

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

Case No. SC/8919/16
ID No. 02403R0150822013

Narcotics Control Bureau

Through: Sh. Rupesh Kumar Kakaria,
Intelligence Officer,
Narcotics Control Bureau, New Delhi

Versus

1. **Monika @ Kajal (on bail)**
D/o Late Sh. Parash Ram,
R/o 186, First Floor, Block- B,
Sector- 16, Dwarka, New Delhi

2. **James Pascal (in JC)**
S/o Udogdlem,
Permanent R/o 124A,
Village Ubarhaya Menpi,
Imo State of Nigeria

India address : -
274 Pocket C, Sunrise Apartment,
Nasirpur, Dwarka, Delhi

Date of Institution : 24.10.2013
Judgment reserved on : 03.03.2020
Date of pronouncement : 16.03.2020

JUDGMENT

1. Brief facts as per complaint filed that on 22.05.2013, IO SI Rupesh Kumar received a secret information that one Nigerian man along with a lady indulging in illegal trafficking of supply of heroin in Paharganj area near railway station. The superintendent directed to develop the information and mount the surveillance, thereafter on 25.05.2013 another secret information presented by IO Rupesh Kumar to superintendent that one Nigerian namely James Pascal along with lady namely Monika @ Kajal will come between 8pm to 9pm near Sri Lanka Buddhist Pilgrim Centre, opposite Railway Reservation Building, Paharganj, Delhi to deliver heroin, and if raid is conducted huge quantity of

heroin may be recovered. Pursuant to his direction, raiding team was prepared consisting of IO Rupesh Kumar, IO Sarita Kataria, IO Vikas Yadav and sepoy Ved Prakash who all left the NCB office at about 1610 hours in govt vehicle with field testing kit and all other accessories. At Paharganj, IO met Azad Singh, IO and Pradeep Kumar, IO who were already on surveillance in said area. IO Rupesh Kumar also joined Shakil and Mohd Ahmed as independent witnesses thereafter at around 8.50 pm, one Nigerian along with one lady came near Sri Lanka Buddhist Centre on foot. The lady was carrying the greenish colour suitcase make Japan Express and when they tried to leave, NCB intercepted and accused were disclosed about the secret information. Both accused revealed their names and addresses. Notices u/s 50 NDPS Act were given to both the accused persons however they declined to be searched before Gazetted Officer/Magistrate. Nothing recovered from their personal search. Accused Monika @ Kajal told that the suitcase she was holding was that of accused James Pascal. On opening the said suitcase, five transparent polythene filled with off white powdery substance was recovered. On opening the said polythene, separate tests were conducted which gave positive result for heroin, however as the contraband having same colour, texture and property, whole quantity of heroin was mixed homogeneously and transferred in white transparent polythene and weighed around 5kg, thereafter samples of 05gm each were taken. Test memos were prepared. The panchnama was also prepared and whole proceedings were completed by 11.45pm.

2. During investigation, notices u/s 67 NDPS Act were issued to both the accused persons. The entire case property along with test memo were deposited in malkhana and seal was returned to superintendent Sh R K Singh. After recording statements u/s 67 NDPS Act of both the accused persons, they were arrested and personal search memo were prepared. Report u/s 57 NDPS Act regarding arrest was submitted to superintendent. Both the accused persons were medically examined and thereafter produced before concerned court.
3. The statement of independent witnesses Mohd Ahmad and Shakil u/s 67 were

recorded on 04.06.2013. As per CRCL report, heroin was detected with purity percentage of 0.8%. Accused James Pascal made an application before the court stating his name as Ndubuisi Pascal Udoybolem, however no data was found regarding this accused from FRRO. Accused also failed to give his passport details on interrogation in jail. The details of mobile no. 9718407282, 8800548423 and 8586904071 were obtained and on completion of investigation, complaint was filed.

4. Vide order dated 09.09.2014 charges u/s 29 r/w section 21 (c) NDPS Act were framed against both the accused persons. Both the accused pleaded not guilty and claimed trial.
5. Prosecution for substantiating its case, examined 14 witnesses. PW1 IO Rupesh Kumar, PW3 IO Sarita Kataria, PW4 Mohd. Ahmed, PW5/PW7 IO Vikas Yadav, PW8 IO Azad Singh, PW10 Shakeel, PW14 IO Pradeep Singh are the witnesses to apprehension and recovery of contraband. The summary details of prosecution witnesses are reproduced as under:
6. **PW1 IO Rupesh Kumar** stated that he first received the secret information on 22.05.2013, thereafter on 25.05.2013 at around 2pm, on direction of superintendent constituted a raiding team and left the office at about 4.10 pm, and reached the spot at around 4.45pm. IO Azad Singh and IO Pradeep Kumar were already found present in the area. Two passersby namely Mohd Ahmed and Shakil were joined, and at around 8.50pm saw Nigerian man with a lady on the footpath near Sri Lanka Buddhist Centre opp. Railway reservation centre. They waited there for some time and thereafter started moving from that place and lady was having greenish colour bag then both were stopped. Enquiries were made and notices u/s 50 NDPS Act were given. On search of the bag, 05 packets of white colour substance were recovered from the bag which tested positive for heroin. Samples were taken and panchnama was prepared. In cross-examination stated that the same person given him the secret information on 22.05.2013 and 25.05.2013. No Nigerian was interrogated between 22.05.2013 to 25.05.2013. Some other Nigerians were seen at railway station but none was

found walking with the lady. He already found two other Intelligence Officers at the spot. He also stated that they were not standing at particular point but roaming around. He further stated that he had seen the accused coming from the side of railway reservation centre, walking on footpath and both accused crossed the road towards Buddhist Centre and appeared to be waiting for somebody. Accused Pascal was speaking on his mobile phone. He did not see accused Monika speaking on her mobile. He also stated that two panch witnesses met him near reservation centre, and all writing work was done while sitting in govt vehicle. All tests were performed by him. It is wrong to suggest that he had written the secret information after apprehension of accused persons and further denied suggestion that bag was not recovered in the present case. He also denied suggestion that accused Monika was not holding the said bag.

7. In cross-examination on behalf of accused James Pascal stated that the time of receipt of information is not mentioned in Ex PW1/B. He also stated that on 25.05.2013 personal search of accused conducted and they were found in possession of mobile phones but said mobile phones were not taken into possession by them on said date, and it remained with them till they were arrested and during that period, they were receiving calls but not making any calls. IO Chander Shekhar recorded the statement of James Pascal on 26.05.2013. Superintendent himself came to IO room and accused were not produced before him. The bag which was recovered was not long and no key was recovered. He also denied suggestion that bag recovered from accused Monika was very small in size and was locked. No site plan was prepared and writing work took around one hour. He further stated that he cannot tell who was on surveillance from 22.05.2013 to 24.05.2013. He also denied suggestion that all the sealing work was done on 26.05.2013 in NCB office. Landlord of accused James Pascal was not made the witness. He further stated that he had not taken any voice sample of accused. He also denied suggestion that James Pascal had informed that his passport was lying in Nigerian embassy, and he did

not go to verify the same fact.

