



\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Reserved on: 13th August, 2021Decided on: 4th July, 2022

+

CRL.A. 147/2016

CRL.M.(BAIL) 8037/2020

STEPHEN

..... Appellant

Represented by: Mr.Rajiv Bajaj, Advocate.

Versus

STATE

..... Respondent

Represented by: Mr.Subhash Bansal, Sr.Standing Counsel with Mr.Shashwat Bansal, Advocate for NCB.

+

CRL.A. 419/2016

CRL.M.(BAIL) 1638/2018

CRL.M.(BAIL) 874/2021

UDE STANELY CHIDI

..... Appellant

Represented by: Mr.Harsh Prabhakar, Ms. Anjana Prabhakar and Mr.Anirudh Tanwar Advocates.

Versus

NARCOTICS CONTROL BUREAU

..... Respondent

Represented by: Mr.Subhash Bansal, Sr.Standing Counsel with Mr.Shashwat Bansal, Advocate for NCB.

+

CRL.A. 564/2016

AISHA

..... Appellant

Represented by: Mr. Rakhi Dubey, Advocate.

Versus

STATE

..... Respondent

Represented by: Mr.Subhash Bansal, Sr.Standing



Counsel with Mr. Shashwat Bansal,
Advocate for NCB.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By these appeals, the appellants challenge the common impugned judgment dated 18th November, 2015 convicting the appellants for offence punishable under Section 23(c) NDPS Act read with Sections 28 and 29 of the NDPS Act. Appellant Ude Stanely Chidi was also convicted for offence punishable under Section 21(c) NDPS Act for being found in possession of 255 grams of heroin at his residence. Vide the order on sentence dated 21st November, 2015 the appellants were awarded rigorous imprisonment for 10 years and a fine of ₹1 lakh for offence punishable under Section 23 read with Sections 28 & 29 NDPS Act and Ude Stanely Chidi was also awarded rigorous imprisonment for 10 years and fine of ₹1 lakh for offence punishable under Section 21(c) NDPS Act and both the sentences awarded to Ude Stanely Chidi were to run concurrently.

2. Learned counsel for Ude Stanely Chidi states that the appellant has been wrongly convicted. Despite the fact that the premises of the petitioner was searched pursuant to the information, no videography or photography of the spot or even the residence was conducted to lend credence to the version of the investigating agency. Rajesh Kumar, the investigating officer who appeared as PW-9 clearly deposed that he did not take photographs of the premises of the appellant or of co-accused Aisha and further no photographs of recovery and search proceedings were also taken. The investigating agency failed to even prepare the site plan of the spot where raids were allegedly carried out. Reliance is placed on the decisions of this Court reported as (2014) 146 DRJ 629 Ram Prakash Vs. State and (2015) 219



DLT 271 Mohd. Masoom Vs. State of NCT of Delhi. The samples were drawn in breach of Section 52A of the NDPS Act and contrary to the law laid down by the Hon'ble Supreme Court in the decision reported as (2016) 3 SCC 379 Union of India Vs. Mohanlal & Anr. The evidence of the independent witnesses Anil Kumar and Ranbir Singh who were examined as PW-5 and PW-6 respectively is not worthy of credit. There are material contradictions in the testimony of the two independent witnesses. The independent witnesses have also contradicted the evidence of official witnesses in respect of time when the raid was conducted.

3. Learned counsel for Ude Stanely Chidi further contends that the seal after sealing of the pullandas was not handed-over to independent witnesses. Reliance is placed on the decision reported as (1993) 49 DLT 193 Safiullah Vs. State and (2007) SCC Online P&H 573 Gurjant Singh Vs. State of Punjab. Thus, integrity of the chain of custody of the contraband is doubtful and the witnesses have not deposed that while the case property remained in their possession the same was not tampered with. Log book of the vehicle used by the raiding team was not produced to corroborate the version of the witnesses. The witnesses have contradicted each other in relation to the colour of the contraband allegedly recovered. In view of the law laid down by the Hon'ble Supreme Court reported as (2021) 4 SCC 1 Tofan Singh Vs. State of Tamil Nadu the confessional statements recorded under Section 67 of the NDPS Act cannot be used as an incriminating evidence to convict the appellants. Since the quantity of heroin recovered from the house of Ude Stanely Chidi though claimed to be 255 grams is discrepant, hence he cannot be convicted for possessing narcotics drugs in commercial quantity. There is over-writing in the panchnama where quantity recovered is noted.



