

**IN THE COURT OF SH. AJAY KUMAR JAIN : SPECIAL JUDGE NDPS: PATIALA
HOUSE COURTS: NEW DELHI**

Case No. SC/8897/16
ID No. 02403R0197862013

Narcotics Control Bureau
Through: Sh. Vishwanath Tiwari
Intelligence Officer,
Narcotics Control Bureau, New Delhi

Versus

Nzube Christian Asika (In JC)
S/o Okorie Rapheal Asika
R/o Umudara Amaifeke Orlu,
Nigeria
Local Address-
WZ-15, C/2, Krishana Puri,
Tilak Nagar, New Delhi

Date of Institution : 21.12.2013
Judgment reserved on : 18.11.2019
Date of pronouncement : 21.11.2019

JUDGMENT

1. Prosecution case in brief is that on 17.06.2013, Sh. V.B. Mishra, Deputy Director General NCB Delhi received a communication from Serious Organized Crime Agency (SOCA) of UK that a parcel originated from Columbia destined for India via DHL courier bearing AWB reference 9147584832 has been intercepted at London Gatwick airport and on initial examination, it confirmed the presence of prohibited drugs and requested the NCB to conduct the controlled delivery of parcel which will be flown to New Delhi Airport by British Airway Flight No. BA-257 arriving at 06.20 AM on 18.06.2013. The said communication was sent by DDG to DG for approval, and Director General approved and authorized to conduct the controlled delivery operation through competent officers thereafter the DDG directed Zonal Director to conduct the proceeding for controlled delivery. On 17.06.2013 itself Zonal Director directed R.K. Singh, Superintendent regarding the operation of controlled delivery parcel and further directed him to constitute a team. Accordingly, Superintendent R.K. Singh

directed IO C.S.K. Singh to receive controlled delivery parcel from British Airways and to liaise with and hand over the said parcel to DHL. He also directed IO Sandeep Kumar to make surveillance and liaison with DHL office, Rama Road. On 18.06.2013, IO C.S.K. Singh received the parcel sealed with plastic seal of UK Border Agency from Captain Mr. Barrie Addams (alongwith two letters i.e. British Airways letter of request and airline captain indemnity letter issued by Shadow Border Policing Command, UK for Captain Mr. Barrie Adams) and handed over the said parcel to Ashok Tiwari of DHL office for further controlled delivery. IO CSK Singh handed over aforesaid two letters to Sh. R.K. Singh who forwarded it to Zonal Director.

2. On 24.06.2013, at around 12 hours, Sh. R.K. Singh received an information telephonically from Sandeep Kumar that one person was likely to come to DHL office for taking delivery and requested the team be immediately sent for further action. The said information was marked to IO Vishwanath Tiwari who constituted a team thereafter the team was constituted by IO Vishwanath Tiwari consisting of IO Rajesh Kumar, IO Ajay Dahiya, Sepoy Mahinder and Driver Malkeet Singh. Superintendent R.K. Singh gave some documents relating to controlled delivery, seal of NCB after making necessary entries. IO Vishwanath Tiwari took all the accessories i.e. IO kit and field testing kit, and left office with team at around 1215 hours and reached Rama Road at around 1245 hours where met IO Sandeep Kumar, also contacted two panch witnesses. Thereafter, at around 1310 hours, the accused collected the delivery of said parcel and when he was coming out of reception area NCB team intercepted him, then he revealed his name and address. Notice u/s 50 was given and he was informed about his legal rights that if he wants his search can be conducted before magistrate or gazetted officer however he declined, thereafter, from his personal search one passport and three mobile phones recovered from the inbox of gray Nokia mobile a message was found received from one Uzo @ Ugo of 22.06.2013 in which the number of airway bill was mentioned. The parcel found to be weighing around 2.353 kg. On opening the transparent polybag recovered inside the said parcel having the UK border seal, one blue and white cardboard box

bearing mark (rear and front drum motor) of 'Ichiben Brand' was recovered. On opening the cardboard box one silver colour rear and front drum of motorcycle, one transparent polythene and one bubble polythene was recovered. A small piece of khaki tape was found pasted on rear and front drum and on removing the same, a small hole was found in rear and front drum from which the white powdery substance comes out. On minute examination, it was found that round aluminum plate was pasted on one side of the drum. The other side of drum was open cavity. On removing the said aluminum plate from one side of the drum, four black and white colour pouches were found in four boxes of drum. Four pouches were tested separately, gave positive result for cocaine. All pouches were put into transparent polybag and mixed homogeneously. The said substance weighed around 185 gm. Two representative sample of 5 gm each prepared, the material was sealed and seized, panchnama was prepared, the passport, mobile phones and airway bill were also seized. The proceedings were concluded at around 1520 hours. The delivery sheet from concerned DHL office also seized.

3. Statement of accused u/s 67 on 24.06.2013 recorded in which he stated that his friend Vege gave his phone and airway bill of parcel to collect the parcel. He took him to Janak Puri (E) Metro station and directed him about the direction of DHL office on his mobile 8376823881, thereafter, he reached DHL office to receive the parcel where he was apprehended with the parcel and proceedings were conducted in his presence. He also informed the telephone number of Vege and Uzo @ Ugo but unable to tell their addresses. He also stated that he was aware of the contents of parcel as cocaine. After recording of his statement, he was arrested.
4. The statement of one Sudhir Kumar Diwakar u/s 67 of NDPS Act was also recorded on 25.06.2013, who is running a mobile shop stated that accused used to come to his shop for recharge of mobile and also identified the accused, and informed that he is friend of Bobby @ Vege @ Uzo. He further stated that on 21.06.2013 official of courier company came to his shop, however he stated that courier do not belong to him thereafter on the same day in the evening Bobby @

Vege @ Uzo and Christian came to his shop then he informed that the parcel could be collected at Kirti Nagar office. He further stated that 7-8 months ago, Bobby @ Vege @ Uzo booked a parcel at his shop.