8. **PW3 IO Sarita Kataria**, another member of raiding team also deposed that at around 4.15pm, they left the office and reached the spot at around 4.45pm, and at spot met IO Pradeep and IO Azad Singh. Two independent witnesses were joined. At around 8.45pm, IO noticed the accused/ lady was carrying the bag when they are leaving, they were intercepted and proceedings were conducted, and 05 kg of heroin was recovered from bag.
9. In cross-examination on behalf of accused Monika @ Kajal stated that they did not inform the local police regarding the secret information. Her position was around 05 meters from Buddhist Pilgrim Centre, and she cannot say from which side the accused came. She had no knowledge if IO Rupesh and Vikas collected the dialing number from the phone of accused James Pascal as he was calling from phone to someone. She had not heard the conversation with whom the accused was calling. She further stated that bag was made up from some hard cloth however was not locked. She further stated that she do not recollect as to how many chains in the said bag. There was nothing except the contraband in the said bag. The testing was conducted by the IO and electro weighing machine was used to weigh the contraband. The panchnama was prepared by IO Rupesh however she had not signed the same. She did not give any summons to accused Monika however she was with her in the night, and also in the next morning. She did not investigate the source and destination of contraband. The mobile phone of accused Monika was also recovered from personal search which was handed over to the incharge malkhana, however she had not gone to the house of Monika for investigation. She also denied suggestion that greenish colour bag was not recovered from the possession of accused Monika. She also denied suggestion that some other bag was recovered from accused Monika. She also denied the suggestion that all the proceedings were conducted at NCB office.
10. In cross-examination on behalf of accused James Pascal, she denied suggestion that accused was not apprehended from the spot. She also denied the

suggestion that bag recovered from the spot was of black colour and it contained only clothes and other belongings of accused Pascal.

11. **PW4 Mohd Ahmed** stated that on 25.05.2013 when he was standing near New Delhi Railway station, few persons came and showed him their identity cards that they are from NCB thereafter he agreed to join the search proceedings and accompanied and stood near Sri Lanka Buddhist Centre and after some time one Nigerian national along with lady came and then shown them I card and served the notice for search. From personal search of both accused, nothing was recovered but from the bag which was in the hand of lady, 05 polythenes packets were recovered, and all of them were found containing heroin. Proceedings were concluded at around 11.45pm, his statement at NCB office were recorded on 04.06.2013.
12. In cross examination on behalf of accused James Pascal stated that he studied upto 3rd or 4th standard and was having barber shop at Ghaziabad and also do not remember why came to New Delhi Railway station. There were 4-5 NCB officials and other independent witnesses were also with the NCB team. He told us the size of the bag from gestures to be around 2 ft by 2ft. The bag was in green in colour and made of cloth. He further stated that he do not remember whether the bag had buttons or zips as long time had already passed. He stated that all the NCB officers intercepted accused together. The contraband was weighed together. He further stated that he do not remember the colour which appeared in the field testing kit but it was done on the spot. He further stated that he reached the NCB office on 04.06.2013 at about 1 or 2 pm and met IO Rupesh Kumar. He denied the suggestion that bag in question was in red colour and small in size. He also denied suggestion that it was containing household items. He also denied suggestion that he was the stock witness of NCB.
13. In cross-examination on behalf of accused Monika @ Kajal stated that he had purchased the entry ticket from the railway station when apprehended by the NCB and in his presence, NCB did not ask any other person to join the investigation and when he made the exit, the other public person was already

with the NCB officials. He also stated that he saw accused Monika for the first time at about 8.45pm near Sri Lanka Buddhist Pilgrim Centre and both were coming from side of railway station. He did not see any of the accused persons talking on the mobile on the spot. The panchnama was of about 4-5 pages. He further stated that he do not understand the word seizure procedure. He did not remember whether any ID proof or passport was recovered from accused. He also stated that he along with independent witnesses stayed at the spot and did not accompany the two NCB officials. He did not notice any of the public person on 04.06.2013 at NCB office.

14. **PW5/PW7 IO Vikas Yadav** also the member of raiding team party. In cross-examination on behalf of accused James Pascal stated that he was not told anything about the case prior to 25.05.2013 and he also do not remember in which vehicle they went to the spot and he did not check the expiry date of IO kit. The public persons were joined by IO Rupesh Kumar. IO did not show the information to the public witnesses. IO Pradeep and IO Azad Singh met them at around 4.45pm however he cannot tell the exact location of their meeting. He took the position around 5.15pm but cannot tell the position of other. The government vehicle was driven by Ved Prakash. When he left the office on 25.05.2013 he handed over the key to malkhana to R K Singh, superintendent. Sepoy Dinesh Kumar did not make any entry in the malkhna register regarding taking of sample to CRCL on 27.05.2013. He stated that bag was recovered from accused Monika @ Kajal. He however denied suggestion that the bag which was recovered from accused was not containing any contraband and also denied suggestion that substance planted over the accused after taking them to NCB office.

15. In cross-examination on behalf of accused Monika @ Kajal stated that IO did not show any photograph of accused when met at the office. IO also did not tell the description of accused persons. He further stated that he spotted the accused at around 8.50 pm, and they were on the opposite side of the road. He saw the public witnesses first time at around 5.15pm near Buddhist Pilgrim

Centre while IO Rupesh was talking to them however did not see both the accused persons were coming at the spot. He further stated that he do not know if any of the articles were recovered except 05 polythene packets. He denied suggestion that accused Monika was not aware about the contents of bag.

16. **PW8 Azad Singh** stated that on 25.05.2013, he alongwith IO Pradeep Singh were called by Superintendent R.K. Singh and informed that one lady and one Nigerian will come opposite reservation centre, New Delhi Railway Station thereafter he went to spot at around 2.15-02.30 Pm and reached Buddhist Centre at around 03-03.15 PM. At around 04.30-04.40 PM another team also reached in a vehicle driven by Ved Prakash and all of them started keeping surveillance, at around 08.30-8.45 PM one lady and one Nigerian national came and started moving here and there, then they were stopped. Thereafter he had given notice u/s 50 to accused James Pascal. IO Sarita Kataria gave notice u/s 50 to Monika. The bag carried by Monika was opened found to be containing 5 polythene packets, tested positive for heroin. On 26.05.2015, he recorded statement of Monika. In cross-examination stated that he alongwith IO Pradeep left NCB office in their private vehicle. All the team members were roaming in the area not staying at a particular place. He do not remember the colour of clothes of accused persons. When the notice was given to accused James, all the team members including public witnesses were there. The contraband was weighed using electronic weighing machine brought by IO Rupesh Kumar however he cannot tell the size of bag, it was normal size. He further stated that bag was opened by Rupesh Kumar and it took about 8-10 minutes in testing the material from all 10 packets. He further denied suggestion that greenish bag about which he stated earlier was a makeup box of accused Monika and nothing was recovered from said bag. In cross-examination on behalf of accused Monika stated that he had not taken the identity proof of public witnesses and he had seen accused persons coming from the side of reservation office. However he did not request police person standing as a guard or the person at the counter. The personal search of accused Monika was conducted by IO Sarita Kataria. He

further stated that statement of accused Monika was not shown to any superior officer and same was handed over to IO Rupesh Kumar. He denied suggestion that accused was not in conscious possession of contraband when apprehended.

17. **PW10 Shakeel**, another independent witness who also stated that NCB official took them near Sri Lankan building where one male and female came, and lady was carrying a green colour suitcase/bag and from said suitcase 5 packets were recovered tested positive for heroin. In cross-examination stated he was working as aluminum fabricator on demand however he cannot tell at which shop he was working on that day. He further stated he is 6th pass and do not understand English. He also stated he was standing in front of booking counter. The NCB officials were in plain clothes. Accused came from the side of Sri Lankan building on foot, however did not notice if they were talking on phone or not. NCB official did not ask any public person or security person to join the raid. He further stated that he had seen only 2 NCB officials at spot. Another NCB officer was also in plain clothes. He also stated that inquiry was conducted from lady at the spot but he do not know if the statement Ex.PW8/C was recorded at spot or not. He further stated he did not witness any other case of NCB earlier. In cross-examination on behalf of accused James Pascal stated that 5 packets were not individually weighed and he was at a distance of 20-30 ft. the proceedings completed by 11.30 to 12 midnight. He denied suggestion that he is stock witness of NCB.