Further, as per the independent witness, the recovered drug was weighed along with the packets and the weight of the packet being approximately 5.5 grams the appellant cannot be convicted for possessing commercial quantity.

4. Learned counsel for Stephen states that sole basis of conviction of the appellant is the statement of the appellant recorded under Section 67 NDPS Act which cannot be used against him in terms of the decision of the Supreme Court in Tofan Singh Vs. State of Tamil Nadu (supra). There is no recovery of the alleged contraband from the appellant. The call records allegedly proved between the appellant Ude Stanely Chidi do not prove that the appellant Stephen was a conspirator with Ude Stanely Chidi. Even as per the learned Trial Court the only ground on which appellant Stephen has been convicted is because he is a friend of Ude Stanely Chidi.

5. Learned counsel for appellant Aisha states that her conviction is based on the testimony of Jyoti Rawat who identifies her as the person who booked the courier, however there is no record to prove the same. No register in relation thereto has been proved by the prosecution. The appellant has been falsely implicated in the case and no recovery has been made from her possession or pursuant to her disclosure. The appellant's husband died long back and she has a son to look after, thus a compassionate view be taken.

6. Learned counsel for the NCB submits that contention of learned counsel for the appellant that the samples allegedly recovered were drawn and seized contrary to the NDPS Act and the guidelines issued by the respondent deserves to be rejected. There is no violation of any provision of the NDPS Act much less Section 52A NDPS Act. Further Standing Order No. 1/88 and 1/89 are mere internal advisory guidelines of the Department



and have been duly complied with and have not been notified in the Gazette and thus not statutory law. The seized substance was tested separately by the UN Field Testing Kit and the same gave positive results and since the contraband was of the same colour and texture, the same was homogeneously mixed together and thereafter samples were drawn. Reliance is placed on the decision of the Supreme Court reported as AIR 2002 SC 1450 Khet Singh Vs. Union of India and AIR 2004 SC 3061 State of Punjab Vs. Makhan Chand. Reliance is also placed on the decision reported as (2013) 1 SCC 395 Sumit Tomar Vs. State of Punjab. It is stated that the decision of the coordinate Bench of this Court in Amani Fidel Chris Vs. NCB is not binding and in the present case there are two recoveries of commercial quantity of the contraband and hence heinous offence has been committed. Rajesh Kumar (PW-9) who had drawn the samples proved the Panchnama Ex.PW-9/B for recovery of 260 grams of heroin from the parcel and stated that 7 envelopes of contraband were recovered. Therefore each envelop was tested separately and each one gave positive result of heroin.

7. Learned counsel for the NCB further contends that the seizure of 255 grams of heroin from the house of Ude Stanely Chidi was proved by Jai Bhagwan PW-21, the investigating officer who exhibited the seizure memo dated 19th April, 2012 vide Ex.PW-21/D and stated that he recovered off-white colour powder which was tested with the help of Field Testing Kit which gave positive for heroin. The off-white colour powder weighed on the electronic weighing machine was 255 grams. The witnesses have not at all been cross-examined on these aspects and hence now a new case cannot be set up. The seals on the seized case property i.e. the contraband and the samples were found intact when they were received at the CRCL New Delhi



and hence there is no tampering with the case property. Minor contradictions in the time of search and seizure at the premises of Ude Stanely Chidi will not vitiate the entire trial and cannot be a ground to acquit the appellants. Version of the official witnesses is duly corroborated by the public witnesses. In view of the overwhelming evidence led by the prosecution, provisions of Section 35 NDPS Act is required to be invoked which provides for presumption of mental culpability of the accused persons and as per Section 54 NDPS Act once the conscious possession of contraband is proved, unless satisfactorily accounted for, it shall be presumed that the accused has committed an offence under the NDPS Act. No evidence has been led in defence by the accused to discharge the presumption raised against him.

