

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 26.03.2014

+ CRL.A. 999/2010

AKABUOGU GODWINN OJIMBA Appellant

Through: Mr Dharmender Bhau, Adv

versus

CUSTOM Respondent

Through: Mr Satish Aggarwala, Adv

+ CRL.A. 1355/2010

OBI BASIL CHUKS Appellant

Through: Mr Yogesh Kr. Saxena, Mr Yogesh
Mehta and Mr Tushar Oberio, Advs.

versus

CUSTOMS Respondent

Through: Mr Satish Aggarwala, Adv

+ CRL.A. 1238/2010

EDWARD CHUKWUDILE Appellant

Through: Mr Yogesh Kr. Saxena, Mr Yogesh
Mehta and Mr Tushar Oberio, Advs.

versus

CUSTOMS Respondent

Through: Mr Satish Aggarwala, Adv

CORAM:

HON'BLE MR. JUSTICE V.K. JAIN

JUDGEMENT

V.K. JAIN, J. (ORAL)

The case of the complainant/respondent in nutshell is as follows:-

The appellants before this Court arrived from Kabul by flight No.KB-44 at about 4.50 PM on 13.09.2005. When they were in the transit area to catch flight No.ET 0629 at about 6.30 PM on that date, the Complainant Surinder Pal Singh, Inspector (Customs) intercepted them on suspicion that they might be carrying contraband in their checked in luggage. Two witnesses were called to witness the proceedings of examination. The document obtained from Indian Airline staff indicated the check-in baggage booked by the appellants. The aforesaid document was signed by the witnesses who were called there. The checked-in baggage of the appellants were then brought. It was found that the baggage bearing tag No. 0485452 was booked by the appellant Obi Basi Chuks. Baggage bearing tag No. 486618 had been booked by the appellant Akabuogu Godwin Ojimba, whereas the baggage against tag No. 486619 had been booked by the appellant Edward Chukwudile. The appellants identified their respective baggage. The appellants on being asked to produce their respective tickets for travelling

from Kabul to Delhi, appellant Obi Basi Chuks and appellant Edward Chukwudile produced their respective boarding tickets. Akabuogu Godwin Ojimba, however, was unable to produce any ticket or boarding pass. On being asked as to whether they were carrying any contraband goods and/or narcotic or psychotropic substance, either in their baggage or in person, the appellants replied in the negative. The complainant then served notice under Section 50 of NDPS Act on the appellants who, however, had no objection to them as well as their package being examined by any custom officer.

2. Obi Basil Chuks identified his baggage bearing tag No. As 485452 and opened the said baggage from the key which he took out from his pocket. After removing all the articles in the bag, it was examined carefully. A number of sandals/shoes had been taken out by Obi Basi Chuks from his bag. On examining coffee colour sandals having trade name “Ancona”, its bottom was found to be explicitly heavy. On cutting upon the sandal from the bottom, it was found that its cavity had concealed a dummy sole of silver colour. The concealment, which was in the form of a sole, and had been covered with silver foil colour was taken out from the sandal. On cutting the silver foil, off white colour powder was recovered from the dummy sole. The said powder was collected in a polythene bag. Another pair of sandal

was then cut from the bottom and was found to have cavity concealed with dummy sole of silver colour. On being taken out from the sandal, the aforesaid concealment was found to contain white colour powder kept in dummy sole. That powder was also collected in polythene bag. Several other sandals found in the bag were then examined and found to contain inexplicably heavy bottom. On being cut from the bottom, a cavity was found which had concealed bottom soles of silver colour. The concealment in those sandals, again, in the form of sole, had been covered with silver foil and on cutting silver foil, white powder was recovered from the dummy sole concealment. The off white powder in this manner was discovered in as many as eight pair of sandals. After it had been homogenously mixed, a small quantity of the powder equivalent to the tip of match stick was taken as a sample and on being tested using Field Drug Test Kit, it gave positive indication of heroin. Thereafter, the complainant examined various books which were found in the bag. The hard binding of the books on both the sides were found to have some concealment. On carefully cutting the upper hard binding of the books, white layer of powdery substance was found which got broken into small pieces while removing and collecting in the polythene bag. The lower hard binding of the book was also carefully cut

and white layers of powdery substance was recovered, which also got broken in the small pieces while removing and collecting the same into polythene bag. The powdery substance in this manner was found in as many as four books. The black colour small leather carrying bag (pouch) on being carefully examined gave suspicion. On being cut, the packet was found to contain white layer of powdery substance which also got broken in the small pieces while removing it. Those pieces were also collected in the same polythene bag. A brown colour envelope folder on being examined gave suspicion of concealment. On cutting the sides, it was found to contain a layer of off white which also got broken into small pieces, while removing and was collected in the same bag. A small quantity was drawn as sample and on being tested, it also gave positive indication of being heroin.

