

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

Case No. SC/8801/2016
ID No. 02403R0196502014

Narcotics Control Bureau
Delhi Zonal Unit, Government of India
West Block No.1, Wing No.7,
IInd floor, R.K. Puram, New Delhi

Versus

1. **Henry Emeka Ndupu (in JC)**
S/o Fedrick Ndupu
R/o H.No. D-230,
Patel Garden Extension
Dwarka Mor, New Delhi

Permanent Address:
Village- Sarbongida,
Taraba State,
Nigeria

2. **Sharon Phocum (on interim bail)**
D/o Benjamin Phocum
R/o H.No. RZG-203, Vishwas Park,
Uttam Nagar, New Delhi

Date of Institution : 30.10.2014
Judgment reserved on : 07.01.2021
Date of pronouncement : 13.01.2021

JUDGMENT

1. Brief facts of the case as per complaint is that on 15.04.2014 NCB, DZU received the information from National Crime Agency, UK through DDG Operations (NCB) that a consignment described as cosmetics containing approximately 500 gm of cocaine destined to arrive in India. On the basis of authorization letter of DG, NCB IO Vishwanath Tiwari was directed to collect the consignment from the Captain of flight no. BA-257 coming to Delhi on 23.04.2014, pursuant to which IO collected the consignment from Captain John Watts alongwith two letters i.e. Airline Captain Indemnity and British Airways Letter of Request. The said parcel

was deposited in malkhana and the letters were handed over to Superintendent Jai Kishan. The Superintendent directed Vivek Prakash IO to verify the addresses mentioned on the parcel as well as mentioned in the order u/s 50A NDPS Act. He was also directed to take charge of both the letters to liaison with postal authority to get it listed in their list. Thereafter, IO Vivek Prakash on 24.04.2014 contacted postal authorities to make entries in their online portal and contacted Kalkaji Post office.

2. On 01.05.2014 postal authorities informed that some telephone enquiries were being made regarding the parcel in the name of Nani Deborah from one mobile phone no. 9643160795. The said information was reduced in writing, thereafter, IO Vivek Prakash on the directions of Superintendent alongwith the team and the sealed parcel reached post office, Kalkaji. At post office, the postal officials Sh. Rambir Singh and Rajender Shah voluntarily agreed to become independent witnesses. Sh. Pradeep Kumar, postman who was dealing with said enquiries was called and informed that enquirer has called to tell that he shall be coming at around 1535 to 1540 hours. At around 1545 hours accused Henry James having mobile no. 9599984703 arrived and asked for the parcel in question and also showed the ID of Nani Deborah and thereafter completed all the formalities, received the parcel thereafter, the NCB team surrounded him and notice u/s 50 was given however nothing incriminating was found on his personal search. The parcel was opened and it was found to contain some black colour round and square shape plastic boxes containing cosmetic face powder, and in the hollow bottom some off white colour powder found wrapped up in transparent polythene and each on testing found to contain cocaine, and there were 63 boxes of round shape and 6 boxes of square shape. All the round boxes found to be containing the cocaine, having the same colour, texture and property. Entire white powder recovered from 63 round shaped plastic boxes collected and transferred to plastic bottle which on weighing came out to 610 gm. Samples of 5 gm each were taken. Nothing incriminating was found concealed in square shaped boxes. Test memos in triplicate were prepared. Panchnama was also prepared.

3. Accused Henry Emeka disclosed that one Sharon Phocum asked him to collect the aforesaid parcel. The rented flat no. B4, third floor, D-230, Patel Garden Extension, Dwarka Mor of accused Henry Emeka was searched in presence of owner Mansa Ram Lamba but nothing incriminating was found. At the instance of accused Henry Emeka, the team reached the house of Sharon Phocum where notice u/s 50 was served to her however nothing incriminating was found from personal search or from the search of her rented house.
4. Accused Sharon Phocum in her statement u/s 67 admitted her guilt and stated that she called the postman on his mobile no. 8826186823 from her mobile no. 9643160795 to enquire about the status of abovesaid parcel. She also stated Henry used to work with her in drug business for money. She also admitted that she received 3-4 drug consignments in the past. Accused were arrested and intimation letter was sent to Ministry of External Affairs informing their arrest. Henry Emeka was found to be using mobile no. 9818923825 and 9599984703 recovered from his possession and accused Sharon Phocum found using mobile no. 7838612705, and also stated that she was using 9643160795 for contacting postman Pradeep on mobile no. 8826186823 but destroyed the SIM card. Both the accused are found to be connected with mobile no. 9818923825 and 7838612705 and also in contact with foreign Nigerian No. +2349093909752 which belongs to Nani Deborah. Another mobile no. 9643160795 used by Sharon Phocum was also found in touch with mobile no. 8826186823. Pradeep Kumar postman in his statement u/s 67 stated that Sharon Phocum was regularly enquiring about the said parcel from the said mobile number. The mobile no. 9599984703 was verified however the address given could not be located. Accused Henry Emeka also disclosed another no. 9818923825 however the address of said number was found incomplete. The addresses of the mobile no. 9643160795 and 7838612705 are found to be incomplete and could not be located.
5. On 20.05.2014, IO Vivek Prakash received an information from credible source that another parcel suspected to contain narcotic drugs lying in foreign post office addressed to Nani Deborah and the mobile number mentioned therein is

9643160795. Foreign post office was requested to inform NCB that in case anyone came to collect the parcel, NCB be informed however no one came to collect the same. The said parcel was handed over to NCB and in presence of independent witnesses, the said parcel was opened and found to contain another sheet of 68X52 cm in white polythene packet. The sheet was cut opened and it was seen that there was a white colour cotton sheet soaked with some powdery substance and a small piece of cotton sheet was tested found to be positive for cocaine. Two samples were drawn. Test memos in triplicate were prepared. Total weight of cocaine as per CRCL report found to be 165 gm. Accused Nani Deborah could not be traced and on completion of investigation complaint was filed.

6. Vide order dated 03.03.2015 charge u/s 29 NDPS Act is framed against both the accused. Charge u/s 21(c), 23 r/w 28 and 29 NDPS Act was also framed against both the accused for the recovery of contraband from accused Henry Emeka. Charge u/s 21(c), 23 r/w 28 and 29 NDPS Act is also framed for recovery of parcel on 26.05.2014 from foreign post office against both the accused.
7. Ld. SPP after closing of prosecution evidence on 12.03.2020, filed an application u/s 311 Cr.PC dated 26.08.2020 for recording the evidence of PW K.L. Gurjar, Superintendent Jai Kishan, Zonal Director Ravi Sharma, godown incharge Vikas Yadav, CRCL Expert Ajay Karar, Chemical Examiner Dr. Mahesh Kumar, etc. However, these witnesses are not part of list of witnesses in the complaint filed but this court vide order dated 24.09.2020 partially allowed the application to examine malkhana/godown incharge Vikas Yadav IO. Pursuant to the order on this application, the prosecution examined PW22 IO Vikas Yadav, godown incharge.
8. Prosecution for substantiating its case, examined 22 witnesses. The investigating officer Vivek Prakash (Intelligence Officer) during pendency of prosecution evidence reported to have died. PW Pradeep, daily wage postman was summoned number of times however could not be traced therefore, on the basis of reply filed by Ld. SPP regarding non execution ofailable warrants against witness Pradeep, he was dropped on 12.03.2020. On the said date, the

prosecution evidence was also closed.

9. The material witnesses examined by the prosecution are PW2 Rambir Singh and PW18 Rajender Shah postmen /independent witnesses to the recovery of first parcel. PW7 Vishwanath Tiwari, IO primarily involved in taking the controlled delivery. PW21 C.S.K. Singh, PW3 Azad Singh, PW4 Ajay Dahiya, PW5 Kamlesh Kumari, PW8 HC Dinesh Kumar are the raiding party officials in whose presence the accused Henry Emeka with parcel was apprehended at post office. PW15 Ravi Shankar Joshi, superintendent. PW1 Ram Avtar is the landlord at whose rented premises accused Sharon Phocum was residing. Summary details of the prosecution witnesses is reproduced as under:

PW7 Vishwanath Tiwari, IO took the controlled delivery

10. **PW7 Vishwanath Tiwari**, IO stated that on 17.04.2014, he was called by B.B. Mishra, DDG to undertake the controlled delivery and on 23.04.2014, he went to IGI Airport and met Capt. John Watts of British Airways and received the concerned controlled delivery parcel alongwith two letters. Thereafter, he deposited the said parcel in malkhana and handed over the letters to Superintendent Jai Kishan, thereafter, he verified the address where the controlled delivery is to delivered. On 02.05.2014 on search authorization, searched the premises of Henry Emeka and recorded statement of landlord Ram Avtar on 19.05.2014.
11. In cross-examination stated that Sh. B.B. Mishra told him that DG, NCB has sanctioned a controlled delivery which he has to receive and he went to airport alone. He had not recorded the statement of Captain u/s 67 nor took the ID proof. He did not take any photograph or x-ray or weight of parcel. He also could not tell at what time the report Ex.PW7/B was prepared and he also do not know whether the report Ex.PW7/C was prepared before Superintendent Jai Kishan or not. He also stated that he was not directly authorized by Sh. Rajiv Mehta, DG to undertake the controlled delivery. He also did not remember that controlled delivery in terms of section 50A could be taken by the DG himself or to the person directly authorized by him. He denied the suggestion that he was not competent to take the delivery. The parcel in question was sealed and some

seal was also affixed on it but he do not remember its description however after seeing report Ex.PW7/B, stated that there is no mention of description of seal and also there is no mention that he received the controlled delivery in sealed condition. He also denied suggestion that he had not deposited the said parcel in malkhana.

