

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

Case No. SC/9512/2016  
ID No. 02403R0164132016

**Narcotics Control Bureau, Through**  
Sh Vikash, Intelligence Officer,  
Narcotics Control Bureau,  
Delhi Zonal Unit, R.K. Puram, New Delhi

**Versus**

**Micheal Webuda (in JC)**  
S/o Sh Webuda  
R/o Mabale Yuganda  
Local Address: 43/7E, Ist Floor,  
Street no. 13, Krishna Park Extension,  
Tilak Nagar, New Delhi.

Date of Institution : 14.09.2016  
Judgment reserved on : 17.03.2021  
Date of pronouncement : 24.03.2021

**JUDGMENT**

1. Prosecution case in brief is that on 19.03.2016 IO Anand Kumar of NCB received information from CISF terminal 1D, IGI Airport that accused Micheal Webuda flying to Bangalore by Spice Jet is suspected to carry narcotic drug and psychotropic substance, and if search is conducted there is possibility of recovery. After recording of said information in writing, same was put up before superintendent and on his direction team was constituted which reached IGI Airport at around 1105 hours where IO met Inspector R.K. Vishwas of CISF who pointed out towards the accused. The accused thereafter on inquiry revealed his name as Micheal Webuda, showed his passport of Uganda, e ticket of Spicejet and boarding pass, 3-4 public persons were asked to join but none agreed however Inspector Ram Prasad, CISF joined the raid. Accused was given notice u/s 50 and apprised of his right to be searched before magistrate or gazetted officer however declined. The accused also declined to search the raiding team members as well as independent witness. During search, some hard object was

noticed around his private part and on inquiry, accused disclosed that he was carrying some capsules of drug which were to be handed over at Bangalore. Accused took out the white colour cloth packet from innerwear having word 'Klove' found to be containing 6 oval shaped capsules wrapped in a brown colour adhesive tape. Each capsule on testing found to be containing similar type of white powdery substance and tested positive for cocaine. As the colour, texture, appearance and properties of all six were similar, they were collected at one place, on weighing found to be 105 gm. Two samples were drawn, seizing and sealing proceedings were conducted, panchnama was prepared, travel documents were also seized.

2. House of accused i.e. 43-7E, first floor, street no. 13, Krishna Park Extn. Tilak Nagar was searched but nothing was recovered. The accused in his statement u/s 67 disclosed that he received the said capsules from one Sunny but was not aware of his address and whereabouts. IO Anand Kumar prepared seizure report. Statement of witnesses u/s 67 recorded. Case property was deposited with malkhana. Vide letter dated 21.03.2016 the sample were sent to CRCL for chemical analysis. Vide report dated 10.06.2016 CRCL opined that sample in question found positive for cocaine. FRRO provided arrival and departure detail of accused. On completion of investigation, complaint is filed.
3. Vide order dated 25.10.2016, charge u/s 21(c) framed against the accused to which he pleaded not guilty. Prosecution for substantiating its case examined 12 witnesses. Summary details of witnesses is reproduced as under:
4. **PW1 IO Anand Kumar** deposed that at around 08.00 AM on 19.03.2016, he received information from CISF terminal airport then he communicated the same to Superintendent R.S. Joshi telephonically, and thereafter at his instructions he constituted raiding team and after collecting the material used for seizure and sealing, etc, reached airport at around 11.15 AM where he met Inspector R.K. Biswas who pointed out towards accused thereafter inquiry was made from accused. SI Ram Prasad joined as independent witness. Notice u/s 50 was given to accused. From the bodily search of accused six oval shaped capsules wrapped in brown tape were recovered tested positive for cocaine, panchnama was

prepared. In cross-examination stated that he was on deputation from CISF and he used to come to office at around 09-09.30AM, and in present case he received intimation at his residence however he does not remember whether he was using the same telephone on which he received information on that day and he reached the office at around 10.30 AM. He reduced in writing the secret information at office at around 10.30 AM and reached airport within 25 minutes. Inspector R.K. Biswas had not conducted the proceedings till his arrival at airport. The accused was not having any checked in baggage. The first document which he prepared at airport was test memo but do not remember if he prepared the test memo in duplicate or triplicate. He do not remember the time as to when he deposited the case property, samples in malkhana but it was immediately after his arrival in NCB office. Accused was found conversing in English. He denied suggestion that accused do not know English. He also stated it is correct that accused was found available at airport and pointed out by R.K. Biswas. He denied suggestion that CISF official had already taken out the contraband from personal hideouts of present accused and intimated to NCB department. He denied suggestion that panch witness is a stock witness. The weighing machine was being self operated is electronic machine.

