IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 14.07.2020

\+ **CRL.A. 918/2017 & CRL.M. (BAIL) 7406/2020 & CRL.M.A. 7951/2020**

NITESH AMRUT BHAI PATEL ..... Appellant

Versus

NARCOTIC CONTROL BUREAU ..... Respondent

Advocates who appeared in this case:

For the Appellant :Mr Colin Gonsalves, Senior Advocate with Mr R. Gopal and Ms Olivia Bang, Advocates.

For the Respondent :Mr Rajesh Manchanda, SPP with Mr Rajat Manchanda, Advocate.

AND

\+ **CRL.A. 931/2017 & CRL. M. (BAIL) 509/2018 & CRL.M.A. 5881/2020**

RAFIQ AHMED SHAIKH ..... Appellant

Versus

NCB ..... Respondent

Advocates who appeared in this case:

For the Appellant :Mr Deepak Gandhi, Advocate with Mr Arhum Sayeed, Advocate.

For the Respondent :Mr Rajesh Manchanda, SPP with Mr Rajat Manchanda, Advocate.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The appellants in the present set of appeals impugn the judgment dated 29.07.2017 (hereafter the impugned judgment) passed by the Learned ASJ, Patiala House Courts, New Delhi, whereby the appellants have been convicted for the offence punishable under Section 23 read with Section 29 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (NDPS Act). The appellants also impugn an order dated 29.07.2017 (hereafter the impugned order), whereby they have been sentenced to undergo Rigorous Imprisonment for ten years with a fine of ₹1,00,000/- each for the offences punishable under Section 23 read with Section 29 of the NDPS Act. And, in case of default of payment of fine, to undergo Simple Imprisonment for a further period of fifteen days.

2. The appellants challenge the impugned judgment, essentially, on four fronts. First, that the learned trial court has erred in convicting the appellants solely on the basis of self incriminating statements of the appellant Nitesh Patel, which were not made voluntarily. Secondly, the case set up by the prosecution is not supported by evidence on record. Third, that the sample tested by the Central Revenue Laboratory is not the sample of the seized substance allegedly sent to the said laboratory. And fourth, that the case has not been properly investigated.

The Prosecution's Case

3. The appellants were charged for committing an offence punishable under Section 23 read with Section 28 and 29 of the NDPS

Act. By an order dated 11.10.012 passed by the learned trial court, the appellants were charged that on or before 21.03.2011, they had conspired to export illegal psychotropic substances from India to Malaysia under a fake identity and without taking any authorization or license from the Narcotic Commissioner in accordance with the NDPS Act and the Rules made under the said Act. They were charged that in pursuance of the said criminal conspiracy to illegally export psychotropic substances, they had *"procured, stored and attempted to export 2.4 kgs of amphetamine in a parcel vide Airway Bill No. 466420580086 which was seized on 21.03.2011 at 1604 Hrs at Fedex Express Services India Pvt. Ltd., C-152, Mayapuri Industrial Area, Phase-II, New Delhi"*.

4. In addition, Rafiq Ahmed Shaikh (appellant in CRL.A. 931/2017 and hereafter referred to as 'Rafiq' or 'Rafiq Shaikh') was also separately charged for attempting to export 1kg of Ketamine in a parcel vide Airway Bill No. AWB947312, which was seized from the premises of Dart Air Services Pvt. Ltd., Express House, A-50/4, Mayapuri, Phase-I, New Delhi at 17:15 hours on 08.06.2011. He was acquitted of the aforesaid charge of attempting to export 1 kg of ketamine and the allegations and evidence led in that regard are not relevant as far as the present appeals are concerned. These appeals are limited to the appellants' challenge to their conviction (and consequent sentence) for procuring, storing and attempting to export 2.4 kg of amphetamine in a parcel that was seized from the premises

of Fedex Express Services India Pvt. Ltd (hereafter also referred to as 'Fedex').

5. It is the prosecution's case, as is evident from a plain reading of the complaint filed by the NCB, that Ms Mehak Jain, IO, NCB, DZU had received secret information on 31.03.2011 that some narcotic drugs were concealed in a parcel bearing Airway Bill No. 466420580086 (hereafter referred to as 'the Airway Bill in question') and the said parcel was lying with Fedex at the premises located at C-152, Mayapuri Industrial Area, Phase-II, New Delhi. The said information was reduced in writing and forwarded to Sh. Y. R. Yadav, Superintendent, NCB, DZU for necessary direction. He directed that a team be constituted for taking immediate action. Pursuant thereto, Ms Mehak Jain (IO) along with C.S. Rai (IO), Harish Kumar (IO) and Rajbir (Driver) departed from Delhi Zonal Unit and reached Fedex Office at about 16:00 hours. Ms Mehak Jain, IO introduced herself to the Manager, Mr Punit Sharma, and other office employees of Fedex. She requested them to be present and witness the proceedings, for which they voluntarily agreed.

6. Mr Puneet Sharma produced the parcel in question. The same was examined. It was a cardboard box containing five executive synthetic fibre bags. The envelope attached to the parcel contained a proforma invoice dated 24.02.2011 and Airway Bill No. 466420580086. The same indicated that the parcel was booked by Ramesh Bhai, 15 Ground Floor, Gold Souk Complex, CG Road, Ahmedabad, Gujrat and was consigned to Mr S. Ganeshan, No. A-

GF08, Pongsapuri Lakshmana Jaya, A. Kanpung Lakshmana, Batu Caves, Selangor Darulehsan – 68100, Malaysia.

7. On close examination of the said parcel, it was found that there were cavities stitched in the inner layer of the bags and the same contained a white powdery substance. The said substance was tested and was found to be amphetamine. Since the texture and the colour of the substance in each bag were similar, they were transferred into a transparent polythene bag which was weighed and found to be 2.4 kgs. Two samples of 5 grams each were taken from the said bag and put in zip lock packets. The said samples were put in paper envelopes and were marked as A-1 and A-2. The packing material containing the card board box, along with the five synthetic executive fiber bags, were packed in a white cloth (*pullanda*) that was marked as B. The white substance (drug) recovered was packed in another white cloth which was marked as A. White paper slips bearing the signatures of witnesses as well as the IO (Ms Mehak Jain) were pasted on all the four packets: packets marked as A1, A2, A and B, as mentioned above. The same were sealed with the seal of Narcotic Control Bureau DZU-5.

8. Test memo in triplicate was prepared at the spot and facsimile of the seal was also affixed on the three copies of the test memo. A *panchnama* (Ex PW1/B) was prepared in the presence of the witnesses and they put their signature on each and every page of the *panchnama* (PW1/B), Proforma Invoice(Ex PW1/B1) and the Airway Bill in question (Ex PW1/B2).

9. The case property and the samples along with the test memos were deposited with the Malkhana Incharge and the official seal was deposited with the Seal Incharge. The seizure report under Section 57 of the NDPS Act was submitted by Ms Mehak Jain (IO) to the Superintendent, DZU.

10. On 22.03.2011, Sh. Y.R. Yadav, Superintendent, NCB, DZU sent the sample marked as A-1 for chemical examination along with test memo to the Chemical Examiner CRCL, Pusa Road, New Delhi, and the same was acknowledged by Sh. Kamal Singh, Assistant Chemical Examiner.

11. The said sample was tested and on 02.06.2011, a test report (Ex Pw2/B) confirming that the substance was amphetamine was received. The said report bore the signatures of V.B. Chaurasia, Chemical Examiner -2 (who was examined as PW2).

12. At the request of the Superintendent, NCB, New Delhi, inquiries were made by the officials of the Ahmedabad Zonal Office of NCB with regard to the name, address and antecedents of Ramesh Bhai (the shipper/consignor of the parcel in question). The inquiries revealed that a courier company, Trackon Courier Pvt. Ltd, was being operated from the said address by one Mr. Sagar Iyer (PW8). It was reported that no person by the name of Ramesh Bhai was found at the said address. A business card of Mr Sagar Iyer, Indo Express Courier and Cargo was obtained from the said courier office.

13. It was alleged that the inquiries conducted "*with regard to the seized parcel*" revealed that Nitesh Patel of Patel Couriers (Appellant in CRL.A. 918/2017) had handed "*this shipment*" to Indo Express Courier Service, owned by Sagar Iyer, for couriering it to Malaysia. It was alleged that Nitesh Patel had collected "*the said shipment*" from another courier company at Ahmedabad, namely, Patel On Board Courier (POBC) and "*the shipment*" had arrived from Chennai. It was alleged that Nitesh Patel was given the contract to receive "*the shipment*" and dispatch it further to the consignee (Ganeshan in Malaysia) by Rafiq Shaikh of M.R. Express Courier Mumbai, whose address was provided as K-104, Hanjar Nagar,Opposite Aghadi Nagar, Pump House, Andheri (East), Mumbai-93.