8. Learned counsel for the appellant Ude Stanely Chidi in rejoinder submits that drawing of representative samples by the investigating agency is opposed to the principles of fairness and logic, as it cannot be presumed with determinative certainty much less proved, that the entire quantity of substance recovered is contraband. Reliance is placed on the decision reported as (1993) 3 SCC 145 Gaunter Edwin Kircher Vs. State of Goa, Secretariat Panaji, Goa. Further, the procedure adopted also stands foul of the Standing Order No. 1/88 and 1/89 issued by the Department of Revenue, Ministry of Finance, Govt. of India. Reliance is placed on the observations of the Hon'ble Supreme Court in the decisions reported as (2008) 16 SCC 417 Noor Aga Vs. State of Punjab & Anr. and (2009) 12 SCC 161 Union of India Vs. Bal Mukund & Ors. Reliance of the respondent on the decision in Sumit Tomar (supra) is misconceived as the Standing Orders as noted above were not applicable in the said case for the reason the investigating agency



therein was neither CBI nor DRI. Though the case of the prosecution is that similar laces were recovered from the house of the appellant Ude Stanely Chidi, however such laces are commonly and easily available in the market and there is no distinctive feature to identify them. Learned counsel for the appellant reiterates his contention claiming breach of Section 52A of the NDPS Act and that the conviction is contrary to the law laid down by the Supreme Court in Tofan Singh (supra).

9. Briefly case of the prosecution as per the complaint and documents filed therewith is that Rajesh Kumar, the investigating officer of the NCB received a secret information on 19th April, 2012 at about 9.30 AM that some narcotics drugs are concealed in a parcel of Aramex Courier with airway bill No. 3297128800, the parcel was destined for South Africa and is lying at Lancer Express Service, Subhash Nagar (in short Lancer). After reducing the information in writing, the same was conveyed to Senior Officer and a raiding team was constituted. Officers of NCB reached the office of Lancer where the investigating officer met Sunil Satija, an employee working in the office. On disclosing the purpose of the visit, Sunil Satija produced the suspect parcel which was in a pink polythene bag with the airway bill number as mentioned above, invoice cum packing list and ID of one Satyajit Sur. Name of the consignee was mentioned in the parcel as Ismael Haroon Patel, 29 King Edward Street, Tzaneen Limpopo Province, South Africa 0850, Phone number 0728875464 and name of the consignor was Satyajit Sur C-347, Sarita Vihar, New Delhi through Aramex Courier.

10. The parcel was opened and it contained two pieces of ladies sarees and seven pieces of fancy laces wrapped on cardboard. On minute checking



of the said cardboard it was found that carbon paper envelopes were concealed in between each of the seven cardboard pieces. On tearing the cardboard pieces off-white colour powder was found concealed in the carbon envelopes. On testing, the powder with Field Testing Kit, it was found to be heroin. The off-white powder was transferred in a transparent polythene, mixed homogeneously and on weighing the same it was found to be 260 grams. Thereafter two samples of 5 grams each were drawn from the recovered heroin and put in two separate zip lock pouches and kept in white paper envelopes. The two ladies sarees, laces and cardboards were kept in a pink polythene bag and converted into a separate parcel. Panchnama was drawn in the presence of witnesses along with the test memo in triplicate. Sunil Satija revealed that he had received the parcel from Space Courier, Safdarjung Enclave. When inquiry was conducted at Space Courier, Safdarjung Enclave, it was revealed that the same was received from one Sandeep Sharma of Concord Courier, Masjid Moth, South Extension. Sandeep Sharma of Concord Courier informed that he received the parcel from Satyajit Sur of A.S. Service, Masjid Moth, South Extension. Satyajit Sur, owner of A.S. Service revealed that the parcel was booked by a lady Aisha, R/o A-267, 4th Floor, Munirka Village, New Delhi.

11. Pursuant to this information received, on 19th April, 2012 at about 6.00 PM a raid was conducted at H.No. A-267, 4th Floor, Munirka Village, New Delhi and some passerby were requested to join the proceedings and one Lalit Rawat voluntarily agreed to join the raiding team. On knocking the door, one lady came out who revealed her name as Aisha. She was briefed by the members of the raiding team that search was required to be conducted and a notice under Section 50 NDPS Act was given to her. She



was explained her legal rights of being searched before a Magistrate or a Gazetted Officer. However, she refused to exercise the said right and stated that any lady NCB officer could conduct the search. Personal search of Aisha was conducted by Ms. Mehak Jain, investigating officer, but nothing incriminating was recovered in her personal search. One more person was present in the premises and his name was revealed as Stephen who hailed from Nigeria. Even on the search of the house, no incriminating item was recovered but some documents including POD of Track-on courier slips and judgment of Judicial Magistrate of Tirupura were recovered which were seized.

