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Illicit Drug Trafficking at International Airports – Booking of Cases under the Narcotic Drugs and Psychotropic Substances Act, 1985 and Challenges and Problems before Prosecution under the Narcotic Drugs and Psychotropic Substances Act, 1985 – Defects in the Complaint Charge Sheet and Other Reasons

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ABSTRACT

The booking of cases at the international airports or elsewhere does not result in the conviction of the accused under the Act. The empowered officers/departments are mandated to comply with the provisions under the Act. It is noted that despite the detection of cases, there have been serious infirmities which have crept into the prosecution's case in cases booked at the international/domestic airports and elsewhere. Lapses which could have been easily avoided have crept into the prosecution's case and accordingly on account of a number of defects, we see a very low rate of conviction. Even if the prosecuting agency has secured a conviction, the Hon'ble High Court has overturned the conviction. The need of the hour is for the empowered officer/department to go in for capacity building and reach out to that Institution for effective training of the empowered officers at various levels in the interest of the empowered departments/officers.

BACKGROUND

The tile of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act') suggests that the Act has only two limbs i.e. narcotic drugs and psychotropic substances. However, this is not true. The Act has a third limb and the third limb deals with the control substances.

1.1 We now refer to the definitions for proper understanding of the terms used in para *supra.*

1.1.1 The term 'narcotic drug' has been defined under section 2(xiv) of the Act as under:

> *"(xiv) "narcotic drug" means coca leaf, cannabis (hemp), opium, poppy straw and includes all manufactured drugs;"*

1.2 We further find that the definition of narcotic drug contains the use of the expression "manufactured drugs". 'Manufactured drug' has been defined under section 2(xi) of the Act as under:

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"(xi) "manufactured drug" means—

(a) all coca derivatives, medicinal cannabis, opium derivatives and poppy straw concentrate;

(b) any other narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare to be a manufactured drug,

but does not include any narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare not to be a manufactured drug;

1.2.1 In terms of Government of India's Notification S.O. 826(E) dated the 14th November 1985, S.O. (E) dated the 29th January 1993, S.O. 1431(E) dated the 21st June 2011 and S.O. 2373 (E) dated the 12th July 2016, the Central Government has declared certain narcotic drugs and preparations to be manufactured drugs. According to these notifications, preparations, admixtures, extracts or other substances containing any of these drugs also come under the definition of manufactured narcotic drugs.

1.3 Moving further we find under section 2(xxiii), the term 'psychotropic substance' has been defined under the Act as under:

"(xxiii) "Psychotropic substance" means any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the Schedule;"

1.4 Any narcotic drugs or psychotropic substances can be imported into/ exported out of India, subject to Rule 53 of the NDPS Rules, 1985.

1.5 The import of (i) opium, concentrate of poppy straw, and (ii) morphine, codeine, thebaine, and their salts is prohibited save by the Government Opium Factory under the provision of Rule 54 of the NDPS Rules, 1985.

1.6 The import into and export out of India of any narcotic drugs or psychotropic substances specified in Schedule I is prohibited under the provision of Rule 53 and 64 of the NDPS Rules, 1985.

1.7 Finally, we find that 'controlled substance' has been defined under the Act under section

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2(viid) as under:

> *(viid) "controlled substance" means any substance which the Central Government may, having regard to the available information as to its possible use in the production or manufacture of narcotic drugs or psychotropic substances or to the provisions of any International Convention, by notification in the Official Gazette, declare to be a controlled substance;"*

1.8 Before we move deep into the issues, it is essential to understand the concept of 'controlled substance'. The initial Act did not deal with 'controlled substance'. The expression/term 'controlled substance' came to be defined under section 2(viia) and this was inserted with effect from 29th May 1989 *vide* section of Act 2 of 1989 and this was re-lettered/re-numbered as section 2(viid) with effect from 2nd October 2001 *vide* section 3 of Act 9 of 2001.

1.8.1 Simultaneously, we find that section 9A was inserted into the Act by section 6 of Act 2 of 1989 with effect from 29th May 1989 and section 9A deals with "*Power to control and regulate controlled substances"* and in exercise of the power conferred under the section 9A, The Narcotic Drugs and Psychotropic Substances(Regulation of Controlled Substances) Order 1993 was issued and the 1993 Order was superseded by the Narcotic Drugs and Psychotropic Substances (Regulation of Controlled Substances) Order, 2013(hereinafter referred to "2013 Order") which was notified *vide* GSR (E) dated 26th March 2013 and this was amended *vide* Notification GSR 779 (E) dated 14th October 2019 by the Narcotic Drugs and Psychotropic Substances (Regulation of Controlled Substances) Amendment Order, 2019.

1.8.2 Under the scheme of control prescribed in 2013 Order, the Controlled Substance (hereinafter referred to as 'CS') are divided into three categories *viz.* Schedule A, B and C

1.8.2.1 Schedule A : In relation to controlled substances included in Schedule-A, the operations (activities), including their supply, distribution, trade and commerce, possession, store, consume, offer for sale or distribution or mediate in the sale/purchase through website, social media.

1.8.2.2 Schedule B: They are those CS whose export from India is subject to controls

1.8.2.3 Schedule C: They are those CS whose import into India is subject to control as specified in this Order.

1.8.2.4 Schedule-A substances are those controlled substance whose manufacture, distribution, sale, purchase, possession, storage and consumption is subject to control as specified in this Order.

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1. Acetic anhydride

2. N-Acetylanthranilic acid

3. Anthranilic acid

4. Ephedrine and its salts

5. Pseudoephedrine and its salts

*6. 4-Anilino-N-phenethylpiperidine (ANPP)

*7. N-Phenethyl-4-piperidone (NPP)

[*Sl. No. 6 & 7 added vide Notification G.S.R. 536(E) dated 26.08.2020]

No person shall manufacture, distribute, sell, purchase, possess, store, or consume or offer for sale or distribution or mediate in the sale/purchase through website, social media any controlled substance included in Schedule-A - without a unique registration number in Form-A issued by the Zonal Director of NCB.

1.8.2.5 Schedule-B substances are those controlled substance whose export from India is subject to controls as specified in this Order.

l. Acetic anhydride

2. N- Acetylanthranilic acid

3. Anthranilic acid

4. Ephedrine, its salts and preparations thereof

5, Ergometrine and its salts

6. Ergotamine and its salts

7. Isosafrole

8. Lysergic acid and its salts

9. 3,4-methylenedioxyphenyl-2-propanone

10. Methyl ethyl ketone

11. Norephedrine (Phenylpropanolamine), its salts and preparations thereof

12. l -pheny | -2-propanone

13. Phenylacetic acid and its salts

14. Piperonal

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15. Potassium permanganate

16. Pseudoephedrine, its salts and preparations thereof

17. Safrole and any essential oil containing 4% or more safrole

18. 4-Anilino-N-phenethylpiperidine (ANPP)

19. N-Phenethyl-4-piperidone (NPP)

20. 3,4-MDP-2-P methyl glycidate (PMK glycidate) (all stereoisomers)

21. 3,4-MDP-2-P methyl glycidic acid (PMK glycidic acid) (all stereoisomers)

22. alpha-phenylacetoacetamide (APAA) (including its optical isomers)

23. methyl alpha-phenylacetoacetate (MAPA) (including its optical isomers)

[Sl. No. 18-19 notified vide Notification published as G.S.R. 186(E) dated 27.02.2018 and Sl. No. 20 to 23 added vide Notification G.S.R. 536(E) dated 26.08.2020]

No Person shall Export any Controlled Substance in Schedule-B except in accordance with the conditions of the No Objection Certificate issued by the Narcotics Commissioner, Gwalior.

1.8.2.5 Schedule-C substances, as mentioned herein are those controlled substance whose import into India is subject to controls as specified in this Order.

1. Acetic anhydride

2. N-Acetylanthranilic acid

3. Anthranilic acid

4. Ephedrine, its salts and preparations thereof

5. Ergometrine and its salts

6. Ergotamine and its salts

7. Isosafrole

8. Lysergic acid and its salts

9. 3,4-Methylenedioxyphenyl-2-propanone

10. Methyl ethyl ketone

11. Norephedrine (Phenylpropanolamine), its salts and preparations thereof

12. I -phenyl-2-propanone

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13. Phenylacetic acid and its salts

14. Piperonal

I 5. Potassium permanganate

16. Pseudoephedrine, its salts and preparations thereof

17. Safrole and any essential oil containing 4% or more safrole

19. N-Phenethyl-4-piperidone (NPP)

20. 3,4-MDP-2-P methyl glycidate (PMK glycidate) (all stereoisomers)

21. 3,4-MDP-2-P methyl glycidic acid (PMK glycidic acid) (all stereoisomers)

22. alpha-phenylacetoacetamide (APAA) (including its optical isomers)

23. methyl alpha-phenylacetoacetate (MAPA) (including its optical isomers)

[Sl. No. 18-19 notified vide Notification published as G.S.R. 186(E) dated 27.02.2018 and Sl. No. 20 to 23 added vide Notification G.S.R. 536(E) dated 26.08.2020]

No person shall import any Controlled Substance in Schedule-C except in accordance with the conditions of the No Objection Certificate issued by the Narcotics Commissioner, Gwalior.

