

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

Case No. SC/8510/16
ID No. 02403R0046652014

Narcotics Control Bureau
Through: Sh. Pardeep Singh
Intelligence Officer,
Narcotics Control Bureau, New Delhi

Versus

1. **Chidiebere Kingsley Nawchara (In JC)**
S/o Fidelie Nwachara
R/o 712, Road Festac,
Lagos, Nigeria

2. **Ezechi Nwankwo Israel Junior (Proclaimed Offender)**
S/o Ezechi Nwankwo
R/o Akin Joe bus stand,
Satellite Town,
Lagos, Nigeria

Date of Institution : 21.03.2014
Judgment reserved on : 13.12.2019
Date of pronouncement : 21.12.2019

JUDGMENT

1. Prosecution case in brief as per the complaint filed that on 01.10.2013 at around 07.00 AM, a secret information was received by IO CS Rai that accused Chidiebere Kingsley Nawchara is coming from Lagos via Dubai by flight no. EK-510 carrying narcotic drug in his red colour trolley bag no. EK-029831 thereafter the said information was reduced into writing and put up before Jai Kishan, Superintendent who directed IO C.S. Rai to constitute a team. Thereafter the team consisting of IO C.S. Rai, IO Pardeep Singh, IO Vishwanath Tiwari, Sepoy Dinesh Kumar and driver Nadeem departed from NCB office at around 08.00 AM with all the necessary material in government vehicle to IGI Airport and reached there at around 08.30 AM thereafter, C.S. Rai requested number of people to become witnesses, one Ct. Bansi Lal of CISF agreed. The

said flight reached at around 09.20 AM. The suspected baggage came on conveyor belt at around 09.35 AM. The particulars of bags were matched and found in order, thereafter the NCB officials started waiting for owner. After some time the present accused came and collected the suspected bag thereafter, he was intercepted and on inquiry disclosed that the bag he picked up belongs to him. His identity is also established through his passport and other traveling documents. He further disclosed that one of his associates accused Nawnkwo Ezechi is also coming via flight no. ET-688 alongwith Mexican cocaine in his bag. Thereafter the said information was conveyed by IO Vishwanath Tiwari to Superintendent Jai Kishan telephonically who directed NCB officials to take action as per information. Thereafter at the instance of accused Chidiebere accused Nawnkwo Ezechi was intercepted, then both the accused with their baggages were taken to CISF control room where notices u/s 50 were served upon them and they were explained their legal right to be searched in presence of magistrate or gazetted officer however they replied in writing that they do not want the presence of gazetted officer or magistrate and have no objection if their personal search would be conducted by NCB officials. The bag of accused Chidiebere marked Summit was opened found to contain clothes and when the clothes were emptied a bulge was observed in the bottom. Three packets wrapped in blue colour plastic gift wrap marked with happy birthday paper were recovered from false cavity of bottom of the bag. All the three packets were found containing similar type of substance. The substance of each packet was tested separately and found positive for cocaine. The substance of all the three packets were similar in nature, colour, texture, appearance, smell and found positive for similar narcotics. The total substance was found to be 5 kg. Samples of 5 gm each were drawn.

2. On opening the bag of accused Nawnkwo Ezechi, one packet wrapped with yellow tape was found, and on opening the same, found to contain white substance which tested positive for cocaine, totally weight 3.4 kg. Samples were drawn, seizing and sealing proceedings were completed, panchnama was

prepared, seal was returned and seizure formality in the seal movement register were completed. The case property was deposited in malkhana. The statement of both accused u/s 67 was recorded in which they admitted the recovery and incriminating facts. Respective seizure report and arrest report required u/s 57 were submitted before Jai Kishan, Superintendent, samples were sent to CRCL for testing. As per CRCL report dated 17.10.2013 the samples were not found positive for cocaine and opined that the samples be sent to CFSL, Hyderabad for further testing, thereafter, after obtaining permission of this court samples were sent to CFSL, Hyderabad and as per report dated 23.10.2013 was found positive for methamphetamine. Both the accused disclosed the name of one Ebere having mobile no. 9717509567 to whom the drugs were to be delivered but the said mobile was found to be in the name of one Pushpa Chaudhary who was not traceable. The information about the seizure of substance and arrest of accused was also sent to Ministry of External Affairs by Superintendent Jai Kishan and consequently the complaint was filed before this court.