18. **PW14 Pradeep Singh** also reached spot with IO Azad Singh on the directions of superintendent where noticed the accused at around 08.15 PM and on the search of bag of accused Monika contraband was recovered. In cross-examination on behalf of accused Monika stated that they saw accused persons coming together when intercepted and denied suggestion that accused Monika was alighted from three wheeler scooter when apprehended. Accused Monika was searched by taking on the side of the vehicle outside the view of public by IO Sarita Kataria. He denied suggestion that Monika disclosed that bag was given to her by accused James Pascal just before she was apprehended and she

had no knowledge about the contents of bag. He also denied suggestion that she was just standing on side of James at the time of apprehension. In cross-examination on behalf of accused James stated that the bag of heroin was in the hand of accused Monika and he do not remember the colour of their clothes. It is correct that R.K. Singh had not given instructions to join raid however they are bound to assist each other when requested by another empowered officer. He also denied suggestion that he did not participate in seizure and surveillance activities. He also denied suggestion that no search and seizure were conducted in his presence.

19. **PW2 Ct. Dinesh Kumar** took the samples to CRCL. **PW6 Chandrashekhar**, Nodal Officer exhibited CAF of mobile no. 8800548423. **PW9 Pawan Singh**, Nodal officer Idea Cellular Ltd. exhibited CAF of mobile number 9718407282. **PW11 CSK Singh**, IO recorded statement of accused James, arrested him, prepared report u/s 57 however in cross-examination stated that he do not remember if accused was having notice u/s 50 when brought before him. **PW12 R.K. Singh**, Superintendent who directed IO Rupesh Kumar to constitute a team and take action as per law. In cross-examination stated that they are not maintaining any separate register for information received by IO. On 25.03.2013 IO Rupesh Kumar also told him that Pradeep Singh and Azad Singh were already on surveillance in the area. IO did not produce James and Monika before him on 26.05.2013. He did not put any seal on sample and case property. He denied suggestion accused James was apprehended on the basis of mistaken identity from the spot. He denied suggestion that accused was apprehended on 21.05.2013 from Pahargunj, Delhi. **PW13 Saurabh Aggarwal**, Nodal Officer exhibited CDR and CAF of mobile no. 8586904071.

20. Accused Monika in her statement u/s 313 Cr.PC stated that the bag in question was handed over to her by accused James Pascal 5-7 minutes before their apprehension and also stated that she does not remember the colour of bag and was scared at that time. Furthermore, notice u/s 50 was given to her but the explanation of gazetted officer and magistrate was not given to her. She further

stated she cannot say anything about the recovery of heroin from the bag as she was detained by a lady officer and NCB officers were doing some proceedings in front of vehicle. She also stated that she could not see the proceedings that is why cannot say about the facts of proceedings. She also stated that she had signed on some small papers as per directions of IO. She further stated that she cannot tell anything about the proceedings as sitting in the vehicle. She also stated that she had given a statement u/s 67 in her own handwriting and also told the fact that concealment of alleged contraband was not in her knowledge as James Pascal did not disclose her about any concealment. She in reply to the question that she has given voluntary statement u/s 67 stated that it is correct. She also that it is correct that she was arrested by IO Sarita Kataria but the contraband was not in her conscious possession. She also admitted that she was medically examined at Safdarjung Hospital. She further stated that she is a divorcee having two sons and being a poor lady had to meet day to day expenses by working as a sex worker. Accused James Pascal knew her from one church at Vikas Puri, and he usually hired her with handsome amount and day before the incident she was with him whole night and left early morning to her home. She further stated on the said night accused requested her to go to Connaught Place to purchase some clothes as Indians were charging high amount from him being foreigner, and also promised to give Rs. 5000/- as commission. She further stated at around 07.30 PM, she got down from her auto as per direction by the accused James Pascal who was waiting near railway station booking counter side and was carrying green and red strip suitcase and thereafter told him that the said bag having clothes and when they moved towards Connaught Place, they were apprehended and she came to know that drugs were concealed in the said bag. She further stated that she was not in conscious possession of drugs, and also told this fact in writing to NCB officials. Accused Monika opted to lead DE.

21. Accused James Pascal in his statement u/s 313 Cr.PC stated that his names is not James Pascal but Ndubuisi Paschal. He further stated when NCB officials

arrested him they told that they were looking for one James however he told them that he is not Mr. James but Ndubuisi Paschal. He further stated that no notice u/s 50 was given to him nor he was made aware of his legal right to be searched before magistrate or gazetted officer. Some of the officials not in uniform took him to NCB office where beaten mercilessly and forced to sign blank papers. He further stated he was forced to write the statement u/s 67. He also stated he was wrongly picked up from road to NCB office and when he cried for help nobody came for his help because of him being black everybody mistook him as criminal. He further stated he do not know Monika and seen her first time in NCB office.

22. Accused Monika examined **DW1 Parveen** who stated that on 25.05.2013 at around 05.30, he picked accused Monika @ Kajal in his taxi and dropped at Connaught Place circle at about 06.30 PM then accused told him to wait for her friend for 2-3 minutes. In the meanwhile one auto came and one black person came down from auto having some cramps. The said person was having green colour suitcase with him and thereafter he left the spot. In cross-examination by SPP stated he knew Monika since 2011 and remained at spot for around 5-10 minutes after dropping Monika at 06.00 PM. Monika left the spot with other accused towards Pahargunj side on foot. He further stated that he used to drop Monika at airport or different places. In cross-examination on behalf of accused stated that he cannot tell whether accused called somebody on phone after riding taxi. He further stated that lot of time elapsed therefore he cannot tell exact time when reached Connaught Place. He had no conversation with accused during journey. He had seen only the partial face of accused not entire face. He however stated that he was brought to court by Monika. He also stated he had seen bag in the hands of James Pascal but he cannot tell the size but by gesture stated it could be size of computer screen.

23. **Material exhibits-**

Ex.PW1/A is secret information dated 22.05.2013. **Ex.PW1/B** is the secret information dated 25.05.2013. **Ex.PW3/A** is the notice u/s 50 served to accused

Monika. **Ex.PW8/A** is the notice u/s 50 served to accused James Pascal. **Ex.PW1/C** is the Panchnama. **Ex.PW8/C** is the statement of Monika u/s 67. **Ex.PW8/D** is the arrest memo of accused Monika. **Ex.PW3/B** is the personal search memo of accused Monika. **Ex.PW11/A** is the statement u/s 67 of accused James Pascal. **Ex.PW11/B** is the arrest memo of accused James Pascal. **Ex.PW11/C** is the jamatalashi of accused James. **Ex.PW8/E** is the arrest report u/s 67 of accused Monika. **Ex.PW11/D** is the arrest report u/s 57 of accused James Pascal. **Ex.PW4/** is the statement of Mohd. Ahmed u/s 67. **Ex.PW10/A** is the statement of Shakeel u/s 67. **Ex.PW1/G** is the seizure report u/s 57. **Ex.PW1/F** is the seal movement register. **Ex.PW5/A** is the malkhana register. **Ex.PW12/A** is the test memo. **Ex.PW2/B** is the receipt of acknowledgment of deposit of samples at CRCL. **Ex.P1** is the CRCL report dated 19.07.2013 showing percentage of diacetylmorphine in the sample as 0.8%. **Ex.PW1/L** is the report of FRRO showing arrival and departure details of accused Ndubusi Paschal, Nigerian national not available. **Ex.PW13/B** is the CAF of mobile no. 8586904071 in the name of one Md. Haq. **Ex.PW13/C** is the certificate u/s 65B Evidence Act. **Ex.PW13/D** (colly) is the CDR of mobile no. 8586904071. **Ex.PW9/G** is the letter from Nodal Officer to IO regarding the mobile no. 9718407282. **Ex.PW9/C and PW9/DA** is the CAF of one Allauddin of mobile no. 9718407282. **Ex.PW6/A** is the CAF of mobile no. 8800548423 in the name of one Sunita Bharadwaj.

