Durand Didier vs Chief Secretary, Union Territory Of Goa on 29 August, 1989

Equivalent citations: 1989 AIR 1966, 1989 SCR (3)1025, AIR 1989 SUPREME COURT 1966, (1990) 1 PAT LJR 40, (1990) 1 CRILC 215, (1990) 2 BOM CR 31, (1990) 40 DLT 139, (1990) EASTCRIC 1, 1990 SCC (CRI) 65, (1989) 3 JT 507 (SC), (1989) 3 CRIMES 163.2, (1990) SCCRIR 76, (1991) 1 CHANDCRIC 38, 1990 CHANDLR(CIV&CRI) 667, 1990 (1) SCC 95, 1989 BOM LR 91 911

Author: S.R. Pandian

Bench: S.R. Pandian

PETITIONER:
DURAND DIDIER

Vs.

RESPONDENT:
CHIEF SECRETARY, UNION TERRITORY OF GOA

DATE OF JUDGMENT29/08/1989

BENCH:
PANDIAN, S.R. (J)
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PANDIAN, S.R. (J)
NATRAJAN, S. (J)

CITATION:
1989 AIR 1966 1989 SCR (3)1025
1990 SCC (1) 95 JT 1989 (3) 507
1989 SCALE (2)449

ACT:
Narcotic Drugs and Psychotropic Substances Act, 1985--Sections 2(xiv), (xxii), 8, 18, 20, 21 and 27.
Narcotic Drugs and Psychotropic Substances Rules, 1985: Schedules I, II and III.
Narcotic Drug or psychotropic substance--'Small quanti-ty---What is--'For personal consumption '--Burden of proof----On whom.
Contrabands--Seizure-Omission to send samples in suffi-cient quantity for analysis--Effect of.
Evidence--Difference between the narcotic drugs and substances--Chemical Analyst's evidence--Value of.
Search and seizure--Seizure of contrabands--Pancha

witnesses residing in the same area but not in vicinity of the seizure--Admissibility and value of evidence.

HEADNOTE:

The appellant is a foreign national. At Colva, on seeing a police party on patrol he accelerated the speed of his motor cycle ignoring the signal given by Assistant Sub-Inspector of Police (P.W. 7) and in that process lost control over the vehicle and fell down. Thereafter he immediately stood up and removed a paper wrapping from his pant pocket and threw it away which on verification was found to contain a small quantity of brown sugar. The appellant was taken to the nearby police post along with the motor-cycle. A hand bag attached to the motor-cycle was opened and examined in the presence of two pancha witnesses and it was found that there was brown sugar hidden in the Camera case, Ganja oil in the steel container, and opium in the shaving cream tube, torch light and shoe. All the substances were weighed and seized under a panchnama and sample of these contrabands divided into three categories were sent to Chemical Analyst (PW. 6) who found that one sample contained 16.8% w/w of Morphine (an alkaloid extracted from opium), and the other sample contained a dark brown
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sticky substance having odour similar to that of extract of cannabis. The quantity of the substance namely a dark brown soft mass having characteristic colour of opium found in the third sample was not sufficient to carry out further analysis.

The appellant was consequently prosecuted for possession of prohibited drugs under the Narcotic Drugs and Psychotropic Substances Act, 1985. The Sessions Judge convicted him under Sections 21, 20(b)(ii) and 18 of the Act and imposed a sentence of 10 years rigorous imprisonment and a fine of Rs. 1,00,000 and in default to undergo rigorous imprisonment for one year. The High Court dismissed the appeal of the appellant and confirmed the sentence passed by the Trial Court but modified the default sentence from one year to six months.

In this appeal challenging the correctness of the conviction it was contended on behalf of the appellant that: (i) in the absence of any injury on the person of the appellant, the case of the prosecution that the appellant fell down from his vehicle is hardly acceptable (ii) the pancha witnesses were not the respectable inhabitants of the locality therefore the seizure of the contrabands was in violation of the provisions relating to search and seizure; (iii) the omission to send sufficient representative quantity of the contrabands for analysis affected the veracity of the prosecution case; (iv) the omission to include the owner of the motor-cycle (PW-5) as an accused and the non-examination

of the person at whose instance the vehicle was lent to the appellant affected the prosecution case; and (v) since the appellant was in possession of these drugs or substances in a small quantity for his personal consumption he was liable to be punished only under section 27(a) of the Act.