3. Vide order dated 03.09.2014 charges u/s 29 and 22(c) and 23(c) were framed against both the accused to which they pleaded not guilty and claimed trial. The accused Ezechi during trial jumped the interim bail and declared PO vide order dated 06.09.2018.
4. The prosecution for substantiating its case examined 14 witnesses. The summary details of their depositions are as follows:
5. **PW13 IO C.S. Rai** stated that after getting the secret information, communicated the same to Superintendent Jai Kishan and on his directions constituted the team which left to the airport and at airport he confirmed the name of accused from concerned airline staff and one Bansi Lal was joined as independent witness. The bag in question was identified at conveyor belt no.14, and when the accused collected the same, he was stopped and inquired. IO Vishwanath Tiwari made inquiries and he disclosed the name of his another associate who has come to IGI airport with black colour trolley bag thereafter, Superintendent Jai Kishan was informed then at the instance of accused

Chidiebere the said person was stopped. In the presence of independent witnesses, section 50 notice was given and from the bags of both accused, cocaine was recovered. In cross-examination, stated before reaching the airport they did not conduct any inquiry from the airlines but not collected any passenger manifest of flight arriving in Delhi on 01.10.2013. He denied suggestion that no information vide Ex.PW8/A was given to the Superintendent. The accused was first noticed at conveyor belt and he alongwith Vishwanath Tiwari and Pardeep Singh went inside the airport. He also did not make any inquiry from concerned airline staff by which the suspect would be coming. The passenger manifest of both the accused were not collected. He denied suggestion that accused Chidiebere has not given information about the arrival of second accused. He further stated that if on the baggage tag of accused, there was any ticket number to correlate with the accused. No CCTV footage from the airport was taken. He denied suggestion as the accused had not picked the bag from conveyor belt therefore no CCTV footage was taken. Respective bags were carried by accused to CISF rooms by themselves. The bag of accused was locked but he do not remember the type of lock and did not mention in panchnama how the accused opened the bag and not weighed all the three packets individually. He also stated that in present case he seized custom declaration form of accused and denied suggestion that baggage of contraband was planted over the accused.

6. **PW1 IO Pardeep Singh** also accompanied IO C.S. Rai to airport being a member of raiding team and stated that they had joined Bansilal as public witness. Both the accused were apprehended with their baggages, notice u/s 50 were given and on search of baggage, contraband cocaine was recovered. In cross-examination stated that he had not signed the panchnama. He further stated he do not remember whether Bansilal intimated his commanding officer before joining. He also stated that he knew Bansilal since he met him at airport on 01.10.2013. He further stated that he do not remember whether Bansilal wrote in his statement that contraband was recovered from the false cavity of

red colour trolley bag or not. He further stated that he do not remember what sort of tests were conducted by IO C.S. Rai to know the nature of contraband. The chemicals in the test kit were in liquid form in small bottles. He further stated that substance from each packet was tested separately. He also stated that C.S. Rai showed him the packets which he had taken out from the bottom of the bag. In cross-examination on behalf of other accused stated that they had not seen accused no.2 picking up bag from conveyor belt. He had no directions from anyone to act on the second information. The drug was white crystalline substance. Both the accused carried their own baggage to CISF office. The statement of Bansilal was recorded by him on 10.10.2013.

7. **PW10 IO Vishwanath Tiwari** also accompanied the team to airport and also made call from airport to Superintendent Jai Kishan regarding the second accused. In cross-examination stated that he did not correlate the baggage number as contained in information with travel documents. He further stated he do not know where Bansilal was posted and where from C.S. Rai brought him however he came to spot before interception of accused and bag of accused reached at conveyor belt no.14. He do not remember whether Bansilal was also witness in some other case of NCB. He further stated he do not remember whether the bag of accused was having any lock or not and also do not remember three packets were recovered from one place of bag or from different places but C.S. Rai taken them out of the bag. The bag of the accused no.1 was searched first and thereafter that of second accused. C.S. Rai conducted the test and then they came to know about the substance as cocaine. He further stated he do not remember whether any test for 'methamphetamine' was conducted by IO C.S. Rai or not.
8. **PW11 Bansilal** stated that on request of NCB official he joined as a witness and in his presence accused collected the bag and inquiry was made from him. He also disclosed about his other friend coming to Delhi airport and then both the passengers were intercepted and taken to CISF control room. Three packets of accused Chidiebere were opened found to contain some crystal type

