

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

Case No. SC/9016/16 (old case no. 17/2015)  
ID No. 02403R0133042015

**Narcotics Control Bureau**

Through: R.D. Sharma  
Intelligence Officer,  
Narcotics Control Bureau, New Delhi

**Versus**

1. **Mahesh Singh (In JC)**  
S/o Late Sh. Suresh Singh  
R/o Budhkaran PO & PS Naxalbari  
Distt. Darjeeling
  
2. **Jaylal Singha (In JC)**  
S/o Late Sh. Jyotilal Singha  
R/o Budhkaran PO & PS Naxalbari,  
Distt. Darjeeling

Date of Institution : 25.07.2015  
Judgment reserved on : 17.08.2019  
Date of pronouncement : 02.09.2019

**JUDGMENT**

1. Prosecution case in brief is that on 20.01.2015, IO Azad Singh received a secret information that a parcel lying at Overseas Logistics Pvt. Ltd. is suspected to contain narcotic drugs, thereafter the said information was reduced into writing and placed before the Superintendent. Then on the directions of superintendent a team was constituted consisting of IO Azad Singh, IO Rajender Dutt Sharma, Sepoy Vasudev Bharadwaj, Sepoy Yogesh Kumar and Sh. R.S. Yadav. The team left the office after collecting the seal and other necessary items in government vehicle and reached the Logistics office where they met Abdul Khan, Operations Manager who thereafter handed over the team, the parcel. However before opening the same, IO Azad Singh requested Abdul Khan to provide two independent witnesses pursuant to which Parvesh Kumar and Gulshan Kumar working in the said office became the witnesses, thereafter in their presence,

the parcel was opened and found to be containing 31 pairs of woolen shoes of different colour and sizes, and 11 fancy woolen bags of different colours and sizes. On minute scrutiny of the shoes, the rubber sole of the shoes was found to conceal a transparent plastic containing plate type dark brown colour semi solid substance, then, the small quantity of the substance tested which gave positive result for charas. Similarly, the little quantity of substance found concealed in all the shoes was tested with the help of field testing kit and all gave positive result for charas. As the substance having the same colour and giving positive test for charas therefore the said plates were broken and transferred into transparent polythene packet, and on weighing their weight came around 5.250 kg. Two samples of 25gm each were drawn and put in transparent pouches marked A1 and A2. The remaining recovered substance was put in transparent envelope wrapped in white marking cloth. The remaining packing material were also put into the plastic packet mark A, then stitched with plastic rope mark B. Thereafter the packets were sealed. The test memo in triplicate was prepared and facsimile of seal was also affixed on the same. The panchnama was also prepared and both the witnesses put their signatures on each page of panchnama.

2. Statement of Parvesh Kumar and Gulshan Kumar u/s 67 was recorded on 30.01.2015. The sample was sent to the chemical examiner. On enquiry from Abdul Khan, the said parcel found to be received from Overnight Express, thereafter enquiry was made from Ashok Kumar who works in operations with Overnight Express and revealed that the parcel was received from Siliguri and sender's ID is of Mahesh Singh of Darjeeling.
3. On 22.01.2015, IO submitted seizure report u/s 57 NDPS Act. On 27.01.2015 the Intelligence Officers of Kolkata Zone conducted the search of residential premises of Mahesh Singh and seized the voter card and copy of driving license. Mahesh Singh appeared on 27.01.2015 and tendered his voluntary statement u/s 67 NDPS Act and admitted that the parcel containing charas was booked for courier by his relative Jay Lal using his ID. He stated that he has the knowledge

about the contents of parcel having charas and Jaylal Singha used to procure the charas from Kathmandu, Nepal, thereafter the search of house of Jay Lal was conducted and then notice u/s 67 was issued. Jaylal Singha appeared and tendered his statement in which he stated that he used to obtain the charas from one Prem from Kathmandu and also provided his mobile number. Accused Mahesh Singh and Jaylal were arrested on 27.01.2015. The witness Vimal Singh and Vishnu Singh who witnessed the search conducted at the residential premises of Mahesh Singh and Jaylal Singha not appeared before the IO. Thereafter on 29.01.2015 the compliance report u/s 42 and 57 was submitted to superintendent, NCB, Kolkata.

4. The production warrant were taken for the accused to bring them to Delhi and after production before the Special Judge, Delhi, they were sent to Judicial Custody. The CRCL report dated 23.02.2015 was received in NCB office. The call details of the accused were obtained showing their frequent conversation with each other. The letters were written by Superintendent, NCB to headquarters for conducting verification of address and person in Nepal through proper channel. On completion of investigation, complaint was filed.
5. Vide order dated 04.09.2015 charges u/s 29 and also u/s 23 r/w 28 and 29 NDPS Act were framed to which accused pleaded not guilty and claimed trial.
6. Prosecution for substantiating its case examined 14 witnesses. The summary details of their depositions are as follows:
7. **PW3 Azad Singh**, IO stated that on 20.01.2015 he received the secret information from Overseas Logistics that they had received a parcel suspected to contain narcotic drugs and the said information was reduced into writing and put up before the Superintendent, R.S. Joshi. Thereafter a team was constituted including himself, IO R.D. Sharma and two constables Vasudev and another. Then after taking the seal and making entries in seal movement register and also with IO kit, etc left NCB office and reached Bhikaji Cama Place where they met Abdul Khan, Operations Manager. Thereafter in presence of the two witnesses the parcel was opened and 31 pairs of woolen shoes and 11 fancy

woolen ladies bag were recovered, and on testing the same positive results for charas noticed, thereafter the samples were taken and the articles were seized. Test memo and panchnama were prepared. All the documents through which the parcel was booked i.e. identity of Mahesh Singh, invoice, etc were taken into possession. IO R.D. Sharma gave notices to public witnesses, thereafter they left for office and deposited case property with malkhana, and returned the seal to superintendent. He submitted the report u/s 57 NDPS Act to superintendent. He during investigation also taken the custody of accused arrested in New Jalpaiguri and brought them to Delhi after obtaining order from Court at Siliguri.