5. **PW10 SI Ram Prasad** stated that on frisking he found something concealed by the accused therefore informed the seniors who informed NCB. At around 11-11.10 AM IO Anand Kumar and Rajiv Sehrawat came at airport and at their instance he joined the team. Notice u/s 50 was given and accused stated that he do not want to search himself in presence of gazetted officer or magistrate. On search from private parts, accused taken out parcel/thaili containing 6 capsules wrapped in brown colour tape and on testing found to contain white colour powdery substance tested positive for cocaine. The total recovered weight was 105 gm. Sample were taken, proceedings were conducted.
6. In cross-examination stated that accused was checked by him by metal detector and he observed hard object near private part, thereafter at around 09.45 AM, he informed the senior officer. Accused did not collect his articles before joining Mr. Biswas. He was also asked whether he saw any mobile phone, laptop etc. He

stated that the articles were x-rayed on the other side therefore he is not aware about the said articles. Accused was not frisked by Mr. Biswas however NCB team searched the accused. NCB officials also asked accused whether he wants to be searched in presence of gazetted officer or magistrate or not however he refused. He do not remember except him who other persons signed the notice. Accused had not made any statement in his presence at NCB office. The NCB officials had not separately weighed each capsule however total weight of all the capsules was 105 gm and weight of all the capsules is with polythene. He further stated IO Rajiv Sehrawat measure and told the total weight of 6 capsules as 105 gm. He further stated he cannot tell whether the weighing machine is electrical or battery run. In reply to the question that whether the cocaine separately weighed he stated that weight of cocaine is 105 gm. The witness stated that cocaine recovered from each capsule was weighed and total came about 105 gm however again stated that after checking the cocaine, the material alongwith shell of capsule weighed around 105 gm. The passport was also seized.

7. **PW2 IO Rajiv Sehrawat** stated that on 19.03.2016 he joined the team led by IO Anand Kumar and reached airport at around 11.05 AM where R.K. Vishwas, CISF official pointed towards accused thereafter IO Anand Kumar made enquiries from him. Accused produced his boarding pass, e-ticket. Ram Prasad, SI, CISF is joined as independent witness however some other persons were asked to remain present but none agreed. Accused was served with notice u/s 50 and was apprised of his right to be searched before magistrate or gazetted officer. His personal search was conducted and some hardness noticed near his private parts and he disclosed that he had concealed some drug capsules which were to be delivered in Bangalore thereafter he took out one thaili on which word 'Klove' was written and same was tied with orange colour string. Thereafter on opening, 6 capsules were recovered found to be containing white colour powdery substance then each capsule was tested individually found positive for cocaine and then the substance of all the capsules were collected in transparent polythene weighed around 105 gm. Panchanama was prepared, samples were taken. Statement of accused u/s 67 was recorded on 19.03.2016.

8. In cross-examination stated that he did not make any inquiry from R.K. Vishwas. IO Anand Kumar discussed with Vishwas. He had not seen the logbook and cannot say whether any entry was made. When they reached there, no passenger was present with Vishwas. He do not remember what was worn by the accused perhaps he might be wearing jeans. He further stated that he had given notice u/s 50 to accused and also apprised about his legal rights. He also stated that it is correct that one thaili was recovered from undergarments of accused found to be containing 6 capsules. The recovered capsules were examined and found containing cocaine. The weight of recovered contraband was 105 gm. He denied suggestion that panch witness is stock witness. He further submitted that as far as he remember, blue colour came during the test. He also denied suggestion that team members did not make any effort to collect CCTV footage. He also denied suggestion that they had not deliberately collected the CCTV footage. The colour of the substance was white and can be said milky. He further stated that accused met them at security hold area and he has taken out drugs from his underwear. They had gone to airport with prior information. He denied suggestion that reply of accused was forged and after testing each capsule, the substance of all the capsules were collected in a polythene weighed around 105 gm and the substance of all the capsules were mixed homogeneously and then two samples of 5 gm each were drawn. The weight of substance was done after putting the substance in the lock pouch/polythene but he cannot tell the weight of pouch. Weight might hardly be half gram.
9. He also stated that he do not remember whether the gross weight of sample pouch was exactly 5 gm or more than 5 gm. One sealed pullanda mark C with the court seal is opened found to be packet mark A containing remaining cocaine and packet mark B containing concealing material. Sample mark A1 was also opened found to be containing one polythene pouch with remnant substance of sample. The total weight today is found to be 3.5 gm with pouch. Packet mark A containing remaining cocaine is also found to be 94 gm with polythene. The witness was also pointed out the cutting from mark X to X in the statement of accused where originally 100 gm was written which was changed to be 105 gm.