5. The sample were sent to CRCL. Report u/s 57 was submitted by IO Vishwanath Tiwari to the Superintendent. The statement of independent witness Dev Karan and Harish Jain u/s 67 NDPS Act was also recorded on 08.07.2013. The call detail records were also called through Nodal Officer. As per CRCL report, the sample gave positive test for cocaine.
6. Vide order dated 29.04.2014 charge u/s 23(c), alternatively u/s 21(c) NDPS Act were framed against the accused to which he pleaded not guilty and claimed trial.
7. Prosecution for substantiating its case examined 19 witnesses. The summary details of their depositions are as follows:
8. **PW2 CSK Singh** IO stated that on 17.06.2013 Superintendent R.K. Singh told him to receive the parcel from British Airway flight and thereafter on 18.06.2013 he received a parcel of DHL company from Captain Mr. Barrie Adams with two letters and then handed over the parcel to Ashok Tiwari of DHL for its controlled delivery. In cross-examination stated that his statement was not recorded by IO or R.K. Singh and went to airport in government vehicle and he do not remember the name of British Airways staff with whom he met but staff consisted of one lady and the said lady did not tell him as to how she came to know that the parcel was with the pilot and even not enquired the same with her. Only one plastic seal was appearing on the said parcel and he had not put any seal of NCB nor prepared any handing over memo. He also not recorded the statement of Pilot. He also stated that he left the DHL office at about 10.30 AM. He also not recorded the statement of Ashok Tiwari of DHL. The parcel was given to him at the cockpit of British Airways flight.
9. **PW4 Dev Jyoti Ray** stated that as a Zonal Director, NCB, he received a communication from DDG Operations that DG of NCB approved the undertaking of controlled delivery of a consignment coming from London to New Delhi. He instructed R.K. Singh to constitute a team, and on 18.06.2013 it was brought to

his notice that said delivery was taken and surveillance mounted at DHL Office. In cross-examination stated that his statement was not recorded by IO. He also denied suggestion that Ex.PW4/2 also not received by Mr. Mishra from SOCA and i.e. why the same is not containing the official seal of authorities.

10. **PW18 Vishwanath Tiwari**, IO stated that on 24.06.2013 at around 12 noon, R.K. Singh called him and marked information then instructed to form a team to go to DHL as some person is coming to take the controlled delivery of parcel thereafter he constituted a team and went to DHL office where met IO Sandeep Kumar. Two persons were made independent witnesses. The accused took the delivery of parcel. He was given notice u/s 50. From his possession mobile and passport recovered. Mobile also containing the message mentioning airway bill number. Thereafter the proceedings conducted, sample of 5 gm each of cocaine taken, panchnama prepared. He recorded the statement of Sudhir Kumar Diwakar in NCB office. Subscriber details were called of mobile numbers recovered. In cross-examination stated that the parcel cannot be opened without opening the plastic seal. The parcel containing some papers, when the same was seized, but did not have any other authentication. There were four packets. The secret information was silent about the nature of substance though firstly stated that it is regarding cocaine. The information was conveyed by Sandeep and he had not seen or filed any information received by Sandeep. He stated that he cannot say whether the document Ex.PW2/1 and PW2/2 can be typed on any computer. He had not summoned any document from UK Border Agency. He further denied suggestion that accused had not collected the controlled delivery parcel. He further stated that he had not enquired about the name of manager of DHL, and he alongwith IO was inside DHL office and others were outside. He further stated that he do not remember whether the independent witnesses Dev Karan and Harish Jain are permanent employees or working as daily wager. He further stated that only one drum was recovered and four pouches were recovered from cavity like structure of said drum which is referred to as four boxes of drum. He further stated that he do not remember how much time was taken in completing the proceedings. The seal was not handed over to any public

person.

11. **PW15 Harish Jain** stated that on 24.06.2013 he was working in DHL office as Operation agent and still working in said office after promotion, and at the asking of NCB officials became independent witness. At around 01.10-01.15 PM one African national came to him at the reception and demanded the shipment by showing the airway bill number as mentioned in mobile phone message box then he had taken out the delivery sheet of said airway bill and demanded ID proof, then he showed his passport and he handed over the said consignment to him after obtaining his signature alongwith telephone number of delivery sheet. He was intercepted out of reception area by NCB officials. Served the notice u/s 50 NDPS Act, then in his presence, parcel was opened found to be containing machine part of round shape, and on removing the tape, four transparent pouches recovered which gave positive test for cocaine, thereafter samples were prepared, panchnama was also prepared. His statement was recorded on 08.07.2013. In cross-examination stated that he is working with DHL since 16.11.2010, and also brought his I card and his main role is to deal with undelivered shipments through network and he was sitting on the reception on the said date. He denied suggestion that he is a stock witness. He also denied suggestion that there is no recovery in this case in his presence or in the presence of witness Dev Karan.

12. **PW19 Dev Karan** stated that at around 01.10 PM one person named Asika approached at reception, and Harish Kumar was posted at reception, thereafter he came and informed the airway bill number after reading from the message box, then received the parcel and while coming out he was intercepted by the NCB officials. Notice u/s 50 was given to him. In his presence, the parcel was opened found to be containing one gray colour rim type portion and NCB recovered four packets from it on checking informed to be cocaine, thereafter the proceedings were completed, and on 08.07.2013 his statement u/s 67 was recorded. However on being cross-examined by SPP for NCB, he also stated that NCB official took from his possession three mobile phones, copy of passport, copy of airway bill and the receipt by way of which he took the delivery. The

case property was also exhibited through this witness. In cross-examination stated that he was posted as a guard and NCB official did not show any secret information to him, and he saw the NCB officials first time at around 12.45 PM. No outsider had talked to NCB official before accused came to receive the parcel and he had seen the accused coming to DHL on foot. Accused had given ID proof, to Harish Jain at reception but he do not remember what was the ID proof and he also do not remember whether the said ID proof was taken or not. The parcel was in a polythene with the marking of DHL. There was no seal on the box in which the said article was contained (note: as per prosecution case, there is a plastic seal and not the seal of NCB and no suggestion was on the factum that there was no plastic seal). He further denied suggestion that no contraband was recovered in his presence at the spot. He denied suggestion that entire proceedings were conducted in NCB office.

13. **PW1 Narender Kumar** took the sample A1 to CRCL. **PW3 Arun Kumar Maurya** Chemical Examiner stated that he received the parcel and handed over the same to Prashant Kumar, Assistant chemical Examiner, and on 05.08.2013 Prashant Kumar opened the envelope and examined it, which gave positive test for cocaine having content of 18.5%. **PW5 Ajay Kumar Dahiya** IO also accompanied the raiding team to DHL office. **PW6 Superintendent Jai Kishan** stated that IO Ajay Kumar Dahiya submitted the arrest report. On 06.09.2013, CRCL sent the report and remnant sample in sealed condition. **PW7 Rajesh Kumar** also the raiding team member accompanied the IO Vishwanath Tiwari to DHL office. **PW8 Chander Shekhar** Nodal Officer, Bharti Airtel exhibited the call detail records of mobile no. 8527919526 allotted to one Sakshi Singh and 9717903618 allotted to one Pradyumn. **PW9 IO Pradeep Singh** recorded the statement of Sudhir Kumar Diwakar u/s 67 of NDPS Act. He also recorded the statement of Harish on 08.07.2013. **PW10 Deepak, Nodal Officer**, Vodafone exhibited the CDR of mobile no. 8378623881 and 7838355788. **PW11 Vikas Yadav, IO** recorded the statement of Dev Karan. **PW12 Superintendent Raj Kishore Singh** stated that the Zonal Director handed over him the letter addressed to him alongwith the letter of DDG B.B. Mishra and Sanjay Maini,

Mutual Legal Assistance Officer, SOCA. Then directed CSK Singh, IO to receive the parcel and hand over the same to DHL for controlled delivery and further directed IO Sandeep to make surveillance. **PW13 Sandeep Kumar, IO** who conducted the surveillance and in his presence the raiding team member completed the proceedings in DHL office. **PW14 Ashok Tiwari** stated that on 18.06.2013 IO CSK Singh delivered the parcel for controlled delivery. The parcel given to him was not having any seal. No separate document was given however volunteered that in controlled delivery parcel there is a window in the parcel itself which contains shipment documents. The only ID proof is required for taking delivery of consignment. He had sent a boy from their office to verify the address of consignee but it could not be verified since there were many similar addresses in Uttam Nagar. The said parcel has access between 18.06.2013 to 24.06.2013 through the officials of DHL. **PW16 Prashant Kumar**, Assistant Chemical Examiner who examined the sample. **PW17 B.B. Mishra**, DDG Operations stated that he received an information from SOCA of UK. The written request was submitted by one of his colleague Sanjay Maini.