14. It is alleged in the complaint filed by the NCB that Nitesh Patel "*had received a copy of the document i.e airway bill no. from Konnection Express Courier and Cargo, Royal Villah Room No.15, 3rd floor, 27/69, Venkatesh Street, Chintadripet, Chennai.*"

15. The Ahmadabad Zonal Office of NCB recorded the statements of Nitesh Patel and Sagar Iyer under Section 67 of the NDPS Act on 04.04.2011. It is alleged in the complaint that Nitesh Patel was shown a copy of the Proforma Invoice dated 24.02.2011, which was seized vide *Panchnama* dated 21.03.2011 (that is, seized from the office of Fedex) mentioning the shipper's name as Ramesh Bhai and the name of consignee as Mr. Ganeshan. Nitesh Patel disclosed that that parcel (that is, the parcel which was seized under the panchnama dated 21.03.2011 from the office of the Fedex at Mayapuri, New Delhi) was

received by him from POBC and he had forwarded the same to Indo Express Courier Office. He disclosed that *"the parcel"* was received by him on 24.02.2011 at the directions of one Mr. Rafiq Shaikh of Mumbai. He also allegedly explained that *"the parcel of Ramesh Bhai"* was received by him on 24.02.2011 and he was directed by Rafiq Shaikh to receive the parcel, which was sent from Chennai and to further dispatch it to Malaysia through Indo Express Courier Services. Rafiq Shaikh allegedly also informed him of the consignee's name and address. Nitesh further disclosed that he had received parcels "in the name of Ramesh Bhai" from Chennai on 26 occasions as per directions of Mr. Rafiq and dispatched them to Malaysia.

16. Mr. Sagar Iyer Subramaniam stated that the Proforma Invoice dated 24.02.2011 mentioned the shippers name as Ramesh Bhai but the address on the telephone mentioned in the invoice was that of his office (office of his courier service).

17. NCB alleges that "*actual booking of parcel was done by Mr. Rafiq Shaikh resident of Mumbai*".

18. NCB claimed that on 06.06.2011, Ms. Mehak Jain received secret information that Rafiq Shaikh who was wanted in connection with the seizure of 2.4 kg amphetamine from the parcel, seized at the office of Fedex Express Services India Pvt. Ltd., Mayapuri is staying in Room No. 107, Hotel Millennium 2000 DX, Paharganj near New Delhi Railway Station and if a search is conducted, it is possible that some narcotic drugs would be recovered from his possession. It is

claimed that on the basis of this information, the Superintendent NCB authorized that Room No. 107, Hotel Millennium 2000 DX, Paharganj be searched and on the basis of the said authorization, a raiding team was constituted. The said raiding team reached the hotel at about 16:15 hours on 06.06.2011. The Reception Manager informed that at the material time, Rafiq was not inside his room. Rafiq was apprehended when he returned to the hotel and proceeded to the Reception Desk for requesting the key to his room. He as well as his room was searched but nothing incriminating was found.

19. Thereafter, according to NCB, summons were issued to Rafiq pursuant to which he appeared on 06.06.2011 and voluntarily gave his statement. NCB alleges that while recording his statement, he was shown the Proforma Invoice dated 24.02.2011 and he submitted that "the said parcel" was booked by him through Nitesh Patel and dispatched from Konnection Express Courier and Cargo, Royal Villah, Chennai. He allegedly disclosed that the said parcel was dispatched through POBC, Ahmadabad and that he had contracted with Nitesh Patel to receive the shipment and to further dispatch it to Malaysia. He allegedly stated that he would give details of the consigner and the consignee on mobile phone or SMS to Nitesh. According to NCB, Nitesh Patel received a copy of the document named "Certificate" from Konnection Express Courier and on the basis of the said certificate, collected the shipment from the Ahmedabad office of POBC.

20. NCB alleges that Rafiq had packed "*the said parcel with five Indian made synthetic fiber executive bags and concealed Amphetamine*". The said substance was given to him by one Salim Bhai.

21. NCB alleges that consequent on the recovery of 2.4 kgs. amphetamine on 21.03.2011 and on the basis of the voluntary statement of Rafiq recorded under Section 67 of the NDPS Act, he was arrested on 06.06.2011 at about 23:00 hours.

22. Summons were issued to Nitesh Patel on 01.07.2011, pursuant to which he appeared on 14.07.2011 before Ms. Mehak Jain. NCB alleges that he voluntarily gave a statement on the said date, which was recorded under Section 67 of the NDPS Act. He confessed to booking a parcel containing amphetamine, which he had received from Rafiq Shaikh. Pursuant to the said statement, he was arrested on the same date, that is, on 14.07.2011.

23. According to NCB, Rafiq had sent the parcel in question to one Mushahid Ali in Chennai. Mushahid Ali also operates a courier company in the name of Nisha Cargo Courier in Chennai. He was shown the Proforma Invoice dated 24.02.2011 and he stated that Rafiq had sent him a parcel and upon instructions, he had handed over the said parcel to one Kasim Bhai. Kasim Bhai had asked him to send the parcel to Ahmedabad but he had refused. Subsequently at the instructions of Rafiq Bhai, he accepted the parcel from Kasim Bhai and booked the same to Ahmedabad.

24. According to NCB, Sagar Iyer had prepared the Proforma Invoice dated 24.02.2011. He had signed the said invoice on behalf of Ramesh Bhai (shipper) and had booked the said parcel for shipment through Fedex. However, he did not know the contents of the parcel and had done so only at the instance of Nitesh Patel. NCB founded their case on the statements of Rafiq Shaikh, Nitesh Patel, Sagar Iyer and Mushaid Ali, recorded under Section 67 of NDPS Act. NCB claimed that through their investigations, they had confirmed that the accused (appellants herein) are involved in drug trafficking and had intentionally booked the parcel under a fake name and identity to mislead and misguide NCB officers as wells as to escape the clutches of law.

25. To summarize the NCB's case, the parcel that was seized on 21.03.2011 from the office of Fedex at Mayapuri was packed by Rafiq in Mumbai, in which he had concealed 2.4 kgs of Amphetamine. The said parcel was sent to one Mushaid Ali in Chennai. He then booked the parcel from Chennai to Ahmadabad at the instructions of Rafiq. Nitesh Patel collected the parcel on 24.02.2011 from the courier agency (POBC) in Ahmadabad and shipped it to Malaysia through Fed Express. The parcel was booked by Sagar Iyer.

Evaluation of Evidence and Reasons

26. The prosecution's case rests almost entirely on the alleged voluntary statements of the appellants (accused) recorded under Section 67 of the NDPS Act, and the statements of Sagar Iyer

Subramanium (PW8) and Mushahid Ali (PW18). It is also apparent from the record that apart from recording of such statements, no investigation of any value was conducted by NCB.

27. The Trial Court has convicted the appellants on the basis that the statements of the appellant Nitesh Patel are corroborated by statements of Sagar Iyer (PW8) and Mushahid Ali (PW18). The said statements establish the case of the prosecution notwithstanding that no other evidence of dispatch of the parcel from Mumbai to Chennai and Chennai to Ahmedabad is placed on record. However, a closer examination of the statements indicate that the same do not reconcile with the material on record.

28. According to NCB, secret information was received by Mehak Jain, Intelligence Officer, DZU (who deposed as PW1). She had deposed that she had received secret information that some narcotic drug is concealed in a parcel bearing Airway Bill No. 466420580086, which is lying with Fedex Express Services India Pvt. Ltd. at their office at C-152, Mayapuri Industrial Area, Phase-II, New Delhi-110064. Based on the said alleged secret information, authorization was received from the Superintendent, DZU to constitute a team and take the necessary action. Thereafter, Ms Mehak Jain along with a team of two other officers and a driver left their office at 15:00 hours on 21.03.2011 and reached the Fedex Office at 16:00 hours. They asked the officials at Fedex Office to produce the parcel in question. They complied and the parcel bearing Airway Bill No. 466420580086 was produced before the NCB team by Mr Puneet Sharma, who

testified as PW5. Mr Puneet Sharma and one Gulshan Kumar Kaushik (who deposed as PW4) joined the proceedings as independent witness. The parcel was a cardboard box. It was opened by Ms Mehak Jain and she deposed (as PW1) that there were five fibre bags in the parcel and on examination of the bags, it was found that there were cavities in the inner stitched layers. She deposed that the layers were cut open by a cutter and it was found that the cavities contained a white colour powder, which was stitched in the inner layers of each bag. Small quantities of the powder were tested with the DD kit and the same indicated that the substance was Amphetamine. She deposed that the substance found in all five bags appeared similar in colour and texture and, therefore, the contents were transferred into a transparent polythene bag. The same was weighed and it was found to weigh 2.4 kgs. Thereafter, two samples of 5 grams each were drawn and were kept in zip-lock transparent pouches. They were put in white coloured paper envelopes, which were marked as A-1 and A-2. She deposed that paper slips bearing her signatures and that of the two independent witnesses were pasted on the said pouches marked as A-1 and A-2 and the same were sealed with the seal of NARCOTICS CONTROL BUREAU DZU-5.

29. She further testified that she prepared the test memo (Ex PW 1/C) in triplicate and the *panchnama* (Ex PW1/B) at the spot in the presence of the witnesses. She identified her signatures on the *panchnama*. PW4 and PW5 also identified their signatures on the *panchnama*. Ms Jain deposed that she prepared the seizure report

under Section 57 of the NDPS Act (Ex.PW1/F). The two envelopes containing the samples marked A-1 and A-2 as well as the *pullanda* containing the remaining substance (marked as A) and the *pullanda* containing five fibre bags (marked as B), were deposed with the *Malkhana*.

30. It is important to note that Ms Mehak Jain (PW1) also testified that Mr Puneet Sharma (PW5) had produced the parcel bearing Airway Bill No. 466420580086 along with documents – Invoice (Ex PW1/B-1) and Airway Bill (Ex PW1/B-2). The test memo was marked as Ex.PW1/C.