Witness stated that it was written by accused himself in his own handwriting.

10. **PW3 Saurabh Aggarwal** Nodal Officer exhibited the CDR of mobile no. 8586090436. **PW4 Ram Kumar Chauhan**, Assistant Chemical Examiner, CRCL exhibited the CRCL report. **PW5 Chandrashekhar** Nodal Officer exhibited the CDR of mobile no. 7042881545. **PW6 Meenakshi Gupta**, Chemical Examiner, CRCL also stated that sample was tested by R.K. Chauhan, Assistant Chemical Examiner under her supervision. **PW7 A.K. Garg**, Sepoy, CISF who deposited the samples at CRCL and also accompanied the team to Nizamuddin railway station as well as Krishna Park Extension. **PW8 Sh. Vikas Yadav**, IO stated that the mobile phones in question were in the name of Shobha Devi and Chetan Kumar however Shobha Devi was not found living there and Chetan Kumar stated that the mobile did not belong to him, and he also made complaint to police. **PW9 Deepak Attri** stated that he searched the house of accused with the team however nothing was recovered. **PW11 Dr. Swaraj Swadesh Sekia** exhibited the MLC of accused. **PW12 R.S. Joshi**, Assistant Director NCB stated that IO Anand Kumar put the information before him and he issued the seal and made entry in seal movement register. At around 01.30 PM on the same day, IO deposited the seal back. He had thereafter given the search authorization of house of accused, arrest reports were also put before him. He authorized Sepoy A.K. Garg to deposit the samples. In cross-examination stated that he instructed the IO to constitute the team and take action as per law.
11. Accused in his statement u/s 313 Cr.PC denied all the incriminating circumstances put to him and stated that no notice was given to him nor the contents were explained to him and the statement u/s 67 NDPS Act was written by him under pressure and torture. CRCL report is false and fabricated. PW10 is an interested witness. The phones were not recovered from him nor he is the owner of phone. He further stated that at airport, one CISF officer was frisking on his body by metal detector and after completing the searching process while he was waiting to collect the belongings, one senior officer of CISF brought him to his office and told him to sit there, and thereafter NCB officials came and took his signature on some small and long paper. Nothing was recovered from him.

The contraband was planted over him and he is not involved at all in any drug business.

