

Delhi District Court

Case No. Sc/64/19 Ncb vs . Mohamed Anas Dated: 11.06.2021 ... on 11 June, 2021

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

Case No. SC/64/19
ID No. 02403R0003632019

Narcotics Control Bureau, Through
Sh B.L. Bairwa, Intelligence Officer,
Narcotics Control Bureau,
Delhi Zonal Unit, R.K. Puram, New Delhi

Versus

Mohamed Anas (in JC)
S/o Sh Mohamed Sammoon
R/o 90, Medakokila Deltota,
Kandy, Sri Lanka

Date of Institution : 01.02.2019
Judgment reserved on : 10.06.2021
Date of pronouncement : 11.06.2021

JUDGMENT

1. Prosecution case in brief is that IO Virender Kumar on 04.12.2018 at around 2230 hours received an information that accused Mohd. Anas, Sri Lankan national travelling to Muskat by Jet Airways was detained by officials of CISF and suspected to carry narcotic drugs/psychotropic substances, thereafter the said information was given to zonal director who endorsed the said information to IO Rajesh Yadav to constitute the team and take action as per law. Then, raiding team was prepared headed by IO Rajesh Yadav left the office at around 2300 hours and reached airport at around 2350 hours where shared the information with SHA incharge who pointed towards the accused detained by CISF officials. IO requested 2-3 persons to join raiding team. SI Sanjeev Kumar Sharma and SI Robin Lakra of CISF agreed to be the independent witnesses. Accused was explained the secret information then accused disclosed that he is a resident of Sri Lanka, and declined to take search of raiding team members. Notice u/s 50 was given to the accused apprising him his legal right to search before gazetted officer or magistrate but accused wrote that he does not require presence of gazetted officer or magistrate for personal search, however nothing recovered from his personal search. On opening the blue colour pithu bag, nothing incriminating was found in the clothes however the base bottom part looked abnormal and on touching feel like a solid Case No. SC/64/19 NCB Vs. Mohamed Anas Dated: 11.06.2021 Page No. 1 of 21 substance then on cut open of the bottom part of the said bag, it was noticed that wrapped/brown adhesive tape was concealed. On taking out the whole brown tape and on cutting open, a brown colour solid substance was found which accused told that it was charas. On testing it gave positive result for charas, total weight of charas is found 200 gm, thereafter two samples of 25 gm each were drawn, panchnama was prepared. All recovered material alongwith samples, passport of accused, e-ticket, cancelled boarding pass, ticket information and visa confirmation documents were taken in possession. Seizure and sealing proceedings were completed.

2. On 05.12.2018 statement of accused Mohd Anas u/s 67 was recorded in which he disclosed that he came to India at Chennai Airport from 01.12.2018 from Colombo thereafter came to Delhi and went Bhuntar where stayed at Hotel HHH in Kasol then purchased charas in Kasol from one Raji of Malana village having mobile no. 9805612904 thereafter came back to Delhi on 04.12.2018 and stayed in Shyama Palace Hotel in Pahargunj however during security check at airport some suspicious thing is noted in X-ray machine thereafter he was detained. He further stated that he has purchased the said charas for Rs. 22,000/-, thereafter, statement of independent witnesses u/s 67 NDPS Act were also recorded. The samples were duly deposited in malkhana. Entries in seal movement register were made. After recording of voluntary statement u/s 67, accused was arrested. Proceedings u/s 57 was conducted. CDR and CAF of mobile recovered from accused collected. As per CRCL report, the contraband was found positive for charas having THC contents. The mobile data extraction report was obtained and on completion of investigation, complaint was filed.

3. Vide order dated 09.07.2019, charge u/s 20(b)(ii)(B) r/w section 23(b) NDPS Act was framed against the accused to which he pleaded not guilty. Prosecution for substantiating its case examined 13 witnesses. The summary details of prosecution witnesses are reproduced as under:

4. PW2 Virender Kumar, IO stated that on 04.12.2018, after receiving the information from the official of CISF at IGI Airport, on the directions of Zonal Director Madhav Singh, team was constituted by IO Rajesh Yadav thereafter they left the NCB office at around 2300 hours on 04.12.2018 and reached airport at 2340 hours. At airport IO Rajesh Yadav gave notice u/s 50 to the accused however nothing incriminating was recovered from bodily search. Thereafter, his bag was checked found to be concealing Case No. SC/64/19 NCB Vs. Mohamed Anas Dated: 11.06.2021 Page No. 2 of 21 200 gm of charas which was checked by testing kit and two samples of 25 gm each were taken. Seizing and sealing proceedings were conducted. In cross-examination stated that he received the information at around 09.30 PM and gave information to Zonal Director Madhav Singh who was not present in the office on mobile phone. The office at that time was closed however the control room is open for 24 hours and NCB officials were present for any exigency. Zonal Director also reached at around 10.00 PM, and he put the information before Zonal Director in writing. At airport, they were assisted by CISF incharge. The entire proceedings were concluded at around 01.30 AM in the intervening night of 4/5.12.2018.