8. In cross-examination stated that he received the information at around 03.00 PM on official phone number. However he do not know the name of person to whom he had a talk. Also they did not tell since when the parcel in question was present in their office. The information was reduced into writing at around 03.00 PM but he had not put the time on information. He had not mentioned any file number on the information and there is also no specimen seal on the seizure report Ex.PW3/E u/s 57. He did not carry any search authorization and taken the information alongwith him to the office of Overseas Logistics. 31 pairs of woolen shoes were of different colours but he has not mentioned the colours of shoes or the ladies bag nor lifted the finger prints. He further stated he do not remember the expiry date of field testing kits or the serial number, and also not mentioned about the chemical mixed for testing in the panchnama or any other document. He also did not mention the final colour attained after the testing. He did not take any help of computer at Overseas Logistics and prepared all the documents himself. All the proceedings were conducted in the office of Abdul Khan however he did not obtain the signatures of Abdul Khan on any of the documents. He denied suggestion that the document Ex.PW3/C is a manipulated document. He further stated that he cannot say whether any CCTV was installed in the office of Overseas Logistics and denied suggestion that all the exhibits are fabricated and manipulated.

9. **PW1 Rajender Dutt Sharma** also accompanied IO Azad Singh and stated that the said parcel was produced by Abdul Khan on which the consignor name was written as Mahesh Singh and thereafter the said parcel was opened in the presence of witnesses Gulshan and Parvesh and on test found to be containing charas, thereafter seizure was made. In cross-examination stated the name of consignor and consignee was not told to him by IO Azad Singh and they did not take any document alongwith them from the office, and he did not talk to Abdul Khan till he remained in the said office and they remained at the cabin from 04.00 PM to 06.50 PM. All the documents were prepared by IO Azad Singh. He stated that he had given notices u/s 50 to the witnesses but again stated that he had given notices u/s 67 NDPS Act. He denied suggestion that no proper procedure was followed in recording the statement of witnesses.
10. **PW12 Parvesh Kumar** stated that on 20.01.2015 he received telephone call from his manager Abdul Khan and found 4-5 persons sitting in the office stated to be from NCB and they told him that they had to search a parcel. Thereafter parcel was searched containing 31 pairs of woolen/cotton shoes and on testing found to be containing some charas. All the substances from 31 shoes were removed and the weight came around 5-5.25 kg and two samples were taken, and on 30.01.2015 he gave his statement in his own handwriting at NCB office. He further stated that he had booked the said parcel and at the time of booking invoice and copy of ID proof were furnished by Overnight company and all his documents bear his signature at point A. In cross-examination stated that he went to NCB office on 30.01.2015 all alone without anybody else and he wrote his statement in narrative, and he was not been shown any document by NCB. He also not claimed any conveyance charges from his office. He further stated that he had brought the said parcel from the office of Overnight on 17.01.2015, and he had other parcels also alongwith him at that time. However, he has not mentioned this fact in his statement. He further stated that he had brought airway bill invoice, manifest and ID proof alongwith the said parcel. He denied suggestion that Ex.PW3/C is not the original bill. He further stated the

proceedings were carried out in the office of his senior Abdul Khan who was also present in the office. NCB officers recorded the proceedings in writing and he did not prepare any document. CCTV cameras were installed in the office as well as in the portion of office of Abdul Khan. NCB officers also brought the weighing machine with them. He further stated that he had checked the weight and other dimensions of parcel while taking delivery and also signed the manifest, however, he cannot tell who had received the said parcel in Overnight Courier. The parcel was not sealed but only sewed. He is not aware who called the NCB officers.

11. **PW13 Gulshan Kumar** stated that on that day in his presence also in presence of Abdul, the parcel was opened by NCB officials and found to be containing 31 pairs of shoes. On removal of sole of the shoes, one polythene containing bhura (brown) colour substance affixed in the lower portion were found and two samples were taken and on checking, the officials told him that these are drugs. He further stated that officers prepared certain slips which were affixed on samples as well as on case property. In cross-examination denied suggestion that he is deposing falsely at the behest of NCB. He also stated that there is a CCTV installed at their office and on that day he remained in the office from 3 pm to 12 mid night. He further stated that NCB officers had also come to the office earlier but he do not remember the exact date. He also appeared as a witness in court in other cases as well. Ex PW3/C was not prepared by anyone in their office and also do not know who encircled Ex PW3/C at point A. He further stated that he do not remember whether he had made any entry in NCB office regarding their arrival or leaving the office. He denied the suggestion that in connivance with courier officials and NCB officials, documents were manipulated as well as the parcel. He further stated that he do not remember if the parcel were weighed in his presence and also do not remember if the NCB officials were having some weighing machine with them.

12. **PW2 Ashok Kumar Prajapati**, IO stated that on 22.01.2015, he received an office order from Zonal Director, Calcutta for a follow up action in connection

of seizure of 5.25 kg of Charas then he came to know that said consignment was booked by Mahesh Singh, thereafter on 27.01.2015 with the help of Excise officers, he reached at the residence of Mahesh Singh with two independent witnesses namely Vimal Singh and Vishnu Singh. Mahesh Singh opened the door and search was conducted and nothing incriminating was recovered and only copy of Voter ID and driving license were recovered. The seizure list was prepared and thereafter the notice u/s 67 of NDPS Act was given to accused then he made voluntary statement however could not write properly, therefore, he recorded his statement. He told that the consignment was booked by his brother in law Jaylal Singha then he along with accused went to his house thereafter his house was also searched and during search, one voter card and one black colour Micromax mobile was seized. The seizure report was prepared and notice u/s 67 of NDPS Act was given to accused. At the office of Excise, the accused Jaylal gave his voluntary statement, thereafter both were arrested and kept in police custody in the intervening night of 27/28.01.2015. In cross-examination stated that he received the document Ex PW2/A in the evening and copy was given to Ravi Kant and Nitish Kumar. He stated that he reached Siliguri along with Ravi Kant and Nitish Kumar and he along with one O C and driver reached the house of Mahesh Singh. He did not inform Mahesh Singh that if he wants to remain silent he can remain silent. He did not enquire how much money Mahesh Singh received. All the documents were prepared in the house of Mahesh Singh and were signed by the independent witnesses. He further stated that he did not ask Jaylal to call Prem and asked him to arrange a meeting with him.

13. **PW4 Bhuvnesh Kumar**, sepoy handed over the envelope along with test memo in duplicate to Rajesh Kumar, Asstt Chemical Examiner, CRCL, New Delhi. **PW5 Rajesh Kumar**, Asstt Chemical Examiner stated that on 21.01.2015 Bhuvnesh kumar came to him after getting the sample mark A1 checked from Chemical Examiner who directed him to receive the sample. All the four seals were intact and he also gave test memo in duplicate. He also given the receipt of the same.

