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* IN THE HIGH COURT OF DELHI AT NEW DELHI

DATE OF DECISION: 8th AUGUST, 2014

+ CRL.A. 1092/2012 & Crl. M.B. No.1704/2012

VARGAS JOSEANTONIO MAURICIO Appellant

Through Mr. Sanjiv Kumar and Mr. Santosh,
Advocates.

Versus

D.R.I. Respondent

Through Mr. Satish Aggarwala and Ms. Pooja
Bhaskar, Advocates.

CORAM:
HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. This criminal appeal has been preferred under Section 374 of Code of Criminal Procedure against the judgement and order dated 07.07.2012 and 13.07.2012 passed in Sessions case no. 21A/08 passed by Learned Special Judge, NDPS, Saket Court by which the appellant was convicted under Section 21(c) & 23(c) r/w Section 28 of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred as NDPS Act) and sentenced to undergo Rigorous Imprisonment for 10 years each and a fine of Rs 1 Lakh each for both the aforesaid offences, and in default of fine to further undergo S.I. for six months each for the said offences.

2. The facts and circumstances giving rise to this appeal are that on 25.10.2007, an intelligence was gathered by Sh Raman Mishra, Intelligence officer of Directorate of Revenue Intelligence(DRI) that one man named Vargas Joseantonio Mauricio would leave from Delhi to London by Cathay Pacific flight on 28.10.2007 and he would be carrying narcotic drugs concealed either in his checked in baggage or on his person. On taking instructions from N.D. Azad, Senior Intelligence Officer and based on the said information, a team of DRI officers accompanied by two public witnesses on 28.10.2007, had reached the IGI Airport and had off loaded the accused from the Cathay Pacific Flight no. CX-752 which was scheduled to depart at 7:40 AM. The accused was found to be holder of one Canadian Passport no. WK280916 which was seized vide Ex.PW3/E and was scheduled to travel from Delhi to London, via Hongkong, Vancouver by the said flight. The accused was carrying a blue colour trolley bag marked 'Jetliner' and a black colour zipper bag as his hand bag. The accused was told about the above secret information and he was then taken to the conveyor belt to identify his checked-in baggage. He had thereupon identified two suitcases covered with dark green colour cover, which were then retrieved. Thereafter, accused along with the baggage was taken to the left wing of the Customs Preventive Room situated at the departure hall of the Terminal-II of the airport.

3. The accused was asked there, in the presence of the public witnesses, as to whether he was carrying any contraband goods and he had replied in

negative. Thereafter, he was served with a notice U/S 50 of the NDPS Act Ex. PW6/A asking specifically as to whether he required the presence of a Magistrate or a Gazetted Officer for carrying out his personal search and the search of his checked in baggage and in reply to the same he had expressed his willingness by writing on the said notice that any officer of DRI could search him and his baggage. On being asked, the accused had also provided the keys of the above two checked in suitcases to the DRI Officers.

4. Thereafter, in the presence of the public witnesses, the dark green colour covers of the above two suitcases were removed and the same were found to contain two steel grey coloured suitcases of 'NOVEX' make, which contained some clothes and blankets. The clothes and blankets of both the suitcases were taken out and on careful examination of the empty suitcases, the bottom and upper lids of both the suitcases were found to be extraordinarily thick and heavy. On removal of the rivets inside the suitcases and on breaking open the upper and bottom lids of the suitcases one by one, a packet secured with carbon and brown colour adhesive tape was found, both from the upper lid and bottom lid of each suitcase. The four packets thus retrieved from the said suitcases were marked as A, B, C and D and on removal of the adhesive tape and carbon, the same were found to contain a white transparent polythene bag each and the same on further opening were found to contain some off white granule/powder, which was giving a pungent smell. A pinch of the powder from each of the packet was taken and the same

on testing with the UN Field Drug Testing Kit had given positive result for the presence of Heroin.