31. There is a material inconsistency between the weight of the sample of the illicit substance as drawn and the weight of the sample as received by the Central Revenue Control Laboratory. PW1 (Ms Mehak Jain) deposed that she had drawn two samples of 5 grams each and packets containing the same were marked as A1 and A2. The *panchnama* also reflects the same. The copy of the test memo indicates that the net weight of the sample received by the Central Revenue's Control Laboratory as 5.5 grams. It is also material to note that although the test memo (Ex PW1/C) requires that the weight of each sample be stated by the seizing officer, PW1 had not mentioned the weight of the sample in the relevant column of the pre-printed test memo. The copies of the test memo produced also indicate that there is some overwriting in one of the copies. The discrepancy in the weight of the sample raises doubt as to the case set up by the prosecution.

32. However, for the purposes of further evaluating whether the prosecution has established its case, it is assumed that the sample drawn by PW1 and marked as A-1 is the same sample that was received in the laboratory and on testing, the same was found to be amphetamine.

33. The NCB's case that the secret information was received does not inspire much confidence when one examines the evidence of the two independent witnesses – PW4 (Gulshan Kumar Kaushik) and PW5 (Puneet Sharma) – the two employees of Fedex at Delhi. In his cross-examination, PW4 had explained the procedure of accepting shipments. He stated that whenever the shipment was received, it is checked physically and an airway bill is generated against the shipment. One copy of the invoice along with the airway bill is sent to the manifesting team while the other copy accompanies the shipment. He stated that the manifesting team scans the invoice and the airway bill copy and sends it back for data entry. Thereafter, the shipment starts moving towards the destination points. He explained that along with this, the data entry team enters all details and uploads it on the Fedex Software and this system is followed worldwide.

34. PW4 also testified that generally a parcel sent abroad reaches its destination within five to seven days. He deposed that the parcel in question was received in the office at Mayapuri and was complete in all aspects for being sent to its destination. He stated that he was informed by the gateway security manager that the shipment that had moved from his office had some suspected items in it and was to be

kept at the Mayapuri office/his cabin specifically. He was informed that a team from NCB would arrive and they were to hand the parcel over to them. He stated that the X-Ray of the parcel in question would have been done before 21.03.2011. He could not precisely state as to when the x-ray was done but confirmed that it would have been done a week or ten days prior to 21.03.2011.

35. PW5 testified that the parcel would have reached the airport office by 28.02.2011 and it would have been X-Rayed after two- three days after reaching the airport office. He also testified that he received the information from the security staff that something suspicious was suspected in the parcel. He stated that the packet normally takes five to seven daysto reach its destination.

36. Thus, even though the parcel in question was booked on 24.02.2011, Fedex did not dispatch it to its destination but detained the same as it appears that the security staff had found that there was some suspicious substance in the said parcel. It is apparent that this information was provided to NCB and the security staff had also informed its concerned employees that an NCB team would come and take the said parcel. Clearly, the said parcel was not intercepted by NCB while it was on his way in the normal course, to its destination. The courier service provider (Fedex) had detained the said packet and information in this regard had been provided to NCB. Notwithstanding the same, no investigation as to the discovery and storage of the parcel in question was conducted. The security staff of Fedex who had detected the same were not examined by the officials of the NCB. Nor,

any inquiries were conducted to ensure that the parcel remained un-tampered after it was detained. However, NCB built a case that the information received was secret and had sought to present the case as if the parcel was intercepted while on its way to its destination in the normal course. But for the independent witnesses – PW4 and PW5, who were also employees of Fedex – revealing the above in their cross examination, the fact that the parcel in question had been detained by Fedex would not have been disclosed.

37. The above aspect is important because in the given circumstances, where the parcel had been detained and was not being processed, it was necessary for the prosecution to establish that the parcel was kept securely and was no tampered with. However, in her cross examination PW1 conceded that she had not make any such enquiries.

38. The *panchnama* (Ex.PW1/B) indicates that Mr Puneet Sharma (PW5) had produced the parcel bearing the Airway Bill No. 466420580086 before the NCB Team on 21.03.2011. The same was a cardboard box and contained five synthetic fiber bags. The *panchnama* also indicates that the parcel envelope was accompanied by Proforma Invoice and the Airway Bill in question (Airway Bill No. 466420580086).The said Proforma Invoice (Ex.PW1/B1) indicates the date of shipment of the parcel as 24.02.2011. The shipper's name is reflected as under:

"**Mr. Ramesh Bhai**

15, GR. FLR, GOLDSOUK COMPLEX
C.G. ROAD
AHMEDABAD
GUJARAT
INDIA TEL – 9376195587”

39. The consignee is reflected as:

“**MR. GANESHAN**

NO. A-GF08 PANGSAPURI, LAKSAMANA JAYA
A. KAMPUNGLAKSAMANA, BATU CAVES
SELANGORDARULEHSAN – 68100
MALAYSIA
TEL. 0102183994

40. The ‘VISA manifest report’ indicates the Airway Bill no. as 466420580086 and the shipment date as 24.02.2011.

41. It is important to note that the Proforma Invoice reflects the weight of parcel as 7.400kgs and the size of the box is noted as 32 x 35 x 22. The goods are described as *“Indian made synthetic fiber executive bags”*. The quantity was noted as five and its value is put down as ₹220/- each. Under the Column Description and Details, the goods are described as, “UNSOLICITED GIFT FROM INDIVIDUAL TO INDIVIDUAL FOR PERSONAL USE ONLY. NOT FOR SALE. IT HAS NO COMMERCIAL VALUE”.

42. The “VISA manifest report” indicates the weight of the parcel as 7.4 kgs. The consignee’s Airway Bill copy (Ex.PW1/B2) also clearly reflects the shipment date as 24.02.2011 and the weight of the consignment as 7.4 kgs. The dimensions of the parcel are reflected as

35 x 32 x 22 cm. Undisputedly, the Airway Bill in question was generated by Fedex. It reflects the origin as:

> "Origin ID – AMDA 26400141
> C/O THE FRIGHT CENTRE
> MR. RAMESH
> 15, GR. FL. GOLDSUKH COMPLEX,
> C.G. ROAD,
> AHMEDABAD 380009,
> INDIA, IN"

43. Although the Airway Bill in question (Ex PW1/B2) as well as the Proforma Invoice (PW1/B1) clearly indicated the address and the telephone number of the consignor, no further inquiry was made immediately on the seizure of the parcel on 21.03.2011. However, on 24.03.2011, the Superintendent, NCB sent a letter to the Zonal Director, Ahmedabad Zonal Unit of NCB seeking verification of the name, address and antecedents of Mr Ramesh Bhai (the consignor) as reflected in the Airway Bill in question. The Ahmedabad Zonal Unit of NCB responded by a letter dated 25.03.2011 (Ex.PW6/A) stating that an officer had visited the address of the shipper on 25.03.2011 and noticed that the address was that of a courier company in the name of "Trackon Courier Pvt. Ltd.". The said office was run by Mr Sagar Iyer assisted by Mr Kumar Pillai. No person by the name of Mr Ramesh Bhai was found at the address. However, a business card in the name of "Indo Express Courier and Cargo" was obtained from the said office. The said visiting card (Ex PW6/B) was of Sagar Iyer and mentioned his mobile number as 9376195587.

44. It is relevant to note that the said mobile number, 9376195587, is the same number as was reflected in the Proforma Invoice as that of Ramesh Bhai, the shipper.

45. On 29.03.2011 – that is, four days later – the Superintendent, NCB sent a letter to his counterpart at the Ahmedabad Zonal Unit requesting him to find out the details of the shipper of the parcel from from Mr Sagar Iyer.

46. On 05.04.2011, the Superintendent Ahmedabad Zonal Unit responded by letter dated 05.04.2011 (Ex PW6/C) reporting that inquires had revealed that (i)Nitesh Patel of Patel Couriers had handed the shipment to Indo Express Courier Service owned by Sagar Iyer for sending it to Malaysia on commission basis; (ii) Nitesh Patel had collected the shipment from another courier company of Ahmedabad named Patel On Board Couriers (POBC) where the shipment had arrived from Chennai; (iii) Nitesh Patel was given the contract by Rafiq of MR Express Couriers, Mumbai on commission basis to receive the shipment and to further dispatch it;(iv)Nitesh Patel received a copy of the document named "certificate" from Konnection Express Courier and Cargo, Royal Villah, Room No. 15, 3rdFloor, 27/69, Venkatesh Street, Chintadripet, Chennai from where the shipment had been booked; (v) Nitesh Patel collected the said shipment on showing a copy of a document named Certificate; (vi) Rafiq Shaikh had given the details of the consignor and the consignee to Nitesh Patel telephonically or by SMS; (vii) Sagar Iyer and Nitesh Patel had explained that it is normal in the trade if the actual identity

of the potential customer is not known, a fake identity of customer is generated;(viii) Rafiq Shaikh would be the person who could throw more light about the main person dispatching the shipment; and (ix) that other consignments were also sent in the name of Ramesh Bhai.

47. The Ahmedabad Zonal Unit of NCB also provided the address and the phone numbers of Rafiq Shaikh and advised that urgent verification be conducted from Mumbai and Chennai. Along with the said letter, the statements of Nitesh Patel (Ex.PW7/A) and the statement of Sagar Iyer (Ex.7/B) recorded on 04.04.2011 and other documents allegedly collected from them were also forwarded.