24.Ld. counsel for accused James Pascal submitted that prosecution case on the factum of apprehension of accused with contraband is blatantly false and entire recovery is planted over the accused persons. Ld. Counsel submits that present accused is not the accused to whom NCB is looking and furthermore present accused has nothing to do with co-accused Monika @ Kajal and he met her first time during custody in the NCB office. The statement of independent witnesses i.e. PW4 and PW10 are not at all credible. Both witnesses appears stock witnesses. The testimony of NCB officials is inconsistent over the timings and manner of apprehension of accused. The necessary corroboration from the

mobile call records is lacking. Ld. Counsel submits that the recovery is even not shown from present accused. There is no record of surveillance of area as per prosecution case. There is no record that PW8 and PW14 are doing surveillance in the said area. Ld. Counsel submits that the secret information as recorded do not appear to be credible. There is no record of issuance of testing kit, log book, even no site plan was prepared. Ld. Counsel submits that the statement u/s 67 was recorded under force which was retracted. Ld. Counsel also submitted that the present accused is apprehended because of being Nigerian national and is not in any manner involved in present offence. The prosecution not able to prove its case beyond reasonable doubt.

25.Ld. Counsel for accused Monika submitted that accused Monika when apprehended do not at all know what is lying in the said bag. Ld. Counsel submits that in this regard accused also relied upon testimony of DW1. Ld. Counsel submits that accused Monika is a poor lady who after divorce forced to live as a sex worker, and because of this fact the co-accused misused the company of the present accused. Ld. Counsel submits NCB officials very much knew that accused was not in conscious possession of contraband which is also clear from her statement u/s 67. Ld. Counsel submits that even otherwise the contraband recovered is of small quantity as having percentage of .8% only therefore no offence u/s 21(c) stands proved. Furthermore there is no witness from the railway joined and the independent witness appear to be stock witnesses. Ld. Counsel submits that accused is entitled to be acquitted. Written submissions are also filed.

26.Ld. SPP for NCB on the other hand submitted that testimony of NCB officials alongwith independent witnesses is credible over the apprehension and recovery from accused. Accused Monika in her defence also admitted the said fact. Ld. Counsel submits that accused James had supplied the said bag containing drugs to accused Monika just prior to their apprehension and both unable to rebut presumption u/s 35 and 54 NDPS Act. Prosecution able to prove foundational facts beyond reasonable doubt however accused unable to

rebut the presumption hence liable to be convicted for the offence charged.

27. Arguments heard. Record perused.

28. As per the case of the prosecution, accused Monika @ Kajal was apprehended while carrying the bag containing contraband alongwith accused James Pascal who handed over the said bag 5-7 minutes prior to their apprehension. The prosecution has to prove foundational facts of apprehension and recovery of contraband from the possession of accused persons beyond reasonable doubt prior to raising of presumption u/s 35 and 54 NDPS Act.

Secret information, raid and recovery

29. As per the case of prosecution, a secret information dated 22.05.2013 (Ex.PW1/A) was received that one lady and one Nigerian is indulging in illegal drug trafficking of supply of heroin in Pahargunj area pursuant to which surveillance was mounted and thereafter in continuation to said secret information, another secret information (Ex.PW1/B) dated 25.05.2013 was received at around 02.00 PM in which it is mentioned that accused James Pascal with description of built, height and age, and accused Monika with description of built will be coming near 08.00-09.00 PM near Sri Lanka Buddhist Pilgrim Centre opposite railway reservation building pursuant to which raiding team was prepared which reached the spot. PW1 IO Rupesh Kumar constituted the raiding team on the direction of PW12 R.K. Singh, Superintendent. The raiding team consists of PW3 IO Sarita Kataria, PW7 IO Vikas Yadav, Sepoy Ved Prakash and left the NCB office at around 04.10 hours, and reached spot at around 04.45 PM. Thereafter PW1 IO Rupesh Kumar joined independent witness PW4 Mohd. Ahmed and PW10 Shakeel. PW8 IO Azad Singh and PW14 IO Pradeep Singh were also present in the area doing surveillance. Thereafter, in presence of all these witnesses the accused persons were apprehended at around 08.50 PM and accused Monika was found to be carrying the bag containing contraband accompanying accused James Pascal.

30. The prosecution for proving factum of recovery of contraband from the bag carried by accused Monika @ Kajal accompanying accused James Pascal has

relied upon the testimony of PW1 IO Rupesh Kumar, PW3 IO Sarita Kataria, PW4 Mohd. Ahmad, PW7 IO Vikas Yadav, PW8 IO Azad Singh, PW10 Shakeel and PW14 IO Pradeep Singh. PW1 IO Rupesh Kumar stated that on receiving secret information on 25.05.2013 at around 02.00 PM, he alongwith the team reached the spot in Bolero vehicle at around 04.45 PM. At the spot he also met PW8 IO Azad Singh and PW14 IO Pradeep Singh and thereafter he joined two more witnesses PW4 Mohd. Ahmed and PW10 Shakeel. Thereafter at around 08.50 PM saw accused James Pascal and accused Monika coming on foot near Sri Lanka Buddhist Pilgrim Centre, and for sometime they kept on waiting, and accused Monika was having greenish colour bag in her hand, however, when they were leaving, they were stopped. PW4 Mohd. Ahmed, the independent witness, also stated that he was joined in investigation as an independent witness by NCB official and they were waiting for quite sometime near Sri Lankan Buddhist Pilgrim Centre and saw accused Monika @ Kajal and James Pascal, and the accused Monika @ Kajal was carrying bag. PW10 Shakeel also stated that he has joined NCB team. He further stated that another independent witness was also joined namely Mohd. Ahmed. He also stated that accused Monika alongwith accused James Pascal reached near Sri Lanka building and accused Monika was carrying green colour suitcase/bag. The factum of accused Monika reaching to the spot i.e. in front of Sri Lanka Pilgrim Centre is also corroborated by statement of PW3 IO Sarita Kataria, PW7 IO Vikas Yadav and PW8 IO Azad Singh and PW14 IO Pradeep Singh. There is nothing material in the cross-examination of these witnesses that they have not witnessed the arrival of both the accused together in front of Sri Lanka Pilgrim Centre opposite reservation office of railway.

