

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 13.05.2020

+ **CRL.A. 1186/2015 and CRL.M.A. 41216/2019 and
CRL.M.(BAIL) 1943/2018 and CRL.M.(BAIL) 2070/2019**

OKAFOR CHUKWUKA UGOCHUKWU Appellant

versus

NARCOTICS CONTROL BUREAU Respondent

Advocates who appeared in this case:

For the Appellant: Mr K. Singhal and Mr Arshid Bashir.
For the Respondent: Mr B.S. Arora.

AND

+ **CRL.A. 1041/2016**

LAYA EMILYN Appellant

versus

NARCOTICS CONTROL BUREAU Respondent

Advocates who appeared in this case:

For the Appellant: Mr Harsh Prabhakar and Mr Anirudh
Tanwar.
For the Respondent: Mr B.S. Arora.

JUDGMENT

VIBHU BAKHRU, J

1. The appellants have filed the present appeals impugning a judgment dated 17.09.2015 passed by the Special Judge, NDPS Court,

New Delhi in the case titled as “*Narcotics Control Bureau v. Laya Emilyn Mananquil & Anr.*”, whereby the appellant, Okafor Chukwuka Ugochukwu (hereafter ‘Okafor’) was convicted of an offence punishable under Section 29 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (NDPS Act) and the appellant Laya Emilyn Mananquil (hereafter ‘Laya’) was convicted of committing offences punishable under Sections 21(c), 23(c) and 29 of the NDPS Act.

2. The appellants further impugn an order dated 21.09.2015. By the said order, Okafor was sentenced to rigorous imprisonment for ten years with a fine of ₹1,00,000/- and in default of payment of fine, to undergo simple imprisonment for a further period of two months, for committing the offence under Section 29 of the NDPS Act. Laya was sentenced to rigorous imprisonment for a period of ten years with a fine of ₹ 1,00,000/- each for committing the offences punishable under Sections 21(c), 23(c) and 29 of the NDPS Act. And, in default of payment of fine, Laya was directed to undergo simple imprisonment for a further period of two months. The three sentences were directed to run concurrently.

3. The case set up by the prosecution is that on 14.05.2010 at about 1200 hours, secret information was received by Sh Y.R. Yadav, Superintendent NCB-DZU that one lady, namely Laya Emilyn who is a national of Philippines, holding Passport no. XX3585148, would arrive at Delhi by Emirates Airlines (Flight no. EK510) at about 9:15 am on 15.05.2010, alongwith a huge quantity of cocaine in her baggage. Consequently, a raiding team was formed. The said team

reached Terminal 2 of IGI airport at about 8:15 am. After reaching the airport, two persons from public voluntarily joined the raiding team to witness the proceedings conducted by the NCB team.

4. The flight arrived at the scheduled time, that is, at 9:15 am. The suspect was identified on the basis of description available and her identity was confirmed as Laya Emilyn Mananquil (Laya) by the immigration officials after her clearance. She collected her baggage and after waiting for 5-10 minutes, she started moving towards the exit gate. She was seen talking on her mobile phone. Thereafter, she attempted to engage a taxi and that time, the NCB officials intercepted her. On enquiry, she revealed her name as Laya Emilyn. Thereafter, the accused was served with a notice under Section 50 of the NDPS Act and was informed about her legal right to be searched before a magistrate or a gazetted officer. However, she refused to exercise the said right and instead chose to be searched by the lady officer. Thereafter, her personal search was conducted and her luggage was also searched. A blue colour bag was found and on opening the same, seven silver colour pouches and some personal belongings were found inside it. The pouches were opened and were found to contain white colour powder. The powder was tested with the help of field-testing kit and it tested positive for cocaine. The entire substance was mixed and weighed and it was found to be 1.780 kgs.

5. Thereafter, samples were made of the substance and put into separate pouches. The remaining substance was converted into a parcel. The blue coloured bag along with the hand bag and certain

documents (including her passport, one tag and boarding pass) were seized. Thereafter, Laya was summoned under Section 67 of the NDPS Act. She made a voluntary statement that the said substance was directed to be delivered to one Okafor Chukwuka Ugochukwu (Okafor), who was a resident of house no. C-21, Third Floor, Hasthal Vihar, Uttam Nagar. On the basis of this information, a team consisting of officials went to Uttam Nagar where they met owner of the said house, one Mr Gurdev Singh, and requested him to join the proceedings. Thereafter, on enquiry, Mr Okafor was found to be inside the house. He was told about the information given by the accused Laya and was served with a notice under Section 50 of the NDPS Act. However, the accused Okafor declined to be searched in front of the Magistrate or the Gazetted officer. Thereafter, a search was conducted in the house but nothing was recovered. Subsequently, his statement and the statement of various witnesses were also recorded pursuant to a notice served to him under Section 67 of the NDPS Act.

6. Since the accused persons appeared to have committed offences punishable under the NDPS Act, they were arrested on 15.05.2010 and thereafter, were medically examined. On the basis of the material on record, a complaint was filed. Thereafter, charges were framed against the accused Okafor under Section 29 read with Section 23(c) of the NDPS Act. Laya was charged with committing an offence punishable under Section 23(c) of the NDPS Act and under Section 29 read with Section 23(c) of the NDPS Act. Both the accused pleaded not guilty and were tried for the offences for which they were charged.

7. The Prosecution examined fourteen witnesses in total to prove its case. After examining the evidence, the Trial Court convicted the accused Okafor for the offences for which he was charged. The Trial Court found that the NCB came to know about the accused Okafor and his parentage and address, on the basis of the information provided by the accused Laya. It further noted that the evidence of Okafor's landlord Sh Gurdev Singh (PW-13) proved the case of the prosecution that he was apprehended from his residence, where he admitted his complicity in the commission of the offence. The Trial Court further held that the testimony of PW-12 (the *panch* witness) that the accused Okafor was called at Nawada Metro Station and was apprehended there, was insufficient to disbelieve the case of the prosecution. Thus, the trial court held that the prosecution was able to prove its case beyond reasonable doubt that the accused Okafor was part of a criminal conspiracy along with accused Laya, which entailed Laya importing the said quantity of cocaine from abroad to India and the accused Okafor receiving the same from her. The Trial Court held that this was an offence punishable under Section 29 of the NDPS Act and accordingly, Okafor was convicted for committing an offence punishable under Section 29 of the NDPS Act.

8. Laya was convicted for committing offences punishable under Sections 21(c), 23(c) and Section 29 of the NDPS Act.

Evidence

9. Before proceeding further, it is important to briefly examine the

evidence led by various witnesses.

10. Sh Vikas Kumar, who was posted as Intelligence Officer with NCB DZU on 15.05.2010, was examined as PW-1. He deposed that secret information that a lady named Laya Emilyn Mananquil, a Philippines National aged about 50 years, would arrive at IGI Airport from Dubai by Emirates Airlines (Flight no. EK 510) at about 9:15 am, was received. Pursuant to this information, he constituted a team consisting of himself, superintendent Shri YR Yadav, IO Vikas Kumar, IO Sanjay Rawat, IO Akhilesh Mishra, IO Jai Bhagwan, IO GS Bhinder, IO Smt Savitri Jaswani and Hawaldar Shiv Ratan. He deposed that they left the NCB office in two cars and reached the Terminal II, IGI airport at around 8:15 am. There they informed some taxi drivers about the secret information and asked them to join the search. Two of them, namely Pramod Kumar and Ramesh Kumar, agreed to join the raiding party. Thereafter, he alongwith Superintendent YR Yadav, IO GS Bhinder and IO Savitri Jaswani went inside the airport at about 8:40 am and waited near the immigration counter for the anticipated flight at about 9:15 am. The flight arrived on schedule and they identified the accused as per the description given in the secret information. Her name was also confirmed by the Immigration Officer. The accused Laya collected her baggage from the conveyor belt and after 5-10 minutes, she started moving towards the exit gate. After going out of the exit gate, she tried to contact someone on her mobile phone and thereafter, she tried to engage a taxi. At this point, she was approached by the NCB team

and they also introduced the witnesses to her. She was informed about the secret information and on enquiring, she told her name as Laya Emilyn Mananquil and also showed her passport.

11. Thereafter, a notice under Section 50 of the NDPS Act was issued to the accused (Ex.PW-1/B) and she was informed of her legal right to be searched before a Magistrate or Gazetted Officer if she so wished. PW-1 deposed that she refused the same and asked to be searched by any lady officer. She also wrote down the same in her own handwriting on the notice and put her signatures on the same. The notice was also signed by public witnesses. Further, the search authorisation was also signed by the accused. A lady officer took the personal search of the accused. The accused was carrying a blue coloured bag. On opening, it was found to contain seven silver pouches and several other personal belongings. The said silver colour pouches contained transparent polythene packets and on cutting the same, some white colour powder was recovered. PW-1 deposed that the substances in all the packets tested positive test for cocaine. As they were of the same texture and colour, the team mixed all the substances in one packet and took two samples from the whole property and were marked as A-1 and A-2. Rest of the cocaine was marked as A. The samples marked A-1 and A-2 were kept in transparent polythene packet and they were put in a white envelope. Thereafter, paper slips were prepared on which signatures of the two public witnesses and the accused Laya were taken along with the signature of PW-1. The said samples were sealed with the seal of

NARCOTICS CONTROL BUREAU DZU-5 and the said paper slips were also put in before sealing.