3. The zipper bag bearing tag No.486619 which Edward Chukwudile had identified as his bag was opened by him from the key which he took out from his pocket and it was also found to contain various pairs of sandals, books, folders and clothes. All the aforesaid articles were taken out of the bag. On being checked, one pair of coffee colour sandal having a mark Urban Sole Free Walk with mark No.43 was found to be inexplicably heavy, giving suspicion of concealment. On cutting the bottom of the said sandal, a

cavity concealing dummy sole of silver colour was found. The concealment from the said sandal, which also was in the shape of a sole covered with silver colour foil contained off white powder, which was collected in a polythene bag. Similar treatment was given to seven other pairs of sandals found in the check-in baggage of Edward Chukwudile and white powder was recovered from the dummy sole concealment of the aforesaid sandals. After it had been homogeneously mixed, a small quantity of the powder was drawn as sample and on being tested, it was found to be heroin. Edward Chukwudile was also carrying a hand baggage having mark Hrigren. Nothing, however, was found in the said bag.

4. The appellant Akabuogu Godwin Ojimba identified the check-in baggage bearing tag No. 486618. He opened the checked-in baggage from the key which he took out from his pocket. The articles found in the checked in bag were taken out by him. It also contained sandals which were found to be inexplicably heavy and white powder was recovered from three sandals, found in the said bag. The powder had been concealed in the dummy sole of silver colour. Sample was drawn from the aforesaid powder, after it had been homogeneously mixed and it gave indication of heroin. The books found in the bag were examined and their top and bottom gave

suspicion about concealment. On being cut, off white powdery substance was found which got broken into small pieces while removing and collecting in the polythene bag. Two ladies bags found in the baggage were also checked on suspicion of concealment. On cutting the sides of the said purses, they were found to contain a layer of off white powdery substance which got broken into small pieces while removing. A brown colour folder found in the bag also gave suspicion of concealment on both the sides. On being cut, a layer of off white powdery substance was found on both the sides of the folder which got broken into small pieces while removing and collecting in the polythene bag. A small quantity of powder was drawn as sample and gave indication of being heroin though Akabuogu Godwin Ojimba was carrying a black colour suitcase as handbag, but nothing incriminating was found in the said bag.

5. The off white powder recovered from the checked in baggage of Obi Basi Chuks on being weighed, was found to be 4.315 kgs and marked as A1. The off white powdery substance recovered from black bag and one folder recovered from the checked in baggage of Obi Basi Chuks which had been collected in a polythene bag, on being weighed, was found to be 1.265 kgs and marked as A2. The off white powdery substance recovered from the

concealment of four pairs which were found in the checked in baggage of Obi Basi Chuks and had been collected in a polythene bag on being weighed was found to be 1.365 kgs and was marked as A3. Thus, according to the complainant, Obi Basi Chuks was found in possession of 6.945 kgs of heroin.

6. The off white powder which was recovered from the checked in baggage of Edward Chukwudile, on being weighed, was found to be 4.215 kgs and marked as B1. The off white powder recovered from the concealment of folders and books which were found in the checked in baggage of Edward Chukwudile and had been collected in a polythene bag, on being weighed was found to be 2.015 kgs and marked as B2. Thus, the appellant Edward Chukwudile was found to be in possession of 6.230 kgs of heroin.

7. The powdery substance which was recovered from the checked-in baggage of Akabuogu Godwin Ojimba and had been collected in a bag, on being weighed, was found to be 1.765 kgs and was marked as C-1. The off white powdery substance recovered from the concealment of three ladies purses and one brown folder recovered from the checked-in baggage of appellant Akabuogu Godwin Ojimba which had been collected into a

polythene, on being weighed was found to be 2.015 kgs and marked as C2. The powdery substance recovered from the concealment of three books found in his checked in baggage on being weighed was found to be 0.665 kgs and marked as C3.

8. Thereafter, the complainant drew three representative samples of five gram each for testing from A1, A2, A3, B1, B2, B3, C1, C2 and C3. The said samples were marked as A1/S1 to S3, A2/S1, to S3, A3/S1 to S3, B1/S1 to S3, B2/S1 to S3, B3/S1 to S3, C1/S1 to S3, C2/S1 to S3, C3/S1 to S3. The samples A1/S1, A2/S1, A3/S1, B1/S1, B2/S1, B3/S1, C1/S1, C2/S1 and C3/S1 were marked for CRCL Pusa Road, New Delhi. The samples of five gram each drawn for testing were kept in polythene pouches and then in brown colour envelope which was sealed with custom seal No. 6 over the place of thick paper slip bearing signature of the complainant and the appellants.

A *panchnama* was drawn on the spot and signed by the witnesses, the complainant and the appellants. The seal was taken by the complainant from Shri Ashok Gulia, ACO, Incharge Valuable Godown at IGI Airport on 14.09.2005, which was later returned to him on 15.09.2005.