14. Accused in his statement u/s 313 Cr.PC denied all the incriminating circumstances put to him. He stated that he was apprehended on 26.06.2013 from his residence, thereafter, he was taken to NCB where beaten mercilessly and they obtained his signatures on blank, semi written or written papers, and he had not given voluntary statement to NCB and retracted the statement already. He further stated that he has never visited DHL office, Kirti Nagar on that day. He also stated that no intimation of arrest was given to any of his friends or relatives. However accused not opted to lead any defence evidence.

15. **Material exhibits-**

Ex.PW4/2 is the letter dated 17.06.2013 written by Mutual Legal Assistance Officer Sanjay Maini of SOCA to DDG, NCB. **Ex.PW17/1** is the authorization note of DG for conducting controlled delivery proceedings. **Ex.PW4/1** is the letter of DDG to Zonal Director to undertake controlled delivery. **Ex.PW4/3** is the letter of Zonal Director to R.K. Singh, Superintendent for controlled delivery. **Ex.PW12/1** is the authorization by R.K. Singh (Superintendent) of IO CSK Singh

to collect the parcel from British Airways flight and also direction for surveillance to IO Sandeep Kumar. **Ex.PW2/3** is the report of delivery of parcel at DHL office. **Ex.PW2/1** is the letter of request to British Airways from Shadow Bordering Policing Command. **Ex.PW2/2** is the indemnity letter to the Captain of British Airways. **Ex.PW12/2** is the information received by Superintendent R.S. Yadav from IO Sandeep Kumar regarding likely presence of one person for taking delivery of parcel. **Ex.PW12/3** is the seal movement register. **Ex.PW13/1** is the notice u/s 50. **Ex.PW15/1** is the panchnama. **Ex.PW15/2** is the copy of airway bill. **Ex.PW18/1** is the passport of accused. **Ex.PW15/3** is the delivery receipt. **Ex.PW7/3** is the malkhana register. **Ex.PW5/2** is the statement of accused u/s 67. **Ex.PW5/3** is the arrest memo. **Ex.PW5/4** is the jamatalashi. **Ex.PW9/1** is the statement of one Sudhir Kumar Diwakar u/s 67. **Ex.PW18/4** is the copy of test memo. **Ex.PW1/B** is the receipt of acknowledgment of parcel. **Ex.PW6/1** is the seizure report u/s 67 dated 26.02.2013. **Ex.PW5/5** is the arrest report u/s 57. **Ex.PW12/4** is the arrest report to the Ministry of External Affairs. **Ex.PW11/1** is the statement of Dev Karan u/s 67. **Ex.PW9/2** is statement of Harish Jain u/s 67. **Ex.PW3/A** is the CRCL report showing the sample under reference answered positive for cocaine and cocaine content is 18.5%. **Ex.PW6/2 and PW6/3** are the investigation reports over the mobile numbers recovered from the accused showing that these were in the name of different persons **however no such person exist on those mobile numbers.**

16.Ld. counsel for the accused submitted that PW2 IO CSK Singh while taking the parcel from pilot not made any handing over memo nor took any receipt while handing over the said parcel to DHL official. Ld. Counsel submits that therefore it suggests that entire exercise is farce. Ld. Counsel submits that PW17 B.B. Mishra stated that he has not done any documentation to find out the veracity of letter received from SOCA. Furthermore the proper compliance of section 50(A) is not conducted. Ld. Counsel submits that IO had not collected any authenticated record from concerned embassy. Ld. Counsel submits that testimony of officials of DHL i.e. PW15 Harish Jain and PW19 Dev Karan are not at all credible even the message found in the mobile has not been taken out nor

the said mobile was sent to FSL. Ld. Counsel submits that secret information regarding the arrival of accused to receive the parcel is doubtful and cannot be relied upon. Ld. Counsel further submits that no independent public person was joined and officials of DHL are not independent witnesses. Ld. Counsel submits that even the public witnesses could not tell that IO Sandeep Kumar was on surveillance. Ld. Counsel further submits that there is non compliance of section 52 and furthermore there is no strict compliance of section 50 NDPS Act. Ld. Counsel submits that accused is falsely implicated and has nothing to do with present case. Besides oral arguments, Ld. Counsel also filed written memorandum of arguments.

17.Ld. SPP on the other hand submitted that the accused was apprehended after taking of delivery of parcel in presence of independent witnesses. On opening of the parcel, the contraband was found. The testimony of independent witnesses alongwith the officials found credible. The prosecution able to prove the foundational facts beyond reasonable doubt. However accused unable to rebut the presumption raised against him u/s 35 and 54 NDPS Act.

18.Arguments heard. Record perused.

19.Apex court in "*Mohan Singh Vs. State of MP, AIR 1999 SC 883*", held that effort should be made to find the truth, this is the very object for which courts are created. One has to comprehend the totality of the facts and circumstances as spelled out through the evidence depending upon the facts of each case.