**Material Exhibits:**

12. **Ex.PW1/A** is the information. **Ex.PW2/A** is the notice u/s 50 NDPS Act. **Ex.PW1/B** is the Panchnama. **Ex.PW1/C (colly)** is the e-ticket. **Ex.PW1/D** is the boarding pass. **Ex.PW1/E** is the baggage tag. **Ex.PW10/A** is the copy of passport. **Ex.PW1/J** is the information regarding house of accused. **Ex.PW9/A** is the search authorization of house of accused. **Ex.PW9/B** is the panchnama of search at the house of accused. **Ex.PW9/C, PW9/D, PW9/E, PW9/F, PW9/G** are the list and documents recovered from house of accused. **Ex.PW2/B** is the statement of accused u/s 67 NDPS Act. **Ex.PW2/C** is the arrest memo and the memo of jamatalashi. **Ex.PW11/A** is the MLC of accused. **Ex.PW1/K** is the seizure report u/s 57 NDPS Act of the cocaine. **Ex.PW2/C** is the arrest report u/s 57 NDPS Act. **Ex.PW1/H** is the test memo. **Ex.PW4/A** is the acknowledgment of deposit of sample at CRCL. **Ex.PW4/B** is the CRCL report showing that sample A1 is found positive for cocaine and contents of cocaine in the sample is 63.7%. The gross weight of the remnant sample returned with plastic pouch is 3.5 gm. **Ex.PW3/B (colly) and PW3/C** are the CDR and CAF of mobile no. 8586090435 in the name of one Shobha Devi. **Ex.PW5/B (colly) and PW5/C** are the CAF, CDR record in the name of one Chetan Chaudhary of mobile no. 7042881545. **Ex.PW12/F** is the record of accused from FRRO showing his date of arrival/departure from 08.02.2015 to 29.04.2015, 23.06.2015 to 13.12.2015 and arrival on 16.02.2016. **Ex.PW12/A and Ex.PW9/K** are the entries of seal movement register in respect of receiving and depositing back of seal. **Ex.PW12/B** is the entry in godown register regarding deposit of contraband.
13. **Ld. LAC** for accused submitted that secret information appears to be suspicious. **PW1 IO Anand Kumar** stated that he received the secret information at about 8am when he was at home however not recorded the said information at that time and recorded the said information at around 10.30am in the office. He also stated that he noted down the main points on the paper but not put the said paper to the superintendent, therefore, sanctity of secret information was in



doubt. Furthermore there is a material difference between the timings as mentioned by this witness PW1 and PW10 who has frisked the accused. PW10 stated that he has done the frisking about 9.45am therefore there is no occasion for intimation of secret information at around 8am. Ld. counsel submits that accused was illegally detained and nothing was recovered from accused and entire recovery is planted over the accused. Ld. counsel for accused submits that R K Viswas, Sr officer of CISF informed the NCB as well as produced the accused before the IO however that witness is not examined by NCB. The provisions of section 42 NDPS Act are also not followed. Ld. counsel submits that there is discrepancy in the testimony of witnesses regarding the net weight of contra-band recovered which is material infirmity [relied upon *Kamruddin Jamaluddin Pathana Vs State of Maharashtra, 1991, CRLJ, 826 (Bombay) DB*]. Ld. counsel submits that there is an overwriting over the weight of the contra-band in statement under section 67 NDPS Act. Ld. counsel further submits that PW1 did not state about the safe custody of case property in examination in chief thus creates doubt over the safe custody of the case property at NCB office. Furthermore, NCB did not follow the mandatory procedure required under section 50 NDPS Act while taking search. Number of Gazetted Officers and Magistrates were present but nobody was called and signatures were obtained forcibly. Furthermore no CCTV footage was seized. Ld LAC submits that prosecution has miserably failed to prove its case beyond reasonable doubt.

14.Ld. SPP submits that accused was apprehended from the airport when trying to board the plane for Bangalore while concealing the contra-band in private part. After recording of the information, the raiding team reached airport and searched the accused in presence of independent CISF officials and recovered 06 capsules containing cocaine having total weight of 105gm which is a commercial quantity. Ld. SPP submits that accused has refused to be searched before Gazetted Officer/Magistrate, therefore there is no infirmity in compliance of section 50 NDPS Act. Ld. SPP submits that the testimony of PW1, PW2 and PW10 over the apprehension of accused and recovery of cocaine appears fully credible and there is nothing material in cross-examination to dispute their



testimony. The minor contradiction regarding the weight hardly material in overall facts and circumstances. The presumption u/s 35 & 54 NDPS Act against accused however accused unable to rebut the said presumption. Ld. SPP submits that CRCL report also corroborated the fact that the recovered material is cocaine. The weight of the material has also been taken before the court in cross-examination. There is no material change in the weight of the contra-band before the court. Ld. SPP submits that prosecution able to prove the foundational facts beyond reasonable doubt however accused unable to rebut the presumption. Accused is liable to be convicted for the offence charged.

*15. Arguments heard. Record perused.*

16. 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.

17. 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:

18. *“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.....”.*

19. 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*).
20. To sum up while appreciating evidence on record the duty of the court is to separate credible and incredible part of evidence.