9. This is also the case of the complainant that pursuant to the summons

issued to him, appellant Akabuogu Godwin Ojimba appeared before Shri Kamal Gautam, Air Custom Superintendent and made a voluntary statement dated 14.09.2005. Appellant Obi Basi Chuks is also stated to have made a voluntary statement under Section 67 of the NDPS Act on the same date. Appellant Edward Chukwudile is also stated to have made a voluntary statement under Section 67 of the NDPS Act, admitting the recovery, seizure and other incriminating facts. On 14.09.2005, Shri Kamal Gautam, Air Custom Superintendent handed over the representative samples to Shri R.K. Soni, ACO along with a forwarding letter dated 14.09.2005 and test memos in duplicate for onward transmission to CRCL for chemical analysis. Shri R.K. Soni handed over the same to Shri R.P. Meena, Assistant Chemical Examiner on 15.09.2005. The intimation of the seizure of the heroin and the arrest of the appellants was conveyed to the Directorate of Revenue Intelligence, New Delhi and the arrest of the appellants was intimated to High Commission, Embassy of Nigeria on the same date. The seized case properties were deposited by the complainant with Shri Ashok Kumar Gulia, Incharge Valuable Godown at IGI Airport on 14.09.2005 in intact condition. The packing material was also deposited with him. The samples were also deposited with Mr Gulia on the same date. On being analysed in the

laboratory, the samples of the substance seized from the appellants were found to be diacetylmorphine (heroin). All the three appellants were prosecuted under Section 21,23 and 29 of NDPS Act.

10. The appellants were charged under Section 21(c) of the aforesaid Act read with Section 8 thereof as well as under Sections 23 and 29 read with Section 21 of the NDPS Act. Since they pleaded not guilty and claimed trial, as many as nine witnesses were examined by the complainant. No witness, however, was examined in defence.

11. The complainant came in the witness box as PW1 and *inter alia* stated that on 13.9.2005, he was posted as Air Custom Officer at IGI Airport, New Delhi. On the abovesaid date, the accused present in the court arrived from Kabul on flight No.IC 844. When they were in the transit lounge to board a flight to Addis Ababa they had some apprehension that the accused were carrying some narcotic drugs in the checked in baggage. They called for documents from Indian Airlines staff giving details of the passengers. At that time they were accompanied by *panch* witnesses who put their signatures on the documents produced by Airline staff. The checked in baggage identified, by the appellants, were searched, after they had been asked whether they were carrying any narcotic drug/objectionable item and

they had replied in the negative. The articles in the checked in baggage comprised shoes, books and personal effects. Notice under Section 50 of the NDPS Act was given to them and they were informed as to whether they wanted to be searched before a Magistrate or a Gazetted Officer, to which they declined.

He further stated that the accused offered to be searched before a Customs Officer available on the spot. The bags were opened and found to contain shoes, sandals, books, personal clothes. The soles of the shoes were cut upon and were found to contain off-white powder substance, packed in a foil. Similarly hard cover of the books, i.e. bindings were also opened and found to contain white powder substance in paper envelope glued. It was cut open and found to contain white powder. On being tested with the help of the test kit, the powdery, substance gave positive indication of being heroin. Similarly, the second accused, Obi Basil Chuks, was called and notice under Section 50 of the Act was served upon him. He also declined to be searched before a Magistrate and offered to be searched before any Custom officer. His luggage was opened and was found to contain shoes and books. The shoes were too heavy and were cut open and found to contain white powder substance. The books were also similarly cut open

and found to contain white powder substance. The powder was tested with the help of the testing kit and gave positive indication of being heroin. Thereafter, the luggage of the third person, Edward Chukwudile, was called and notice under Section 50 of the Act was served upon him. He declined to be presented before a Magistrate and offered to be searched before the Custom officer present there. He also signed the notice in token of giving the consent. Thereafter his luggage was opened and was found to contain shoes, sandals. It was also cut open from the sole area of the shoe and white powder substance was found. It was also tested and gave positive indication of being heroin. After testing, the white powder was collected in a polythene bag. The powder recovered from the baggage of the accused Basil Chuks was found to be 6.945 kgs in total, which included the recovery from the shoes, folders and books marked as A1, A2 & A3.

Thereafter the white powder purporting to be heroin was collected from the concealment of the checked in baggage of Edward Chukwudile. On being weighed, it was found to be 6.23 kg of heroin and the packets marked as B1, B2..

He further stated that the white powder substance recovered from the shoes marked A1 weighed 4.315 kg, whereas the powder from the folders

which was marked as A2 weighed 1.265 kg and the recovery from books weighed 1.365 kg., which was marked A3. The powder substance recovered from sandals, folders and books weighed 4.215 kg and marked as B1, whereas the recovery from the folder weighed 2.015 kg and was marked as B2. The substance recovered from sandal weighed 1.765 kg and was numbered as C1, the recovery from purse C2 weighed 2.015 kg and recovery from books weighed 0.665 kg, which was marked as C3.