20.In appreciating the evidence, the approach of the court must be integrated and not truncated or isolated meaning thereby inferences should not drawn by picking up an isolated statement from here and there; rather the evidence on a particular point should be examined in the background of the total statement of said witness or other witnesses as well as other evidence. The finding should be on the basis of objective assessment of the evidence and not on the conjunctures and surmises. In "*Dalbir Singh and Ors. Vs. State of Punjab, AIR 1987 SC 1328*", no hard and fast rule can be laid down about the appreciation of evidence and every case has to be judged on the basis of its own facts. While appreciating the evidence of the witness, the approach must be whether the evidence of a witness

read as a whole appears to have ring of truth. Once that impression is formed, it is undoubtedly, necessary for the court to scrutinize the evidence more particularly, keeping in view the deficiency, drawbacks and the infirmities pointed out in the evidence as a whole, and evaluate them to find out whether it is against the general tenor of evidence given by the witness as to render it unworthy of belief. In '*Bhagwan Tana Patil Vs. state of Maharashtra, AIR 1974 SC 21*', the apex court ordained that the function of the court is to disengage the truth from the falsehood and to accept what it finds the truth and rejects the rest. It is only where the truth and falsehood are inextricably mixed up, polluted beyond refinement down the core, the entire fabric of the narration given by a witness then the court might be justified in rejecting the same. This legal position was further elaborated in '*State of UP Vs. Shankar, AIR 1981 SC 897*', wherein the Apex court observed that mere fact that the witness has not told the truth in regard to a peripheral matter would not justify whole sole rejection of his evidence. In this country, it is rare to come across the testimony of a witness which does not have a fringe or an embroidery of untruth although his evidence may be true in the main. It is only where the testimony is tainted to the core, the falsehood and the truth being inextricably intertwined, that the court should discard the evidence. Therefore, the duty is cast over this court to dispassionately disengage the truth from the falsehood and accept the truth and reject the same. This court is not meant to reject the testimony of a witness on slightest deflection, however has a bounden duty to search the truth. Apex court in case titled "*Gangadhar Behera & Ors. Vs. State of Orissa (2002) 8 SCC 381*", held that the principle *falsus in uno falsus in omnibus* is not applicable in India and it is only a rule of caution. Even if major portion of the evidence is found to be deficient, *in case residue is sufficient* to prove the guilt of the accused. The conviction can be maintained. It is the duty of the court to separate the grain from chaff. Apex court in '*Smt. Shamim Vs. State, Crl. Appeal No. 56/2016 dated 19.09.2018*', in para 12 observed

“while appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole inspires

confidence. Once that impression is formed. It is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error without going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. Minor omissions in the police statements are never considered to be fatal. The statements given by the witnesses before the police are meant to be brief statements and could not take place of evidence in the court. Small/trivial omissions would not justify a finding by court that the witnesses concerned are liars. The prosecution evidence may suffer from inconsistencies here and discrepancies there, but that is a shortcoming from which no criminal case is free. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant aspects thereof.....”.

21. As far as the defective and illegal investigation is concerned, apex court held that if investigation is illegal or suspicious, the rest of the evidence must be scrutinized independent of faulty investigation otherwise criminal trial descend to the IO ruling the roost. Yet if the court is convinced that the evidence of eye witnesses is true, it is free to act upon such evidence though the role of the IO in the case is suspicious (*Abu Thakir, AIR 2010 SC 2119*). An accused cannot be acquitted on the sole ground of defective investigation; to do so would be playing into the hands of the IO whose investigation was defective by design. (*Dhanaj Singh Vs. State of Punjab AIR 2004 SC 1920*). Mere defective investigation cannot vitiate the trial (*Paramjit Singh Vs. state of Punjab AIR 2008 SC 441*). The lapses or the irregularities in the investigation could be ignored only if despite their existence, the evidence on record bears out the case of the prosecution and evidence is of sterling quality. If the lapses or irregularities do not go to the root of the matter, if they do not dislodge the substratum of the prosecution case, they can be ignored (*Sunil Kundu & Anr. Vs. State of Jharkhand, 2013(4) SCC 422*).

22. To sum up while appreciating evidence on record the duty of the court is to separate credible and incredible part of evidence.
23. The brief sequence of facts is that on 17.06.2013 an information was received by the Serious Organized Crime Agency of UK. Consequently Sanjay Maini, Mutual Legal Assistance Officer, British High Commission communicated to DDG, NCB regarding the fact that parcel in question intercepted at London Gatwick Airport thereafter the said information was put to the DG, NCB who authorized DDG to conduct the operation. Thereafter PW 17 B.B. Mishra, DDG authorized PW4 Dev Jyoti Ray, Zonal Director, then the Zonal Director directed R.K. Singh, Superintendent to conduct the proceedings of controlled delivery. Thereafter, PW12 Superintendent R.K. Singh authorized PW2 IO C.S.K Singh to take the controlled delivery of parcel from British Airways flight consequently, on 18.06.2013 PW2 took the controlled delivery of the parcel and PW13 IO Sandeep Kumar was directed to make surveillance. IO CSK Singh (PW2) handed over the controlled delivery to PW14 Ashok Tiwari of DHL office. PW13 IO Sandeep Kumar deputed for surveillance. On 24.06.2013, PW13 forwarded the information to the Superintendent that one person is likely to come to take delivery of the said controlled delivery parcel, thereafter Superintendent directed IO Vishwanath Tiwari (PW18) to constitute the team and take necessary action pursuant to which the team reached DHL office.
24. The accused at around 01.10 PM came to the reception of DHL office and met PW15 Harish Jain and enquired about the said controlled delivery parcel, and thereafter took the delivery of the parcel after signing on the delivery sheet on showing his passport and the message regarding the said parcel from his mobile, however while he was coming out of reception office, he was apprehended by the team headed by PW18 Vishwanath Tiwari thereafter the notice u/s 50 was given to him but he denied and stated he do not want to be examined before a gazetted officer or magistrate. From personal search nothing incriminating was found, however one passport and three mobile phones were recovered. Thereafter, the parcel was taken from his possession and checked. The weight of the parcel was found to be around 2.353 kg. The said parcel was opened in

presence of independent witnesses i.e. officials of DHL PW15 Harish Jain and PW19 Dev Kumar. The said parcel was found to be sealed with the seal of UK Border Agency and on opening the same, a packet recovered, thereafter, on further opening a transparent polybag was recovered which was already open, and then on further opening one blue and white cardboard box bearing mark 'rear and front drum motorcycle' of Ichiben brand was recovered and on opening of the said cardboard, one silver color rear and front drum of motorcycle and one transparent polythene and one bubble polythene was recovered. The small piece of khakhi tape was found pasted on the rear and front drum. On removing the said tape white powdery substance came out. On minute examination, the round aluminum plate was pasted on one side of the drum and other side of the drum was open cavity. Thereafter, on removing the said aluminum plate 4 black and white color pouches were concealed in four boxes of the drum. From, the four pouches the white colour powder was tested separately which gave positive result for cocaine. However as the colour, texture and property of recovered substance was same, they were mixed homogeneously and total weight came around 185 gm. Two samples of 5 gm each were taken out. The sealing proceedings were conducted. All these parcels were pasted with paper slips having signatures of accused alongwith the witnesses. The passport, mobile phones, airway bill were seized. The panchnama was prepared bearing signatures of the accused and witnesses on each page.

25. For proving the charges, prosecution has to primarily prove that from said parcel concealed contraband i.e. cocaine was recovered and accused took the delivery of same.