### **Information**

21. Ex PW1/A is the information recorded by PW1 IO Anand Kumar in which he mentioned that he received an information from CISF terminal that a person namely Micheal Webuda flying to Bangalore is suspected to carry narcotic drug and said information is submitted after reaching the office at 1030 hours. Pursuant to which, PW12 superintendent directed to constitute a team. PW1 IO Anand Kumar in his testimony categorically stated that at around 8am, he received the information from CISF terminal regarding the present accused

thereafter he informed the said communication to superintendent R S Joshi and after reaching the office, he reduced the same into writing and R S Joshi directed him to constitute a team for taking necessary action as per law. The said factum is also corroborated from the testimony of PW12 superintendent R S Joshi. PW2 IO Rajiv Sehrawat, another member of raiding team corroborated the said fact by stating that at the instance of IO Anand Kumar, he joined the team and reached airport.

22. The contention of Ld. defence counsel that the intimation is received at 8am however there are no notes regarding the intimation placed on record. Though PW1 categorically stated that he has taken down the notes after receiving the information but wrote the secret information as soon as he reached the office, in this scenario, non production of notes do not affect the sanctity of the secret information. Furthermore, the accused was apprehended at airport and information is not of a public place. The stoppage of accused at airport is prior to information therefore non placing of notes hardly any relevance regarding the presence of accused at the airport. The prosecution able to prove the factum of secret information and direction of action as per law, therefore it cannot be held that there is any non compliance of section 41 & 42 NDPS Act.

#### **Frisking of accused at airport while he is trying to board for Bangalore**

23. After apprehension of accused, e-ticket, boarding card, copy of passport of accused seized showing his departing to Bangalore from IGI Airport, Delhi. The accused in his statement u/s 313 CrPC also admitted his presence at the airport at relevant time for boarding to Spicejet flight for Bangalore however pleaded that he was detained illegally by the security officials. PW10 Ram Prasad in his statement stated that on 19.03.2016, he was working as security official and during routine frisking, he observed something in his private part and thereafter senior was informed and accused was asked to wait outside. Thereafter at about 11/11.10am, NCB officials came and searched the accused. There is nothing in cross-examination that he is not the person who had done the frisking. The NCB officials i.e. PW1 and PW2 also corroborated the fact that this accused was apprehended after pointing out by the CISF official R K Vishwas and his search

was taken in presence of PW10 Ram Prasad, security officer, CISF, therefore prosecution able to prove that accused was stopped when he was frisked by PW10 and found suspected to be concealing something in the private part.

#### **Search and recovery of the contra-band from accused**

24. The accused was searched by PW2 Rajiv Sehrawat in presence of IO Anand Kumar (PW1) and PW10 Ram Prasad, Sub Inspector CISF. PW2 stated that this accused was produced by R K Vishwas, CISF officer, and thereafter PW1 made enquiries then he disclosed that his name and produced boarding pass, e-ticket etc then in presence of Ram Prasad, SI CISF he was given notice u/s 50 NDPS Act apprising about his legal rights and personal search in presence of Gazetted Officer/Magistrate however he stated that he do not to be searched in presence of Gazetted Officer/Magistrate. The said fact is duly substantiated through the notice u/s 50 NDPS Act Ex PW2/A. This fact also corroborated by PW1 and PW10. It is suggested to PW2 in cross-examination that it is correct that notice was served to accused by PW2 and also it is correct that he is apprised about legal rights. There is nothing in cross-examination of PW2 that proceedings u/s 50 NDPS Act was not conducted in terms of the provisions or no search was conducted and entire recovery is planted. Mere suggestion in the last part of cross-examination that the recovery is planted and search is not conducted could not in any manner discredit the testimony of PW2. There is also nothing in cross-examination of PW1 that proceedings u/s 50 NDPS Act were not conducted in the manner relied by the prosecution. PW10 Ram Prasad also stated in cross-examination that the notice u/s 50 NDPS Act was prepared by Rajiv Sehrawat, NCB officer and contents of the same were also written by him. The bodily search was also conducted by PW2 Rajiv Sehrawat. Therefore there is no infirmity in compliance of section 50 NDPS Act as per testimony of PW1, PW2 and PW10 (relied upon judgments of Delhi High Court in case titled as "*Sayaed Md. Ridwan @ Munna vs State CrI.A.785/2014 dated 22.02.2019, Ram Gopal Vs. State CrI.A. 676/2016 dated 16.10.2018 and Innocent Vs. State CrI.A. 139/2017 dated 14.01.2020*).