According to the witness, three (3) representative samples of 5 gram each were drawn from packets A1, A2 & A3 which contained the substance recovered from appellant Akabuogu Godwin Ojimba and were marked as A1/S1, A1/S2, A1/S3, A2/S1, A2/S2, A2/S3, A3/S1, A3/S2, A3/S3. The samples after keeping them in polythene pouches and thereafter in brown envelope were sealed with Custom seal No.6 over the paper slip signed by him, *panch* witnesses and the accused. Similarly, three representative samples of 5 gram each were drawn from the packets marked B-1 and B-2. The said samples were marked as B1/S1, B1/S2, B1/S3 and B2/S1, B2/S2 and B2/S3 and after keeping them also firstly in polythene pouches and then in brown envelopes sealed with the above-referred seal in the same manner. Three representative samples of 5 gram each were drawn from the packets

marked as C1, C2 & C3, which were numbered as C1/S1 to C1/S3, C2/S1 to C2/S3 and C3/S1 to C3/S3. The aforesaid samples were also sealed in the same manner. After drawing samples, the remaining substance of packets No. A1, A2 and A3 were put together in a polythene bag and placed in a rectangular container having a lid which was stitched with a cloth and sealed with Custom seal No.6 over the paper seal signed by him, the *panch* witness and the appellant. Similar treatment was meted out to packets B1 to B2 and C1 to C3. He further stated that out of the drawn samples A1/S1, A2/S1, A3/S1, B1/S1, B2/S1, C1/S1, C2/S1 & C3/S1 were marked for CRCL, New Delhi.

12. PW9 Manoj Gupta was one of the *panch* witnesses referred to in the complaint. He *inter alia* stated that at about 7-8 p.m., custom officials had informed him and his junior Ajay Sharma that they had apprehended some passengers and, therefore, they should report to their office. Accordingly, they reached the office of the Customs and sat there, while Custom officials were performing their duties. According to him he neither saw the passengers whom the Custom officials had detained nor were they searched in his presence. He also stated that the baggage of the aforesaid passengers were not called or searched in their presence. He claimed that the Custom

officers had obtained his signatures on various documents, some shoes, books, etc. The witness, however, admitted that the statement Ex.PW2/M was made by him and was a correct statement. During cross-examination he admitted that he had signed all the documents at one time in the evening of 15.9.2005. He also stated that some shoes, books, their covers, some white colour material was lying in the container and those articles were seized in his presence.

13. PW3 Shri Ashok Kumar Gulia *inter alia* stated that in the night intervening 14/15.9.2005, he had taken charge of SDO (Arrival) since regular SDO was on leave on that day and Shri S.P. Singh had deposited with him the goods as mentioned in the detention receipts in intact condition. He identified his signatures on the detention receipts Ex.PW1/V to PW1/Y and stated that the goods were duly sealed with custom seal No.6 which Shri S.P. Singh returned to him on the same day during his duty hours. He further stated that the entire goods mentioned in the detention receipts were handed over by him to the SDO (Arrival) who joined duty on 15.9.2005.

14. PW4 Shri R.K. Soni *inter alia* stated that on 15.9.2005, he had taken eight (8) packets of samples along with three sets of test memos in duplicate

to the office of CRCL for analysis. The aforesaid samples were sealed with custom seal No.6 and were taken by him from Mr. Kamal Gautam. The aforesaid goods were handed over by him to Shri R.P. Meena, Assistant Chemical Examiner, CRCL in intact condition and Mr. Meena gave him an acknowledgement.

15. PW5 Shri R.P. Meena is the Assistant Chemical Examiner of CRCL, Pusa Road, who received the samples from PW4 R.K.Soni on 15.9.2005, which had been sealed with the seal of Custom seal No.6. He stated that the facsimile of the seal was tallied with the specimen seal given on the test memos. According to him the samples were taken out from the room for analysis by Shri D.K. Beri, Chemical Examiner, on 16.9.2005 and at that time the seals were intact on them and the facsimile of the seal on the samples was tallied with the specimen of the seal as given on the test memos. On examination, the substance in each of the samples tested positive for heroin (diacetylmorphine).

16. PW6 Shri R.P. Kaushik is the officer who received the case property on 15.9.2005. According to the witness he had received one (1) container weighing 6.900 kg marked as A-1, A-2 and A-3 sealed with seal No.6, one (1) container weighing 6.200 kg marked B-1 and B-2 and sealed with seal

No.6 and one (1) container weighing 4.400 kg marked as C1, C2 & C3 and sealed with seal No.6. He also received the goods mentioned in detention receipt No.51479 Ex.PW1/W as well as the samples mentioned in the detention receipt Ex.PW1/Y.

17. PW8 Mr. Somnath Bhattacharjee is the official of Indian Airlines who *inter alia* stated that three (3) passengers who came on flight No.IC 844 from Kabul to Delhi when inquired, were found to be Nigerian nationals and their onward connection was to Adis Ababa on Ethiopian Airlines. He further stated that on being asked regarding their checked in baggage, they showed their baggage stubs, from which the numbers were written by him (the witness) on the transit slip. The witness proved the transit slip Ex.PW2/J. He further stated that after immigration in the transit area the checked in baggage was brought next to Custom Check Point, where he asked the passengers to identify their baggage and then he went to Ethiopian Airlines along with transit slips to give the details of the passengers. When he returned to the transit area, he found Custom officials making inquiries from the aforesaid three Nigerian passengers. The witness identified the accused present in the Court as the above referred three (3) Nigerian passengers.

He further stated that when the Custom officer requested him to bring the checked in baggage of the above-referred three persons, he showed the transit slip Ex.PW2/J to them. He also admitted his statement Ex.PW2/I, which he had made to the Custom officers.