5. PW5 IO Rajesh Kumar Yadav also stated that on the direction of Zonal Director he constituted a team, collected the seal and made necessary entry in seal movement register, also collected IO kit, DD kit, etc, left office at around 2300 hours and reached IGI Airport at around 2340 hours. At the airport he met incharge, SHA, in the meanwhile also contacted 2-3 persons to become independent witnesses and SI Sanjeev Kumar Sharma and SI Robin Lakra agreed to become independent witnesses. Accused showed his ticket and passport as going to Muskat from Delhi. Nothing recovered from his bodily search. On checking the bag of accused, the abnormality noticed in the bottom part then he cut open the bottom part and found something wrapped in brown colour adhesive tape and on removing the adhesive tape, he noticed brown colour substance and accused replied the same as charas. Thereafter, on testing the said substance gave positive test for charas. Sampling and seizing proceedings were conducted. Panchnama was prepared. After returning the office, he returned the seal to Zonal Director and case property was deposited. He also gave arrest

report u/s 57 NDPS Act to the Superintendent V.B. Singh. In cross-examination stated that at the time when the information was marked he was in office as on operational duty. He has not maintained any register regarding handing over of the kits. He do not remember the name of incharge of CISF. Their pass were made at the counter then they met the CISF incharge however not annexed the pass with the complaint. He further stated he told the accused that his personal search could be conducted in presence of gazetted officer or magistrate however accused not asked him to clarify the meaning of gazetted officer or magistrate. While searching the bag, accused was told to open it who opened it and took out the clothes however on touching the bottom part something found concealed in the Case No. SC/64/19 NCB Vs. Mohamed Anas Dated: 11.06.2021 Page No. 3 of 21 bottom. There were two packets wrapped together with the tape, after taking out the substance, when the accused confronted with the substance, he told that it was charas. Panchnama was prepared in the presence of SI Sanjeev Kumar Sharma, CISF and SI Robin Lakra, CISF.

6. PW6 SI Sanjeev Kumar Sharma stated that on 04.12.2018, he was posted as SHA at IGI Airport and his duty was on X-ray machine. He noticed some doubtful image in the baggage thereafter sent the bag to SI Robin Lakra for physical checkup. Then passenger was called who refused for physical checkup. Area incharge of rank of Inspector was called and on feeling that something like narcotic drug was concealed, the passenger was asked to stand on the side thereafter NCB team came and accused was given notice u/s 50. NCB officials also requested 2-3 persons to become witnesses. Artificial cavity was noticed in the bottom of the bag. Some solid substance was found wrapped with brown tape which gave positive result for charas. Samples of 25 gm each were taken. In cross-examination stated that his shift duty was 1315 hours to 2115 hours on the said day and only the case of present accused over illegal baggage was dealt on that day. He had seen some doubtful image on the bottom of the bag. The bag was referred for physical checkup to Robin Lakra as he was deputed for physical checkup. They had not checked the bag physically prior to the checking of NCB officials. Their senior is Sheesh Ram Chaudhary however he was not present during search and seizure proceedings. The NCB officials were brought by CISF security but he do not remember their name. NCB officers made both of them as witness however not requested other officials or public persons to become witness. He denied suggestion that the narcotic drug was planted with connivance of NCB officials.

7. PW10 Robin Lakra also stated that he was on duty at X-ray machine and Sanjeev Kumar Sharma found some doubtful image in X-ray and referred the bag for physical checkup to him. NCB team also arrived on information. Notice u/s 50 was also given to accused. NCB team also requested 2-3 persons to become independent witnesses. The clothes lying in the bag were removed by accused and they noticed artificial cavity in the bottom. They found some solid substance wrapped in brown tape and the said tape was removed and on testing it was found positive for charas. Seizing and sealing proceedings were conducted. In cross-examination stated that he had not physically checked the bag and also informed suspicion to their senior incharge Sheesh Ram Case No. SC/64/19 NCB Vs. Mohamed Anas Dated: 11.06.2021 Page No. 4 of 21 Chaudhary. He also denied suggestion that they had checked the bag prior to checking by NCB officials.

8. PW1 Satya Kumar Gupta Assistant chemical Examiner who exhibited the chemical examination report prepared under the supervision of PW3 Dr. Poornima Mishra Chemical Examiner. PW4 Dr.

Ranjeet Kumar Singh, Managing Director of SIFS India, Forensic Science laboratory exhibited the report over extraction of data from the mobile of accused. PW7 Ajay Kumar, Nodal Officer exhibited the CAF and CDR of mobile no. 8870817319 and 9805612904. PW8 Dharmender Singh, Sepoy deposited the samples at CRCL. PW9 Sunil Bhagotia, Assistant Chemical Examiner issued the receipt of deposit of samples deposited by Dharmender Singh, Sepoy. PW11 B.L. Bairwa, IO sent letter to SHO PS IGI Airport regarding arrest of accused, letter to MEA for verification of passport and visa of accused, letter to nodal officer requesting CDR and CAF details of mobiles recovered from accused, letter to Manager Jet Airways to provide departure details alongwith menifesto and baggage details, wrote a letter to Director SIFS, to extract the data and mobile image of mobile, recorded statement of SI Sanjeev Kumar Sharma u/s 67 NDPS Act. In cross-examination stated that he has not collected the X-ray report or any photograph of suspected articles. He also did not call the incharge, SHA Area and also not made him witness in this case. The mobile recovered from the accsued was in the name of one lady from Tamil Nadu who stated that her identity documents were misused. The second mobile was in the name of one Raju whose whereabouts were not found.