5. The total gross weight of the above four packets was found to be 12.196 KG and their net weight to be 11.976 KG. Three representative samples of 5 Grams each were taken out from each of the above four packets and the same were kept in separate polythenes and correspondingly marked as A1, A2 & A3 to D1, D2 & D3 and the same were further kept in separate paper envelopes and sealed with the DRI seal affixed over a paper slip bearing the signatures of witnesses, the accused and the complainant. The facsimile of the above seal was also affixed alongside. The remaining white granule/powder was re-packed in the above four original polythene packets and the same were also put in separate paper envelopes and were further kept in a tin box, which was wrapped in a white cloth and the same was stitched and sealed with the above seal in the same manner. The two steel grey coloured 'NOVEX' brand suitcases, along with their dark green covers, the carbon paper and tape etc. used for concealing the contraband substance, were also separately converted into a sealed pullanda in the similar manner and all the above contraband substance, suitcases and the packing material etc. were seized under the provisions of the NDPS Act. The accused was also found to be in possession of some documents and some currency amount, and the currency amount was also seized and separately sealed in a paper envelope in the similar manner. A detailed panchnama Ex. PW6/B regarding the above proceedings was drawn at the spot in respect of the above

proceedings and same was read over to the accused and the witnesses and was signed by them.

6. It is also alleged in the complaint that in response to the summons Ex. PW3/C, the accused had appeared before Sh. N.D. Azad, SIO, and had tendered his voluntary statement U/s 67 of the NDPS Act Ex. PW3/D in which he had, *inter-alia*, admitted the above said recovery and seizure etc. of the above contraband substance. He had also disclosed therein that the above two suitcases were given to him by one Sunny, whom he had met in hotel Radisson in Jalandhar, Punjab, two days back at Jalandhar and the same were to be handed over to the sister of above Sunny in London and his sister was to come at the London Airport with his name plate. However, the accused had not told the address or contact number etc. of the above Sunny while stating that he did not know the same, though he had met the above Sunny few times and he also used to call him on his mobile number. He had also stated therein that he was carrying the above suitcases for Sunny without any consideration and he had been befooled by the above Sunny and he was even got dropped at Delhi by a cab by the above Sunny a day before and he had stayed in room no.449 of the Radisson hotel in Delhi before catching the above flight. He had further stated in this above statement that the suitcases contained some blankets and clothes, but he was never aware that the suitcases were having false bottoms and ceilings and the same contained some drugs and he was not concerned with the above seized Heroin. Thereafter accused was arrested in this case. He was got medically examined.

7. The parcels of the case property were deposited in the valuable godown, New Custom House and one set of the sample parcels, along with the duplicate test memos, was deposited in the CRCL and the same was subsequently tested and gave positive for the presence of Diacetylmorphine (Morphine). After completion of investigation, a complaint was filed against the accused. The accused abjured his guilt to the charge under Section 21 (c) and 23 (c) of NDPS Act and claimed trial.

8. In order to substantiate its case, Prosecution in all examined 11 witnesses. After the conclusion of the evidence of the DRI, all the incriminating evidence brought on record was put to the accused in his statement recorded u/S 313 Cr.P.C. and the same was claimed by him to be incorrect. He claimed himself to be innocent and to have been falsely implicated in this case. Though he admitted that he was apprehended from the Airport and he had also checked in two baggages, but he specifically claimed that no suitcases were searched in his presence nor anything incriminating was recovered from his possession, person or in his presence. He further claimed that the above two suitcases were given to him by the above Sunny, but he was not aware that the same was containing Heroin, concealed therein or any false cavities thereof. He also stated that some part of his statement recorded by the DRI Officer is incorrect and he had retracted the same. However, no defence evidence was led by him on record though he had initially chosen to lead the same and had also availed few opportunities

for the same. The Trial court after considering the evidence on record held the accused guilty and convicted as mentioned above.

9. Mr S.K. Santoshi, learned counsel for the accused/appellant has challenged the findings of Ld. Trial Court on the sole ground that appellant was not in conscious possession of the contraband article. It was submitted that Trial court failed to appreciate the fact that appellant had admitted that he was handed over the baggage by one Sunny and that he had no knowledge that the same contained any narcotic drugs. It was further submitted that the appellant was not aware about the contents contained in the bag and he was told that the bag contained some blanket and personal effect items and the same were to be handed over to Sunny's sister at the London airport, who will come to receive those bags with a placard having the name of the appellant at the London Airport.