18. In their respective statements under Section 313 of Cr.P.C., the appellants admitted that they had arrived from Kabul to IGI Airport on 13.9.2005 on flight No.KB44 and had thereafter gone to transit area to take a flight to Adis Ababa. They claimed that from the transit area, Custom officials forcibly took them to their office. They also claimed that the bags in question did not belong to them and were never identified by them. They, however, admitted that the Custom officers had seized their air tickets and boarding passes. They also claimed that the Custom officers had forcibly taken their signatures on several papers. They also denied the alleged recovery of heroin, as stated by PW1.

19. Vide impugned judgement dated 30.4.2010, all the appellants were held guilty under Section 21(c) read with Section 29 and Section 23(c) read with Section 28 of the NDPS Act. Vide impugned Order on Sentence dated 10.5.2010, they were sentenced to undergo RI for fourteen (14) years each and to pay fine of Rs.1.50 lakh each or to undergo SI for six months each in

default of both the counts. Being aggrieved from their conviction and sentence the appellants are before this Court by way of this appeal.

20. The impugned judgement has been assailed by the learned counsel for the appellants on the following grounds:

- a) The complainant has failed to prove that the samples were kept in safe custody and there was no possibility of the same being tampered with.
- b) The weight of the samples when they were weighed in CRCL was found to be different from the weight at the time these samples were drawn.
- c) The complainant has failed to prove that the bags from which the heroin is alleged to have been recovered belonged to the appellants.

21. It has come in the deposition of PW1 Shri Surender Pal Singh that the appellants had identified their respective checked-in baggage, after the same were produced by the Airlines officials. There is no reason to disbelieve the aforesaid part of the deposition of PW1, who searched the baggage in exercise of his official duties as a public servant and who had no reason to depose falsely against the appellants and implicate them in a false case. That apart a perusal of Ex.PW2/J, which is a document prepared by PW8 Somnath Bhattacharjee would show that three (3) passengers namely Akabuogo Godwinn Ojimba, Edward Chukwudile and Obi Basil Chuks had

met him in the transit area. The passport numbers as well as tag numbers of the aforesaid three (3) passengers all of whom were to board flight No.EI 629, have been recorded in the aforesaid document. The passport numbers and tag numbers obviously would have been provided by the passengers who had met the witness in the transit area. It is an admitted case that the appellants were to board flight No.EI 629 of the Ethiopian Airlines for going to Addis Ababa from IGI Airport on that date. The tag number noted against the name of Obi Basil Chuks is 485452, the tag number noted against the name of Edward Chukwudile is 486199 and the tag number noted against the name of Akabuogu Godwinn Ojimba is 486618. The passport numbers mentioned against the names of the above-referred persons are A30986441, A3010222 and A2499539 respectively. It is not in dispute that correct passport numbers of the appellants Obi Basil Chuks and Akabuogu Godwinn Ojimba have been noted in the aforesaid document. As far as the appellant Edward Chukwudile is concerned, the passport number noted against his name is not correct, his correct passport number being A1064602. It is inconceivable that some passenger other than Edward Chukwudile would have given his name as Edward Chukwudile, his passport number as 3010222 and tag No. as 486619. There is no way some

other person could have known that another person by the name of Edward Chukwudile was to travel on flight No.E 629 to Ethiopia on that day. Moreover this is not the case of the appellant that there was some other person by the name Edward Chukwudile holding passport No.3010222 who had to travel on flight No.EI 629 to Ethiopia on that date. Therefore, I am quite satisfied that the persons whom PW8 had met in the transit area on that date had booked check in luggage vide tag Nos.485452, 486199 & 486618.

A perusal of the deposition of PW8 Somnath Bhattacharjee would show that three (3) Nigerians who were to travel to Adis Ababa and from whom inquiry was made by him were the same persons whom he later found facing inquiry from the Custom officials. He also identified all the three (3) appellants present in the court as the above-referred three (3) Nigerian persons. Thus, this independent witness clearly identified the appellants as the person from whom inquiry was being made by him in the transit area and who were later found being questioned by the Custom officials. Thus, there can be no reasonable doubt that tag Nos.485452 pertained to the luggage of Obi Basil Chuks, tag No.486199 pertained to the luggage of Edward Chukwudile and tag No.486618 pertained to luggage of Akabuogu Godwinn Ojimba.

A perusal of Ex.PW1/G, PW1/H and PW1/I would show that these are the tags bearing Nos.485452, 486619 and 486618. Therefore, it would be difficult to accept the contention that the complainant failed to establish that checked in luggage from which heroin was seized by them concealed inside the soles of sandals, books and folders belonged to the appellants before this Court. As regard passport numbers noted in the *panchnama* Ex.PW1/N and the documents annexed to it, the only explanation which I can conceive is that initially the Custom officials noted down the passport numbers from the information which PW8 had provided to them in the form of Ex.PW2/J but later, on verification from the passports they came to know that correct number of passport of the appellant Edwant Chukwudile was A1064602 and not A3010222 and that is why, the number 1064602 seems to have been inserted later in the aforesaid document.