12. PW-1 further deposed that the proceedings were completed at about 1:30 pm. Certain documents were also seized at the spot, that is, two passports, one boarding pass with tag numbers and four electronic tickets. The raiding party alongwith the case property and the accused Laya returned to the office of NCB and the case property was deposited in the *malkhana* at about 1415 hours and entries regarding the same were made in the *malkhana* register.

13. PW-1 stated in his cross examination that the boarding pass of the accused did not have the luggage tag pasted on it and volunteered that the luggage tag filed on the judicial record was affixed on the luggage.

14. GS Bhinder, who was posted as Intelligence Officer at NCB, DZU, was examined as PW-2. He deposed that on 15.05.2010, he joined the investigation team headed by Sh Vikas Kumar, IO and reached the airport at around 7:30 am. The team consisting of seven intelligence officers including PW-2 with other staff members reached the airport at about 8:15 am. There they were also introduced to the two public witnesses. He deposed that as per the secret information, the accused lady arrived at the airport and at the immigration area, she was identified by Sh Vikas Kumar and other team members. After collecting her baggage, she moved out of the exit gate and the NCB team followed her. He deposed that after a while, she made a call to

someone and thereafter, she tried to arrange a taxi. At that point of time, NCB team intercepted her. She was issued a notice under Section 50 of the NDPS Act and she was briefed of her legal rights. Thereafter, NCB officials carried out her search and she also signed on the search authorisation. He deposed that thereafter, search proceedings were conducted and on opening the blue colour bag carried by the accused, seven silver colour packets were found containing white colour substance, which tested positive for cocaine. The said packets were transferred to another transparent polythene packet and their aggregate weight was found to be 1.870 kg.

15. Ms Savitri Jaswani, Intelligence Officer at NCB, DZU was examined as PW-3. She deposed that on the day of incident, she was called in the office by Sh YR Yadav, Superintendent, NCB and she was told to accompany them to IGI Airport for searching a lady arriving at the said airport. She deposed that she alongwith three or four Investigating Officers, including GS Bhinder, Sh Vikas Kumar, and the Superintendent went to the airport. Thereafter, she went inside Terminal II of the IGI Airport along with YR Yadav and GS Bhinder. She deposed that the accused Laya arrived in a flight from Dubai and after taking her luggage from conveyor belt, she moved out of the exit gate. Thereafter, she made a call from her mobile phone and it appeared that she was arranging for a taxi. At this point, the NCB team alongwith one other team apprehended the accused. She was told that she was required to be searched as it had come to their knowledge that she was carrying drugs. She was served a notice under Section 50

of the NDPS Act. PW-3 testified that the accused refused to be searched by the Gazetted officer or a Magistrate and she wanted a lady officer to search her. Accordingly, she was taken to a toilet at the airport and was searched by her but nothing was recovered from Laya's personal search. Thereafter, she came out with the accused Laya at the exit gate of the airport where the other members of the investigating team were conducting the search of the luggage of the accused. On a search of her luggage by the other members of the team, 7 silver pouches were found from one bag and the same was found to contain white powder. On being tested with the help of field testing kit, the white substance was found to be cocaine and its weight was found to be 1.780 kg. Thereafter, two samples of 5 gm each were taken out from the said white powder and were marked as A1 and A2. The accused was then served with a notice under Section 67 of the NDPS and accordingly, she alongwith the all the members of the team came to office of NCB and there, IO Akhilesh recorded Laya's statement and PW-3 conducted her personal search. She then collected Laya's personal belongings, put them in a bag and deposited them in the *malkhana*.

16. On being cross-examined, she stated that they had not recorded the statement of the immigration officer who had confirmed the identity of the accused. It was further stated that when she alongwith her team came out of the airport, the accused was already encircled by the members of the other team. The said team was led by IO Vikas and they were standing outside the airport. PW-3 stated that no

document was found in the baggage of the accused which could confirm that the said baggage belonged to the accused. PW-3 also stated that she (PW-3) did not sign any document prepared at the spot, which could show her presence at the airport. PW-3 further stated that she did not know whether the recording of the statement of the accused started and concluded on 15.05.2010, that is, the date of the incident. She also deposed that the statement of Laya was written in her presence. Sh Akhilesh Mishra had asked the questions and Laya had written the answers.

17. Sh. Sanjay Rawat, the Intelligence officer, NCB, DZU was examined as PW-4. He deposed that at about 11:15 am, the accused had come near the VIP parking lot. The NCB team which was following her from inside the airport intercepted her there and seized cocaine, weighing 1.780 kg, from her possession. The seizure proceedings started at about 11:20 am and ended upto 1:30 pm. Thereafter, they left for the NCB office at about 2:15 pm. On the basis of information provided by the accused Layla Emilyn, he constituted a team and on the direction of the Superintendent, they went to Uttam Nagar to find out Mr. Okafor Chukwuka who, as per the information, was residing at C-21, third floor, Hatsal Vihar, Uttam Nagar, New Delhi. After reaching there, they met the owner of the house and he was briefed about the information. He voluntarily agreed to join the proceedings. Thereafter, the door of the house was knocked and a Nigerian man opened the door. On enquiring, he provided his identity as Mr. Okafor Chukwuka Ugochukwu. He was served a notice under

Section 50 of the NDPS Act and was informed about his legal rights. However, the accused declined to be searched before the magistrate or a gazetted officer. PW-4 deposed that, thereafter, Okafor's house was searched but nothing incriminating was recovered. Thereafter, the accused Okafor was taken to the NCB office where the other accused, Layla Emilyn identified Okafor as the same person to whom she was supposed to deliver the consignment of cocaine. Thereafter, the accused Okafor's statement was recorded in writing by IO Sh Vikas Kumar. In this statement, he admitted that he was directed by one Mr. Henry and Dave to collect a consignment of cocaine from Ms. Layla Emilyn. He further admitted that he is involved in drug trafficking and was supposed to get Rs. 20,000/- for this particular job.

18. In his cross-examination, PW-4 deposed that on 15.05.2010 he along with other members of the raiding party left the NCB office at about 14:15 hours for Hastal Vihar. He deposed that he was informed by Sh YR Yadav about the accused Okafor and was instructed to interrogate him and bring him to NCB office. Sh YR Yadav or any other NCB officer did not disclose to him that Ms Laya Emilyn was supposed to deliver cocaine to the accused Okafor. Later, while the raiding team were on their way to Hatsal Vihar, PW-4 was informed by YR Yadav that the accused Laya had disclosed that she was supposed to deliver the cocaine to the accused Okafor.

19. Vikas Kumar, who was on deputation to NCB, DZU on the day of incident, was examined as PW-5. He deposed that in pursuance to the summons issued by Sh Sanjay Rawat (PW-4) to the accused

Okafor, he (Okafor) appeared before him (PW-5). And, on Okafor's request, PW-5 wrote down his statement as per his dictation (Ex.PW-4/D).

20. In his cross-examination, PW-5 stated that he did not know where summons were served upon the accused Okafor or where he was apprehended and was brought to NCB office.

21. Inspector Akhilesh Mishra was examined as PW-6. He deposed that he was part of the team, which had seized cocaine from the possession of the accused. He deposed that he along with other members of the team had left the airport at about 1:30 PM. He deposed that the accused Laya was interrogated during the journey but he did not remember who was carrying out the said interrogation. The said interrogation was orally conducted and no written proceedings were prepared with respect the same. He further deposed that he recorded the Laya' voluntary statement in the office of DZU, which was tendered by her in her own handwriting (Ex.PW-6/A). He also received the case property from Sh Vikas Kumar on 15.05.2010 and the same was deposited on the same date in the *malkhana*. The entries were made in the *malkhana* register regarding the same and a photocopy of the relevant page of the register was exhibited as Ex.PW-1/L. PW6 deposed that subsequently, the accused Okafor was also identified by the accused Laya Emilyn and her statement to this effect was also recorded by him and the same was signed by Okafor in his presence (Ex.PW-6/B). PW6 testified that on 17.05.2010, the sample marked A-1 was taken out by him from the *malkhana* and was

handed over to Sepoy Rajbir (PW-9) for sending it to CRCL for examination.