1.8.3 The problem in containing CS is that they are used both for legitimate and illicit purposes and, unless they are diverted, they are legal substances. These substances also cannot be banned since they are essential for legitimate uses. The objective of the Regulations is to maintain a balance between preventing diversion of precursors/CS for illicit manufacture of drugs, and not affecting the legitimate trade. This balance can be achieved through non-intrusive monitoring of the trade. Coordination with legitimate trade and industry, verifying legitimacy of transactions when in doubt, and coordination with other countries in international trade. In short, 'No precursors = No illicitly 'manufactured' Drugs'. Hence a need exists to prevent availability of precursors to illicit drug manufacturers.

1.8.4 Salient features of 2013 Order

1.8.4.1 Registration: The salient features of control over Schedule A substances are the requirements of registration, within a period of 180 days of the coming into force of this Order, for engaging in activities like manufacturing, trade and commerce, possession and consumption. A person, including a legal person, is required to apply in Form B to the jurisdictional Zonal Director of NCB for registration of the premises and the activity pertaining to the CS and obtain

a unique registration number issued by the concerned Zonal Director.

1.8.4.2 Returns: Under the provisions of the said Order of 2013, the registrant must maintain a daily account in Form C or D, must file quarterly returns in Form E or F to the Zonal Director, NCB by the last day of the month following that quarter, preserve these records for minimum two years etc., must report regarding any loss or disappearance of any CS immediately to the concerned Zonal Director, NCB.

1.8.4.3 Transportation: Transportation is a very vulnerable area for diversion of these substances for illicit purposes. Control measures over transportation of Schedule A substances include compulsory accompaniment of a Consignment Note in Form G (in case of indigenous goods) or a Bill of Entry (in case of imported goods) during movement of a consignment, use of tamper proof seals with identifiable descriptions while being transported in motorized containers etc. Sale of a Schedule A substance will be made only to a person holding registration. If the destination of a consignment falls under the jurisdiction of another Zonal Director of NCB, the consignor shall send a quarterly report to that Zonal Director in Form H.

1.8.4.4 Destruction: Any person intending to destroy a Schedule-A substance, will have to apply in Form I to the concerned Zonal Director of NCB. The Zonal Director will appoint a committee consisting of a Gazetted Officer of NCB, Superintendent of Central Excise of the concerned range and an authorized representative of the applicant within 30 days. This committee will supervise the destruction within 30 days of its appointment.

1.8.4.5 Export and Import Controls: Export of a Schedule B Controlled Substance and import of a Schedule C Controlled Substance requires a No Objection Certificate (NOC) from the Narcotics Commissioner of India. The NOC is valid for a single consignment only. The applicant has to apply to the Narcotics Commissioner in Form J (for export) and Form K (for import) for issue of a NOC. The import/export consignments shall be labeled prominently giving details of the name and quantity of the controlled substance, name and address of the exporter and importer and the consignee. Import and export related documents are to be submitted to the Narcotics Commissioner within seven days of import or export as the case may be. The importer/exporter shall preserve the documents for a period of five years.

1.8.4.6 Offence and Punishment: Section 25A of the Act provides for punishment for a term of rigorous imprisonment which may extend to 10 years and also fine of up to Rs 1 lakh for contraventions of the provisions of the Order.

Section 26 of the Act can also be invoked by the empowered officer when an applicant or any person in his employment and acting on his behalf, fails to maintain account or to submit any

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return in accordance with the provisions of the Act or keeps any account or makes any statement which, he knows or has reason to believe, is false or willfully and knowingly does any act in breach of the conditions of the license, permit or authorization. Offences under section 26 of the Act are punishable with imprisonment for a term which may extend up to three years or fine or both

1.9 USE OF CONTROLLED SUBSTANCES IN THE ILLICIT MANUFACTURE OF NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES

SL. NO	NAME OF THE PRECURSOR CHEMICAL	USED IN THE ILLICIT MANUFACTURE OF
1	Potassium permanganate	Cocaine
	Acetone/ethyl ether/methyl ethyl ketone/toluene	
	Sulphuric Acid	
	Hydrochloric Acid	
2	Acetic Anhydride	Heroin
	Acetone/ethyl ether	
	Hydrochloric Acid	
	Phenylacetic acid	Amphetamine And Methamphetamine
	Acetic Anhydride	
	Sulphuric Acid	
	Pseudo/Ephedrine hydrochloride	
	Norephedrine hydrochloride	
	Hydrochloric Acid	
	Phenylacetic acid	
	alphaPhenylacetoacetonitrile	
	1-Phenyl-2-propanonea	
3	Piperonal	MDMA and
	Isosafrole	
	Safrole	

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	3, 4- methylenedioxy- phenyl-2-propanone (3,4-MDP-2-P)	Related Drugs
4	Ergometrine	LSD, Methaqualone and Phencyclidine
	Ergometamine	
	Anthranilic	
	Lysergic Acid	
	N- Acetylanthranilic Acid	
	Acetic Anhydrate	
	Piperididne	

1.10 LICIT USES OF SOME OF THE CONTROLLED SUBSTANCES

SL. NO	NAME OF THE PRECURSOR CHEMICAL	LICIT USE OF THE PRECURSOR CHEMICAL
1	N-acetylanthranilic Acid	explosives, dyes, coatings
2	Potassium Permanganate	tanning leather, disinfectant
3	Phenylacetic Acid	perfumes, penicillin, ester
4	Methyl Ethyl Ketone	coatings, lacquers, solvent
5	Acetic Anhydride	Acetylating and dehydrating agent, used in pharmaceutical, paints, dyestuff, plastic, chemical industries
6	Pseudoephedrine	Bronchodilators and nasal decongestant
7	Piperonal	fragrance in perfume, flavouring agent, in organic synthesis
8	Ephedrine	Bronchodilators

1.11 Moving further, esteemed readers may note that the provisions for mandatory compliance required for narcotic drugs and psychotropic substances are equally applicable to controlled substances and while acting on an information or intelligence with reference to controlled substances, the compliances as brought out herein are required to be mandatorily

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compiled with.

1.12 Booking of cases against the offenders is nothing new to the empowered departments under the Act. But the problem is that they have not withstood the scrutiny of law and as a result of the non-compliances of mandatory compliances, we see a lot of cases falling to the ground.

1.13 Equally true is the fact that international passengers indulging in illicit drug trafficking is not new to the investigative agencies and a lot of cases have been booked at the international airports under the Act.

1.14 The study of the reasons for acquittal of the accused persons attains importance for the reasons that such mistakes pointed out by the Ld. Trial Courts are not repeated and the pitfalls noticed are taken care of and the provisions of the Act are implemented in letter and spirit. Further, it is seen, the accused on acquittal, appears to revive the network or join the same syndicate/gang or in the alternative he is approached by other unscrupulous persons operating in the field.

1.15 This article attempts to explore the reasons for the failure to secure the conviction by the empowered departments. Needless to mention that the conviction secured is a miserly 10%. Even when the Ld. Trial Court has convicted the accused, the Hon'ble High Court has reversed the conviction and thus further reducing the rate of conviction. The mandatory compliances of the provisions can be seen from section 41 to section 57 of the Act.

1.16 At the outset, the empowered officers can book cases on the receipt of specific information received and on gathering their own intelligence. There is no restriction on this. The important aspect that is required to be noted herein that the information is required to be reduced into writing and such information should be put up to the immediate superior officer.

1.17 There are different ways in which the drugs come into country. They are through the passenger route through the international airports, sea port, Foreign Post Office route, International Courier Route, Air Cargo route, Land Customs route. Apart from these routes, illegal maritime routes/land routes, use of drones (for dropping the drugs along with arms, ammunition and Fake Indian Counterfeit Notes, as a packaged deal) are also used for the proliferation of drugs into the country.

1.18 For the purpose of this article, the analysis has been divided into two broad categories i.e. (i) cases booked at the international/domestic airports and cases booked other than (i).

PART -I : CASES BOOKED AT THE INTERNATIONAL/DOMESTIC AIRPORTS

1.19 Out of all the routes undertaken by the syndicates operating in this white collar crime,

the international passenger route poses the most challenging task in booking the case and securing a conviction. Readers may be aware of the fact that on account of the security concerns, the entire international airports are wired with CCTV cameras and this is required to be kept in mind while filing the case before the competent court. The challenging aspect of international travel, especially in the winters, into India especially in Delhi and in other airports in the North is the delay in the arrival of the flight coupled with the delay in the receipt of the checked-in baggage of the international passengers. Sometimes, after the checked in baggage tags are issued and the passengers go through the security, immigration and customs drill, the flights are cancelled on mainly cancelled on technical grounds, as some issues crop up at the last time. Such passengers are accommodated in other flights and the initial baggage tags continue to hold good in the new flight of the same carrier. While the passengers arriving by a new flight with erstwhile baggage tag require special attention, especially when they are caught while indulging in illicit trafficking. The investigating agencies booking cases at the airport should be aware of the functioning of the airport and the airlines, the manner of issuance of baggage tags, the accounting of the baggage tags, the manner of verification of baggage tags, the manner of reading passenger manifest.