31. All these witnesses also stated that accused were given notices u/s 50 for taking personal search however they refused to be searched in presence of magistrate or gazetted officer however nothing was recovered from personal search of accused but on searching the bag, 5 polythene packets containing off white colour substance recovered. PW1 stated that from one packet small quantity

taken out for purpose of testing which gave positive test for heroin and thereafter 4 of the remaining packets were also opened and small quantity from each packet was taken which tested positive for heroin however as the entire contraband having same colour and texture therefore mixed homogeneously and transferred into transparent polythene, and total weight came around 5kg. The manner of recovery and testing of contraband is also corroborated through testimony of PW3 IO Sarita Kataria, PW7 Vikas Yadav, PW8 Azad Singh and PW14 Pradeep Singh. PW4 Mohd. Ahmed also stated that the small pinch of substance tested from each of packets which was informed on testing as heroin and thereafter all the material was packed in one polythene packet and came out at around 5 kg. This witness in cross-examination described thoroughly what is his position at the time of testing. He also gave description of the bag. The cross-examination do not in any way appears to dislodge his presence and factum of witness to the proceedings at spot. PW10 Shakeel, another independent witness also stated that five packets were recovered from suitcase and some quantity from each packet was tested and it was apprised that it was heroin. Thereafter all packets were put in polythene whose weight was come around 5 kg. This witness in cross-examination on behalf of accused James Pascal stated that 5 packets were not weighed individually however this witness categorically stated that each packet was tested separately and found positive for heroin. The non weighing of packets separately hardly of any relevance, particularly when all the packets containing substance of same colour and texture. Therefore as far as the factum of recovery and testing of contraband at the spot is concerned, all the witnesses duly corroborated the said fact and nothing material came in their cross-examination to create dispute over the said fact. The factum of recovery of heroin from bag/suitcase and its testing is duly proved through all these witnesses which is corroborated through CRCL report (Ex.P1).

32. Now it is pertinent to look at the defence of accused persons which somehow also corroborates the prosecution case over the apprehension of accused persons

from spot alongwith contraband. Accused Monika in her statement u/s 313 categorically stated that the bag in question was handed over to her by accused James 5-7 minutes before their apprehension. She also admitted that notice u/s 50 was also given to her. She also admitted that some NCB officials were doing some proceedings in front of vehicle. She also admitted she signed on small papers as per directions of IO. From the statement of accused Monika u/s 313, it is clear that they were apprehended from the spot with the contraband in the manner relied upon by prosecution. The factum of meeting with accused near spot and handing over bag is also fortified by her through defence witness DW1 Praveen.

33. It is pertinent to relook at the cross-examination of the witnesses of spot. PW14 Pradeep Singh was suggested that Monika alighted from three wheeler when apprehended. He was also suggested that Monika had disclosed that bag was given to her by James Pascal just before when she was apprehended but she has no knowledge about contents of bag. She also raised the defence that she was not aware about contents of bag. PW14 was also given suggestion that she was just standing by the side of James Pascal at the time of apprehension. This cross-examination itself suggests that accused was apprehended from spot in question together alongwith bag. Accused James Pascal in cross-examination suggested to PW14 that bag was recovered from the hand of Monika and further stated that accused were coming together however cannot tell who was ahead.

34. Accused Monika contrary to her defence suggested PW1 that she was not holding bag. Accused Monika in cross-examination to PW3 though admitted the recovery of bag however suggested that another bag was recovered from accused Monika which is contrary to her statement u/s 313 Cr.PC. Accused James Pascal in cross-examination suggested to PW4 that bag in question was red in colour and small sized having household articles whereas suggested to PW3 that bag is black in colour but manner of putting this question somehow also corroborates prosecution case that accused were apprehended together

from the spot. It is suggested to PW7 by accused Monika that she was not aware of contents of bag however do not appear to be disputing through this witness that bag was not recovered from accused Monika. The defence of Monika through PW8 is that she was not in conscious possession of contraband when apprehended. However, defence pleas, manner of cross-examination of prosecution witnesses and relevant suggestions also supported prosecution case over manner of apprehension of accused as well as recovery of contraband from bag from the spot in question.

Proceedings u/s 50 NDPS Act

35. The recovery witnesses as discussed before stated that accused were given notices u/s 50 apprising their legal rights to be searched before gazetted officer and magistrate however accused refused. Ld. Counsel for accused submitted that despite refusal the accused are required to be searched before magistrate or gazetted officer however the search was not conducted in presence of magistrate or gazetted officer and this is non compliance of section 50 NDPS Act (relied upon *Sumit Rai @ Subodh Rai Vs. State CRL.A. 578/2017 dated 29.07.2019*, *Arif Khan Vs. State of Uttarakhan AIR 2018 SC 2123*, *Dilip Vs. State of MP (2007) 1 SCC 450*, *State of Rajasthan vs. Parmanand (2014) 5 SCC 345* and *State Vs Vicky CRL.L.P. 143/2017 dated 13.09.2019*). The contraband admittedly is not recovered from personal search but from the bag carried by accused Monika @ Kajal. Apex Court in case titled ***State Of Punjab vs Baljinder Singh Criminal Appeal Nos.1565-66 of 2019 dated 15.10.2019*** (3 Judges Bench) 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 safeguards provided in Section 50 of the Act cannot by itself be used as admissible evidence of proof of unlawful possession of contra-band.

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

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

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

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

36. Therefore, as per mandate of this judgment, there is no requirement for complying section 50 which is only restricted to personal search and not to the bag, briefcase, premises, vehicles or articles. Even otherwise, accused refused to be searched before gazetted officer or magistrate. Hon'ble Delhi High Court in case titled as Sayaed Md. Ridwan @ Munna to state CrI.A.785/2014 dated 22.02.2019 held as under:

11. A Constitution Bench of Supreme Court in Vijaysinh

Chandubha Jadeja (supra) has ruled that Section 50 of the NDPS Act itself gives an option to the raiding officer to search any person and if such person requires, then such person ought to be produced before the nearest gazetted officer. In the instant case, appellants had refused to exercise their option to be searched in the presence of a gazetted officer. Supreme Court in Arif Khan (supra) has taken note of the afore-referred legal position, but has chosen to acquit accused on facts of said case. While relying upon the dictum of Constitution bench in Vijaysinh Chandubha Jadeja (supra), this Court holds that the giving of option to appellants to be produced before a gazetted officer is sufficient compliance of Section 50 of the NDPS Act. As far as appellant -Syaed Md. Ridwan @ Munna signing notice under Section 50 of NDPS Act in English is concerned, I find that though he claims to be illiterate, still such persons can and do sign in English and on this count also, benefit of doubt cannot be extended to appellant -Syaed Md. Ridwan @ Munna.

12. As regards appellant -Gulzar Sheikh @ Sonu, he had clearly written on the Notice under Section 50 of the NDPS Act that he does not want to be searched in the presence of a gazetted officer. So, on this count, conviction of appellants cannot be faulted with.

37. Further, in case titled as *Ram Gopal Vs. State* CrI.A. 676/2016 dated 16.10.2018, the Hon'ble Delhi High Court held as under:

11. The Supreme Court therefore, has held that while the obligation of the authorised officer under Section 50(1) of the Act is mandatory and requires strict compliance, the suspect may or may not choose to exercise the right provided to him under the said provision. It was further held that the question whether or not the procedure prescribed under Section 50(1) of the Act has been followed and the requirement prescribed therein has been met, is a matter of trial.

12. In the present case, PW-7 Ct. Kheta Ramse, PW-8 HC Jagdish and PW-10 Inspector Satyawan have duly proved the service of mandatory notice under Section 50 of the Act (Ex.PW7/A) on the Appellant and refusal of the Appellant to exercise his legal right to be searched before a Gazetted Officer or the Magistrate, in his own handwriting (Ex.PW7/B). In the statement of the Appellant recorded under Section 313 Cr.P.C., the Appellant had not denied his reply in Ex.PW7/B. Therefore in my opinion, the requirement of Section 50(1) of the Act has been duly complied with by the prosecution.