22. On being cross-examined, PW-6 stated that after concluding the raid at the airport, they reached NCB office at about 1:50 pm and the interrogation on the way was recorded in writing by Sh YR Yadav after reaching the office. The name and address of the other accused person (Okafor) furnished by the accused Laya during the said interrogation were recorded. It is stated that the first statement of the accused Laya Emilyn was concluded at about 3:30 pm. PW-6 testified that the Superintendent had written these details on a rough piece of paper and handed the same to the members of the team. He also deposed that he was uncertain whether these details written on a rough paper, were recorded formally in any document. Thereafter, her second statement was recorded after she had identified the accused Okafor and, in fact, her first statement had not been concluded. PW-6 stated that the accused Laya had written her statements on her own. He further deposed that he had not informed the Superintendent that the accused Laya had mentioned in her statement that she had visited the house of Okafor and that she should be taken there for pointing out the said house. The team had already left for the house of Okafor on the basis of the information revealed by Laya in the vehicle. He deposed that recording of Laya's second statement was concluded at 5:30 pm after Okafor was produced before her and she had identified him.

23. Sepoy Rajbir, the driver with DZU, NCB was examined as PW-

9. He deposed that after the raid at the airport, the team returned to the NCB office at about 1:30 PM. He further deposed that on 17.05.2010, Sh YR Yadav called him and handed over one sample packet marked A-1, duly sealed with the seal of Narcotics Control Bureau, DZU at the four corners of the samples alongwith two forwarding letters and one more paper. The said samples and the forwarding letter (PW-8/A) were handed over by PW-9 to Sh AK Moharia, Chemical Examiner, CRCL office. In his cross-examination, PW-9 deposed that the forwarding letters were not sealed.

24. Sh Y R Yadav, Superintendent NCB DZU, was examined as PW-10. He deposed that on 14.05.2010, he received the said secret information. He reduced the said information in writing and put it before the Zonal Director, DZU for further action. PW-10 testified that on 15.05.2010, a team was constituted by Sh Vikas Kumar on his directions. The team reached the airport in two vehicles at about 8:15 am. There they had briefed some persons there about the secret information the requested them to be participate as public witnesses during the search and seizure. The accused landed at the airport and when she came out of the airport, she made a call from her mobile phone and thereafter tried to hire a taxi. At that point, she was intercepted by the NCB officers. She was served with a notice under Section 50 of the NDPS Act and was briefed about her legal rights. She preferred her search not to be conducted before a Magistrate or a Gazetted Officer and she wrote down on the notice that her search could be conducted by a lady officer of NCB. Accordingly, her

personal search was conducted by Smt. Savitri Jaswani, however, nothing incriminating was recovered. On her luggage being searched, seven pouches were found inside and on opening the same, white coloured powder substance was recovered. The same was tested and it tested positive for cocaine. This white substance was put in small polythene zipper pouch and that in a white paper envelope and was marked as A1 and A2. After the conclusion of the proceedings at the airport, they proceeded to the NCB office.

25. In his cross examination, PW-10 deposed that when they returned to the NCB office, IO deposited the seal with him and an entry was made in the seal movement register to this effect. He further stated that on the basis of the statement of the accused Laya, he directed Sh Sanjay Rawat (IO) to constitute a team to find out the co-accused to whom the consignment was to be delivered. Accordingly, a team was constituted and it left for the spot as disclosed by Laya in her statement. He deposed that on 15.05.2010, IO Vikas Kumar submitted seizure report (Ex.PW-1/A) and on 16.05.2010, IO Sanjay Rawat submitted a report dated 15.05.2010 (Ex.PW-4/K) regarding the arrest of the accused Okafor. IO Savitri Jaiswani also submitted a report dated 15.05.2010 regarding the arrest of the accused Laya (Ex.PW-10/C). He deposed that on 17.05.2010, he forwarded the sample marked as A-1 alongwith the test memo in duplicate to CRCL through driver Rajbir Singh.

26. He deposed that the statement of the accused Laya was recorded by Sh Akhilesh Mishra before IO Sanjay Rawat on the dictation of the

accused. He deposed that when Sanjay Rawat had produced the accused Laya before him, she had not been arrested. PW-10 was present in the room for some time in which the said statement was being recorded. The information provided by accused Laya was in respect of accused Okafor, who was a Nigerian national and to whom she was supposed to deliver the consignment of cocaine. IO Sanjay Rawat did not record the said information in writing separately and the same was included in the statement of the accused Laya. PW-10 deposed that in his presence, accused Laya did not disclose that she could point out Okafor's house. He further deposed that at the airport, the luggage of the accused Laya was locked and the same was opened by her during the search.

27. Sh Pramod Kumar, a public witness was examined as PW-12. He deposed that he generally drives taxi around the airport. On 15.05.2010 at about 8:15 am, he was standing near the VIP parking taxi stand when four or five persons including one lady approached him. They introduced themselves as NCB officers and told him that they have information that some persons will be coming out of the airport and at that time, he should be present. Thereafter, at about 11:15 am, one lady had come out of the VIP gate no.2 of the airport and she was carrying a white colour baggage. The NCB officer gave a letter to her and spoke something in English. After reading the said letter, the lady said that the NCB officers can search her. He deposed that thereafter, her baggage was also searched and on opening the white bag, seven cardboard cartons were recovered. The said cartons

were opened and they were found to contain packets packed in bright packing papers. The said packets were opened and they were found to contain white powder. Further, he deposed that the said powder was then checked by some objects, which were being carried by the said officers and he was informed thereafter that the said white substance was cocaine. The white powder from all the packets was then mixed together and weighed. Thereafter, some quantity of the powder was taken out separately and was hot sealed. The total weight of the white powder was found to be 1.780 kg. The remaining powder was also separately sealed. He deposed that the accused was made to sign all the sealed packets and he along with the other public witness was also made to sign on the said packets. He deposed that thereafter, they (PW-12, the accused and the other witness) were taken to the NCB office at RK Puram, where the accused was interrogated. Thereafter, they were taken to Nawada Metro Station, Uttam Nagar/Dwarka Mor because the lady had disclosed that she was supposed to deliver the white powder to some person, who would meet her there.

28. In his cross-examination, he deposed that the accused was carrying two bags – one of blue colour and the other of white colour – and the substance was recovered from the blue bag. He deposed that earlier he had deposed that the substance was recovered from the white bag but in fact, he was referring to the white powder at that point. He further deposed that he and the accused Laya were taken to Newada Metro Station at about 4-5 pm. The man who was supposed to deliver the substance was not found at the said Metro Station,

however, he was telephoned and called. He deposed that the accused had given the said person's phone number and he called him from his mobile phone. It took about 15 minutes for the person to reach the station and then the NCB officer had spoken to him. Thereafter, some written proceedings were conducted and PW-12 alongwith both the accused and NCB officers had signed on the said written proceedings. He further deposed in his cross-examination that on the date of incident, he remained with YR Yadav and the NCB team at the airport during the period 08:30 am-11:15 am and none of the NCB officers had left the VIP parking area at gate no.2.

29. Gurdev Singh, the owner of C-21, third floor, Hastal Vihar, Uttam Nagar was examined as PW-13. He deposed that he had rented the third floor of the said premises to Okafor around two/two and a half years prior to the date of the incident, on rent. He deposed that in May 2010, NCB officials had come to the said house and searched the premises, however, nothing was recovered from the premises. He was called by the NCB officials and was told to give his statement.

30. During his cross-examination, PW-13 stated that he was present at the tenanted premises when the accused Okafor was searched in presence of three/four NCB officials.

31. Sh Ramesh Kumar, who is taxi driver at Delhi Airport, was examined as PW-14. He deposed that in May, 2010 on a certain day, some 4-5 persons had come to him at the VIP parking gate of the airport at around 8:15 am and introduced themselves as NCB officers.

They showed their identity cards and told him about the said secret information. They asked him become a public witness, to which he agreed. At about 11:15 am, the accused Laya came out of the VIP gate and she was carrying two bags – one of blue colour and other of white colour. She was intercepted by the NCB officers and was informed about the secret information. Thereafter, she was served a notice for her personal search and her baggage search. The accused agreed to be searched by the lady police officer. He deposed that on the search of her luggage, seven bright coloured packets were found inside the blue bag. The said packets were opened and they contained white powder and the same tested positive for cocaine. Thereafter, he was called to the NCB office and his statement was recorded on the same day. He deposed that he was again called at the NCB office after six months. He further deposed that on the date of the incident, he had written his statement in Hindi. Thereafter, the NCB officers prepared his statement in English and read the contents of the same to him. However, he further deposed that the NCB officers had written a statement in English (Ex.PW-1/C), recording the proceedings which happened at the spot and then read over the contents to him PW-14. Thereafter, PW-14 had written the same statement in Hindi. He deposed that his signatures were not taken on the statement which was prepared by the NCB officers in English.

32. In his cross-examination, he stated that all the written proceedings were conducted in the NCB office and not at the airport. He stated that the bag of the accused was searched by the lady NCB

official.