48. The aforesaid letter dated 05.04.2011(Ex.PW6/C), essentially, encapsulated the case pursued by NCB. The voluntary statements allegedly made by Nitesh Patel and Sagar Iyer which were annexed with the letter (Ex.PW7/A and Ex.PW7/B) thereafter formed the foundation of NCB's case. It does not appear that apart from accepting the said statements as correct, NCB undertook any worthwhile investigation in the matter. No document named "certificate", on the basis of which the Nitesh Patel is alleged to have collected the parcel in question, has been produced on record. Although it appears that a slip mentioning the CD No *517664804* forming a part of the documents marked as DW1/DC, may be the document referred to in the letter dated 05.04.2011(Ex PW6/C) but NCB has done little to establish the same.

49. Examination of the voluntary statement allegedly made by Nitesh Patel on 04.04.2011 (Ex PW7/A), indicates that the first page contains two paragraphs written in Nitesh Patel's own handwriting. The second paragraph records his request that the remaining statement be written on his behalf. The remaining statement is in question and answer form.

50. A plain reading of the said statement indicates that the alleged responses of Nitesh Patel to the questions allegedly put to him were to the following effect:

(i) the parcel was received by him from a courier agency – Patel On Board Couriers (POBC), Ahmedabad on 24.02.2011;

(ii) the said parcel was received by POBC, Ahmedabad from their Chennai office on 24.02.2011;

(iii) on receiving the said parcel from POBC, Ahmedabad, the same was forwarded to Indo Express Courier office for further dispatch to Malaysia on 24.02.2011;

(iv) the Proforma Invoice dated 24.02.2011 was prepared by SagarIyer of Indo Express of CG Road Ahmedabad;

(v) the parcel was physically collected by his employee, Ibrahim;

(vi) the parcel was received by him on the direction of one Rafiq Shaikh of Mumbai.

(vii) Rafiq Shaikh also operated an international courier agency in the name of "MR Express";

(viii) he had never seen or met Ramesh Bhai;

(ix) the details of Mr Ramesh Bhai were provided by Rafiq over phone and as intimated by him, his address was 501/2, Gomptipur Road, Ahmedabad;

(x) the consignee's name and address were intimated by Rafiq Shaikh on phone or by SMS;

(xi) Payments were received through *angaria* namely "Vishnu-vijay" located at Ratanipol Zaweri Chembur Relief Road, Ahmedabad and the said payments were sent from Mumbai by mentioning the sender's name as "Mangesh" and "Swamy";

51. It is important to note that the said statement indicates that Nitesh Patel was interrogated as to the manner in which the parcel in question was received. He reiterated that the parcel was dispatched from Chennai on 23.02.2011 by Konnection Express Courier and Cargo, Royal Villa, Room No. 15, 3rd Floor, 27/69 Venketesha Street, Chintadripet, Chennai- 600 002 under CD No. *517664804* and was 38 kgs. He stated that the said parcel was dispatched from POBC, Chennai to POBC Ahmedabad and the said parcel was received at the POBC Ahmedabad office on 24.02.2011 and its weight was 36 kgs. The statement indicates that Nitesh Patel provided the POBC Delivery Run Sheet and the document reflecting the CD No. *517664804*. He

also provided the telephone numbers of Konnection Express Courier and Company as well as the CD Number. Further, his statement also provides the address of Rafiq (MR Express) as well as his telephone numbers (four in number)

52. Nitesh Patel was interrogated as to what was the reason for the difference in the weight of the parcel as dispatched from Chennai and as received in Ahmedabad. He allegedly responded by stating that one staff member, Ibrahim, had received the parcel and he had no idea as why the weight of the parcel dispatched and received was different.

53. Statement of Sagar Iyer Subramanium (PW7/B) was recorded on 04.04.2011 and the same was sent by the Ahmedabad Zonal Unit along with the letter dated 05.04.2011 (PW6/C). In his statement, he stated that he ran a courier agency as a franchisee of Trackon Courier Pvt. Ltd. He acknowledged that he had signed as the authorized signatory of Ramesh Bhai, the shipper (consignor), on the Proforma Invoice (Ex PW1/B1). He stated that whenever a local courier brings a parcel, where the name of the sender is not available, he writes the address of his office and also signs the same. He admitted that the Proforma Invoice was prepared in his office. He stated that the parcel in question, which was dispatched from his office, was given to him by Nitesh Patel at his office. He also stated that Nitesh Patel had dispatched 15 such parcels in the past where the shipper’s name was reflected as Ramesh Bhai.

54. On 06.04.2011, Mr Y.R. Yadav, Superintendent, NCB (who was examined as PW20) sent a letter (PW20/E) to the Zonal Director, Mumbai Zonal Unit informing him about the seizure of 2.4 kgs of amphetamine effected by the Delhi NCB Unit. The letter further stated that and on investigation, it was found that the booking was done by Mr Rafiq Shaikh. The details and address of Rafiq Shaikh was provided and the Zonal Director, Mumbai Zonal Unit was requested to verify the name, address, antecedents etc. of Mr Rafiq Shaikh.

55. On the very next day, on 07.04.2020, another letter (PW20/F) was sent by PW20 to the Zonal Director Mumbai informing him about the inquiries conducted by Ahmedabad Zonal Unit. The Zonal Director was informed that inquiries had revealed that (i) Nitesh Patel had handed over the shipment containing 2.4 kgs amphetamine to Indo Express Courier Service owned by Sagar Iyer for sending it to Malaysia; (ii) Nitesh had collected the said shipment from a courier company of Ahmedabad, namely, Patel On Board Couriers (POBC); (iii) the Shipment had arrived from Chennai; (iv) Nitesh Patel had received a document named "Certificate" from Konnection Express Courier, Chennai from where the shipment was booked and had collected the shipment from POBC's Ahmedabad Office on showing a copy of the said document, namely, "Certificate"; (v) The address of Rafiq Shaikh was disclosed as K-104, Hanjar Nagar, Opposite Aghadi Nagar, Pump House, Andheri (East), Mumhai-93; and (vi) the telephone numbers of Rafiq Shaikh are 09324338225, 09374335105, 07498285405 and 02232525652. The Zonal Director of the Mumbai

Zonal Unit of NCB was requested to arrange for further investigation *"in a secret manner in order to trace out Rafiq Shaikh"* and to send a report to the office at the earliest.

56. Apart from the said letter being put on record, there is no material that any investigation was conducted by the NCB at Mumbai. No document has been placed on record, which would indicate that any investigation was conducted by Mumbai Unit of NCB or any information was provided by Mumbai NCB Unit. If at all any information was provided, the same has not been placed in evidence in the trial.

57. PW1 in her cross-examination stated – "*we neither received any reply from Mumbai NCB nor we sent any reminder*". Thus, apart from sending the two letters (Ex.PW20/E and Ex.PW20/F), no further investigations were carried out by NCB at Mumbai. This is despite the fact that NCB had in its possession the complete address and phone numbers of Rafiq and his courier agency. There is no material on record to even remotely suggest that Rafiq was not available at the address or on the phone numbers as available with the NCB were not genuine. Concededly, he was also not served any summons for further inquiries at the material time (that is prior to 06.06.2011).

58. Although, the statements allegedly made by Nitesh Patel and Sagar Iyer are the foundation of the NCB's case against the accused, no effective investigation was conducted to verify the information as contained in the said statements. Nitesh Patel had disclosed in his

allegedly voluntary statement recorded on 04.04.2011 (Ex PW7/A) that the parcel was booked from Chennai on 23.02.2011 through Konnection Express Courier and Cargo and he had also provided the address and the phone number of the said agency. However, there is no document available on record, which would indicate that any investigation was conducted with regard to booking or dispatch of a parcel through M/s Konnection Express Courier and Cargo. In any event, no material has been placed on record regarding any ushc investigation.

59. Mushahid Ali (PW18), in his statement recorded under section 67 of the NDPS Act (Ex. PW1/Z8) – which is relied upon to corroborate the statements made allegedly made by Nitesh Patel – stated that all records regarding the dispatch of couriers through Konnection Express Courier and Cargo had been seized by NCB Chennai. However, PW1 in her cross-examination stated that NCB had not provided her with any documents. Thus, the documentary proof, if any, that the parcels had been booked from Chennai to Ahmedabad through Konnection Express Courier have not been brought in evidence before the Court.

60. As observed earlier, no investigation was conducted at Mumbai and there is no documentary evidence of any parcel being couriered by Rafiq Shaikh or his courier agency (MR Express) from Mumbai to Chennai. Although Rafiq Shaikh was summoned to appear under Section 67 of the NDPS Act, no summons were issued for production of any records. Section 67 of the NDPS Act does not limited the

power of the competent officer to examine any person acquainted with the facts and circumstances of the case, but in terms of clause (b) of Section 67 of the NDPS Act, the competent officer can also require *any person to produce or deliver any document or thing useful or relevant to the enquiry.* Despite such wide powers to secure documents from any person, NCB failed and neglected to secure material documentary evidence.

61. It does not appear that investigation any value was done after the two letters (Ex PW20/E and ExPW 20/F) were issued to NCB's Mumbai Unit, as noticed above.