10. It was further submitted that from the testimony of the witnesses coupled with the statement of the accused, it is crystal clear that he had no knowledge about the contents in the suitcases and nothing was recovered in his presence and as such, in absence of evidence connecting his consciousness with the incriminating article, his conviction should be set aside. He had duly retracted the statement made under Section 67 of the Act.

11. Reliance was placed on *Dilbagh Singh vs DRI*, 2009(3)JCC(Narcotics)124; *Custom v Jorawar Singh Mundy*, 2013(1)JCC(Narcotics)32; *Kamaljeet Singh v HK Pandey*, 2005(3)JCC(Narcotic)220 and *Narcotic Control Bureau v Ali Mohd* in CrI Rev (P)27/2004.

12. Rebutting the submissions, learned counsel for the respondent, Sh. Satish Aggarwala, Advocate submitted that the factum of recovery and seizure was admitted by the appellant in the voluntary statement tendered under Section 67 of NDPS Act. However, subsequently, he filed a retraction application denying the allegations.

13. It was submitted that there is statutory presumption of conscious possession in view of Sections 35 and 54 of the NDPS Act. Accused has failed to discharge the burden that he had no knowledge of the presence of heroin in the baggage. Mere retraction is not sufficient. Retraction application was not moved at the first available opportunity. Moreover, the applicant himself did not enter the witness box nor proved the retraction application as per the Evidence Act. Hence it was submitted that the appeal is liable to be dismissed.

14. Reliance was placed on *State of Punjab v Lakhwinder Singh v State of Punjab*; *Ambrose Ihecherobi Okeke* in C.A.1110/2010; *Subhash Jain v State* in CrI Rev.P 261/2007.

15. I have considered the rival submissions made by learned counsel for the parties and have perused the record.

16. The Trial Court has extensively dealt with the issue regarding the recovery of the contraband substance. The testimony of the intelligence officers corroborated by the testimony of the two independent public witnesses and the other documentary evidence on record establishes beyond reasonable doubt the factum of recovery of 11.976kg of Heroin from the baggage which was in possession of the accused.

17. The sole point for consideration is whether the accused/appellant had the knowledge of the possession of such substance i.e. whether he was in 'conscious possession' of the contraband substance. Whether there was conscious possession has to be determined with reference to the factual backdrop of the case.

18. Before appreciating the evidence on record, it is first necessary to go through the provisions of Section 35 and 54 of the NDPS Act. Section 35 of the NDPS Act provides as under:

"35. Presumption of culpable mental state :- 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."

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"54. Presumption from possession of illicit articles:- In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of-

(a) any narcotic drug or psychotropic substance or controlled substance;

(b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;

(c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance or

(d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, for the possession of which he fails to account satisfactorily."

19. 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 NDPS Act gives a statutory recognition of this possession because of presumption available in law.

20. The question of “conscious possession” came up for consideration in ***Megh Singh v State of Punjab***, (2003) 8 SCC 666, where it was held as under:-

“7. Section 20(b) makes possession of contraband articles an offence. Section 20 appears in chapter IV of the Act which relates to offence for possession of such articles. It is submitted that in order to make the possession illicit, there must be a conscious possession.

8. It is highlighted that unless the possession was coupled with requisite mental element, i.e. conscious possession and not mere custody without awareness of the nature of such possession, Section 20 is not attracted.

9. The expression “possession” is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in *Supdt. & Remembrancer of legal Affairs, West Bengal v. Anil Kumar Bhunja*, 1979 SCC (Cri) 1038 to work out a completely logical and precise definition of “possession” uniformly applicable to all situations in the context of all statutes.

10. The word 'conscious' mean awareness about a particular fact. It is a state of mind which is deliberate or intended.

11. As noted in *Gunwantlal v. State of M.P*, SCC(Cri)678, possession in a given case need not be physical possession but can be constructive, having power and control over the article in case in question, while the person whom physical possession is given holds it subject to that power or control.

