

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 22.02.2021

+ **CRL. A. 220/2016 & CRL. M. (BAIL) 1664/2017 & CRL. M. (BAIL) 7725/2020**

**MOKIBE MR LEEPILE MOSES @
PATRICK UMECHUKWU**

.....Appellant

versus

NARCOTICS CONTROL BUREAU

..... Respondent

Advocates who appeared in this case:

For the Appellant :Mr Harsh Prabhakar, Advocate.

For the Respondent :Mr Rajesh Manchanda, SPP.

**CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU**

JUDGMENT

VIBHU BAKHRU, J

1. The appellant has filed the present appeal, *inter alia*, impugning a judgment dated 27.01.2016 whereby he was convicted of committing an offence punishable under Sections 21(c) and 23(c) read with Section 28 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter the 'NDPS Act').

2. He also impugns an order dated 30.01.2016, whereby he was sentenced to undergo (i) ten years of rigorous imprisonment for the offence punishable under Section 21(c) of the NDPS Act along with a fine of ₹1 lakh and in default of payment of fine, to undergo simple imprisonment for two months; (ii) ten years of rigorous imprisonment for the offence punishable under Section 23(c) read with Section 28 of the NDPS Act along with a fine of ₹1 lakh and in default of which, to undergo simple imprisonment for two months; and (iii) five years of rigorous imprisonment for the offence punishable under Section 21(b) of the NDPS Act along with a fine of ₹50,000 and in default of which, to undergo simple imprisonment for one month. All the sentences were directed to run concurrently and his period in custody as an undertrial was directed to be set off against the sentence awarded to him.

3. The case of the prosecution is that on 08.06.2011, the Intelligence Officer, NCB, DZU, received information that one parcel pertaining to Airway Bill No. 9473329 lying at Dart Air Services Pvt Ltd (Express Tower, A-50/4, Mayapuri Phase – 1, New Delhi-110064) contains Heroin. The same was booked by ‘Mr. Mokibe Leepile Moses or Mr. Mosike’ and he may come to the office of Dart Air Services Pvt. Ltd. (hereafter ‘Dart Air’) on 08.06.2011 to inquire about the parcel. The said information was reduced to writing at 08:30 AM and was forwarded to Sh. YR Yadav, Superintendent, NCB, who directed that a team be constituted to take action necessary under law. Thereafter, a team consisting of Sh. Surender Singh, Sh. Rajesh

Kumar, Sepoy Narender and Sh. Babu Lal was constituted. Sh. YR Yadav, Superintendent, NCB, had issued the seal of 'NARCOTICS CONTROL BUREAU DZU 3' to Surender Singh (the IO) The raiding team proceeded from the office of the NCB in an official vehicle and reached the office of Dart Air. Upon reaching the courier agency, they joined Sh. Rajesh Kashyap and Sh. Rajiv Sharma as independent witnesses, for witnessing the search and seizure proceedings. The team mounted surveillance and waited for the suspect. At about 04:00 pm, a person who looked like an African national, came to the office and enquired about the said parcel. He was intercepted and questioned. Thereafter, the IO served him a notice under Section 50 of the NDPS Act. The person refused to search the raiding party and declined to be searched in the presence of a Gazetted Officer/Magistrate.

4. The parcel bearing Airway Bill No. 9473329 was produced and was found to contain three cardboard boxes marked as 'Tata Genuine Parts' and a photocopy of a Passport bearing no. N1033214 issued by Republic of Botswana was appended to it. The parcel bore the name of the shipper as "Mosike, New Delhi, P No. N1033214" and the name of consignee as Francis William, USA. The box bearing Airway Bill No. No. 9473329/A contained thirty-seven boxes of Tower Signal Light (TSL) and seventeen boxes of Premier Filter. On close inspection, it was found that the weight of the TSLs was unusually heavy. One TSL was broken and was found to contain suspicious white coloured powder. The same was tested with the help of the Field Testing Kit and it tested positive for Heroin. All TSLs were broken

and each was found to contain four pouches wrapped with black tape (totaling one hundred and forty eight pouches). Two representative samples of five grams each were drawn and marked as A-1 and A-2. The remaining off white powder was packed and converted into a parcel and the same was marked as A. The remaining packing materials, which were the TSLs, black tape pouches, TSL Boxes were kept in the same cardboard box, which was further kept in a white poly bag and was marked as B. Thereafter, the statement of the accused (the appellant herein) was recorded under Section 67 of the NDPS Act. He confessed to his complicity in the commission of the offence. The statements of the *panch* witnesses were also recorded under Section 67 of the NDPS Act.

5. According to the prosecution, the appellant disclosed his residential address as B-75, Hardev Nagar, Burari. He confessed that the drugs were packed at his residence and some drugs and packing material remained at his residence. On 09.06.2011, Rajesh Kumar, IO, disclosed the said information to Mr. Yadav, Superintendent NCB, who issued the authorization for searching the said residential premises. On his instructions, a raiding team consisting of two officers (G.S. Bhinder and Ms. Kiran Bala) and two Sepoys (Narender and Ved Prakash) was constituted. They were driven in an official vehicle by the driver Babu Lal to the location, that is, B-75, Hardev Nagar, Burari. The appellant also accompanied them. Two independent witnesses present at the location, were included in the proceedings. The door of the house was opened by one of the independent witness

(who was also the husband of the owner of the said premises) with a key provided by the appellant. The said residential flat consisted of three rooms. According to the prosecution, a white colour synthetic bag was recovered from the room in the middle. It contained a black coloured polythene, which contained off-white coloured substance. The said substance was tested on a Field Testing Kit and it was found to be Heroin. The said substance weighed 180 grams. Two samples of five grams each were drawn from the said substance and were placed in two transparent polythene packets. They were then kept in white envelopes, which were marked as A-3 and A-4. The remaining substance was kept in the polythene and was sealed in a *pullanda* marked as AA. In addition to the Heroin, some other articles such as TSLs, gear parts, air valve joints, packing materials, stickers, various tools, polythene, black tapes, screw drivers and other items were also recovered. The said packing material and spare parts were kept in a white synthetic bag, which was marked as C. According to the prosecution, currency notes of \$15,000 and ₹230/- were also recovered from underneath the mattress which was kept in the third room. The said currency notes were also seized. Thereafter, the accused was arrested. Charges were framed by the Trial Court against him, to which he pleaded not guilty and the matter was, accordingly, set down for trial.