1.20 Generally, the cases booked at an international airport can be classified into broad categories – (i) swallow cases (ii) recovery from the hand baggage and the checked-in baggage.[2] This would be for narcotic substances or psychotropic substances. Controlled substances are concealed in huge quantities by way of ingenuous concealment in checked-in baggage.

APPLICABILITY OF RELEVANT SECTION OF THE ACT AT AIRPORTS

2. The cases booked by the investigative agencies generally involve prior information/ specific information, which is invariably reduced into writing in compliance of the provisions of section 42(2) of the Act by the empowered officer and then put up to the superior officer, who while acknowledging the information put up to him, simultaneously issues directions to take action. It is important to note here that in terms of Explanation appended to section 43 of the Act, airport is a public place, even though there is restriction to the entry to the airport.

APPLICABILITY OF SECTION 42 OR SECTION 43 AT AIRPORT

3. The Air Intelligence Officers (AIOs)/Air Customs Officers/Air Customs Superintendents of the Customs or Junior Intelligence Officers, Intelligence Officers, Superintendents of other empowered departments such as NCB, CBN, etc. play a vital role in the detection of cases at the International Airports. They are known by the above names at

[2] Baggage serves as both singular and plural.

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different international airports. They move in civvies to discreetly watch and identify the passengers arriving or exiting the country.

LOG BOOK CONTAINING ENTRIES REGARDINGMOVEMENT OF OFFICERS

4. In respect of cases being booked by the officers posted at the airports itself, the maintenance of log does not arise. But in respect of other investigating agencies, having their offices outside the airport and that too at a far distance are required to maintain the log book to show the manner of arrival and mounting surveillance. The use of Government Vehicles for the operations should be entered and the name of the officers travelling should be carefully recorded and be made a part of the complaint. In case of hiring of private vehicles, the entries for the movement of the vehicles by the driver of the private vehicles should be produced in evidence. In short, the movement entries serve as a first step towards the booking of a case.

USE OF DOG SQUAD

5. Sniffer dogs are also put to use by the Customs Officers named herein above. Sniffer dogs are handled by an officer called the Dog Handler. The Dog Handler is trained to use the services of the sniffer dogs and sniffer dogs runs through the baggage and in case of suspicion in the bags, the sniffer dog starts barking after sniffing. Because of the fact that the sniffer dogs are trained to identify narcotic drugs, psychotropic substances, the barking of the dog after sniffing the baggage gives rise to "reason to believe" that there is contraband (falling either under the Customs Act, 1962 or under the Act) inside the baggage belonging to the passenger. This stage assumes importance for the simple reason that the indication given by the sniffer dog is of vital importance and hence it is necessary that the information is reduced into writing in compliance to section 42 of the Act and put up to the superior officer, who would acknowledge the receipt of information and issue further directions. Such a proactive step is necessary on the part of the Air Intelligence Officer/Air Customs Officer. It is another matter that the same may not lead to the recovery of narcotic drugs, psychotropic substances or controlled substances but may lead to recovery and seizure of contraband falling under the provisions of the Customs Act, 1962 i.e. gold, foreign currencies, electronic gadgets, etc.

5.1 In connection with the aforesaid proposition, it would be apposite to record the findings of the Ld. Court of the Special Judge for NDPS Cases at Mumbai in NDPS Special Case No. 172 of 2014 in the case of **Anand Patil**[41]

> *"141. Further there is no documentary evidence about compliance of Sec. 42 of NDPS Act. In this case as mentioned in seizure report Exh. 21 sniffer dog Amol had given signal in respect of*

concealment of contraband in the suit cases allegedly possessed by accused. Hence it can be said from seizure report Exh. 21 that Intelligence officer Mr. Anand Patil had knowledge of concealment of contraband prior to alleged search of baggages of accused. As Intelligence officer Mr. Anand Patil was having prior knowledge of alleged concealment of contraband in suitcases, this case cannot be said to be the case of chance recovery. Hence I am unable to accept arguments advanced by SPP Mr. Sadlhana that this is the case of chance recovery. ***In such circumstances, it was incumbent son (sic) the part of Intelligence Officer Mr. Anand Patil to make the compliance of mandatory provision i.e. sec. 42 of NDPS Act. However, as already observed there is no oral or documentary evidence son record in respect of compliance of sec. 42 of NDPS Act. On this count also prosecution case falls to ground. For all above reasons, I find that prosecution has failed in establishing the charge levelled against accused"***

CHANCE RECOVERY - EXPLAINED

6. On the other hand, chance recovery would mean that when a person is intercepted on the basis of information that he is carrying gold, foreign exchange on his person or hand carry baggage or checked-in baggage. During the course of checking, albeit after issuing notice under section 102 of the Customs Act, 1962, in addition to gold, foreign currencies, some other substances in powder form (or any other form) are recovered, which when put to test using the Field Testing Kit (FTK) or Field Detection Kit (FDK) give indication for one of the substances under the Act. This would be a 'chance recovery'. In case of 'chance recovery', the initial compliance level would not be there. But it is required to be noted that once the FTK/FDK gives indication, the officers are duty bound to follow the procedure under the Act. The officers are, then, required to conduct the proceedings only under the Act and the provisions of Act would supersede other actions. In such a situation, it is always advisable that the initial panchnama is drawn for the recovery and seizure of gold and foreign currencies and end the same by making a mention of the 'chance recovery' under the Act. Thereafter, a fresh/new panchnama should be drawn for the 'chance recovery' by making reference to the earlier panchnama drawn for the recovery and seizure of gold and foreign currencies. The aforesaid situation holds good whether the detection is made at the arrival hall or at the departure hall.

INTERCEPTION OF THE PASSENGER AND OVERCOMING LANGUAGE BARRIER

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7. The use of international airport is done by citizens of different countries and the officers are not equipped to speak all the languages and, in some cases, communication becomes ineffective and the cases booked falls flat on the ground that the communication has not been effective and the passenger could not understand/comprehend the Notice issued to him. To overcome the situation, it is better to associate the senior officials of the airlines for effective communication as the airlines would invariably have personnel speaking the language of the passengers. In case this is not possible, urgent measures should be taken to call for the services of the language interpreters from the accredited Translation Bureau. It is very important that the communication is effective and the same is communicated in the language known to the intercepted passenger. This is done to avoid acquittal of the accused.

7.1 We now take the help of a case decided by the Hon'ble High Court of Delhi in the case of **Juarah & Anr**[2] to understand the issue in proper perspective.

7.1.1 The facts of the case as recorded by the Hon'ble High Court are as under:

> *"2. The case of the prosecution is that on 01.04.2010 at 12:45 pm, an information was received by Sh. D.C. Misra (PW8), Joint Commissioner, Air Customs, IGI Airport, New Delhi, that a person namely Jura (an Afghan national) and his accomplice (name not known) would arrive on the same day from Kabul by Ariana Afghan Airlines, Flight no. FG311, who were suspected to carry Heroin concealed in their baggage and in their bodies. Sh. D.C. Misra reduced the information into writing and forwarded the same to Sh. J.S. Kandhari (PW17), Assistant Commissioner, Air Customs, IGI Airport, who constituted a team consisting of Sh. S.C. Rawat (PW5) (Air Customs Superintendent), Sh. Prashant Prakhar (PW1) (Air Customs Officer), Sh. Amrik Lal (PW23) (Air Customs officer) and Sh. S.S. Hundal (PW22) (Air Customs Officer). On the basis of the above information, the said Jura (respondent No.1) was identified by the Customs officers after immigration clearance with the help of his passport, wherein his name was reflected as Juarah. After about ten minutes, respondents M.Walai joined respondents Juarah after immigration clearance and both of them started going towards the exit gate of the arrival hall. They were carrying only one hand baggage. Both the respondents were intercepted near the exit gate by the Customs officers.* ***Since both the respondents were not conversant with English and Hindi, the Customs officers took help of two personnel from Ariana Afghan Airlines namely Khalid A. Noori (PW13) and Noor Ali Khosti, who were***

acquainted with the vernacular language of the respondents i.e. Farsi. On being asked as to whether they were carrying any narcotic drug, the respondents hesitatingly replied in the negative. Both the Respondents were served with separate notices under Section 50 of the NDPS Act which were read over to them by the said interpreters. By the said notices, it was explained to the Respondents that if they desired, the examination of their baggage and their personal search could be conducted before a Magistrate or a Gazetted Officer. However, both the Respondents declined to avail the same and stated that any Customs officer could take their search or they could be taken anywhere for medical check-up*. Thereafter, the examination of the baggage of the Respondents and their personal search was conducted but nothing incriminatory was recovered. Since the Respondents were feeling uneasy and had also refused to take any hot/cold drinks being offered to them, their body search was conducted and it was noticed that their bellies were unusually stiff. Considering the same, the Respondents were produced before the learned Duty Magistrate, Patiala House Courts, New Delhi and an application seeking permission for their medical examination was filed which was allowed vide order dated 01.04.2010."*