12. Aisha in her statement disclosed that the said parcel had been handed-over to her by Stephen for booking to South Africa. A notice under Section 50 of the NDPS Act was served on Stephen as well and he was made to understand his legal rights to be searched before a Magistrate or a Gazetted Officer. However, he refused to exercise the said right and stated that any NCB officer could conduct the search. On personal search of Stephen nothing incriminating was recovered. Summons under Section 67 NDPS Act were given to Aisha and Stephen.

13. Stephen revealed that the parcel bearing airway bill No. 3297128800 seized by NCB had been handed-over to him by one Stanely Chidi who was residing at H.No. A-17, Ground Floor, Vipin Garden, Uttam Nagar. This information was also reduced in writing and with the permission of the senior officer a raiding team was constituted which reached H.No. A-17, Ground Floor, Vipin Garden, Uttam Nagar at about 10.15 PM on 19th April, 2012. Some passerby were requested to join the proceedings and two persons, namely Ranbir Singh and Anil Kumar who voluntarily agreed were



joined in the raiding party. On knocking the door of H.No. A-17, Ground Floor, Vipin Garden, Uttam Nagar, one person opened the door. The investigating officer introduced himself and the members of the raiding team and showed the authorization for search and explained him about the information. The person revealed his name as Stanely Chidi.

14. Stanely Chidi was served a notice under Section 50 of the NDPS Act and was made to understand his legal right to be searched before a Magistrate or a Gazetted Officer. However, Stanely Chidi refused to exercise the said right and stated that the NCB officer could conduct the search. On the personal search of Stanely Chidi nothing was recovered but on the search of the house, in the left side room one double bed was found and on search of the boxes of the said double bed, one transparent polythene containing off-white powder was recovered. Further, 18 fancy laces packets which were identical to the laces which were seized from the parcel at Lancer Express were also recovered. The off-white powder on being tested with the help of Field Testing Kit gave positive for heroin. The off-white powder was found to be weighing 255 grams. Two samples of 5 grams each were drawn from the said substance and kept in two separate zip lock polythene pouches and thereafter in white paper envelopes which were duly marked. The remaining heroin in the polythene was converted into a cloth parcel, seized and sealed. The parcel, samples and the panchnamas were duly signed by the independent witnesses besides the investigating officer and the members of the raiding team.

15. It is the case of NCB that pursuant to the summons all accused tendered their voluntary statements under Section 67 of the NDPS Act in the office of the NCB. The case property along with the samples and test



memos were deposited with the malkhana incharge. Report in terms of Section 57 of the NDPS Act was submitted to senior officers. As per the FSL report as well, the two contrabands recovered were found to be heroin. Prosecution examined 25 witnesses. In their statements recorded under Section 313 Cr.P.C. plea of false implication was taken by the appellants, however no defence evidence was led.

16. Learned counsels for the appellants have vehemently relied on the decision of the three Judge Bench of the Hon'ble Supreme Court in Tofan Singh (supra) to contend that the only evidence against the appellants was their purported confessional statement made under Section 67 of the NDPS Act which as per the majority decision is inadmissible in evidence and there being no other material evidence on record against the appellants, judgment of conviction and order on sentence are liable to be set aside.

17. In Tofan Singh (supra) the majority answering the reference before it held:

“158.1. That the officers who are invested with powers under Section 53 of the NDPS Act are “police officers” within the meaning of Section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of Section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

158.2. That a statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act.”

18. Thus, in view of the law laid down by the Supreme Court, if the only evidence against an accused is his statement recorded under Section 67 of the NDPS Act by an officer invested with the power under Section 53 of the



NDPS Act, he would be a Police Officer within the meaning of Section 25 of the Evidence Act and the said confessional statement cannot be taken into consideration to convict the accused. However, if the confessional statement leads to recovery of a fact, the same would be admissible to the extent permissible under Section 27 of the India Evidence Act. In the present case as regards appellant Stephen is concerned, the only evidence against him is his statement recorded under Section 67 of the NDPS Act and as held by the Hon'ble Supreme Court the same cannot be taken into consideration to convict Stephen for offence punishable under the NDPS Act.

19. Therefore there being no other evidence against the appellant Stephen except his statement under Section 67 of the NDPS Act and there being no discovery of a fact pursuant thereto, Stephen is liable to be acquitted of the charges framed against him. However, in respect of appellant Aisha there is other evidence including the identification by Jyoti Rawat that Aisha had booked the parcel with the courier and as against Ude Stanely Chidi there is recovery of 255 grams of heroin, beyond their statements under Section 67 NDPS Act.