6. Two of the samples drawn by the raiding team were sent to CRCL and the Chemical Examiner's Report confirmed that the said substance was Diacetylmorphine.

7. NCB examined nineteen witnesses to establish its case. The Trial Court concluded that the NCB had established the allegations made in the complaint and accordingly, convicted the appellant.

Submissions

8. Mr. Prabhakar, learned counsel appearing for the appellant has assailed the impugned judgment convicting the appellant on several fronts. First, he submitted that the prosecution had failed to establish that each of the pouches recovered during the raid at the premises of the courier agency contained Heroin. He submitted that although, one hundred and forty-eight pouches were allegedly recovered, the substance in each of the individual pouches was not tested. NCB had mixed the substance recovered from all the one hundred and forty-eight pouches and from the said mixture, two samples of five grams each were drawn. He submitted that this did not establish that each and every pouch contained Heroin. He relied on the decision of the Supreme Court in *Gaunter Edwin Kircher v. State of Goa, Secretariat Panaji, Goa: (1993) 3 SCC 145* and the decision of this Court in *Charlse Howell @ Abel Kom v. N.C.B.: (2018) 3 JCC (Narcotics) 153; Amani Fidel Chris v. Narcotics Control Bureau: CRL. A. 1027 of 2015, decided on 13.03.2020; Santini Simone v. Department of Customs: CRL. A. 1088 of 2017, decided on 05.10.2020; and Edward Khimani Kamau v. The Narcotic Control Bureau: CRL.A. 1113/2011, decided on 28.05.2015* in support of his contention that the procedure followed by the officials of NCB in

testing the alleged contraband was flawed and did not establish the substance recovered was Heroin.

9. Second, he submitted that the manner in which the samples were drawn was also in violation of the provisions of Section 52A of the NDPS Act. He referred to the decision of the Supreme Court in ***Union of India v. Mohan Lal and Anr.: CRL.A. 652/2012, decided on 28.01.2016*** and on the strength of the said decision, submitted that the samples drawn were not in conformity with the provisions of Section 52A of the NDPS Act.

10. Third, he submitted that the search proceedings were not video graphed. Even though the “Drug Law Enforcement Field Officers Handbook” required that the search and seizure ought to be video recorded to obviate any allegations of foul play. He submitted that this Court had also made observations in ***Mohd. Masoom v. State of NCT of Delhi: (2015) 219 DLT 271*** and ***Ram Prakash v. State: (2014) 146 DRJ 629*** to the effect that efforts must be made to conduct videography and obtain photographs. He submitted that the NCB had not produced any scientific evidence such as call detail records of the appellant to establish that he was present at the office of Dart Air, as alleged. He referred to the decision of the Supreme Court in ***Tomaso Bruno and Anr. v. State of Uttar Pradesh: (2015) 7 SCC 178*** and submitted that the Apex Court had drawn an adverse inference in a case where such steps had not been taken.

11. Fourth, he submitted that there was a serious possibility of the samples being tampered with as the *malkhana* Register, which was produced before the Trial Court, was in a dismal condition. He stated that the evidence on record establishes that the *malkhana* Register was in a torn condition. It was not paginated and was in fact, only a sheaf of papers. He stated that such a document could not be relied upon to establish that the samples and case property that had been deposited with the *malkhana* and had been safekept.

12. Fifth, he submitted that the testimonies of the independent witnesses were inconsistent and thus, the testimony of the said witnesses could not be relied upon. He pointed out that PW12 (Rajesh Kashyap) had failed to identify the appellant in the dock during his examination-in-chief. Further, during the course of his cross-examination, it was discovered that he had scribbled the details of his case including the Airway Bill Number, weight of the substance allegedly recovered on the sleeve of his white shirt. He had also noted down certain details on the palm of his left hand. He further testified that NCB had furnished a copy of his statement a day before and he had read the same. He submitted that PW12 also appeared to be a regular witness in NCB cases and he was also one of the witnesses for the prosecution in '*NCB v. Rafique Ahmad Sheikh*'. Apart from the above, his testimony is also inconsistent with the case set up by NCB in certain aspects. He submitted that the testimony of Sh G.S. Bhinder (PW14) and the testimony of Sh. Devender Singh (PW13) was also

inconsistent with the testimony of the other independent witness, Shankar Singh (PW15).

13. Lastly, Mr Prabhakar submitted that the whole case set up by the prosecution is improbable. He stated that there was no reason for a person who had booked a parcel with the courier agency to come back the next day to inquire about it. Further, in any event, there was no reason how any person could have predicted the same. He stated that the status of the consignment could easily be ascertained, either telephonically or online. He submitted that the conduct of the personnel of Dart Air was also suspicious. Admittedly, the said persons are required to verify the contents of any parcel before booking the same. However, PW11 (Rajeev Sharma) had testified that he did not scrupulously adhere to the procedure. He pointed out that the name of the consignor written on the Airway Bill was not the same as in his passport (the identification document). However, PW11 also testified that the name of the consignor is written on the Airway Bill on the basis of information furnished in the identification document. In this case, the Airway Bill mentioned the name of the consignor as 'Mosike'. However, the appellant's passport mentioned his name as 'Mokibe Mr. Leepile Moses'. The Airway Bill also did not bear the signatures of the customer.

14. Mr. Manchanda, learned SPP appearing for NCB countered the aforesaid submissions. He submitted that there is unimpeachable evidence that the appellant had booked the consignment in question.

He referred to the testimony of PW11 (Rajeev Sharma), who had testified that the consignment pertaining to the Airway Bills (Ex. PW8/23, Ex. PW8/24 and Ex. PW8/25) was booked by the appellant.

15. He submitted that there was no flaw in the search and seizure procedure adopted by the NCB and in any event, the same did not prejudice the rights of the appellant. Mr. Manchanda conceded that the sampling was not in conformity with the Standing Order 1/89 issued by the Government of India and the decisions cited by Mr. Prabhakar supported the contention that the sampling was flawed. However, he submitted that the sampling procedure did not cause any disadvantage to the appellant. He relied on the decision of the Supreme Court in *Sumit Tomar v. State of Punjab: (2013) 1 SCC 395*, in support of his contention. He also referred to the decision of the Supreme Court in *State of Himachal Pradesh v. Pirthi Chand and Anr.: (1996) 2 SCC 37* and submitted that every deviation in the procedure does not necessarily lead to the conclusion that the recovery of articles pursuant to an illegal search, is not relevant. He submitted that in *Radha Kishan v. State of Uttar Pradesh: AIR 1963 SC 822*, the Supreme Court had further held that evidence obtained by illegal search and seizure could not be rejected. He also relied on the decision of the Supreme Court in *Khet Singh v. Union of India: (2002) 4 SCC 380* and submitted that even if there is a procedural irregularity in conducting the search and seizure, it does not necessarily become inadmissible.