14. The important points for consideration to adjudicate in the present leave petition are:

A. whether the alleged recovery of the narcotic drug from the Respondents was in compliance of the provisions of Section 50 of NDPS Act B. whether the alleged recovery of the narcotic drug from the Respondents was in compliance of the provisions of Section 103 of the Customs Act and;

7.1.1.1 The Hon'ble High Court, after hearing the rival submissions on the issue, held as under:

"17. It is the case of the prosecution that the Respondents Juarah and M. Walai, who were intercepted at IGI Airport on 01.04.2010 at about 2/2.30 p.m after their arrival from Kabul by Ariana Afghan Airlines on the basis of prior information against them of carrying drug in their baggage's and bodies, were served with separate notices under Section 50 of the NDPS Act. PW1 Sh. Prashant Prakhar, Air Customs Officer, has proved the said

notices as Ex.PW1/A and Ex.PW1/D respectively. He has deposed that since both the Respondents were not conversant with English or Hindi, the Customs officers took the help of two personnel from Ariana Afghan Airlines namely PW13 Sh. Khalid A. Noori and Sh. Noor Ali Khosti, who explained the contents of the notices under Section 50 of the NDPS Act to the Respondents in their vernacular language. By way of the said notices, the following information was conveyed to the Respondents:

"The examination of your baggage and your personal search is to be conducted. If you so desire, the same could be conducted before a Magistrate or a Gazetted Officer of Customs."

18. PW13 Sh. Khalid A. Noori in his cross-examination, clearly and categorically deposed that he had translated the notice under section 50 of the NDPS Act verbatim to the Respondents without any addition or deletion of any word. He also explicitly admitted that since the expression 'legal right' did not find mention in the aforesaid notice, the Respondents were not apprised about the same by PW1. From the contents of the notices served upon the Respondents and the above deposition of PW13 Sh. Khalid A. Noori, it is apparent that the Respondents were merely given an option and only an enquiry was made by the empowered officer to get their search conducted in the presence of a Gazetted Officer or a Magistrate and were not apprised of their legal right to be taken to a Gazetted Officer or nearest Magistrate for the purpose of their search, if they so required.

20. In view of dictum laid down by the Hon'ble Supreme Court in the above judgment, it is apparent that the notices served upon the Respondents were not in conformity with the provisions of Section 50 of the NDPS Act and were merely an enquiry by the empowered officer to the Respondents. By these notices the respondents were not informed of their legal rights to be searched before the Magistrate or Gazetted officer. Further it is note worthy that PW13 ***Sh. Khalid A. Noori in his cross examination admitted that he did not know the meaning of words "Gazetted officer" and "Magistrate" in Persian****. **Since both the respondents were not conversant with English, the meaning of these two words was not conveyed to them in vernacular language by PW13. Looked from any angle the very purpose of notice under section***

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50 was defeated what to speak of compliance.

7.1.2 In respect of this very case, a careful reading of the facts, as recorded, reveal that the PW-8 is the Joint Commissioner of Customs, Air Customs, IGI Airport, New Delhi who received the information and he did reduce the information into writing but squarely failed to put up to his senior and instead "forwarded" the information to his junior PW-17, the Assistant Commissioner of Customs.

7.1.3 In connection with the information being reduced into writing for complying with the provisions of section 42 of the Act, it will be useful to refer to the judgment of the Constitution Bench of the Hon'ble Supreme Court rendered in the case of **Karnail Singh**[3] wherein the Hon'ble Supreme Court concluded as under:-

> "*35. In conclusion, what is to be noticed is that Abdul Rashid [(2000) 2 SCC 513 : 2000 SCC (Cri) 496] did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham [(2001) 6 SCC 692 : 2001 SCC (Cri) 1217] hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows: (a) The officer on receiving the information [of the nature referred to in sub-section (1) of Section 42] from any person had to record it in writing in the register concerned and* ***forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).***"

7.1.4 Reverting to the issue of communication in the language known to the person, we may now refer to another decision in CRL. A. No. 708/2010 decided on 11th October 2013 of the Hon'ble High Court of Delhi in the case of **Mohd Dawood**[4] wherein the counsel for the petitioner challenged the impugned judgment and order of sentence dated 20th February, 2010 and 26th February, 2010 passed by Ld. Additional Sessions Judge-cum-Special Judge, NDPS cases, Dwarka Courts, New Delhi in Sessions Case No. 37/3/2008 under sections 21(c) and 23 (c) of the Act on the following grounds:-

> *'(i) The appellant was convicted* ***without considering the fact that he was unaware of any other language than Persian.*** *According to the prosecution, one Sayed Mohd. Ashraf Hofiyani joined as interpreter and he was present during the proceedings. He was the person who had interpreted the contents of the documents to the appellant.* ***However, despite the fact that he was the star witness of the prosecution, he was not examined for the reasons best***

known to them. Non examination of the said witness has caused prejudice to the appellant"

7.1.4.1 The Hon'ble High Court, after hearing the rival submissions, repelled the arguments/submissions put forth by the Ld. Defence Counsel as under:

*"10. The thrust of argument of learned counsel for the appellant was on the fact that the appellant being an Afghani national was not aware of any language other than Persian. Documents were prepared in English, as such, he was not aware about the contents and serious prejudice has been caused to him by non-preparation of the documents in Persian language….. Both these authorities does not help the appellant, inasmuch as, prosecution has examined PW11 Mr. Rajesh Kumar, one of the interpreters, who categorically deposed that he was(**sic**) translated the contents of notice under Section 50 of NDPS Act Ex.PW1/B in Persian language by Mohd. Ashraf Hofiyani. Thereafter, notice was signed by him.* ***He further deposed that panchnama Ex.PW1/C was also translated to the accused with the help of Mohd. Ashraf Hofiyani. He denied the suggestion that reply of the accused on the notice Ex.PW1/B was written by him at the instance of Customs Officer and that no such notice was served upon the accused or that he had not given any such reply. In fact, the testimony of the witness that panchnama was duly translated to the accused goes unchallenged and unrebutted as the witness was not cross-examined on this aspect nor any suggestion was given to him that the same was not translated to the accused.***

11. Although it is true that Mohd. Ashraf Hofiyani was not examined by the prosecution, but no adverse inference can be drawn against the prosecution for his non-examination, inasmuch as, it had come on record that he was working in Ariana Airlines and was transferred to Kabul. That being so, ***the department was not in a position to produce him before the Court. In Dalbir Kaur and Ors v. State of Punjab 1977*** *Cr.L.J. 273 (SC) omission to examine material witnesses, who were not deliberately withheld or unfairly kept back, in the circumstances held, was not sufficient to throw doubt on prosecution case."* **Emphasis applied**

7.1.5 The language barrier would be equally applicable even to an Indian Citizen – literate, semi-literate, skilled labour, unskilled labour going abroad in search of job opportunities. Generally, the proceedings under the Act are conducted in English and the passengers coming from certain parts of the country do not understand the language. To understand this, we may see how the Hon'ble High Courts and Ld. Trial Courts have interpreted on the issue.

7.1.6 We now take the help of some more cases decided on the issue. In the case of **Hasan Imam Inamdar[5] ,**the counsel for the appellant submitted as under:

> *"4. Mrs. Gauri Jadhav, counsel appearing for the appellant, vehemently submitted that in the present case the members of the raiding party did not follow the provisions of law at all and that resulted in serious miscarriage of justice. She pointed out firstly that when the evidence of PI Patel and PI Wadhankar* ***was making it clear that the appellant was an illiterate person and was knowing only Marathi and Hindi, panchanama was drawn in English*** *language. According to her submission,* ***it was indirectly denying him the opportunity of knowing what was being written in the panchanama. She further submitted that the appellant has not been informed that he is having a right to be searched before a magistrate or gazetted officer and nothing has been reduced into writing for showing that such compliance has been made****."*

7.1.6.1 The Hon'ble High Court, after hearing the rival submissions on the issue, held as under:

> *"7. It is true that both PSI Wadhankar and PI Patel had stated that the appellant was informed that he has a right to be searched before a magistrate or gazetted officer but that has not been conveyed to him, informed to him, as section 50 of the NDPS Act indicates. He has to be told that he has a right to be searched before the gazetted officer or magistrate and that should find place in the panchanama at least because that is the document which happens to be recorded immediately thereafter.* ***In this case, the panchanama has been recorded in English when the appellant happens to be illiterate and knows nothing other than Marathi and Hindi. The improper sentences in the evidence in respect of compliance of provisions of Section 50 are not protecting prosecution. Same is the case in respect of the evidence of the pancha witnesses. Therefore, this aspect would be creating a serious dent on the merit of the prosecution case so far as the present appeal is concerned."***

Emphasis applied

7.1.7 In a case booked **by Department of Customs, through Sh. Vivek Singh, Air Custom Officer, IGI Airport, New Delhi[6] ,**the case of the prosecution, in brief, is that on 26.02.2017, the respondent accused was going to Dammam by Air India Flight No. AI-913 along with his two check-in baggage. The said check in baggage, having baggage Tag No. AI-573088 and AI 573089, was offloaded by security at level 4 at IGI Airport, New Delhi and he was handed over to Customs Officials by Air India Staff on the suspicion that he was carrying Phensedyl Cough Syrup in commercial quantity.