Testimony of raiding team members over the recovery of first parcel

12. **PW21 C.S.K. Singh**, IO stated that with team he reached Kalkaji Post office at around 1520 hours on 01.05.2014 thereafter IO Vivek Prakash contacted postmaster of PO Kalkaji, then on his request two independent witnesses Rambir and Rajender Shah joined proceedings. Concerned postman Pradeep was also called and he told that receiver of said parcel will come at post office at around 1540 hours. The said parcel was handed over to Rajender Shah who made necessary entries regarding parcel in system. At around 1545 hours, an African national came and took his receiving on delivery slip and collected the parcel from postman Pradeep Kumar, then he was surrounded who told his name as Henry James. Notice u/s 50 was given to him. He denied to exercise his legal right and an endorsement was made in this regard. Nothing recovered from physical search of accused Henry James. During the search of parcel which was carried by accused Henry James, it was containing off white colour powder in round and square shaped plastic boxes on testing found positive for cocaine. A small quantity of powder was taken from each box and tested separately and all of them gave positive result for cocaine. Being the same colour, texture and property, all off white colour powder recovered from 63 round shaped boxes was mixed together. The total weight of powder from 63 round boxes was found to be 610 gm. Two samples of 5 gm each were taken and put inside plastic pouches. Nothing incriminating was recovered from square shaped 6 plastic boxes. On 02.05.2014, accused Sharon Phocum was identified by accused Henry James at her house in presence of landlord Ram Avtar Chaudhary. Notice u/s 50 was given but nothing incriminating was recovered.

13. In cross-examination stated that directions were given to IO Vivek Prakash not to him and they went to Kalkaji post office in two government vehicles. He also

denied suggestion that postman Pradeep Kumar was not present in office and also that he had not given any information to NCB that receiver of this parcel was arriving at 03.40 PM. He also stated he did not check where was CCTV installed in post office and he has not collected any CCTV footage. Accused came to post office alone however he did not know how he arrived at post office and he was apprehended after collection of parcel. He denied suggestion that parcel was opened by NCB prior to handing over the same to postal assistant. He denied suggestion that nothing recovered from the parcel. He do not recollect by which NCB official the substance for testing was taken out. He denied suggestion that panchnama and test memo are fabricated documents. He also denied suggestion that on 02.05.2014, they did not go to house of Sharon Phocum with accused. He also stated that apart from section 50 notice, he did not sign any other proceedings which were drawn at post office.

14. **PW3 IO Azad Singh** accompanied the team to post office Kalkaji and stated that they reached Kalkaji post office at around 03.15 PM and after about 45 minutes accused came to post office and took delivery of parcel after signing some documents. Then he was encircled, notice u/s 50 was given. From search of parcel, 63 boxes in round shape and 6 in square shape were recovered. On testing each round shaped boxes positive result for cocaine came thereafter the total weight found around 610 gm. Panchnama was prepared. Accused stated that he was sent by a lady to collect the said parcel, then house of the said lady was searched. Nothing incriminating was found. Statement of accused was recorded u/s 67 as well as of Ram Avtar.

15. In cross-examination stated that the panch witnesses Rambir Singh and Rajender Singh were only knowing Hindi and accused was speaking in English. The proceedings at post office were concluded by 06.00 PM on 02.05.2014. He do not remember who issued summons u/s 67 NDPS Act to accused Henry. Statement of accused Henry was written by him in his own handwriting and before recording the same, he was disclosed about his right to remain silent. He denied suggestion that name of accused Sharon Phocum was not given by accused Henry. He had not heard the name of accused Nani Deborah in this

matter. He also do not remember whether any document was seized in post office in the name of Nani Deborah. He also do not know about any relation between Sharon Phocum and Nani Deborah. He also do not know the name of consignee.

16. He further stated that on 01.05.2014 no information was shared with him. He cannot tell the number of other vehicle however it was Bolero. IO Vivek Prakash might have shared information with him at around 01-01.30 PM. No written directions were given to him to participate in the said case. He further stated that he cannot say with regard to other documents prepared at the spot but test memo and panchnama were prepared before him. He denied suggestion that he did not go to the spot. He also stated that there are few cabins in post office but he cannot say what were their numbers. He was not aware about the qualification of independent members. Nobody was standing on a fixed assigned location. He was with Madam Kamlesh and IO Vivek. He further stated he did not investigate if Nani Deborah ever met the accused in present case. He do not remember whether he asked accused Henry that what amount was received by him. He himself did not investigate if Henry Emeka had ever talked to Sharon Phocum as he was not the IO. He also denied suggestion that accused Henry never met accused Nani or Sharon Phocum. He also denied suggestion that accused Henry was picked up from his house.

17. **PW4 Sh. Ajay Dahiya**, IO stated that on 01.05.2014 IO Vivek Prakash told him that he had received a controlled delivery parcel which is to be deposited at Kalkaji post office as some person was expected to come there to take the delivery of said parcel, team was constituted and reached Kalkaji post office at around 03.15 PM. Two independent witnesses Rambir Singh and Rajender shah were joined. Some staff of post office told IO that accused will come around 03.45 PM thereafter at 03.45 PM accused came and received the parcel. Thereafter he was stopped by NCB team, notice u/s 50 was given however nothing was recovered from his personal search. The said parcel was opened containing 63 round boxes and each on testing gave positive test for cocaine. Sealing and seizing proceedings were conducted. On the next day he

accompanied IO Vishwanath Tiwari for house search B-4, 3rd floor, D-230, Patel Garden Extension, Dwarka in presence of Mansa Ram, landlord however nothing incriminating was recovered. Investigation report regarding mobile numbers was received from service providers. Recorded the statement of postman Pradeep Kumar u/s 67. He wrote letter to CFB regarding address of Nani Deborah, his travel history, address and phone number.

18. In cross-examination stated that he had not seen the parcel at the office on that day. It was not shared with him who was the sender of consignment. IO was carrying the case file and parcel, and remained at the spot i.e. post office for around 3-3 ½ hours. IO was only conversing with public persons. Panchnama was prepared by IO. IO Vivek Prakash did not use any computer during their stay at post office and he is not aware about the rules of receiving and depositing the parcel and before apprehension of accused, public witnesses were on their seats and were doing official work. He did not come across the name Nicole Tannidadwi Deborah and only came across the name Nani Deborah. The strength of post office was around 40-50 employees. He did not participate in investigation after 01.04.2015. He denied that the statement of accused Henry has been a dictated one and his signatures were obtained on many blank, semi printed and printed papers.

19. **PW5 IO Kamlesh Kumari** also accompanied the team to post office and stated that at around 03.45 PM African national took the delivery of parcel and Sh. Rajender Shah took his signature in token of receipt of parcel. The said parcel is found to be containing 63 plastic dibbis, gave positive test for cocaine. On 02.05.2014, she accompanied IO Azad Singh, IO CSK Singh, etc and reached RWZ Vishwash Nagar and met Ram Avtar, owner of the house. On opening the door, accused Sharon Phocum, one more lady in the name of Phocum and one more boy found inside the room however nothing was recovered from the said house. Accused Henry pointed towards accused Sharon Phocum and stated that she asked him to take delivery of the parcel at post office. Accused in her statement u/s 67 stated that she had called post office number of times and asked Henry Emeka to collect the parcel.

20. In cross-examination stated she was asked to accompany the team by Superintendent R.S. Joshi on 01.05.2014. No document was prepared or signed by her and denied suggestion that she did not accompany the team to the spot. She stated computer system in post office are not used by any member of raiding party while preparing the documents at the spot and only receipt was got printed from the post office computer. She cannot tell whether there is any addition or alternation and cutting on said receipt as the post office was very crowded. She is not aware about the presence of CCTV camera at post office. She cannot tell the position of members in the said post office.
21. In cross-examination, she further stated that on 01.05.2014 IO Vivek Prakash was having secret information however she was requested by Superintendent R.S. Joshi to join raiding party. She was not shown any information in writing by the IO. She R.S. Joshi also accompanied the raiding party. She further stated she cannot admit or deny whether IO Pradeep Kumar or Pradeep Singh joined raiding party. They met Sh. Mahavir Prasad, postmaster and R.S. Joshi and IO Vivek Prakash communicated with Mahavir Prasad. She did not see Rajender Shah issuing any receipt to African national. She cannot specifically tell the name of IO who apprehended the accused at post office. The parcel was seized from accused Henry. She was standing at the back side, as such cannot say who weighed and tested the contraband. Panchnama was prepared by IO Vivek Prakash however she do not know as to which document R.S. Joshi appended his signatures. She did not sign panchnama. She do not remember the description of Sh. Ram Avtar, landlord however aged around 45-50 years. No pointing out memo was prepared by IO for pointing out of accused Sharon Phocum. She stated that only Vivek Prakash and R.S. Joshi were talking to office staff and independent witnesses, and denied suggestion that she did not join investigation on 01.05.2014 and 02.05.2014.
22. **PW8 HC Dinesh Kumar** accompanied the team to post office and remained outside however the team went inside and came out at around 06.00 PM alongwith the accused, thereafter accompanied the team on 02.05.2014 to Uttam Nagar and remained outside, deposited samples at CRCL.

Testimony of independent witness PW2 Rambir Singh and PW8 Rajender Shah, postmen at Kalkaji post office over the recovery of first parcel

23. **PW2 Rambir Singh** stated that on 01.05.2014 NCB officials came to their post office and showed their identity cards then they were taken to postmaster who asked Rajender to make entry in the register of parcel. Pradeep received a call from Henry. Thereafter Henry arrived and took the delivery of parcel. When accused was about to leave, he was apprehended and from the said parcel, cocaine of 610 gm was recovered, panchnama was prepared. In cross-examination stated that NCB officials met him at around 03.30 PM and there were around 8-10 NCB officials. Documents were prepared in the office of postmaster and it took around 2½ hours. He denied that Ex.PW2/D is a manipulated document. Henry met with Rajender and he was not near him when met with Rajender. The receipt was prepared by Pradeep at around 03.45 PM. There were not CCTV cameras in the post office.