Apprehension of accused with parcel after taking delivery of parcel

26. As far as the presence of the accused for taking the delivery of parcel is concerned the main witnesses i.e. PW15 Harish Jain and PW19 Dev Karan, official of DHL. PW15 Harish Jain stated that he was working as Operations Agent on the day of recovery i.e. 24.06.2013 and till today he is working in the said office and at the asking of NCB officials he became witness. He deposed that accused came at the reception by showing airway bill number as mentioned in

mobile phone inbox, then he taken out the delivery sheet of the said airway bill and demanded his ID proof. Thereafter accused showed his passport and he handed over the consignment after taking his signatures, and his mobile number. PW19 Dev Karan, employee of DHL also stated that the accused came to reception office at around 01.10 PM, and PW15 Harish Jain was posted at reception, and thereafter after showing the message from his mobile, he received the parcel. There is nothing material in cross-examination of PW15 that the accused did not appear before him for taking the delivery or the entire proceedings of delivery is farce. This witness in cross-examination gave the detailed working and described the incident clearly and elaborately. He categorically denied that he is a stock witness. PW19 in cross-examination also stated that no outsider had talked to NCB officials before the accused came to receive the parcel, and he had seen the accused coming to DHL office on foot. From the testimony of both these witnesses, the prosecution able to show that the accused took delivery of parcel from PW15. The said delivery is also corroborated through the statement of PW13 IO Sandeep Kumar, PW18 Vishwanath Tiwari, PW7 Rajesh Kumar and PW5 IO Ajay Kumar.

Search of parcel concealing contraband

27. Now it is pertinent to appreciate the factum of recovery of cocaine from the said parcel. The said parcel was opened in presence of independent witnesses PW15 and PW19. PW15 categorically stated that accused was given section 50 notice and the said notice was also signed by him as well as PW19 Dev Karan, and from personal search of accused passport was recovered, and the parcel was having the seal of UK Border Security and then they on opening the said packet found to have one parcel in open condition of DHL found to contain one machine part concealing four transparent pouches of some powder which gave positive test for cocaine. Thereafter the proceedings were conducted, samples were prepared. Then in his presence panchnama was also prepared. This witness has correctly identified the parcel produced in the court as well as the accused. In cross-examination categorically stated that he signed number of documents and there is nothing in his cross-examination that the such recovery proceedings were not

conducted in his presence. PW19 Dev Karan also deposed that the contraband was recovered in his presence after opening of parcel. This witness also in cross-examination stated that there was contraband inside the parcel, and the rim was containing four packets out of which the said substance was recovered. There is nothing in the testimony of this witness that the contraband, in the manner relied upon by the prosecution, is not recovered from the said parcel. The minor discrepancies of observation are natural deviations and not material. There is nothing in cross-examination which can create doubt over their presence at the time of recovery proceedings. They categorically stated that the entire proceedings conducted at the DHL office. Testimony of both these witnesses is also corroborated through their statement u/s 67 NDPS Act.

28. The other witnesses to the recovery of contraband examined by prosecution is PW18 IO Vishwanath Tiwari. This witness stated that he reached with the team at the spot and in presence of the independent witnesses parcel was searched found to be containing contraband. The passport and mobile phones were also recovered from possession of accused. There is nothing material in his cross-examination that the contraband was not recovered in the manner stated by him. The recovery proceedings were further corroborated by PW5 IO Ajay Kumar Dahiya, PW7 IO Rajesh Kumar and PW13 IO Sandeep Kumar, therefore, prosecution able to prove through cogent evidence that from the said parcel the contraband cocaine found concealed has been recovered.

Probative value of statement of accused u/s 67 NDPS Act

29. The prosecution further relied upon the statement of accused u/s 67 NDPS Act. As far as the admissibility of said statement is concerned, Apex court in case titled *Ram Singh Vs. Central Bureau of Narcotics 2011(11) SCC 347* after relying upon judgment of Apex court in case titled as *Kanhaiya Lal Vs. UOI*, held that if the confessional statement u/s 67 are found voluntary then they could form the basis of conviction, but because of the difference in view, the later Bench of Apex Court in case titled *Toofan Singh Vs. State of Tamil Nadu 2013(16) SCC 31* referred the matter to the larger Bench. Delhi High Court in case titled *Rapheal*

Vs. Devender Singh (Intelligence Officer) (Directorate of Intelligence) Crl. Appeal No. 1394/2013 dated 24.05.2015 held that “it is trite that a statement under Section 67 of the NDPS Act is admissible in evidence and can be considered by the Court against the accused. It is also settled law that if the same is found to be made voluntarily, then the same can even be made the sole basis of conviction of accused. However, if the same is subsequently retracted by the accused then such a statement cannot be made the sole basis of conviction of accused and independent corroboration is required.” Apex court in case titled as *Mohd. Fasrin Vs. State Crl. Appeal No. 296/2014 dated 04.09.2019* held that even if confessions made to investigating officers are held to be admissible under Section 67 of Narcotic Drugs and Psychotropic Substances Act, 1985, the Court has to be satisfied that it is a voluntary statement, free from any pressure and also that the accused was apprised of his rights before recording the confession. Thus the law till today is that the statement u/s 67 is admissible however if it is retracted then the court cannot act upon it without any corroboration. Furthermore, before acting of the statement, the court has to satisfy whether it is voluntary and accused was apprised of their right that it could be used against them. Therefore, the conviction in present case cannot be maintained merely on the basis of confessional statements u/s 67 but it could be used for the purpose of corroboration with other evidence on record.

30. Accused in his statement u/s 67 disclosed that he came to Mumbai from Nigeria on 04.06.2013 and thereafter came to Delhi on 06.06.2013 by train for doing the cloth business for sending it to Nigeria, and on 24.06.2013 his friend Vege and Ugo met him near Krishna Park, Tilak Nagar and gave him his phone and airway bill to collect the parcel from DHL office. Then, when he reached the DHL office, he was handed over the parcel, and he signed on one sheet and thereafter when he was leaving he was apprehended by NCB officials and in his presence the parcel was opened found to be concealing cocaine. He disclosed about the phone numbers used by him, Vege and Ugo however stated that he do not know their address but they used to meet him in the church and outside metro station and

paid Rs. 2000/- for delivery and remaining payment after selling the cocaine. He further stated that Vege told him that parcel containing cocaine will come to DHL office and asked him to collect the same. The said statement was retracted by the accused on 09.07.2013 in which he alleged that nothing incriminating was recovered from him, and NCB officers forced him to sign the courier service documents and slips just to incriminate him with parcels.

31. There is material information in statement u/s 67 regarding his arrival in India and his purpose and his association with other natives. In his retracted statement, he has not stated anything why the NCB officials falsely implicated him. This witness is duly identified by the independent witnesses. He nowhere in his retracted statement stated that these independent witnesses are planted witnesses and he has never visited the parcel office. This witness in his statement u/s 313 Cr.PC only raised the plea that he was arrested from his house. However not stated the said fact in his retracted statement. Once the prosecution able to show recovery of cocaine from the parcel in his possession through cogent evidence, then accused has to provide some clear explanation why he was implicated, and mere denial mode or the fact that he was beaten or forced to sign etc without any plausible explanation is of no use. The accused even not tried to establish that he came to India for cloth business as stated by him in statement u/s 67 of NDPS Act. Accused apprehended within few days of his arrival in India. Thus statement u/s 67 of NDPS Act in present facts and circumstances could also be used as corroboration.