Submissions

33. Mr Prabhakar, learned counsel appearing for Laya assailed the impugned judgment on several grounds. First, he submitted that the provisions of Section 50 of the NDPS Act were not complied with as the search was not conducted in the presence of a Gazetted Officer or a Magistrate. He relied on the decision of the Supreme Court in ***Arif Khan @ Agha Khan v. State of Uttarakhand: AIR 2018 SC 2123***. He submitted that in the present case although the contraband was allegedly recovered from Laya's luggage, she was also searched. And, in the aforesaid circumstances, it was mandatory that the provisions of Section 50 of the NDPS Act be complied with. He referred to the decision of the Supreme Court in ***S. K. Raju @ Abdul Haque @ Jagga v. State of West Bengal: (2018) 9 SCC 708*** in support of his contention that where a person is searched in addition to his luggage being searched, the provisions of Section 50 of the NDPS Act are required to be complied with.

34. Second, he submitted that Laya's luggage was not searched in her presence. He referred to the testimony of IO Savitri Jaswani (PW-3) and Vikash Kumar (PW-1) and contended that Savitri Jaswani had searched Laya in a public convenience while, her luggage was allegedly searched by other officers of NCB. He further submitted that this raises doubts as to the recovery of the contraband. He also submitted that the manner in which the search was allegedly

conducted also flouted the procedure as set out in the Drug Law Enforcement Field Officers Handbook prepared by NCB, which requires that the search of premises be conducted in presence of the occupier.

35. Third, he contended that the Drug Law Enforcement Field Officers Handbook requires that proceedings be videographed. However, in the present case, the officers of NCB had waited till Laya had exited the airport and had allegedly conducted the search, thereafter. Although, the search was pre-planned, no efforts were made by the officials of NCB to videograph the proceedings. On the contrary, the search was conducted just outside the airport which was outside the CCTV coverage area of the airport.

36. Fourth, he contended that there was complete absence of any technical evidence inasmuch as, the call detail records (CDRs) had not been analyzed. He submitted that although it was stated that Laya was talking to somebody on phone after exiting the airport, there is no material on record to indicate as to whether any investigations were conducted to ascertain the identity of that person. He submitted that although two mobile phones were allegedly recovered from Laya, there is no material to indicate that the analysis of the said phones established that she was in contact with the co-accused Okafor. He relied upon the decision of the Supreme Court in ***Tomaso Bruno and Anr. v. State of Uttar Pradesh: (2015) 7 SCC 178*** in support of his contention that scientific and technical evidence is required to be gathered by the concerned official.

37. Fifth, he submitted that the provisions of Section 52A of the NDPS Act were not followed. He submitted that the manner of drawing a representative sample has been prescribed and the same is required to be conducted in the presence of a Judicial Magistrate. He also referred to the decision of the Supreme Court in ***Union of India v. Mohan Lal & Anr.: (2016) 3 SCC 379***, wherein the Supreme Court had noticed the above aspect. He pointed out that in the proceedings before the Supreme Court, NCB had submitted that they do not draw samples at the time of seizure but do so in accordance with Section 52A of the NDPS Act. He submitted that the samples in the present case were drawn contrary to the provisions of Section 52A of the NDPS Act and not in conformity with the affidavit submitted by NCB before the Supreme Court in ***Mohan Lal & Anr.(supra)***.

38. Sixth, he submitted that although two independent witnesses had joined the proceedings, the seal used had not been handed over to either of them. He relied on the decision of the Coordinate Bench of this Court in ***Safiullah v. State (Delhi Administration): 1993 DLT 193*** and the decision of the Punjab and Haryana High Court in ***Gujrant Singh v. State of Punjab: (2007) 4 RCR (CRI) 226*** in support of his contention that it was necessary to hand over the seals to independent witnesses and to ensure that the same was not available with the custodians of the sample, to obviate any possibility of tampering of the samples.

39. Seventh, he submitted that the logbook of the vehicle was also not produced and the same detracts the credibility of the case set up by

the prosecution.

40. Eighth, Mr Prabhakar contended that none of the witnesses had deposed that the case property had not been tempered with. He relied on the decision of this Court in ***Hannan v. State: 2013 SCC OnLine DEL 1416*** in support of his contention.

41. Lastly, he pointed out that there were several inconsistencies in the testimony of the independent witnesses (PW-12 and PW-14). He stated that their statements had been recorded at a much belated stage, that is, after a delay about four months. PW-14 had not even identified Laya in the dock. Further, PW-14 had deposed that all written proceedings were conducted at the office of the NCB and not at the airport. He had also testified – contrary to the prosecution’s case – that contraband was recovered from the luggage of Laya on a search conducted by a lady NCB official. PW-14 and PW-12 had also deposed that they had visited NCB’s office on the date of the incident. However, that was not the case of the prosecution. He pointed out that PW-12 had deposed that Okafor had been apprehended near Dwarka/Newada Metro Station. However, this was neither the case of the prosecution nor the statement of Okafor recorded under Section 313 of the CrPC. PW-12 deposed that cardboard cartons have been recovered from the baggage. However, this too was not consistent with the case set up by the prosecution.

42. Mr Prabhakar and Mr Kanhaiya Singhal, learned counsel appearing for Okafor, submitted that the confession statement of Laya

or Okafor recorded under Section 67 of the NDPS Act could not be relied upon by the prosecution as the same had been retracted at the first available moment. Mr Prabhakar stated that although, the statement made by Laya had not been retracted when she had been produced before the court, however, he pointed out that at that stage, Laya did not have any counsel. She had retracted her statement on the first available occasion when she had been provided legal counsel. He further submitted that the question whether the confessional statement could be relied upon has been referred by the Supreme Court to a Larger Bench in ***Tofan Singh v. State of Tamil Nadu: (2013) 13 SC 344.***

43. Mr Kanhaiya Singhal contended that apart from the statement of Okafor and Laya recorded under Section 67 of the NDPS Act, there was no material whatsoever to establish any conspiracy between Laya and Okafor. He submitted that the said statements could not be relied upon. Firstly, for the reason that they were recorded while both Okafor and Laya had been detained by NCB officials. And secondly, for the reason that both Laya and Okafor had retracted their statements at the earliest opportunity. He submitted that Okafor could not be convicted solely on a statement of a co-accused or his statement recorded under Section 67 of the NDPS Act. He relied upon the decision of the Supreme Court in ***Kashmira Singh v. State of Madhya Pradesh: AIR 1952 SC 159*** in support of his contention.

44. Mr Singhal also referred to Section 53A of the NDPS Act and submitted that a statement made by any person, who was empowered

under Section 53 of the NDPS Act for investigating the offences under the Act, is admissible provided certain conditions are met. He submitted that none of those conditions were met in the present case and the provisions of Section 53A of the NDPS Act could not be circumvented by recording the statement under Section 67 of the NDPS Act.

Reasons and Conclusion

45. The first and foremost question to be addressed is whether provisions of Section 50 of the NDPS Act are applicable and whether the same were complied with. Admittedly, Laya was searched. Thus, plainly, provisions of Section 50 of the NDPS Act would be applicable notwithstanding that the recovery was made from the bag carried by her. This issue was considered by the Supreme Court in ***State of Rajasthan v. Parmanand and Anr.: (2014) 5 SCC 345***. And, the Supreme Court held as under:-

“15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No.1 Parmanand’s bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application.”

46. In view of the above, the question whether provisions of Section 50 have to be complied with in case a search of a person is carried is no longer *res integra*. ***In Raju @ Abdul Haque @ Jagga v. State of West Bengal***(*supra*), the Supreme Court had reiterated the above. The Court also referred to the Constitution Bench decision in ***Vijaysinh Chandubha Jadeja v. State of Gujarat: (2011) 1 SCC 609***, wherein the Court had held that provisions of Section 50 of the NDPS Act are mandatory. The court held that the concept of substantial compliance is not borne out from the language of the said Section, therefore, strict compliance with Section 50(1) of the NDPS Act is required.

47. The decision of the Supreme Court in ***State of Punjab v. Baljinder Singh and Anr.: (2019) 10 SCC 473*** has little application in the facts of this case. In that case, the contraband was recovered on search of a motor vehicle. In the aforesaid context, the Court held that merely because there was a non-compliance of Section 50 of the NDPS Act as far as personal search was concerned, no benefit could be extended to invalidate the effect of recovery from the search of the vehicle. It is material to note that the Supreme Court was not considering a question where recovery had been effected from a bag being carried by a person.

48. The next aspect is whether provisions of Section 50 have been complied with. The fact that Laya was not searched in presence of a Magistrate or a Gazetted Officer does not *ipso facto* mean that provisions of Section 50 were not complied with. The decision of the Supreme Court in ***Arif Khan @ Agha Khan v. State of Uttarakhand***

(*supra*), which was relied upon by the appellants, turned on its own facts. In cases where the suspect proposed to be searched, is duly informed of his/her right to be searched in the presence of a Magistrate or a Gazetted Officer and yet the said person voluntarily consents to be searched by the authorized officer; the provisions of Section 50 of the NDPS Act would stand complied with. This aspect was considered by this Court in a recent decision captioned ***Innocent Uzoma v. State: Crl. A. 139/2017, decided on 14.01.2020.*** Thus, merely because Laya was not searched in the presence of a Gazetted Officer or a Magistrate, would not invalidate her search or the recovery of the contraband from her bag.