22. It can hardly be disputed that better evidence, in the form of the record of Airlines, could have been led by the complainant to prove that tag No.485452 was in respect of the checked in luggage booked by the appellant Obi Basil Chuks, tag No.486619 was in respect of the checked in luggage booked by the appellant Edward Chukwudile and tag No.486618 was in respect of the checked in baggage booked by the appellant Akabuogu

Godwinn Ojimba, but, no benefit of the aforesaid deficiency in the investigation accrues to the appellants since in such an eventuality, the Court is required to examine the evidence which has come on record, bereft of the deficiency in the investigation and find out whether the evidence which the prosecution actually led during the trial is creditworthy and sufficient to establish the guilt of the accused beyond reasonable doubt or not. In my view, documentary and oral evidence led by the complainant/respondent, as discussed hereinbefore, leaves no reasonable doubt that the checked in luggage from which heroin was recovered belonged to the appellants before this Court.

23. Coming to the contention that the complainant has failed to prove that there was no possibility of the samples having been tampered with, I find from a perusal of the reports of CRCL PW5/A, that the sample marked B1/S1 had four intact seals of Custom seal No.6 on them whereas the sample marked B2/S1 had three such intact seals. The report Ex.PW5/B would show that the sample C1/S1 had four intact seals on it, samples C2/S1 & C3/S1 had five intact seals each on them and report Ex.PW5/C shows that the samples A1/S1, A2/S1 and A3/S1 had three intact seals on each of them. It is, thus, quite evident that there was no possibility of the samples having

been tampered with except by or in connivance with the person who had Custom seal No.6 with him.

It has come in the deposition of PW1 that the aforesaid seal belonged to PW3 Shri Ashok Kumar Gulia and was taken from him. The seal was returned to Mr. Ashok Kumar Gulia at the time, the eight (8) samples A1/S1, A2/S1, A3/S1, B1/S1, B2/S1, C1/S1, C2/S1 and C3/S1 were deposited with him. According to Mr. Ashok Kumar Gulia in the morning of 15.9.2005, he had handed over the samples to the SDO (Arrival) who joined duty at 9:00 a.m. on that day. He does not say that Custom seal No.6 was also handed over to the SDO (Arrival) who joined duty at 9:00 a.m. on 15.9.2005. Of course the samples as well as Custom seal No.6 remained in the custody of PW3 Shri Ashok Kumar Gulia for some time and, therefore, theoretically there was a possibility of his tampering with the samples, in case he wanted to do so. The next question which then arises is as to whether there was any reasonable possibility of Mr. Ashok Kumar Gulia having actually tampered with the samples. It has to be kept in mind that Mr. Ashok Kumar Gulia was not his subordinate. Therefore, there was no reasonable possibility of his becoming a party to the replacement of the samples on account of his being influenced by the seizing officer Shri S.P.

Singh. It has also to be kept in mind that the samples remained with Mr. Ashok Kumar Gulia only for a short period, i.e. till 9:00 a.m. on 15.9.2005.

Another material aspect in this regard is that PW1 Shri S.P. Singh also tested the substance recovered from the appellants, with the help of the testing kit before the sample was drawn. On such testing the substance gave positive indication of being heroin. Though the report on the basis of testing using a field kit may not be conclusive, this would certainly be a piece of evidence towards proving that the substance recovered from the appellants was, in fact, heroin.

Yet another important aspect of the case is that in their respective statements recorded under Section 67 of NDPS Act, the appellants expressly admitted that the product which was seized from them was heroin. Admittedly the appellants were produced before a Magistrate on 15.9.2005. At that time, the aforesaid statement made under Section 67 of the NDPS Act was not retracted by any of them. It was only on 29.9.2005, that the appellants submitted applications retracting the statements made by them. I have perused the applications submitted by the appellants in this regard. A perusal of the application submitted by the appellant Akabuogu Godwinn Ojimba would show that according to him he was manhandled and treated

inhumanly during the course of interrogation to the extent that his ear drum and one side of his face were still paralysed and his ribs had been damaged. The appellant Edward Chukwudile alleged that during the interrogation he was badly beaten and was forced by Custom officers to sign on blank papers and write down dictated statement. He also alleged that third degree methods were used on him by the Custom officers. The appellant Obi Basil Chuks also alleged that he was badly beaten during interrogation and forced to sign blank sheets. However, there is absolutely no evidence of any of the appellants having actually been beaten, tortured or subjected to any third degree methods. None of the appellants chose to come in the witness box to substantiate the plea taken in their respective applications. Moreover, had they been subjected to torture and use of third degree methods as is alleged by them, they would have complained to the Magistrate at the time they were produced before him for the first time on 15.9.2005.

A perusal of the MLCs of the appellants Akabuogu Godwinn Ojimba, Obi Basil Chuks and Edward Chukwudile, which are available on the judicial file would show that when they were examined in Dr. Ram Manohar Lohia Hospital on 15.9.2005, no external mark of injury was found on their person. The MLCs do not indicate any complaint of torture or beating by

the aforesaid appellants. Therefore, neither the appellants have led any evidence nor have they shown existence of circumstances from which it can be reasonably inferred that they were subjected to torture and beating by the Custom officers. Consequently, the ground taken by them for retracting their confessional statement cannot be said to be *bonafide* or genuine. The inevitable conclusion, therefore, would be that the statements made by them under Section 67 of the NDPS Act were voluntary.