13. In Arif Khan (supra) on the facts of that case, the Court found that the mandatory procedure under Section 50 of the Act had not

been satisfied. The said case was peculiar on its own facts and therefore, is distinguishable from the facts of the present case. In the present case, the prosecution has been able to prove its case through the testimonies of its witnesses and the documents produced on record.

38. In judgment titled as *Innocent Vs. State* CrI.A. 139/2017 dated 14.01.2020, Hon'ble Delhi High Court held as under:

34. The above decision also makes it clear that the mandate of Section 50(1) of the NDPS Act is to ensure that the authorized officer informs the person proposed to be searched about his right to be searched before a Magistrate or a Gazetted Officer. The authorized officer is also obliged to take the concerned person (the suspect) to the nearest Gazetted Officer of any departments mentioned in Section 42 of the NDPS Act or to the nearest Magistrate, if such person so requires. In Vijaysinh Chandubha Jadeja (supra), the Supreme Court had also observed that though Section 50 of the NDPS Act gives the option to the empowered officer to take the person suspect either before the nearest Gazetted Officer or to a Magistrate; in the first instance, an endeavor should be made to produce the suspect before the nearest Magistrate. This, obviously, would follow only 'if the person so requires'.

35. In view of the decisions as mentioned above, it is no longer res integra that it is mandatory to comply with Section 50 of the NDPS Act. There is also no ambiguity as to manner in which Section 50 of the NDPS Act is required to be complied. Plainly, there is no requirement to conduct the search in the presence of a Magistrate or Gazetted Officer, if the person proposed to be searched did not so desire, after being informed of his right in this regard. The words "if such person so requires" as used in Section 50(1) of the NDPS Act make it amply clear that the person to be searched would be taken before a Magistrate or a Gazetted Officer, only if he so requires.

39. Therefore, in present facts and circumstances it cannot be held there is non-compliance of section 50 as accused themselves refused the option to be searched before gazetted officer or magistrate. Even otherwise section 50 is not applicable as the recovery is effected from bag not from personal search.

PW4 Mohd. Ahmed and PW10 Shakeel are independent or stock witnesses

40. Ld. counsel for accused vehemently argued that PW4 and PW8 are not at all independent witnesses and are stock witnesses. Ld. Counsel submits this fact is clear because there is inconsistency in the statement of witnesses from where

they were joined, timing when they were joined. Ld. Counsel submits that PW4 Mohd. Ahmed stated that he was joined around 08.00 PM when standing near railway station and PW10 stated that at around 07.30 PM he was joined. PW1 IO Rupesh Kumar stated that he met panch witnesses at around 06.30-07.00 PM near reservation centre. PW7 stated in cross-examination that they were joined at around 05.30-06.00 PM. Ld. Counsel submits that PW10 in cross-examination stated that he was doing work of Aluminum fabricated but could not tell the shop where he was working and was not carrying any instrument for doing the work. PW4 also stated that he has come for some purchase but had not purchased anything till he met NCB officials and only thing purchased is the ticket. Ld. Counsel submits that both these witnesses are found to be almost illiterate but given statement in very refined manner which itself suggest that these are stock witnesses and not independent witnesses.

41. The joining of both these witnesses in proceedings is corroborated by other NCB officials. Both these witnesses were examined before court after 2-3 years of raid and recovery. Both these appear to be semi literate and of a very humble background. One stated to be having barber shop in Ghaziabad and other as aluminum fabricator. Both these witnesses categorically stated that they were not stock witnesses and are not witnesses in any other case of NCB. There is nothing brought before court that they have joined investigation previously also with NCB or with any other agency. The discrepancies are pointed out over the timing of joining and the exact place of joining. The raiding team reached spot at around 04.45 PM and accused persons were apprehended at around 08.45 PM. In the meanwhile both these witnesses were joined. They are thoroughly cross-examined, and from their cross-examination it cannot be inferred that they were not present in New Delhi Railway Station area at relevant time. The minor discrepancies over timings when they were joined or exact place of their joining cannot in any manner dent prosecution case over the nature of their independent witness. There is nothing in testimony of other NCB officials from which it can be inferred that these witnesses are not independent. Merely on the

basis of fact that these witnesses are of humble background or semi literate category cannot be considered as circumstance that they are not eligible or independent witnesses. Even otherwise, the defence of accused persons as discussed also enhance the prosecution case over their presence at the spot or the manner of apprehension and recovery of contraband from them. Therefore the submissions that the testimony of PW4 and PW5 cannot be relied upon and both these witnesses are found to be independent witnesses and their testimony duly corroborated the testimony of NCB officials over the recovery and apprehension of accused in the manner relied by prosecution.

Whether the testimony of DW1 Parveen could be read against accused James Pascal

42. Accused Monika in her statement u/s 313 took the defence that she was apprehended alongwith accused with bag in question however said bag containing contraband was supplied to her by accused 5-7 minutes prior to their apprehension together. In this regard, this accused also examined DW1 Praveen who stated that on 25.05.2013 at around 05.30 PM, he picked up accused Monika in his taxi and dropped at Connaught Place where accused told him to wait for 2-3 minutes. In the meanwhile accused James Pascal came in auto having one green colour suitcase and then he left the spot. However, accused Monika in her statement u/s 313 not stated that he was brought by this witness in taxi for meeting the accused James Pascal. On the other hand, raised the plea that she herself came in an auto and not stated to come by taxi. In cross-examination on behalf of accused James Pascal, DW1 stated that he could not notice whether accused Monika was talking to accused or not, and further stated that he has only seen partial face of accused not the entire face. This witness was brought to court by accused Monika for deposition in this case on 16.10.2019 i.e. almost after 6 years of incident. It is also not coming from his testimony that he during this period also has any contact with Monika. Furthermore, it is unlikely for any person to identify the person after six years when he has just seen the partial face. Furthermore, there is a substantial

difference in the timing when he stated to have dropped accused at Connaught Place. The testimony of this witness regarding seeing of a bag in hand of accused James Pascal prior to his handing over to accused Monika do not appear to be at all credible. The testimony of DW1 therefore cannot be read against the accused James Pascal however from this defence evidence it can be inferred that accused Monika is somehow admitting that she was carrying the bag which was given by accused James Pascal. DW1 is produced by accused Monika further corroborates the prosecution case to the extent that accused Monika was carrying the bag when apprehended.

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

43. 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 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.

44. Accused Monika in her statement u/s 67 admitted that she was apprehended with the bag containing contraband however stated that she do not know whether the said bag was having heroin. Accused Monika in her statement u/s 313 stated that she met the accused James Pascal in a church and furthermore she was working as sex worker and had remained in the company of accused previous night and came to Connaught Place as accused James told her to accompany him for purchase of clothes because being foreigner he was charged more and if she accompany then the deal is at reasonable rates and further promised Rs. 5000/- as commission. The defence as taken by accused Monika is not at all corroborated, further, lacks the particulars regarding what kind of clothes has to be purchased and from where it has to be purchased and why accused promised to give her Rs. 5000/- as commission particularly when there is nothing substantial as money recovered from the possession of accused persons. The defence as laid by accused Monika do not appear to be at all credible. Thus statement of accused Monika despite retraction could be used as corroboration.