20. The other major contention of learned counsels for the appellants is that Section 52(A) NDPS Act has not been complied by the respondent. The three judges bench of the Hon'ble Supreme Court in Union of India vs. Mohanlal (supra) dealing with Section 52(A) of the NDPS Act held:

“12. Section 52-A(1) of the NDPS Act, 1985 empowers the Central Government to prescribe by a notification the procedure to be followed for seizure, storage and disposal of drugs and psychotropic substances. The Central Government has in exercise of that power issued Standing Order No. 1 of



1989 which prescribes the procedure to be followed while conducting seizure of the contraband. Two subsequent standing orders one dated 10-5-2007 and the other dated 16-1-2015 deal with disposal and destruction of seized contraband and do not alter or add to the earlier standing order that prescribes the procedure for conducting seizures. Para 2.2 of Standing Order No. 1 of 1989 states that samples must be taken from the seized contraband on the spot at the time of recovery itself. It reads:

“2.2. All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot.”

13. Most of the States, however, claim that no samples are drawn at the time of seizure. Directorate of Revenue Intelligence is by far the only agency which claims that samples are drawn at the time of seizure, while Narcotics Control Bureau asserts that it does not do so. There is thus no uniform practice or procedure being followed by the States or the Central agencies in the matter of drawing of samples. This is, therefore, an area that needs to be suitably addressed in the light of the statutory provisions which ought to be strictly observed given the seriousness of the offences under the Act and the punishment prescribed by law in case the same are proved. We propose to deal with the issue no matter briefly in an attempt to remove the confusion that prevails regarding the true position as regards drawing of samples.

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.

.....

31. To sum up we direct as under:

31.1. No sooner the seizure of any narcotic drugs and psychotropic and controlled substances and conveyances is effected, the same shall be forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application under Section 52-A(2) of the Act, which shall be allowed by the Magistrate as soon as may be required under sub-section (3) of Section 52-A, as discussed by us in the body of this judgment under the heading "seizure and sampling". The sampling shall be done under the supervision of the Magistrate as discussed in Paras 15 to 19 of this order.

31.2. The Central Government and its agencies and so also the State Governments shall within six months from today take appropriate steps to set up storage facilities for the exclusive storage of seized narcotic drugs and psychotropic and controlled substances and conveyances duly equipped with vaults and double-locking system to prevent theft, pilferage or replacement of the seized drugs. The Central Government and the State Governments shall also designate an officer each for their respective storage facility and provide for other steps, measures as stipulated in Standing Order No. 1 of 1989 to ensure proper security against theft, pilferage or replacement of the seized drugs.

31.3. The Central Government and the State Governments shall be free to set up a storage facility for each district in the States and depending upon the extent of seizure and store required, one storage facility for more than one districts.

31.4. Disposal of the seized drugs currently lying in the Police Malkhanas and other places used for storage shall be carried out by the DDCs concerned in terms of the directions issued by us in the body of this judgment under the heading "disposal of drugs".



21. Hon'ble Supreme Court in Mohanlal (supra) decided on 28th January, 2016 was dealing with Section 52(A) of NDPS Act as amended with effect from 30th April 2014 whereas in the present case recovery was effected on 19th April, 2012, i.e. prior to the amendment coming into force. Supreme Court noted that Section 52-A(1) of the NDPS Act empowers Central Government to prescribe by a notification, the procedure to be followed for seizure, storage and disposal of narcotic drugs and psychotropic substance and Central Government in exercise of this power issued Standing Order No.1 of 1989 which prescribes for the procedure to be followed while conducting seizure of the contraband followed by two more Standing Orders. Supreme Court thus resolved the conflict between the provisions of the Act and Statutory notifications and held that the former has to prevail. Hon'ble Supreme Court did not lay down that all sampling done prior to the decision, contrary to the requirement of the Act would vitiate the trial. Thus the contention that sampling was not done in the presence of the Magistrate and hence appellants are entitled to be acquitted deserves to be rejected in view of the sampling having been done in this case, prior to the decision in Mohanlal (supra).