substance and each packets was tested by NCB officials and told him that it was cocaine. Second bag was also tested. He also stated that he can identify the passenger. At this stage, witness pointed out towards accused Chidiebere and regarding the second passenger he stated that he is unable to identify him. However later on after being cross-examined by Ld. SPP this witness identified the second accused Nawnkwo Ezechi. In cross-examination stated that three packets were recovered from the said bags under the clothes and the documents were prepared at the spot. He also stated that when NCB officials met him they disclosed about the bag in question however do not remember the said number. He further stated that packets were not recovered from side walls of the bag and the NCB officials checked the contents of each packet by taking out sample from each of them.

9. **PW2 IO Azad Singh** recorded the statement u/s 67 of accused Chidiebere and arrested the accused on 02.10.2013. **PW3 Sandeep Kumar** recorded the statement of co-accused Nawnkwo Ezechi u/s 67. **PW4 Vikas Yadav** stated that IO C.S. Rai deposited the case property in malkhana, and on 03.10.2013 on the directions of Superintendent samples were sent to CRCL on 18.11.2013 remnant sample mark A1 and B1 were received from CRCL which were sent to CFSL, Hyderabad on 14.12.2013. On 30.01.2014 the reports received from CFSL, Hyderabad.
10. **PW5 Arun Kumar Arya**, Chemical Examiner, CRCL stated that on both the samples, presence of cocaine could not be ascertained, and therefore opined that both the samples be sent to CFSL, Hyderabad. **PW6 K.M. Varshney** stated that he examined the sample at CFSL Hyderabad and methamphetamine was detected. **PW7 Vasudev Bharadwaj** collected report from CFSL, Hyderabad.
11. **PW8 Jai Kishan**, Superintendent stated that he have directed C.S. Rai to take necessary action upon the information received from him, and thereafter received another information through telephone from IO Vishwanath Tiwari. Further also received the seizure and arrest report. **PW9 Ct. Dinesh Kumar** accompanied the team to airport on 01.10.2013.

12. **PW12 Mukesh Kumar Gautam**, Assistant Chemical Examiner CRCL stated that sample sent for analysis was not found positive for cocaine.
13. **PW14 Dr. Umang Kumar Verma**, Medical Officer exhibited the MLC of both the accused and stated that both accused are fit and no fresh injury observed.
14. Accused Chidiebere in his statement u/s 313 Cr.PC denied all the incriminating circumstances put to him and stated that he did not bring any red colour trolley bag into India and no proceedings of sealing of contraband was done in his presence either from his bag or from the bag of co-accused. He also denied that co-accused was apprehended at airport in his presence. He further stated that statement u/s 67 was recorded under force and he was beaten and tortured and signatures were taken on various blank papers, semi printed papers or small slips. He also stated that no medical examination was conducted. He also stated that he only brought one bag with him which was a cabin baggage containing the personal articles. He also stated that no person in the name of Bansi Lal was ever present. He stated that he came to India on 01.10.2013 only with a personal bag i.e. shoulder bag as a cabin baggage, and he do not know the co-accused and no contraband was recovered from him, and he was forced to write the statement and retracted the same at first opportunity and also opted to lead defence evidence. However, accused not led any DE, thus DE stood closed vide order dated 30.09.2019.

Material exhibits:

15. **Ex.PW8/A** is secret information. **Ex.PW8/C** is the information given by IO Vishwanath Tiwari to Superintendent on telephone. **Ex.PW11/E** is the copy of passport of accused Chidiebere. **Ex.PW11/E** is the e-ticket of the accused. **Ex.PW11/B, PW11/C and PW11/D** are the boarding pass, baggage stub and customs declaration form of the accused. **Ex.PW11/K** is the copy of passport of accused Nawnkwo Ezechi. **Ex.PW11/F** is the e-ticket of accused Nawnkwo. **Ex.PW11/G, PW11/J and PW11/K** are the boarding pass, baggage stub and custom declaration form of accused Nawnkwo Ezechi. **Ex.PW1/A and PW1/B** is the notice u/s 50 to accused persons. **Ex.PW11/L** is the panchnama of