7.1.7.1 The Ld. Court, in respect of the Notice issued under section 50 of the Act held as under:

> *"25. I have perused the notices U/s 50 NDPS Act. The word mentioned is "Legal Right". However, the accused has given his reply in the form of noting on notice itself which is in Hindi. Accused signed all the documents prepared at spot in Hindi. In the voluntary statement of accused U/s 67 of NDPS Act Ex. PW-1/L itself, the qualification of accused has been recorded as 5th pass* ***out and it is mentioned that he can read and write Hindi only. So it is observed that accused was not much conversant with proceedings recorded in English and he was not comfortable with English. So this defence is available to the accused."***

Emphasis supplied

7.1.8 In another case booked by **Department of Customs, through Sh. Nilesh Kumar, Air Custom Superintendent, IGI Airport, New Delhi[8] ,**the case of the prosecution is that on 28/29.01.2017, accused was offloaded by GMR Security Officials at Level IV, IGI Airport, New Delhi, the baggage were found to contain 260 bottles of Chlorpheniramine Meleate & Codeine Phosphate Cough Linctus Phensedyl Cough Linctus 100 ML each. All 260 bottles were kept inside black polythene bags used for concealing the said bottles which were further kept inside his checked-in baggage. In this case, the services of a translator were made available and despite this the Ld. Court on the Notice issued under section 50 of the Act held as under:

> "*28. I have perused the notices U/s 50 NDPS Act. The word mentioned is "Legal Right". However, the accused has given his reply in the form of noting on notice itself which is in Hindi.* ***Accused signed on all the documents prepared at spot in Hindi only. It is nowhere alleged that accused was comfortable with English. So this defence is available to the accused."***

Emphasis supplied

7.1.9 Communication in the language known to the person to be searched assumes vital importance. In the absence of the proper and effective communication, the Notice issued under section 50 of the Act may fail as is evident from the following cases being discussed herein.

7.1.10 In CRL.A NO. 317 of 2008 decided on 28th June 2022 in the case of **K.B.Rasheed[8]**, the appellant was convicted *vide* judgment dated 30th January 2008 in S.C.No.5 of 2007 of the Special Court (NDPS Act Cases), Vadakara. The Hon'ble High Court overturned the judgment dated 30th January 2008 of the ld. Trial Court by holding as under:

> *"24. PW1 deposed that the appellant was apprised of his right and as he stated that the presence of Gazetted Officer or Crl.Appeal No.317 of 2008 a Magistrate was unnecessary, he himself conducted the search. At the same time, PW1 stated that the appellant knew Kannada only. The appellant wrote in Ext.P2 also in Kannada. In the absence of certification in Ext.P2 or a statement of PW1 in court that* ***the appellant was communicated in Kannada about his right under Section 50 of the NDPS Act, it can only be said that there occurred non-compliance with the provisions of Section 50. In the circumstances, conviction of the appellant for the offence under Section 20(b)(ii)(B) of the NDPS Act cannot be sustained****. Hence, this appeal is allowed and the judgment dated 30.01.2008 in S.C.No.5 of 2007 of the Special Court (NDPS Act Cases), Vadakara, convicting and sentencing the appellant is set aside.* ***The appellant is acquitted and set at liberty."***
>
> **Emphasis supplied**

ISSUANCE OF JOINT NOTICE – WHETHER CORRECT?

7.2 Another issue which requires mention at this point of time is the issuance of a joint notice under section 50 of the Act. Many of the investigative agencies do adopt this practice of issuance of a joint notice. Sometimes joint notice is issued to save time. Else, this is done on account of lack of awareness of the provisions. The Hon'ble Supreme Court deprecated the practice of issuance of a joint notice under section 50 and the exercise of option by one for the another in the case of **State of Rajasthan v. Paramnand** categorically held as under:

> *"14. In our opinion, a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would frustrate the very purport of Section 50. Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most of the offences under the NDPS Act carry stringent punishment and, therefore, the prescribed*

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procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. ***A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right.*** *We are, therefore, of the view that the accused must be individually informed that under Section 50(1) of the NDPS Act, he has a right to be searched before a nearest gazetted officer or before a nearest Magistrate. Similar view taken by the Punjab & Haryana High Court in Paramjit Singh and the Bombay High Court in Dharamveer Lekhram Sharma meets with our approval. It bears repetition to state that on the written communication of the right available under Section 50(1) of the NDPS Act, respondent No.2 Surajmal has signed for himself and for respondent No.1 Parmanand. Respondent No.1 Parmanand has not signed on it at all. He did not give his independent consent. It is only to be presumed that he had authorized respondent No.2 Surajmal to sign on his behalf and convey his consent. Therefore, in our opinion, the right has not been properly communicated to the respondents.*

Emphasis supplied

7.2.1 Similarly, on the issuance of joint notice under the Act and the casual manner of issuance of **omnibus communication**, we find the Hon'ble Allahabad High Court in Jail Appeal No. - 1087 of 2017, 1093 of 2017, 1091 of 2017, 6908 of 2017 decided on 12th October 2018 in the case of **Shakti Dom[10]** came down heavily on the prosecution and while calling it **'paper transaction'**, held as under:

"35. A reading of the aforesaid deposition of PW-2, ***also clearly indicates, that it was a joint communication of the right available to the appellants to be searched before a Gazetted Officer or a Magistrate, and, not an individual communication of that right. The words employed throughout, specifically, and, contextually clearly express a general address to all the accused, through a common communication.***

36. Apart from the evidence relevant to the point, in the dock testimony of

PW-1 and PW-2, the most important document about the manner of communication, whether it was joint or individual, is the record of the transaction evidenced by the recovery memo, ***about which this Court has expressed opinion, that communication of the right under Section 50(1) of the Act, was a joint communication to all the appellants.***

37. In view of the evidence appearing in the case, ***this Court is of clear opinion, that the communication of the right to be searched before a Gazetted Officer or a Magistrate, is not at all individual, clear and unequivocal. It is an omnibus communication to all the four appellants who, considering the fact that three of them are absolutely illiterate, and, cannot even sign,*** *with Basant Dom (Basant Ram) signing his name on the consent letter, does not at all meet the mandatory requirements of a clear communication of the right under Section 50(1) of the Act, to each of the appellants. From the entirety of evidence appearing in the case, relating to communication of the appellants' right under reference, this Court is not at all assured, that the appellants were made duly aware of what their right was.*

38. This Court feels, that ***no more than an empty formality about a communication of their right, to the accused was done. It must be added here, that in cases like the one in hand, where the appellants are apparently rustics, illiterate, and, certainly not even scantly educated, the communication of the right under Section 50(1) of the Act should be unimpeachably established by cogent evidence of an individual communication about the right, clearly showing, that each individual, given the poor understanding of his legal rights, on account of poverty and lack of education, has been made aware of his right to make an informed decision.*** *Here, the Court would think that nothing more than a mere formality has been done, to make the appellants barely aware about their right in question. A perusal of the consent letters, on behalf of each of the appellants would indicate, that they have been scribed by one or the other police officer, part of the arresting team, all written in a stereotype language, in identical words to which the appellants, Shakti Dom,*

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> *Devendra Ram and Vikas Ram, have affixed their left hand thumb impression, whereas Basant Dom, has signed his letter of consent.* ***Certainly, the three appellants who have thumb marked the letters of consent, could not have read the consent. It is not known whether Basant Ram (Basant Dom), who signed, is educated enough to have read the contents of the letter. There is no recital in any of the letters of consent, that the same have been read out and explained to the appellants, as to the character and contents of their respective letters of consent.*** *In the evidence of the prosecution witnesses too, there is nothing said to show, that the contents and character of the letters of consent, were explained to each of the appellants, before they were made to thumb mark/ sign the same.* ***Apart from the legal effect as to what would be the consequence of this kind of a consent, given by illiterate persons like the appellants, coming from a marginalized section of the society, it is a positive index of the fact, that clear and individual notice was not given to the appellants, about their right to be searched before a Gazetted Officer or a Magistrate. Everything appears to have been done, <u>as a matter of paper transaction</u> by the arresting police party."***
>
> **Emphasis applied**

7.2.2 For a detailed analysis of section 50 of the Act and its non-compliance leading to acquittal, readers may visit the link https://doij.org/10.10000/IJLMH.112916

SWALLOW CASES - EXPLAINED

7.3 Coming to the core issue, the international passengers, mostly while arriving into India, do indulge in swallow cases and on interception some of them do admit that they have secreted the contraband in their abdomen. Such swallow cases may require immediate medical intervention and accordingly, the empowered officer, based on the request, is to take them to the nearest Government Hospital for medical intervention. **<u>Needless to record here that the Act does not have a specific provision for X-ray, albeit of an international passenger in contradistinction to the availability of section 103 of the Customs Act, 1962 which provides for X-ray of the passenger arriving at an international passenger</u>**.