22. As regards the seals on the pullandas not being handed over to the independent witness are concerned it may be noted that the investigating officer appeared in the witness box as PW-9 and exhibited the chart Ex.PW-9/D regarding the movement of the seals. Further Y.R. Yadav, Ex-Superintendent NCB appeared as PW-11 and deposed that on 19th April, 2012 at 10.00 hours he issued a seal of NARCOTICS CONTROL BUREAU DZU3 to the investigating officer. The seal was deposited back to him at about 13.20 hours on the same day after completing the operation. He also



deposed about the seal movement register already exhibited as Ex.PW-9/D by the investigating officer. PW-11 also deposed about the seal of NARCOTICS CONTROL BUREAU DZU2 issued to Sanjay Rawat and NARCOTICS CONTROL BUREAU DZU5 issued to Jai Bhagwan. Statement of PW-11 thus clarifies that seals were given by him for operation and returned back to him. PW-11 is not a member of the raiding party. PW-11 who handed-over the seals for operation and received back the seals was extensively cross-examined on the movement of the seals, however nothing material to discredit his testimony was elicited in cross-examination. Further reliance on the decision of this Court in Saifullah (supra) is also misconceived. In the said decision beside the seal not being handed over to the independent witness, it was not stated by the prosecution therein that the CFSL form was filled or that articles were sent to FSL with the form, thus benefit of doubt was granted to the accused. In the present case when the sample packages were received by the FSL, the seals thereon were found intact and tallied with the specimen seals affixed on the CFSL forms thereby ruling out the possibility of tampering with the samples. Further the witnesses who deposed that the pullandas and samples were sealed in their presence were cross-examined at length however no cross-examination was done to elicit that there was any tampering with the pullandas and samples and hence the plea of an apprehension of tampering of the seals is unfounded.

23. As regards Aisha is concerned, contention of learned counsel for the appellant Aisha is that no recovery was made from her possession or pursuant to the disclosure made by her. Thus her conviction cannot be based merely on her confessional statement and the deposition of Ms. Jyoti



Rawat who cannot be relied upon as no corresponding registers have been shown by her. As noted in the narration of facts above, after the contraband was intercepted from the courier agency, it was traced to be booked in the name of one Satyajit Sur as the consignor. Enquiries revealed that Satyajit Sur was the owner of A.S. Services, Masjid Moth and the parcel was booked by a lady named Aisha resident of A-267, 4th Floor, Munirka Village, New Delhi. In this regard the prosecution has examined Ms. Jyoti Rawat (PW-7) who had booked the said parcel, handed-over to her by the appellant Aisha.

24. In her deposition before the Court Ms. Jyoti Rawat stated that on 16th April, 2012 while she was sitting on the reception one lady came and informed her that she wanted to book a parcel for South Africa. The lady revealed her name as Aisha and asked about the courier charges, which she informed after weighing the parcel. When asked about her ID proof, she stated that she had lost the ID proof and thus Jyoti Rawat made Aisha meet Satyajit Sur, the owner of the courier agency. As Aisha stated that it was very necessary for her to send the parcel to South Africa and she was a resident of Munirka and the witness had seen her in the market of Munirka 2-3 times, Satyajit Sur agreed that the courier be parcelled by affixing his ID proof, since they did not suspect anything in the parcel and it was informed that it contained two sarees and some gota (laces) material. She then cut the slip in the name of Aisha and handed-over to her after she paid the courier charges. The witness clarified that no invoice was prepared at that time as A.S. Couriers did not send any international couriers but used to send such consignments through Concord company. She stated that on the request of Aisha she gave her visiting card and mobile number and also noted the name of Aisha, her address, mobile number in a register maintained by them. This



witness correctly identified Aisha in the Court. This witness also exhibited her statement which was recorded by the NCB officials. In cross-examination she reiterated having seen Aisha earlier in Munirka. Merely because the register where the name of Aisha and her address was noted was not produced would not be sufficient to belie the testimony of Jyoti Rawat for the reason it is from the said register only that the name and address of Aisha was available to the NCB officials who then reached Aisha who was duly identified by Jyoti Rawat. In the entire cross-examination conducted on behalf of Aisha it has not been elicited that Aisha was not the person who handed-over the parcel containing the contraband concealed in the two sarees and the laces. Thus, the evidence of Jyoti Rawat who received parcels from Aisha is sufficient to prove the offence against Aisha. In view of the statement of Jyoti Rawat it cannot be said that the case against Aisha is based only on her disclosure statement which is inadmissible in evidence in terms of the decision of the Hon'ble Supreme Court in Tofan Singh (supra). Hence, this Court finds no error in the impugned judgment convicting appellant Aisha for the offences charged as also the order on sentence.