24. **PW18 Rajender Shah** stated that Vivek Prakash at around 03.30 PM handed over him the parcel in presence of postmaster Bharadwaj and asked him to receive the same and make entry in the computer, then, he delivered the same to postman Pradeep for further delivery. One Nigerian came to post office and Pradeep delivered the said parcel and had shown the identity of one Nani Deborah and signed delivery note as Henry Emeka. Then NCB officer apprehended him and told him that said parcel contained cocaine and he admitted the same. On opening 63 round shaped black boxes and 6 square shaped boxes found and total weight of powder was 610 gm which was positive for cocaine. On putting leading question stated that he prepared delivery slip and Ex.PW2/B is copy of identity furnished by Henry Emeka. He also stated that he was not sitting in the area where testing and samples were drawn and was called subsequently and asked to sign. In cross-examination stated that writing work was done inside the chamber of post master however denied suggestion that no proceedings were conducted in his presence. The parcel was received in post office on 01.05.2014. The details were filled by computer system on its own and he had taken the printout at around 03.00 PM. The portion X and X1 and at

point B were not written in his presence on Ex.PW2/A. It is correct that article under Ex.PW2/A was not handed over by him to the recipient. Vol. It was handed over to postman for further delivery. CCTV cameras were not there in the office on 01.05.2014. Accused Henry was seen by him for the first time at around 03.40 PM and had been apprehended by NCB officers. It is correct that no inquiry was made from accused Henry in his presence. The parcel was not opened in his presence. Statement was written by NCB officers on his dictation and denied suggestion that he wrote the said statement on dictation. He denied suggestion that Ex.PW2/B was not signed by Rambir Singh in his presence. He further stated that date 30.04.2014 appearing at X3 seems to be booking date. Booking date means the date on which the article was booked from original source.

Testimony of PW1 Ram Avtar, landlord of accused Sharon Phocum

25. **PW1 Ram Avtar**, landlord is the witness in whose presence accused Henry identified Sharon Phocum and stated nothing was recovered on search of the house. In cross-examination stated that it is difficult to remember the names and I remember the name as Karon Phocum and he is the owner of premises RZG-204, Vishwas Park, Uttam Nagar. The premises in question was let out by his son and no agreement was reduced into writing. He cannot say whether any person in the name of Benjamin was living with her. Some Nigerians were living with her but he do not know their names. He cannot say whether any person in the name of Nani Deborah was visiting or staying with Phocum. Accused Henry used to visit Phocum in the tenanted premises, his son Sandeep was also present at the time when proceedings were conducted who read over the contents of documents to him. He also stated that it is correct that when my statement was recorded I knew that Henry had told the NCB officials that Phocum told him on phone to collect the parcel. It is correct that whatever I knew about the matter, it is reduced in writing in his statement u/s 67 NDPS Act. He denied suggestion that Henry was not brought to premises by NCB officials. He denied suggestion that statement u/s 67 was conducted on the dictate of NCB officials. The proceedings continued for about 2-2.5 hours. One of the neighbours also signed

alongwith him whose name he do not remember.

Testimony of other witnesses

26. **PW6 IO Pradeep Singh** stated that on 26.05.2014, he accompanied IO Vivek Prakash to the office of Director Foreign Office where met Bala Chandran, Superintendent where Balachandran produced a cardboard box with matching shipping details. The parcel contained baby clothes, baby bib, t shirt and a play mat. The stitching on mat was removed and found to contain a white cotton sheet soaked in some white powder which gave positive result for cocaine. It was measured and two samples of 5x5 cm were taken. This witness again stated that size of cotton cloth is 68x35 cm instead of 68x53 cm. In cross-examination stated that he did not sign any proceedings and all proceedings were carried out by IO Vivek Prakash in his presence.

27. **PW15 Ravi Shankar Joshi**, Superintendent stated that on 01.05.2014 IO Vivek Prakash submitted a written information that he has liaised with postal authorities regarding controlled delivery parcel and details of parcel have been made on online portal and from inquiry it was apprised that one person is enquiring about the said parcel. He directed IO to constitute a team, issued seal and the seal after use was returned by IO Vivek Prakash to him. He forwarded the samples to CRCL. In cross-examination stated that he do not know anything about the present case prior to 01.05.2014. When the information was put before him the said parcel was in the custody of NCB in sealed condition. He further stated that IO Vivek Prakash liaised with postal authorities and as far as he remember liaisons were made with foreign post office and he was informed that controlled delivery can be done through Kalkaji post office.

28. **PW9 Sunil Parewa**, IO recorded the statement of IO Rambir Singh u/s 67. **PW10/PW17 Sepoy Vishwender Singh** took the sample to CRCL on 27.05.2014. **PW11 Chandra Shekhar**, Nodal Officer exhibited the call detail records of mobile no. 9599984703, 8826186823 and 9818923825. **PW12 Saurav Aggarwal**, Nodal Officer exhibited the call detail records of mobile no. 9543160795 and 7838612705. **PW13 Inspector Amit Kumar Sharma**, IO stated that he recorded the statement of Mansa Ram Lamba on 07.05.2014.

PW14 IO Sh. Virender Kumar recorded the statement of Rajender Shah on 07.05.2014. **PW16 Pramod Kumar Rai** stated that on 26.05.2014, he was head sorting assistant at foreign post office and at around 12.30 PM, he was called by Superintendent to produce the packet. The said parcel was looked by Sachin Chhabra, sorting assistant. NCB official opened the said parcel, found white colour powder on the mat. The small quantity was checked by NCB officers and gave positive result for cocaine.

29. **PW19 Sachin Chhabra** is the sorting assistant with foreign post office in whose presence the parcel on 26.05.2014 was opened. **PW20 Mansa Ram** stated that accused Henry Emeka and Henry Augustia were his tenant. The house was searched on 02.05.2014 but nothing incriminating was recovered. He signed the panchnama. **PW22 IO Vikas Yadav** stated that on 01.05.2014, he was malkhana incharge and IO deposited case property and samples. On 02.05.2014 samples were sent to CRCL through Sepoy Dinesh Kumar. On 26.05.2014 also the case property was deposited in malkhana and on 27.05.2014 it was sent to CRCL.

Material Exhibits:

30. **Ex.PW7/A** is the letter dated 17.04.2014 written by B.B. Mishra, DDG Operations to Serious Organized Crime Agency stating therein that Vishwanath Tiwari is deputed to take delivery of the consignment. **Ex.PW7/B** is the report regarding receiving of controlled delivery from the Captain of flight BA-257. **Ex.PW7/C** is another report of IO Vishwanath Tiwari that the parcel is addressed to 444/14, Tughlakabad Extension whereas in DG's order, it is mentioned 447/14. **Mark 7A and 7B** is the indemnity letter and letter of request from international crime team. **Ex.PW15/A** is the information of Vivek Prakash that on inquiry found telephonic inquiries of receiving of said parcel bearing endorsement of PW15 R.S. Joshi, Superintendent to constitute the team. **Ex.PW2/C** is the notice u/s 50 to accused Henry James. **Ex.PW2/D** is the panchnama. **Ex.PW21/A** is the site plan of Kalkaji post office from where recovery was effected. **Ex.PW2/A** is the delivery slip. **Ex.PW2/B** is the copy of I card of Nani Deborah. **Ex.PW3/F** is the jamatalashi of accused showing he was carrying mobiles. **Ex.PW14/A** is the statement u/s 67 of Rajender Shah.

Ex.PW2/E is the statement u/s 67 of Rambir Singh. **Ex.PW15/D** is the seizure report dated 02.05.2014 u/s 57 NDPS Act. **Ex.PW15/B** is the copy of seal movement register. **Ex.PW22/A and PW22/B** are the malkhana entries. **Ex.PW3/B** is the information and the direction of Superintendent to constitute team to identify lady Sharon Phocum. **Ex.PW3/C** is the search warrant of H.No. RZG-203, Ground floor, Vishwas Park. **Ex.PW3/E** is the arrest memo of accused Henry Emeka. **Ex.PW1/A** is the notice u/s 50 to accused Sharon Phocum. **Ex.PW1/B** is the panchnama prepared at the house of accused Sharon Phocum. **Ex.PW5/C** is the arrest memo of accused Sharon. **Ex.PW5/D** is the personal search memo showing seizure of mobile phones from accused Sharon Phocum. **Ex.PW1/C** is the statement u/s 67 of Ram Avtar. **Ex.PW3/G** is the arrest report u/s 57 of accused Henry. **Ex.PW15/B** is the arrest report u/s 57 NDPS Act of accused Sharon Phocum. **Ex.PW7/C** is the search warrant of H.No. D-230, Patel Garden. **Ex.PW4/C** is the panchnama of house at Patel Garden. **Ex.PW13/A** is the statement u/s 67 NDPS Act of Mansa Ram Lamba, witness to the search at house at Patel Garden alongwith document of police verification and rent agreement with Henry Emeka. **Ex.PW8/A** is the forwarding letter to CRCL. **Ex.PW8/B** is the test memo. **Ex.PW15/C** is the CRCL report. **Ex.PW4/M** is the statement u/s 67 NDPS Act of postman Pradeep Kumar recorded by IO Ajay Dahiya. **Ex.PW4/P** is the memorandum of Assistant Director, CFB that according to available arrival and departure records, no such person in the name of Nani Deborah could be traced. **Ex.PW15/F** is the information dated 20.05.2014 of lying of a parcel at foreign post office. **Ex.PW15/G** is the information dated 26.05.2014 that no one has come to take delivery of the said parcel. **Ex.PW16/A** is the seizure/panchnama of the said parcel. **Ex.PW16/C** is the statement of Pramod Kumar Rai, head sorting assistant. **Ex.PW19/A** is the statement of Sachin Chhabra, sorting assistant. **Ex.PW10/B** is the test memo. **Ex.PW15/H** is the CRCL report over the second sample seized on 26.05.2014 found cocaine. **Ex.PW15/I** is the seizure report. **Ex.PW15/J** is another report over the said parcel showing the total cocaine 165 gm. **Ex.PW4/E1** is the letter to Vodafone by IO Ajay Dahiya regarding subscriber detail and CDR of mobile number