**PW6 Gyanender Saxena**, Chemical Examiner, stated that on 10.02.2015 sample tested positive for charas. In cross-examination stated that he do not remember the time when sample was received. The sample remained along with other samples in the Pigeon hole inside the strong room allotted in the name of Rajesh Kumar and the key was with him. **PW7 Vikas Yadav**, IO stated that on 20.01.2015 at around 7.20 am, IO deposited the case property in the malkhana and he deposited the same on the directions of R S Joshi, Superintendent. **PW8 R S Joshi** stated that on 20.01.2015 Azad Singh, IO put an information before him that a parcel suspecting some narcotic drugs lying at M/s Overseas Logistics, thereafter, he made endorsement and authorized to constitute a team. In cross-examination stated that the name of consignor and consignee was not told to him nor he enquired from Azad Singh. We do not maintain any register with regard to secret information neither put or give any numbering to secret information. No facsimile or seal is being taken on seal movement register. **PW9 Devesh Chaudarhy**, Superintendent, Calcutta Unit stated that received the compliance report u/s 57 of NDPS Act from Intelligence officer Ashok Kumar wherein he intimated the arrest of Mahesh Singh and Jaylal Singha. **PW11 Ashok Kumar** of Overnight Express stated that on 17.01.2015, he received the parcel destined for France along with parcel copy of airway bill, voter id card of Mahesh Singh, driving license, thereafter on the basis of the same, he prepared invoice and handed over the said parcel to his vendor Overseas Courier with Manifest. He also stated that he had given voluntary statement at NCB office. In cross-examination stated that he went to NCB wherein he met one Sharma ji, the case property was also shown to him, however, Sharma ji did not inform him if he wants to remain silent he can remain silent. He further stated that he cannot tell when the parcel in question was received in their office. **PW12 Ajay Kumar**, Nodal Officer, exhibited the CDR and CAF of mobile no. 8670008235. **PW14 Arup Ghosh** stated that on 13.01.2015 one customer booked the big parcel and he produced one invoice, voter card and driving license and identified the accused Jaylal who booked the



said parcel. In cross-examination stated that he obtained the declaration regarding sending the parcel from Jaylal and the said declaration is already Ex PW14/C. He also stated that there was no CCTV at their office.

14. Accused Mahesh Singh in his statement u/s 313 CrPC stated the do not know about any parcel. His document is with his brother in law for the purpose of renewal of DL and other documents and later, all the documents were lost and his documents may be misused by some one to book the parcel. He further stated that he was called by Darjeeling police to PS where he was arrested and they asked him about his identity so he produced the document and no narcotic police came to his house. He further stated that police asked him to write the statement and it was not voluntary. He never booked any parcel and his brother never given any money regarding this. He further stated that mobile no. 8670008235 was never used by him. He further stated that he is innocent and falsely implicated in the present case as the photocopy his original documents were used by some one to book the parcel.
15. Accused Jaylal in his statement u/s 313 CrPC stated he do not know the documents of his brother in law was with him and lost at his village. He also stated that he or his brother in law did not book any parcel. He further stated that his brother in law was called by the local police and arrested by local police. He further stated no search was conducted at his house and no mobile was recovered from his house. He also stated that he had not given any voluntary statement. He also stated that mobile no. 977981121806 was not used by his brother in law. He further stated that he never booked any parcel and falsely implicated in this case.
16. Accused Mahesh Singh examined himself as DW1 and stated that he had given his identity i.e. Driving license, election ID and three passport size photographs to his jija Jaylal for renewal, thereafter in the month of 2015 his jija was apprehended by NCB officials and came to his house for the purpose of investigation. His jija also told him that the documents were lost. In cross-examination stated that it is correct that exhibits are photocopies of election

card and DL. It is also correct that election card had not expired and did not fill any form of driving license. He denied the suggestion that his statement was not a voluntary statement.

17. **Material exhibits-**

**Ex.PW3/C** is the secret information received on 20.01.2015. **Ex.PW3/E** entries of seal movement register. **Ex.PW3/D** is the panchnama of the proceedings in presence of independent witnesses Parvesh Kumar and Gulshan Kumar. **Ex.PW3/C (colly)** is the courier receipt of Overnight Express, invoice dated 17.01.2015 duly signed by the consignor Mahesh, the manifest. **Ex.PW14/A** is the copy of election card bearing the signature of Parvesh Kumar and Gulshan Kumar. **Ex.PW14/B** is the driving license. **Ex.PW14/C** is the bill of shoe bag and bag mix issued from Felt Fairy Handicraft, Kathmandu exhibited by Arup Ghosh, PW14 who booked the parcel at Siliguri. **Ex.PW4/A** is the forwarding letter regarding examination of the sample. **Ex.PW3/D** is the copy of test memo. **Ex.PW4/B** is the receipt of samples at CRCL. **Ex.PW7/A1 to A2 and A3 to A4** are the photocopies of malkhana entries. **Ex.PW1/C** is the notice u/s 67 to Ashok Kumar. **Ex.PW1/D** is the statement of Ashok Kumar. **Ex.PW2/B** is the letter dated 21.02.2015 regarding followup action sent by Zonal Director, Delhi to Kolkata. **Ex.PW3/E** is the seizure report u/s 57 NDPS Act dated 22.01.2015. **Ex.PW2/C** is the search cum seizure list from the house of accused Mahesh Singh. **Ex.PW2/D** is the notice u/s 67 to Mahesh Singh. **Ex.PW2/E** is the statement of accused Mahesh Singh u/s 67. **Ex.PW2/F** is the search cum seizure list of accused Jay Lal. **Ex.PW2/G** is the notice u/s 67 issued to Jay Lal. **Ex.PW2/H** is the statement of accused Jay Lal Singha u/s 67. **Ex.PW2/I** and **PW2/J** is the arrest memo of accused persons. **Ex.PW2/A** and **PW2/L** are the notices of arrest sent to the relative of accused. **Ex.PW2/P** and **PW2/Q** are the notices u/s 67 to Bishnu Singh and Bimal Singh. **Ex.PW2/B** is the intimation of search and seizure and arrest in compliance of section 42 and 57 of NDPS Act. **Ex.PW1/A** is the notice u/s 67 to Parvesh Kumar. **Ex.PW1/E** is the statement of Parvesh Kumar u/s 67. **Ex.PW1/B** is the notice u/s 67 to Gulshan Kumar.

Ex.PW1/F is statement u/s 67 of Gulshan Kumar. Ex.PW6/A is the test report showing positive test for charas prepared by Gyanendra Saxena (PW6). Ex.PW12/C is the certificate u/s 65B pertaining to mobile no. 8670008235. Ex.PW12/B is the CDR details of said mobile from 20.12.2014 to 23.01.2015. Ex.PW14/D is the statement of Arup Ghosh u/s 67 NDPS Act.