25. PW2 Rajiv Sehrawat stated that on search, he noticed hardness near the private

part then accused disclosed that he had concealed the drug capsules which were to be delivered at Bangalore. PW1 also deposed that IO Rajiv Sehrawat noticed the hard substance near the private part of accused and accused told to have concealed the narcotic capsules. PW10 Ram Prasad also stated that PW2 noticed hard substance near the private part and accused disclosed that he was carrying capsules to supply at Bangalore. Therefore, the factum of search regarding the concealing of the narcotic capsules is credibly proved by the testimony of PW1, PW2 and PW10. There is nothing in cross-examination to dispute the factum of search in the manner relied by the prosecution.

26. Ld counsel submits that there is inconsistency in the testimony of PW1, PW2 and PW10 regarding the manner of weighing the contraband and weight of the contra-band. It is pertinent to peruse the panchnama Ex PW1/B in which after noticing of the hard substance the accused has taken out white colour cloth packet from his inner wear in which word 'Klove' was written and substance had been taken out and found that 06 oval shaped capsules were wrapped with brown colour adhesive tape, thereafter, one capsule was cut opened and white colour powder came out which on testing gave positive result for cocaine. Thereafter all the five capsules were tested and gave positive test for cocaine. Then the substance of all the 06 oval shaped capsules were taken out in a transparent polythene and weighed which came out to be 105gm. Then two samples of 05gm was taken and put it in transparent zip. This fact is corroborated through the testimony of PW1, PW2 and PW10. The case property was also produced in the court and duly exhibited suggested the recovery of one *thaili* of cloth having word 'Klove', concealing material, etc.

27. PW1 in his testimony stated that each capsule was tested separately then the powdery substance from each capsule found positive for cocaine, and thereafter powdery substance of each capsule was collected in polythene and mixed homogeneously and total weight found is 105gm. There is nothing in cross-examination of PW1 regarding the infirmity of the procedure and weight of the contra-band recovered. PW2 Rajiv Sehrawat and PW10 also deposed in the same manner. PW2 in cross-examination stated that the weight of the cocaine is

105gm and on further cross-examination on the next date, he also stated that substance of all capsules were collected in a polythene and weighed around 105gm and substance was also homogeneously mixed. The samples were taken as mark A1 and A2, and rest of the narcotic substance is kept in a packet mark A. The mark A was opened and weighed in the court during the cross-examination of PW2 at the instance of counsel for accused and found to be containing the packet mark A and on weighing found 94 gms gross with polythene pouch and with plastic string. This witness categorically stated that weight of the polythene is not more than half gram. Therefore, it cannot be held that the sampling was done wrongly and weight of the contra-band cocaine is less than 100gm. There is approximation in the weight i.e. 105 gm but it cannot be held that weight of the contraband in packet A along with sample mark A1 and A2 is less than 100gm. Remnant sample Mark A1 is also produced during cross-examination and on weighing found to contain 3.5gm of cocaine with pouch/small polythene. The pouch is very small, hardly have any effect on the weight. It is also not the case of prosecution that weight of cocaine is 101 or 102 gm, but 105gm. If the weight of the polythene is somehow excluded, it cannot be less than 102-103 gms. This fact is also proved from the fact that as contra-band is weighed in the court during the cross-examination of PW2. The accused could not be given benefit for hypertechnicalities.

28.Ld. counsel submits that PW10 in cross-examination stated that weight of the cocaine is 105gm however the said weight is along with the shell of the capsules. It is pertinent to go through the testimony of PW10 along with PW1 and PW2 in totality. PW10 in examination in chief categorically stated that the total weight of cocaine recovered is 105gm. In cross-examination also stated that all the capsules of same colour and size and total weight of capsules with polythene is 105gm. He also stated on specific question regarding the weight of cocaine and he stated that the weight of cocaine is 105gm. He also clarified that the weight of cocaine is after taken out of the capsules however again stated that the weight with the capsules. This witness is examined after 05 years of the incident before the court. The such kind of deviation is bound to occur in the testimony however



considering the testimony of PW1, PW2 and panchnama and also the fact that the case property is weighed before the court, there is no manner of doubt that the total quantity of cocaine weighed is not 105gm along with the polythene in which it is weighed. The weight of the transparent plastic polythene cannot be assumed to be more than 1gm particularly when this contra-band has already been weighed in the court itself. This court cannot doubt the fact that the cocaine recovered is less than 100 gm because the polythene was not weighed at the time of taking the weight of contra-band. The recovered cocaine is more than 100gm thus falls under the category of commercial quantity.