7838612705 and 83131966462HLR. **Ex.PW4/E2** is the letter to Airtel by IO Ajay Dahiya regarding subscriber detail and CDR of mobile number 9818923825 and 8991101302302609896. **Ex.PW4/E3** is the letter to Bharti Airtel by IO Ajay Dahiya regarding subscriber detail and CDR of mobile number 9599984703. **Ex.PW4/E4** is the letter to Airtel by IO Ajay Dahiya regarding subscriber detail and CDR of mobile number 9818923825 SIM no. 8991101302302609896H2. **Ex.PW4/E7** is the letter to Vodafone by IO Ajay Dahiya regarding subscriber detail and CDR of mobile number 9643160795. **Ex.PW4/E8** is the letter to Airtel by IO Ajay Dahiya regarding subscriber detail and CDR of mobile number 8826186823. **Ex.PW4/F** is the certificate u/s 65B of mobile no. 9599984703. **Ex.PW11/A** is the CAF of this number. **Ex.PW11/B** is the CDR. **Ex.PW4/I** is the investigation report over mobile no. 9599984703 that the address of this mobile number is not found. **Ex.PW4/G** is the certificate u/s 65B of mobile no. 9818923825. **Ex.PW11/C** is the CAF of this number. **Ex.PW1/D** is the CDR. **Ex.PW4/H (colly)** is the certificate u/s 65B of mobile no. 8826186823. **Ex.PW1/E** is the CAF of this number. **Ex.PW1/F** is the CDR. **Ex.PW4/J** is the letter of Vodafone enclosing the CDR, CAF and certificate u/s 65B of mobile no. 9643160795 in the name of one Preeti. **Ex.PW12/A** is the CAF of this number. **Ex.PW12/C** is the certificate u/s 65B of this number. **Ex.PW12/B** is the CDR of this number. **Ex.PW4/L** is the investigation report that address of Preeti could not be traced. **Ex.PW4/K** is the CDR of mobile number 7838612705. **Ex.PW12/D** is the CAF of this mobile. **Ex.PW12/E** is the CDR of this mobile. **Ex.PW4/M** is the statement u/s 67 of postman Pradeep Kumar in which he alleged that he has a job of letter delivery and on 01.05.2014 the parcel came in the office and for this parcel, he was getting inquiry from mobile no. 9643160795 by one Sharon Phocum and told that the said parcel is in the name of her husband Nani Deborah and also told that she will send the brother of Nani Deborah to collect the same. He told the NCB officials that he is getting query from this mobile number and he received the mobile call around 02.00 PM.

31. **Ex.PW3/A1** is the statement u/s 67 of accused Henry Emeka in which he stated that he came to India in 2013 as called by Nani Deborah, his friend and Nani

Deborah used to deal in drug trafficking business and also involved in this business after coming to India. Nani Deborah in Nigeria booked parcel containing drug and sent it to India, and told the tracking ID to his wife and when the parcel arrived in India, his wife Sharon Phocum called him and gave ID of Nani Deborah for collecting the parcel, and they used the same method every time for which he got quick money and has done this many times. On 01.05.2014, she called him that parcel arrived at post office and gave the ID of Nani Deborah at Dwarka and further told that she has informed the postal authority that you are coming. Thereafter he reached Kalkaji post office where collected the parcel thereafter apprehended. Notice u/s 50 was given from the parcel. Boxes containing drugs were recovered. Further stated that his mobile number is 9818923825 and that of Nani 2349093909752 who is presently in Nigeria and Sharon's mobile 7838612705. He also stated that he received the parcel number of times and presently residing at D-230, Patel Garden, Dwarka Mor and Sharon Phocum resides at RZG- 203, ground floor, Vishwas Park and Sharon Phocum sent him to collect the parcel. He also stated that he took the team to the house of Sharon Phocum however nothing was recovered from her house.

32. **Ex.PW5/B** is the statement of accused Sharon Phocum u/s 67 in which she stated that she is an Indian national having love marriage with Nigerian however do not know the address of his Nigerian husband. She worked with her husband Nani Deborah @ Benjamin and accused Ndupu Emeka Henry works with her husband and they all do the business of drug for money. Accused Benjamin @ Nani Deborah sends the parcel number, and she tracked the same online and contacted the postman at 8826186823 as she was able to speak Hindi and told Emeka Henry to collect the parcel. She further stated she called the postman from number 9643160795. On 02.05.2014 NCB team searched her house but nothing was recovered. She disclosed the contact number of her husband is +2349093909752 and her email ID sharonphocum@yahoo.com, and the accused Henry Emeka was having mobile no. 9818923825.

33. Accused Henry Emeka in his statement u/s 313 Cr.PC denied all the incriminating circumstances put to him and also raised the plea that NCB did not make any effort to trace out accused Nani Deborah. He also stated that he has nothing to do with drugs and no recovery was effected from him. NCB officials took him to the NCB office where they tortured and beaten him and took his signatures on blank papers. He do not know the co-accused, and he came to know about her only when he was produced before the court.
34. Accused Sharon Phocum in her statement u/s 313 Cr.PC denied all the incriminating circumstances put to her and she used to exchange the mobile numbers with various persons at church of different countries however she do not know any person in the name of Nani Deborah.
35. Ld. Counsel for accused Henry Emeka submitted that there is a clear violation of section 50A of NDPS Act. PW7 IO Vishwanath Tiwari is not authorized by the DG. The DG has authorized Zonal Director however Zonal Director has not taken the controlled delivery. Furthermore neither DDG nor ZD has any authority to sub delegate the powers. Even otherwise, neither DDG nor Zonal Director or Director General examined before the court to prove the relevant letters. The flight captain John Watts from whom delivery was taken has also not been examined. Superintendent Jai Kishan to whom delivery was shown by PW7 has also not been examined. Prosecution therefore unable to prove the factum of controlled delivery. Ld. Counsel further submits that there is inconsistency in the statements of postman/alleged independent witness PW18 Rajender Shah and PW2 Rambir Singh. The principal witness i.e. postman Pradeep Kumar who has delivered the parcel has not been examined by prosecution. Ex.PW2/A alleged to be the booking receipt bearing the signature of accused on delivery. The said receipt bears the date of 30.04.2014, however PW18 Rajender Shah stated that it might be booking date which is different from the case of prosecution because as per prosecution parcel was handed over in the post office on 01.05.2014. PW2 as well as PW18 both had talked about the postman Pradeep who was assigned the key role however prosecution unable to examine that witness therefore failed to prove the fact who had delivered the said parcel to the accused. The prosecution

has not exhibited the malkhana entries of taking out the parcel from malkhana on 01.05.2014.

36.Ld. Counsel submits that PW18 Rajender Shah in cross-examination has demolished the case of prosecution. He could not state the address to which the said parcel is going to be delivered. He further stated that accused Henry was seen by him after apprehension by NCB officials which is contrary to prosecution case. He also stated that no inquiry was made with accused Henry in his presence and parcel was not opened in his presence. Ld. Counsel submits that this witness stated that parcel was not opened in his presence therefore created doubt over the entire panchnama proceedings. According to the prosecution case, the said parcel is in the name of Nani Deborah however this witness could not state anything about Nani Deborah. PW5 Ms. Kamlesh Kumar even could not tell the name of consignor and consignee. She could not tell who had weighed and tested the contraband which itself suggests that proceedings are not conducted in the manner relied by the prosecution. The postmaster Mahaveer Bharadwaj was also not examined by prosecution.

37.Ld. Counsel submits that as per prosecution there are 63 round shaped plastic boxes opened found to be containing cocaine with total weight of 610 gm however the samples were not withdrawn in terms of judgment of Delhi High Court in case titled *Amani Fidel Chris Vs. NCB Crl. Appeal No. 1027/2015 dated 13.03.2020*. Ld. Counsel submits that the samples were withdrawn after mixing the entire contraband which is in violation of the standing orders and furthermore the samples were not drawn under the supervision of the Magistrate. Ld. Counsel submits that this ground in itself is sufficient for acquittal of accused.

38.Ld. Counsel submits that there is non compliance of section 50 NDPS Act. The notice u/s 50 (Ex.PW2/C) is not found to have been recovered from accused therefore it can be inferred that no such personal search took place. Furthermore, there is no mention in the said notice that the accused can be produced before gazetted officer or magistrate. The accused was not also explained the meaning of gazetted officer or magistrate therefore, the entire

recovery becomes illegal (relied upon *State Vs. Vicky Crl. LP 143/2017 dated 13.09.2019 and Rakesh @ Shankar Vs. State 2014(1) HCC (Delhi) 123*). Ld. Counsel submits that once the personal search has been done u/s 50 NDPS Act then even if nothing is recovered from personal search then its non compliance also makes the recovery of contraband from the parcel illegal (*Akhilesh Bharti Vs. State 2020 SCC Online Del 306*). Ld. Counsel submits that the prosecution even could not connect both the accused with mobile phones recovered. The recovered mobile phones are not even in the name of accused persons. The prosecution even has not filed the location chart and this itself suggests that the prosecution has withheld the material evidence therefore adverse inference is to be drawn (relied upon *Mussauddin Ahmed Vs. State of Assam 2009(14) SCC 541*). Ld. Counsel submits that prosecution miserably failed to prove its case therefore accused is entitled for acquittal.

39.Ld. Counsel for accused Sharon Phocum submits that the controlled delivery was not taken by authorized person therefore there is total non compliance of section 50A NDPS Act. The concerned officials who were part of controlled delivery are not examined. As per the document mark 7A the flight arrived around 08.15 AM and the parcel was deposited at around 09.15 AM which itself suggests that parcel could not be deposited in such a short time and thus creates doubt over the fact whether infact the parcel was taken by PW7 from the Captain or not. The consignee details are also not matched with email received as the address are different. The parcel started its journey from Trinidad however the controlled delivery request is from London. Furthermore, as per the request, 500 gm of cocaine was noticed but it was found 610 gm. There is an increase in weight which itself creates doubt over the parcel, and on this ground the accused stands acquitted by Apex court in case titled *Rajesh Jagdamba Awasthi Vs. State of Goa 2015(9) SCC 773*. The panchnama was prepared by IO Vivek Prakash however he could not be examined as reported to have died. Ld. Counsel submits that the IO died after five years of prosecution evidence therefore his non examination is a material lacuna in the prosecution case and caused grave

prejudice to the accused. The controlled delivery received on 23.04.2014 however accused Henry Emeka was apprehended on 01.05.2014, prosecution unable to explain the delay of 8 days in apprehending the accused. Ld. Counsel submits that the prosecution for proving the conspiracy between both accused relied upon the statement u/s 67 of both accused persons however in view of recent judgment of Apex Court in case titled *Toofan Singh Vs. State of Tamil Nadu Crl. Appeal no. 152/2013 dated 29.10.2020*, the confession through the said statements u/s 67 is not admissible. Ld. Counsel submits that the said statements are only admissible to the extent of recovery of any material fact or documents in terms of section 27 Evidence Act however the prosecution trying to prove the said statement for the fact that accused Sharon Phocum had sent accused Henry for taking delivery of parcel which is inadmissible. Mobile number 9643160795 and 7838612705 neither belongs to accused Sharon nor seized from her. As per jamatalashi one mobile phone having sim no. 83131966462 was recovered from her however prosecution could not connect the said sim with the mobile. The prosecution could not examine PW Pradeep postman who had received the call. Furthermore as per Ex.PW15/A a male person made enquiries from mobile no. 9643160795 which contradicts the statement of postman Pradeep. Ld. Counsel submits that as per case of prosecution accused married with Nani Deborah however unable to prove the said fact. Ld. Counsel submits that accused Sharon Phocum is Christian by religion and used to meet number of persons in Sunday prayer at Church and sometimes exchanged her numbers with her but this itself does not suggest that the accused has any connection with the co-accused persons.