Compliance of section 50A NDPS Act

32. Ld. Counsel for the accused submitted that the entire controlled delivery proceedings is to be conducted by DG in terms of section 50A of NDPS Act however the said proceedings is not conducted by the DG. PW17 B.B. Mishra, categorically stated that he received the intimation from SOCA, UK about the consignment containing contraband, and a written request in this regard was submitted by Sanjay Maini. Thereafter, permission of the DG was taken and DG accorded the permission to undertake the controlled delivery of the said consignment therefore there is no force in the submission that section 50A NDPS

Act is not complied with.

Effect of non examination of PW Sudhir Kumar Diwakar

- 33.Ld. counsel for the accused submitted that material witness Sudhir Kumar Diwakar who was examined during investigation is not examined by the prosecution. The parcel is to be delivered at shop, therefore, he is a material witness and non examination of this witness is greatly prejudicial to the accused and the accused is entitled the benefit of this omission.
- 34.As per airway bill Ex.PW15/2 the address of delivery in India is Mr. Scon Vijay, RK-3, Jain Road, Mohan Garden, Uttam Nagar. During investigation, this address is found to be of one Sudhir Kumar Diwakar. PW Sudhir Kumar Diwakar, in his statement u/s 67 recorded during investigation stated that on the said address he was running a mobile shop and at his shop number of Nigerians used to come to recharge their mobiles, and in this regard one Bobby @ Vege @ Ugo and one Christian used to come for recharging the mobile but he do not know where they reside and he further identified the accused Christian Asika as a friend of Vege @ Ugo. He stated that on 21.06.2013 DHL courier person came and enquired that on a parcel his mobile phone number is mentioned, however he told him that nobody sent him that parcel, and in the same evening Bobby @ Vege @ Ugo, and his friend Christian came, and thereafter he told that DHL courier person came to deliver the parcel, then they stated that they will collect it from DHL office.
- 35.This witness is material connection to the fact that the accused were related to the said address of parcel through this witness. He also apprised about the arrival of DHL official at his shop for delivery of parcel but the prosecution has not examined this witness therefore this is material omission, in the case of prosecution, in connecting the said parcel to his address and his acquaintance with accused.
- 36.However, this court has bounden duty to examine the effect of said omission in relation to the entire facts and circumstances of the case. The present accused is also found to be connected with the co-accused and with this Sudhir Diwakar through the mobile phones recovered from him as per the CDR exhibited on

record. As discussed, this accused has physically visited and taken delivery at DHL office. It is not his case that he was forced to take delivery at DHL office, even, as per his retraction statement. In statement u/s 313 CrPC, he only stated that he was forced to sign some papers or arrested from his house but he nowhere took the plea that he was forcibly taken to DHL office for the entire proceedings. The prosecution case is found fully credible over the factum that he received the parcel from DHL office. The testimony of independent witnesses i.e. PW15 and PW19 are fully credible in this respect, therefore, this material omission of prosecution of non examination of PW Sudhir Kumar Diwakar has no effect on the core of prosecution story i.e. the delivery taken by the present accused from the DHL office and his apprehension at DHL office with the said parcel and recovery of contraband from the said parcel. Apex court in “*C. Muniappan & Ors. Vs. State of Tamil Nadu 2010 (10) SCC 567*”, observed that defective investigation by itself cannot be ground for acquittal. If the primacy is given to such designed or negligent investigations then the faith and confidence of people in criminal justice administration would be eroded. There is legal obligation on the part of court to examine prosecution evidence dehors such lapses. The investigation is not the solitary area for judicial scrutiny in the criminal trial. The conclusion of trial in a case cannot be allowed to depend solely on probity of investigation.

37. Apex Court in case titled *Sardul Singh Vs. State of Haryana in (2002) 8 SCC 372* observed that “There cannot be a prosecution case with a cast iron perfection in all respects and it is obligatory for the courts to analyse, sift and assess the evidence on record, with particular reference to its trustworthiness and truthfulness, by a process of dispassionate judicial scrutiny adopting an objective and reasonable appreciation of the same, without being obsessed by an air of total suspicion of the case of the prosecution. What is to be insisted upon is not implicit proof. It has often been said that evidence of interested witnesses should be scrutinized more carefully to find out whether it has a ring of truth and if found acceptable and seem to inspire confidence, too, in the mind of the court,

the same cannot be discarded totally merely on account of certain variations or infirmities pointed or even additions and embellishments noticed, unless they are of such nature as to undermine the substratum of the evidence and found to be tainted to the core. Courts have a duty to undertake a complete and comprehensive appreciation of all vital features of the case and the entire evidence with reference to the broad and reasonable probabilities of the case also in their attempt to find out proof beyond reasonable doubt. In present case, the core of the prosecution case is recovery of parcel after being taken delivery by accused and recovery of contraband from the said parcel on checking by the raiding party. These aspects as already discussed, found credible thus, no benefit of this discrepancy/omission could be given to the accused.

Mobile phone recovered from accused when he was apprehended

38. When the accused was apprehended with the said parcel three mobile phones were recovered as per panchnama bearing no. 8376823881 (SIM No. 89911100184010509621), 8527919526 (SIM No. 8991101302300488244) and 9717903618 (SIM No. 8991101262601069). In the message box of mobile no. 8376823881 the "scon Vijay 9147584832" was found mentioned which is the airway bill delivery number. There is nothing material in cross-examination of PW15 Harish Jain that no such message was seen by him. This mobile is also produced in the court. The accused do not opted to point out that no such message was mentioned. Therefore no benefit could be given to accused by not taking of printout of said message in present facts and circumstances. The said mobile number from which the message was recovered alleged to be of Ugo however the name of the person is one Rita who is a non existent person. The other three mobile numbers recovered are also in the name of Ram Kamar, Sakshi Singh and Pradyumn who are also non existent persons. The mobile recovered from accused were found to be duly connected with mobile number of Ugo. Ugo and Nzube as per the CDR record are found to be in contact frequently from 13.06.2013 to 22.06.2013. Furthermore, the mobile no. 8527919526 is found to be connected with Sudhir Kumar Diwakar through his mobile no. 919953582122 on 20.06.2013 and 21.06.2013. The CDR clearly suggests that

mobile recovered from accused Nzube Christian showing that he was in contact with Ugo, and even with one of mobile number PW Sudhir Kumar Diwakar was also found to be in contact. This itself suggests that present accused is in contact with other accused. Furthermore, as all the mobile phones are found to be in name of other untraceable persons used by accused or his associates which also creates doubt over the conduct and activities of accused.