16. Next, Mr. Manchanda submitted that even if there was any doubt as to the substance recovered from the office of the courier agency, there could be no doubt as to the substance recovered from the residence of the appellant. He submitted that both Ms. Hardeep Singh (PW16) – the owner of the premises tenanted by the appellant – and her husband, Devender Singh (PW13) had testified that the appellant was a tenant of the said premises bearing no. B-75, Hardev Nagar, Burari. He submitted that there was no flaw or irregularity in conducting the search in the said premises and the testimony of the independent witnesses (Sh. Devender Singh, PW13 as well as Mr. Shankar, PW15) clearly established that 180 grams of Heroin had been recovered from the appellant's residence.

Reasons and Conclusion

17. NCB's case is founded on the alleged recovery of 2.850 kilograms of Heroin from the parcel allegedly booked by the appellant at Dart Air as well as, on the alleged recovery of 180 grams of Heroin from the appellant's residence. It would be apposite to separately examine the case set up by NCB regarding these recoveries as the evidence led by NCB to establish the same is not common.

Re: Alleged Recovery of 2.850 kgs of Heroin from the Office of Dart Air.

18. It is NCB's case that Sh. Surender Singh, IO had received secret

information from a reliable source that a parcel containing Heroin, with the Airway Bill bearing no. 9473329 is lying at the office of Dart Air at Express Tower, A-50/A, Mayapuri, Phase-I, New Delhi. Surender Singh, IO, who was examined as PW8 testified to the aforesaid effect. According to his testimony, he was also informed that the parcel in question was booked by an African national named Mokibe Mr Leepile Moses or Mosike and he may come to the courier agency on 08.06.2011 to enquire about the status of that parcel. He reduced the said information into writing (Ex.PW 7/1) and placed the same before Sh. Y. R. Yadav, Superintendent, NCB. He testified that on the direction of Sh. Y. R. Yadav, he constituted a team comprising of IO Rajesh Kumar, Sepoy Narender, and driver Babu Lal. At about 8:55 AM on 08.06.2011, Sh. Y.R. Yadav, Superintendent, NCB, issued him the seal of 'Narcotics Control Bureau DZU3' and an entry regarding the same was made in the Seal Movement Register. PW8 identified his signature on the said Register (Ex.PW-7/2). He stated that he took the necessary material such as the IO Kit, Field Testing Kit, weighing machine, blank papers etc. and proceeded to the courier agency/office of Dart Air in a government vehicle bearing no. DL-9C-0125. The team reached the office of the said courier agency at about 10:00 AM. PW8 testified that on reaching the said office, he met Sh. Virender Nautiyal, CEO, Dart Air and they (the raiding team) introduced themselves to him. He stated that he also requested that two independent witnesses be arranged to be present during the search and seizure proceedings. On his request, Sh. Rajiv Sharma and Sh. Rajesh Kashyap agreed to remain present as independent witnesses.

PW 8 testified that thereafter, they kept surveillance at the said courier company. At about 4:00 PM, one person came to the agency who appeared to be an African national. He started making enquiries from the reception of the courier agency and at that stage, they intercepted him. He testified that he asked the said person (the appellant) his name and the purpose of his visit. The appellant identified himself as Mokibe Mr. Leepile Moses @ Mosike and, also informed him that he had come to enquire about the status of his parcel bearing Airway Bill No. 9473329 which he had booked on 07.06.2011. PW8 also identified the appellant in the Trial Court during his examination-in-chief. He further testified that they introduced themselves to the accused (appellant) and also informed him about the secret information received by them. He stated that thereafter, he issued a notice under Section 50 of the NDPS Act to the suspect (the appellant) and explained to him his legal right to be searched in presence of a Gazetted Officer or a Magistrate. However, the accused declined to be searched before such officers and he also wrote the said response on the notice issued to him under Section 50 of the NDPS Act. The said notice (Ex.PW 8/1) was signed by the suspect (appellant) as well as the independent witnesses. PW 8 also identified his signature on the said notice.

19. He stated that thereafter, IO Rajesh Kumar conducted a personal search of the appellant. However, nothing incriminating was found during the personal search.

20. PW 8 testified that thereafter, the parcel in question was brought for inspection/search by the witnesses who were working at the office of the courier agency/Dart Air. He testified that the parcel comprised of three cardboard parcels and “TATA Genuine Spare Parts” was embossed on them. He stated that three copies of the Airway Bill and a copy of the Passport of the accused was also attached to the packet with the Airway Bill No. 9473329/A. The other packets were numbered 9473329/B and 9473329/C. The consignee’s address was written on the parcel with the Airway Bill No. 9473329/A and consignor’s particulars were also mentioned on the airway bill as Mosike, New Delhi, with Passport No. N1033214. The consignee was mentioned as Francis Williams, 619, K Street North East Washington DC, USA.

21. PW8 deposed that the box with the Airway Bill No. 9473329/A was opened and was found to contain thirty-seven Tower Signal Light (TSL) boxes and seventeen boxes of Premier Filter. Each box of filters contained two filters. Each box of TSL contained one TSL, two small indicators and one relay. He stated that one TSL was broken and it was found to contain some black pouches. On opening the black pouches, it was found that it contained another white pouch and, on further search, it was found that it contained off white coloured powder. A small quantity of the said powder was tested with the help of the Field Testing Kit and was found to be Heroin. The remaining TSLs were also broken. Each TSL concealed four pouches and, similar off-white powder was found in each of those pouches. He

stated that the entire white powder was collected in a polythene and was properly mixed. Thereafter, a small pinch of the said powder was tested on the Field Testing Kit and yielded positive result for Heroin. The entire powder weighed 2.850 kilograms. Thereafter, two samples of 5 grams each were drawn from the said material and, the same were kept in a transparent zip lock polythene pouch and, then kept in two separate white envelopes which were marked as A1 and A2. The remaining recovered Heroin was wrapped and stitched in an off-white marking cloth. The said parcel (*pullanda*) was marked as A. The set of broken TSLs, two indicators, relay and empty pouches was kept packed in the same box from which it was retrieved. The said boxes were then kept in the cardboard box with the Airway Bill No. 9473329/A and that box was kept in a white coloured polythene bag marked as B.