40. Both the counsels submit that as far as recovery of cocaine from second parcel is concerned which is seized from the postoffice on 26.04.2014 is not addressed to any of the accused nor seized from them. The prosecution unable to connect the accused from the said parcel. Both the counsels also filed written submissions.

41. Ld. SPP submits that accused Henry is apprehended with parcel containing the contraband in presence of independent witnesses and the raiding party members. The testimony of raiding party members and independent witnesses in

this regard fully credible therefore presumption arose u/s 35 and 54 in favour of prosecution, however the accused unable to rebut the presumption. Ld. SPP submits that there is no infirmity in taking the samples as the samples were taken after testing each plastic box. Ld. SPP submits that there is no requirement of compliance of section 50 NDPS Act in present case as the recovery is from parcel not from the bodily search of accused. Ld. SPP submits that both accused are found to be connected with each other as per their statements u/s 67 NDPS Act. The mobile phones recovered and deposited in the statements u/s 67 clearly suggest their connection and the accused Henry was sent for taking the delivery by the co-accused Sharon Phocum. Ld. SPP submits that as far as second recovery is concerned, it was addressed to same address as of the first parcel bearing the mobile number of Sharon Phocum therefore the accused persons are also found connected with second parcel. The minor discrepancies in the testimony of witnesses is not at all material and the prosecution is able to prove its case beyond reasonable doubt however the accused unable to rebut the presumption u/s 35 and 54 NDPS Act. Thus accused are liable to be convicted for the offences charged.

42. *Arguments heard. Record perused.*

43. 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.

44. 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 as under:

“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.....”.

45. 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 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).

46. To sum up while appreciating evidence on record the duty of the court is to separate credible and incredible part of evidence.

Controlled delivery of parcel containing contraband by PW7

47. Vide letter dated 15.04.2014 Sh. B.B. Mishra, DDG, NCB was apprised by the Operations Officer, Border Policing Command, National Crime Agency that a consignment of 500 gm of cocaine arose from the consignor Nicole James, Trinidad is arriving in India pursuant to which the DDG vide letter dated 15.04.2014 apprised the Zonal Director that the competent authority has approved the controlled delivery of the said consignment. Sh. Rajiv Mehta, Director General NCB vide order dated 15.04.2014 authorized the Zonal Director to undertake the delivery. On the directions of the competent authority i.e. DG, the DDG Sh. B.B. Mishra vide letter dated 17.04.2014 authorized PW7 IO Vishwanath Tiwari to take the delivery. The said letter was also marked by Zonal Director to Superintendent Jai Kishan. On the basis of these directions, PW7 took the delivery of the parcel on 23.04.2014 from John Watts, Captain of flight No. BA-257 and prepared the report (Ex.PW7/B) regarding his authorization and taking of delivery of parcel from the Captain at around 08.45 AM alongwith two letters and depositing same in malkhana. PW7 in his testimony in his testimony duly deposed about his authorization and taking of delivery from Captain John Watts of British Airways and handing over the letters to the Superintendent Jai Kishan and filing of his report. There is nothing in cross-examination of this witness which can dispute the fact that he was not authorized to take the delivery or had not taken the delivery in the manner stated by him from the flight Captain.

48. In the indemnity letter (mark 7A) and request letter (mark 7B), it is categorically mentioned that one Intelligence Officer of NCB will collect the same from Captain. The seal number mentioned on the parcel as noticed in mark 7A and 7B and malkhana register is found matching with seal number BA00997456 mentioned in panchnama (Ex.PW2/D) when opened. In this scenario, it cannot be doubted that the parcel in sealed condition was not duly handed over by

flight Captain to PW7 who thereafter deposited the same in malkhana on 23.04.2014 at around 09.15 AM. Ld. Counsel for accused submitted that the flight arrived around 08.15 AM and collected by PW7 at around 08.45 AM and deposited in the malkhana at around 09.15 AM and in such a short duration this act could not be completed. However, this plea is hardly of any relevance as was not put to PW7 in cross-examination.

Information about the delivery of the said parcel at post office Kalkaji, preparation of raiding team and apprehension of accused Henry Emeka from post office on 01.05.2014 after taking delivery

49. The investigation after taking controlled delivery was marked to IO Vivek Prakash who recorded the information (Ex.PW15/A) at around 11.10 AM on 01.05.2014 that an information has been obtained that the said parcel would be delivered from Kalkaji post office in the afternoon and thereafter on the directions of PW15 the raiding team was constituted. The team comprising of PW3 IO Azad Singh, PW4 IO Ajay Dahiya, PW5 IO Kamlesh Kumari, PW21 IO C.S.K. Singh alongwith other officials reached the Kalkaji post office at around 1520 hours and thereafter contacted postmaster Mahaveer Bharadwaj and then the two postmen PW2 Rambir Singh and PW18 Rajender Shah were joined as independent witnesses. PW18 Rajender Shah made necessary entries in the system and Pradeep Kumar, postman told that the enquirer will be coming around 1535-1545 hours. Then the receipt Ex.PW2/A is prepared by Rajender Shah from the computer and thereafter at around 03.45 PM accused Henry Emeka came and received the parcel on delivery slip by disclosing his mobile number and showing the ID of Nani Deborah (Ex.PW2/B), and collected the said parcel from the postman Pradeep, thereafter he was apprehended.

50. The factum of constitution of raiding party and the raid is duly deposed by PW21 IO C.S.K. Singh, PW3 IO Azad Singh, PW4 IO Ajay Dahiya, PW5 IO Kamlesh Kumari, PW8 HC Dinesh Kumar. All these witnesses have deposed to the fact that they reached post office at around 03.15 to 03.30 PM. There is hardly any inconsistency over the factum when they reached the post office. These witnesses also stated that parcel was carried by IO Vivek Prakash which was handed over

to postmaster and necessary entries were made before delivery. Therefore, the prosecution case despite minor inconsistencies is fully credible on the aspect of constitution of raiding party and consequent delivery of parcel to the accused Henry Emeka.

51. PW2 Independent witness postman Rambir Singh categorically deposed that NCB officials came to post office on 01.05.2014 and thereafter they were taken to postmaster who asked Rajender Shah (PW18) to make entry of parcel. Thereafter Henry arrived and took the delivery of parcel and signed a delivery note Ex.PW2/A with identity card Ex.PW2/B. However when the accused about to leave, he was encircled by the NCB officials. There is nothing in his cross-examination to dispute the fact that NCB officials have not raided the post office for the purpose of apprehension of Henry Emeka or the fact that they had not come with the parcel or the fact that parcel was not delivered to Henry. This witness in cross-examination stated that accused Henry met with Rajender and had seen him talking to Rajender. However in cross-examination stated that receipt was prepared by Pradeep. Ld. Counsel submits that there is inconsistency in the statement of witnesses because as per prosecution case Pradeep delivered the parcel and PW18 Rajender made entries in the computer however this witness in cross-examination gave contrary version. This witness has duly explained the entire facts about the arrival of NCB officials, entries of parcel and delivery of parcel to accused Henry in post office itself. The minor inconsistency about the entry or delivery in cross-examination hardly matters in discrediting the entire circumstance of delivery and apprehension of accused Henry in post office, particularly when there is nothing to suggest that accused brought to post office through any inducement or coercion by the NCB officials.

52. The statement of PW2 Rambir Singh is duly corroborated with the statement of PW18 Rajender Shah who also stated that NCB team on arrival met the postmaster and handed over the parcel to him then he made the entry in the computer and delivered the same to postman Pradeep for delivery and accused took delivery from Pradeep after showing identity of one Nani Deborah and then Henry Emeka was apprehended by NCB officials alongwith parcel. This witness

in cross-examination duly stated that parcel was received in post office on 01.05.2014 and details were filled by him in the computer, and also stated that he has not handed over the parcel to recipient but by the postman Pradeep, therefore, the entire sequence of handing over is also corroborated by this witness. From the cumulative appreciation of testimony of NCB officials and independent witnesses PW2 and PW18, the prosecution able to prove that accused was delivered the parcel in post office after taking ID of Nani Deborah. The minor inconsistencies in the cutting on the receipt Ex.PW2/A or non disclosing the name of Nani Deborah by the witnesses do not in any manner discredit the testimony of witnesses over the factum of apprehension of accused Henry Emeka after taking delivery of parcel from post office.

Search of parcel

53. After apprehension of accused with parcel, the parcel was opened and the panchnama (Ex.PW2/D) was prepared. The parcel bears the number EE0022A7607TT having the seal of BA00997456 of UK Border Agency. On opening the same, yellow colour paper envelope was found containing some black colour round and square shape plastic boxes. On close examination, these plastic boxes were found to be heavier than their usual weight, thereafter one of the plastic boxes was break opened and small amount of powder was tested which gave positive test for cocaine. All the 63 boxes were tested separately and gave positive result for cocaine. However, the six square boxes did not result positive for any contraband. After testing each of the boxes, the entire powder was transferred into plastic packet and total weight came around 610 gm. Two samples of 5 gm each were taken. The raiding team officials as well as PW2 and PW18 corroborated the recovery of cocaine from the said parcels in their testimony. PW2 Rambir Sharma categorically stated in cross-examination that panchnama was prepared in his presence and denied suggestion that it is manipulated and fabricated document. From his cross-examination, it cannot be inferred at all that he has not witnessed the testing of each box and seizure of 610 gm cocaine from the said parcel.