9. PW12 Madhav Singh, Zonal Director stated that on the basis of information, he directed IO Rajesh Kumar to constitute a team and take action as per law. He made endorsement on test memo form and thereafter sent the same to CRCL. In cross- examination stated that the information was given by IO Virender Kumar in writing and not through mobile phone and at that time he was in office. The information was given at around 10.30 PM. IO Virender Kumar was not in the office at that time. PW13 V.V. Singh, Superintendent NCB, Malkhana incharge stated that IO Rajesh Kumar Yadav deposited the case property, test memo forms and samples in malkhana. On 06.12.2018, he submitted seizure and arrest report u/s 57 NDPS Act.

10. Accused in his statement u/s 313 Cr.PC pleaded that he is falsely implicated and went for security at around 09.30 PM. He kept his bag for scanning and went for physical Case No. SC/64/19 NCB Vs. Mohamed Anas Dated: 11.06.2021 Page No. 5 of 21 checkup and it took around almost 10 minutes to pick his bag. He enquired with the officer incharge near the scanning machine when could not find the bag however they did not respond. After half an hour, two officers came and told that there is some suspicious material in his bag. He took out all the contents of bag and showed them the empty bag and then the officer took his empty bag in a separate room and he does not know what they did with the bag then he was asked to sign papers and forcibly taken to NCB office. He stated that he is innocent and falsely implicated in this case. Material Exhibits:

11. Ex.PW2/1 is the information. Ex.PW5/1 is the seal movement register. Ex.PW5/2 is the notice u/s 50 NDPS Act. Ex.PW5/3 is the panchnama, boarding pass, visa of Sultanate of Oman, ticket, passport. Ex.PW5/7 is the entry in malkhana register. Ex.PW5/8 is the statement of accused u/s 67 NDPS Act. Ex.PW5/9 is the test memo. Ex.PW8/1 is the letter forwarding sample for examination to CRCL. Ex.PW8/2 is the acknowledgment of deposit of sample. Ex.PW5/10 is the arrest memo alongwith list of jamatalashi articles including two mobiles recovered from accused. Ex.PW5/14 and PW5/15 are the seizure and arrest report u/s 57 NDPS Act. Ex.PW5/16 is the letter from Central Foreigners Bureau regarding arrival and departure of accused. Ex.PW7/1 and PW7/2 are the request to Nodal Officers to provide subscription details of mobile no. 8870817319 and 9805612904. Ex.PW1/2 is the CRCL report. Ex.PW4/2 is the forensic examination report of data extracted from

mobile phone Samsung Galaxy S8 Plus recovered from accused.

12. Ld. Counsel for accused submits that PW6 SI Sanjeev Kumar Sharma and PW10 SI Robin Lakra of CISF are not independent witnesses and are interested witnesses. The presence of PW6 at the spot after duty hours appears suspicious. The senior inspector Shish Ram Chaudhary to whom the incident is reported has not been examined by prosecution. This is material omission in the case of prosecution. PW2 IO Virender Kumar stated that he communicated the information to PW12 on telephone however PW12 stated that he and Virender Kumar were present in office when the information reported to him. Ld. Counsel submits that this all creates doubt over the information received by PW2. PW5 Rajesh Yadav stated that he reached the office after receiving the information at around 10.15 PM however the information was written at around 10.30 PM. This also creates doubt over the information. No register to maintain handing Case No. SC/64/19 NCB Vs. Mohamed Anas Dated: 11.06.2021 Page No. 6 of 21 over kit is produced. PW5 stated two packets whereas other witnesses only one which creates doubt over the contraband recovered.

13. The samples stated to be of 25 gm were taken however as per the testimony of PW3 the total quantity of sample is 26.4 gm. Ld. Counsel submits that this itself suggests that there is tampering in the samples. The mobile phones recovered are also planted as not found connected with the present accused. Ld. Counsel submits that there is a bald statement of the IO that public persons were asked to join however no public persons were joined. No particulars of public persons were noted and this practice was deprecated by Apex Court in case titled Ritesh Chakravarty Vs. State of MP 2006(3) JCC Narcotics 150. Ld. Counsel in this regard also relied upon Anoop Joshi Vs. State 1999(2) CCC 314, Roop Chand Vs. State 1999 (2) CLR, Mohd. Masoom Vs. State CrI. Appeal No. 1404/2011 dated 09.04.2015 (DHC). Ld. Counsel submits that the sampling was also not done in accordance to the procedure (relied upon Amani Fidel Chris Vs. NCB CrI. Appeal No. 1027/2015 dated 13.03.2020). Ld. Counsel submits that accused is falsely implicated and recovery of charas is planted over him and prosecution has been unable to prove its case beyond doubt hence accused is entitled to be acquitted in this case. Ld. Counsel for accused also filed the written submissions.