62. NCB appears to have galvanized into action in the beginning of June, 2011. PW1 had deposed that on 06.06.2011, she received secret information that a person named Rafiq Shaikh who deals in narcotic drugs and is also wanted in connection with the seizure of 2.4 kgs amphetamine from a parcel seized from Fedex Services Express Ltd., is staying in Room No. 107, Hotel Millennium 2000 DX, Paharganj near New Delhi Railway Station. She was informed that if search is conducted, it would result in his apprehension and possible recovery of some narcotic drugs from his possession. According to PW1, the said secret information was recorded and forwarded to Mr Yadav (PW 20) who authorized the search.

63. It is important to note that there is no material on record to establish that Rafiq was *"wanted"* in connection with the seizure of 2.4 kgs amphetamine. There is nothing on record to indicate that any

effort was made to contact Rafiq or to make any inquiries from him. Mr Yadav (PW20) had, in his letters (Ex.PW20/E and Ex.PW20/F) sent on 6.04.2011 and 7.04.2011, requested that inquiries be conducted by NCB Mumbai in a *secret* manner. Thus, even if his request was complied with, inquiries if any would have been done in a secret manner. There is no material whatsoever to indicate that Rafiq was evading NCB or avoiding any inquiries. His telephone numbers and his addresses were known to NCB and also provided to the Zonal Unit in Mumbai. It is also important to note that, admittedly, no summons under Section 67 of the NDPS Act were sent to Rafiq prior to 06.06.2011. This Court is unable to appreciate as to why Rafiq was treated as a wanted man in connection with the seizure of 2.4 kg of amphetamine.

64. Be that as it may, Rafiq was apprehended on 06.06.2011 from the hotel Millennium Paharganj. When the NCB team reached the said hotel, he was not there. They waited till he returned and apprehended him as he approached the reception for seeking the key to his room. Rafiq as well as the room occupied by him were searched, however, no incriminating material was found.

65. PW1 has testified that at that stage – that is after Rafiq was apprehended and searched – she issued summons under Section 67 of the NDPS Act and recorded his statement (Ex PW1/K), which is alleged to be voluntary. Clearly, his statement recorded on that date cannot be considered to be voluntary. First of all, the same was obtained when Rafiq was under the effective custody of NCB.

Secondly, it was also retracted (Mark DP). The earliest retraction letter on record is dated 28.07.2011 sent from jail to the Inspecting Officer. The said letter was forwarded by Jail authorities under the cover of their letter dated 26.08.2011. The second letter retracting the statement was forwarded by the jail authorities to the trial court under the cover of the letter dated 27.09.2011. And thirdly, this Court can also not readily accept that Rafiq had,on mere asking by NCB, set out in detail his statement supporting the case of NCB and confessed to having dealt with amphetamine in the manner as alleged.

66. Having stated the above, it is also apposite to examine the statement of Rafiq recorded on 06.06.2011(ExPW1/K).

67. He was shown the Proforma Invoice dated 24.02.2011 (Ex PW1/B1) and it is recorded that he stated that "*above parcel was booked by me through Nitesh Patel, dispatched from Konnection Express Courier and Cargo, Royal Villah Room No.15, 3rd floor, 27/69, Venkatesh Street, Chintadripet, Chennai-600002*". He is further alleged to have stated that "*this shipment reached Patel On Board Courier's Chennai Office from where it was dispatched to Patel On Board Courier Ahmedabad Office*". He stated that Nitesh Patel received a copy of a document named "Certificate" from Konnection Express Courier and Cargo, from where the shipment was booked and he collected the said shipment from POBC Ahmedabad by showing the said document named "Certificate".

68. Rafiq allegedly confessed that he had *"concealed amphetamine/Ketamine given by salim bhai"* in the inner layer of bags as directed to him by one Salim Bhai.

69. Rafiq was questioned by NCB as who he had tied up in Chennai and he responded by giving Mushahid Ali's name. He further stated that he knew Mushahid Ali since last one year and Mushahid Ali worked for one Kasim Bhai of Chennai. He further stated that Mushahid Ali was fully aware that Ketamine/Amphetamine was concealed in the said bags. Rafiq stated that he had no other source of income except his courier business, which is being run in the name of M.R. Express. He further stated that he received commission of ₹700/- per kg for couriering the substances.

70. Rafiq was arrested on the same date 06.06.2011. Thus, his apprehension at the hotel Millenium, his examination under section 67 of the NDPS Act and his arrest was done in succession, He was effectively in NCB's custody after his apprehension as a wanted man.

71. PW1 in her cross-examination stated that she sent summons under Section 67 of the NDPS Act to Nitesh Patel, Sagar Iyer, Mushahid Ali, Kasim Bhai and Salim Bhai. According to her, all the said summons were issued by her on 01.07.2011. It is important to note that although summons issued to Nitesh Patel, Sagar Iyer and Mushahid Ali have been placed on record (Ex.PW1/Z, Ex.PW1/Z-1 and Ex.PW1/Z-2); the summons allegedly claimed to have been issued to Kasim Ali and Salim Ali are not on record. There is no

concrete evidence on record to indicate that any such summons were, in fact, issued or any efforts were made to make any inquiries from them. The summons issued to Nitesh Patel and Sagar Iyer indicate their addresses. The summons issued to Mushahid Ali does not indicate the complete address and merely mentions his address as Nisha Cargo and Courier, Chennai. Although PW1 claimed that the summons had been served on Mushahid Ali at Chennai, he had testified that he did not receive any such summons but was asked by NCB officials to appear before PW1 on or before 20.07.2011.

72. Mushahid Ali, in his statement (PW1/Z8) recorded on 19.07.2011, claimed that he ran a courier agency in the name of Nisha Cargo. He stated that he knew Rafiq Shaikh for the past one/one and a half years in connection with his courier business. He was shown the Proforma Invoice (Ex.PW1/B1) and he stated that Rafiq Shaikh had sent him a parcel, which according to him contained five synthetic fibre bags with instructions to give the said parcel to Kasim Bhai. He stated that the parcel received from Rafiq Shaikh was handed over to Kasim Bhai. Thereafter, Kasim Bhai had asked him to book that parcel to Ahmedabad but he had not done so. Thereafter, Rafiq Shaikh had instructed him on phone to accept the parcel from Kasim Bhai and book it in the name of "Patel Courier, Ahmedabad". He stated that he was informed that the said parcel would be collected by Nitesh Patel. Mushahid Ali further stated that thereafter he booked the parcel through "Konnection Express Courier and Cargo" for Patel Courier, Ahmedabad. He further stated that he did not know any Salim Bhai

and had met Kasim Bhai only on one or two occasions. He denied that he ever worked for Kasim Bhai.

73. Insofar as the documents regarding the booking of the said parcel is concerned, he stated that the record of parcels booked by him through Konnection Express is with Chennai Zonal Unit of NCB.

74. The statement of Sagar Iyer under Section 67 of the NDPS Act was recorded once again on 11.07.2011 (Ex PW1/Z3). A plain reading of the said statement indicates that it is not entirely consistent with his earlier statement recorded on 04.04.2011 under Section 67 of the NDPS Act (Ex PW7/B). In his first statement recorded on 04.04.2011, he was pointedly asked as to why he had signed as an authorized signatory of Ramesh Bhai (the consignor) on the Proforma Invoice (Ex PW 1/B1) if h0e did not know him. He had responded by stating that if any local courier brought a parcel to him and was not aware of the sender's name, then he would put his office address on the invoice and also sign as a signatory for the sender. Thus, if Mr Sagar Iyer's first statement is to be accepted, it would mean that he would prepare invoices in his office and sign the same in all cases where the local courier was not aware of the sender's name, address and other details.

75. On 11.07.2011, he was again asked the same question as to why he had signed as an authorized signatory of Ramesh Bhai if he did not know him. This time he responded by saying that Nitesh Patel used to come at the last moment and insist that it is necessary to send the parcel urgently. He stated that he knew Nitesh Patel and complied

with his request. Nitesh Patel had told him to put his office address as that of the shipper Ramesh Bhai. Insofar as signing as an authorized signatory for Ramesh Bhai is concerned, he stated Nitesh Patel had told him that since he had put his address as the shipper, therefore, he should sign as an authorized signatory as well. And, on his asking he had done so.

76. The statement of Nitesh Patel was also recorded for the second time on 14.07.2011. It is material to note that whereas this statement is in the handwriting of Nitesh Patel; his first statement recorded on 04.04.2011 was not in his own handwriting for the ostensible reason that he was not able to write his statement in his own hand and he did not have practice. Apparently, there was no such issue on 14.07.2011. His statement is more or less is on the same lines except that there are significant improvements in favour of the prosecution's case; he now acknowledged that he was fully aware that the parcel sent by him contained Ketamine/Amphetamine but Sagar Iyer was not. Additionally, he confessed that he was aware that dealing in drugs was a crime and he had done so for money. If the statement is accepted, it also absolves Sagar Iyer of any knowledge that Ketamine/Amphetamine was concealed in the parcels that were dispatched by him. Further, at the end of the statement, he also identified Rafiq Shaikh from his passport size photograph.