45. The accused James Pascal in his statement u/s 67 admitted the recovery and company of co-accused Monika at the time of apprehension. He also stated he met accused Monika at New Delhi Convent church further provided the phone numbers of himself and Monika. He also stated he had to deliver said heroin to Mike. This accused further submitted that he know keeping heroin is punishable offence. This accused in his statement u/s 313 Cr.PC stated that he was

apprehended from the road however not took any specific plea from which road or on which day he was apprehended but in cross-examination of PW12, he suggested to him that this accused was apprehended on 21.03.2013 from Pahargunj area. The accused could not substantiate this fact. This accused however in cross-examination of PW3 suggested bag recovered was of black colour containing clothes only, however suggested PW4 that it was red in colour, thus somehow enhancing prosecution case over his apprehension with accused Monika from spot with bag. The testimony of prosecution witnesses regarding his apprehension with contraband bag carried by Monika as discussed appears credible. In these circumstances the statement of accused James u/s 67 can be acted for corroboration of prosecution case. Even otherwise the prosecution able to prove the factum of recovery of contraband from the spot by accused persons.

Deposit of case property in malkhana and formalities u/s 57

46. PW1 IO Rupesh Kumar categorically stated that after completion of proceedings at the spot he reached office at around 12.30 AM and deposited case property with malkhana incharge PW5/7 IO Vikas Yadav. The said fact is duly corroborated by testimony of PW5/7 IO Vikas Yadav and the malkhana entries Ex.PW5/A. The handing over of the seal by superintendent PW12 to PW1 IO Rupesh Kumar is also duly proved through the entry (Ex.PW1/F) in seal movement register. PW2 Ct. Dinesh Kumar took the samples alongwith test memo to CRCL and handed over the same to Ajay Kumar Sharma, Assistant Chemical Examiner. There is nothing in his cross-examination to suggest that any tampering took place till he handed over the same at CRCL laboratory. The proceedings u/s 57 regarding forwarding of seizure report and arrest report are also duly proved.

CRCL report over the contraband and plea of consideration of percentage of heroin/diacetylmorphine.

47. Order dated 09.09.2014 of this court shows that Ld. Defence counsel submits that they do not want to dispute the report and CRCL report is admissible u/s

293 Cr.PC which can be tendered by Ld. SPP, and therefore observed there is no need to examine the chemical examiners. Accordingly the said report u/s 293 is tendered by SPP. As per chemical examination report Ex.P1, the sample sent found to have 0.8% percent of diacetylmorphine (heroin). Ld. Counsel for accused person submits that the content of diacetylmorphine is only 0.8% i.e. around 40 gm which falls in small quantity. Ld. Counsel submits that Delhi High Court in case titled *CBN Vs. Sandeep Kumar 2019 LAW Suit (DELHI) 2001* held that provisions of law passed in E. Michael Raj are applicable and therefore the percentage is to be taken to determine quantity of contraband.

48. The judgment of E. Michael Raj's case was rendered before issuance of SO 2941(E) dated 18.11.2009. This notification was challenged before Hon'ble High Court in Abdul Mateen's case and before Hon'ble Punjab and Haryana Court in Hari Singh's case. The challenge in Abdul Mateen's case was dismissed by Hon'ble Division Bench of Hon'ble Delhi High Court by judgment report in Abdul Mateen's case. Similarly, Hon'ble Punjab and Haryana High court also dismissed the challenge to SO 2941(E) dated 18.11.2009 by judgment reported in *Hira Singh Vs. UOI 2013 SCC OnLine P & H 17488*. Both these judgments were challenged before Hon'ble Supreme court. On behalf of the respondent (UOI) before Hon'ble supreme court it was argued that Central Government was empowered to issue the notification u/s 76 and 77 of the Act. It was also argued that in E. Michael Raj's case, all relevant provision of the act were not considered. By the order reported as *Hira Singh Vs. UOI & Anr (2017) 8 SCC 162*. Hon'ble two judge Bench decided to refer the matter to larger bench. The observations made by hon'ble two Judge Bench in paragraph 10 and 11 of the judgment are important and they are reproduced as hereunder:

10. It was possible to examine the wider issues raised by the respondents upon accepting their argument that the decision in E. Micheal Raj (supra) is per incuriam. However, in our view, that decision has interpreted Section 21 of the Act. That interpretation would bind us. Moreover, that decision has been subsequently noted in other decisions of this Court in the case of Harjit Singh Vs. State of Punjab, Kashmiri Lal Vs. State of 3 (2004) 4 SCC 446 4 (2011) 4 SCC 441 Haryana, State Through Intelligence Officer,

and Narcotics Control Bureau Vs. Mushtaq Ahmad and Others - followed or distinguished. In Amarsingh Ramjibhai Barot vs. State of Gujarat, quantity of entire mixture was reckoned and not limited to the pure drug content therein. Significantly, in none of these decisions, was the Court called upon to examine the issues now raised by the respondents. Further, all these decisions are of two Judges Bench.

11. Thus, considering the significance of the issues raised by the respondents and the grounds of challenge of the appellants/petitioners concerning the impugned notification, to observe judicial rectitude and in deference to the aforementioned decisions we direct that these matters be placed before atleast a three Judges Bench for an authoritative pronouncement on the matters in issue, which we think are of seminal public importance.

49. In Hira Singh's case, while making the reference to the larger bench, hon'ble Supreme Court did not stay operation of the judgments passed by hon'ble Delhi High Court in Abdul Mateen's case and by hon'ble Punjab and Haryana High Court in Hira Singh's case. It would be appropriate to refer to some other judgments by hon'ble Supreme Court and by hon'ble High Court to see what has been the view on Note 4 added by notification dated 18.11.2009.

50. In *Harjit Singh Vs. State of Punjab (2011) 4 SCC 441* hon'ble Supreme court observed that it was evident that under the notification dated 18.11.2009, the whole quantity of material recovered in form of mixture is to be considered for imposition of punishment. But the said notification did not apply to the particular case as it could not be applied retrospectively. It is pertinent to note that in Harjit Singh's case, the seizure was made on 04.07.2003 i.e. prior to issuance of the notification dated 18.11.2009. It is also pertinent to notice that hon'ble Supreme court clearly held that for the cases registered after issuance of the notification, weight of the entire mixture is to be taken into consideration.

51. In *Ajay Kumar Vs. State 2015 Vs. State SCC OnLine Del 12592* there was recovery of 270 gm of heroin with purity of 1% diacetylmorphine. The recovery was made on 29.12.2009 i.e. after the notification dated 18.11.2009, it was argued before hon'ble High court that in view of the judgment in E. Michael

Raj's case only the pure drug content is to be considered to determine whether the quantity falls within the commercial category or not. Hon'ble High Court rejected this argument and observed that the judgment in E. Michael Raj's case was rendered before issuance of notification dated 18.11.2009. Same was the decision by hon'ble High court in the matter of *Kiran Vs. State 2015 SCC OnLine Del 12912*. In *Karan Sharma Vs. Union of India 2018 SCC OnLine Del 7034* also it was held that in view of SO 2941 (E) dated 18.11.2009, the entire mixture of the particular drug and not just its pure drug content has to be taken into account to determine whether the quantity recovered falls into small quantity or commercial quantity. These judgments were also rendered by Hon'ble Single Bench of Hon'ble Delhi High Court.

52. When we read the observations made by hon'ble Supreme court in Harjit Singh's case (supra), the judgments by hon'ble Delhi High court mentioned above and the observations made by hon'ble Supreme court in paragraph 10 and 11 of Hira Singh's case (supra), the position which emerges is that for the seizure prior to insertion of Note 4 to the notification vide SO 2941 (E) dated 18.11.2009, judgment in E. Michael Raj's case would apply. For subsequent seizures Note 4 would be applicable and weight of the entire mixture will have to be taken into account to decide whether the narcotic or psychotropic substance falls within small category or commercial category. In view thereof, the entire contents of mixture is to be seen not the percentage. The entire contraband in present case weighing 5 kg which falls in commercial quantity.