18. Ld. Amicus Curiae for the accused Jaylal Singha submitted that there is nothing on record which suggests that this accused has booked the parcel. The testimony of PW14 Arup Ghosh regarding the identity of this accused is not credible. Ld. Amicus Curiae submits that this parcel was sent from Siliguri office to the area office however none from the area office has been examined therefore, the factum of tampering of parcel cannot be ruled out. Ld. Amicus Curiae submits that PW11 Ashok Kumar stated that the said parcel was found to be wrapped in white bag tied with brown tape however the factum of brown tape is missing in panchnama and the statement of other witnesses. The principal witness Abdul Khan is not made witness in this case. The testimony of independent witnesses PW10 and PW13 is discrepant and cannot be relied upon. Ld. Amicus Curiae submits that PW11 in his testimony stated that he was shown the case property however as per the prosecution case, the case property was in malkhana therefore suggesting the case property from malkhana is illegally removed. Even otherwise, the declaration for Ex.PW3/C is not bearing signature of anybody else except Ashok Kumar showing that it was planted later on. The statement of accused persons u/s 67 cannot be relied upon as they are not in their handwriting and were retracted at the earliest. Further, accused were not told to remain silent. Ld. Amicus Curiae submits that PW14 has not prepared the airway bill and this fact is explicit as the writings of this witness in his statement u/s 67 is different from the writing of the airway bill. Ld. Counsel submits that Chemical Examiner report Ex.PW6/A is not proved. Furthermore the test memo showing the accused name as unclaimed whereas the name of accused is Mahesh Singh. Phone recovered are not found to be in the name of any applicant/accused. Ld. Amicus Curiae submits that there is non compliance

of section 41 and because of non compliance of mandatory provisions, accused is entitled to benefit of doubt. Ld. Amicus Curiae submits that prosecution unable to prove foundational facts and therefore the presumption u/s 35 and 54 do not arise in favour of prosecution. Ld. Amicus Curiae submits that accused thus entitled to be acquitted by granting benefit of doubt. Ld. Amicus Curiae, besides oral submissions also filed written submissions.

19. Ld. counsel from Legal Aid for accused Mahesh Singh submits that this accused is implicated just because of fact that he is relative of accused Jaylal Singha. Ld. Counsel submits that this accused is not found to be indulging in dealing with charas and as per prosecution case only the co-accused was dealing. Ld. Counsel submits that the ID and driving license has been lost which was misused by somebody else in booking the parcel. Furthermore, the accused was wrongfully arrested and he has already retracted his statement. Ld. Counsel submits that this accused has not received any financial benefit and further has no background of said business. The parcel is not found to be booked by him nor recovered at his instance. The prosecution not able to prove its case qua this accused hence this accused is entitled to be acquitted.

20. Ld. SPP for NCB on the other hand submitted that on secret information duly recorded in writing, the raiding team searched the parcel at the office of Overseas Logistics in presence of independent witnesses and the contraband was recovered from sole of shoes duly corroborated through CRCL report. Ld. SPP submits that the said parcel was booked in the name of Mahesh Singh by accused Jaylal Singha however accused Mahesh Singh had the knowledge that the parcel booked contains the contraband charas. Ld. SPP submits that accused persons in their statement u/s 67 which is admissible, admitted the entire facts. The said parcel remained intact till it was opened therefore the is presumption u/s 35 and 54 against the accused persons however the accused unable to rebut the said presumption and prosecution is able to prove its case beyond reasonable doubt.

21. Arguments heard. Record perused.

22. The brief sequence of facts is that the secret information Ex.PW3/A is recording in writing thereafter, on the direction of the Superintendent PW8 R.S. Joshi, raiding team was constituted. Thereafter, the raiding team reached the office of Overseas Logistics Pvt. Ltd. where they met the Operations Manager Abdul Khan who provided two witnesses i.e. the officials working there i.e. PW10 Parvesh Kumar and PW13 Gulshan Kumar and in their presence, the parcel was opened containing 31 pairs of woolen shoes of different colour and sizes, 11 woolen bags of different colours and sizes. The rubber sole of the shoes found concealing a transparent plastic containing plate type dark brown colour solid substance. Small quantity of substance was tested which gave positive result for charas. The said substance is found to be concealed in all the soles of the shoes which is tested positive for charas. Thereafter, the entire material was transferred in transparent polythene packet weighing around 5.25 kg and two samples of 25 gm each were drawn. Remaining material was put in a packet, test memo in triplicate was prepared, panchnama was also prepared. As per panchnama, alongwith this material, invoice, used ID, manifest and airway bill were also seized (Ex.PW13/C (colly)). As per the airway bill and the invoice and IDs, the consignor was accused Mahesh of Darjeeling, thereafter the Zonal Director of Kolkata Zonal Unit was requested to take the followup action, then vide office order dated 22.01.2015 (Ex.PW2/A) a raiding team headed by PW2 Ashok Kumar Prajapati was constituted who raided the house of the accused Mahesh on 27.01.2015 however, nothing recovered from his house but copy of his election card and copy of license was taken into possession. Thereafter at his instance, co-accused Jaylal stated to be his brother in law was also apprehended. Their statements u/s 67 were recorded in which it is disclosed that accused Jaylal used the IDs of co-accused Mahesh Kumar in sending the said parcel through Overnight Express of Siliguri. During investigation, PW14 Arup Ghosh was called and his statement u/s 67 was recorded who stated that accused Jaylal Singha has booked the parcel on the basis of voter I card and driving license of accused Mahesh and the parcel was containing 31 pairs of

woolen shoes and 11 bags and the same was booked, thereafter the said parcel was forwarded by Arup Ghosh to the office of Overnight Express Ltd. Pradhan Nagar, Siliguri having area manager Mr. Amitabh Bhattacharya, then that office forwarded the parcel to Overnight Express, Mahipalpur and the office of Mahipalpur forwarded the said to Overseas Logistics, Bhikaji Cama Place from where the said parcel containing contraband was recovered. PW11 Ashok Kumar of Overnight Express of Mahipalpur office was examined and his statement was also recorded u/s 67 in which he stated that the said parcel is destined for France having copy of airway bill, voter I card of Mahesh Singh, driving license of Mahesh Singh and one bill. On the basis of the bill, he prepared one invoice and handed over the said parcel to vendor Overseas Courier with manifest and he has also taken the token receipt from the vendor Overseas Logistics. The statement of Ashok Kumar was recorded in NCB office on 21.01.2015.

