pirivu and the informer identified vehicle Bolero Maxi Truck plus bearing Reg. No. GJ 19 U 0883 and the raiding party



stopped the vehicle and enquired the accused. At that time the accused told that he do not know Tamil and his mother tongue is Hindi. Immediately P.W. 2 who is well versed in Hindi had explained about the entitlement to be searched in the of presence Gazetted Officer or nearest Magistrate and the accused also gave consent for searching. Thereafter they seized vehicle and found two white polythene bags each weighing 30kgs of ganja. When P.W.2 enquired about the contraband the accused gave voluntarily confession statement and then they recovered ganja through mahazhar/Ex.P.2 in the presence of witnesses and thereafter they drawn two samples each containing 50gs from each bag and fixed NIBCID Seal on it and also packed the remaining ganja and thereafter arrested the accused and returned back to police station and registered First Information Report/Ex.P.6 for the offences under Sections 8(c)r/w.20(b)(ii) (C) and 25 of NDPS Act . Thereafter duly prepared report under Section 57/Ex.P.7 and sent to P.W.4 superior officer and the samples were sent to chemical analysis and the remaining ganja and photo of the vehicle were produced before the trial Court. P.W.4 conducted investigation, examined witnesses and then sent the contraband for chemical analysis and after obtaining chemical analysis report/Ex.P.11 he filed final report against the accused. Thereafter the trial Court framed charges under Section 8(c)r/w. 20(b)(ii)(C) and 25 of NDPS Act and the charges were read over and explained to the accused through translator and he denied the charges.



Thereafter the trial Court examined P.W. 1 to P.W.5 and marked Ex.P.1 to Ex.P.11 and M.O.1 to 7.

3. After completion of evidence the trial Court had examined the accused under Section 313(1)(b) of Cr.P.C with regard to the incriminating circumstances as against the accused through translator and the accused denied the evidence. After analysing the oral and documentary evidence on both sides the trial Court had convicted the accused for the offences under Section 8(c)r/w.20(b)(ii)(C) of NDPS Act and sentenced him to undergo 10 years rigorous imprisonment and to pay a fine of Rs.1,00,000/- in default to undergo six months simple imprisonment and acquitted the accused for the offence under Section 25 of the NDPS Act

4. As against the judgment and conviction passed by the trial court, the present appeal has been filed by the accused on the following grounds:

a) the judgment of the trial Court is against law, weight of evidence and probabilities of this case.

b) the trial Court has erroneously convicted the appellant without appreciating the evidence available in the prosecution case and the same is not correct.



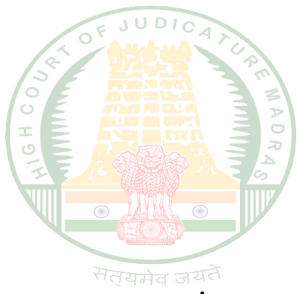
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c) In the entire judgment the trial Court had not discussed about the points raised by the appellant orally. On the other hand the trial Court concluded and convicted only on the basis of chief examination of witnesses and on its own inference.

d) the trial Court has failed to appreciate the evidence let in by te appellant in the cross examination which would go to the entire prosecution case and therefore the conviction is unsustainable.

e)the cross examination of witnesses would definitely probablize that the case of prosecution is unbelievable, artificial, concocted but this has not been looked into by the trial Court

f)the trial Court failed to peruse the time of Ex.P.1 which was served by P.W.3 to the accused prior to the interception of appellant/accused in the trial Court would have perused the above said document/Ex.P.1 Court will come into conclusion that the appellant has not committed any offence, as stated by the prosecution. The trial Court has not appreciated the ground in respect of Ex.P.1 raised by accused during oral argument and the same was not discussed in the judgment



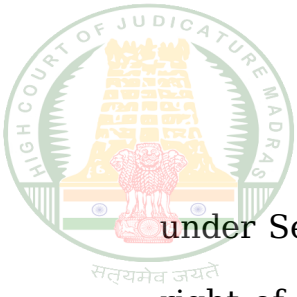
g)the trial Court has failed to note that the entire search and seizure proceedings has not been proved beyond doubt and the prosecution case is not free from doubt, but the trial Court has not given benefit of doubt to the appellant

h)the trial Court failed to see the contradiction between the prosecution witnesses.

i) the trial Court ought to have rejected the evidence of P.W. 1 to P.W. 5 and without assigning any reasoning and discussed in the judgment convicted the accused.

j)the trial Court failed to appreciate the defense version that there is no effective steps to procure the independent witness to attest the mahazhar.