Effect of discrepancies, omissions and lapses

53. Hon'ble Apex Court in *State of UP Vs. M.K. Anthony 1985 (1) SCC 505* held that while appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, draw-backs 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 given by the witness 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, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the : root of the matter would not ordinarily permit rejection of the evidence as a whole.

54. Apex court in 'Smt. Shamim Vs. State, Crl. Appeal No. 56/2016 dated 19.09.2018', in para 12 observed

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

55. Ld. Defence counsel submits that as per personal search memo the prosecution shown to have recovered one mobile phone having two SIMs from accused Monika and two mobile phones from accused James and prosecution also examined PW6 Nodal officer, PW9 Pawan Singh and PW13 Saurabh Agarwal who exhibited records of mobile no. 8800548423, 9718407282 and 8586904071. Ld. Counsel submits however there is nothing on record to

suggest in what manner accused was connected with said mobile phones, as personal search memo mentioned only SIM numbers. Ld. Counsel submits as per the testimony of NCB officials the accused when apprehended were talking on phone however not tried to prove the said fact from mobile records. Ld. Counsel submits that prosecution is obliged to prove presence of accused at the spot when specifically pleading that accused were talking on phone by placing call details on record. Furthermore, it is natural if the accused Monika is meeting accused James Pascal at Connaught Place she might have called him before meeting him at Connaught Place. Ld. Counsel submits that mobile call record is material piece of evidence to connect both accused however the prosecution not tried to prove said factum through mobile call record.

56. The prosecution examined relevant nodal officers with relevant mobile call records. It is surprising the prosecution not exhibited CDR of mobile no. 8800548423 and 978407282 and only exhibited CDR details of mobile no. 8586904071. All these mobile numbers are in the name of different persons. None of them has been examined. The prosecution even otherwise could not substantiate in what manner the accused used these mobile numbers. On specific query Ld. SPP could not give any reply how the accused persons were connected through these mobile calls records. Therefore in this scenario the prosecution case is found deficient in corroborating its case through mobile call records. However, no benefit of this omission could be given to accused as testimony of NCB officials and independent witnesses found credible over apprehension and recovery which is also found supported by defence of accused as discussed. The substantive evidence of PWs cannot be brushed aside due to lack of this corroboration. The accused also have opportunity to rebut their presence at spot through mobile record but not opted to do so either through prosecution case or defence evidence. Accused further denied the knowledge of all mobile numbers put to them in their statements u/s 313 Cr.PC.

57. Ld. Counsel submits that there is a discrepancy in the testimony of PW1 over the time of receiving of information. PW1 in cross-examination stated that he

received information at around 02.05 PM whereas secret information Ex.PW1/B showing that he has put up the same at 02.00 PM before superintendent furthermore there is no record of surveillance between 22.05.2013 to 25.05.2013. Ld. Counsel submits that PW8 and PW14 stated that they reached the spot to mount surveillance at about 03.00 PM, however this fact is not deposed by any other witness. PW12 R.K. Singh, Superintendent not stated that he has put PW8 and PW14 on surveillance duty on 25.05.2013, furthermore there is no departure entry from NCB office. No log book of vehicle produced. There is no site plan made. There is no entry of field testing kit. PW12 stated accused not produced before him, however, PW1 in cross-examination stated superintendent himself seen accused in IO room.

58. PW1 in secret information Ex.PW1/B recorded that said information is received around 02.00 PM on 25.05.2013 whereas in testimony stated at 02.05 PM. This hardly makes any dent on the time of receiving information. PW8 and PW14 stated that they were called in office by Superintendent R.K. Singh PW12 who told them to have surveillance in the area however PW12 R.K. Singh in his examination chief not disclosed about deputing these officials for surveillance but in cross-examination stated that IO Rupesh told him that these two officials are also deputed for surveillance. This discrepancy considering the entire factum of raid and recovery as discussed do not appear to be at all material for giving any material benefit to accused persons. Furthermore, production of accused after arrest before Superintendent PW12 R.K. Sharma or PW12 seen accused in IO room hardly material.

59. Ld. counsel submits that PW3 Sarita Kataria stated that personal search of accused Monika was conducted in the vehicle however the other official stated that it was conducted on the side. This discrepancy itself suggests that there was no search conducted at the spot. The vehicle was also lying at the spot itself. These discrepancies are only matter of observation and appear to be very minor in nature in present facts and circumstances, particularly when nothing is recovered from personal search.

60. The discrepancies of prosecution case regarding non preparation of site plan or non production of log books or no record in regard to expiry date of kits used for testing are not very material. The contraband was also tested at CRCL. The surveillance record is also not very material. There is no statutory requirement for maintaining such surveillance record, thus no benefit of those discrepancies could be given to accused.

61. Ld. counsel for the accused James raised a defence that accused is not the real James Pascal to whom the NCB is searching and real name of accused is Ndubusi Paschal. Ld. Counsel submits that prosecution falsely made this accused as James Pascal. This plea appears blatantly farce because in the retraction statement dated 08.06.2013 the accused has not raised such plea. The accused in said retraction statement mentioned his name as Ndubusi Pascal Udgbalem. The plea of wrong identity even otherwise do not hold any water as identified by the witnesses in the court being the person who was apprehended from the spot with accused Monika @ Kajal.

Presumption u/s 35 and 54 of NDPS Act

62. 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.

xxx xxx xxx xxx

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

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

27. In the factual scenario of the present case, not only possession but conscious possession has been established. It has not been shown by

the accused-appellants that the possession was not conscious in the logical background of Sections 35 and 54 of the Act."

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

63. 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 bag containing contraband from the accused Monika who is in company of accused James Pascal duly proved. Now the presumption is upon the accused to prove that they are not in conscious possession. Apex court in *Baldev Singh Vs. State of Haryana (2015) 17 SCC 554* categorically held that once possession is proved then it is for the accused to establish that he was not in conscious possession of contraband. Accused Monika almost admitted the prosecution case however stated that she has no knowledge of contraband inside the bag but unable to prove the said contention as already discussed. Accused James Pascal found in the company of Monika at that time. The statement of Monika and presence of accused with Monika shows that accused has delivered the said bag to Monika. Accused James Pascal unable to rebut the said presumption. The plea of accused that he was apprehended due to wrong identity or from the road do not found at all credible. The prosecution able to prove the foundational facts of apprehension of accused with contraband however the accused Monika @ Kajal and James Pascal unable to rebut the said presumption.

64. Apex Court in *Sachin Kumar Singhraha Vs. State of Madhya Pradesh 2019 SCC Online SC 363* held that it is worth reiterating that though certain discrepancies

in the evidence and procedural lapses have been brought on record, the same would not warrant giving the benefit of doubt to the accused/appellant. It must be remembered that justice cannot be made sterile by exaggerated adherence to the rule of proof, in as much as the benefit of doubt given to an accused must always be reasonable, and not fanciful. Therefore despite procedural lapses and certain discrepancies as already dealt the prosecution able to prove its case against the accused persons beyond reasonable doubt.

65. On overall appreciation of evidence, 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 Monika @ Kajal and James Pascal are found guilty for commission of offence under Section 21 (c) and 29 NDPS Act and convicted accordingly. Let both the accused be heard on point of sentence.

**Announced in the open court
on this 16th day of March, 2020**

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