Dismissing the appeal,

HELD: 1. If a person is thrown off or fails from a speeding vehicle he may sustain injuries either serious or simple or escape sometimes unhurt but it depends on the speed of the vehicle, the manner of fall, the nature of the soft and the surface of the earth etc. In the instant case, the evidence and other connected facts lead to the inference that the appellant had fallen down immediately after he attempted to speed up the vehicle and was caught hold of by the police. Therefore it is right that the appellant was caught by the police under the circumstances as put forth by the prosecution and the appellant however escaped unhurt. [1031H; 1032A-D]

2. If pancha witnesses are not respectables of the same locality

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but from another locality, it may amount only to an irregularity, not affecting the legality of the proceedings and that it is a matter for Courts of fact to consider and the Supreme Court would not ordinarily go behind the finding of facts concurrently arrived at by the Courts below. [1032G-H; 1033A-B]

Sunder Singh v. State of U.P., [1956] Cr. L.J. 801; Tej Bahadur v. State of U.P., [1970] 3 S.C.C. 779 and State of Punjab v. Wasson Singh and Ors., [1981] 2 S.C.R. 615; applied.

2.1 In the instant case, the appellant was secured in the midnight near the Police Out Post. It is indisputably shown that the pancha witnesses are not outsiders but are residents of the same area where the Police Out Post is situated. The fact that these two witnesses are not residing in the vicinity of the seizure, does not disturb the acceptance of the evidence relating to the seizure of the contrabands and other articles. Except making some bare suggestions that both the witnesses were regular and professional witnesses, nothing tangible has been brought out in the cross-examination to discredit the testimony. [1033C-E]

3. In the instant case, the omission to send sufficient quantity of samples of contrabands for analysis does not affect the intrinsic veracity of the prosecution case. The testimony of the Chemical Analyst and her opinion recorded in the unimpeachable document lend assurance to the case of the prosecution that the contrabands seized from the possession of the appellant were prohibited drugs and substances. [1033F-H]

4. The Medical Officer is not expected to know the differences in the legal parlance as defined in section 2(xiv) and (xxii) and specified under Schedules I to III of

the Narcotic Drugs and Psychotropic Substances Rules 1985 made under the Act. Therefore, the admission of the Chemical Analyst that she does not know the difference between the narcotic drugs and psychotropic substances by itself is no ground for ruling out her evidence. [1034A-B]

5. There is absolutely no material to hold that the owner of the motor-cycle was in any way connected with the seizure of the contrabands or he has committed any indictable offence though the vehicle belonged to him. The non-examination of the person at whose instance the owner lent his motor-cycle to the appellant does not in any way affect the prosecution case. [1034C-D]

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6. Section 27(a) of the Act provides punishment for illegal possession in small quantity for personal consumption of any narcotic drug or psychotropic substance. The expression 'small quantity' occuring in that section is explained under Explanation I there of as such quantity as may be specified by the Central Government by Notification in the Official Gazette. [1035A-B]

In the instant case, the penal provisions of section 27(a) has no role to play as the prohibited drugs and substances possessed by the appellant were far in excess of the quantity mentioned in Column 3 of the table under the relevant Notification. [1036D]

Even if a person is shown to have been in possession of a small quantity of a narcotic drug or psychotropic substance, the burden of proving that it was intended for the personal consumption of such person, and not for sale or distribution, lies on such person as per Explanation 2 of Section 27 of the Act. [1036E]

The very fact that the appellant in the instant case had kept these drugs and substances in many ingeniously devised places of concealment in the camera, shaving tube, torch and shoes would indicate that the appellant was having full knowledge that the drugs he carried were prohibited drugs and that he was having them in violation of law. Therefore, the sentence of 10 years rigorous imprisonment and the fine of Rs.1,O0,000 with the default clause as modified by the High Court does not call for interference. [1036F; 1037D]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 533 of 1989.