5. The learned counsel appearing for the appellant would contend that the accused has been charged for the offences under Sections 8(c)r/w. 20(b)(ii)(C)of NDPS Act and the accused does not know Tamil and he only know Hindi but no translator was appointed before the trial Court and the entire evidence were recorded without appointment of translator. Further at the time of examination of accused, framing of charges and questioning



under Section 313(1)(b) of Cr.P.C no translator was appointed, thereby the right of the accused for fair trial is denied before the trial Court. Further the mandatory procedures under Sections 50 and 52(A) and 57 of the NDPS Act are not complied with by the prosecution agency and the ownership of the vehicle was not identified by the prosecution. As per section 52(A) of NDPS Act samples have to be drawn in front of the Magistrate and independent witnesses have not been examined. Further the trial Court without considering the nonfollowing the mandatory procedures wrongly convicted the accused and thereby the accused is entitled for acquittal. In order to support his contention he relied on the following judgments:

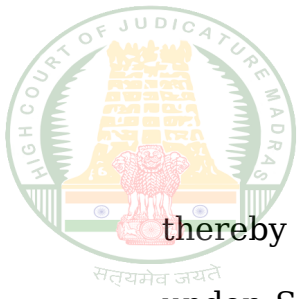
- i) Ghanshyam Agarwal .vs. the State in Crl.A.No.15 of 2016
- ii) Judgment of Delhi High Court in the case of Tuncay Alankus vs Central Bureau of Investigation
- iii) Judgment of the Hon'ble Supreme Court in the case of Arif Khan @ Agha Khan .vs. State of Uttarkhand reported in 2018(2)Crimes 389(SC)
- iv) Vasantha .vs. State in cro.A.No.856 of 2012
- v) Shivanarayan Kabra vs. The State reported in AIR 1967 SCC 986
- vi) Karuppasamy .Vs. State reported in 2020(3)MWN(Cr.) 401
- vii) Ishaque.vs.State of U.P. in Criminal Appeal No.5977 of 2019
- viii) Nalinin .vs. The Superintendent of Central Prison, Madurai Central Prison, Madurai and other in HCP(MD) No.1071 of 2022



ix) Simarnjit Singh vs. State of Punjab reported in 2023 Live

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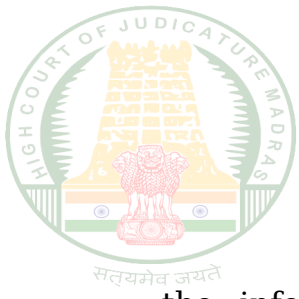
6. The learned Additional Public Prosecutor appearing for the State would contend that the prosecution has examined P.W.1 to P.W.5 and marked Exhibits Ex.P.1 to Ex.P.11 and material objects M.O.1 to M.O.7. The prosecution witnesses P.W.1 to P.W.3 have categorically deposed about the secret information received recorded in the diary and informed to the superior officer and after obtaining permission from the superior officer the raiding party went to the place of occurrence and made vehicle check up. At that time they found the accused along with contraband along with vehicle and they found two polythene bag containing ganja. They had taken samples of 50 gms from each of the bag and seized the contraband along with the vehicle. Thereafter they came to police station and registered First Information Report and report under Section 57 of the NDPS Act was sent to the superior officer and thereby all the legal formalities have been complied with by the prosecution and there is no any deviation in the mandatory provisions as mandated in the NDPS Act. Therefore there is no procedural violation in this case and the prosecution has also clearly established the case as against the accused. Further as per the chemical analysis report the contraband contains Cannabinoids. Therefore the prosecution has proved the case as against the accused and



thereby the trial Court has correctly convicted the accused for the offence under Section 8(c)r/w.20(b)(ii)(C)of NDPS Act. Since the vehicle was not registered in the name of the accused the trial Court has acquitted the accused for the offence under Section 25 of the NDPS Act. The learned Additional Public Prosecutorrelied on the judgment of the Himachal Pradesh High Court judgment in the case of **Minunno Vincenzo v.s State of Himachal Pradesh** reported in **2006 Crl.L.J.2339**.