22. The remaining two cardboard boxes – box no. 9473329/B and 9473329/C were opened. The first box (bearing no. 9473329/B) contained ninety-six Premier Filters and each box contained two filters. However, nothing incriminating was found in the said boxes. The contents of the second box (bearing no. 9473329/C) also contained ninety-six Premier Filters with one box containing two filters each. Nothing incriminating was found in this bag as well.

23. PW-8 stated that he prepared a *panchnama* and issued summons under Section 67 of the NDPS Act to the accused (the appellant). The *panchnama* was signed by both the independent witnesses and the

search procedure, which started at about 04:10 PM on 08.06.2011 concluded at about 7:00 PM. PW-8 stated that he issued summons to the two other witnesses. He seized copies of the Airway Bills as well as a copy of the Passport of the accused. He stated that on returning back to the office, he returned the seal to Sh. Y. R. Yadav, Superintendent, NCB, at 8:10 PM and made an entry in the Seal Movement Register. He also testified that he deposited the case property, seized the Heroin samples and Test Memo Form with the *malkhana* In-charge, who made an entry in the *malkhana* Register (Ex.PW-5/A). Thereafter, on 09.06.2011, he submitted his Seizure Report under Section 57 of the NDPS Act (Ex.PW-7/6). PW-8 identified his signature on the same. In addition to the above, he also testified as to the statements made under Section 67 of the NDPS Act by Ms. Hardeep Kaur (owner of the premises let out to the appellant) and Sh. Shankar Singh.

24. The testimony of IO Rajesh Kumar, who was examined as PW-4, is more or less consistent with the testimony of Sh. Surender Singh (PW-8). However, his description of the packaging of the contraband allegedly recovered from the TSL is somewhat different. According to him, on breaking the TSL, small pouches wrapped with black tape were recovered and each pouch contained white powder. He did not testify that the black pouch contained a white coloured pouch which, in turn, contained the white powder as testified by PW-8. In addition, he testified that Sh. Surender Singh (PW-8) had seized the invoices of the Airway Bills. However, it does not appear that there are any

invoices pertaining to the consignment on record.

25. Sh. Virender Nautiyal, CEO, Dart Air, was examined as PW-10. He introduced Sh. Surender Singh (PW-8) to Sh. Rajeev and Sh. Rajesh, two of his employees, who were there at the reception area of his office, for the purpose of witnessing the proceedings. He stated that he left office at about 10:30-10:45 AM and returned in the evening at about 6:30 PM. He was informed that the shipper of the parcel in question had come to the office and was caught by the NCB officials. In his cross examination, he confirmed that the Department of Customs had issued rules, which are applicable to courier companies. He accepted that the rules required that each and every packet that is booked for shipment to be opened and checked. However, he stated that they did not follow the said procedure. He stated that according to the rules, a copy of the invoice is to be obtained, which is supplied by the customer. He stated that they did not prepare the same but they obtained it from the consignor. He was not sure whether the invoice had accompanied the Airway Bill in question but he confirmed that no invoices were placed on Judicial Record.

26. PW4's testimony is important as according to him the invoices had been seized by PW8, IO Surender Singh. Since the invoices are obtained from the consignor, they would indicate whether the parcel was booked by the appellant or not. However, no invoices were produced by the prosecution, even though PW-4 testified that they

were seized and PW-10 had testified that it was mandatory for them to take a copy of the invoice at the time of booking a consignment.

27. Sh. Rajeev Sharma, Operation In-charge, Dart Air, was examined as PW-11. He testified that on 08.06.2011 at about 10:30 AM, Sh. Virender Nautiyal had introduced Sh. Surender Singh, IO and other officials from the NCB to him and his colleague Sh. Rajesh. He stated that at 4:00 PM, the appellant had come and, enquired from him and Sh. Rajesh regarding the parcel that he had booked on 07.06.2011. The NCB officials who were standing nearby, intercepted him and showed him their identity cards. He was informed that he could be searched before a Magistrate or a Gazetted Officer but the accused (the appellant) had told them that they could search him. He stated that thereafter, the NCB officials told him and Sh. Rajesh to get the parcels that was booked by the accused on 07.06.2011. He also testified that the first cardboard box contained 37 TSLs and Filters. He deposed that nothing incriminating was found in the Filters. However, one of the TSLs which were broken by the NCB officials by dropping it on the floor, was found to contain four pouches, which were wrapped in black tape. On opening the said pouch, it was found that they contained off white coloured powder. He stated that the remaining lights (TSLs) were broken in a similar manner and each one of them was found to contain four pouches of off white coloured powder. The white powder was taken from two of the pouches and was tested. He confirmed that the powder from one hundred and forty-eight pouches was taken out and NCB officials placed the

powder recovered from those pouches into one transparent polythene and thereafter, drew samples for testing it on the Field Testing Kit. He stated that the NCB officials had informed him that the off white coloured powder had tested positive for Heroin. He also testified that two samples of five grams each were taken and sealed separately and, the remaining white powder was sealed using a white cloth.

28. The other independent witnesses, Sh. Rajesh Kashyap, was examined as PW-12. He stated that the officials of the NCB had come to the office of the courier agency. The CEO, Sh. Virender Nautiyal, had called him and Sh. Rajeev Sharma (who is in the Operation Department) and, introduced them to the said three officials from the Narcotics Department. He stated that the officials had told him that they had come to make enquiries with regard to the packets booked by a Nigerian. He stated that Sh. Rajeev Sharma confirmed that the Airway Bill that they were referring to was in respect of a parcel booked by a Nigerian. He stated that at about 4-4:30 PM, one Nigerian had come to their office. He could identify the said Nigerian. However, he stated that the accused present in court (the appellant) did not appear to be that Nigerian because that Nigerian was heavily built and his facial description was also different from the accused. He stated that from the three cardboard boxes, some lights and other electrical parts were recovered. The lights were heavier than what was mentioned and therefore, the NCB officials became suspicious. He testified that they dropped one of the lights on the ground so that they could open it. On breaking the said light, it was found that it

contained pouches which, in turn, contained some white powder.