From the Judgment and Order dated 31.8.88 of the Bombay High Court in Criminal Appeal No. 24 of 1988. Govind Mukhoty and V.B. Joshi for the Appellant. Anil Dev Singh, C.K. Sucharita and Ms. A. Subhashini for the Respondent.

The following order of the Court was delivered Special leave granted.

The appellant who is a French national has preferred this appeal under Article 136 of the Constitution of India canvassing the correctness of his conviction under Sections 21, 20(b)(ii) and 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for brevity hereinafter referred to as the 'Act') and the sentence of 10 years rigorous imprison- ment in addition to pay a fine of Rs. 1,00,000 in default to undergo rigorous imprisonment for one year inflicted by the Court of Sessions Judge, South Goa, Margao and confirmed by the High Court of Bombay, Panaji Bench (Goa) with a modifi- cation of the default sentence from one year to six months on the indictment that the appellant on 7.12.87 at about 0.40 hours at Colva was found in possession of prohibited drugs/namely 51 gms. of brown sugar, 45 gins. of ganja oil and 55 gms. of opium all worth approximately Rs. 13,465 without valid documents.

Adumberated in brief, the relevant facts of the prosecu- tion case giving rise to this appeal are as follows. On 6th December, 1987 at about 11.00 p.m. the Assistant Sub Inspector of Police, Shri Laxman Mahalsekar (PW-7) while along with his police party was on his patrol duty at the 3rd ward of Colva, saw the appellant speeding up his motor- cycle, bearing Registration No. GDK 851 ignoring his signal to stop. The appellant in such attempt, presumably to escape from being nabbed by the police lost control over the vehi- cle and fell down. No sooner he stood up and removed a paper wrapping from his pant pocket and threw it away. PW-7 on entertaining suspicion over the conduct of the appellant verified that wrapping to contain small quantity of brown sugar and then he took the appellant along with his motor- cycle to the nearby Police Out Post. A handbag, bluish in colour with red strips had been attached to the motorcycle. When the said bag was opened with a key handed over by the appellant and examined in the presence of two pancha wit- nesses, namely Francis Xavier D'Silva (PW 1) and one Connie D'Silva (not examined), it was found to contain some person- al belongings such as wearing apparels, a pair of shoes and a canvas bag. Inside the bag, there was one shaving cream tube, one camera, a torch and four plastic rolls. There was also one plastic bag containing contraceptives. The torch was found to contain two bundles of plastic material each one containing a small piece of blackish substance. Inside the cream tube, four bandies wrapped in a plastic material were found. Each of the bundle contained small pieces of blackish substance. There was also one more bundle of plas- tic material concealed in the shoes which when opened was found to contain small piece of blackish substance similar to the one found in the torch as well in the shaving cream tube. The camera was found in a box in which there were five packets of plastic material with some powder of yellowish colour i.e. brown sugar. According to PW-7, there were 50 gms. of brown sugar hidden in the camera case, 45 gms. of Ganja oil in the steel container and 55 gms. of opium in the shaving cream tube, torch light and shoes. All the materials were weighed and seized under a panchnama (Ex. P. 1) attested by PW 1 and Connie D'Silva. The appellant was arrested and kept under medical treatment and observation. Samples of these articles were sent to Chemical Analyst (PW-6) who has de- posed that she received three envelopes Ex.1 to 3. According to her, the envelope marked Ex.1 contained 1.57 gms. of substance which on analysis was found to contain 16.8% w/w of Morphine (which is an alkaloid extracted from opium i.e. conversion of opium). The quantity of the substance namely a dark brown soft mass having characteristic colour of opium found in the envelope Ex. 2, weighing 2.45 gms. was not sufficient to carry out further analysis. The substance in envelope Ex. 3 weighing 2.97 gms. on analysis was found to contain a dark brown sticky substance having odour similar to that of extract of cannabis. PW-6 gave her report (Ex.P-

3) dated 8.2.88. PW-7, after receiving Ex. P-3 and complet- ing the investigation charge-sheeted the accused under the provisions of the Act on the ground that the appellant was in possession of prohibited drugs without a valid licence or permit or authorisation in violation of Section 8 punishable under the penal provisions of the Act.