7.3.1 A letter is required to be addressed to the Medical Superintendent of the concerned Government Hospital giving the details of the passenger giving the background of the case and

should invariably contain his details (name of the passenger, father's name, passport number, nationality, details of flight number, arrival time at the international airport and all connected details). The Out Patient Card made out is carefully made out containing the details specified herein.

MEDICAL INTERVENTION

7.4 Upon medical intervention, X-ray, digital X-ray, CT scan, MRI etc is done on the passenger. In some extreme cases, when normal easing is not possible, the attending doctors do take recourse to surgery.

CONFIRMATION OF FOREIGN SUBSTANCE IN THE BODY

7.4.1 The attending doctors on the passengers would confirm the presence of foreign substance in the body. The estimate time of purging would depend upon various factors and no time frame can be attached. Sometimes recourse to surgery, as a last resort, is also undertaken.

DEPLOYMENT OF OFFICERS – ISSUE OF DUTY ROASTER ORDER

7.4.2. Consequent to confirmation of the foreign substance in the body by the doctors attending on the passengers, it should be ensured that a duty roaster is drawn up immediately and the officers are put on duty at the hospital. This ensures the smooth drawing of the panchnama proceedings. Needless to mention that the passengers continue to be under the custody of the officer on duty, despite under medical supervision.

7.5 A number of cases have been booked during the currency of the calendar year by the empowered departments at the international airports and they can be categorised into different headings ***viz.***

(i) Swallow cases

(ii) Non-swallow cases i.e. recovery and seizure effected from the baggage, etc. of the passenger

7.5.1 Coming to the statistical portion, we find the following cases were booked against various international passenger during the period December 2021 to July, 2022.

RECENT SWALLOW CASES BOOKED AT THE INTERNATIONAL AIRPORTS

Sl. No.	**Name of the international airport**	**Nationality**	**Date of interception**	**Number of capsules eased/purged**	**Weight in grams**	**Name of the substance recovered and seized**

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1	Chennai	Tanzanian	14.07.2022	86	1266	Heroin
2	Chennai	Passenger arrived from Sharjah	17.05.2022	63	794.64	Heroin
3	Chennai	Ugandan	08.05.2022	80	940	Heroin
4	Chennai	Passenger arrived from Sharjah	20.01.2022	108	10700	Heroin
5	Delhi	Malwi	27.05.2022	NA	607	Cocaine
6	Delhi	Ugandan	26.05.2022	NA	1850 From two passengers	Cocaine
7	Delhi	Ugandan	22.04.2022	69	762	Cocaine
8	Delhi	Tanzanian	07.04.2022	59	702	Cocaine
9	Delhi	Ugandan	31.03.2022	NA	921	Heroin
10	Delhi	Ugandan	31.03.2022	82	894	Heroin
11	Delhi	Ugandan	31.03.2022	70	815	Heroin
12	Delhi	Ugandan	19.02.2022	68	946	Heroin
13	Delhi	Ugandan	09.02.02022	51	501	Heroin
14	Delhi	Ugandan	04.02.2022	30	382	Heroin
15	Delhi	Ugandan	15.01.2022	91 including 38 capsules swallowed	998	Heroin
16	Delhi	Ugandan	25.12.2021	NA	992	Cocaine
17	Hyderabad	Tanzanian	26.04.2022	108	13891	Heroin
18	Hyderabad	Tanzanian	21.04.2022	79	1157	Cocaine

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REPRESENTATIVIE PICTURES OF SWALLOWED CAPSULES PURGED BY PASSENGERS

7.5.2 It may be seen from the aforesaid pictures that the size and dimensions of the capsules varies and an international passenger intercepted on the basis of a specific information or upon chance recovery purges out such capsules. The pictures are illustrative and are representative in character. The international passengers engaged to transport or indulging in illicit trafficking are trained to swallow capsules over a period of time and only upon being trained and fit, they embark on their international journey. Such passengers are difficult to identify on account concealment in the body. However, should the investigating officer intercept a passenger of this kind, the easiest way to unravel the mystery is to offer them food, water, chips, cool drinks (Coca Cola, Pepsi, lemonade), etc. and watch their reaction. A passenger who had swallowed capsules would refuse the offer and they are under instructions of their handlers not to eat during travel, until the capsules are eased out. Even if the foodstuff is placed before them, they would not venture into eating them. The reason is simple, the chances of the capsules bursting inside is extremely high and the refusal possibly indicates the ingestion of capsules.

RECENT TRENDS AT THE INTERNATIONAL AIRPORTS

7.5.3 A cursory glance of the list of cases booked also reveals that there has been shift. It categorically appears that the Nigerians, who were instrumental in fulfilling & fuelling the demand have become backbenchers and citizens of other countries from the African continent have taken over the job of illicit drug trafficking. Hyderabad International Airport has also become a new hub for illicit drug trafficking. The empowered departments are to watch for the trends.

7.5.4 In addition to the swallow cases, as stated herein, non-swallow cases at the international airports are booked on regular basis. In most of the cases detected, the concealment is unique. Different types of concealment are brought out in the cases appended below:

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CASES BOOKED AT THE INTERNATIONAL AIRPORTS – NON-SWALLOW CASES

Sl. No.	Name of the international airport	Nationality	Date of interception	Name of the substance recovered and seized	Mode of concealment	Weight in grams
1	Delhi	Zimbabwean	19.07.2022	Cocaine	concealed in the soles of ladies sandals	1011
2		Liberian	26.06.2022	Cocaine	concealed inside large buttons sewed on 11 kurtas in checked-in baggage	947
3		Pax arrived from Ethiopian	21.06.2022	Cocaine	Concealed in file folders	1955
4			09.06.2022	Heroin	Concealed in the checked-in baggage	10000
5		Ugandan	15.05.2022	Cocaine	Concealed in 210 buttons of 5 kurtas stitched randomly	1877
6		Kenyan	19.04.2022	Heroin	Concealed in checked-in baggage	18000
7		-	09.02.2022	Cocaine	52 capsules in abandoned polybag	870
8		Ivory Coast	10.02.2022	Cocaine	Concealed in checked-in baggage	2880
9		Ugandan	18.01.2022	Heroin	concealed in her	1293

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					undergarments	
10		Guinean	25.12.2021	Heroin	Concealed in her baggage	10350
11		Ugandan	21.12.2021	Heroin	Concealed in her checked-in baggage	2000
12		Nigerian	09.12.2021	Cocaine	Concealed in the checked-in baggage	2838
13		Ugandan	13.11.2021	Heroin	ingeniously concealed inside pseudo cavities of Trolley bags.	12900
14		NA	08.11.2021	Heroin	concealed in the luggage bag of the Pax	2975
15	Hyderabad	South African	06.05.2022	Heroin	Concealed in Folders	6750
16	Hyderabad	Tanzanian Angloa	01.05.2022	Cocaine	concealed in the false bottom of their trolley bags. Recovered 4000 grams each	8000
17	CSI, Mumbai	Zimbabwean	10.12.2021	Heroin	specially made cavities of Trolley Bags from two passengers	35000

During the impugned period under reference, a study of the above cases also reveals that there marked shift in as much citizens of countries, other than Nigeria, from the African continent having taken the lead in illicit drug trafficking. As in the case of swallow cases, Hyderabad International Airport has also become a new hub for illicit drug trafficking. The empowered departments are to watch for the trends.

WHETHER PURGING OF CONTRABAND INVOLVES ISSUANCE OF A NOTICE

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UNDER SECTION 50 OF THE ACT?

7.6 Detection of foreign substance in the body is confirmed by the attending doctors. Subsequently, the passenger, on his own volition, purges out the swallowed capsules. While purging out the capsules, whether the issuance of a Notice under section 50 of the Act is essential is a contentious issue.