23. The prosecution has to prove the foundational facts beyond reasonable doubt that contraband recovered from the parcel was booked by accused and all mandatory requirements envisaged under NDPS Act were complied before invoking presumption u/s 35 and 54 NDPS Act in favour of the prosecution.
24. Secret information regarding parcel bearing airway bill was received which was recorded in writing thereafter raiding team went to the office of Overseas Logistics, Bhikaji Cama Place where they met Abdul Khan, Operations Manager and he was apprised by PW1 the purpose of their coming to their office. Thereafter Abdul Khan produced the parcel on which consignor name was written as Mahesh Singh and address as Budhakaran, Naksalbari. Then two independent witnesses PW13 Gulshan and PW10 Parvesh Kumar were provided and in their presence the parcels was opened found to contain white colour plastic bag on which address of France was written with black marker and pen. Telephone number was also written and on opening the parcel, woolen shoes of different colours and sizes. On checking from their soles found to contain the transparent plastic envelope and on testing they gave positive result for charas

and the total weight of charas was found to be 5.250 kg. The testimony of PW3 in this regard is duly corroborated with the testimony of PW1 Rajender Dutt Sharma, IO who accompanied PW3 Azad Singh to the spot. The testimony of PW10 Parvesh Kumar and PW13 Gulshan Kumar regarding the recovery of charas in the manner stated by the PW3 is materially corroborated. There is nothing material in cross-examination of these two independent witnesses that they were not present in the office at the time of said recovery. Therefore from the testimony of PW3, PW1, PW10 and PW13 the recovery of charas concealed in the soles of the shoes is duly proved. The proceedings conducted at the spot regarding taking of samples, sealing and seizure is also found to be proved beyond doubt.

25. In the panchnama Ex.PW3/B, it is categorically mentioned that Manager Abdul Khan handed over the parcel describing the details mentioned on the parcel and on opening the parcel, one plastic bag recovered in which with a black marker pen also the name of consignee and its address and phone number were found to be written and thereafter inside the shoes having concealed the contraband in the sole was found. The said parcel as per panchnama is also found to be accompanying invoice, the used ID, manifest and airway bill. As far as the airway bill is concerned the number of airway bill is also found to be mentioned in secret information Ex.PW3/A. This airway bill showing the consignor name as Mahesh Singh and consignee of the France. This airway bill, invoice, manifest, ID proofs (Ex.PW3/C (colly)) also bear the signatures of the independent witnesses as well as the IO. However as far as the bill of purchase/declaration of items Ex.PW14/C is concerned though stated by PW3 is that it was accompanying those documents but neither bear the signature of IO nor the independent witnesses but that aspect is to be dealt later.

26. The recovery of the parcel in intact condition at the office of Overseas Logistics cannot be doubted from the testimony of witnesses and the production of case property before the court. The name of accused Mahesh was found reflected on the parcel itself as well as the documents annexed with the parcel. The said

parcel travelled from Siliguri branch of Overnight Express to the area office and from area office to the office at Mahipalpur and from Mahipalpur office sent to Overseas Logistics where it is suspected to have some narcotic material, and from there it was recovered.

27. Now the prosecution has to prove that the said parcel was booked by accused Mahesh. The name of the accused on the parcel as well as the documents recovered with the parcel, the said name was duly communicated to the Zonal Director, Kolkata to take necessary action as the accused Mahesh was residing in Darjeeling. Accordingly, PW2 Ashok Kumar Prajapati on 27.01.2015 with the help of Excise Officers reached the house of accused Mahesh Singh alongwith two independent witnesses however they could not be examined as not found traceable. Thereafter in their presence, Mahesh Singh opened the door but nothing incriminating was recovered and only copy of voter ID and driving license were recovered. The seizure list of the same was prepared and thereafter at his instance, his brother in law, co-accused Jaylal Singha was apprehended and from his search, one voter card and one Micromax mobile was seized. As far as the arrest of accused persons are concerned, the said factum is also duly corroborated from the fact that they were produced before the magistrate on the next day, and then on 28.01.2015 they were remanded by the concerned magistrate and intimation of the same is given to the Superintendent, NCB Kolkata Zonal Unit on 29.01.2018 by PW2 IO Ashok Kumar Prajapati.

28. The material witness Arup Ghosh who is stated to be the incharge of branch office from where the parcel was booked was also examined by NCB and his statement u/s 67 (Ex.PW14/D) was recorded in which he has categorically mentioned that the said parcel was booked by accused Jaylal on the ID of accused Mahesh Singh. This witness PW14 in his testimony before the court has duly identified the accused Jaylal Singha. Therefore the prosecution able to establish the connection of parcel with accused Mahesh as well as Jaylal Singha. Accused Mahesh is found connected as his name is found mentioned over the parcel, in the airway bill, invoices and his IDs i.e. voter card and driving license



attached with the parcel recovered at the time of preparation of panchnama and accused Jaylal was duly identified by PW14 Arup Ghosh in his testimony before the court. The testimony of PW14 remains unimpeached on the factum of the identity of the accused Jaylal Singha and the booking of parcel at his instance from the office of Arup Ghosh.

29. However, Ld. Counsel for the accused vehemently argued that the prosecution unable to prove that the parcel booked by the accused Jaylal is same parcel which is recovered at the office of Overseas Logistics. This argument as far as documents and what is in printed form found on the parcel concerned do not appear to be at all tenable as the airway bill number is found the same from the beginning to last with the name of consignor and consignee on the parcel itself. However, Ld. Counsel submits that entire chain where the parcel has been sent, is not examined. Ld. Counsel submits that from the branch office of Siliguri the parcel was sent to the other office of Overnight Express having area manager Amitav Bhattacharya however the said Amitav Bhattacharya who sent it to Mahipalpur has not been examined. Ld. Counsel submits therefore the possibility of tampering is not ruled out. This argument do not appear to be convincing because it is a natural course when a parcel is booked at a branch office, it will be sent to area office then to main office in Delhi, then to main courier agency who will send it outside India. There is nothing in the cross-examination of PW14 which could suggest that the parcel in the manner received by him could be tampered during transaction. PW14 was duly shown the parcel during his testimony and there is nothing suggested to him that the parcel, he identified, is not the parcel which was booked by Jay Lal at his branch office. It is also not suggested to PW11 Ashok Kumar that this parcel might have been tampered at the area office of Siliguri. Merely non examination of any person from the area office could create any doubt over the non tampering of the said parcel. The manner of concealing contraband also suggests that this cannot be tampered on the way. The every omission has to be appreciated in the entire facts and circumstances, thus no benefit could be given

to the accused for non examination of any official of area office of Overnight Express at Siliguri.