### **Sampling**

29. In present case, there is a recovery of 06 oval shaped capsules containing contra-band cocaine and each capsule was tested separately found positive for contra-band cocaine, and after testing the cocaine powder was collected in a polythene weighing around 105gm. Two samples of 05gm each were drawn. The procedure of testing each capsule before being mixing and thereafter drawing of samples after mixing is found correct in terms of judgment of *Sumit Tomar Vs State of Punjab 2013 (1) SCC 395*, thus no infirmity found in taking the samples.

### **CRCL Report (Ex.PW4/B)**

30. PW4 Ram Kumar Chauhan, Asstt Chemical Examiner, CRCL stated that in supervision of PW6 Meenakshi Gupta, Chemical Examiner, the sample mark A1 was tested found positive for cocaine hydrochloride. The said statement is also corroborated by PW6 Meenakshi Gupta, Chemical Examiner. CRCL report Ex PW4/B shows that the sample found positive for cocaine Hydrochloride and net contents of cocaine are 63.7% and gross weight of remnant sample with plastic pouch is 3.5gms. The pouch weight of sample mark A1 is also weighed in the court during the cross-examination of PW2. There is nothing in the cross-examination of PW4 and PW6 that the weight of the contra-band could change size ably with the polythene pouch. In view of judgment of Apex Court in *Heera Singh Vs. Union of India & Anr. Crl. 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 105 gm though with

polythene but cannot be less than 100gm, therefore the quantity of cocaine is found commercial quantity (more than 100gm).

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

31. PW12 Superintendent R.S. Joshi stated that on 21.03.2016 IO Anand Kumar put up before him the seizure report u/s 57 NDPS Act (Ex PW1/K) and IO Rajiv Sehrawat put up the arrest report u/s 57 NDPS Act (Ex PW2/C). The same is also corroborated by the testimony of PW1 and PW2. 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.

**Other Pleas**

32. Ld. counsel for accused submitted that PW1 categorically stated that he received the information regarding the apprehension of one passenger having concealed the suspected narcotic drug at around 8am however PW10 Ram Prasad SI CISF who conducted the frisking stated that at around 9.45am he noticed the hard object near his private part and thereafter communicated the same to his officers R K Vishwas. Ld. counsel submits that therefore the information cannot be communicated at around 8am to PW1. Though there appears anomaly over the timings when the accused was frisked in the testimony of PW1 and PW10 however the entire circumstances to be appreciated in totality, the accused was stopped at airport concealing narcotic drug. The accused reached the airport voluntarily. It is not the case of accused that he was forcibly taken to the airport. The tickets and boarding pass of accused were also recovered showing the flight time at 10.30am therefore it can be reasonably inferred that accused might have reached the airport for security check around 1-2 hour prior to the flight timings. PW1 recorded the information at around 10.30am in the office. Merely the statement of PW that he had received the information at around 8am do not in any manner creates doubt over the frisking of the accused at the relevant security counter and presence of accused at airport. Even accused not disputed factum of frisking at airport. Therefore, these discrepancies do not in any way displaces the case of prosecution from core. Ld. counsel submits that in the statement u/s 67 NDPS Act, there is a cutting and weight of the contra-band is

changed from 100gm to 105gm. This cutting is not at all material. Considering the panchnama the weights of the contra-band exhibited before the court and testimony of PW1, PW2 & PW10. Ld. counsel submits that the accused was already searched by CISF officers prior to the search by PW1 and PW2 but this fact is not at all emanating from the testimony of PW1, PW2 & PW10.