proceedings over the baggages. **Ex.PW2/A** is the statement of accused Chidiebere u/s 67 NDPS Act. **Ex.PW3/A** is the statement of accused Ezechi u/s 67 NDPS Act. **Ex.PW2/B** is the arrest memo of accused Chidiebere. **Ex.PW2/C** is the personal search memo of accused Chidiebere. **Ex.PW3/B** is arrest memo of accused Ezechi. **Ex.PW3/C** is the memo of jamatalashi. **Ex.PW14/A** is the MLC of accused Chidiebere and **Ex.PW14/B** is the MLC of accused Ezechi. **Ex.PW8/D** is the seizure report u/s 57 NDPS Act. **Ex.PW2/D** is the arrest report u/s 57 of accused Chidiebere. **Ex.PW3/D** is the arrest report of accused Ezechi u/s 57. **Ex.PW5/A** is the acknowledgment of delivery of parcels at CRCL. **Ex.PW5/B** is the report of CRCL showing presence of cocaine could not be ascertained with opinion that sample be forwarded to CFSL Hyderabad to rule out the presence of any narcotic drug or psychotropic substance. **Ex.PW6/C** is the CFSL report of Hyderabad showing both the samples found to contain methamphetamine. **Ex.PW1/D** is the statement of Bansi Lal u/s 67 NDPS Act. **Ex.PW8/B** is the copy of seal movement register. **Ex.PW4/B** is the copy of malkhana entry. **Ex. DA** retracted statement of accused dated 09.10.2013.

16.Ld. Counsel for accused submits that prosecution not able to prove the factum of possession of trolley bag by the accused. The custom receipt column about number of baggages is blank and which corroborated the stand of accused that he was carrying only hand baggage/shoulder bag. Ld. Counsel for accused submits that the testing at airport for cocaine is found suspect because it was not confirmed by CRCL Delhi, and later on, falsely methamphetamine alleged to be detected at the CFSL Hyderabad. Ld. Counsel for accused submits that this creates doubt over the recovery of contraband in the manner relied by the prosecution. Ld. Counsel for accused submits that mandatory provisions of section 50 is not complied and prosecution not able to prove the foundational facts beyond doubt therefore, presumption u/s 35 and 54 do not arise in favour of prosecution. Ld. Counsel for accused submits that malkhana register was manipulated, the statement of independent witness u/s 67 NDPS Act is not admissible as the legal right was not explained to him, and furthermore the

testimony of prosecution witnesses are contradictory and no reliance can be placed on them. Besides oral submissions, Ld. Counsel also filed detailed written submissions.

17.Ld. SPP on the other hand submitted that accused was found with check-in-bag at airport counter. His presence at the airport is not at all doubtful as clear from the travel documents and furthermore also admitted the said fact in his statement u/s 313 Cr.PC but only raised the plea that check-in-baggage do not belong to him and he was carrying only hand baggage. Ld. SPP submits that the testimony of PW11 independent witness, and PW1, PW13 and PW10 on the factum of apprehension of accused and recovery of contraband from check-in-baggage of accused is fully credible. Ld. SPP submits that prosecution able to prove its initial burden beyond reasonable doubt however accused unable to rebut the presumption u/s 35 and 54 NDPS Act thus, liable to be convicted for the offences charged.

18.Arguments heard. Record perused.

19.The brief sequence of facts is that on receiving the secret information regarding the particulars of accused Chidiebere, raiding team on the directions of Superintendent reached airport where joined PW11 Ct. Bansi Lal of CISF, as an independent witness and noticed the baggage of accused Chidiebere at belt no.14, and thereafter when the accused picked up the said baggage, he was stopped and interrogated. Thereafter, accused also informed that co-accused was coming with another baggage containing contraband, then the said information was communicated to superintendent telephonically who directed to take action as per law. Consequently co-accused was also apprehended thereafter both accused were taken to CISF room where notices u/s 50 were given however both accused refused to get searched before gazetted officer or magistrate, and on the search of their baggages 5 kg of cocaine was recovered from bag of accused Chidiebere and 3.4 kg of cocaine was recovered from bag of co-accused.