12. The word 'possession' means the legal right to possession (See *Heath v. Drown*, (1972)2 All ER 561. In an interesting case it was observed that where a person keeps his fire arm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. (See *Sullivan v. Earl of Caithness*, (1976)1 All ER 844.

13. 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 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. This position was highlighted in *Madan Lal v. State of H.P.*, (2003) 7 SCC 465.”

21. Again Hon’ble Supreme Court dealt with this issue in *Gian Chand & Ors v State of Haryana*, (2013) 14 SCC 420, wherein it was observed:

“17. This Court dealt with this issue in *Madan Lal and Anr. v. State of Himachal Pradesh*, (AIR 2003 SC 3642), observing that (See P.472, Para 20):

“20. Section 20(b) makes possession of contraband articles an offence. Section 20 appears in Chapter IV of the Act which relates to offences and penalties for possession of such articles.”

Undoubtedly, in order to bring home the charge of illicit possession, there must be conscious possession. The expression 'possession' has been held to be a polymorphous term having different meanings in contextually different backgrounds. Therefore, its definition cannot be put in a straitjacket formula.”

“23. The word 'conscious' means awareness about a particular fact. It is a state of mind which is deliberate or intended.

24. possession in a given case need not be actual physical possession and may be constructive i.e. Having power and control over the article in case in question, while the person to whom physical possession is given holds it subject to that power or control.”

18. The Court further held as under:

“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 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....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.”

19. From the conjoint reading of the provisions of Section 35 and 54 of the Act, it becomes clear that if the Accused is found to be in possession of the contraband article, he is presumed to have committed the offence under the relevant provisions of the Act until the contrary is proved. According to Section 35 of the Act, the court shall presume the existence of mental state for the commission of an offence and it is for the Accused to prove otherwise.

20. Thus, in view of the above, it is a settled legal proposition that once possession of the contraband articles is established, the burden shifts on the Accused to establish that he had no knowledge of the same.

21. Additionally, it can also be held that once the possession of the contraband material with the Accused is established, the Accused has to establish how he came to be in possession of the same as it is within his special knowledge and therefore, the case falls within the ambit of the provisions of Section 106 of the Evidence Act, 1872 (hereinafter referred to as 'the Act 1872').

22. In ***State of West Bengal v. Mir Mohammad Omar***, AIR 2000 SC 2988, this Court held that if the fact is specifically in the knowledge of any person, then the burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of Accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the Section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the Accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the Court to draw a different inference.

“38.....Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused.(See also “***Shambhu Nath Mehra v. The State of Ajmer***, AIR 1956 SC 404; ***Gunwantlal v. The State of Madhya Pradesh***, AIR 1972 SC 1756; ***Sucha Singh v. State of Punjab***, AIR 2001 SC 1436; ***Sahadevan @ Sagadevan v. State rep. by Inspector of Police, Chennai***, AIR 2003 SC 215; ***Durga Prasad Gupta v. The State of Rajasthan thr. CBI***, (2003) 12 SCC 257; ***Santosh Kumar Singh v. State thr. CBI***, (2010) 9 SCC 747; ***Manu Sao v. State of Bihar***, (2010) 12 SCC 310; ***Neel Kumar alias Anil Kumar v. State of Haryana***, (2012) 5 SCC 766).”

22. What can be culled out from the aforesaid judicial pronouncements is that once the possession of the accused and control over the contraband is proved, then statutory presumption under Sections 54 and 35 of the Act operates against him that he was in conscious possession thereof. Thereafter, it is for him to rebut the statutory presumption by leading cogent and convincing evidence. ***Abdul Rashid Ibrahim Mansuri vs. State of Gujarat***, (2000) 2 SCC 513, not only lays down the standard of proof for an accused to discharge the onus placed upon him for proving the absence of such

mental state or knowledge regarding the possession of a contraband substance, but it also lays down the modes in which such a burden can be discharged. The relevant extracts of the above judgment are being reproduced herein below:

“21. No doubt, when the appellant admitted that narcotic drug was recovered from the gunny bags stacked in the auto-rickshaw, the burden of proof is on him to prove that he had no knowledge about the fact that those gunny bags contained such a substance. The standard of such proof is delineated in Sub-section (2) as "beyond a reasonable doubt". If the Court, on an appraisal of the entire evidence does not entertain doubt of a reasonable degree that he had real knowledge of the nature of the substance concealed in the gunny bags then the appellant is not entitled to acquittal. However, if the Court entertains strong doubt regarding the accused's awareness about the nature of the substance in the gunny bags, it would be a miscarriage of criminal justice to convict him of the offence keeping such strong doubt dispelled. Even so, it is for the accused to dispel any doubt in that regard.

22. The burden of proof cast on the accused under Section 35 can be discharged through different modes. One is that, he can rely on the materials available in the prosecution evidence. Next is, in addition to that he can elicit answers from prosecution witnesses through cross-examination to dispel any such doubt. He may also adduce other evidence when he is called upon to enter on his defence. In other words, if circumstances appearing in prosecution case or in the prosecution evidence are such as to give reasonable assurance to the Court that appellant could not have had the knowledge or the required intention, the burden cast on him under Section 35 of the Act would stand discharged even if he has not adduced any other evidence of his own when he is called upon to enter on his defence.”

23. Whether there was conscious possession has to be determined with reference to the factual backdrop.

24. Besides the seizure of the contraband substances from the two suitcases recovered from the possession of the accused, there is also a statement u/s 67 of NDPS Act Ex.PW3/D which was tendered by the accused in his own handwriting in response to the summons Ex.PW-3/C served upon him. Needless to say, a statement u/s 67 of the NDPS Act is admissible in evidence as the same is made prior to the arrest of the accused

and if the same is found to be voluntary, then the same can be acted upon by the Court and can be made the sole basis of conviction of the accused. However, if such a statement has been subsequently retracted by the accused then it is not prudent to solely act upon the same for the conviction of the accused unless it has been corroborated by some independent witness. It is the case of the accused that the statement u/s 67 of NDPS Act Ex.PW-3/D dated 28.10.2007 was not made by him voluntarily and the same was subsequently retracted vide another written statement dated 28.10.2007. The question whether the retraction was made by the accused on the same day i.e. 28.10.2007 and what was its effect have been discussed in detail by the learned Special Judge with the following observations:-

“On perusal of the case file the exact date of filing of the above retraction on record is not clear. The accused was apprehended in this case from the IGI Airport premises shortly before he was to leave India by the above flight scheduled to depart at 7.40 AM. As per the evidence brought on record the panchnama proceedings were commenced at around 6.30 AM and the same were concluded at about 10.30 AM on 28.10.2007. The summons Ex.PW3/C given to the accused were for his appearance before PW3 at 11 AM on that day and according to the depositions of PW3 the accused had appeared before him at about 11.30 AM and had tendered the above statement. The formal time of arrest of the accused in this case as per his arrest memo Ex.PW6/D is 2 PM on 28.10.2007 itself.

After his medical examination etc., the accused was produced in the court on the same day before the Ld Duty MM, as shown by the record of the case, and he was remanded to judicial custody till 31.10.2007. Though the retraction application of the accused is also dated 28.10.2007, but it appears that the same was not filed before the Ld Duty MM and was written subsequently by the accused. It is so because in the above retraction application there is a mention of his appearance before the Ld Duty MM(Judge) and the next date of hearing given in the above retraction application is also 31.10.2007. It appears that this retraction application was filed in the court of learned Special Judge by the accused on 31.10.2007, though there is no endorsement on the said retraction application of that date, as it is addressed to the Ld. Special Judge, NDPS Act. In any case the retraction application of the accused has come on record just within three days of his making of his previous statement Ex.PW3/D u/s 67 of the NDPS Act.