77. It is also relevant to note that the second statement of Nitesh Patel recorded on 14.07.2011 is also countersigned by Sagar Iyer. Concededly, Sagar Iyer had appeared before PW 1 on 11.07.2011

pursuant to the summons issued to him on 01.07.2011 and his statement was recorded on 11.07.2011. No further summons were issued to him. Yet, he was present at the office of NCB and was also present when Nitesh Patel's Statement was recorded. In her cross examination, PW 1 deposed that she had not called Sagar Iyer but he and Nitesh Patel were present in the office of Mr Yadav (PW20) and he had asked her to confront Nitesh Patel with the statement of Mr Sagar Iyer. Thereafter, she improved her testimony by stating that she was asked to confront both of them.

78. Nitesh Patel examined himself in his defence (as DW1). He stated that in April 2011, four-five officials from NCB had come to his office to inquire about some parcel. The said officials had asked him to accompany them to their office. He stated that he denied having dealt with the parcel in question. He stated the officers were talking with each other and he was made to sit idle for several hours as he had reached their office at about 02:00-03:00 p.m. and remained there till 09:00-10:00 p.m. He stated that they wrote something on certain papers and obtained signature on the same. He further stated that the officials called him to their office on the next day as well. On that day also, they made him write on certain papers and obtained his signatures. Thereafter, he was allowed to go back and was never called at NCB Office at Ahmedabad. He further testified that in July, they handed over the summons to him and asked him to go to NCB Office in Delhi, where he gave a statement in similar manner. He stated that when his first statement was recorded, he was under

pressure to make the statement and was told that he would be let free if he made the statement. He stated that he went to NCB office on 14.07.2011 and reached the office at about 09:30 a.m. He met Ms Mehak Jain (PW1) and four or five other officers. He further stated that Ms Mehak Jain put questions to him regarding the consignment, to which he replied that he did not know anything about the consignment but thereafter, he was pressurized to write the statement as dictated by them. He stated that he was beaten and forced to write the dictated statement, which he wrote and signed. Thereafter, he was arrested and sent to jail. He further testified that from jail he sent a complaint through the Munshi of his jail ward and reproduced a photocopy of the same (Ex.DW1/A). He was cross-examined. He denied the suggestion that his statement was only recorded once and stated that it was done on multiple times. He also denied that he had any knowledge of the contents of the pages of his alleged statement written by NCB officials (Ex.PW7/A). He denied any knowledge of Sagar Iyer Subramanium of Ahmedabad. He also denied that he had any such dealings with them. He reiterated that his statement recorded on 14.07.2011 was dictated to him under pressure and physical duress (he was physically beaten). He further denied that he knew Rafiq Shaikh and volunteered that he came to know him when he was produced before the Court for the first time. He categorically denied that his statements (Ex.PW7/A and Ex.PW1/Z4) are his voluntary statements.

79. As noticed at the outset, NCB's case is, essentially, founded on the statements made by the accused, Sagar Iyer (PW8) and Mushahid Ali (PW18). Apart from the said statements which are alleged to have been made voluntarily, there is no material on record which would even remotely connect the two accused to the parcel that was seized by NCB from the office of Fedex. As is apparent from the above, the facts as recorded in the said statements have not been corroborated by any concrete evidence as no investigation of any value was conducted. The NCB seems to have restricted itself to writing letters, issuing summons and recording statements in their office. Even this exercise was left incomplete. According to PW1, summons issued to Salim Bhai and Kasim Bhai on 01.07.2011 remained unserved. No such summons are on record. Assuming that the same were issued, no steps were taken to ensure that the same are served. There is no material on record to establish whether any enquiries were made to ascertain their whereabouts and to trace their identities.

80. Rafiq had allegedly issued instructions to Mushaid Ali and Nitesh Patel on phones and through SMSs. But there are no call records produced by NCB to establish that Rafiq was ever in touch with Nitesh Patel or Mushaid Ali. The telephone numbers of Rafiq, Mushaid Ali and Nitesh Patel were available with NCB in the beginning of April 2011 but either the call records were not examined or the said records did not support the case set up by the NCB and therefore, the same have not been produced in evidence. In either

event, there is no evidence (except the statements of the accused and Mushaid Ali) to support the prosecution's case.

81. It is the prosecution's case that Rafiq had packed five fibre bags in a parcel and had dispatched the same from Mumbai to Chennai. The said parcel was collected by Mushahid Ali of Nisha Couriers and Cargo at Chennai and he had thereafter dispatched the said parcel to Ahmedabad through M/s Konnection Express Cargo & Couriers and Patel On Board Couriers (POBC). The said parcel was thereafter collected by Nitesh Patel from the office of POBC and dispatched through Indo Express Courier and Cargo, run by Sagar Iyer (PW8), who in turn booked the parcel through Fedex to Malaysia on 24.02.2011. And, the said parcel was then seized on 21.03.2011 from the office of Fedex at New Delhi. PW8 had deposed that he was not a franchisee of Fedex and Ex PW1/B2 (Airway Bill) indicates that parcel originated at Freight Centre. Thus, it appears that PW8 had booked the parcel at Freight Centre.

82. It is material to note that there are no documents which would even remotely suggest that Rafiq had booked any parcel from Mumbai to Mushahid Ali in Chennai. Similarly, there are no documents to establish that any parcel dispatched by Rafiq from Mumbai was received by Mushahid Ali. According to the statement of Mushahid Ali (Ex.PW 1/Z8) – which is relied upon by the Prosecution as the statement corroborating the statement made by Nitesh Patel (Ex.PW7/A) – he had delivered the said parcel to Kasim Ali and had refused his request for booking the parcel to Ahmedabad. He had,

subsequently, on the instructions of Rafiq, accepted the parcel from Kasim Ali and booked the same through Konnection Express Courier and Cargo.

83. The Trial Court convicted the appellants solely on the basis of the statements made by the appellant Nitesh Patel. The Court proceeded on the basis that the said statements were also corroborated by statement of independent witnesses, namely, Sagar Iyer (PW8) and Mushahid Ali (PW18). Paragraphs 69 and 70 of the impugned judgment reflect the above and are set out below:

> "69. In the facts and circumstances of the case both the statements of accused Nitesh Patel appear to be voluntary. They are further corroborated by statement of independent witnesses i.e. PW-8 Sagar Iyer and PW-18 Musahid Ali.
>
> 70. Hence, court is of the opinion that prosecution has successfully proved that both accused conspired together for export of 2.4 kg of psychotropic substance Amphetamine in a parcel vide airway bill no. 466420580086 seized on 21.03.2011 at 16:04 hours at Fedex Express Services India Pvt. Ltd. C-152, Mayapuri Industrial Area, Phase-II and thereby both of them contravened the provisions of section 8 (c) of NDPS Act and committed offences punishable u/s 23 r/w section 29 of NDPS Act. "

84. At this stage it is relevant to refer to section 53A of the NDPS Act and the same is set out below:

> "**53A. Relevancy of statements under certain circumstances.—**

(1) A statement made and signed by a person before any officer empowered under section 53 for the investigation of offences, during the course of any inquiry or proceedings by such officer, shall be relevant for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains,—
(a)when the person who made the statement is dead or cannot be found or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which under the circumstances of the case, the court considers unreasonable; or
(b)when the person who made the statement is examined as a witness in the case before the court and the court is of the opinion that having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.
(2)The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceedings under this Act or the rules or orders made thereunder, other than a proceeding before a court, as they apply in relation to a proceeding before a court."

85. By virtue of Section 53A of the Act, a statement signed by a person before any officer empowered under Section 53 for investigation of offences, during the course of inquiry, would be relevant for the purpose of proving the truth of the fact stated in the said statement in circumstances set out in clause (a) of sub-section (1) of Section 53A of the Act.

86. In the present circumstances, none of the said circumstances exist. Nonetheless, the facts stated by Nitesh Patel and his statements have been accepted as proved by relying on the provisions of Section 67 of the NDPS Act. It is doubtful whether the provisions of Section

67 of the NDPS Act can be read in a manner so as to circumvent the conditions as set out in clause (a) of sub-section (1) of Section 53A of the NDPS Act. The question whether the statement made by accused under Section 67 of the Act is admissible in evidence has been referred by the Supreme Court to a Larger Bench rendered in ***Tofan Singh v. State of Tamilnadu: (2013) 13 SCC 344***. However, for the purposes of the present petition, this court is proceeding on the basis that such statements are admissible.

87. Having stated the above, it is also necessary to bear in mind that an incriminating statement recorded under Section 67 of the Act is a weak evidence and must be tested and evaluated before the same can be accepted. First of all, the Court must be satisfied that such a statement has been made voluntarily without any fear, coercion or duress. In addition, such statement can only be used to corroborate other evidence. The Supreme Court in the case of ***Kashmira Singh v. State of Madhya Pradesh***: ***AIR 1952 SC 159*** had examined the evidentiary value of a confession made by a co-accused. After referring to various decisions, the Supreme Court held as under:-

> "10. Translating these observations into concrete terms they come to this. The proper way to approach a case of this kind is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other evidence as it stands even though, if believed, it would be

> sufficient to sustain a conviction. In such an event the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept."

88. The decision in the case of ***Kashmira Singh*** (*supra*) was approved by the Constitution Bench of the Supreme Court in ***Hari Charan Kurmi v. State of Bihar: (1964) 6 SCR 623***. The relevant observations made by the Supreme Court are set out below:

> "Thus, though confession may be regarded as evidence in that generic sense because of the provisions of Section 30, the fact remains that it is not evidence as defined by Section 3 of the Act. The result, therefore, is that in dealing with a case against an accused person, the court cannot start with the confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence. That, briefly stated, is the effect of the provisions contained in Section 30. The same view has been expressed by this Court in ***Kashmira Singh v. State of Madhya Pradesh*** where the decision of the Privy Council in Bhuboni Sahu's case has been cited with approval."