7.6.1 We find that the Hon'ble High Court of Bombay in the case of **Mohamed Rashid Mohamedi**[11] was seized of the matter and it was held in this case as under:

> *"12. Mr. Thakur appearing for Respondent No. 1* ***contended that Section 50 would not be applicable*** *as the contraband was not found on the person or on the body of the accused* ***but inside his body.*** *According to him Section 50 is applicable only in case the contraband is found on the body i.e. when he is carrying contraband on his person outside the body and not inside his body.* ***In my view the said argument is devoid of substance.*** *The wording used in Section 50 of the NDPS Act is "When any officer duly authorised under Section 42 is about to search any person". Thus, the search of any person or personal search contemplated by Section 50 cannot be confined to the search on the person or outside body of the person****. In my view the search of the inside body of a person or the search of body cavity of the person would also be covered by the provisions of Section 50 of the Act and, therefore, the mandatory provisions of Section 50 would be applicable and failure of compliance therewith would result in search being illegal and the conviction and sentence vitiated."***
>
> **Emphasis applied**

7.6.1.2 Moving further, we find that this issue came up again in the case of **Ahmed Adenwala Kola**[12] wherein the Hon'ble High Court of Bombay went on to observe and hold as under:

> *"In my view the search of the body cavity or inside of the abdomen of a person amounts to personal search and, therefore, attracts the provisions of Section 50 of the Act. When the accused was taken for the purpose of X-ray in the J. J. Hospital to find out whether he had secreted or concealed narcotic drugs in his body cavity the search was made of the person of the accused on prior information as contemplated by Section 50 of the Act. The wording used*

> *in Section 50 is, "is about to search any person". It is this wording i.e. "search any person" which was being interpreted by the Apex Court and the Full Bench in the aforesaid decisions. Phrase "on person" was used by the Apex Court and the Full Bench not with a view to distinguish the possession inside the body of a person but to distinguish an article which was kept in the luggage which was not in his immediate physical possession like bag in hand but kept in checked-in-baggage.* ***The distinction sought to be made with regard to the contraband concealed in the body of a person is not warranted either by the provisions of Section 50 of the Act or by interpretation of that provision by the Apex Court or the Full Bench of this Court****. It is not in dispute that* ***at no stage in this case when the accused was taken to the hospital for X-raying or at any subsequent stage before alleged purging of the contraband capsules concealed in his body cavity the choice or option under the provisions of Section 50 of the Act was given to the accused. It is settled position in law that the accused had to be made aware of his right under Section 50 and given the option to be searched in the presence of a Magistrate or a Gazetted Officer which was not done in this case. Thus there was non-compliance with the mandatory provisions of Section 50 of the Act."*** ***Emphasis applied***

7.6.2 Looking from a different angle, in a case where a passenger purged out capsules under medical supervision, the Hon'ble Supreme Court upheld the findings of the Hon'ble High Court and it was held that it was only the sweeper who had collected the capsules (referred to as 'sachets'), who was not examined and the resident doctor to whom ***"sachets were given after cleaning every time the same were purged was also not examined by the prosecution nor is there any material*** *to show that as and when these sachets were purged, they were kept separately from the other sachets which were also similarly purged by other accused persons."* We may refer to the findings recorded by the Hon'ble Supreme Court's judgment in **the case of Abdullah Hussain Juma & Anr**[13] wherein it was held as under:

> *"As seen above, though the High Court has given a number of reasons for allowing the appeal filed by the respondent-accused before it, on the facts and circumstances of this case, we find it not necessary to go into all the points urged before us because we are in agreement with the finding of the learned Judge of the High Court on the question that the prosecution has failed to establish that the 41 satchets(sic) recovered by it are really the ones which*

were allegedly purged by this respondent-accused. While discussing this fact, we have to bear in mind that there were 9 accused persons who were intercepted at the airport by the NCB Officers on 8.3.1994. All these 9 persons were brought to the hospital and subjected to radiological test and were ***suspected of having concealed certain foreign substance in their body cavity.*** *Evidence of Dr. Algotar, PW-3, shows that all these accused persons were kept in the hospital because it was thought that they would in due course of time, purge foreign substance from their bodies. He also states in his evidence that arrangements were made by the hospital authorities in regard to each of these accused persons to facilitate them to purge the foreign substance from their body cavities and these persons were kept under observation.* ***He also stated that each of these accused persons was provided with a toilet pan and every time the accused persons purged the sachets, they were collected, cleaned by the sweeper of the hospital and handed over to the Resident Doctor****. It is thereafter according to this witness the sachets purged by each of these accused persons were collected, sealed and sent for chemical examination. But we notice from the evidence of PW-3 that he was not personally present when these sachets were recovered after they were purged by the concerned accused nor when the sachets after collection and cleaning, were handed-over to the Resident Doctor, therefore, this witness is not competent to say that the 41 sachets collected from the respondents-accused are the very same sachets which he had purged and not those which the other accused might have purged.* ***The appropriate person who could have spoken about this fact of purging by the respondent-accused, was the sweeper who collected the said sachets. He has not been examined nor the Resident Doctor to whom these sachets were given after cleaning every time the same were purged was also not examined by the prosecution nor is there any material*** *to show that as and when these sachets were purged, they were kept separately from the other sachets which were also similarly purged by other accused persons.* ***Therefore, there is a serious doubt as to the identity of the sachets actually purged by the respondent-accused. Learned counsel for the appellant, however, contended that it is seen from the evidence of PW-3 that a proper inventory was maintained by the hospital as and when sachets were recovered from the respondent-accused but, as noticed by the High Court, it***

> ***is seen that the so-called inventory maintained by the hospital is not signed or attested by any of the officials of the hospital nor any person who really maintained the said inventory****, has been examined in this regard. Even the Panch witness PW-4, who had signed the Panchnama for the recovery of the alleged sachets from the respondent accused, has not fully supported the prosecution case. In this background, we agree with the High Court that the prosecution has not established beyond reasonable doubt that the sachets which were collected on various dates between 16th and 20th March, 1994, as a matter of fact, were purged by the respondent-accused and not by anybody else. In such factual background, we feel that the High Court was justified in coming to the conclusion that the prosecution has failed to establish the recovery of these sachets from the respondent-accused beyond all reasonable doubt.* ***In our opinion, this ground alone is sufficient to sustain the judgment of the High Court, hence, it is not necessary for us to consider the correctness of the legal argument as to the applicability of Section 50 of the Act in regard to a search made by a doctor. We leave this question open and in view of the fact that we are in agreement with the finding of the High Court on a question of fact namely the prosecution has failed to establish beyond all reasonable doubt that the sachets sent to the Chemical Examiner are the very same sachets recovered from the respondent. We think this appeal has to fail and the same is dismissed. The bailbonds of the respondent stand discharged."***
>
> **Emphasis applied**

7.6.3 It follows from the Hon'ble Supreme Court's judgment and Hon'ble High Court of Bombay's judgments, as stated herein above, that purging capsules by an accused falls well within the scope of section 50 of the Act and **anything recovered from the cavity of the accused would attract section 50 of the Act**. Hence, it is imperative that the accused is duly apprised of the legal right vested in him that he/she can himself/herself searched before a Gazetted Officer of Customs or before the nearest Magistrate. Should the accused exercise the option to get himself/herself before the Gazetted Officer, the empowered officer should ensure that the accused is **'taken'** to the nearest Gazetted Officer and not the Gazetted Officer forming part of the raiding team as held by the Larger Bench of the Hon'ble Supreme Court in the case of **Sanjeev V Deshpande**[14]

7.6.3.1 The duty roaster, referred to in **para 7.4.2,** should have a separate set of Gazetted

Officers not forming the team deployed at the concerned hospital for the purpose of compliance of the judgment of the Hon'ble Supreme Court in **Sanjeev V Deshpande**[14] .

OPTION TO BE EXERCISED ON THE BODY OF THE NOTICE

7.6.4 It is also imperative that the accused should be allowed to exercise the option on the body of the Notice itself and such exercise of power by the accused should be witnessed by two independent witnesses (here preferably by the Hospital Staff say nurse/male nurse, ward boy, other non-medical personnel attached to the hospital).

PANCHNAMA PROCEEDINGS

7.6.5 The proceedings conducted in the presence of independent witnesses, doctors, nurses and other officers are to be meticulously recorded in a sequential manner giving the vivid description. It should also capture the notice issued under section 50 of the Act, the option being explained in the language known to him and the number of capsules eased out, the washing of the same by the person deployed (i.e., the sweeper), the sealing of the same in transparent pouches, the slips placed inside the pouches containing the signatories of the panchnama and other regular formalities associated with the proceedings. Needless to mention, such transparent pouches should be placed in a separate envelope and sealed properly and should invariably contain the signatures of the all signatories of the panchnama.

IMPORTANCE OF PROPER, ACCURATE AND TRUE DRAWAL OF PANCHNAMA

7.6.5.1 To digress a little, the importance of proper recording of the facts correctly and accurately can serve as a good tool, *inter alia,* to oppose the bail proceedings in the Ld. Trial Court and appellate courts.

7.6.5.1.1 To illustrate, we may refer to one of the recent Order dated 27th April, 2022 of the Larger Bench of the Hon'ble Supreme Court in the case of **Ramjhan Gani Palani**[15] .The facts of the case, recorded in the Order *ibid,* are as under:

> *"1. The petitioner has filed the present petition seeking special leave to appeal against the order dated 19th August, 2021, passed by the Gujarat High Court, dismissing the appeal preferred by him against the order dated 19th March, 2021, passed by the Special Judge, National Investigating Agency, Ahmedabad, whereby his bail application was rejected in a case registered originally by the Directorate of Revenue Intelligence and subsequently taken over by the National Investigating Agency for offences under Sections 120-B, 121-A & 122 of the IPC, Sections 17, 18, 18-B, 20 of Unlawful Activities*

(Prevention) Act and Sections 2, 8, 16, 17, 18, 23, 24, 29 and 32 (B) (e) of the Narcotic Drugs and Psychotropic Substances Act, 1985 , relating to seizure of 236.622 Kgs. of Narcotics drug, Heroin near Jakhau Port, Gujarat on 21st & 22nd May, 2019 in a joint operation by the Indian Coast Guard and DRI.