30. The accused were apprehended on 27.01.2015. There is nothing in the testimony of PW2 which could suggest that accused were not apprehended on 27.01.2015 from their houses. However accused Mahesh Singh in his statement u/s 313 Cr.PC raised the plea he was called by Darjeeling Police to the PS and where he was arrested and they asked him about his identity so he produced the documents and no narcotics police came to his house. PW2 who apprehended the said accused was not suggested this fact, however this plea somehow fortifies the stand of the prosecution that his documents were also seized at the time of apprehension. Accused Jaylal in his statement u/s 313 Cr.PC also raised the plea that his brother in law was called at PS where he was arrested however he had also not suggested this fact to PW2.
31. Now it is pertinent to appreciate the testimony of accused Mahesh Singh who examined himself as DW1 in which he stated that in the month of January, his jeeja accused Jaylal Singha was apprehended by NCB officials and came to his house for the purpose of investigation. He nowhere in his defence took the plea that he was arrested by the local police of Darjeeling and not by NCB officials in the manner relied by the prosecution. He, however, on the other hand corroborates the stance of the prosecution that he was apprehended from his house and a driving license and voter card was recovered from him.
32. Both these accused in their statement u/s 313 Cr.PC took the plea that they have nothing to do with this case and no parcel was ever booked by them. Accused Mahesh Singh in his statement u/s 313 Cr.PC stated that he has given his documents to his brother in law i.e. co-accused for the purpose of renewal, however later on all the documents were lost and his documents might be misused by someone to book the parcel. Accused Jaylal in his statement u/s 313 Cr.PC also stated that the documents of his brother in law was with him but lost at his village. This accused has nowhere stated that he was given the DL by accused Mahesh Singh for the purpose of renewal and he lost the same. Now

again, it is pertinent to see the testimony of DW1 in which he stated that he had given the copy of driving license, election ID and three passport size photographs to his jeeja accused Jaylal who told him that he has lost the documents. But there is nothing on record to suggest any lost report was made. Even otherwise, if the defence is that he has given for renewal of his license then it should be mentioned from where the license is to be renewed. Whether he has filled any form or not. Furthermore, in his testimony he only stated that his originals were lost, thus from his testimony, it can be inferred that he was having the copies which were found appended on parcel and seized. The defence as pleaded by the accused do not appear to be at all credible. On the other hand, pumping credence to the case of prosecution that parcel booked by them with ID documents. The plea that somebody might have misused the lost copies is not at all to be believed particularly because of the incredible defence and the categorical statement of PW14 identifying accused Jaylal and booking of parcel on the ID documents of Mahesh Singh. The prosecution able to prove beyond doubt that contraband recovered from the parcel booked by accused Jaylal on the ID of accused Mahesh, and the said contraband reached Delhi in untampered condition. Now the presumption u/s 35 and 54 NDPS Act is in the favour of the prosecution and the accused persons have to rebut the same.

33.Ld. Amicus Curiae for the accused submitted that PW11 Ashok Kumar categorically stated in his examination in chief that the parcel was wrapped in a white bag and tied with brown tape and the said parcel was destined to France. Ld. Counsel submits that on recovery of parcel there is no mention about the brown tape therefore, it can be held that the said parcel was tampered. As per panchnama Ex.PW3/B the plastic bag was opened in which with black marker pen the consignee name and address was written. Though there is no mention of any brown colour tape, but it is categorically stated that it was opened. Merely non mentioning of brown colour tape do not suggest that the said parcel was tampered. The entire material was produced before the court and from the said material, it is not anywhere pointed out that this was tampered. Merely

mentioning of brown tape by PW11 in his testimony do not create any doubt that the said parcel was tampered.

34.Ld. Counsel also submitted that PW11 Ashok Kumar in his cross-examination stated that he was shown the case property when his statement was recorded on 21.01.2015, therefore, it suggest that the case property was tampered. It is pertinent to notice that this witness categorically stated in his statement u/s 67 that the documents of the parcel were seen by him. It is not clarified in his statement that the case property in the sense that entire shoes were seen by him. The witness is a lay person and from this testimony, it cannot be inferred that he had shown the sealed case property but the cross-examination on the other hand suggests that he was shown the documents accompanying the parcels. Admittedly, his signatures were taken on the documents and this circumstance is part of his statement u/s 67 Ex.PW1/D. This witness in his testimony as well as in his statement u/s 67 categorically stated that he has checked the documents sent with the parcel and not checked what is inside the parcel and made the invoice, and sent to Overseas Logistics, therefore, mere averment in cross-examination that he was shown the case property without any further clarification do not at all suggest that he was shown the case property in a sense that shown after removal of seals but on the other hand shows that he was shown the documents of case property.

35.Ld. counsel further submitted that the principal witness to be joined is Abdul Khan, Operational Manager of Overseas Logistics, however he was deliberately left out. The proceedings of opening of the parcel is conducted in presence of independent witnesses, PW12 and PW13. The main aspect which this court has to appreciate in this context is that a parcel was found at the office of Overseas Logistics in intact condition which was opened in presence of raiding team members and independent witnesses. This fact is credibly proved by the prosecution as discussed. Therefore, the prosecution can cannot be doubted merely from the factum of non joining of Abdul Khan, Operational Manager.