49. In the present case, all of the witnesses present at the Airport had deposed that Laya was handed over a notice under Section 50 of the NDPS Act. PW-1 and PW-3 had testified that Laya was duly informed of her rights of being searched in presence of a Magistrate or a Gazetted Officer. She had, thereafter, desired to be searched by a lady officer and did not want her search to be conducted before a Magistrate/Gazetted Officer. All of the witnesses for the prosecution has testified to the aforesaid effect. The independent witnesses (PW-12 and PW-14) also testified that Laya was handed over a notice. She had read the same and thereafter, had consented to be searched by the lady officer. The notice under section 50 of the NDPS Act was brought in evidence (Ex.PW-1/B). The said notice also contains a noting made by Laya to the effect that she is permitting NCB lady officer to take her search and she does not need any Gazetted Officer

or a Magistrate to search her. It is established that Laya is familiar with the English language and the notice clearly informed her of her rights to be searched before a Gazetted Officer or a Magistrate, if she so desires. In view of the above, this Court is unable to accept that provisions of Section 50 of the NDPS Act were not complied with.

50. The next aspect to be considered is whether there was any infirmity in the search conducted by the NCB officials. Mr Prabhakar had contended on behalf of Laya that her baggage was searched in her absence and therefore, the said search is invalid. He also submitted that the same fell foul of the Drug Law Enforcement Field Officers Handbook of NCB, that required that the search be conducted in the presence of the person being searched. Mr Prabhakar referred to the testimony of PW-3 (Ms Savitri Jaswani). She had stated that she had taken Laya to the toilet in the airport and then searched her, but nothing was recovered. She stated that thereafter, she came out with Laya at the exit gate of the airport and there, other members of the team were conducting the search of the luggage of the accused (Laya). According to Mr Prabhakar, this clearly established that the search of Laya's baggage had been conducted in her absence. He submitted that this was also corroborated by the testimony of PW-1 (Shri Vikash Kumar). He testified that IO Smt. Savitri Jaswani took the personal search of the accused Laya and the other members started taking search of her luggage. Whilst PW-1 denied the suggestion that the baggage of Laya (accused) was searched while she was away with the lady official to the toilet area; it is apparent that the search of Laya's

baggage was conducted almost simultaneously. While, PW-3 (Savitri Jaswani) had searched Laya at a public convenience located outside the airport, the other officers had opened her bag and searched the same.

51. There is also inconsistency in the testimony of witnesses whether the said bag was locked. Whereas PW-10 (Shri Y. R. Yadav) deposed that the bag was locked and had been opened by Laya; the public witness (Shri Pramod Kumar) has unequivocally stated that the bag was not locked.

52. Their testimony as to the recovery is also not consistent. Whereas, according to the prosecution, the pouches containing cocaine were recovered from the blue bag; PW-12 deposed that the same were recovered from a white colored bag. However, on being cross-examined by the SPP, he corrected the same and stated that the recovery was made from the blue bag. He also deposed that on opening the bag, seven cardboard cartons were recovered and on opening the boxes, packets in bright packing paper were recovered. This evidence does not conform to the case of the prosecution. PW-12 testified that all documents other than the notice were prepared at the office of the NCB and he had signed them there.

53. PW-14 also deposed that all the written proceedings were done at the NCB office and not at the airport. Although PW-12 had also deposed that they had gone to Nawada Metro Station Uttam Nagar; both the public witnesses (PW-12 and PW-14) are consistent in their

testimony that they had accompanied the NCB officials to the NCB office. This is not the prosecution's case. Although PW-12 and PW-14 have signed the seizure memo in English, neither of them are proficient in English. PW-14 testified that on the date of the incident, he had written his statement in Hindi and then the NCB officials had written it in English. He then identified the said statement as PW-1/C as the statement written in English, which was written after he had written the same in Hindi. He then changed his testimony and stated that the statement written in English (PW-1/C) was written in English and readout to him and thereafter, he had written his statement in Hindi. The statement allegedly written by PW-14 on the date of the incident in Hindi is not on record.

54. The seizure memo (PW-1/C) indicates that "Boarding pass dt 13/5/2010 with tag No. 449845" was seized. Although the seizure memo does not indicate so, PW-1 had deposed (in his cross-examination) that the boarding pass did not have the luggage tag pasted on it and volunteered that the luggage tag filed on judicial record was affixed on the luggage. Apart from PW-1 and PW-3 testifying that Laya had collected her bags from the conveyor belt, none of the witnesses have deposed as to how the bag in question was identified as the one that was checked in by Laya. Concededly, the bag from which contraband was allegedly collected did not contain any document that would indicate the same as belonging to Laya. Surely, she would have the corresponding baggage tag with her.

55. Laya testified as DW1. She stated that she had two blue-

coloured bags and the bags produced in court did not belong to her. She was not specifically cross-examined on this testimony.

56. The fact that the seizure memo bears the signatures of the independent witnesses is quite meaningless in view of the fact that (a) none of them have testified that they had signed the same at the spot but testified – contrary to the case of the prosecution – that all documents (apart from the notice) were prepared at the NCB office; (b) that neither of the public witnesses were proficient in English; (c) that the testimony of PW-12 regarding the recovery of contraband from cardboard boxes is contrary to the facts as stated in the seizure memo; and (d) the alleged statement made in Hindi by PW-14, is not on record. In addition to the above, their evidence inspires no confidence as apart from contradicting themselves, their testimony is wholly inconsistent with the case set up by the prosecution on several counts. PW-12 had stated that from the airport, the NCB officials had taken Laya and him to Newada Metro Station. In his cross examination, he had described the proceedings in some detail including that he had called the person to whom the cocaine was required to be delivered from his phone. He had also written some facts on his hand (which he claimed was only a date) at the time of his testimony. He testified that YR Yadav and NCB team had stayed with him outside the airport at VIP parking area near gate no.2 till Laya had arrived and none of them had left the spot. PW-14 deposed that a lady official had searched the bag from which contraband was recovered. All of these assertions are inconsistent with the Prosecution's case.

57. In view of the above, there are significant doubts as to the case set up by the prosecution.

58. The next question to be examined is whether there was any infirmity in drawing the samples of the contraband and whether there is any doubt that the integrity of the samples was maintained. Mr Prabhakar had contended that the procedure established under Section 52A of the NDPS Act had not been followed and the same vitiated the entire process of seizure and sampling. He relied on the decision of the Supreme Court in ***Union of India v. Mohan Lal*** (*supra*) in support of his aforesaid contention. He also submitted that the sealed samples had not been handed over to independent witnesses and thus remained in the possession of the raiding/seizing party. It is stated that in the circumstances, tampering of the samples could not be ruled out. In addition, he pointed out that neither PW-1 nor PW-10 had deposed that the case property was not tampered with.

59. There is some confusion regarding whether samples are required to be drawn at the spot or whether they had to be drawn before a Magistrate. This question was considered by the Supreme Court in ***Union of India v. Mohan Lal*** (*supra*) and the Court held as under:-

“14. Section 52-A as amended by Act 16 of 2014, deals with disposal of seized drugs and psychotropic substances. It reads:

“52-A. Disposal of seized narcotic drugs and psychotropic substances.—(1) The Central

Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of—

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances and

certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) When an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.”

15. It is manifest from Section 52-A(2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory, (b) certifying photographs of such drugs or substances taken before the Magistrate as true, and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the

police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-sections (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.

18. Be that as it may, a conflict between the statutory provision governing taking of samples and the Standing Order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction.

19. Mr Sinha, learned Amicus Curiae, argues that if an amendment of the Act stipulating that the samples be

taken at the time of seizure is not possible, the least that ought to be done is to make it obligatory for the officer conducting the seizure to apply to the Magistrate for drawing of samples and certification, etc. without any loss of time. The officer conducting the seizure is also obliged to report the act of seizure and the making of the application to the superior officer in writing so that there is a certain amount of accountability in the entire exercise, which as at present gets neglected for a variety of reasons. There is in our opinion no manner of doubt that the seizure of the contraband must be followed by an application for drawing of samples and certification as contemplated under the Act. There is equally no doubt that the process of making any such application and resultant sampling and certification cannot be left to the whims of the officers concerned. The scheme of the Act in general and Section 52-A in particular, does not brook any delay in the matter of making of an application or the drawing of samples and certification. While we see no room for prescribing or reading a time-frame into the provision, we are of the view that an application for sampling and certification ought to be made without undue delay and the Magistrate on receipt of any such application will be expected to attend to the application and do the needful, within a reasonable period and without any undue delay or procrastination as is mandated by sub-section (3) of Section 52-A (*supra*). We hope and trust that the High Courts will keep a close watch on the performance of the Magistrates in this regard and through the Magistrates on the agencies that are dealing with the menace of drugs which has taken alarming dimensions in this country partly because of the ineffective and lackadaisical enforcement of the laws and procedures and cavalier manner in which the agencies and at times Magistracy in this country addresses a problem of such serious dimensions.”