29. It is important to note that PW2 testified that all the lights (TSLs) were not broken but one or two lights were broken and thereafter, the powder was taken out from the lights and was sealed. He stated that the remaining lights (without breaking them) were sealed in a similar manner. He testified that Sh. Surender Singh had prepared some documents, which were signed by him, Sh. Rajeev Sharma and the Nigerian. However, he did not recollect the contents of those documents. He stated that on the next day, he had gone to the office of the NCB and, had made his statement and affixed his signature on it (Ex.PW-8/11). He identified his signatures on the same. He testified that he recalled the weight of the powder recovered and it was more than two kilograms. On a query made by the Court, he had stated that there were thirty-seven to thirty-eight lights and the weight of the lights taken by the NCB officials was two kilograms and eight-hundred/nine-hundred grams. He also confirmed that the NCB officials had collected invoices, Airway Bills from Sh. Rajeev Sharma, who was an employee from the Operation Department.

30. Plainly, PW-12's testimony was not consistent with his statement (Ex.PW-8/11). At that stage, a request was made by the learned SPP for cross examining the said witness, which was allowed. In his cross examination by the learned SPP, he confirmed that he had written the statement (Ex.PW-8/11) out of his own free will. He accepted the suggestion that all TSLs recovered from the three boxes

were broken and four pouches from each of the TSLs were recovered.

31. PW12 was cross examined on behalf of the appellant. In his cross examination, he admitted that he had written down the time as 10-10:30 AM and his name on the palm of his left hand. He had written down the Airway Bill No. on the palm of his left hand. He had noted the number of the Airway Bill and weight 2.850 kilograms on the sleeve of the white shirt worn by him.

32. There are several questions that arise in the context of the evidence led by NCB. The first question that arises is why would a person who had already booked a consignment come to the courier agency on the next day to enquire about the parcel. Such enquiries could have been made telephonically and it may have been possible to make it online as well. However, Mr. Manchanda submitted that that is a matter of secret information and therefore, there is no evidence in this regard required to be led. This contention is not persuasive. It is possible that some aspects are not required to be disclosed as they may lead to revealing the identity of the secret informer. However, the question as to why was it necessary for the appellant to physically come to the courier agency to make an enquiry regarding his parcel that was accepted a day earlier, would certainly be a matter that would tie up the case of the prosecution. But, as is apparent, it does not appear that any evidence was led in this regard.

33. It is also material to note that in his cross examination, Sh.

Rajeev Sharma (PW-11) had stated that the accused did not fill the Proforma Invoice on 07.06.2011 and, had informed him that he would come on the next day, that is, on 08.06.2011 to fill up the same. However, no such explanation was given by any witness in their examination-in-chief. There is also no plausible explanation of why the appellant would not have filled up the Proforma Invoice on 07.06.2011. It is NCB's case that the accused had only come to make enquiries about his parcel. In his examination-in-chief, PW-11 had stated that the accused had come at around 4:00 PM and had enquired from him and Sh. Rajesh about the parcel that he had booked on 07.06.2011 for USA. PW-12 had also stated in his examination-in-chief, that a Nigerian had come to their office at about 4-4:30 PM and, had confirmed about the parcel from Sh. Rajeev Sharma. If the appellant had indicated to PW-11 (Sh. Rajeev Sharma) that he would come the next day to fill up the Proforma Invoice, there was no reason for PW-11 to not immediately inform the NCB officials (PW-4 and PW-8) when they introduced themselves and made inquiries about the parcels earlier in the day about the same, when they made enquiries about the parcel. On the contrary, PW-4 and PW-8 testified that they had informed Sh. Virender Nautiyal about the information in their possession and, had requested for two independent witnesses to join the proceedings. They were introduced to PW-11 and PW-12 who were stated to be working in the reception area. They were informed about the secret information received by the NCB officials. Surely, if PW-11 knew that the accused would come to fill up the Proforma Invoice, he would have informed PW-4 and PW-8 about the same.

However, none of these witnesses have testified to this effect. There is no evidence that these independent witnesses shared any information with the NCB officials. According to NCB, these witnesses were independent witnesses and were joined to witness the proceedings.

34. The next aspect is regarding the name of the appellant as mentioned in the Airway Bill. The said Airway Bill has not been filled in by the appellant. It is also relevant to note that none of the witnesses that testified had stated in their examination-in-chief, as to who had filled up the Airway Bill. However, PW-11, in his cross-examination, conceded that the Airway Bill in question had been filled up in his hand writing. Interestingly, the Airway Bill mentions the name of the appellant as 'Mosike'. But, that is not the appellant's name in his passport or any of his identification documents. The officials from Dart Air (PW-10 and PW-11) had confirmed that they were required to fill-up the details as per the identification documents. A copy of the passport was allegedly made available along with the Airway Bill, which mentioned the name of the appellant as 'Mokibe MR Leepile Moses'. It is also important to note that the Passport indicates that the Passport had been issued by the Republic of Botswana and not by the Federal Republic of Nigeria. Therefore, PW10 and PW11 could not have known that the appellant was a Nigerian. It is material to note that none of the documents pertaining to the shipment bear the signatures of the appellant.

35. It is important to note that the contraband allegedly recovered

from the parcel at the office of the courier agency cannot be stated to be in the possession of the appellant. He has thus, been convicted solely on the basis that he had booked a parcel through Dart Air and that parcel had the contraband concealed in it. It was thus, necessary for the prosecution to establish beyond any reasonable doubt that the appellant had booked the said parcels. This would have to be established by NCB beyond any reasonable doubt. However, the evidence led by the prosecution has several loose ends. There does not appear any other credible evidence, apart from the fact that the appellant is stated to have walked into the office of Dart Air to enquire about a parcel booked by him a day earlier. The name as entered by him in the Airway Bill does not match with his identification documents. The independent witness had declined to identify the appellant as a person who had walked into the office of Dart Air on the date in question. There is no evidence as to from where the automobile parts (TSL) had been purchased. Although, two of the witnesses have testified that the invoices were seized, however, there are no invoices on record. A Proforma Invoice, which was required to be filled up by the shipper, is also not on record. It is important to note that PW-11 and PW-12 who had joined proceedings as independent witnesses were not picked up as random witnesses to join the proceedings as claimed by NCB; but, they were the key witnesses for the purpose of identifying that the appellant had booked the package a day in advance.