The defence of the appellant is one of total denial. As pointed out in the earlier part of this judgment both the Trial Court and the Appellate Court have concurrently found the accused guilty.

Mr. Govind Mukhoty, learned senior advocate appearing on behalf of the appellant directed a manifold scathing attack on the prosecution case raising the following conten- tions:

1. The absence of any visible injury on the person of the appellant while apprehended belies the prosecution version that the appel-

lant had fallen down from the vehicle on accelerating the speed;

2. The fact that the Investigating Offi-

cer did not deliberately join with him respec- tive inhabitants of the locality i.e. within the vicinity of the Police Out Post to witness the seizure but had taken pain to secure PW-1 and Connie D'Silva who were residing far away from the place of seizure and who seem to have been readily willing and obliging to be pancha witnesses devalues the evidence regard- ing the seizure of the contrabands and more so it is in violation of the salutary provisions of law prescribing the procedure to be fol- lowed before making the search and seizure;

3. PW-7 sent only three samples from the alleged seized substances--that too in small quantity instead of sending sufficient repre- sentative quantity from each of the packets seized for assay. Therefore, in the absence of scientific test of all the substances found in each of the packets, no safe conclusion can be arrived that the entire substances seized under various packets were all prohibited drugs;

4. The admission of PW-6 in her evidence that she does not know the difference between the narcotic drugs and psychotropic substances militates against the evidentiary value of her opinion under Exh. P-3.

5. The non-inclusion of PW-5, the owner of the motor-cycle as an accused and the non- examination of Cavin at whose instance PW-5 lent the vehicle are fatal to the prosecution case;

6. Even assuming but not conceding that the prosecution version is acceptable in the absence of any evidence that the appellant was carrying on with the nefarious trade of pro- hibited drugs either as a 'peddler' or 'push- er', the appellant would be liable to be punished within the mischief of Section 27(a) of the Act, since the attending circumstances present in this case indicate that the appel- lant was in possession of the drugs in small quantity only for his personal consumption. We shall now examine the contentions seriatim with reference to the evidence available on record. There is no

denying the fact that the appellant had been taken into police custody on the early hours of 7.12.87 by PW-7 along with the motor-cycle involved in this case. The submission of Mr. Mukhoty is that in the absence of any injury on the person of the appellant, the case of the prosecution that the appellant fell down from his vehicle is hardly acceptable. No doubt if a person is thrown off or falls down from a speeding vehicle he may sustain injuries either serious or simple or escape sometimes unhurt but it depends on the speed of the vehicle, the manner of fall, the nature of the soil and the surface of the earth etc. In the present case, evidence of PWs 4 and 7 is that the appellant on seeing the police party accelerated the speed ignoring the signal given by PW-7 to stop and it was only during the course of this attempt, the appellant fell down from the motor-cycle at a place where the street lights i.e. the fluorescent tube lights and bulbs were on and thereafter immediately stood up. The evidence on these two witnesses and the other connected facts lead to the inference that the appellant had fallen down immediately after he attempted to speed up the vehicle and was caught hold of by the police. It is not the case of the prosecution that the appellant sped away to some distance and then had fallen down from the speeding vehicle. PW-3, the Medical Officer attached to Hospicio Hospital speaks to the fact that when she examined the appellant on 8.12.87 at about 8.00 p.m., the appellant complained of bodyache, nosia etc. but PW-3 does not whisper of having seen any visible injury on the person of the appellant. After carefully scanning the evidence of PWs 4 and 7 coupled with the recovery of the articles Nos 1 to 14, we unhesitatingly hold that the appel- lant was caught by the police under the circumstances as put forth by the prosecution and the appellant however escaped unhurt. Hence in the light of the above evidence, we are constrained to hold that this submission made by the learned defence counsel does not merit consideration. After the appellant was secured by the police, PW-7 directed PW-4 to bring two pancha witnesses. Accordingly, PW-4 brought two witnesses from a place which is according to PW-7 is within a distance of 1 KM and according to PW-5 at five minutes walking distance. Much argument was advanced by the learned defence counsel that these two witnesses were not the respectable inhabitants of that locality; that they were readily willing and obliging witnesses to the police and that there is deliberate violation of the statutory safeguard. This argument cannot be endured for more than one reason to be presently stated. The appellant was secured in the midnight near the police out post. It clearly transpires from the records that these two witnesses are not outsiders but residents of the same area, namely Colva. Except making some bare suggestions that both the witnesses were regular and professional witnesses, nothing tangible has been brought out in the cross-examination to discredit the testi- mony of PW-1. This Court, while considering a similar con- tention in Sunder Singh v. State of U.P., [1956] Crl. Law Journal 801 and Tej Bahadur v. State of U.P., [1970] 3 SCC 779 has observed that if pancha witnesses are not respect- ables of the same locality but from another locality, it may amount only to an irregularity, not affecting the legality of the proceedings and that it is a matter for Courts of fact to consider and the Supreme Court would not ordinarily go behind the finding of facts concurrently arrived at by the Courts below. See also State of Punjab v. Wasson Singh and Five Oth- ers, [1981] 2 SCR 615.