14. Ld. SPP submits that the accused being Sri Lankan national is found to be carrying charas in luggage when trying to leave India for Oman. The recovery of charas from the bag is duly substantiated from the testimony of independent witnesses PW6 and PW10 as well as the NCB officials PW2 and PW5. The accused himself refused to be searched before gazetted officer or magistrate and there is no infirmity in compliance of mandatory provisions under NDPS Act. The accused himself admitted his presence at airport. The testimony of prosecution witnesses are credible and unimpeached. The minor inconsistencies have hardly any effect over prosecution case. The prosecution able to prove the recovery of contraband charas from the bag of accused. The presumption u/s 35 & 54 NDPS Act against accused however accused unable to rebut the said presumption. Ld. SPP submits that CRCL report also corroborated the fact that the recovered material is charas. Ld. SPP submits that prosecution able to prove the foundational facts beyond reasonable doubt however accused unable to rebut the presumption. Accused is liable to be convicted for the offence charged.

15. Arguments heard. Record perused.

16. Apex court in "Mohan Singh Vs. State of MP, AIR 1999 SC 883", held that effort should be made to find the truth, this is the very object for which courts are created. One has to comprehend the totality of the facts and circumstances as spelled out through the evidence depending upon the facts of each case.

17. In appreciating the evidence, the approach of the court must be integrated and not truncated or isolated meaning thereby inferences should not be drawn by picking up an isolated statement from here and there; rather the evidence on a particular point should be examined in the background of the total statement of said witness or other witnesses as well as other evidence. The finding should be on the basis of objective assessment of the evidence and not on the conjunctures and surmises. In "Dalbir Singh and Ors. Vs. State of Punjab, AIR 1987 SC 1328", no hard and fast rule can be laid down about the appreciation of evidence and every case has to be judged on the basis of its own facts. While appreciating the evidence of the witness, the approach must be whether the evidence of a witness read as a whole appears to have ring of truth. Once that impression is formed, it is undoubtedly, necessary for the court to scrutinize the evidence more particularly, keeping in view the deficiency, drawbacks and the infirmities pointed out in the evidence as a whole, and evaluate them to find out whether it is against the general tenor of evidence given by the witness as to render it unworthy of belief. In 'Bhagwan Tana Patil Vs. state of Maharashtra, AIR 1974 SC 21', the apex court ordained that the function of the court is to disengage the truth from the falsehood and to accept what it finds the truth and rejects the rest. It is only where the truth and falsehood are inextricably mixed up, polluted beyond refinement down the core, the entire fabric of the narration given by a witness then the court might be justified in rejecting the same. This legal position was further elaborated in 'State of UP Vs. Shankar, AIR 1981 SC 897', wherein the Apex court observed that mere fact that the witness has not told the truth in regard to a peripheral matter would not justify whole sole rejection of his evidence. In this country, it is rare to come across the testimony of a witness which does not have a fringe or an embroidery of untruth although his evidence may be true in the main. It is only where the testimony is tainted to the core, the falsehood and the truth being inextricably intertwined, that the court should discard the evidence. Therefore, the duty is cast over this court to dispassionately disengage the truth from the falsehood and accept the truth and reject the same. This court is not meant Case No. SC/64/19 NCB Vs. Mohamed Anas Dated: 11.06.2021 Page No. 8 of 21 to reject the testimony of a witness on slightest deflection, however has a bounden duty to search the truth. Apex court in case titled "Gangadhar Behera & Ors. Vs. State of Orissa (2002) 8 SCC 381", held that the principle falsus in uno falsus in omnibus is not applicable in India and it is only a rule of caution. Even if major portion of the evidence is found to be deficient, in case residue is sufficient to prove the guilt of the accused. The conviction can be maintained. It is the duty of the court to separate the grain from chaff. Apex court in 'Smt. Shamim Vs. State, Crl. Appeal No. 56/2016 dated 19.09.2018', in para 12 observed as under:

"while appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole inspires confidence. Once that impression is formed. It is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out

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

18. As far as the defective and illegal investigation is concerned, apex court held that if investigation is illegal or suspicious, the rest of the evidence must be scrutinized independent of faulty investigation otherwise criminal trial descend to the IO ruling the roost. Yet if the court is convinced that the evidence of eye witnesses is true, it is free to act upon such evidence though the role of the IO in the case is suspicious (Abu Thakir, AIR 2010 SC 2119). An accused cannot be acquitted on the sole ground of defective investigation; to do so would be playing into the hands of the IO whose investigation was defective by design. (Dhanaj Singh Vs. State of Punjab AIR 2004 SC 1920). Mere defective investigation cannot vitiate the trial (Paramjit Singh Vs. state of Punjab AIR Case No. SC/64/19 NCB Vs. Mohamed Anas Dated: 11.06.2021 Page No. 9 of 21 2008 SC 441). The lapses or the irregularities in the investigation could be ignored only if despite their existence, the evidence on record bears out the case of the prosecution and evidence is of sterling quality. If the lapses or irregularities do not go the root of the matter, if they do not dislodge the substratum of the prosecution case, they can be ignored (Sunil Kundu & Anr. Vs. State of Jharkhand, 2013(4) SCC 422).