25. As regards appellant Ude Stanely Chidi is concerned, as noted above the case of the prosecution against him is that after the arrest of Aisha, she disclosed that the parcel was given to her by Stephen who in turn disclosed and took the NCB officials to the house of Ude Stanely Chidi from where 255 grams of heroin was recovered besides the laces which were similar to the one which were intercepted. Appellant Ude Stanely Chidi challenges the evidence against him on other grounds as well which are not applicable to the other accused, as discussed above that no videography or photography of



the spot or even the residence was conducted to lend credence to the version of the investigating agencies nor were the site plans prepared of the spot from where raids were allegedly carried out. He has also challenged the veracity of the independent witnesses Anil Kumar (PW-5) and Ranbir Singh (PW-6) and that there was over-writing on the quantity of recovery made in the panchnama and that since independent witness stated that the recovered drug was weighed with the packet and the packet is around 5.5 grams, the appellant cannot be convicted for possession of commercial quantity.

26. Recoveries from the house of the appellant Ude Stanely Chidi were witnessed by the NCB officials as also two independent witnesses. Anil Kumar/ PW-5 in his deposition before the Court stated that on 19th April, 2012 while he was walking after taking dinner at about 10 – 10.15 PM he met 4 - 5 persons at a short distance from his residence. They asked him the location of A-17, Vipin Garden which he informed and he also accompanied the 4 – 5 persons to show the place, when one of them informed him that he was an official of Narcotics Department and showed his identity card and revealed his name as Jai Bhagwan. Jai Bhagwan was accompanied by other persons who were also NCB officials and asked him to join the raid as a witness, to which he agreed. He identified all the documents which were duly signed by him. He deposed that on reaching the house, NCB officials knocked the door which was opened by one Nigerian. When the officials asked him 'where is Chidi'; the said person replied that he himself was Chidi. On this the NCB officials informed him that he was in possession of heroin and that he and his house is to be searched. Chidi was given a notice which he signed and was also signed by the witness. Before search of the house, the officers also informed him that if he has any objection to the



search then they can call a Government Officer to which he refused. The witness identified the notice signed by him which was a notice under Section 50 NDPS Act. Out of the personal search of Chidi nothing incriminating was recovered, however during the search of the box of the double bed in the room, a white polythene was recovered containing white powder besides bundles of yellow colour gota/ laces. The powder was tested with some machine and it weighed 255 grams. Thereafter, sample was drawn from the said packet and both the sample and parcel was seized. Paper slip was prepared on which the witness, Chidi and NCB officials as also the other witness Ranbir Singh signed. He clarified that one Ranbir Singh was with the NCB officials before he met them. The suggestion given to this witness is that when Chidi raised hue and cry, this witness came to the place, which he denied.

27. Undoubtedly, in his cross-examination this witness could not distinguish between Chidi and Stephen stating that he had seen them for one to one and a half hour and both being Nigerians he could not distinguish the same. However, he deposed about the proceedings carried out in the house Chidi was residing. In cross-examination this witness was asked whether he was told by the NCB officials what he was to depose, which suggestion was denied by the witness. This witness was cross-examined even as to the manner of weighing the sample which he clarified that the drug was weighed on electronic weighing machine. The witness on cross-examination further clarified the process and the manner in which the test was conducted and stated that he left at about 12.30 AM after telling the NCB officials that he was leaving. He stated that the search was conducted in one go and he did not notice how many other rooms were there in the



house but there were at least two rooms in the house. He stated that he wrote his statement under Section 67 of the NDPS Act in his own handwriting and that before this, he had never appeared in any Court to depose in a criminal case as a witness. Thus, despite extensive cross-examination nothing could be elicited to discredit the veracity of the witness Anil Kumar/PW-5 who was a crucial witness to the search and seizure carried out at the house of appellant Ude Stanely Chidi.