7. Upon hearing both sides, perusing the records, grounds and the judgment of the lower Court, the point for determination in this appeal is whether the prosecution has proved the charges levelled against the accused under Section 8(c)r/w.20(b)(ii)(C)of NDPS Act beyond reasonable doubt.

8. The case of prosecution is that on 30.09.2018 at about 16.00 hrs near Dindigul to Kumuli Road Athur junction while the police were in vehicle check up they stopped the Bolero Maxi Truck Plus bearing Reg. No. GJ 19 U 0883 at that time they found two white colour polythene bags each weighing 30 kgs of ganja totally 60 kgs of ganja and the same was seized by the raiding party and thereafter they seized the contraband and vehicle and arrested the accused and registered First Information Report.



9. P.W.3 has deposed about the secret information received from the informer and the registration of the same in the diary and the information given to the superior officer and also deposed that he along with raiding party went to the place of occurrence, seized the vehicle bearing Reg.No. GJ 19 U 0883 with two bags of ganja each containing 30kgs of ganja and he had taken the properties along with accused to the police station and registered First Information Report. P.W.1 and P.W.2 were also present at the time of raid. P.W.3 also deposed about he detailed report under Section 57 of the NDPS Act sent to the P.W.4 which is marked as Ex.P.7. On perusal of Ex.P.7 it reveals that the detailed report was sent by P.W.3 to the superior officer and further the investigation officer/P.4 has sent samples for chemical analysis through Court and received Ex.P. 11/Chemical analysis report. As per the chemical analysis report the contraband contained Cannabinoids.

10. The main contention of the accused is that Section 50 of NDPS Act has not been followed while conducting search. As per Section 50 of the NDPS Act search has to be conducted in the presence of nearest Gazetted Officer or nearest Magistrate but in this case the accused was not searched by the respondent police to the person and the body of the accused was not searched by the respondent police and they only searched the vehicle, thereby application of section 50 of NDPS Act would not



attract. The learned counsel appearing for the appellant relied on the judgment of the Hon'ble Apex Court in the case of

i) Arif Khan @ Agha Khan .vs. State of Uttharakhand reported in (2018)2 Crimes 389 (SC), wherein it is held as follows:

“Their Lordships have held in Vijaysinh Chandubha Jadeja (supra) that the requirements of Section 50 of the NDPS Act are mandatory and, therefore, the provisions of Section 50 must be strictly complied with. It is held that it is imperative on the part of the Police Officer to apprise the person intended to be searched of his right under Section 50 to be searched only before a Gazetted officer or a Magistrate. It is held that it is equally mandatory on the part of the authorized officer to make the suspect aware of the existence of his right to be searched before a Gazetted Officer or a Magistrate, if so required by him and this requires a strict compliance. It is ruled that the suspect person may or may not choose to exercise the right provided to him under Section 50 of the NDPS Act but so far as the officer is concerned, an obligation is cast upon him under Section 50 of the NDPS Act to apprise the suspect of his right to be searched before a Gazetted Officer or a Magistrate. (See also Ashok Kumar Sharma vs. State of Rajasthan, 2013 (2) SCC 67 and Narcotics Control Bureau vs. Sukh Dev Raj Sodhi, 2011 (6) SCC 392).

ii) Karuppasamy .vs. The state Inspector of Police, NIB CID, Thoothukudi reported in 2020(3)MWN(Cr.)401, wherein it is held as follows:

“The learned counsel for the appellant has also taken a ground that Section 50 of the NDPS Act has not been adhered to and he strongly denied the consent letter, dated 28.06.2003(Ex.P.4) said to have been given by the appellant. According to the learned counsel no independent witness has attested in Ex.P.5 and it was obtained under coercion. But, according to the prosecution the arrest and seizure was made in a public place (Bus stand) and though attempt was made by them to procure an independent witness from the public, they have refused to stand as witness. This part of the evidence by the prosecution is not acceptable, for the reason that the prosecution has not given the details as to whom they have called to stand as witnesses but refused. Section 100(8) of Cr.P.C enables the police to



take action for the offence under Section 187 IPC against such person who refuse to stand as witness and it is not the case of the prosecution that they have taken any such action. For better appreciation, Section 100(8) of Cr.P.C is extracted hereunder:

“(8) Any person who, without reasonable cause, refuses or neglects to attend and Witness a search under this Section, when called upon to do do by an order in writing delivered or tendered to him, shall be deemed to have committed in offence under Section 187 of the Indian Penal Code(45 of 1860)”.

iii) Vasantha .vs. the State Rep.by the Inspector of Police, NIB CID, Chennai, in Crl.A.No.856 of 2013, wherein it is held as follows:

“For the above mentioned reasons and discussion, this Court is of the considered view that the prosecution has failed to prove that the search and recovery of the contraband made from the appellant was inconsonance with the procedure prescribed under Section 42 and 50 of NDPS Act is fatal to the prosecution case and found that the prosecution was failed to prove the compliance as required in law, the appellant is entitled for claim of benefit acquittal”.

11. From the above judgments it is clear that procedure under Section 50 of the NDPS Act are mandatory. The prosecution has to follow the mandatory procedures but in the case on hand the accused was not searched by the police to the person and the vehicle was only searched, thereby the above said case law will not be helpful to decide the case in favour of the appellant.

12. Further the learned counsel appearing for the appellant argued that the accused has no knowledge of Tamil and English language and he only know Hindi but the proceedings were conducted in Tamil and



thereby the accused has not understood the proceedings, therefore the fair trial was not conducted and the reasonable opportunity was not offered to the accused and no translator was appointed. In this context the learned Additional Public Prosecutor appearing for the respondent has drawn the attention of this Court that in the charge framing itself there is an endorsement by the trial Court that the accused was explained through Hindi knowing person and no specific translator was appointed in this case, however the contents of the charges were explained to the accused by Hindi knowing person. Further at the time of examination of accused the trial Court has made endorsement that translator was appointed and the accused was examined through Hindi translator. Therefore the contention of the learned counsel for the appellant that the accused was not given opportunity to defend the case by appointing translator is not acceptable one. The learned counsel appearing for the appellant relied on the judgements in the case of

i) Judgment of the Delhi High Court in the case of Tuncay Alankus vs. Central Bureau of Investigation, wherein it is held as follows:

“The grievance of the petitioner is that by denial of the services of a competent interpreter in the proceedings before the trial court, his right to a fair trial has been violated. He further urges that under [Section 228 CrPC](#) the accused has to be explained the charge framed against him and asked whether he pleads guilty or not. Therefore, this has to be in the language understood by the accused. It is submitted that [Sections 278 to](#)



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282 CrPC underscore the importance of ensuring that the interpreter dutifully translates the proceedings in the trial court to the accused in the language understood by the accused. Reference is made to the [Article 6](#) of the European Convention for Protection of Human Rights and Fundamental Freedom, 1950 ('European Convention') which guarantees an accused procedural rights to a fair trial. [Article 6 \(e\)](#) includes the right of the accused "to have the free assistance of an interpreter if he cannot understand or speak the language used in court." It is submitted that inasmuch as one of the conditions on which extradition of the petitioner was granted by the Swiss authorities was an undertaking that the Convention provisions would be complied with, the denial of a competent interpreter would vitiate the right of the petitioner to a fair trial"

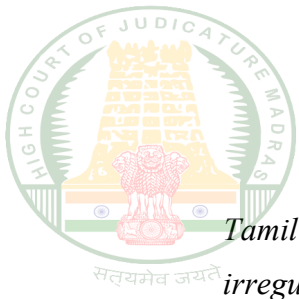
ii) *Shivanarayan Kabra .vs. The State of Madras* reported in AIR 1967 SCC 986, wherein it is held as follows:

We pass on to consider the next contention of the appellant that there was a breach of [s. 361, Criminal Procedure Code](#) which states:

"361. (1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open Court in a language understood by him.