60. In view of the aforesaid authoritative decision, it is clear that

samples are required to be drawn in compliance with Section 52A of the NDPS Act. It is also relevant to note that NCB had filed an affidavit before the Supreme Court in the aforementioned case affirming that it did not draw samples at the spot. This was noticed by the Supreme Court in Paragraph No. 13 of their decision. Whilst, it is clear that provisions of Section 52A of the NDPS Act are required to be complied with, it is also necessary to observe that the decision in ***Union of India v. Mohal Lal*** (*supra*) was rendered on 28.01.2016 and the seizure in the present case was effected in the year 2010. The Supreme Court had also noticed that there was certain confusion with regard to the said issue and most of the states and central agencies were following different practices. In the circumstances, the sampling of the illicit substance cannot be held to be invalid only for the reason that the samples had been allegedly drawn on the spot. Having stated the above, it is also necessary to observe that a close scrutiny would be required as to the manner in which samples were drawn and had been stored in order to sustain a conviction on the basis of the seizure.

61. Although the testimonies of the public witnesses are inconsistent and in some aspects, contrary to the case set up by the prosecution; the testimonies of the witnesses with regard to the drawing of the samples are consistent. The official witnesses have testified that contraband was recovered and the samples were taken at the spot. PW-1 had testified that on opening the blue bag, seven silver-coloured pouches were found. The said pouches were opened and they were found to contain transparent polythene packets. On

cutting the same, white-coloured powder was recovered. He testified that he took out a small quantity from each of the packets and all of them tested positive for cocaine. Because all the packets had tested positive for cocaine, they mixed the contents of all the pouches and made one packet and took out two samples from the same. These samples were marked as A-1 and A-2. PW-1 testified that he sealed the said two samples in a white envelope. Paper slips, which were signed by Laya as well as the two public witnesses, were affixed to the two samples marked as A-1 and A-2. The said paper slips were also signed by PW-1. These were then sealed with the seal of *Narcotics Control Bureau DZU-5*.

62. In view of the above, this Court is unable to accept that there is any apparent infirmity with the procedure of drawing of the samples as adopted by NCB.

63. The next question to be examined is whether it is established that the integrity of the sample was maintained.

64. PW-1 had testified that the said samples and the other case property was deposited at *malkhana* at about 2:15 PM (1415 hours). The photocopy of the *malkhana* register was also produced (Ex.PW-1/L). PW-6 (Insp. Akhilesh Kumar Mishra) testified that on 17.05.2010, he had removed the two samples and had handed over to Sepoy Rajbir for sending it to the CRCL for examination. But Rajbir (PW-9) testified that on 17.05.2010, Shri Y. R. Yadav had called him to his chamber and had handed over one packet sample marked as

A-1. This was duly sealed by *Narcotics Control Bureau Seal DZU-5* on the four corners. He testified that he had taken the said sample along with the forwarding letter to CRCL and handed over it to A. K. Maurya, Chemical Examiner, who had submitted a receipt for the same. The said receipt has been exhibited as Ex.8/B. Here is an aspect that raises certain concerns as to the chain of custody and the integrity of the sample. There is a material inconsistency in the testimony of PW-6 (Insp. Akhilesh Kumar Mishra) and the testimony of PW-10 (Shri Y. R. Yadav) and Shri Rajbir (PW-9). Insp. Akhilesh Kumar Mishra (PW-6) had deposed that he had withdrawn the samples from the *malkhana* and handed it over to Sepoy Rajbir for sending it to CRCL for examination. This is contrary to the testimony of Shri Y. R. Yadav (PW-10), who claimed that he had handed over the said samples to the driver (Rajbir). Rajbir, who deposed as PW-9, also confirmed that he had received one packet marked as A-1 from Shri Y. R. Yadav on 17.05.2010. However, there is no paper trail, which indicates that Insp. Akhilesh Kumar had handed over the said samples to Shri Y. R. Yadav to complete the chain of custody. On the contrary, he had testified that he had handed over the said samples to Rajbir. Shri Yadav (PW-10) has not testified as to how he acquired the possession of the sample marked as A-1. It is important to note that there is also an issue as to the possession of the seal in question (seal of *Narcotics Control Bureau DZU-5*). It has been established that the seal was first handed over by Shri Yadav (PW-10) to Shri Vikash Kumar (PW-1). PW-1 had testified that he had returned the seal to Shri Y. R. Yadav and entries had been made in the movement

register (which was exhibited as Ex.PW-1/M). Thus, according to PW-1 as well as PW-10, PW-10 – who was a part of the raiding party – continued to retain the possession of seal after 15.05.2010. The import of the above is that, concededly, PW-10 was in possession of the seal and he has also testified that he was in possession of the sample in question. However, there is no material on record to establish as to how he came in possession of the samples in question. He has also not testified that while the sample was in his possession it was not tampered with. In the given circumstances, this Court is unable to accept that NCB has established that the integrity of the sample was maintained. There is break in the chain of custody of the samples. It is well settled that the prosecution is required to establish the complete chain as to the movement of the sample in order to establish that the same had remained intact. In the present case, this chain had not been established as there is no material or evidence to indicate as to how PW-10 came in possession of the said sample. This does raises some doubts in the matter.

65. The next question to be addressed is whether there is any evidence on record to establish beyond reasonable doubt that Laya and Okafor had entered into a conspiracy committing an offence punishable under the NDPS Act. Concededly, there is no material on record other than the statement of Laya and Okafor recorded under Section 67 of the NDPS Act to establish that there was any conspiracy between Laya and Okafor. Both these statements had been retracted. The Trial Court had proceeded on the basis that the statements were

not retracted at the first available moment. This Court is unable to appreciate the aforesaid view. Both, Laya and Okafor, had retracted their statements immediately after being provided legal assistance. The importance of providing legal counsel cannot be understated and has been underscored in various decisions (see: ***M.H. Hoskot v. State of Maharashtra: (1978) 3 SCC 544***; ***Hussainara Khatoon v. State of Bihar: AIR (1979) SC 1369***; ***Sheela Barse v. State of Maharashtra: AIR (1983) SC 378***). Prior to providing the aid of counsel, both the accused were in custody and therefore, the fact that they had not retracted their statements immediately on being produced before a Magistrate – when they did not have any legal assistance – cannot be held against them. It is not disputed that they had retracted their statement on the first occasion after they were provided legal assistance.

66. Apart from the fact that the statements recoded under Section 67 of the NDPS Act had been retracted, it would be essential to examine their evidentiary value. In a recent decision of the Supreme Court in ***Surinder Kumar Khanna v. Intelligence Officer, Directorate of Revenue Intelligence: (2018) 8 SCC 271***, the Supreme Court had explained the evidentiary value of such statements.

67. There is a raging debate whether any statement made to officials of NCB would be admissible in evidence. It is contended that officials of NCB are police officers for all intents and purposes; therefore, any confessional statements made before them would be inadmissible in evidence. The NCB contends that their officials are

not police officers and therefore, the confessional statements made before them and recorded under Section 67 of the Act would be admissible in evidence. The NCB relies on the decision of the Supreme Court in *Kanhaiya Lal v. Union of India: (2008) 4 SCC 668*. The said decision has been doubted by the Supreme Court in a recent decision in *Tofan Singh v. State of Tamil Nadu*(*supra*)and the question whether officials of NCB are police officers has been referred to a larger bench. The consequential question whether the statement recorded under Section 67 of the NDPS Act is required to be treated as a statement under Section 161 of the CrPC or whether it is in the nature of the statement made under Section 164 of the CrPC, has also been referred to a larger bench.

68. Before proceeding further, it would be also relevant to refer Section 53A of the NDPS Act, which 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.”

69. It is apparent from the above that a statement, which is made and signed by a person before any officer empowered under Section 53 of the NDPS Act for investigation of offences during the course of any inquiry or proceeding by such officer, it would be relevant for proving in any prosecution, the facts contained therein. However, this is subject to certain conditions. There is no dispute that powers under Section 53 of the NDPS Act have been conferred on certain NCB officials and such signed statements are admissible in evidence provided the conditions as set out in Section 53A of the NDPS Act are met. Concededly, these conditions are not in this case. However, NCB does not seek to rely on the provisions of Section 53A of the NDPS Act but Section 67 of the NDPS Act.

70. Section 67 of the NDPS Act contains provisions which empower an officer to call for information. Section 67 of the NDPS Act is set out below:-

“67. Power to call for information, etc. – Any officer referred to in section 42 who is authorised in this behalf by the Central Government or a State Government may, during the course of any enquiry in connection with the contravention of any provisions of this Act,—

(a) call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provisions of this Act or any rule or order made thereunder;

(b) require any person to produce or deliver any document or thing useful or relevant to the enquiry;

(c) examine any person acquainted with the facts and circumstances of the case.”