20. The co-accused during proceedings jumped the interim bail and absconded thus declared PO. The trial is completed against the present accused. This accused in his statement u/s 313 Cr.PC not disputed his entry in India in the manner stated by prosecution however, only took the plea that he has come to India only with a shoulder bag containing his personal clothes. This witness did not examine any witness in defence to prove the said fact. However, when the accused was apprehended, his e-ticket receipt Ex.PW11/A alongwith the baggage stub / tag Ex.PW11/C also seized suggesting that he was carrying the check-in-baggage and not the hand baggage. The baggage stub categorically shows that accused was carrying checkedin baggage and not shoulder bag as pleaded by him in his statement u/s 313 Cr.PC. There is nothing material in cross-examination of witnesses to discredit that these documents i.e. e-ticket (Ex.PW11/A), boarding pass (Ex.PW11/B) and the baggage stub (Ex.PW11/C) were not recovered.
21. Now this court has to appreciate the fact whether the bag in question recovered was found concealing the contraband drug.

Recovery of trolley bag

22. PW11 Ct. Bansi Lal, the independent witness stated that on the said date he was posted at IGI Airport as a Constable in CISF and at the instance of NCB official joined the raid and NCB official also apprised him about the purpose i.e. one Nigerian person is coming from Dubai in Emirates airlines flight suspected to bring narcotics drug. This witness categorically stated that the said flight landed between 09-09.30 PM and NCB officials took position behind the conveyor belt and when the said Nigerian person touched the bag he was apprehended by NCB officials and thereafter, his passport, boarding pass and ticket were examined. The boarding pass of said passenger was having the counterpart of baggage tag and the particulars of same were tallied with the baggage tag affixed on the bag. This witness categorically stated that the bag recovered at the instance of accused from the possession of accused having the same particulars which was alongwith the boarding pass, and the said fact is duly proved through the documents Ex.PW11/A and PW11/B. His testimony is also

corroborated through testimony of PW13 IO C.S. Rai, PW1 IO Pardeep Singh, PW10 IO Vishwanath Tiwari. Therefore, the presence of accused at the airport collecting the bag from the conveyor belt is duly proved by the prosecution both through oral testimonies as well as the traveling documents of the accused. The explanation of accused that he was carrying only shoulder bag is also falsified the baggage stub/tag Ex.PW11/B suggesting checkin bag.

Recovery of contraband from trolley bag

23. The next circumstance this court has to appreciate is the recovery of contraband articles from the said bag. The said bag was duly searched in presence of independent witness PW11 Bansi Lal. He categorically stated that bag of accused Chidiebere was first examined and found to be containing three packets wrapped in gift packing paper and on opening the same, found to contain crystal type substance and on testing, NCB officials told him that it was cocaine and the total weight was found to be 5 kg. This witness also categorically stated in cross-examination that all the three packets were tested separately and the packets were not recovered from the walls. This fact is duly corroborated through panchnama which suggests that all the three packets were recovered from the bottom of the bag and tested separately and thereafter mixed and total weight is found 5 kg out of which two samples were drawn. The recovery of the contraband from the said bag is also corroborated through the testimony of PW13 IO C.S. Rai, PW1 IO Pardeep Singh and PW10 IO Vishwanath Tiwari. There is nothing material to discredit the fact that the contraband was not recovered from the said baggage. PW11 Ct. Bansi Lal is the government official who was on duty. He is found to be also associated in investigation previously in another case but that fact do not suggest that he is a stock witness. The natural presence of this witness at airport and his deposition regarding the proceedings found credible therefore the factum that he was previously also associated in proceedings of NCB is no ground to discredit this witness. Furthermore, accused is also not disputing his presence at that place and only raised the plea that he was having shoulder bag which itself falsified through his

travelling documents carried by him as discussed.