28. Even Ranbir Singh/PW-6 stated that while on the 19th April, 2012 at about 10 to 10.15 PM he was taking a walk after dinner, he saw 10-12 people gathered in front of House A-17, Vipin Garden which house belonged to him and he had given it on rent to one African Stanely Chidi. He identified Chidi as the person to whom he had given the house on rent. He asked the local residents as to the reason for standing in front of his house and they had informed that Police was inside the house. He saw one Mr. Jai Bhagwan, an official of some Department. The said official then spoke in English with Stanely Chidi, which he could not understand. He stated that he was illiterate except that he can put his signatures in English. He, however, spoke about the search carried out in the room and recovery of a white polythene from the box of the wooden double bed. He also spoke about the recovery of some gota and powder/ flour from the polythene. On weighing, the said powder was tested in a glass tube and he was told that the same was a drug. The weight of the powder was found to be 255 grams. Thereafter, two samples were taken and kept in separate polythene and duly sealed. Jai Bhagwan then prepared the documents which he signed. The witness identified his signatures on the document marked. In his cross-examination he stated that he could read Hindi but not write and that his



statement was recorded as he dictated. This witness was confronted with his statement wherein the words “NDPS” and “Dhara” was noted, to which he stated that he used the word as the same were explained to him. He stated that he knew Stanely Chidi as he was a tenant for about 2 – 3 months prior to the incident. He even stated that he had a confrontation with the NCB officials as they entered his house without his permission. He also stated that the witness Anil was present when he entered the house.

29. Thus, the only contradiction between the testimony of these two witnesses is that Anil stated that Ranbir was already present when he joined the raiding party whereas Ranbir stated that Anil was already present at the house when he entered the house. However, this contradiction does not go to the root of the matter because both the witnesses have consistently stated that there were number of people and thus in a melee, the oversight as to who came first can always be there. This witness in cross-examination further stated that Chidi even tried to run away by pushing him but was caught hold by NCB officials.

30. Challenge on behalf of the appellant Ude Stanely Chidi that photography or videography of the premises was not taken and thus the recovery needs to be discarded deserves to be rejected for the reason there is no provision in the NDPS Act which mandates that the recovery should be videographed or photographed. In Ram Prakash (supra) this Court acquitted the accused not only on account of shoddy investigation but also for the reason the case of the prosecution was not believable. As regards the non-production of the log book of the vehicle used by raiding team is concerned, witnesses including G.S. Bhinder, Assistant Commandant, BSF (PW-12) stated that a team was constituted consisting of Jai Bhagwan I.O.,



himself, Sanjay Rawat and Rajesh Kumar who left in the official vehicle bearing No. DL-12C-1168 and that the same was being driven by Shri Rajesh Kumar. He also stated that when they were locating the house of Ude Stanely Chidi they met Anil, the independent witness who was introduced to him by Shri Jai Bhagwan, who also introduced him to Ranbir the other independent witness.

31. Learned counsel for the appellant has emphasised on the fact that in the panchnama Ex.PW-21/D1 there is an overwriting in the weight of recovery as in the middle number 5, '255' has been overwritten. It may be noted that overwriting is only on the number 5 in the middle and the witness who prepared these documents i.e. PW-2 was not cross-examined on this aspect on behalf of Ude Stanely Chidi, though he was extensively cross-examined on other aspects. Also the recovery of 255 grams of heroin from the box of the bed in the house of Ude Stanely Chidi was from one envelope and not different envelopes. Thus, though mixing of the contraband recovered from the courier agencies was resorted to but the same was not the case for recovery from the room of Ude Stanely Chidi.

32. Considering the fact that the evidence on record beyond the statement of Ude Stanely Chidi recorded under Section 67 of the NDPS Act also proves beyond reasonable doubt recovery of 255 grams of heroin from the box of the double bed in his room which was under his tenancy, by the testimony of the officials of NCB as also independent witnesses, this Court finds no error in the impugned judgment of conviction of appellant Ude Stanely Chidi and also in the order on sentence.

33. Consequently, the conviction and sentence awarded to the appellants Ude Stanely Chidi and Aisha are upheld, however, the impugned judgment



and order on sentence qua Stephen is set aside.

34. CRL.A. 147/2016 is disposed of whereas CRL.A. 419/2016 and CRL.A. 546/2016 are dismissed.

35. Superintendent Tihar Jail is directed to release appellant Stephen if in custody and not required in any other case.

36. Copy of this order be uploaded on the website of this Court and be also sent to Superintendent Tihar Jail for updation of records.

CRL.M.(BAIL) 8037/2020 in CRL.A. 147/2016

CRL.M.(BAIL) 1638/2018 in CRL.A. 419/2016

CRL.M.(BAIL) 874/2021 in CRL.A. 419/2016

Applications are disposed of as infructuous.

(MUKTA GUPTA)
JUDGE

JULY 04, 2022
‘ga/vn’

नस्यमेव जयते