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

Information

20. PW2 Virender Kumar (IO) in his testimony categorically stated that from reliable source, he got the information that accused was detained at the airport by the officials of CISF as suspected to carry drugs in his luggage. The said information was recorded vide Ex.PW2/1 and forwarded to PW12 Madhav Singh, Zonal Director who marked the same for investigation to PW5 IO Rajesh Yadav. This witness in cross-examination stated that he received the information at around 09.30 PM and thereafter reached the office, recorded the said information at around 10.30 PM then forwarded to the Zonal Director. This fact is duly corroborated by PW12 Madhav Singh, Zonal Director. PW12 thereafter directed IO PW5 Rajesh Yadav to constitute the raiding team then PW5 IO Rajesh Yadav constituted the team, collected seal, made necessary entry in seal movement

register, also collected necessary material, IO kit and DD kit and left the office at around 2300 hours and reached IGI Airport at around 2340 hours. The factum of constitution of raiding team is also corroborated by the statement of PW2 Virender Kumar who is also member of raiding team and as per his statement also, the team reached airport at around 2340 hours. There is nothing material in cross-examination to dispute the apprehension of accused by CISF official at airport and thereafter recording of information and reaching of raiding team at IGI airport.

Presence of accused at IGI Airport and recovery of contraband charas from the search of his luggage

21. Accused in his statement u/s 313 Cr.PC categorically stated that he security checked at around 09.30 PM and when he went to pickup his bag, it could not be found thereafter, he enquired. Then after half an hour, two officers came with the bag and told him that there is some suspicious material in the bag. He also handed over his boarding pass and thereafter 3-4 CISF officers came and asked him to remove the contents but nothing was Case No. SC/64/19 NCB Vs. Mohamed Anas Dated: 11.06.2021 Page No. 10 of 21 recovered from the bag, and later he was taken to NCB office where he was forcefully asked to sign some papers. The presence of accused at the airport and his frisking is duly admitted by him however his only defence is that his bag was not having any contraband and it was planted. This accused however could not substantiate this defence either through cross-examination of prosecution witnesses or even not able to provide any material regarding this fact except the bald statement u/s 313 Cr.PC which is not the substantive evidence.

22. The prosecution substantiating the factum of recovery of contraband has relied upon the testimony of PW6 SI Sanjeev Kumar Sharma, CISF official and PW10 SI Robin Lakra, PW2 IO Virender Kumar and PW5 IO Rajesh Yadav. PW6 Sanjeev Kumar Sharma and PW10 Robin Lakra are the officials of CISF working at security check and performing the job of checking the luggage and frisking of the passengers. PW6 SI Sanjeev Kumar Sharma in his testimony categorically stated that at around 09.15 PM one passenger bag came in the tunnel of X-ray machine as he was handling the X-ray machine and he noticed some doubtful image thereafter SI Robin Lakra made the physical checkup of said bag and felt some narcotic drugs concealed in the bag. PW10 Robin Lakra also stated that he physically checked the said bag and felt something like narcotic drug and also called the incharge, and NCB officials were also informed who came around 2340 hours. This factum is also corroborated through the statement of PW2 and PW5. There is nothing in cross-examination of these witnesses that factum of checking of bag of accused was not done in the manner deposed by these witnesses.

23. PW6 stated that on minute checking of the bag, some artificial cavity was noticed in the bottom and same was containing some solid substance wrapped in brown tape which on checking by NCB officials found to give positive test of charas which was also admitted by accused Mohd. Anas. The total weight of recovered charas was 200 gm and thereafter two samples of 25 gm each were taken out. PW10 also stated on the same lines which is also corroborated through the statement of PW2 and PW5. There is nothing material to doubt about the manner of recovery of charas from the said bag. The sequence of events and the presence of accused at the spot also corroborates the authenticity of prosecution story. The accused unable to furnish any plea why charas could be planted in his baggage. Accused movement in India also appears suspicious. His stay in India is for a

short duration in which as per his statement u/s 67 NDPS, Case No. SC/64/19 NCB Vs. Mohamed Anas Dated: 11.06.2021 Page No. 11 of 21 (which is though inadmissible) went to Himachal Pradesh to procure the said charas. The accused however not pleaded anything what he was doing in India during short duration stay. The recovery of 200 gm of charas from the bag of accused is duly proved by the prosecution.

Sampling

24. In present case, there is a recovery of 200 gm of charas. As per the panchnama Ex.PW5/3, the bottom part of bag was found abnormal and on cut open of bottom part of the bag, it was noticed that wrapped brown adhesive tape was concealed, on taking out this whole brown tape and on cut opening brown colour solid substance i.e. charas was recovered which was also corroborated by the statement of PW2, PW5 PW6 and PW10. Thereafter, samples of 25 gm each were drawn. Ld. Counsel for the accused submitted that PW5 in his cross-examination stated that two packets wrapped together with the tape were recovered which is in contradiction to the statement of other witnesses and panchanama and this also suggests that sampling is to be done from each of the packets.

25. As far as the recovery is concerned that is found on cutting the brown colour adhesive tape. There is nothing mentioned in panchnama as well as in the testimony of PW2, PW6 and PW10 that there were two packets wrapped inside the adhesive tape. PW5 also not stated this fact in his examination in chief. Only in cross-examination, he stated two packets were wrapped together in the tape. There appears to be some confusion in his cross-examination which cannot be given any undue preference considering the overall testimonies of witnesses of recovery of contraband charas. The said contraband alongwith the bag etc were also produced in the court and no such anomaly was noticed therefore, the plea of recovery of 200 gm of charas in two different packets cannot be accepted. The judgment of Amani Fidel Chris (supra) as relied by the defence counsel is not applicable in this case.