24. The samples of said contraband were sent to CRCL, Delhi however PW5 Arun Kumar Arya, Chemical Examiner and PW12 Mukesh Kumar, Assistant Chemical Examiner, CRCL Delhi stated that sample sent for analysis were not found positive for cocaine therefore they opined that to rule out possibility of any drug, sample be sent to CFSL, Hyderabad thereafter with the permission of court, samples were sent to CFSL, Hyderabad and then Sh. K.M. Varshney exhibited the report and stated that in both the samples of contraband recovered from both accused. 'Methamphetamine' was detected. There is nothing material in cross-examination that the said drug was not detected after testing. The testimony of PW6 K.M. Varshney over the testing of sample is found unimpeached therefore prosecution able to prove that contraband recovered from bag of accused Chidiebere is 'Methamphetamine'.
25. Ld. Counsel for accused submitted that there is a non compliance of section 50 NDPS Act as the search of baggage was not conducted in presence of gazetted officer or magistrate, and accused is also not apprised of his legal right to be searched before gazetted officer or magistrate. The notice u/s 50 was given to both the accused by PW18 Vishwanath Tiwari. The notice u/s 50 Ex.PW1/B given to accused Chidiebere categorically showing that he has a legal right to be searched before the magistrate or gazetted officer. However, he wrote that he do not need any gazetted officer or magistrate and NCB official can take his search therefore, this plea that he was not apprised about his legal right is not at all tenable. Even otherwise, the contraband is not recovered from the body of accused but from checkin baggage. In this scenario it is relevant to mention the recent judgment titled as ***State Of Punjab vs Baljinder Singh Criminal Appeal Nos.1565-66 of 2019 dated 15.10.2019*** wherein apex court observed as under:

“14. The law is thus well settled that an illicit article seized from the person during personal search conducted in violation of the

safe-guards provided in Section 50 of the Act cannot by itself be used as admissible evidence of proof of unlawful possession of contra-band.

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

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

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

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

Thus as per mandate of search even if there any infraction with respect to personal search that will not affect search for any other articles and in present case it is checked in baggage.

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

26. The prosecution further relied upon the statement of accused u/s 67 NDPS Act. As far as the admissibility of said statement is concerned, Apex court in case titled *Ram Singh Vs. Central Bureau of Narcotics 2011(11) SCC 347* after relying upon judgment of Apex court in case titled as *Kanhaiya Lal Vs. UOI*, held that if the confessional statement u/s 67 are found voluntary then they could form the basis of conviction, but because of the difference in view, the later Bench of Apex Court in case titled *Toofan Singh Vs. State of Tamil Nadu 2013(16) SCC 31* referred the matter to the larger Bench. Delhi High Court in case titled *Rapheal Vs. Devender Singh (Intelligence Officer) (Directorate of Intelligence) Crl. Appeal No. 1394/2013 dated 24.05.2015* held that “it is trite that a statement under Section 67 of the NDPS Act is admissible in evidence and can be considered by the Court against the accused. It is also settled law that if the same is found to be made voluntarily, then the same can even be made the sole basis of conviction of accused. However, if the same is subsequently retracted by the accused then such a statement cannot be made the sole basis of conviction of accused and independent corroboration is required.” Apex court in case titled as *Mohd. Fasrin Vs. State Crl. Appeal No. 296/2014 dated 04.09.2019* held that even if confessions made to investigating officers are held to be admissible under Section 67 of Narcotic Drugs and Psychotropic Substances Act, 1985, the Court has to be satisfied that it is a voluntary statement, free from any pressure and also that the accused was apprised of his rights before recording the confession. Thus the law till today is that the statement u/s 67 is admissible however if it is retracted then the court cannot act upon it without any corroboration. Furthermore, before acting of the statement, the court has to satisfy whether it is voluntary and accused was apprised of their right that it could be used against them. Therefore, the conviction in present case cannot be

maintained merely on the basis of confessional statements u/s 67 but it could be used for the purpose of corroboration with other evidence on record.

27. Accused pleaded that he has not given voluntarily statement u/s 67 and he was forced to write the said statement and was beaten and tortured. However as far as the factum of beating and torture is concerned, the medical examination of accused was conducted and PW14 Dr. Umang Kumar Verma stated that on examination both the accused are found fit and no fresh injury observed. Even otherwise, the statement u/s 67 contains the particulars of accused which were special to his knowledge only. In this statement he stated that he had been to India before also to buy clothes and on 30.09.2013, he met Chigorie in Lagos who handed over him the contraband and also told him that one more Nigerian national taking the cocaine. Thereafter he hide the said cocaine in his trolley bag and came from Lagos to Dubai, and then from Dubai to New Delhi, and when he collected baggage from conveyor belt he was apprehended and on search the contraband was recovered. He categorically admitted that he brought the drugs in India for money. The proceedings which is mentioned in this statement is duly corroborated through statement of independent witnesses and other NCB officials. This accused also admitted his presence in India and the manner in which he came to India. There is nothing in his statement u/s 313 CrPC what prompted the NCB officials to implicate him in present case, particularly when he is naturally coming on said date from outside India. In these circumstances, it cannot be held despite retraction that this statement is not voluntarily given by accused, therefore could be used for corroboration. However, even if this statement is ignored, the prosecution is able to prove that contraband was recovered from the baggage of this accused.