36. The Trial Court has largely proceeded on the basis of the statement recorded by the appellant under Section 67 of the NDPS Act. However, in view of the decision of the Supreme Court in ***Tofan Singh v. State of Tamil Nadu: 2020 SCC OnLine SC 882***, the said evidence is not admissible.

37. The next important aspect is regarding the testing of the contraband. According to the witnesses, only few of the pouches had been tested on the Field Testing Kit. All the pouches were opened and the white substance recovered from them was mixed. According to the prosecution, the entire powder recovered was mixed and two samples were drawn from the mixture. There were in total one hundred and forty-eight pouches. It is at once clear that the procedure followed for testing the substance and drawing samples was not in conformity with the procedure that would lend sufficient credibility to the assertion that the entire white powder was Heroin.

38. In ***Gaunter Edwin Kircher v. State of Goa, Secretariat Panaji(supra)***, two sample pouches of *charas* weighing five and seven grams respectively, were allegedly recovered by the Enforcement Agency. The piece of 5 grams was sent to the Chemical Examiner for analysis but the other piece of seven grams, which was allegedly similar, was not chemically analyzed. The Supreme Court held that it could not assume that the seven grams recovered also contained *charas* and there was no positive proof that both the pieces recovered were *charas*.

39. In *Amani Didel Chris v. Narcotics Control Bureau* (*supra*), four brown bags were allegedly recovered from the accused. The substances recovered from the bags was mixed and weighed 1.5 kilograms and thereafter, 5 grams of the said substance was drawn and kept in a zip lock pouch. A Co-ordinate Bench of this Court held that the procedure adopted was contrary to the Standing Order No.1/88, dated 15.03.1988 issued by the Narcotics Control Bureau. The Court held that in circumstances where there is more than one container or package containing contraband, samples are required to be drawn from each container separately and then required to be tested the same on a Field Testing Kit. However, if the packages are identical in shape, size and weight then several of ten or forty packages may be prepared and thereafter, representative samples from each container/package in a particular lot be drawn and then sent for testing.

40. It is incumbent upon NCB to have at least tested and ensured that the contents of each of the pouches are tested on a Field Testing Kit and further, ascertain that each of the one hundred and forty eight packages were identical in volume, weight and size. However, the NCB officials had failed and neglected to do the same. On mixing the substance from each of the pouches, the identity of the substances in each pouch was lost and a sample drawn from the mixture did not establish that the content of the sample was identical to the substance in each of the pouches.

41. In *Edward Khimani Kamau v. The Narcotics Control Bureau (supra)*, the contraband was allegedly found in nine packets. The Investigating Agency had transferred the substance from the packages into one bag and thereafter, had drawn two samples. This procedure was found flawed and the court held that the analysis of the sample did not establish that all the nine packets contained Heroin.

42. Similarly, in *Charlse Howeli @ Abel Kom v. N.C.B. (supra)*, NCB had allegedly recovered 330 grams of Heroin which was packed in one hundred and sixty-six polythene strips which were concealed in ladies *lehangas*. The substance from the said strips was removed and the entire substance was weighed. Two samples had been drawn out of the entire substance collected at one place. The court following the decision of the Supreme Court in *Union of India v. Bal Mukund & Ors. (2009) 12 Supreme Court Cases 161*, found that the said procedure was not in compliance with the Standing Order No. 1/88, dated 15.03.1988 of NCB.

43. A similar view has been expressed by this Court in a recent judgment, in *Santini Simone v. Department of Customs (supra)*.

44. The contention that the manner in which the samples had been drawn was not prejudicial to the appellant, is wholly unmerited. The pouch from which the substance was allegedly tested was not weighed separately and, there is no evidence to establish that the substance recovered from the other pouches also contained Heroin. This

procedure must also be considered in the light of the decision of the Supreme Court in *Hira Singh & Anr. v. Union of India & Anr.*: (2017) 8 SCC 162, wherein the Supreme Court has held that irrespective of the quantity of the prohibited substance in a mixture, the weight of the entire mixture is to be taken into account for determining the conviction of the accused. Thus, clearly the procedure adopted by NCB was prejudicial to the appellant.

45. In addition to the above, there are also other aspects regarding recovery of the alleged contraband as noticed above that raise doubts as to the case set up by the prosecution.

46. According to PW-12, who was an independent witness, all TSLs were not broken and therefore, his testimony is destructive to the testimonies of the other witnesses that the substance from all pouches had been collected and mixed.

47. It is also material to note that PW-12 was cross examined and in his cross examination on behalf of the NCB and it was suggested to him that TSLs were recovered from each of the three cardboard boxes. However, it is not the prosecution's case that each cardboard box contained TSLs. Only one cardboard box is stated to contain TSLs. The other two boxes contained Filters and nothing incriminating was found in those boxes. The said suggestion was made to PW-12 in the light of his testimony that all the TSLs had not been broken and the

contraband allegedly concealed in the TSLs had been removed and mixed together.

48. In view of the above, this Court is unable to accept that NCB had established beyond any reasonable doubt that the appellant had booked a parcel with Dart Air that contained Heroin weighing 2.850 kilograms.

Re: Alleged Recovery of 180 grams of Heroin from the Premises of the Appellant.

49. According to the prosecution, the appellant's statement under Section 67 of the NDPS Act was recorded on 09.06.2011. PW4 (Rakesh Kumar, Intelligence Officer) had testified that the said statement was recorded at about 6:00-6:15 a.m. The same had been partly written in his own handwriting and the remaining part was written by one Sh. S.K. Sharma. In his statement, he had disclosed that he was residing at B-75, Hardev Nagar, Second Floor, near Burari. The appellant is alleged to have confessed that he had been packed Heroin at his residence and some packing material is kept there. On the same date, that is, on 09.06.2011 at about 8:30 AM, PW4 Rajesh Kumar recorded a "Secret Information Report", *inter alia*, recording that in his statement, the appellant had revealed that he was staying at B-75, Hardev Nagar, Second Floor, near Burari and he used to pack and conceal Heroin with the help of packing material at his residence. The said report records that *"if the search of the said*

residence has been taken, huge quantity of Heroin will be recover.” (Ex. PW7/3). It is relevant to note that although Ex. PW7/3 records the secret information, there is no reference as to how the said secret information was generated. It is not NCB's case that such information was provided by any secret informer. It is also not NCB's case that this was disclosed by the appellant. PW4 has been examined but, he too has not given any indication as to how the said secret information came in his possession.