26. Ld. counsel submits that as per the prosecution case, the samples of 25 gm each were taken however as per the FSL report Ex.PW1/1 the weight of the sample was found 26.4 gm, therefore, the doubt is created over the procedure of taking samples or over the fact that the sample is changed. This plea also has no value firstly it was not put to Case No. SC/64/19 NCB Vs. Mohamed Anas Dated: 11.06.2021 Page No. 12 of 21 Investigating Officer who has done the sampling nor to the chemical examiner who exhibited the report. The sample was found to have been received by the CRCL laboratory in untampered manner. There is nothing in testimony of any of the official to create doubt that the samples were tampered. The mere anomaly of noticing of difference of weight of 1.4 gm is hardly material because the laboratory has very sophisticated instrument to measure the weight.

CRCL Report (Ex.PW1/2)

27. PW1 Satya Kumar Gupta, Assistant Chemical Examiner stated that sample was analysed and tested under the supervision and control of PW3 Dr. Poornima Mishra, Chemical Examiner. PW3

Dr. Poornima Mishra also deposed that sample was tested under her supervision and on analysis, the sample gave positive test for charas. Therefore the CRCL report Ex.PW1/2 duly corroborates the factum of recovery of charas from the bag of accused.

Proceedings u/s 50 NDPS Act

28. The present recovery is not from the personal search of accused but from the bag therefore, there is no requirement of compliance of section 50 NDPS Act. Apex court in case titled Than Kunwar Vs State of Haryana, Crl. Appeal No. 2172/2011 dated 02.03.2020 after relying upon the judgment of Baljinder Singh (2019 (10) SCC 473) held that when the recovery was effected from the bag then the compliance of section 50 of NDPS Act is not required. This view reiterated by Apex Court in recent decision titled 'Jeet Ram Vs The Narcotics Control Bureau, Chandigarh, Crl Appeal No. 688/2013 dated 15.09.2020. However in present case, the accused was also given notice u/s 50 apprising him his legal right to be searched before gazetted officer or magistrate however he categorically stated that he do not require any gazetted officer or magistrate for his search. Therefore in these circumstances, it cannot be held that there is any violation of mandatory provision u/s 50 NDPS Act.

Compliance of section 57 NDPS Act

29. PW13 V.V. Singh, Superintendent NCB stated that on 05.12.2018, PW5 IO Rajesh Kumar deposited case property, test memo, samples, etc at malkhana thereafter on 06.12.2018 PW5 Rajesh Kumar Yadav also submitted seizure report u/s 57 NDPS Act and the arrest report u/s 57 NDPS Act. The said fact is duly corroborated by statement of PW5. There is nothing material in cross-examination to dispute the said fact hence Case No. SC/64/19 NCB Vs. Mohamed Anas Dated: 11.06.2021 Page No. 13 of 21 the prosecution also able to prove the due compliance u/s 57 NDPS Act. Recovery of mobile from the accused and consequent recovery of mirror image documents from the mobile, and lapse of not investigating main supplier Rajj @ Raju.

30. The personal search memo Ex.PW5/10 suggest that one Samsung mobileS8+ black in colour with 2 SIM slots having IMEI number. The first IMEI number is 354359084747361 with Airtel SIM and the second IMEI no. 354360084747309. The statement of accused u/s 67 NDPS Act was recorded on 05.12.2018 and in the said statement, he gave his 2 phone numbers one being Indian for local use and the other phone number was of Sri Lanka. The Indian phone number is 8870817319 and his Sri Lanka's number being 0094766264024 and also referred number of Raju in Q-5 of the voluntary statement which is 9805612904. Accordingly, PW11 IO B.L. Bairwa wrote 2 separate letters to Nodal Officer Bharti Airtel for CAF and CDR of mobile number 8870817319 and 9805612904. The CAF and CDR of mobile no. 8870817319 is used through IMEI no. 354359084747361 found in the name of Tamil lady not knowing accused. Zonal Director wrote letter to NCB Headquarter for sharing Sri Lankan mobile number detail from the Sri Lankan counterpart however no details have been received. From the investigation, the prosecution unable to prove the mobile no. 8870817319 and Sri Lankan mobile no. 0094766264024 is in the name of accused. The other number 9805612904 which as per accused statement u/s 67 was of one Raju, however no investigation was conducted from Raju @ Rajj. Therefore, from the documentary

records, accused was not found to be connected with the mobile phones but the said Samsung mobile with two IMEI slots was recovered from accused were duly proved. Hence, despite absence of any documentary evidence regarding ownership or connection of accused from the said SIM or mobile, it can be safely inferred that accused was using the said mobile. The adverse inference regarding the conduct of accused could also be drawn from the fact that accused was using mobiles obtained on fake documents.

31. The said recovery of mobile phone is material because it was sent for forensic examination to PW4 Dr. Ranjit Kumar Singh, Managing Director of SIFS India Forensic Science Laboratory who in his testimony stated that he carried out the examination and submitted report Ex.PW4/2 and alongwith the report given some printout of images, chat etc. His testimony remains unimpeached in cross-examination. The printouts show the images of the contraband charas. The prices of different types of heroin in Afghanistan, the prices of 1 kg heroin in other than US dollars, prices of Case No. SC/64/19 NCB Vs. Mohamed Anas Dated: 11.06.2021 Page No. 14 of 21 heroin, opium and and hashish at consumer level, and his communication with foreign nationals regarding his inquiry about the hash price, in reply 1\$ for 1 gm. In the chats also there is a mention that he is Sri Lankan national and delivery could be from Morocco, and he was also at Dubai at that time. He also stated about his age. The mirror image documents revealed that his involvement in drug business which is also a corroborating circumstance regarding his involvement in drugs dealing besides recovery of drugs in present case.