28. The plea of the defence counsel that PW11 Ct. Bansi Lal was not informed about the provisions of section 67 is hardly material because PW11 supported the prosecution case regarding the apprehension of accused with the bag and recovery of contraband from the said bag. Ld. Counsel also raised the plea that custom declaration from do not show that there was any checked in baggage.

At this stage, it is pertinent to look at the custom declaration form Ex.PW11/D which mentions accused name and his flight number and date of arrival in India however both checkin baggage and hand baggage column is blank. This form cannot be seen in isolation. The court has to look for the checkin baggage, the e-ticket as well as baggage tag Ex.PW11/C which suggests that there was a checkin baggage of accused. This custom declaration form also not corroborating the plea of accused that he was carrying only hand baggage therefore no benefit could be given to accused because of non mentioning of checkin baggage in custom declaration form.

29.Ld. Defence Counsel for the accused raised plea that NCB officials have not collected the CCTV footage which could clear the entire picture, however there is no mandatory requirement of collection of CCTV footage by the investigating agency neither the accused during proceedings opted to call for CCTV footage, even otherwise because of this omission, the testimony of independent witnesses alongwith NCB officials cannot be brushed aside particularly when the entire sequence appears natural and there is no apparent reason for falsely implicating the accused in present case.

Offence committed :23(c)/22(c) NDPS Act

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

12. Coming to the context of Section 18 of the NDPS Act, it would have a reference to the concept of conscious possession. The legislature while enacting the said law

was absolutely aware of the said element and that the word "possession" refers to a mental state as is noticeable from the language employed in Section 35 of the NDPS Act. The said provision reads as follows:-

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

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

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

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

13. In Noor Aga v. State of Punjab and Anr.[17], the Court noted Section 35 of the NDPS Act which provides for presumption of culpable mental state and further noted that it also provides that the accused may prove that he had no such mental state with respect to the act charged as an offence under the prosecution. The Court also referred to Section 54 of the NDPS Act which places the burden to prove on the accused as regards possession of the contraband articles on account of the same satisfactorily. Dealing with the constitutional validity of Section 35 and 54 of the NDPS Act, the Court ruled thus:-

"The provisions of Section 35 of the Act as also Section 54 thereof, in view of the decisions of this Court, therefore, cannot be said to be ex facie unconstitutional. We would, however, keeping in view the principles noticed hereinbefore, examine the effect thereof vis--vis the question as to whether the prosecution has been able to discharge its burden hereinafter."

And thereafter proceeded to state that:-

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

doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.

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

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

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

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

"12. We do not find any substance in this submission of the learned counsel. The appellant *Dharampal Singh* was found driving the car whereas [pic]appellant *Major Singh* was travelling with him and from the dicky of the car 65 kg of opium was recovered. The vehicle driven by the appellant *Dharampal Singh* and occupied by the appellant *Major Singh* is not a public transport vehicle. It is trite that to bring the offence within the mischief of Section 18 of the Act possession has to be conscious possession. The initial

burden of proof of possession lies on the prosecution and once it is discharged legal burden would shift on the accused. Standard of proof expected from the prosecution is to prove possession beyond all reasonable doubt but what is required to prove innocence by the accused would be preponderance of probability. Once the plea of the accused is found probable, discharge of initial burden by the prosecution will not nail him with offence. Offences under the Act being more serious in nature higher degree of proof is required to convict an accused.

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

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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.

31. On overall appreciation of the evidence on record, the prosecution able to prove that the Methamphetamine 5 kg i.e. commercial quantity found concealed in bag in possession of the accused brought from outside India, therefore, there is presumption under Section 35 and 54 NDPS Act of culpable mental state and conscious possession in favour of prosecution and accused utterly failed to rebut the same either through prosecution evidence or his own explanation. Accordingly, prosecution able to prove its case beyond reasonable doubt. Hence, accused is found guilty for commission of offence under Section 22(c) and 23(c) NDPS Act. Accused **Chidiebere Kingsley Nawchara** is convicted for offence under Section 22(c) and 23(c) NDPS Act. Accused be heard on arguments of sentence.

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

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