33.Ld. LAC for accused submitted that prosecution had not examined the material witness R K Vishwas, CISF official who communicated the information regarding apprehension of accused at airport. The testimony of PW1, PW2 and PW10 regarding apprehension of accused and recovery of contra-band found fully credible, therefore, the non examination of R K Vishwas is not material in present facts and circumstances and no benefit could be given to accused for this omission. Ld. LAC further submitted that no CCTV footage was placed on record regarding the apprehension of accused with contra-band. The accused was apprehended at the airport. It was also not denied by the accused. The testimony of PW1, PW2 & PW10 in this regard found fully credible. There is also nothing suggest to the witnesses examined that accused was searched under CCTV footage therefore, no benefit could be given to accused over non seizing of CCTV footage from the airport.

34.At the time of arrest of accused, the jamatalashi articles were taken into possession including one mobile phone Nokia having SIM no. 899110140138-2989135 and another mobile phone Nokia having SIM No. 8991110018316823658. The accused in his statement disclosed about his mobile no. 7042881545 and 8586090436. The CAF form Ex PW5/B collectively of mobile no. 7042881545 shows the SIM No. 8991101401382989135. Another CAF form of mobile no. 8586090436 shows the SIM No. 8991110018316923658-0. Both the mobile nos. recovered from the accused found to be in the name of one Shobha Devi and Chetan Kumar Sharma however as per the report Ex PW8/A, no such person in the name of Shobha Devi reside at the address mentioned in the ID, and furthermore Chetan Kumar Sharma stated in his statement u/s 67 NDPS Act that somebody had misused his ID card. Therefore, it can be inferred that accused is using the mobile phones not issued

in his name or in the name of the person known to him thus suggest that he is illegally using the mobile on some other person, this creates suspicion on his activities. The accused in his statement u/s 67 NDPS Act have mentioned the mobile number of Sunny who is not found traceable at 2348150678767. The CDR details Ex PW3/C and Ex PW5/C shows that accused is calling internationally, but prosecution unable to substantiate the accused link with other persons through said CDR details. The house of accused was also searched in presence of independent witness Ravi Kumar however no contra-band was recovered from the accused. It is further pertinent to notice that personal search mentions SIM number 8991110018316823658 and SIM number mentioned in CAF record is 8991110018316923658-0. This appears to be only clerical mistake over number '9' however the prosecution case not in any manner got substantiated through mobile records and house search. The prosecution case is entirely dependent upon the recovery of contra-band from the bodily search of accused.

**Presumption u/s 35 and 54 of NDPS Act**

35. 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 Crl. 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.*

36. 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 capsules containing cocaine from the bodily search of accused is duly proved by the prosecution. Now the burden is upon the accused 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. The prosecution able to prove the foundational facts of apprehension of accused concealing contraband beyond reasonable doubt however the accused unable to rebut the said presumption.

37. Apex Court in case titled *Sardul Singh Vs. State of Haryana in (2002) 8 SCC 372* observed that "There cannot be a prosecution case with a cast iron perfection in all respects and it is obligatory for the courts to analyse, sift and assess the

evidence on record, with particular reference to its trustworthiness and truthfulness, by a process of dispassionate judicial scrutiny adopting an objective and reasonable appreciation of the same, without being obsessed by an air of total suspicion of the case of the prosecution. What is to be insisted upon is not implicit proof. It has often been said that evidence of interested witnesses should be scrutinized more carefully to find out whether it has a ring of truth and if found acceptable and seem to inspire confidence, too, in the mind of the court, the same cannot be discarded totally merely on account of certain variations or infirmities pointed or even additions and embellishments noticed, unless they are of such nature as to undermine the substratum of the evidence and found to be tainted to the core. Courts have a duty to undertake a complete and comprehensive appreciation of all vital features of the case and the entire evidence with reference to the broad and reasonable probabilities of the case also in their attempt to find out proof beyond reasonable doubt. On cumulative appreciation of the evidence despite minor lapses, lacunae and discrepancies, the prosecution able to prove the foundational facts against accused beyond reasonable doubt.

38. 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 Micheal Webuda found guilty for offence u/s 21(c) NDPS Act. Accused Micheal Webuda convicted accordingly. Let accused be heard on point of sentence.

**Announced in the open court  
on this 24<sup>th</sup> day of March, 2021**

**(Ajay Kumar Jain)  
Special Judge NDPS  
PHC/New Delhi**