50. Although, there does not appear to be any source of such secret information, on receipt of the said note (Ex. PW7/3), an authorisation for search was issued by the Superintendent, Sh. Yadav in favour of Sh. G.S. Bhinder, Intelligence Officer. He was authorised to search the said premises (B-75, Hardev Nagar, Second Floor, Burari) on the basis of the secret information placed before the Superintendent, Sh. Yadav.

51. It is the prosecution's case that Sh. G.S. Bhinder constituted a raiding team comprising of himself, Ms. Kiran Bala (IO), Sh. Narender (Sepoy) and Sh. Ved Prakash (Sepoy). The said raiding team proceeded to the appellant's residence and had recovered 180 grams of Heroin. Sh. G.S. Bhinder was examined as PW14. He testified that he had constituted the said raiding team. He further stated that Sh. Y.R. Yadav, Superintendent, NCB had issued him a seal of NARCOTIC CONTROL BUREAU, DZU I and after collecting the same as well as the Field Testing Kit, he had left the office of DZU at about 11:15 AM in a Government vehicle (bearing no. DL 12C 1168

along with the accused). He deposed that he reached Hardev Nagar at about 12:45 PM and on reaching the spot, they identified the appellant's residence. Thereafter, he contacted some persons from the locality or passersby and informed them about the purpose of his visit. On his request, the owner of the house and one other person, named, Shankar voluntarily agreed to join the proceedings. He testified that he introduced both the independent witnesses to the appellant and thereafter, the owner of the house took the key from the appellant and opened the same. He stated that the entire flat consisted of three rooms, a kitchen and a toilet. The first room was being used as a sitting room with some plastic chairs and a plastic table. In the middle room, there were various types of spare parts of motor vehicles. He testified that the NCB team searched the middle room and found a white coloured synthetic bag. On opening the said synthetic bag, they found a black coloured polythene containing off white coloured suspicious substance. The said substance was tested on a Field Testing Kit and yielded a positive result for Heroin. He further testified that from the third room, \$1500 and ₹230 were found under the mattresses and the same were also seized by him. The said currency was kept in a brown coloured envelope, which was sealed with the seal of 'Narcotic Control Bureau, DZU-I'.

52. It is important to note that none of the other members of the raiding team were examined. Although it is stated that Ms Kiran Bala (IO), Narender (Sepoy) and Ved Prakash (Sepoy) were a part of the

raiding team and had searched the appellant's residence, NCB did not examine them for the prosecution.

53. NCB's case regarding recovery of 180 grams of Heroin from the premises of the appellant rests on the testimony of G.S. Bhinder (PW14) and two independent witnesses Sh. Devender Singh (PW13) – who was described by G.S. Bhinder as the owner of the premises – and Shankar Singh (PW15). PW14 had testified that both the said witnesses happened to be at the spot and on his request, had agreed to join the proceedings.

54. Sh. Devender Singh, who was examined as PW13, testified that on 09.06.2011 at about 12:45 in the afternoon, he was standing in Gali No.2, Hardev Nagar, where his property is situated. He testified that he had rented his property (B-75, Second Floor) to one Leepile Moses on rent. He stated that he was approached by three-four persons including a lady and they told him that they were NCB Officials. The appellant was also present along with them. He stated that he was informed that drugs had been recovered from the appellant and it was apprehended that drugs were also concealed in his premises. He stated that he took the keys of the premises from the appellant and took the NCB officials to the tenanted premises. Another person, whose name was Shankar, was also standing there. He too joined the proceedings. He testified that on entering the house, the first room was being used as sitting room. On proceeding to the second room, they found car lights, filters, ring like structures lying around. He stated that the NCB

officials on searching the room also found one white polythene lying in the corner. On opening the same, it was found that it contained a black coloured *thaili*, which in turn contained off white coloured powder. He stated that the said substance was tested on some testing kit and he was informed that the said powder was Heroin. He also testified that NCB officials drew samples from the said substance and sealed the same. On a query posed by the court, he stated that his signatures were not taken on the paper slips. He stated that the remaining powder was weighed and it was found to be 180 grams. He further testified that the NCB officials proceeded to the third room where they found one *gadda* on the floor and from underneath the *gadda*, NCB officials recovered \$15,000 and ₹230. The same were put in a brown coloured envelope. He also clarified that the tenanted premises were in the name of his wife (Mrs Hardeep Kaur).

55. During PW13's testimony, one white coloured *pullanda* bearing the Mark AA was produced. It was opened and was found to contain one black coloured polythene. PW13 identified the said polythene as the one that was recovered from the premises of the accused. On opening the same, some light brown coloured powder, which was in small lumps was found. PW13 categorically stated that the powder recovered during the proceedings was off white and it was not of the colour of the powder that was produced in court. He was cross-examined by the learned SPP and in his cross-examination, he stated that he got confused and had now recalled that, he had signed the paper slips, which were attached to the sealed packages containing the

alleged contraband and the samples. But, he remains steadfast in his testimony that the powder produced in court was not of the same colour as recovered from the premises.

56. PW13 was cross-examined on behalf of the appellant. In his cross-examination, he stated that his residence was in Indira Nagar, which was about five kilometres away from the premises in question. He could not identify as to who was residing on the ground floor and the first floor of the premises in question (B-75, Hardev Nagar, Burari). He also stated that he used to visit the tenanted premises occasionally. On being questioned, as to how he was present at the spot (*gali* in which the premises were located) at the given time, he stated that he had come to know, at about 11:30 - 11:45 AM from a known person that some incident had taken place at some other place and as such he was required to go to the tenanted premises. On being further questioned, he stated that he did not remember the name of the person but he was residing in the same *mohalla*. He stated that he went to GTB Nagar where the said person had met him and informed him that some incident had taken place as referred above. He stated that he thereafter, went to the tenanted premises from GTB Nagar. He further stated that he went on a two wheeler. He stated in his cross-examination that the packet containing the contraband was recovered from the right corner after entering the second room and the gate of the second room was on the left hand side. He stated that the white bag in which black coloured polythene was kept was of paper. The white bag was also seized by NCB officials accompanied by Sh. G.S.