89. In ***Surinder Kumar Khanna v. Intelligence Officer, Directorate of Revenue Intelligence: (2018) 8 SCC 271***, the Supreme Court held that "*it would be inappropriate to base the conviction of the appellant purely on the statements of co-accused*".

90. In ***Mohammed Fasrin v. State: (2019) 8 SCC 811***, the Supreme Court after noting that the question whether confessional statements recorded under Section 67 of the NDPS Act are admissible has been referred to the larger bench of the Supreme Court in ***Tofan Singh v. State of Tamil Nadu***(*supra*), observed as under:

> "Even if it is admissible, the Court has to be satisfied that it is a voluntary statement, free from any pressure and also that the accused was apprised of his rights before recording the confession….. It is also well settled that a confession, especially a confession recorded when the accused is in custody, is a weak piece of evidence and there must be some corroborative evidence."

91. It is, thus, necessary to evaluate the evidentiary value of the statements of the accused (appellants herein) bearing in mind the aforesaid principles.

92. Insofar as the alleged voluntary statement of Rafiq (Ex PW1/K) is concerned, he had on 28.07.2011 sent a letter to Inspecting Officer SAFEMA/NDPS Mumbai in connection with freezing of his bank accounts, clearly stating that he was arrested on 06.06.2011 and his statement was obtained under pressure, threat and coercion and he had retracted from the same. He had stated that he had nothing to do with the alleged seizure effected by the NCB officials on 21.03.2011. He stated that he was a proprietor of M.R. Express, a courier agency; an income tax payee and the money deposited into his account was his legitimate money from the said business, which was duly accounted for in his books. The said statement was forwarded by the jail

authorities to the Inspectig Officer SAFEMA/NDPS, Mumbai on 26.08.2011. Rafiq also submitted his retraction statement to the learned Trial Court and the same was forwarded by the concerned jail authorities under cover of the letter dated 26.09.2011. In his statement to the Court, he stated that he had been booked in a fake case while he was waiting for his nephew at Millennium Hotel, Paharganj.

93. It does not appear that the Trial Court had proceeded on the basis of the alleged voluntary statement made by Rafiq (Ex.PW1/K) recorded on 06.06.2011 and, in view of this Court, rightly so. The Trial Court appears to have proceeded solely on the basis of the statements made by Nitesh Patel and on the premise that they were corroborated by other evidence, namely, the statements made by Sagar Iyer (PW8)and Mushahid Ali (PW18). This Court is of the view that the said conclusion is manifestly erroneous for several reasons.

94. First, it is doubtful, if the statements were voluntary. The first statement (Ex PW7/A) was not in his handwriting for the ostensible reason that he could not write English correctly and had no practice. This does not appear to be correct, as he had written his second statement (ExPW1/Z4) in his own handwriting. Further, Nitesh Patel testified that he was called to the NCB office on two consecutive days and he was made to sit idle for several hours. He stated that the officers asked him about his family members, educational qualifications etc. and took his signatures on papers. In his cross examination, he affirmed that he did not know the contents of the

other pages (the ones written by NCB officers) of the statement (Ex PW7/A).

95. In so far as second statement (Ex PW1/Z4) is concerned, Nitesh Patel testified that he was beaten and forced to write the statement. He further testified that he had retracted the said statement by a letter dated 19.07.2011 sent from the jail. There are serious doubts as to whether such a letter was sent. But even ignoring the same, it is doubtful whether the said statement was voluntary. Nitesh was in effective custody of NCB officials and was arrested and sent to jail from the NCB office. Sagar Iyer (PW8) had no reason to be present at the NCB office on 14.07.2011, as his statement had been recorded a few days earlier on 11.07.2011; nonetheless, he was present at the NCB office and has signed the statement (ExPW1/Z4). He was an interested party as the said statement absolved him of knowledge of any illicit substance in the parcel, which was dispatched by him under a fabricated invoice prepared and signed by him.

96. Second, it is difficult to accept that the statements made by Nitesh Patel can be considered as corroborated by the statements of PW8, which have little evidentiary value. First of all, PW8 had recorded his statement twice (PW7/B and PW1/Z3) and, as noticed hereinbefore, the said statements are not entirely consistent in material aspects. The explanation for signing the Proforma Invoice is different.

97. Secondly, the statements are self-serving and they cannot be accepted at their face value.

98. Thirdly, there was no credible explanation as to why PW8 had made the invoice (Ex PW1/B1) in his own office and signed on behalf of Ramesh Bhai. His explanation, as recorded in his first statement, (ExPW 7/B) is that he did so in all cases where local couriers did not know the particulars of the senders. In his second statement (Ex PW1/Z3), he stated that he had done so at the instance of Nitesh Patel. He stated that Nitesh Patel had asked him to do so because his address was reflected on the invoice. This can hardly be a reason for signing on behalf of any person. In his cross examination, he offered yet another explanation: he stated that Nitesh Patel used to come at the last moment, therefore, he signed the Proforma Invoice.

99. Fourthly, there is no credible explanation as to why Nitesh Patel would use PW8 to send parcels through a well-known service provider, Fedex, even though PW8 did not have the franchise/agency of the said service provider (as disclosed by him in his cross examination). The parcel originated (booked) at Freight Centre as is reflected in ExPW1/B2 but there is no clarity regarding this aspect.

100. Fifthly, PW8's statement that he sent couriers is a bald statement unsubstantiated by any other tangible evidence such as confirmatory correspondence, invoices for courier charges, receipts of payments etc. It is important to note that in his cross examination, P8 stated that he had sent confirmatory emails to Nitesh Patel. But no such emails were produced. Further, no such assertion was made by PW8 in either of his two statements (Ex PW7/B and Ex PW1/Z3). It is material to note that NCB has not disclosed or brought in evidence any

document whatsoever, which would establish a business connection between Nitesh Patel and PW8.

101. PW8 had produced a photocopy of a print out of data (PW8/DA) allegedly maintained by him. This document was sought to be voluntarily placed on record by PW8 during his cross examination. No such document was produced by him or disclosed earlier. Interestingly, it indicates that PW8 had booked parcels in the month of February, 2011 to consignees in Malaysia through other courier companies (UBS and DHL) as well. He did not disclose this in any of the earlier statements. The printout contains various columns. It is discernable that the same purports to include name of the courier company (DHL/UBS/Fedex); the date of shipment; the name of the shipper; the name of the consignee, the quantity; and weight. Two columns mention numbers. Presumably one of them mentions the airway no. One of the column indicates the name NITESH AFL in every row. The print out does not indicate the heading of the column and the data point against which the same is recorded. This is also a self serving statement and not a part of the evidence led by NCB.

102. Third, the statement of Mushahid Ali (Ex.PW1/Z8) is also of little evidentiary value. It is interesting to note that he was shown the copy of the invoice (Ex.PW1/B1) and was asked whether he had booked that parcel. In response, he stated that he had received a parcel from M.R. Express Mumbai, which had five synthetic fibre bags and he had delivered the parcel to one Kasim Bhai. Thereafter, Kasim Bhai had asked him to book the parcel to Ahmedabad but he had

refused. He stated that thereafter, at the instance of Rafiq, he had accepted the parcel from Kasim Bhai and booked the same to Ahmedabad. In his cross-examination, he deposed that Kasim Bhai had taken the delivery of the said parcel and had left his office. He stated that thereafter, Kasim Bhai came back again after two-four days for booking the parcel.

103. It has not been established that the parcel allegedly booked by Kasim Bhai was the same that was received by him from Mumbai (if at all) two-four days prior to the same being booked. The statement made by Mushahid Ali does not conform entirely to the statement made by Nitesh Patel. Nitesh Patel has not made any reference to Kasim Bhai, who according to Mushahid Ali, was the person who had finally booked the parcel from Chennai to Ahmedabad.

104. It is also relevant to note that whereas Nitesh Patel had handed over certain documents, more particularly POBC Delivery Run Sheet and document bearing CD No. as *517864804* (Ex. PWD1/DC). The said document also bears the signature of the consignor, who had consigned the parcel allegedly from Chennai. The statement made by Mushahid Ali indicates that the said document was not put to him. No inquiries as to whether his signatures on that document were his or that of Kasim Bhai, were made. Therefore, the question whether the parcel received by Nitesh Patel was the one allegedly dispatched by Mushahid Ali remains unconfirmed.

105. Although, Nitesh Patel was questioned as to the difference in the weight in the parcel, namely, the weight of the parcel when dispatched from Chennai (38 kgs) and weight of the parcel received by him (36 kgs), no such queries were put to Mushahid Ali. This is for obvious reasons that the weight of the parcel, as claimed to have been received by Nitesh Patel in his statement, did not reconcile with the weight of the parcel in question, which was 7.4 kgs.

106. Mushahid Ali was shown the invoice (Ex.PW1/B1) and inquiries were made regarding that parcel. Mushahid Ali in his statement (PW1/Z8) stated that he neither knew the shipper (Ramesh Bhai) nor the consignee (Ganeshan), as reflected in the said invoice. He, therefore, could notpossibly provide any information as to the parcel which was finally dispatched by Sagar Iyer (PW8) to Malaysia.