(2) If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language....."

It was said that the evidence of the prosecution witnesses was given either in Tamil or in the English language and the appellant did not know either of the languages and so he was not able to take part in the trial. Mr. Naunit Lal contended that there was a breach of the requirement of [s. 361\(1\) Criminal Procedure Code](#) and the trial was vitiated. We do not think there is any substance in this argument. Even if it is assumed that the appellant did not know English or

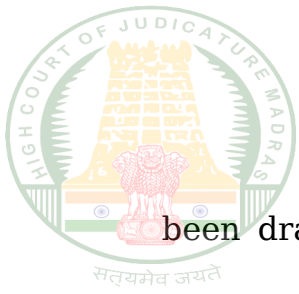


Tamil the violation, if any of S. 361(1), Criminal Procedure Code was merely an irregularity and it is not shown in this case that there is any prejudice caused to the appellant on this account. It is pointed out by the Sessions Judge that the appellant did not make any objection at the time the evidence was given and it appears that he was represented by two eminent advocates-Sri V. T. Rangaswami Iyenger and Sri R. Krishnamoorthy Iyer-in the trial court who knew both these languages and who would not have allowed the interest of the appellant to be jeopardised even to the smallest extent. In our opinion, the irregularity has not resulted in any injustice and the provisions of s. 537 Criminal Procedure Code are applicable to ,cure the defect.

13. On a careful reading of those judgments they will not be applicable to the present facts of the case, because in this case the trial Court itself in the judgment stated that the accused was questioned through Hindi knowing translator.

14. So far as mandatory provisions under Section 57 of the NDPS Act is concerned P.W.3 and P.W.4 have categorically deposed about the report sent to the superior officer after arrest and recovery of materials. Ex.P.7 also reveals the same, therefore there is no violation under mandatory provisions under Section 57 of the NDPS Act.

15. Another contention raised by the learned counsel for the appellant is that at the time of drawing samples, the samples ought to have



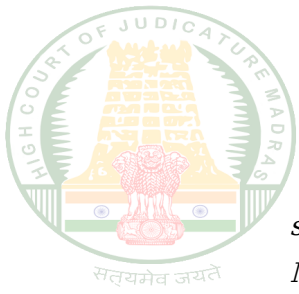
been drawn in the presence of Magistrate but in the said case samples were not drawn in the presence of Magistrate and thereby the entire trial proceedings is vitiated and the prosecution case is highly doubtful and the accused is entitled for benefit of doubt. In this context the learned counsel appearing for the appellant relied on the decision of the Hon'ble Apex Court in the case of **Simarnjit Singh .vs. State of Punjab** reported in **2023 Live Law (SC) 570** wherein the Hon'ble Apex Court has held as follows:

8. In paragraphs 15 to 17 of the decision of this Court in Mohanlal's case¹, it was held thus: thus:

"15. It is manifest from Section 52-A(2) include (supra) that upon seizure of the contraband the same has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory, (b) certifying photographs of such drugs or substances taken before the Magistrate as true, and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

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

17. The question of drawing of samples at the time of



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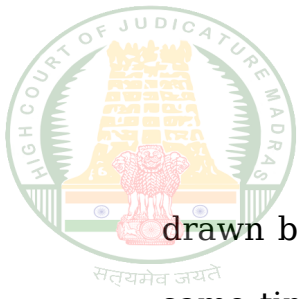
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seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance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

9. Hence, the act of PW-7 of drawing samples from all the packets at the time seizure is not in conformity with the law laid down by this Court in the case of Mohanlal . This creates a serious doubt about the prosecution's case that substance recovered was a contraband.