When such is the view, expressed by this Court on a number of occasions, we are unable to appreciate the submis- sion of the learned counsel that the prosecution case is in violent disregard of the procedure relating to search and seizure. The question that PW-1 and other pancha witnesses are not the inhabitants of the locality does not arise in the present case because it is indisputably shown that they are the residents of the same Colva area where the Police Out Post is situated. The

fact that these two witnesses are not residing in the vicinity of the seizure, in our view, does not disturb the acceptance of the evidence of PW-1 relating to the seizure of the contrabands and other arti- cles. With regard to the drawing up of the panchnama, the defence has come forward with two diametrically contradicto- ry suggestions in that, the suggestion made to PW-1 is that he only subscribed his signatures on some papers whilst a new story, suggested to PW-7 is that the panchanama was fabricated around the 5th of January 1988 in order to save one Ramesh, brother of PW-5 from being prosecuted in connec- tion with this seizure. To establish the seizure of all the articles including the contrabands, the prosecution rests its case not only on the testimony of PW-1 but also on the evidence of PWs 5 and 7 whose evidence is amply corroborated by the towering circumstances attending the case. From the records, it is found that PW-7 divided the contrabands into three categories and sent the samples from each of the categories for analysis. No doubt, it would have been appreciable, had PW-7 sent sufficient representative quantity from each of the packets but however this omission in the present case does not affect the intrinsic veracity of the prosecution case. PW-6 has fairly stated that she was able to thoroughly assay only the substances found in two envelopes marked as Ex. P-1 and P-3 and the substances in envelop Ex. P-2 was not sufficient to carry out further analysis though it was a dark brown soft mass having charac- teristic of odour of opium. The testimony of PW-6 and her opinion recorded in the unimpeachable document (Ex. P-3) lend assurance to the case of the prosecution that the contrabands seized from the possession of the appellant were prohibited drugs and substances.

The criticism levelled by the learned defence counsel is that the evidence of PW-6 is not worthy of acceptance since she has admitted that she does not know the difference between the narcotic drugs and psychotropic substances. This attack, in our view, does not assume any significance be- cause as rightly pointed out by Mr. Anil Dev Singh, the learned senior advocate for the respondent, the Medical Officer is not expected to know the differences in the legal parlance as defined in Section 2(xiv) and (xxii) and speci- fied under Schedules 1 to III in accordance with the con- cerned Narcotic Drugs and Psychotropic Substances Rules, 1985 made under the Act and so this ground by itself, in our view, is no ground for ruling out the evidence of PW-6. Yet another attack by the defence that the omission on the part of the prosecution to include PW-5 as an accused and to examine Cavin as a witness has to be mentioned simply to be rejected as devoid of any merit, as there is absolute- ly no material to hold that PW-5 was in any way connected with the seizure of the contrabands or he has committed any indictable offence though the vehicle belonged to him. The non-examination of Cavin at whose instance PW-5 lent his motorcycle to the appellant does not in any way affect the prosecution case.

For the discussions made above, we see no force in the contentions 1 to 5.