Coming to the contents of the above retraction application, it is found that the accused has claimed therein that he was physically beaten and subjected to third degree methods while he was in the custody of the DRI Officers and he was also made to sign a whole bunch of the blank papers and also to write under dictation. The prosecution has proved on record one application/letter for the medical examination of the accused as Ex.PW3/F and though the MLC of the accused has been brought on record as Mark A only and has not been formally proved on record as per the provisions of the Evidence Act, but no evidence has also not been led on behalf of the accused to show any such physical torture of him or subjecting him to any third degree methods. On the face of it, the above claim made by the accused in his retraction application appears to be false because had his previous statement Ex.PW3/D been written by the accused on the dictation of the DRI Officers, then certainly the knowledge on the part of the accused of the above contraband substance or the conscious possession of the accused of the said substance might also have been a necessary part of the above statement Ex.PW3/D and the DRI Officers could never have dictated to the accused that the accused had no concern with the above seized Heroin or that he was not aware regarding the false cavities of the above suitcases or the Heroin concealed therein. This very fact shows that the statement Ex.PW3/D given by the accused u/s 67 of the NDPS Act is his voluntary statement. Moreover, the accused does not appear to be clear in mind and on record as to which part of his statement u/s 67 of the NDPS Act Ex.PW3/D is owned by him and which is being disowned as dictated and his subsequent retraction only appears to be the outcome of some advice given to him by his Advocate at that time or some other inmate of the jail."

25. It was submitted by learned counsel for the appellant that even if this retraction statement is not taken into consideration, the evidence available on record does not make out a case of conscious possession of the contraband substance on the part of the accused because PW6 had deposed that, on enquiry from the accused about the presence of narcotic drugs on his person or in his checked-in-baggage, the accused had replied in negative. He also referred to the statement u/s 67 of the NDPS Act where also the accused did not admit his knowledge of the contraband substance recovered from the suitcase and it was his case that the suitcase was given to him by one Sunny for delivering the same to his sister in London. He also referred to the testimony of PW6 for submitting that the witness admitted that the statement of the accused was recorded in his office and he was hearing the same. After

the statement was handed over to him, he had properly investigated and verified the same and subsequently the same was made part of the complaint.

26. A perusal of the statement Ex.PW-3/D made by the accused reveals that it was the case of the accused that the above suitcases containing 11.976 kg of Heroin were given to him by one Sunny, whose address in India he did not know; he had met Sunny in Jalandhar, Punjab in Raddison Hotel and he used to contact Sunny over his mobile phone, the number of which he did not remember; he did not have the knowledge that the above suitcases contained banned narcotic drugs and Sunny had given the above two suitcases to him in Jalandhar two days back and asked him to give the same to his sister in London and since he had met Sunny four times in Punjab, he had agreed to do this favour to him for no consideration. He has also stated therein that he had asked Sunny to get him dropped at Delhi by a cab and he had reached Delhi day before yesterday and had stayed at Radisson Hotel in room No.449; that he had no concern with the seized Heroin and he was fooled by his friend Sunny of Punjab, who had asked him for a favour and he had accepted his request to carry the above suitcases to London for his sister and further that he had seen that the suitcases contained some blankets and clothes and he was not aware that the suitcases had any false bottom or ceiling and the same contained some drugs.

27. A perusal of the statement reveals that Sunny was not acquainted with the accused earlier. He had met Sunny for the first time only in Raddison Hotel, Jalandhar, Punjab. The accused failed to disclose in what connect ion

he had met Sunny in Raddison Hotel. In pursuance to the statement made by the accused, enquiry was made from hotel Raddison, Jalandar by the Investigating Officer of the case but no information could be received as to whether Sunny was residing in Raddison Hotel, Jalandhar, Punjab. Moreover accused had come on a tourist visa for the first time on 25.09.2008 and no explanation has been put forth by the accused as to what was the occasion for him to meet Sunny four times during the period of about one month of his stay in India when he had visited many places like Agra, Amritsar and Jammu etc. Although he claims that he used to call Sunny on his mobile number, neither the mobile number nor any contact number of the above Sunny was given to the Investigating Officer either in his statement or during the investigation. From the arrest-cum jama talashi memo Ex. PW 6/D, two mobile phones were recovered and if the plea taken by the accused had some substance, he could have furnished the mobile or the contact number of Sunny to the Investigating Officer of the case. Even during the trial no attempt was made by the accused to produce any such record of the call details of his mobile numbers or of the contacts concerned therein. He also did not inform the Investigating Officer about the residential address of Sunny or any other relevant information which could substantiate the claims made by the accused.