32. It is pertinent to mention here that as per the statement of accused u/s 67 NDPS Act, he came to India through Chennai airport on 01.12.2018 from Colombo and thereafter came to Delhi and took bus and went to Bhuntar, Himachal Pradesh, then stayed at Hotel HHH, Kasaul and purchased charas in Kasol from one Rajj @ Raju and apprehended at IGI Airport when tried to leave India for Muskat (Oman) on 04.12.2018. This fact is duly corroborated from entries of passport seized (Ex.PW5/3 (colly)). The said Rajj @ Raju is from Malana Village and his mobile no. is 9805612904. The present accused, as per CDR of mobile no. 9805612904 (Ex.PW7/4 (Colly)) is found to be connected from his mobile no. 8870817319. This suggests that accused is in connection with Rajj @ Raju corroborating his statement u/s 67 NDPS Act. The CDR of Rajj @ Raju were called which is Ex.PW7/3 however prosecution has not made any investigation from Rajj @ Raju despite the fact that his whereabouts are found through accused as well as through CDR record. The CAF of Rajj @ Raju categorically shows the address alongwith his ID card. While filing complaint, in paragraph 12, it is submitted by the IO PW11 B.L. Bairwa that investigation against Rajj @ Raju is open and complaint will be filed in this regard after getting sufficient evidence against him. On query, Ld. SPP submits that no such investigation was conducted against this Rajj @ Raju. This Rajj @ Raju is the main person who has supplying charas to the accused (a Sri Lankan National). This itself suggests that this supplier Rajj @ Raju of India has international connections for supply of charas however NCB officials have not investigated the case on that lines and not tried to unearth the entire syndicate or supply chain. This is serious lapse on the part of premium agency like NCB and severely deprecated, and require requisite internal enquiry by NCB. However, no benefit of this lapse could be given to accused in present facts and circumstances. Other Pleas Case No. SC/64/19 NCB Vs. Mohamed Anas Dated: 11.06.2021 Page No. 15 of 21

33. Ld. counsel for accused submitted that the testimony of PW6 and PW10 as independent witnesses cannot be relied upon firstly they are not independent as they themselves stated to have searched the bag of accused. PW6 in his examination in chief stated that NCB officials requested 2-3 persons to become independent witnesses and thereafter he and Robin Lakra agreed to become independent witnesses however in cross- examination stated that they had not requested any other official or public witness to become witness to the search. In this case, it is the admitted case of accused as per his statement u/s 313 Cr.PC that he was present at security check and his luggage was also checked. The presence of accused is not at all doubtful at the spot. PW6 and PW10 are the security officials cannot be at all held to be somehow related to NCB therefore, falls in the category of independent witnesses. The minor contradictions that whether any of the public witness was asked to join or not hardly material in present facts and circumstances. Ld. Counsel for accused also raised the plea that incharge Sheeshram Chaudhary of CISF is also not made the witness to whom PW6 and PW10 reported and who brought the NCB officials at the spot. The core of prosecution case is the search of accused and his luggage at the security check for which the material witnesses are PW6 and PW10. There is nothing in their cross-examination that in some manner they have tried to plant contraband in the bag. Recovery of contraband is also found to be from the bottom of bag in a concealed manner therefore in these circumstances, the mere non examination of Sheeshram Chaudhary hardly have any impact on prosecution case.

34. Ld. counsel for accused stated that PW2 IO Virender Kumar stated that he received the information at around 09.30 PM on his mobile and also gave the information to PW12 Madhav Singh, Zonal Director on his mobile however PW12 nowhere stated that he received information on mobile. He only stated that PW2 gave information in writing at around 10.30 PM. This itself creates doubt over the information received by PW2. The accused himself admitted to have apprehended while the security check at around 09.30 PM. PW6 and PW10 stated that at around 09.15 PM while security check, suspicious material was noticed in the bag therefore immediately it was informed to authorities thus the communication of said information at around 09.30 PM to PW2 Virender Kumar appears credible. It is clear from the testimony that at that time neither PW2 nor PW12 were in the office and both reached the office thereafter then information was presented by PW2 to PW12. Mere mentioning by PW12 that he has not received any Case No. SC/64/19 NCB Vs. Mohamed Anas Dated: 11.06.2021 Page No. 16 of 21 mobile call from PW2 does not in present facts and circumstances create doubt over the receipt of information. The minor variation in timing are bound to occur when the testimonies are recorded after long elapse of time.