71. The contention that a statement made under Section 67 of the NDPS Act should be read as evidence of the facts as stated therein is required to be considered in the context of the aforesaid provisions. It is, at once, clear that the import of NCB’s contention is that the provisions of Section 53A of the NDPS Act – which provide for certain conditions to be met before any statement is considered relevant – are effectively overridden by virtue of Section 67 of the NDPS Act. In other words, whereas a statement made under Section 53A of the NDPS Act can be read as evidence only in certain circumstances; according to NCB, the statement recorded under Section 67 of the NDPS Act is admissible in evidence and sufficient to sustain a conviction without meeting any of the conditions mentioned in Section 53A of the NDPS Act. This Court finds it very difficult to accept the aforesaid contention. The import of Section 67 of the

NDPS Act, certainly, cannot be to circumvent the provisions of Section 53A of the NDPS Act. However, it is not necessary to dilate on this issue any further as this question has been referred by the Supreme Court to a larger bench and the scope of Section 67 of the NDPS Act would be examined in the said matter [*Tofan Singh (supra)*]. Thus, for the purposes of these appeals, it would be apposite to proceed on the basis that a statement made under Section 67 of the NDPS Act is admissible. Having stated the above, it would be essential to examine the evidentiary value of such statements.

72. In *Kashmira Singh v. State of Madhya Pradesh (supra)*, the Supreme Court had held that a confession cannot be made as a foundation for conviction and can only be used in support of other evidence. In that case, the Supreme Court had relied upon the decision of the Privy Council in *Bhuboni Sahu v. R.: (1949) SCC OnLine EC 12*, wherein the Court had, in the context of a confession statement of an accused which was sought to be relied against a co-accused, observed as under:-

“It does not indeed come within the definition of evidence contained in Section 3 of the Evidence Act. It is not required to be given in the oath, nor in the presence of the accused, and it cannot be tested by a cross-examination..... Obviously, this evidence is of a weak type. It is a much weaker type of evidence than the evidence of an approver which is not subject to any of those infirmities.”

73. The Supreme Court also referred to the decision in *Emperor v. Lalit Mohan Chuckerbutty: ILR (1911) 38 Cal. 559*, wherein the

Court had held that such a confession can only be used to “*lend assurance to other evidence against a co-accused*”.

74. After referring to the aforesaid 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.”

75. The law laid down in ***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***. In that case, the Court after referring to various decisions observed as under:-

“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."

76. In ***Surinder Kumar Khanna***(*supra*), the Supreme Court referred to the earlier decisions and concluded as under:-

"14. In absence of any substantive evidence it would be inappropriate to base the conviction of the appellant purely on the statements of co-accused. The appellant is therefore entitled to be acquitted of the charges leveled against him. We, therefore, accept this appeal, set aside the orders of conviction and sentence and acquit the appellant."

77. In the present case, there is little doubt that the statement of Laya had been recorded while she was in effective custody of the officials of NCB. Although it had been suggested that she was served with the notice under Section 67 of the NDPS Act and had voluntarily come to the office of the NCB, it is obvious that this contention is without any merit. There is no doubt that Laya had little choice in the matter. She had been apprehended at the airport and had been served with the summons (allegedly) to appear before the NCB officials forthwith. It has also been established that Laya was effectively in the

custody of Savitri Jaswani, IO, who remained present with Laya all throughout. She remained with Laya even while her statement under Section 67 was recorded. Insp. Akhilesh Kumar (PW-6) had testified that he had recorded the voluntary statement of accused (Laya), who appeared at the office of DZU. He also testified that Shri Vikash Kumar, IO was present while the statement was being recorded. Thus, there were atleast three NCB officials present in the room where she was detained, while her statement was being recorded. Curiously, Laya's statement is in two parts. According to PW-6, the first part was concluded at about 3:30 PM. It is important to note that the last portion of the first part of the said statement is in question and answer form. The questions posed by PW-6 were dictated and are also recorded by Laya by her own hand. This also indicates that PW-6 had at least partly dictated the statement, which is alleged to be the voluntary statement of Laya. In the first part of her statement, which is stated to have been concluded at around 3:30 PM, Laya had disclosed the name of Okafor and his address. PW-6 had testified that during recording of the statement he did not give any information to the IO. However, after conclusion of the statement, Laya was arrested and her second part of the statement was recorded after she had identified Okafor, who had been produced before her.

78. Considering the circumstances, this Court has serious doubts whether the statement of Laya can be stated to be voluntary. She had been apprehended at the airport and there is no doubt that she was compelled to accompany the officials of NCB to their office. She had

been allegedly searched earlier. She was accompanied by Savitri Jaswani and she remained in the presence of at least two other NCB officials, namely, Insp. Akhilesh Kumar Mishra (PW-6) and IO Vikash Kumar. She had also been interrogated while she was in the vehicle on the way to the airport to the NCB office.

79. The prosecution's case regarding Laya's disclosure of Okafor and his address and their actions are also inconsistent.

80. If the testimony of PW-6 is accepted, he had not disclosed the contents of Laya's statement to the IO and the first part of the statement – where she had disclosed the name and address of Okafor – was concluded at 3:30 PM. Thus, the name of Okafor and his address would have been known to the other officials of NCB only after 3:30 PM on 15.05.2010. However, PW-10 (S. R. Yadav) had immediately, on reaching the NCB office (which is about 2:00 PM), directed that a team be constituted for apprehending the co-accused Okafor.

81. It is also important to note that PW-10 had testified that the IO Sanjay Rawat had produced Laya before him and he was present when her statement was being recorded. He testified that IO Sanjay Rawat had not recorded the information regarding disclosure of Okafor or his residential address separately. In his cross-examination, PW-10 stated that Laya's statement was written by Insp. Akhilesh Mishra in presence of IO Sanjay Rawat and on her dictation. He stated that he was present in the room while the statement was being recorded. She had disclosed information regarding one Nigerian Okafor and his

residence. The IO Sanjay Rawat had not recorded the said information in writing separately. Except in the statement of the accused (Laya), the said information was not recorded in any other document. And, he (PW-10) was not given the copy of the information. However, Sanjay Rawat had testified that he had left the NCB office at 2.15 PM to apprehend Okafor on the instructions of PW10.

82. There are significant inconsistencies in the testimonies of various witnesses as to how Laya's statement was recorded. According to PW-6, she had written down the statement herself. He had recorded her statement in the presence of IO Vikash Kumar. PW-3 (Savitri Jaswani) had stated that she was also present along with Laya. However, PW-10 Shri Yadav had stated that she had dictated her statement which was written by Akhilesh Mishra and the same was in presence of the IO Sanjay Rawat. Further, he was present in the room as well.

83. Apart from the above inconsistencies, it is material to note that insofar as disclosure of Okafor and his residential address is concerned, it only finds mention in the statement of Laya, which was produced and marked as Ex.6/A. Apart from this, there is no other material where the name of Okafor or his residential address is recorded. According to PW-6, the statement made by Laya was not disclosed till it was concluded, that is, about 3:30 PM. However, prior to that time, PW-10 (Sh S. R. Yadav) had already issued directions for apprehending Okafor. A team was constituted by Sanjay Rawat (PW-4) for the aforesaid purpose and the said team left the NCB office at

2:15 PM, that is barely fifteen minutes after Laya had been brought from the airport to the NCB office.

84. Although it has been stated that the name of Okafor and his address had been written on a rough paper, the same has not been produced on record.

85. Sanjay Rawat (PW-4) had stated in his cross-examination that the address was conveyed to him by Sh Y. R. Yadav at about 14:15 hours. He testified that Sh Y. R. Yadav had *“instructed him to interrogate (Okafor) and to bring him to NCB office.”*; Thereafter he stated that on his way to Hasthal Vihar (address of Okafor) he was informed by Sh Y. R. Yadav that accused (Laya) had disclosed that she was supposed to deliver cocaine to accused Okafor. This, plainly, cannot be believed.

86. The testimony of PW-10, PW-4 and PW-6 raise considerable doubts as to when the disclosure regarding Okafor was made by Laya. According to PW-6, it was only recorded in her statement which was made available after 3:30 PM (that is, after it was recorded). According to PW-10, Sanjay Rawat had produced Laya before him and he was present when her statement was being recorded. There is an apparent inconsistency between this testimony and that of Sanjay Rawat. Sanjay Rawat had testified that on instructions of Y. R. Yadav, he had constituted a team and had left the NCB office at 1415 hours (2:15 PM). Thus, the question of his being present when Laya's statement (at least the first part) was allegedly being recorded by PW-

6 doesn't arise. More importantly, at the material time, there was no disclosure made by Laya regarding Okafor. Sh Y. R. Yadav (PW-10) had testified that he had directed Sanjay Rawat to constitute a team to find about a co-accused on the basis of the disclosure made by Laya in her statement. However, there is no question of any disclosure being made by Laya in her statement prior to 2:15 PM. Laya along with the team arrived at the NCB office around 2:00 PM and recording of the first part of her statement was not concluded till 3:30 PM and prior to that, according to PW-6, it was not disclosed.