28. Moreover, according to the accused he had seen the two suit cases which were containing some clothes and blankets only. Sunny had not disclosed the name of his sister nor her address or contact no etc. It was rightly

observed by the learned Trial Court that if for any unforeseen reasons the sister of Sunny was not able to reach the airport in time then in the absence of any contact number, who would the accused have contacted for delivering the two suit cases. Moreover two packets containing heroin were recovered from each of the two suitcases and total weight of these four packets was around 12 kg. It cannot be believed that the accused was not able to judge from the weight of the above two suitcases that these suitcases did not contain only clothes.

29. As regards the submission that the Investigating Officer had deposed that he had properly investigated and verified the statement , Ex.PW-3/D of the accused, the stay of the accused in Hotel Raddison, New Delhi was verified and in pursuance to the letter sent at Jalandhar it was reported that no person by the name of Sunny was found to have stayed in the said hotel. Therefore, nothing favourable could be elicited from the cross examination of the Investigating Officer of the case. Neither from the evidence led by the prosecution nor by leading any defence evidence, the accused-appellant could rebut the presumption operating against him under Sections 35 and 54 of the NDPS Act.

30. None of the judgments relied upon by learned counsel for the appellant has any application to the facts of the case in hand inasmuch as in ***Joravar Singh*** (supra), the plea taken was that the accused was not in conscious possession of the article inasmuch as he had come to India along with one Sukhjinder who was also a US citizen known to the respondent's family and

went to Chandigarh in his car. He then stayed at the house of one Jatinder Grewal who was known to Sukhjinder. Sukhjinder Singh paid for the airlines tickets and shopping etc. Sukhjinder had asked him to carry two suitcases containing some clothes and articles of the grand daughter of Jatinder Grewal who had to go for studies to USA after some time. The suitcases were to be delivered at the residence of the brother of Sukhjinder in USA. He gave mobile numbers of the brother of Sukhjinder. Despite the fact that the relevant information was given by the accused, the Investigating Officer did not verify the foreign address of the recipient of the packet at USA and the Investigating Officer admitted that he did not interrogate Sukhjinder Singh nor tried to trace him. Moreover the accused had also examined Jatinder Grewal at whose house he had stayed that he had handed over the bag to him. Under those circumstances, it was observed that the accused had succeeded in proving that he was not in conscious possession of the contraband items.

31. Similarly in ***Kamaljeet Singh***(supra), bail was granted to the accused because prima facie there was no material to prove that the accused was in conscious possession. Again in ***Dilbagh***(supra), accused was a driver in whose car the co-accused was travelling. Contraband articles were delivered by other car owner to the person sitting on the rear seat of the car, as such the accused was ordered to be released on bail as prima facie it could not be said that the accused was in conscious possession of the articles. Similarly ***Ali Mohd*** (supra) does not help the accused because in that case one Mohd Amin who was known to the respondent came to his house and kept one bag in the

office of the respondent when he had gone to Jammu leaving keys of the house with Mohd Amin, as such it was held that the respondent was not in conscious possession of the articles.

32. In the instant case, the two suitcases have been established to be belonging to the accused and even accused had admitted that the above two suitcases were checked in by him and the story put forth by him that the same belonged to some other person is not substantiated, as such the accused has failed to prove that he was not in conscious possession of the articles. No other point was urged during the course of appeal.

33. Under the circumstances, the appeal being bereft of merit is dismissed. CrI.M.B.1704/2012 also accordingly stands dismissed.

Information be sent to the accused through Superintendent Jail. Copy of the judgment along with Trial Court record be sent back forthwith.

(SUNITA GUPTA)
JUDGE

AUGUST 08, 2014
as