10. Hence, the case of the prosecution is not free from suspicion and the same has not been established beyond a reasonable doubt. Accordingly, we set aside the impugned judgments insofar as the present appellant is concerned and quash his conviction and sentence.

16. On careful reading of the above judgment it is clear that samples have to be drawn in the presence of Magistrate and the Magistrate has to certify the samples. If the samples drawn are not in conformity with the law laid down by the Hon'ble Supreme Court in the case of Mohanlal, which creates serious doubt over the prosecution case that the substance recovered was a contraband, hence, the case of the prosecution is not free from suspicion and the same has not been established beyond a reasonable doubt. The learned Additional Public Prosecutor has argued that in the case on hand the prosecution has clearly deposed about the seizure of property, arrest of accused and other formalities by the officials, the sample was not



drawn before the Magistrate and not certified by the Magistrate but at the same time immediately after the seizure of properties, they were produced before the jurisdiction magistrate through Form -95 thereby the procedures under Section 52 (A) of the NDPS Act was complied.

17. In the case of hand it is pertinent to note that the Hon'ble Supreme Court in the above cases clearly observed in para 16 that,

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

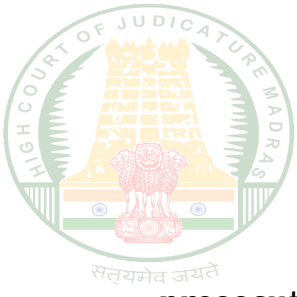
18. Therefore it is clear that the samples ought to have been drawn in the presence and supervision of Magistrate and entire exercise have to be certified by him to be correct. Therefore mere production of samples which were seized by the police before the Court is not sufficient to satisfy the condition of Section 52(A) of NDPS Act. As per article 141 of



the Constitution of India the law laid down by the Hon'ble Supreme Court is law in land thereby this Court has to strictly follow the law laid down by the Hon'ble Supreme Court. As per Article 21 of the Constitution of India “*No person shall be deprived of his life or personal liberty except according to procedure established by law*”.

19. In the case on hand also the procedures laid down by the Hon'ble Supreme Court and the provisions of NDPS Act have not been followed by the prosecution agency, hence the prosecution is not free from the suspicion and the same has not been established beyond reasonable doubt.

20. Therefore the above said case law is squarely applicable to the present facts of the case. In so far as the ownership of the vehicle is concerned the trial Court also acquitted the accused for the offence under Section 25 of the NDPS Act, holding that the accused is not owner of the vehicle. As far as the presumption under Section 35 and 54 of the NDPS Act is concerned the prosecution has to prove the foundational facts to the commission of offence but in the case on hand the possession itself was not proved thereby the presumption under Sections 35 and 54 of NDPS Act would not attract.



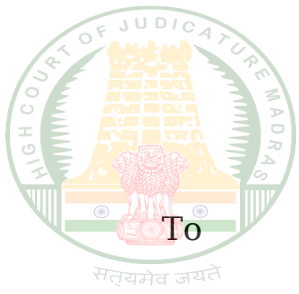
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21. In view of the above discussion and said case law the prosecution has failed to prove the case beyond reasonable doubt and thereby the accused is entitled for acquittal.

22. In the result this criminal appeal is allowed and the judgment and conviction passed by the I Additional Special Court for NDPS Act Cases, Madurai in C.C. No.91 of 2019 is set aside and the accused is acquitted from the charges under Sections 8(c)r/w.20(b)(ii)(C) of NDPS Act and he be set at liberty subject to other cases if any. The bail bond, if any, executed by the appellant shall stand cancelled and fine amount, if any, paid by him is ordered to be refunded forthwith. Consequently connected miscellaneous petition is closed.

29.09.2023

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WEB COPY 1. The I Additional Special Court for NDPS Act Cases, Madurai

2. The Inspector of police
NIB-CID
Dindigul
3. The Section Officer,
Criminal Records,
Madurai Bench of Madras High Court,
Madurai.
4. The Additional Public Prosecutor
Madurai Bench of Madras High Court,
Madurai



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P.DHANABAL, J.

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