The purpose of requiring the prosecution to produce the entire link evidence is to rule out any reasonable possibility of the samples having been substituted or tampered with before they are examined in the laboratory. When there is evidence other than the report of the laboratory, to show that the substance recovered from the accused was, in fact, a narcotic drug, the aforesaid rule of caution loses much of its significance.

It would also be pertinent to note here that according to PW4 Shri R.K. Soni he had collected the samples from PW2 Shri Kamal Gautam on 15.9.2005 and at that time the seals were intact on all the samples. As noted earlier, the seals were intact on the samples when they were received in CRCL on 15.9.2005. When PW3 Shri Ashok Kumar Gulia received the samples from Shri Surender Pal Singh, the seals were intact on them.

Considering the above referred evidence coupled with the report of testing by field kit and the statement made by the appellants under Section 67 of the NDPS Act, in my view, is sufficient to prove beyond reasonable doubt that there was no reasonable possibility of the samples having been tampered with at any time before they were examined in the CRCL.

24. Coming to the variation in the weight of the samples, the case of the complainant is that eight (8) samples weighing 5 gms each were drawn. It is not known whether the balance used by PW1 for weighing the samples was a manual balance or electric balance. Even if it was an electric balance, the accuracy of the balance would not be the same since the extent of accuracy of the balance would depend upon the quality and sensitivity of the balance used for the purpose of weighing. The excess weight was not more than 1.59 gms and the short weight was not more than 2.5 gms. Though in percentage term the variation appears to be quite substantial, it is not so when viewed in terms of weight. The variation of 2-3 gms, in my view, can be easily attributed to the fact that the balance used in CRCL would not be the same which the seizing officer had used at the time of seizure of the narcotic drug.

This issue came up for consideration before this Court in Sunil Kumar

and the following view was taken:

“21. Coming to the discrepancy in the weight of the samples which was sent to CRCL for the purpose of analysis, a perusal of the report would show that three samples were sent to the laboratory, out of which, one weighed 40.8 gram, one weighed 43.3 gram and one weighed 42.9 gram. Thus, the excess weight was almost uniform in all the three samples.

In *Rajesh Jagdamba Avasthi Vs. State of Goa* (2005) 9 SCC 773, the contraband found with the accused was 100 gram in the right foot and 115 gram in the left foot. However, when weighed in the laboratory, the quantity of the substance alleged to have been recovered from the right foot was found to be 98.16 gram, whereas the quantity of the substance alleged to have been recovered from the left foot was found to be 82.54 gram. The Apex Court was of the view that the prosecution had not been able to explain the discrepancy which rendered the case of the prosecution doubtful. The Apex Court in this regard observed that the question was not how much seized, but whether there was an actual seizure and whether what was seized was really sent for commercial analysis. However, discrepancy in weight was not the only ground of acquittal in the aforesaid case and the case of the prosecution suffered from several other infirmities. It was found that the seals as well as the packets were in the custody of the same person, meaning thereby that there was every possibility of the seized substance being tampered with. The Court felt that this was the only hypothesis on which the discrepancy in the weight could be explained. Another aspect of the case was that PW-2, a panch witness was found to be a stock witness, he having been associated in two other cases as panch witness. The decision in *Rajesh Jagdamba*

(supra) was considered by the Apex Court in its subsequent decision *Dehal Singh vs. State of Himachal Pradesh* (2010) 9 SCC 85. In the aforesaid case, two samples of 50 gram each were taken and sent to FSL for examination, but in the laboratory, the net weight of the sample was found to be 65.5606 gram. It was contended before the Apex Court that discrepancy in the weight of the sample casts serious doubt to the credibility of the prosecution case and was enough to reject the said case. Reliance by the learned counsel for the accused in that case was placed on the decision of the Apex Court in *Noor Aga Vs. State of Punjab* (2008) 16 SCC 417 as well as *Rajesh Jagdamba Avasthi* (supra). Both the cases relied upon by the accused were cases of recovery of charas. Noticing that the weighing scale and the weights came from a nearby grocery shop, the Apex Court observed that samples were taken by a common weighing scale and the weights found in a grocery shop, whereas the weight in the laboratory is recorded with precision scale and, therefore, the small difference in the weight loses its significance when no infirmity in the other part of the prosecution story is found. It was noted that in the case of *Noor Aga* (supra), the sample was taken by custom official at the Airport from a precision scale and discrepancy in the weight alone was not the reason to reject the case of the prosecution in the said case. The Court, in this regard, also referred to the observations in *Noor Aga* (supra) to the effect that discrepancy in weight individually may not be fatal. It was also noted that in *Rajesh Jagdamba Avasthi* (supra), the recovery proceedings were found to be suspicious and there was every possibility of the seized substance being tampered with and it were those infirmities which had led the Court to doubt the truthfulness of the prosecution case.