CRCL Report

39. As already discussed prosecution able to prove that the accused was apprehended with the parcel after he has taken its delivery and from the said parcel the contraband i.e. cocaine was recovered. The said factum is verified through the CRCL report which also confirms the presence of cocaine to the tune of 18.5%.

Other pleas

40. Ld. Counsel for accused also submitted that PW2 IO CSK Singh stated to have taken the delivery of parcel from British Airways flight however he has not taken any statement of the official of airways from whom he has taken the delivery. PW2 categorically stated that he had taken the delivery from cockpit. This witness was authorized to take the delivery and the airway bill number over the authorization as well as on the parcel delivered is the same. The intimation in this case was sent through official channel. The indemnity letter (Ex.PW2/2) was also issued to the Captain of the flight to hand over the same to the officers of NCB. That indemnity letter also containing the flight number, etc, therefore merely non recording of statement of any British airways pilot or official is of no consequence. The said parcel was duly sealed with plastic seal of UK Border Agency and delivered to PW2 alongwith the two letters i.e. Ex PW2/1 and Ex PW2/2.

41. Ld. Counsel for the accused further submitted that there is no acknowledgment of delivery of the said consignment at DHL office. This is a controlled delivery which is to be executed secretly. PW14 Ashok Tiwari of DHL office categorically stated that PW2 CSK Singh handed over him the delivery on 18.06.2013. There is nothing in his testimony that the said parcel is not handed over by PW2 CSK

Singh to him. The said parcel with plastic seal condition remained in DHL office, the plastic seal of the British Airways remained intact till its removal, in presence of independent witnesses. Therefore, there is no requirement of any formal record for the controlled delivery parcel. The delivery sheet was duly prepared at the time of handing over of the parcel to the accused.

42.Ld. Counsel for the accused vehemently submits that PW13 IO Sandeep Kumar who is keeping surveillance is not a reliable witness as neither PW15 nor PW19 could tell about his presence. This argument hardly has any relevance because PW13 IO Sandeep Kumar is only for the purpose of surveillance, and that is a secret activity and identity could not be disclosed to everybody.

43.Ld. Counsel submits that while searching the parcel, sections 50 NDPS Act is not strictly complied as the search was not conducted in presence of gazetted officer or magistrate. Ld. Counsel submits that therefore, only because of this infirmity, applicant is entitled to be acquitted (relied upon *Arif Khan @ Aga Khan Vs. State of Uttarakhand 2018 SCC Online SC 459*, *Dharambir Vs. State Crl.A. No. 658/2017 dated 13.11.2018 (Delhi)*, *State Vs. Parmanand AIR 2004 SC 1384 and Daleep Vs. State of MP 2007 (1) SCC 450*). As per prosecution case, the contraband was found concealed in the parcel and not recovered from the body/personal search of accused. In these circumstances, it is pertinent to refer the recent judgment of Apex Court passed by the Bench of three judges titled as ***State Of Punjab vs Baljinder Singh Criminal Appeal Nos.1565-66 of 2019 dated 15.10.2019***:

“14. The law is thus well settled that an illicit article seized from the person during personal search conducted in violation of the safeguards provided in Section 50 of the Act cannot by itself be used as admissible evidence of proof of unlawful possession of contra-band.

But the question is, if there be any other material or article recovered during the investigation, would the infraction with respect to personal search also affect the qualitative value of the other material circumstance.

15. At this stage we may also consider following observations from the decision of this Court in Ajmer Singh vs. State of Haryana:-

“15. The learned counsel for the appellant contended that the

provision of Section 50 of the Act would also apply, while searching the bag, briefcase, etc. carried by the person and its non-compliance would be fatal to the proceedings initiated under the Act. We find no merit in the contention of 6 [(2010) 3 SCC 746] the learned counsel. It requires to be noticed that the question of compliance or non-compliance with Section 50 of the NDPS Act is relevant only where search of a person is involved and the said section is not applicable nor attracted where no search of a person is involved. Search and recovery from a bag, briefcase, container, etc. does not come within the ambit of Section 50 of the NDPS Act, because firstly, Section 50 expressly speaks of search of person only. Secondly, the section speaks of taking of the person to be searched by the gazetted officer or a Magistrate for the purpose of search. Thirdly, this issue in our considered opinion is no more res integra in view of the observations made by this Court in Madan Lal v. State of H.P. [(2003) 7 SCC 465]. The Court has observed: (SCC p. 471, para 16) “16. A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag or premises (see Kalema Tumba v. State of Maharashtra[(1999) 8 SCC 257], State of Punjab v. Baldev Singh [(1999) 6 SCC 172] and Gurbax Singh v. State of Haryana [(2001) 3 SCC 28]). The language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in Baldev Singh case. Above being the position, the contention regarding non-compliance with Section 50 of the Act is also without any substance.”

16. As regards applicability of the requirements under Section 50 of the Act are concerned, it is well settled that the mandate of Section 50 of the Act is confined to “personal search” and not to search of a vehicle or a container or premises.”

44. Therefore, as per mandate of this judgment, there is no requirement for complying section 50 which is only restricted to personal search and not to the bag, briefcase, premises, vehicles or articles. The contention of non compliance of section 50 has no bearing in present case in which the contraband was recovered from the parcel and not from the body of accused.

45. One thing pertinent to notice that PW14 Ashok Tiwari of DHL stated that he sent one boy for verification of address however the boy could not verify the address as there are many similar addresses in Uttam Nagar however this statement of PW14 do not appear in consonance with the case of NCB because in his statement u/s 67 NDPS Act PW Sudhir Kumar Diwakar stated that one courier official came to his shop and he told that this courier do not belong to him. However, from this infirmity the prosecution case that the accused Nzube had not gone for the delivery cannot be dented. Accordingly, no benefit of this infirmity could be given to the accused.

Offence committed :23(c)/21(c) NDPS Act

46. The accused Nzube is apprehended with the delivered parcel containing contraband. The circumstances in which he took the delivery categorically suggests that he had the knowledge of concealment of drugs in the said parcel. It is settled law once the possession is established, the person who claims that it was not a conscious possession or have no knowledge of concealment has to establish it. Section 35 of the Act gives statutory recognition of this proposition because of the presumption available in law. Similar is the position in terms of section 54 where also presumption is also be drawn from the possession of illicit articles. It is for the accused to prove that he has no knowledge or not in conscious possession of contraband. Apex Court in *Mohan Lal Vs. State of Rajasthan* CrI. Appeal No. 139 of 2010 dated 17.04.2015, (2015) 6SCC 222 dealt this aspect in detail and held as under:

12. Coming to the context of Section 18 of the NDPS Act, it would have a reference to the concept of conscious possession. The legislature while enacting the said law was absolutely aware of the said element and that the word "possession" refers to a mental state as is noticeable from the language employed in Section 35 of the NDPS Act. The said provision reads as follows:-

"35. Presumption of culpable mental state. - (1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation. - In this section "culpable mental state" includes intention, motive, knowledge, of a fact and belief in, or reason to believe, a fact.