54.Ld. Counsel for accused submitted that PW18 Rajender Shah in cross-examination stated that he had seen the accused first time when apprehended by NCB officials and no inquiry was done in his presence from the accused and the parcel was not opened in his presence. Ld. Counsel submits that therefore the prosecution case is suspect over the delivery and opening and testing of parcel in presence of PW18. On relooking the testimony of PW18, this witness has deposed categorically about the delivery and opening of parcel in his presence. He has correctly stated about the number of 63 round shaped black boxes and the factum that it was tested positive for cocaine and the total weight is 610 gm. He also stated that panchnama was prepared and he signed the same. This witness in cross-examination also gave the details about the raid conducted by NCB officials and the role of postman Pradeep who could not be examined as was not found available. At length this witness was cross-examined but also stated that he had seen the accused with NCB officials first time and the parcel was not opened in his presence, however, on reading the testimony in entirety, it cannot be inferred that he has not involved with preparation of the delivery or handing over of the parcel and apprehension of accused after the parcel received. He has also witnessed the entire proceedings of search of parcel thus merely from the fact that he deposed in cross-examination that it was not opened in his presence, it cannot be inferred that he has not witnessed the seizure proceedings. This kind of minor inconsistency is bound to come in the detailed cross-examinations under court conditions. This in no manner displaces the case of prosecution that no search of parcel was conducted in the post office when also corroborated by testimony of number of NCB officials and PW2 Rambir. The prosecution able to prove the search of parcel in presence of NCB officials and public witnesses, and recovery of 610 gm of cocaine from 63 round shaped plastic boxes.

Apprehension of accused Sharon Phocum and search of her tenanted premises

55. Accused Henry Emeka in his statement u/s 67 disclosed that he was asked by accused Sharon Phocum to collect the said contraband parcel from postal authorities. He also disclosed her address therefore search authorization of said

premises was issued by PW15. The search warrants were marked to PW3 IO Azad Singh who alongwith PW7 IO Vishwanath Tiwari, other officials and accused Henry Emeka raided the house of accused Sharon Phocum in presence of PW1 Ram Avtar, landlord. Accused Henry Emeka identified accused Sharon Phocum and thereafter search of her house was also conducted but no contraband was recovered from her house search. However, the factum of apprehension of accused Sharon Phocum at the instance of Henry Emeka is duly proved through the testimony of independent witness PW1 Ram Avtar, landlord of Sharon Phocum who stated that accused Sharon Phocum is duly identified by accused Henry Emeka in presence of NCB officials and she was her tenant at premises no. RZG-203. In cross-examination stated though there was no rent agreement however the premises was let out to her 6-7 months prior to date of raid and some Nigerian nationals started visiting her in the premises however could not tell whether any person in the name of Nani Deborah was visiting or staying with accused. This witness has categorically identified accused Henry Emeka and Sharon Phocum in the court therefore the anomaly that he has stated the name of Sharon Phocum as Karon Phocum is hardly material. This witness has categorically stated that his statement was recorded by NCB officials, and he also knew that Henry Emeka told NCB officials that Phocum told him on phone to collect the parcel. He denied suggestion that Henry was not brought into the premises for apprehending accused Sharon. This witness categorically stated in cross-examination that accused Henry Emeka used to visit Phocum in tenanted premises. The apprehension of accused Sharon Phocum from her house at the instance of accused Henry Emeka is also corroborated by testimony of PW3, PW5 and PW21.

Search of tenanted premises of accused Henry Emeka

56. The search authorization of premises of accused Henry Emeka was given by PW15. Search of premises of accused Henry Emeka no. D-230, Patel Garden Extension, Dwarka Mor was conducted by PW7 and PW4 in presence of landlord PW20 Mansa Ram Lamba. PW20 duly identified the accused and stated that accused Henry Emeka and one Henry Augustia were his tenants and house was

searched on 02.05.2014 but nothing incriminating was recovered. The identity of accused Henry Emeka is duly confirmed also through PW20 Mansa Ram as well as independent witness PW1 Ram Avtar.

Arrest memo and jamatalashi of accused Henry Emeka (Ex.PW3/E and Ex.PW3/F)

57. The personal search of accused was conducted by PW3 Azad Singh. As per the personal search, three mobiles were recovered from accused. The mobiles recovered from accused Henry Emeka bearing no. 9818923825 and 9599984703 and one Blackberry mobile bearing IMEI no. 35602050377780. There is nothing in cross-examination of PW3 that no such personal search and recovery of mobiles was made from present accused.

Arrest memo and personal search memo Ex.PW5/C and PW5/D

58. From the personal search memo of accused Sharon Phocum, one mobile phone Nokia bearing IMEI No. 356320/05/668899/9 SIM Number Vodafone 83131966462 HLR1 were recovered. PW5 IO Kamlesh Kumari categorically deposed about the conducting of personal search of accused and there is nothing in her cross-examination to doubt that the said mobile was not recovered from the personal search of accused.

Proceedings u/s 50 NDPS Act

59. Ld. Counsel for accused submitted that there is total non compliance of section 50 NDPS Act in present case. The notice u/s 50 (Ex.PW2/C) is not found to have been recovered from accused therefore it is suggestive that accused was not given any notice u/s 50. Further there is no mention in the said notice that accused can be produced before any gazetted officer or magistrate. The accused was also not explained the meaning of gazetted officer or magistrate thus the personal search as envisaged u/s 50 is not proved and therefore its non compliance also makes recovery of contraband from parcel illegal (relied upon *Akhilesh Bharti Vs. State 2020 SCC Online Delhi 306*). As per prosecution case, the recovery of contraband is not from the bodily search of accused but from the parcel carried by the accused. Apex court in case titled *Than Kunwar Vs. State of Haryana, Crl. Appeal No. 2172/2011 dated 02.03.2020* in detail dealt with this

aspect and held as under:

17. No doubt we notice the judgment of this Court rendered by a Bench of three learned Judges in *SK. Raju (supra)*. Therein, the Court referred to the judgment in *Dilip (supra)*, and thereafter, went on to, inter alia, hold as follows:

“As soon as the search of the person take place the requirement of mandatory compliance with Section 50 is attracted irrespective of whether contraband is recovered from the person of the detainee or not.”

18. In the said case, the Court went on to hold that requirement of Section 50 was complied with. However, we notice a later development in the form of a judgment rendered by a Bench of three learned judges touching upon the correctness of the view expressed in *Dilip (supra)* as contained in paragraph 16 of the judgment.

19. In *Baljinder Singh (supra)*, this Court elaborately considered the matter with reference to the applicability of Section 50 in a case where there is a personal search also.

20. This was the case where 7 bags of poppy husk each weighing 34 kg. were found from the vehicle. A personal search of the accused was undertaken after their arrest which did not lead to any recovery of contraband. The High Court found violation of Section 50 as the personal search of the accused was not conducted before the Magistrate/Gazetted Officer and set aside the conviction of the respondent. This Court, in *Baljinder Singh (supra)*, went on to consider the law laid down by the Constitution Bench in *Baldev Singh (supra)* and, inter alia, held as follows:

“16. The conclusion (3) as recorded by the Constitution Bench in para 57 of its judgment in **Baldev Singh [State of Punjab v. Baldev Singh, (1999) 6 SCC 172: 1999 SCC (Cri) 1080]** clearly states that the conviction may not be based “only” on the basis of possession of an illicit article recovered from personal search in violation of the requirements under Section 50 of the Act, but if there be other evidence on record, such material can certainly be looked into.

17. In the instant case, the personal search of the accused did not result in recovery of any contraband. Even if there was any such recovery, the same could not be relied upon for want of compliance of the requirements of Section 50 of the Act. But the search of the vehicle and recovery of contraband pursuant thereto having stood proved, merely because there was non-compliance of Section 50 of the Act as far as

“personal search” was concerned, no benefit can be extended so as to invalidate the effect of recovery from the search of the vehicle. Any such idea would be directly in the teeth of conclusion (3) as aforesaid.

*18. The decision of this Court in Dilip case [Dilip v. State of M.P., (2007) 1 SCC 450 : (2007) 1 SCC (Cri) 377] , however, has not adverted to the distinction as discussed hereinabove and proceeded to confer advantage upon the accused even in respect of recovery from the vehicle, on the ground that the requirements of Section 50 relating to personal search were not complied with. **In our view, the decision of this Court in the said judgment in Dilip case [Dilip v. State of M.P., (2007) 1 SCC 450 : (2007) 1 SCC (Cri) 377] is not correct and is opposed to the law laid down by this Court in Baldev Singh [State of Punjab v. Baldev Singh, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080] and other judgments.”***

*21. Having regard to the judgment by the three-Judge Bench, which directly dealt with this issue, viz., the correctness of the view in Dilip (supra) reliance placed by the appellant on paragraph 16 may not be available. **As already noticed, we are not oblivious of the observation which has been made in the other three Judge Bench judgment of this Court in SK. Raju (supra), which it appears, was not brought to the notice to the Bench which decided the case later in Baljinder Singh (supra). We notice however that the later decision draws inspiration from the Constitution Bench decision in Baldev Singh (supra). We also notice that this is not a case where anything was recovered on the alleged personal search. The recovery was effected from the bag for which it is settled law that compliance with Section 50 of the Act is not required.***

60. Therefore, in view of mandate of this judgment even if there is non compliance of section 50 in taking the bodily search then the recovery from the parcel carried by the accused do not become illegal. The recovery of cocaine in present case is from parcel thus the compliance of section 50 NDPS Act is not required.

Sampling

61.Ld. Counsel for the accused submitted that in present case the samples were drawn after mixing all the material from 63 round shapes boxes and this is not the proper procedure. The investigating officer is required to draw one sample in duplicate from a particular lot and it must be ensured that representative drug in equal quantity is taken from each package/container of that lot and mixed

together to make a composite whole from which the sample are to be drawn from that lot. Ld. Counsel submits that in this case the representative sample is not drawn in the manner prescribed and the samples were drawn only after mixing the entire material recovered from 63 round shaped boxes which is impermissible. Furthermore, the samples were not drawn in presence of magistrate. Therefore, the mandatory compliance of sampling is not conducted (relied upon *Amani Fidel Chris* (supra)) and on this ground alone accused are entitled to be acquitted. Ld. SPP submits there is no infirmity in drawing the samples. Ld. SPP submits that all the witnesses stated that each box is tested and found positive for cocaine thereafter, entire powder is mixed and samples were drawn. This procedure is found accord by the Supreme Court in case titled *Sumit Tomar Vs. State of Pubjab 2013(1) SCC 395*.