- 36.Ld. Counsel submits that there is inherent discrepancies in the statement of independent witnesses PW10 and PW13. Both have talked about only 31 pairs of woolen shoes and not stated anything about the 11 ladies bag. The incriminating contraband was recovered from the woolen shoes only and not from the ladies bag. The witness is expected to remember the material aspects while deposing before the court and it is not expected from them to give every details in the court which they have noticed at the time when the recovery taken place and parcel was opened. Merely by mentioning the weight around 5 kg or 5.25 kg by PW10 do not suggest that he had not witnessed the incident. On the other hand, give credibility that he is not a tutored witness. Non mentioning of total weight by PW13 is of no consequences in present facts and circumstances. Ld. Counsel submits that both the witnesses had not talked about the presence of each other in their testimonies. PW10 categorically stated that he was called by the manager. PW13 stated that in his presence and presence of PW10 and Abdul the said parcel was opened. The non mentioning of name of PW13 by PW10 is not material particularly when this witness is not confronted over the presence or absence of PW13. Both these witnesses have given the credible description in what manner the parcel was opened and what is recovered after opening the parcel from the sole of the recovered shoes.
- 37.Ld. Counsel further submitted the statement of PW14 Arup Ghosh was recorded after 5 months of the incident and his signatures were also not found on the airwaybill. This itself suggests that he was not present at the time when parcel was booked. PW14 in his examination in chief categorically stated that he had issued the airway bill which is found accompanied with the parcel from branch office Siliguri upto Overseas Logistics. The airway bill mentioning all the material particulars of what is contained in the said parcel. It is categorically mentioned that 31 shoes and 11 bags weighing 23 kg. Merely no signatures, in present facts and circumstances, on airway bill do not suggest that it was not issued by PW14. There is nothing in his cross-examination which can create doubt that he has not booked the said parcel. PW11 Ashok Kumar in his

statement u/s 67 NDPS Act also stated that PW14 Arup Ghosh is the person who is the incharge of the said branch. As far as the delay of around 5 months in recording the statement of this Arup Ghosh is concerned, it is not very material. The main issue to be proved by NCB is that the said parcel belongs to the accused and found to be containing the contraband. The associated documents confirm the identity of the accused and the recovery of contraband from the particular parcel suggest that the accused persons tried to send the contraband outside India. The testimony of PW14 Arup Ghosh is only corroborative. This witness is an independent person who has no grudge with the accused persons. Therefore, mere delay of examination of this witness is no ground to discredit the testimony of this witness.

38.Ld. Amicus Curiae for the accused also stated that identity of accused Mahesh is known on 21.01.2015 itself however he was apprehended on 27.01.2015 i.e. after six days which itself suggests that the NCB officials made the accused as a scapegoat. The intimation to Kolkata office regarding the present accused is already sent on 21.01.2015 for followup action and the office order in this regard was issued to PW 2 Ashok Kumar Prajapati on 22.01.2015. Thereafter, on raid both the accused were apprehended on 27.01.2015. The identity of the accused Mahesh is clearly reflected in the airway bill which is accompanying the parcel. The said parcel also having the ID proofs. Nothing prejudicial against accused came in cross-examination of PW2 over delay in their arrest, thus mere delay in action by NCB in apprehending the accused do not in any way suggests any malafide on part of NCB. The pleas of the accused as discussed also found to be inconsistent whether they were apprehended by local police or the NCB as discussed. The documents of ID of accused Mahesh also do not appear to be planted and the defence of the accused also corroborates the prosecution over the use of documents by him.

39.Ex.PW14/C is the bill/declaration of the items which alleged to be recovered alongwith the documents as per the testimony of the officials when the parcel was recovered however it neither bears the signature of officials i.e. PW1 or

PW3 or the independent witnesses PW10 and PW13. Furthermore, there is no mention of this bill/declaration in the panchnama thus, it cannot be held that this bill was recovered at the time of preparation of recovery of parcels. It, on the other hand, suggests that this bill Ex.PW14/C was produced by PW11 because it only bears the signature of PW11 dated 21.08.2018, however from this discrepancy, the testimony of officials or independent witnesses over the recover of contraband from the parcels and recovery of other documents cannot be doubted. This discrepancy even if assumed to be designed then also it do not create any dent on the credible portion of the investigation conducted by NCB. Apex court in “*C. Muniappan & Ors. Vs. State of Tamil Nadu 2010 (10) SCC 567*, observed that defective investigation by itself cannot be ground for acquittal. If the primacy is given to such designed or negligent investigations then the faith and confidence of people in criminal justice administration would be eroded. There is legal obligation on the part of court to examine prosecution evidence dehors such lapses. The investigation is not the solitary area for judicial scrutiny in the criminal trial. The conclusion of trial in a case cannot be allowed to dependent solely on probity of investigation. In view of the mandate of this judgment no benefit could be given to the accused over these lapses either designed or negligence of investigating officer.

40.Ld. Amicus Curiae for accused Jaylal submitted that prosecution unable to prove CRCL report Ex.PW6/A. Ld. Counsel submits that PW6 Gyanender Saxena stated that the said sample were examined by Rajesh Kumar, Assistant Chemical Examiner under his supervision however Rajesh Kumar (PW5) nowhere stated that he assisted PW6. PW6 Gyanender Saxena is the chemical examiner under whom PW5 Rajesh Kumar was working. PW6 stated that PW5 conducted the analysis in his supervision. There is nothing in cross-examination which could suggest that no such test was conducted in his supervision or there is infirmity in the conducting of examination. PW5 Rajesh Kumar categorically stated that he received the samples. Nothing was suggested to him that he had not assisted PW6 in the examination. Though PW5 nowhere stated in his testimony that he

had assisted PW6 however from this factum the statement of PW6 cannot be discredited. It is the normal course that when the main examiner is conducting the test, it was being conducted through the assistant under his supervision. Mere from this omission, the CRCL report Ex.PW6/A cannot be doubted. As per this CRCL report, the sample gave positive test for charas. Thus the prosecution able to prove that the contraband recovered is charas.

- 41.Ld. Amicus Curiae submitted that there is total non compliance of section 41 NDPS Act. PW3 IO Azad Singh in his cross-examination stated that he did not carry any search authorization alongwith him to the office of Overseas Logistics. Ld. Counsel submits that this non compliance vitiates conviction (relied upon *State of Punjab Vs. Balbir Singh AIR 1994 SC 1872*). Ex.PW3/A i.e. the secret information categorically shows that PW3 IO Azad Singh informed PW8 R.S. Joshi that he had received the information that the parcel lying at Overseas Logistics is suspected to contain narcotic drugs if this parcel is searched. PW8 R.S. Joshi, Superintendent who is gazetted officer and empowered officer to direct search u/s 41(2) NDPS Act have after receiving the information directed PW3 IO Azad Singh to constitute the team and take actions as per law. Therefore, it cannot be held that there is no compliance of section 41 NDPS Act. Section 41 NDPS Act is found complied.
- 42.Ld. Amicus Curiae submits that as per the malkhana entry register Ex.PW7/A1, A2, A3 and A4, there is an entry against the name of accused as unclaimed. This itself creates doubt whether the co-accused Mahesh Singh was already known, as per the documents by the prosecution as consignor. This submission has no force because in the test memo, it is categorically mentioned that accused is unknown. Furthermore, the entry of unclaimed in the said register under the name of accused is because of the fact that till that time prosecution is not confirmed whether the consignor Mahesh Singh is infact accused or not.
- 43.Ld. Amicus Curiae further submitted that the expiry of testing equipment is not mentioned by the IO therefore, it cannot be held that the item recovered is charas. This submission is hardly material because later on the said sample was



tested and found to be charas. Ld. Amicus Curiae also submitted that CCTV footages were also not seized and the factum of CCTV installation is duly mentioned by PW12 and 13. Ld. Amicus Curiae submits that PW13 could not tell whether the parcel was weighed in his presence and also stated he do not remember whether the NCB officials were having some weighing machines with them.