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

On a perusal of the aforesaid provision, it is plain as day that it includes knowledge of a fact. That apart, Section 35 raises a presumption as to knowledge and culpable mental state from the possession of illicit articles. The expression "possess or possessed" is often used in connection with statutory offences of being in possession of prohibited drugs and contraband substances. Conscious or mental state of possession is necessary and that is the reason for enacting Section 35 of the NDPS Act.

13. In Noor Aga v. State of Punjab and Anr.[17], the Court noted Section 35 of the NDPS Act which provides for presumption of culpable mental state and further noted that it also provides that the accused may prove that he had no such mental state with respect to the act charged as an offence under the prosecution. The Court also referred to Section 54 of the NDPS Act which places the burden to prove on the accused as regards possession of the contraband articles on account of the same satisfactorily. Dealing with the constitutional validity of Section 35 and 54 of the NDPS Act, the Court ruled thus:- "The provisions of Section 35 of the Act as also Section 54 thereof, in view of the decisions of this Court, therefore, cannot be said to be ex facie unconstitutional. We would, however, keeping in view the principles noticed hereinbefore, examine the effect thereof vis--vis the question as to whether the prosecution has been able to discharge its burden hereinafter."

And thereafter proceeded to state that:-

"58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is

possession of contraband by the accused cannot be said to have been established.

59. With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt."

14. In *Bhola Singh v. State of Punjab*[18], the Court, after referring to the pronouncement in *Noor Aga (supra)*, concurred with the observation that only after the prosecution has discharged the initial burden to prove the foundational facts, then only Section 35 would come into play. While dislodging the conviction, the Court stated:-

" it is apparent that the initial burden to prove that the appellant had the knowledge that the vehicle he owned was being used for transporting narcotics still lay on the prosecution, as would be clear from the word "knowingly", and it was only after the evidence proved beyond reasonable doubt that he had the knowledge would the presumption under Section 35 arise. Section 35 also presupposes that the culpable mental state of an accused has to be proved as a fact beyond [pic]reasonable doubt and not merely when its existence is established by a preponderance of probabilities. We are of the opinion that in the absence of any evidence with regard to the mental state of the appellant no presumption under Section 35 can be drawn. The only evidence which the prosecution seeks to rely on is the appellant's conduct in giving his residential address in Rajasthan although he was a resident of Fatehabad in Haryana while registering the offending truck cannot by any stretch of imagination fasten him with the knowledge of its misuse by the driver and others."

15. Having noted the approach in the aforesaid two cases, we may take note of the decision in *Dharampal Singh v. State of Punja*[19], when the Court was referring to the expression "possession" in the context of Section 18 of the NDPS Act. In the said case opium was found in the dicky of the car when the appellant was driving himself and the contention was canvassed that the said act would not establish conscious possession. In support of the said submission, reliance was placed on *Avtar Singh v. State of Punjab*[20] and *Sorabkhan Gandhkhan Pathan v. State of Gujarat*[21]. The Court, repelling the argument, opined thus:-

"12. We do not find any substance in this submission of the learned counsel. The appellant Dharampal Singh was found driving the car whereas [pic]appellant Major Singh was travelling with him and from the dicky of the car 65 kg of opium was recovered. The vehicle driven by the appellant Dharampal Singh and occupied by the

appellant Major Singh is not a public transport vehicle. It is trite that to bring the offence within the mischief of Section 18 of the Act possession has to be conscious possession. The initial burden of proof of possession lies on the prosecution and once it is discharged legal burden would shift on the accused. Standard of proof expected from the prosecution is to prove possession beyond all reasonable doubt but what is required to prove innocence by the accused would be preponderance of probability. Once the plea of the accused is found probable, discharge of initial burden by the prosecution will not nail him with offence. Offences under the Act being more serious in nature higher degree of proof is required to convict an accused.

13. It needs no emphasis that the expression "possession" is not capable of precise and completely logical definition of universal application in the context of all the statutes. "Possession" is a polymorphous word and cannot be uniformly applied, it assumes different colour in different context. In the context of Section 18 of the Act once possession is established the accused, who claims that it was not a conscious possession has to establish it because it is within his special knowledge.

xxx xxx xxx xxx

15. From a plain reading of the aforesaid it is evident that it creates a legal fiction and presumes the person in possession of illicit articles to have committed the offence in case he fails to account for the possession satisfactorily. Possession is a mental state and Section 35 of the Act gives statutory recognition to culpable mental state. It includes knowledge of fact. The possession, therefore, has to be understood in the context thereof and when tested on this anvil, we find that the appellants have not been able to satisfactorily account for the possession of opium.

16. Once possession is established the court can presume that the accused had culpable mental state and have committed the offence. In somewhat similar facts this Court had the occasion to consider this question in *Madan Lal v. State of H.P.*[22], wherein it has been held as follows: (SCC p. 472, paras 26-27) "26. Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles.

27. In the factual scenario of the present case, not only possession but conscious possession has been established. It has not been shown by the accused-appellants that the possession was not conscious in the logical background of Sections 35 and 54 of the Act."

16. From the aforesaid exposition of law it is quite vivid that the term "possession" for the purpose of Section 18 of the NDPS Act could mean physical possession with animus, custody or dominion over the prohibited substance with animus or even exercise of dominion and control as a result of concealment. The animus and the mental intent which is the primary and significant element to show and establish possession. Further, personal knowledge as to the existence of the "chattel" i.e. the illegal substance at a particular location or site, at a relevant time and the intention based upon the knowledge, would constitute the unique relationship and manifest possession. In such a situation, presence and existence of possession could be justified, for the intention is to exercise right over the substance or the chattel and to act as the owner to the exclusion of others.

47. In view of the above discussion, prosecution able to prove beyond reasonable doubt that accused Nzube Christian Asika took the delivery of the said parcel and thereafter apprehended with the said parcel containing the contraband thus discharging the initial burden however accused unable to rebut the presumption u/s 35 and 54 NDPS Act. The accused is charged for offence u/s 23(c) and alternatively u/s 21(c) but the said parcel is not booked to India for him. It is clear from his statement u/s 67 that he only came to take the delivery of the said parcel having the knowledge of contraband concealment. Therefore no offence u/s 23(c) made out against him. However he is found guilty for offence u/s 21(c) NDPS Act for having possession of contraband in commercial quantity.

48. Accordingly accused Nzube Christian Asika is convicted for commission of offence u/s 21(c) NDPS Act. Let he be heard on point of sentence.

**Announced in the open court
on this 21st day of November, 2019**

**(Ajay Kumar Jain)
Special Judge NDPS
Patiala House Courts
New Delhi**