Lastly, we have to consider the legal submission made by Mr. Mukhoty that the appellant was in possession of these drugs or substances in a small quantity for his personal consumption and as such he would be punishable only under Section 27(a) of the Act providing imprisonment for a term which may extend to one year or with fine or with both. He further pleaded that the appellant is neither an 'uncrowned king of the mafia world' nor a 'peddler' nor a 'pusher'; that he being a foreigner by prolonged and continuous use of drugs has become a drug-dependent and that he had all symp- toms of an addict and exhibited sufferance of withdrawal symptoms on discontinuing the

drug which, it seems, he was taking on his own as borne out from the testimony of the Medical Officers (PWs 2 and 3) under whose observation the appellant has been kept for some days. Incidentally, he has added that though ignorance of law is not an excuse and it cannot be permitted to be pleaded, yet this Court may take note of the fact that the appellant who is a foreigner should have been lacking awareness of the stringent provi- sions of the Act.

Firstly, let us examine whether the offence would fail within the mischief of Section 27(a) of the Act. This section provides punishment for illegal possession in small quantity for personal consumption of any narcotic drug or psychotropic substance. The expression 'small' quantity occuring in that section is explained under Explanation I annexed to that Section which reads thus:

> "For the purposes of this section 'small quantity' means such quantity as may be speci- fied by the Central Government by notification in the Official Gazette."

In compliance with this explanation, the Ministry of Finance (Department of Revenue) has issued notification No. S.O. 827(E) dated November 14, 1985 published in the Gazette of India, Extra., Part II Section 3(ii) dated 14th November 1985 which notification reads thus:

> "In exercise of the powers conferred by Expla- nation (1) of Section 27 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) and in partial modification of the notification of the Government of India in the Ministry of Finance, Department of Revenue No.S.O. 825(E), dated the 14th November 1985 the Central Government hereby specifies the quantity mentioned in Column 3 of the Table below, in relation to the narcotic drug men- tioned in the corresponding entry in column (2) of the said Table, as 'small quantity' for the purposes of that section.

TABLE Serial No. Name of the Narcotic Drug Quantity 1 2

1. Heroin or drug commonly 250 milligrams known as Brown Sugar or smack

2. Hashish or Charas

-- 5 grams

3. Opium

-- 5 grams

4. Cocaine

-125 milligrams

5. Ganja

-- 500 grams Coming to the case on hand, the appellant was found to be in possession of the narcotic drugs or substances far in excess of the quantity mentioned in column 3 of the table under the notification. According to the prosecution, he was in possession of 51 grams of brown sugar, 45 grams of Ganja oil and 55 grams of opium.

In view of the above position, it cannot be contended that the prohibited drugs and substances seized from the appellant's possession were in small quantity so as to bring him only within the mischief of Section 27(a) of the Act. It may not be out of place to mention that even if a person is shown to have been in possession of a small quan- tity of a narcotic drug or psychotropic substance, the burden of proving that it was intended for the personal consumption of such person and not for sale or distribution, lies on such person as per Explanation 2 of Section 27 of the Act.

Thirdly, the very fact that the appellant had kept these drugs and substances in many ingeniously devised places of concealment in the camera, shaving tube, torch and shoes would indicate that the appellant was having Fuji knowledge that the drugs he carried were prohibited drugs and that he was having them in violation of law.

We, for the above reasons, see no merit in this contention also.

The Trial Court while inflicting the punishment has expressed its view about the drug menace spreading in Gao as follows:

> "The spreading of the drugs in Gao is becoming day by day a terrible menace which is com- pletely destroying the very fiber of our society being also instrumental in subverting the tender soul of our young generation which is being badly contaminated by such danger in a very alarming provisions calling for severe punishment in case of illegal possession and transportation of drugs meant for personal consumption and eventual trade."

With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and pyschotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming pro- portions in the recent years. Therefore, in order to effec- tively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, the Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine. As we have now rejected the plea of the defence hold- ing that the penal provisions of Section 27(a) has no role to play as the prohibited drugs and substances possessed by the appellant were far in excess of the quantity mentioned in Column 3 of the table under the notification, the sen- tence of 10 years rigorous imprisonment and the fine of Rs. 1,00,000 with the default clause as modified by the High Court does not call for interference.

In the result, the appeal is dismissed.

T.N.A. Appeal dismissed.