Presumption u/s 35 and 54 of NDPS Act

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

12. Coming to the context of Section 18 of the NDPS Act, it would have a reference to the concept of conscious possession. The legislature while enacting the said law was absolutely aware of the said element and that the word "possession" refers to a mental state as is noticeable from the language employed in Section 35 of the NDPS Act. The said provision reads as follows:-

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

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

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

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

13. In *Noor Aga v. State of Punjab and Anr.*[17], the Court noted Section 35 of the NDPS Act which provides for presumption of culpable mental state and further noted that it also provides that the accused may prove that Case No. SC/64/19 NCB Vs. Mohamed Anas Dated: 11.06.2021 Page No. 17 of 21 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 Case No. SC/64/19 NCB Vs. Mohamed Anas Dated: 11.06.2021 Page No. 18 of 21 has to be proved as a fact beyond [pic]reasonable doubt and not merely when its existence is established by a preponderance of probabilities. We are of the opinion that in the absence of any evidence with regard to the mental state of the appellant no presumption under Section 35 can be drawn. The only evidence which the prosecution seeks to rely on is the appellant's conduct in giving his residential address in Rajasthan although he was a resident of Fatehabad in Haryana while registering the offending truck cannot by any stretch of imagination fasten him with the knowledge of its misuse by the driver and others."

15. Having noted the approach in the aforesaid two cases, we may take note of the decision in *Dharampal Singh v. State of Punja*[19], when the Court was referring to the expression "possession" in the context of Section 18 of the NDPS Act. In the said case opium was found in the dicky of the car when the appellant was driving himself and the contention was canvassed that the said act would

not establish conscious possession. In support of the said submission, reliance was placed on Avtar Singh v. State of Punjab[20] and Sorabkhan Gandhkhan Pathan v. State of Gujarat[21]. The Court, repelling the argument, opined thus:-

"12. We do not find any substance in this submission of the learned counsel. The appellant Dharampal Singh was found driving the car whereas [pic]appellant Major Singh was travelling with him and from the dicky of the car 65 kg of opium was recovered. The vehicle driven by the appellant Dharampal Singh and occupied by the appellant Major Singh is not a public transport vehicle. It is trite that to bring the offence within the mischief of Section 18 of the Act possession has to be conscious possession. The initial burden of proof of possession lies on the prosecution and once it is discharged legal burden would shift on the accused. Standard of proof expected from the prosecution is to prove possession beyond all reasonable doubt but what is required to prove innocence by the accused would be preponderance of probability. Once the plea of the accused is found probable, discharge of initial burden by the prosecution will not nail him with offence. Offences under the Act being more serious in nature higher degree of proof is required to convict an accused.

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

15. From a plain reading of the aforesaid it is evident that it creates a legal fiction and presumes the person in possession of illicit articles to have committed the offence in case he fails to account for the possession satisfactorily. Possession is a mental state and Case No. SC/64/19 NCB Vs. Mohamed Anas Dated: 11.06.2021 Page No. 19 of 21 Section 35 of the Act gives statutory recognition to culpable mental state. It includes knowledge of fact. The possession, therefore, has to be understood in the context thereof and when tested on this anvil, we find that the appellants have not been able to satisfactorily account for the possession of opium.

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

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

conscious in the logical background of Sections 35 and 54 of the Act."

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

36. In view of the mandate of above judgment, section 35 raises a presumption as to the knowledge and culpable mental state from the possession of illicit articles. As discussed the prosecution case over the factum of recovery of charas from the bag of accused is duly proved by the prosecution. Now the burden is upon the accused to rebut that he is not in conscious possession. Apex court in Baldev Singh Vs. State of Haryana (2015) 17 SCC 554 categorically held that once possession is proved then it is for the accused to establish that he was not in conscious possession of contraband. The prosecution able to prove the foundational facts of apprehension of accused concealing contraband beyond reasonable doubt however the accused unable to rebut the said presumption.

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37. Apex Court in case titled Sardul Singh Vs. State of Haryana in (2002) 8 SCC 372 observed that "There cannot be a prosecution case with a cast iron perfection in all respects and it is obligatory for the courts to analyse, sift and assess the evidence on record, with particular reference to its trustworthiness and truthfulness, by a process of dispassionate judicial scrutiny adopting an objective and reasonable appreciation of the same, without being obsessed by an air of total suspicion of the case of the prosecution. What is to be insisted upon is not implicit proof. It has often been said that evidence of interested witnesses should be scrutinized more carefully to find out whether it has a ring of truth and if found acceptable and seem to inspire confidence, too, in the mind of the court, the same cannot be discarded totally merely on account of certain variations or infirmities pointed or even additions and embellishments noticed, unless they are of such nature as to undermine the substratum of the evidence and found to be tainted to the core. Courts have a duty to undertake a complete and comprehensive appreciation of all vital features of the case and the entire evidence with reference to the broad and reasonable probabilities of the case also in their attempt to find out proof beyond reasonable doubt. On cumulative appreciation of the evidence despite minor lapses, lacunae and discrepancies, the prosecution able to prove the foundational facts against accused beyond reasonable doubt.

38. In view of above discussion, prosecution able to prove foundational facts beyond doubt. The presumption u/s 35 and 54 NDPS Act of culpable mental state and conscious possession arose in favour of the prosecution but accused unable to rebut the said presumption. Accordingly, prosecution able to prove its case beyond reasonable doubt. Hence, accused Mohamed Anas found

guilty for possessing and exporting 200 gm of charas which falls under intermediate quantity, thus convicted for offence u/s 20(b)(ii)(B) r/w section 23(b) NDPS Act. Let accused be heard on point of sentence.

Announced in the open court
on this 11th day of June, 2021

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

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