107. NCB was fully aware of that it did not have the evidence to connect the parcel allegedly sent by Mushahid Ali (if at all one was sent) and the parcel in question, namely, the parcel dispatched by Sagar Iyer (PW8). It appears that in order to connect the two, NCB sought to project a case that the documents under which the parcel in question was dispatched, namely, the Proforma Invoice (Ex. PW1/B1), the Airway Bill in question and the VISA manifest report (Ex.PW1/B2), were received by Mushahid Ali along with the parcel received by him from Mumbai and then forwarded by him to Ahmedabad. PW18 did not testify to the aforesaid effect in his examination-in-chief recorded on 15.05.2015. Therefore, the learned SPP sought permission to cross-examine Mushahid Ali (PW18) and

was granted the said permission. In this cross-examination by the learned SPP, a suggestion was made to PW18 to the effect that he had been shown copies of proforma invoice, airway bill and manifest report and he had identified the documents as those received along with the consignment. PW18 accepted the said suggestion and deposed as under:

> *"It is correct that NCB officers had also shown me the copy of proforma invoice, airway bill and manifest report which I had identified as the documents received along with the aforesaid consignment ……."*

108. PW18 was cross-examined in respect of this testimony. In his cross-examination, he stated as under:

> "*When the parcel in question was received by me from Mumbai the proforma invoice Ex.PW1/B1 was not accompanying the said parcel. Vol. The proforma invoice Ex.PW1/B1 was handed over to me when the parcel was booked to me by Kasim Bhai*".

109. He, subsequently, stated that he did not go through Ex.PW1/B1 and had put his signatures on the same without going through its contents. He, subsequently, stated in his cross-examination that he was told by the NCB officials that this document (Ex.PW1/B2) relates to the consignment in question.

110. There is no question of any of the said documents (proforma invoice, airway bill in question and the manifest report) accompanying the parcel allegedly received by Mushahid Ali and delivered to Kasim Bhai or received by Mushahid Ali from Kasim Bhai and dispatched to

Nitesh Patel. The Proforma Invoice was, admittedly, prepared by Sagar Iyer (PW8) on 24.02.2011. The airway bill and the manifest report are documents prepared by Fedex and the same were also prepared on 24.02.2011. Thus, the question of Mushahid Ali being aware of the said documents or ever seeing the said documents prior to him being shown the same by NCB officials does not arise. The suggestions were put to Mushahid Ali (PW18) on behalf of NCB in an endeavour to establish that the parcel dispatched by PW8 was the same that was dispatched by Mushahid Ali.Clearly, such link evidence,as was sought to be established by the NCB, is non-existent.

111. According to the statement of Nitesh Patel, his employee had received the parcel dispatched by Mushahid Ali and the said delivery is reflected in the POBC delivery run sheet. The same was allegedly handed over by him to the officials of NCB as the same is reflected in his statement (PW7). The POBC Delivery Run Sheet (DW1/DC)indicates that the parcel consisted of two pieces weighing 36 kgs, and the consignee's name is 'Patel'. The said parcels were against CD No.*517864804*. However, according to the testimony of Mushahid Ali, "*there was only one parcel*". This is inconsistent with the POBC Delivery Run Sheet, which indicates two pieces received from Chennai (MAA).

Conclusion

112. To summarize the above, NCB has founded its case on statements of the accused Nitesh Patel, Sagar Iyer (PW8) and

Mushahid Ali (PW18). Notwithstanding that there is little evidence to corroborate the statements, the Trial Court accepted the said case on the premise that the self-incriminating statements of the accused were corroborated by the statements of Sagar Iyer(PW8) and Mushahid Ali (PW18). As discussed above, the said premise is erroneous and therefore, the impugned judgment cannot be sustained.

113. Unsubstantiated statements recorded by NCB in their offices are intrinsically weak evidence and of limited evidentiary value even though the same may be considered as admissible. It would be unsafe to convict any person solely on basis of such statements. It is equally unsafe to accept such statements as corroborative of one another, in cases where hard evidence to establish whether such statements are true or false exist but are not produced.

114. *Afortiori*, such statements would lose any evidentiary value if they do not conform to the available tangible evidence. In the present case, the statements made by the accused and Mushahid Ali is not consistent with the evidence on record including the POBC Delivery Run Sheet.

115. Further, Mushahid Ali's (PW8's) testimony – and his statement (ExPW1/Z8) – seeks to establish that he could identify the parcel dispatched by Sagar Iyer (PW8) as the parcel dispatched by him to Ahmedabad on the basis of the Proforma Invoice, Airway Bill in question and VISA manifest report (Ex PW1/B1 an Ex PW1/B2), which is impossible in the given facts. Clearly, his

statement/testimony could not be relied on to provide the link evidence or ascribe any corroborative value.

116. The Trial Court erred in not examining the material placed on record and accepted the prosecution's case even though there is sufficient material to doubt the case set up by the prosecution. The Trial Court had completely ignored that the parcel seized by NCB weighed 2.4 kgs and the parcel allegedly received by Nitesh Patel weighed 36 kgs and this belied the prosecution's case that the parcel dispatched by Sagar Iyer was the same that was received by Nitesh Patel from Chennai.

117. There is a doubt whether the sample of the substance seized is the same as the sample received by the Central Revenue Control Laboratory because the weight of the sample sent and received is different.

118. As discussed above, NCB has failed to garner any hard evidence either on account of being highly economical in carrying out any investigation or for some ulterior motives. Their failure to tender any meaningful evidence is clearly indicative by the following:

(i) NCB failed and neglected to hold any enquiries from Rafiq at the material time (in April and May 2011) even though his complete address and phone numbers were available with the NCB on 04.04.2011;

(ii) call records were not collected and analyzed to establish any connection between Rafiq, Nitesh Patel or Mushahid Ali and therefore, there is no hard evidence that they even knew each other;

(iii) no documents were collected to establish that any courier was dispatched by Rafiq from Mumbai to Chennai;

(iv) there is no material to establish that Rafiq had paid any money to Mushahid Ali or Nitesh Patel as their charges;

(v) t no documentary evidence was produced to establish that Nitesh Patel had paid any charges to Sagar Iyer for his services;

(vi) according to the statement of Nitesh Patel (Ex PW7/A), the parcel in question was collected by his employee Ibrahim but no enquiries were made from him;

(vii) Nitesh Patel had stated that he received the money from *Angaria* "Vishnu-Vijay" and had also provided the address of the said *Angaria* but no investigation/enquiries were conducted in this regard;

(viii) according to Mushahid Ali, he had delivered the parcel to Kasim Bhai and subsequently (two-four day later) accepted the parcel from him for being dispatched to Ahmedabad but no inquiries were made from him;

(ix) althoughPW1 stated that she had issued summons to Kasim Bhai on 01.07.2011, the same are not on record and in any view, PW1 conceded that the summons were not followed through as the address was incomplete;

(x) according to the statement of Mushahid Ali – which is relied upon by NCB – the records relating to dispatch of couriers were taken by NCB Chennai but said records to establish the dispatch of the courier to Ahmadabad has not been produced. If PW1 is to be believed, the same were not forwarded by NCB Chennai to NCB Delhi;

(xi) although Sagar Iyer had, in his statement (Ex PW7/B), named three employees (Kumar Pillai, who worked at the office and Shailesh Solanki and Kamlesh Kohli, who collected the couriers) but none of them were examined;

(xii) no one was examined from Patel On Board Couriers (POBC) and no documents regarding the dispatch and receipt of the parcel in question were recovered from it;

(xiii) no inquiries were made from M/s Konnection Express Cagro and Couriers and no evidence of booking of any parcel by the said agency was produced.

(xiv) although the letter (Ex PW6/C) received from Ahmedabad Zonal Unit of NCB alleges that Nitesh collected the parcel from POBC on showing a document named "certificate", there is no such document on record and no evidence in this regard was led by NCB;

(xv) NCB had put some documents to Nitesh Patel in his cross examination and assuming that the document showing CD No. *517864804* (DW1/DC) is the said certificate (although there is no assertion by NCB to this effect), there is no material on record as to how and from whom this document was received by Nitesh Patel; and

(xvi) Although PW1 stated that she had issued summons to Salim Bhai on 01.07.2011, the same are not on record and in any view, PW1 conceded that the said summons were not followed through as the address was incomplete. Salim Bhai's phone number was allegedly provided by Rafiq but no investigation in this regard is reflected in the evidence led by NCB;

119. The net result of the exercise conducted by the NCB is also that the person (sagar Iyer) who is admittedly guilty of fabricating the invoice; falsely signing on behalf of the shipper of the parcel; and shipping the parcel, has been absolved of his role in the said offence. This is despite his statements indicating the reasons for doing so are not consistent. Further, there is no credible explanation as to why he was chosen to book the parcel by another courier agent (Nitesh Patel) even though he was not the franchisee of Fedex and the parcel was

booked through Freight Centre (as reflected on the Airway Bill in question).

120. In view of the above, the present appeals are allowed. The impugned judgment convicting the appellants and the impugned order are set aside. The appellants are acquitted of the charges and shall be released from custody forthwith if they are not required in any other case.

121. The pending applications are also disposed of.

VIBHU BAKHRU, J

JULY 14, 2020
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