44. The seizing of CCTV footage is not mandatory. The accused also not taken any steps to ask the investigating agency for preserving CCTV footages. The factum of weighing the material or weighing machine is hardly material and do not in any manner creates doubt over the presence of PW13 during the seizure proceedings. Hon'ble 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. In view of this proposition, no benefit of minor discrepancies and lapses could be given to the accused persons.

45. Accused Mahesh Singh in his statement u/s 67 Ex.PW2/E stated that he do not know reading and writing therefore requested PW11 Ashok Prajapati, IO to record his statement. In his statement, he alleged that he came to know that the parcel sent on his name was seized thereafter the search in his house was conducted and out of search voter card and driving license were recovered. He also disclosed that the said contraband was sent in the shoes by his brother in law Jaylal Singha who used to bring it from Nepal. Accused Jaylal Singha in his statement u/s 67 Ex.PW2/H also stated that he do not know reading and writing therefore his statement was recorded by PW11 IO A.K. Prajapati. This accused in his statement stated that he alongwith Mahesh Singh used to do the business and from search of his house, voter I card and a mobile was recovered

and disclosed that he sent the courier concealing charas and stated that he received the said charas from one Prem and Raj Kumar and used to sent them on the documents of his brother in law Mahesh Singh through courier agency. He further stated that he used to call Prem and Raj Kumar from his mobile.

46. PW2 IO Ashok Kumar Prajapati in his testimony stated that he has recorded the statement u/s 67 as accused unable to read and write. There is nothing in the statement of accused persons u/s 313 or defence evidence that they are able to read and write. It is only suggested to this witness PW2 that the accused were not explained the contents in their native language however this witness denied this suggestion. There is nothing suggested to PW2 that statement u/s 67 was recorded by him under threat or coercion. Both the accused have retracted the said statements before this court on 06.05.2015 after substantial delay during the judicial custody remand period. 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. Thus the law till today is that the statement u/s 67 is admissible however if it is retracted then the court cannot act upon it without any corroboration. Furthermore, before acting of the statement, the court has to satisfy whether it is voluntary and accused was

apprised of their right that it could be used against them. Therefore, the conviction in present case cannot be maintained merely on the basis of confessional statements u/s 67 but it could be used for the purpose of corroboration with other evidence on record. From these statements it can be corroborated that the parcel in question is booked by accused Jaylal using the ID of accused Mahesh Singh. The accused Jaylal categorically stated that he used to send the said contraband on the documents of his brother in law Mahesh Singh. Mahesh Singh in his statement also stated that the said contraband was sent on the basis of his documents by his brother in law. However, the accused Mahesh Singh himself is not found to be involved in dealing with contraband. It is only accused Jaylal who is found to be dealing in contraband as per statement u/s 67 NDPS Act. Thus the only evidence against accused Mahesh Singh is the recovery of his ID documents alongwith the parcel and the statement u/s 67 NDPS Act.

47. It also appears somewhat improbable that for exporting the contraband, the accused Jaylal will use the ID of the relative after telling him that he is exporting the contraband on his ID outside India. Though the defence of the accused over the use of ID and his misplacement of ID appears not credible however it appears somewhat improbable that merely by providing ID without anything more the accused Mahesh will conspire with main accused Jaylal. Nothing is found in the investigation whether there is any money received by accused Mahesh from Jaylal. The statement of Mahesh over the receiving of money over this fact is vague. This accused Mahesh is also not found in contact with any Prem or Raj Kumar. There is nothing on record that previously also parcel in this manner was sent by using his ID. It can be inferred that ID of accused Mahesh can be used by his relative easily without knowledge, though, this is not the specific defence of accused Mahesh but from the circumstances, it can be inferred as accused Mahesh is not found to be involved in any such activity and the copy of the documents of a relative is not difficult to be procured. Therefore, merely on the basis of statement u/s 67 or on the basis of

the ID of the accused Mahesh recovered with the parcel without any other substantial link of money transaction or with other member of any syndicate the accused Mahesh cannot be held to have conspired with accused Jaylal.

48. However as far as accused Jaylal is concerned, in his statement u/s 67 he has given the manner in which he had got the said contraband. Merely the main kingpin who is resident of Nepal could not be apprehended or connected through mobile (it is common that in these kind of cases accused/culprits will not use mobile on their IDs and addresses) is no ground to discard his statement u/s 67 when this accused has himself booked the parcel and he was duly identified by Arup Ghosh and the said parcel was found to be containing contraband. The prosecution able to credibly prove factum of booking of parcel containing contraband by accused Jaylal and recovery of contraband from that parcel.

49. The possession in present case infers that accused Jaylal has also knowledge of contraband in parcel. It is for accused to prove that he has no knowledge or not in conscious possession. 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.*

50. In view of the above discussion, prosecution able to prove beyond reasonable doubt that accused Jaylal has booked the parcel containing contraband charas thereby discharging the initial burden of proof now the presumption u/s 35 and 54 NDPS Act arose in favour of the prosecution. The possession implies the conscious possession and the accused has to prove that he has no knowledge or not conscious that the parcel containing the contraband but the accused Jaylal Singha unable to rebut the said presumption.

51. Accused Jaylal Singha found to be exporting the contraband charas in commercial quantity out of India through courier. Thus found guilty of offence u/s 23(c) r/w section 28 NDPS Act. However, as discussed the prosecution unable to prove beyond reasonable doubt that the accused Mahesh Kumar conspired with accused Jaylal Singha in exporting the parcel containing contraband. Accordingly, accused Mahesh Kumar stands acquitted of all charges framed against him but accused Jaylal is convicted for commission of offence u/s 23(c) r/w section 28 NDPS Act. Accused Mahesh Kumar is directed to furnish personal bond of Rs. 50,000/- with one surety in the like amount u/s 437A Cr.PC. Accused Jaylal Singha be heard on point of sentence.

**Announced in the open court  
on this 2nd day of September, 2019**

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