62. In present case, the controlled delivery of parcel containing cocaine in small plastic boxes were taken by the PW7. The said cocaine powder is found concealed in small plastic boxes and in the unique modus operandi, the drugs were found to have been smuggled in India. The total weight of the drug around 610 gm recovered from 63 plastic boxes however every box is tested separately and gave positive result for cocaine. The six square boxes were also tested however not found to be containing any contraband. The colour, texture and property of all the off white coloured powder recovered from 63 round shaped plastic boxes found same therefore after testing each box, the off white colour powder mixed, then samples of 5 gm each were drawn therefore, it cannot be inferred that before mixing the NCB officials had not satisfied about the presence of cocaine in each box. This procedure has found the force of law from the judgment of *Sumit Tomar* (supra), thus no infirmity found in taking the samples.

Conspiracy

63. Accused Henry Emeka after being apprehended in his statement u/s 67 (Ex.PW3/A1) stated that he came to India in 2013 as called by Nani Deborah and Nani Deborah used to send the parcel containing drug to India and told his wife Sharon Phocum to track the same, and on 01.05.2014 she called him that the parcel had arrived in post office and further informed the postal authorities

that he is coming to take delivery. Thereafter he went to post office where he was apprehended. He also disclosed that he is using mobile no. 9818923825 and co-accused Sharon Phocum is using mobile no. 7838612705 and Nani Debora is using 2349093909752. The co-accused Sharon Phocum in her statement u/s 67 Ex.PW5/B stated that she is an Indian national however married to Nani Deborah @ Benjamin (her husband) and they used to deal in drug. Her husband sends the parcel containing drug through post and she tracked the same and contacted the postman at 8826186823 from mobile no. 9643160795. She further asked Henry Emeka to collect the parcel who is having mobile no. 9818923825.

64. As far as statement of accused u/s 67 NDPS Act is concerned, the Apex court in recent judgment titled *Toofan Singh vs. State of Tamil Nadu Crl. Appeal No. 1328/2013 dated 29.10.2020* held that the confession recorded u/s 67 is not admissible. The said statement therefore could be admissible only to the extent of recovery of any material, fact or documents in terms of section 27 Evidence Act. The statement u/s 67 could not be used for proving the fact that both accused indulged in drug trafficking and accused Sharon Phocum asked Henry Emeka to collect the parcel. Furthermore, the mobile number of accused Sharon Phocum as disclosed i.e. 9643160795 and 7838612705 are not found to be recovered from accused Sharon Phocum. Even the CDRs exhibited on record of these numbers are not in the name of Sharon Phocum therefore her conversation through these numbers with accused Henry Emeka and the postman Pradeep is not proved. From the personal search of accused Henry mobile no. 9818923825 and 9599984703 were found recovered though these are not in his name but it can be inferred that these mobiles were used by this accused as recovered from him. However, mere recovery of these mobile numbers and his contact with mobiles of Sharon Phocum do not in any way help the prosecution case because prosecution unable to prove that alleged mobiles were used by Sharon Phocum. Prosecution even not able to prove in evidence that postman Pradeep was using the mobile 8826186823 as he was not examined before the court being not traceable. One thing pertinent to notice here is that there is nothing even in the statement u/s 67 (Ex.PW4/M) of postman Pradeep that he was using this mobile

number i.e. 8826186823. The CAF of this mobile number however suggests that it was in the name of Pradeep but mere exhibition of CAF through a nodal officer is not sufficient to prove that this CAF belonged to postman Pradeep. Even otherwise, when accused Sharon is not found connected with the mobile alleged to be of her then even if the prosecution able to prove that she had made call to Pradeep is of no value particularly when postman Pradeep not examined. The prosecution therefore through the mobile call records unable to connect the accused Sharon Phocum and Henry Emeka.

65. During the evidence, it is found that accused Henry Emeka is connected with the mobile number 2349093909752 of Nani Deborah, alleged husband of Sharon Phocum with his mobile number 9599984703 and 9818923825 through number of calls. Accused Sharon Phocum is also found connected with this mobile number through her mobile number 7838612705 but prosecution unable to prove that this mobile number belongs to Nani Deborah, husband of accused Sharon Phocum. There is nothing on record to suggest that during investigation, investigating officer has tried to locate accused Nani Deborah through this mobile number therefore, it cannot be held that both the accused are also found connected through to Nani Deborah. On overall appreciation, prosecution unable to connect both the accused through mobile call records but from this it cannot be held that both accused are not connected.

66. Accused Sharon Phocum was apprehended at the instance of accused Henry Emeka and this fact was duly corroborated through independent witness PW1 Ram Avtar, landlord of accused Sharon Phocum. Furthermore, PW1 Ram Avtar in his testimony categorically identified both accused Sharon Phocum and Henry Emeka. He also stated that some Nigerian were living with her. In cross-examination also stated that accused Henry used to visit Phocum in tenanted premises and he also stated that accused Henry told NCB officials that Phocum told him on phone to collect the parcel. The testimony of PW1 Ram Avtar appears fully credible, therefore, from the testimony of PW1 independent witness the relationship and dealing between the accused Henry Emeka and Sharon Phocum stands credibly proved. Accused Henry Emeka in his statement

u/s 313 categorically deposed that he do not know accused Sharon Phocum. Accused Sharon Phocum in her statement u/s 313 only raised the plea that she might have met the foreigners in church while attending Sunday prayers, therefore both these accused apparently falsely stated before this court that they do not know each other. There is no reason on record to disbelieve the testimony of PW1 regarding acquaintance between accused Henry Emeka and Sharon Phocum and that accused Sharon Phocum asked Henry Emeka to collect the parcel. Therefore, despite the fact that prosecution not able to connect the accused persons through mobile call records but found connected credibly regarding their acquaintance and knowledge about delivery of parcel through PW1 Ram Avtar. Hence, prosecution able to prove that accused Sharon Phocum directed accused Henry Emeka to collect parcel from post office. The factum of conspiracy between the accused persons stands proved credibly by prosecution.

CRCL Report (Ex.PW15/C)

67.As already discussed prosecution able to prove that the accused Henry Emeka was apprehended with the parcel after he has taken is 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 17.1%. In view of judgment of Apex Court in *Heera Singh Vs. Union of India & Anr. CrI. Appeal No. 722 OF 2017 dated 22.04.2020*, the entire contents of the mixture be taken into considering for determination of total weight. The total weight of contraband found to be 610 gm containing cocaine therefore the quantity of cocaine is found commercial quantity.

Compliance of section 57 NDPS Act over the recovery of first parcel

68.PW15 Superintendent R.S. Joshi submits that IO Vivek Prakash has filed seizure report u/s 57 on 02.05.2014 regarding the recovery of 610 gm of cocaine from the parcel recovered from the accused Henry Emeka. Another report u/s 57 is also filed regarding the arrest of accused Henry Emeka and Sharon Phocum on 05.05.2014. There is nothing in cross-examination to suggest that such compliance is not made. Therefore prosecution also able to prove the compliance of section 57 NDPS Act.

Recovery of second parcel

69. As per prosecution case, one more parcel arrived in foreign post office on 20.05.2014 however none collected the same thereafter, on 26.05.2014 the said parcel was seized found to be in the name of consignee Nani Deborah R/o 447/14, mobile no. 9643160795. This parcel on search found to be containing white colour cotton sheet soaked with some powdery substance which on testing found to be cocaine. Admittedly as per prosecution case, at the time of recovery of this parcel both accused are in judicial custody. The said parcel is not addressed to accused persons apprehended in this case. The mobile no. 9643160795 alleged to be of Sharon Phocum even could not be proved to be that of Sharon Phocum as already discussed therefore this parcel is not at all found to be connected with present accused persons. The prosecution unable to connect the present accused through this parcel therefore there is no need for appreciation of testimony of witnesses in this regard, the CRCL report and other compliances over this parcel.

Defence of the accused

70. Accused Henry Emeka in cross-examination of PW3 IO Azad Singh suggested that he was lifted from his house by the NCB however not tried to put this defence to independent witness PW20 Mansa Ram, his landlord. This accused in his statement u/s 313 Cr.PC raised the plea that he was taken by NCB officials to their office where he was tortured to sign some blank and semi filled papers. This accused nowhere pleaded that he had not gone to the post office. His presence at post office and his act of taking the delivery and apprehension thereafter is duly substantiated through the testimony of raiding party officials as well as independent witnesses at post office as already discussed. There is nothing to suggest in this entire circumstances that accused was induced to visit the post office or forcibly taken to post office. The defence of co-accused Sharon Phocum is only that she does not know accused Henry Emeka which is found false as per the testimony of PW1 Ram Avtar, his landlord, as already discussed. The defence of accused persons is not at all credible. The prosecution on the other hand able to prove that accused went to post office voluntarily on the

direction of accused Sharon Phocum to collect the said parcel.

Effect of discrepancies, omissions and lapses

71.Ld. Defence counsel raised the plea that the controlled delivery is not proved because neither the DG, DDG, Zonal Director or the Superintendent Jai Kishan has been examined by the prosecution. There is no exhibition of any document that DG has authorized PW7 IO Vishwanath Tiwari to collect the parcel. The said controlled delivery as discussed is proved through PW7 IO Vishwanath Tiwari. From his testimony it is credibly proved that he has taken the controlled delivery and deposited the same in malkhana which was taken from malkhana on 01.05.2014 for delivery at the post office. There is nothing in his testimony which could suggest that he is not authorized by competent authority i.e. DG. The DDG B.B. Mishra at the instance of competent authority vide letter dated 17.04.2014 Ex.PW7/A authorized PW7 IO Vishwanath Tiwari to take delivery and this fact is also communicated to the International Crime Agency and this factum is corroborated in the letters marked 7A and 7B therefore, no benefit of these omissions could be given to accused.