In *Mahender Singh* (supra), 21 samples of 50 gram each were drawn at the time of seizure. However, when weighed in the laboratory, the weight of the samples

varied from 21 grams (lowest) to 84 grams (highest). Thus, the difference in the weight was not uniform, in some samples it being less than the quantity stated to have been drawn as sample and in another cases it being much more than the stated quantity. Moreover, the discrepancy in the weight of samples was not the only ground for acquittal of the accused, the other discrepancies being a) material contradiction in the deposition of witnesses; b) the accused did not try to run away despite seeing police officials in uniform; c) keys of the motorcycle of the accused had not been seized; d) the seal was never given to an independent witness and retained by IO; e) samples were sent for analysis, after one month, meaning thereby that there was sufficient time to tamper with them.

22. In State by CBI Vs. Dilbagh (2004) 13 SCC 99, dealing with the difference in weight of sample, the Apex Court inter alia observed as under:

“8. The other ground on which the High Court has acquitted the respondent is that there was a difference in weight. In such cases what has to be ensured is that what has been recovered is what has to be sent for chemical analysis. In case there is any doubt that what was received by the Chemical Analyser is not the same, then the benefit of that doubt could be given to the accused. But in cases where it is proved that what was sent to the Chemical Analyser is the same as what was recovered, minor differences in weight would not vitiate the trial.”

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“11. It was next urged that in view of the difference in weight, this Court should give benefit of doubt to the respondent. It was urged that difference in weight supports the respondent that he has been falsely implicated in this case. In view of the evidence, including the evidence of the independent witnesses it is

not possible to accept this submission. In our view, the defence taken appears to be highly improbable.”

In *Kulwant Singh Vs. Narcotics Control Bureau* (supra), the learned counsel for the respondent stated that the sample weighing 5 gm was drawn by the Investigating Officer from the contraband. In the laboratory, its weight was found to be 4.6 gm. Rejecting the plea taken by the appellant with respect to variation in the weight of the sample, this Court, inter alia, observed as under:

“21. A plea has been taken by the appellant that weight of sample, as found by forensic laboratory was 4.6 gm and not 5 gm. The discrepancy in the weight of the sample as found in the test laboratory is no ground to doubt the case of the prosecution. Anybody having a little knowledge of science and the scientific instruments knows that every scientific instrument has a least count. The accuracy of a scientific balance is much more than the ordinary balance used by a I.O and there may be a variation of weight plus or minus depending upon the least count of the scientific balance. The atomic balances are more accurate than scientific balance. Such balances are used in more sensitive laboratories and are accurate to .0001 gm and even more accurate. An Investigating Officer, who draws sample for testing, need not have a balance of a high accuracy in order to draw the samples. He can draw sample weighing approximately 05 gm using ordinary balance. If the same sample is weighed at an accurate scientific balance used in CRCL, the weight of each sample is bound to differ. The difference in weights of samples rather shows the genuineness of the case. If the case had been a made up or a false case, the IO might have used more accurate balance and weighed the samples with accuracy. One may have doubt on the genuineness of the case if the each sample weigh the same on accurate balance used in CRCL, but one cannot doubt if the weight difference is found as in this case.

Such difference in weight is natural. No malafide can be drawn by the appellant by this difference of weight. Thus the weight difference in the sample cannot be considered as a ground for acquittal.”

In *Sunday Emegha Vs. State* (2012) 194 DLT 3, the case of the prosecution was that two samples of contraband, each weighing five grams were drawn. In the laboratory the weight of one sample was found to be 6.5 grams whereas the weight of the other sample was found to be 5.5 grams. It was contended on behalf the accused that the aforesaid discrepancy in the weight indicated tampering with the case property. The contention, however, was rejected considering that the link witnesses examined by the prosecution as well as FSL report duly proved that the samples which were taken were sent to laboratory and at the time of examination the seals on them were intact.

23. xxx

Moreover, though an unexplained variation in the weight of the sample, along with other shortcomings and discrepancies in the case of the prosecution may, in appropriate cases, lead to acquittal of the accused, it cannot be made the sole basis of acquittal in a case where the prosecution produced the entire link evidence to rule out any reasonable possibility of the sample having been tampered with before it is examined in the laboratory. The learned counsel for the appellant has not drawn my attention even to a single case where discrepancy in the weight of the sample was the sole ground for acquittal of the accused in a case under NDPS Act. In fact, the Apex court observed in *Noor Aga* (supra) that the discrepancy in weight individually may not be fatal.”

25. For the reasons stated hereinabove, there is no good ground to

interfere with the conviction of the appellants. However, in the facts & circumstances of the case the substantive sentence awarded to the appellants is reduced to ten (10) years each whereas the fine imposed on them is reduced to Rs.1.00 lakh each. In default of payment of fine, they shall undergo SI for three (3) months each.

The appeals stand disposed of accordingly.

One copy of this order be sent to the concerned Jail Superintendent for information and necessary action.

LCR be sent back along with a copy of this order.

V.K. JAIN, J

MARCH 26, 2014
BG/rd/b'nesh