Bhinder (PW-14). He was emphatic in his statement that the white bag was not synthetic.

57. Sh. Shankar Singh was examined as PW15. He testified that he drives a taxi which belongs to one Amarjeet Singh. He stated that on 09.06.2011 at about 12:00 - 12:15 PM, he had gone to the residence of Amarjeet Singh to drop his vehicle and while returning from his residence, he was walking towards Burari *chowk* when he saw some persons standing at T-point *chowk* outside the said *gali*. He also stopped at the said point to see what was happening as lot of other public persons were also standing. One of the *Sardarji* present at the spot introduced himself as an NCB officer and told all the public persons present there that he desired to take the search of a Nigerian, who was standing with him and some public witnesses should come forward to witness the said search. He testified that along with the said Nigerian, another *Sardarji* was also present. He stated that he agreed to that request and accompanied the NCB officer, Nigerian and the other *Sardarji* along with two other NCB Sepoys to the second floor of the house, which was on the left side of the *chowk*.

58. He testified that the premises were opened by the *Sardarji* using the key given by the Nigerian. He stated that on opening the door, they entered the premises, which had plastic chairs and tables. He stated that they saw a white plastic bag kept near one of the said chairs and on opening of the white plastic bag it was found to contain a black polythene bag and the same in turn was found to contain a white

powder. He stated that NCB officials tested the said powder using a kit which had some small bottles and the NCB officials told them that the said powder was Heroin. He stated that thereafter, the said powder was weighed and it found to weigh 180 grams. Thereafter, two samples of five grams each were drawn from the said powder and kept separately in the envelopes. He stated that the envelopes were sealed using hot wax and he had put his signatures on the same. He stated that the signatures of the Nigerian and the *Sardarji* (the witness) were also taken on a paper and then, the said paper was used to seal the envelopes. The remaining powder was similarly sealed in a cloth *pullanda*. He stated that thereafter, they entered the second room and found a mattress lying there. On removing the said mattress, \$15,000 and some documents were found underneath. The said currency was kept in a brown envelope and the said envelope was sealed in a similar manner. In his cross-examination, he was confronted with his statement recorded earlier, wherein he had stated that on that date, he had gone to Hardev Nagar to drop some passengers. He stated that it was not so and he had gone to leave the vehicle at Amarjeet's house.

59. He was cross-examined on behalf of the NCB. He then resiled from his examination-in-chief and reiterated that the bag containing the substance was found in the middle room and not next to a chair.

60. It is apparent from the above that there are a number of issues that raise doubts regarding the alleged recovery of 180 grams of Heroin from the premises let out to the appellant. First of all, all the

material witnesses were not examined. As noticed above, the raiding team consisted of four members. However, apart from Sh. G.S. Bhinder, none of the other three members who had searched the premises were examined. There is also material inconsistency in the testimony of the two independent witnesses. Sh. G.S. Bhinder did not testify as to exactly from which spot in the house the contraband was recovered. He merely stated that it was recovered from the middle room. There was no explanation whether the contraband was kept in an almirah, kept in a drawer or any cupboard. According to G.S. Bhinder, it was kept in a bag in the room, which would mean that it was lying on the floor. According to examination-in-chief of PW 15, the said contraband was recovered near a chair, which would be in the first room, where some chairs and tables were kept.

61. Sh. Devinder Singh, PW13 stated that the recovery was made from the middle room. The bag was kept in a corner of that room.

62. Although the raiding team had sufficient opportunity to take photographs and record the search, the same had not been done.

63. Apart from the above, there is also an issue as to the receipt of secret information as noticed above. Clearly, there was no secret information that was received by PW4 and there is no evidence to such effect. Yet, secret information had been recorded on a slip and put up before the Superintendent, who accepted the same and issued the authorisation for the search.

64. There is also an issue as to how PW13 came to be present at the location. According to the prosecution, he was present there by coincidence. However, according to his testimony, it was not so. He had stated that he was informed by somebody that some event had happened and he had then proceeded to meet that person at GTB Nagar and thereafter, reached the spot. It is, thus, apparent that he had some information which had led him to come to the spot. However, PW13 concealed the name of the person who had called him to GTB Nagar. He also did not disclose the information received by him despite being cross-examined in that regard. His testimony in this regard is quite vague. It does appear from the above that he was asked to come to the spot. This raises serious doubts whether he is an independent witness who coincidentally happened to be present at the spot as claimed by NCB. The witnesses had testified that a number of persons had collected at the spot however, the reason as to why large number of persons would have collected at the spot has not been explained. According to NCB, it was a surprise raid. Thus, there was no reason for a crowd of persons, including the husband of the landlord, to be present at the spot when the NCB team arrived there. There is also some doubt as to how PW15 was present at the spot. According to his statement recorded at the material time, he was driving a taxi and had come to drop passengers. However, in his testimony, he stated that he had come to leave the vehicle, which belonged to one Amarjeet. He did not know the address of Amarjeet or the location of his house.

65. In addition to the above, there is inconsistency in the testimony of PW15 and the other witnesses. As noticed above, according to PW15, the contraband was recovered from the first room and not in the manner as testified by PW14.

66. There is also some discrepancy in the evidence relating to the recovery of currency from the residence of the appellant. While the impugned judgment proceeds on the basis that it established that \$1,500 were recovered from the residence of the appellant, the *panchnama* records recovery of \$15,000. PW13 and PW15 had also deposed that \$15,000 were recovered. However, PW14 (Sh. G.S. Bhinder) had testified that only \$1,500 were recovered from the premises of the appellant.

67. Lastly, on opening of the *pullandas*, Devinder Singh had emphatically denied that the substance produced in Court was of the same colour as allegedly seized.

68. Given the above, this Court is unable to accept that there are no doubts as to the recovery of 180 grams of Heroin from the premises in question as asserted by NCB. This Court is of the view that NCB has failed to meet the standard of proof for convicting the appellant for the offence for which he was charged.

69. In view of the above, the appeal is allowed and the appellant is acquitted of the offence for which he was charged. He is directed to be released forthwith, if not wanted in any other case.

70. The pending applications are also disposed of.

FEBRUARY 22, 2021
RK

VIBHU BAKHRU, J