72.It is pertinent to mention that as per report Ex.PW7/B the said parcel was deposited in malkhana by PW7 at around 09.15 AM. The said fact is also corroborated through the malkhana entry dated 23.04.2014 and its taking out from the malkhana on 01.05.2014 however the said malkhana entry is not exhibited in the testimony of PW22 IO Vikas Yadav, malkhana incharge but no benefit of this omission could also be given to accused persons because seal no. BA00997456 which is of foreign origin found intact even at the time of its opening at the post office.

73.Ld. Defence counsel also raised the plea that there is nothing on record to suggest what investigation was conducted between 23.04.2014 to 01.05.2014. Perusal of file suggests that the address of Nani Deborah i.e. 444/14, Tughlakabad Extension is verified however none is found in the name of Nani Deborah but the said report is not exhibited nor K.L. Gurjar, NCB official who conducted the said inquiry is examined. However this omission is also not material because the prosecution credibly able to prove that accused Henry

Emeka had taken the delivery of the said parcel at the post office. There is nothing even in cross-examination of any of the raiding party members or independent witnesses that he was by way of any inducement or coercion brought to post office for taking delivery. His presence at the post office at the time of taking of delivery of parcel and his apprehension with parcel is credibly proved as already discussed, thus, in these circumstances no benefit of this omission could be given to accused.

74.Ld. Defence counsel submits that prosecution case regarding delivery of parcel to accused is dependent upon the delivery receipt/note Ex.PW2/A however the perusal of said delivery receipt itself makes the prosecution case doubtful because in the said receipt, the booking date is mentioned as 30.04.2014 whereas the prosecution case is that the said receipt is prepared on 01.05.2014 before delivery of parcel to the accused. Even otherwise, there are number of cuttings in the said delivery receipt at point X, X1 however prosecution not able to explain those cuttings. It is pertinent to peruse the said receipt Ex.PW2/A. Perusal of receipt suggests that it was generated on 01.05.2014 however at point X3 the booking date is mentioned as 30.04.2014. This anomaly is clearly explained by PW18 Rajender Shah who filled the said receipt in the computer. He explained that the parcel received in post office on 01.05.2014 and the portion X3 showing the booking date 30.04.2014 got filled by computer system on its own and the same was not filled manually. The receipt was prepared on 01.05.2014 is corroborated through the statements of PW18, PW2 and other raiding party officials. Certain anomaly regarding the time or not seeing by some of the witnesses of the person who had taken out the receipt is hardly material. PW18 though in cross-examination stated that portion X and X1 and point B are not written by him. The portion X and X1 are the cuttings on the name (handwritten) of accused Nani Deborah @ Nicole Tannidadwi and address 444/19 and point B is the signature of the accused. The signature of accused are not at all disputed. The cuttings of name of accused Nani Deborah (handwritten) do not in any manner discredit the said receipt. The signature of delivery PA found blank is stated to be due to omission. The execution and the discrepancy if

any in the said receipt is duly explained. There is nothing material in the evidence to discredit the receipt. The receipt is credibly proved by the prosecution through the testimony of raiding team officials and PW2 and PW18.

75.Ld. Defence counsel also raised the plea that prosecution has not examined postman Pradeep who is alleged to have received the call from Sharon Phocum regarding the delivery and also delivered the said parcel to accused Henry Emeka at the post office. This witness was summoned number of times by this court however he was not found traceable therefore, he was dropped. Ld. Defence counsel also raised the plea that IO Vivek Prakash is also not examined by prosecution. IO Vivek Prakash died when the prosecution evidence was going on therefore no benefit of his non examination could be given to accused persons particularly when the prosecution is able to prove the factum of delivery of parcel in intact condition to accused Henry Emeka. The prosecution also able to prove the circumstances connecting the accused with the offence even independent of his examination.

76.Ld. Defence counsel submits that as per information dated 01.05.20214 (Ex.PW15/A), IO Vivek Prakash mentioned that one male person contacted the postman Pradeep however the postman Pradeep in his statement u/s 67 NDPS Act (Ex.PW4/M) has categorically mentioned that he was contacted by a lady. This itself create doubt over the genuineness of this information. The perusal of information Ex.PW15/A only suggests that one person from telephone no. 9643160795 made enquiries regarding the parcel. There is no mention of any male person in the said information hence this plea as raised is not at all material.

77.Ld. Defence counsel also raised the plea that the said parcel has started its journey from Trinidad and request for controlled delivery was received from London, UK however there is no material about the investigation from Trinidad. Once the parcel is received in sealed condition in India for controlled delivery which was taken by accused Henry Emeka then merely the fact that there is nothing on record regarding investigation from Trinidad is not material. Ld. Defence counsel also raised the contention that as per the information of

controlled delivery it is alleged that the parcel contains 500 gm of cocaine however the parcel is found to be containing 610 gm of cocaine. The identity of parcel is duly proved and the seal on the said parcel is also found intact till it was opened at the post office after delivery to accused Henry Emeka, then in these circumstances, this anomaly also of no benefit to the accused.

78.Ld. Defence counsel also raised the plea that there is no mention of the parcel number and seal in the report Ex.PW7/B, however as already discussed the parcel in intact condition found to have been delivered by the Captain, then deposited in malkhana thereafter opened in sealed condition at post office. Therefore no benefit of these omission can be given to accused in overall facts and circumstances.

79.It is pertinent to notice that during personal search of accused Sharon Phocum one mobile phone Nokia IMEI No. 356320/05/668899/9, SIM No. Vodafone 83131966462HLR1 and from the personal search of accused Henry Emeka, besides two mobile bearing no. 9818923825 and 9599984703, one Blackberry mobile having IMEI no. 356020503777880 are recovered. However during investigation, though the query is sent for ascertaining the mobile number of SIM Vodafone of accused Sharon Phocum however there is nothing on record to suggest that the said query was addressed. There is no effort made during investigation to ascertain the mobile numbers through the SIM and IMEI number recovered from accused Sharon Phocum and Henry Emeka. There is nothing on record i.e. complaint and documents filed alongwith complaint and also in evidence why such material evidence could not be brought during investigation however from this lapse no benefit could be accorded to the accused in present facts and circumstances.

80.Ld. Defence counsel submits that PW4 IO Ajay Dahiya in the letters to Nodal Officers (Ex.PW4/E1, E2, E3, E8 dated 16.05.2014, 19.06.2014 and 20.08.2014) mentioned in this case one person was arrested which creates doubt over the entire story of prosecution. This plea is not at all convincing because as per the record, the accused persons are in JC on the said dates therefore, the mentioning of fact that only one person was arrested is only thus a casual mistake, hence no

doubt at all is created because of this mistake over prosecution case.

81. It is pertinent to notice that investigation over the identity and location of accused Nani Deborah is not only very poor but incompetent. The IO got to know about the whereabouts of Nani Deborah through the co-accused that he is in Nigeria therefore written a letter (Ex.PW4/O) to the Assistant Director, Central Foreigners Bureau (CFB), and in reply Ex.PW4/P the Assistant Director, Central Foreigners Bureau stated that the arrival or departure report of said person could not be traced on the given parameters. Now it is pertinent to see the letter Ex.PW4/O over the parameters sent to CFB and the contents are reproduced as under:

“Sub- Address of the respondent/Nani Deborah-reg.

It is submitted that one Nigerian namely Nani Deborah was came to India and his period of stay in India is unknown. Details of the said person are unknown:

- 1. Any travel history and paragraph of the abovesaid persons.*
- 2. If any address and phone number given by the said person during his stay in India.”*

This letter only contains the name Nani Deborah and no other particulars i.e. passport number, his address or the mobile number available with NCB. This letter also suggests that travel history and photograph, address and phone number are not known whereas the NCB has got his photograph through the community membership card Ex.PW2/B and the phone number through the co-accused but not sent those details to CFB. This suggests that NCB ritually sought the details from CFB without any clear intent to trace accused Nani Deborah. Furthermore, at the time of delivery of parcel, accused Henry Emeka showed the All India Nigeria Students Community membership card of Nani Deborah (Ex.PW2/B), however there is nothing on record that during investigation any inquiry was conducted from this All India Nigerian Students Community Association by IO. There is also nothing in statement of accused u/s 67 about the identity documents of Nani Deborah. No enquiry over the dates of his staying in India and exit from India from accused u/s 67 NDPS Act. The act and intent of NCB in tracing the main international drug trafficker Nani Deborah is deplorable.

82. However, 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 de hors 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 dependent solely on probity of investigation. The investigation as well as the prosecution of present case found not only defective but also incompetent which is not expected from the agency like NCB. The intent to go deep into the matter is conspicuously missing on the part of NCB, however on cumulative appreciation of the evidence on record, no benefit of these defects and lapses could be given to the accused.

Presumption u/s 35 and 54 of NDPS Act

83. 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.

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.

84. In view of the mandate of above judgment, section 35 raises a presumption as to the knowledge and culpable mental state from the possession of illicit articles. As discussed the prosecution case over the factum of recovery of parcel containing contraband from the accused Henry Emeka who has taken the delivery on the instructions of accused Sharon Phocum is duly proved. Now the burden is upon the accused Henry Emeka to rebut that he is not in conscious possession. Apex court in *Baldev Singh Vs. State of Haryana (2015) 17 SCC 554* categorically held that once possession is proved then it is for the accused to establish that he was not in conscious possession of contraband. Accused Sharon Phocum is found to have directed the accused Henry to collect the parcel. The prosecution able to prove the foundational facts of apprehension of accused Henry Emeka with contraband and the conspiracy between both the accused beyond reasonable doubt however the accused Henry Emeka and Sharon Phocum unable to rebut the said presumption.

85. 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. On cumulative appreciation of the evidence despite lapses, lacunae and discrepancies, the prosecution able to prove the foundational facts against accused persons beyond reasonable doubt.

86. In view of above discussion, prosecution able to prove foundational facts beyond doubt. The presumption u/s 35 and 54 NDPS Act of culpable mental state and conscious possession arose in favour of the prosecution but accused unable to rebut the said presumption. Accordingly, prosecution able to prove its case beyond reasonable doubt. Hence, accused Henry Emeka Ndupu found guilty for offence u/s 21(c) NDPS Act. Accused Henry Emeka Ndupu and Sharon Phocum are also found guilty for commission of offence under Section 29 NDPS Act. Both the accused convicted accordingly. Let both the accused be heard on point of sentence.

**Announced in the open court
on this 13th day of January, 2021**

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