87. PW-6 stated that Laya was interrogated in the vehicle but he did not remember who interrogated her. He further stated that Y. R. Yadav had, after reaching the office, recorded the interrogation in writing. He testified that he recorded the name and address of the co-accused (Okafor) as furnished by Laya on rough piece of paper and handed it over to a team member. This testimony is not corroborated by PW-10. On the contrary, he stated that he was present in the room when Laya's statement was recorded and the information was with respect to one Nigerian Okafor and his residence. He stated that IO Sanjay Rawat did not record the said information in writing separately except in the statement of the accused Laya. And, he was not given the copy of that information.

88. It appears from the above that there is significant amount of confusion as to when name of Okafor and his residential address had cropped up. According to Sanjay Rawat, the same was informed to him by Shri S. R. Yadav (PW-10). PW-10 states that he became

aware of the same on the information being recorded in Laya's statement, which was not recorded separately. PW-6 adds another twist to it. He states that the said information had been recorded by PW-10 (S. R. Yadav) on a rough piece of paper that was handed over. These testimonies are not consistent and raise material doubt as to any theory of a conspiracy between the two appellants, Laya and Okafor.

89. As noticed above, the statement made by Laya was retracted and this Court is of the view that the same could not have been considered voluntary. Even, if the statement is considered as being made voluntarily, the same could not form the sole basis of Okafor's conviction. The evidentiary value of such a statement, as noticed above, can at best be corroborative and not sufficient to return or sustain a conviction.

90. In her statement (Ex.PW-6/A), Laya had stated that she was to receive \$2000 for delivering cocaine to Okafor. A search was conducted at Okafor's residence, however, there is no allegation that \$2000 were found during such search. This too indicates that there is little evidence to corroborate the statement made by Laya.

91. Okafor's statement also cannot be considered as voluntary. As deposed by PW-4 in his cross-examination, he was instructed to go and bring Okafor to the NCB office. Thus, clearly, Okafor had not come to the NCB office voluntarily. He was confined to the said office and his statement was recorded in the said circumstances. Further, there was really no occasion for Okafor to have made any

voluntary statement. Considering that no incriminating evidence was found in his residential house and him being searched. Okafor had, thereafter, retracted his statement. In his retraction, he had stated that he was coerced to sign the said statement. He stated that he was coerced to sign many blank papers. And, he had done nothing voluntarily.

92. It is also important to note that there was no follow up investigation, which would corroborate any of the facts as disclosed in the statements made by Laya and Okafor. Laya, in her initial statement (the first part recorded prior to 3:30 PM), had not disclosed that she had stayed with Okafor. She had mentioned her previous days in India and had stated that she had stayed for the first four days in a hotel but had been later called by one Chris and he let him stay in his house. She stated that during her stay, she met another Nigerian named Henry Onononkwu, who behaved like a priest. She did not state that she stayed at the house of Okafor. She was also questioned by PW-6. He asked her whether she could identify Okafor and she responded in the affirmative. However, thereafter, recording of her statement was stopped. In the meanwhile, Okafor was apprehended and he was brought to NCB office. Thereafter, the second part of Laya's statement was recorded and she allegedly identified Okafor and now stated that she stayed in his house for three days. Okafor also stated that Laya had stayed with him for three days. However, no further investigation was done as to when Laya had come to India last time. No other material was brought on record to even establish that

Laya had stayed at the residence of Okafor. His neighbours were not contacted to verify the same. Although the statements mentioned other persons (Chris, Onononkwa, Henry and Dave), but there is no material to indicate that any investigation was done to find out about their whereabouts.

93. At this stage, it would be relevant to refer to the decision of the Supreme Court in ***Mohd. Fasrin v. State: (2019) 8 SCC 811***. In that case, the Court found that the only material on the basis of which the accused were convicted was the statement of the co-accused and his own. In that case also, certain other persons had been named but no investigation had been carried out. In this context, the observations of the Supreme Court are relevant and are reproduced below:-

“6. As far as the present appellant is concerned, the only evidence, if it can be called that, is the statement of a co-accused (Accused 2) and his own alleged confession. As far as statement of co-accused (Ext. P-41) is concerned, in that the co-accused states in great detail as to how he came into contact with one other person also called Mohammed in Bombay who had instructed him to go to Manglapuram from Bombay. There he was again asked to come to Hotel Airline at Manglapuram where he met the said Mohammed of Bombay. It was that Mohammed of Bombay, who handed over the vehicle to him and told him that 7.4 kg of heroin is kept hidden in 7 packets in a false compartment beneath the front seat of the car. The only allegation with regard to the appellant is that after taking delivery of the contraband from Mohammed of Bombay, the co-accused was to take the heroin and hand it over to one Nalliappan. The said Nalliappan was to further hand over the heroin to the appellant.

Neither the said Mohammed from Bombay nor Nalliappan have been examined in the case nor have they been arrayed as accused. Therefore, the link evidence is totally missing. Furthermore, the allegation is only in the nature of hearsay that Mohammed had told the co-accused that he had to deliver the contraband to the present appellant. Even if we take the confession of the co-accused Hasan Mohamed (A-2) into consideration, it would only prove that Mohammed (from Bombay) had told the co-accused that Nalliappan would hand over the contraband to the present appellant. This evidence of a co-accused is a very weak type of evidence which needed to be corroborated by some other evidence. The confession of a co-accused gives a clue to the investigating authorities as to how to investigate the matter and against whom to investigate the matter. Thereafter, it is for the investigating officers to collect evidence against the said person who has been named by the co-accused. In the present case no such corroborative evidence has been led.

7. That brings us to the confessional statement of the appellant recorded by PW 1. Admittedly, this confession was recorded after the appellant was arrested. It is true that the issue, whether a statement recorded under Section 67 of the NDPS Act can be construed as a confessional statement even if the officer who has recorded such statement was not to be treated as a police officer, has been referred to a larger Bench in Tofan Singh v. State of T.N. [Tofan Singh v. State of T.N., (2013) 16 SCC 31 : (2014) 6 SCC (Cri) 196].

8. We, for the decision of this case, therefore, proceed on the premise that the confession is admissible. 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. No such material has been brought on the record of this case. 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. The confession of the co-accused, which was said to be a corroborative piece of evidence, has been discussed above and is of no material value. Therefore, other than the two confessional statements — one of the co-accused and the other of the accused, the prosecution has gathered no evidence to link the appellant with the commission of the offence. As such, without going into the legality of the admissibility of the confession, we hold that even if these confessions are admissible then also the evidence is not sufficient to convict the accused.”

94. There is yet another important aspect that was completely ignored by the Trial Court. According to the prosecution, Laya was accosted while she was trying to arrange taxi at the airport. PW-1 had testified that she was speaking to someone on her mobile phone. Two mobile phones were also seized. The report submitted by PW-1 as well as the seizure memo (PW-1/C) also records that she was speaking on the phone. However, PW-1 and PW-10 – contrary to the statement allegedly recorded at the material time – testified that she was trying to speak to somebody. Be that as it may, the fact is that Laya was in possession of two phones and obviously, she would have been in touch with somebody if she was speaking on the phone or trying to contact somebody. However, no investigation was done to even determine as to who Laya was in touch with. In order to sustain an allegation of conspiracy, it must be established that there was some

meeting of minds of the co-conspirators. Clearly, examination of call record details would indicate whether Laya was in touch with Okafor. However, the fact that no such material/evidence has been brought on record, raises considerable doubt whether they were ever in touch with each other. In the circumstances, the prosecution has failed to establish that there was any meeting of minds between Okafor and Laya to sustain an allegation of conspiracy.

95. In view of the above, this Court is unable to sustain the conviction of Okafor. He is, accordingly, acquitted of the charges for which he was convicted (commission of an offence under Section 29 of the NDPS Act). Accordingly, Laya is also acquitted of committing an offence under Section 29 of the NDPS Act and her conviction is set aside.

96. Laya's conviction for commission of an offence punishable under Section 21(c) of the NDPS Act also cannot be sustained, as there was no charge framed against her for committing the said offence.

97. As noted above, there is considerable doubt as to the manner in which the contraband was recovered and the chain of custody of samples has also not been established. The possibility of tampering with the same also cannot be ruled out. Thus, her conviction for committing of an offence punishable under Section 23(c) of the NDPS Act also cannot be sustained.

98. Accordingly, the appeals are allowed. The appellants are

acquitted.

99. Laya and Okafor are two days short of completing their prison sentence. They shall be released forthwith. The Jail authorities shall act on the basis of the order as uploaded on the website of this court without any further communication.

MAY 13 2020
MK/RK

VIBHU BAKHRU, J