3. On receiving the aforesaid information, a radio operator was deputed by the Indian Coast Guard Officers to go on calling "Mohammed-Ramzan-Ramzan" by a hit & trial method on VHF Channel No.16, being an International Maritime channel that was meant for use of fishermen communication and for Ship-to-ship contact. In response to the said call, the petitioner herein on board an Indian fishing boat drifting in a nearby location close to where the Pakistan Flag Ship was intercepted, had replied, "Ramzan-haan bolo", but on VHF Channel No.8. The prosecution version is that there was only one Indian fishing boat in the immediate vicinity that belonged to the petitioner herein with twelve crewmen on board. The said boat had remained on the high sea for 4-5 days and in all that period, they had managed to catch only five fish. ***Moreover, the Captain and the crew members of the Indian fishing boat appeared with neat and clean clothes, though the petitioner claimed to be fishing on the high sea for 4-5 days. Even the fishing net and the deck of the boat were found unsoiled, clearly, pointing a finger of suspicion towards the petitioner. It was contended that no attempt was made to prove that any substantial number of fish had been caught while on sea and that the boat was drifting at that location for five days only with the motive of collecting the consignment of the contraband****. As a result, the petitioner was detained on a reasonable belief that he was the Indian recipient for the drug consignment brought into the Indian territory by the Pakistani Flag Ship.*

9. We have perused the impugned order and carefully considering the arguments advanced by learned counsel for the parties, duly recorded in paras 8 and 9 of the impugned judgment and are of the prima facie view that there is sufficient material on record to deny the discretionary relief of bail to the petitioner. Much is sought to be made of the five Ghol fish netted by the petitioner and his ***crew members over five days of remaining on the high seas by referring to the high market value of the prize catch. The petitioner would be entitled to justify his presence in the fishing boat, at the scene of crime***

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> ***which is sought to be described as a sheer coincidence during the trial***. *The explanation offered by* ***the petitioner of having responded to the call "Mohammed-MohammedRamzan-Ramzan" on Channel No.8, instead of Channel No.16 which is the specifically earmarked channel for communication with fishermen and for Ship-to-Ship contact, would also be available to him at that stage. But at the threshold, this appears to be a case where the petitioner has been fishing in troubled waters and as per the respondent No.1/NIA, has got caught in his own net."***
>
> **Emphasis supplied**

FURTHER PROCEEDINGS

7.6.5.2 The exercise as conducted shall be done separately for each time the easing/purging of capsules is done by the passenger. It is to ensure that the panchnama should be drawn by the officer deputed for the same. The formalities as brought out herein has to be strictly followed.

DEPOSIT OF PURGED CAPSULES WITH THE STATION DUTY OFFICER (ARRIVAL)

7.6.5.3 The sealed envelope containing the transparent pouches should be deposited at the earliest possible time and the entry number obtained. The register should record the name of the officer depositing and receiving the envelope. This is essential because they are prosecution witnesses and would depose on behalf the department, as and when they are summoned by the court on the basis of the complaint filed by the complainant-officer. The extract of the same or photocopy of the said register containing the deposit particulars should be taken and placed in the file. This process should be followed for all the entries.

DRAWAL OF LAST PANCHNAMA AT THE HOSPITAL

7.6.5.4 Once the attending doctors certify that the passenger is free of foreign objects, he can be got discharged. The last panchnama should invariably include the taking over of all the medical records i.e. OPD slips, medical slips generated, x-ray, digital x-rays, CT Scan, MRI San, which should duly signed by the signatories to the panchnama.

WITHDRAWAL OF SEAL AND ITS MOVEMENT

7.6.5.5 The entries in the seal movement register are an important piece of evidence in the booking of the case against any person. The seal is always in custody of the Assistant/Deputy Commissioner of Customs and is given upon making proper entries and signatures on the said register. The history of the movement has to be recorded properly i.e. handing over and taking

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over is requires to be noted carefully. In case of the panchnama proceedings happening at the hospital premises, it should be ensured, proper orders are issued and the seal movement register and the seal is in proper custody and thereafter, the handing over and taking over is recorded faithfully and accurately in the register. Since, some of the operations at the airport, happen over a period of time, it should be ensured that the entries in the register are made by the empowered officer at the right date and time. The seal can be handed over to the independent witnesses and handing over and taking over by them takes place properly and this can be recorded separately in the panchnama. Subsequently, in compliance to the Office Order, the return of the seal to the Assistant/Deputy Commissioner of Customs should be done by the independent witness.

RECORDING OF STATEMENT IN RESPECT OF MEDICAL PERSONNEL, INCLUDING DOCTORS BEFORE EXITING THE HOSPITAL PREMISES.

7.6.6 It should also be ensured that the statement of the doctors, nurses (including male nurse, if any), ward boy, initial officer who made the OPD card, sweeper and other connected person with the case is recorded under section 67 of the Act at the earliest and such medical personnel shall be invariably cited as the prosecution witnesses in the case.

WITHDRAWAL OF THE DEPOSITS FROM THE SDO(ARRIVAL) (OR MALKHANA INCHARGE) FOR THE PURPOSE OF TESTING

Appointment of Investigation Officer – neutrality in investigation

7.6.7 Before, venturing into the main issue, it is essential to digress a little and discuss on the appointment of the investigating officer. The investigation officer appointed is to be done by the superior officer. It is always preferable to have another officer of the team as the investigating officer, instead of the seizing officer, to have neutrality and avoid bias. On this issue, we have three major decisions rendered by the Hon'ble Supreme Court in the case of **Mohan Lal[16] ,Varinder Kumar[17] and Mukesh Singh[18]** , which are discussed as under:

7.6.7.1 The Hon'ble Supreme Court in the case in the case of **Mohan Lal[16]** in para 13 observed as under:

> *"13. A fair trial to an accused, a constitutional guarantee under Article 21 of the Constitution, would be a hollow promise if the investigation in an NDPS case were not to be fair or raises serious questions about its fairness apparent on the face of the investigation. In the nature of the reverse burden of proof, the onus will lie on the prosecution to demonstrate on the face of it that the investigation was fair, judicious with no circumstances that may raise doubts*

about its veracity. ***The obligation of proof beyond reasonable doubt will take within its ambit a fair investigation, in the absence of which there can be no fair trial. If the investigation itself is unfair, to require the accused to demonstrate prejudice will be fraught with danger vesting arbitrary powers in the police which may well lead to false implication also. Investigation in such a case would then become an empty formality and a farce. Such an interpretation therefore naturally has to be avoided.***

7.6.7.1.1 While allowing the appeal, the Hon'ble Supreme Court held as under:

"31. Resultantly, the appeal succeeds and is allowed. <u>The prosecution is held to be vitiated because of the infraction of the constitutional guarantee of a fair investigation</u>. The appellant is directed to be set at liberty forthwith unless wanted in any other case."

Emphasis applied

7.6.7.2 However, the Larger Bench of the Hon'ble Supreme Court in the case of **Varinder Kumar**[17] ,it was observed as under:

"2. At the outset, it is required to be noted that the decision of this Court in Mohan Lal [Mohan Lal v. State of Punjab, (2018) 17 SCC 627 : (2019) 4 SCC (Cri) 215] taking the view that in case the investigation is conducted by the police officer ***who himself is the complainant, the trial is vitiated and the accused is entitled to acquittal, came up for consideration subsequently before this Court in Varinder Kumar v. State of H.P. [Varinder Kumar v. State of H.P., (2020) 3 SCC 321*** *: (2020) 2 SCC (Cri) 54] and a three-Judge Bench of this Court (out of which two Hon'ble Judges were also in the Bench in Mohan Lal [Mohan Lal v. State of Punjab, (2018) 17 SCC 627 : (2019) 4 SCC (Cri) 215]) held that* ***the decision of this Court in Mohan Lal [Mohan Lal v. State of Punjab, (2018) 17 SCC 627 : (2019) 4 SCC (Cri) 215] shall be applicable prospectively, meaning thereby, all pending criminal prosecutions, trials and appeals prior to the law laid down in Mohan Lal [Mohan Lal v. State of Punjab, (2018) 17 SCC 627 : (2019) 4 SCC (Cri) 215] shall continue to be governed by individual facts of the case."***

Emphasis applied

7.6.7.3 The Constitution Bench of the Hon'ble Supreme Court in the case of **Mukesh Singh**[18] after analysing the case laws and the provisions of Cr. P.C., 1973 and the Act, held as under:

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> ***"10.5. <u>Therefore, as such, the NDPS Act does not specifically bar the informant/complainant to be an investigator and officer in charge of a police station for the investigation of the offences under the NDPS Act. On the contrary, it permits, as observed hereinabove. To take a contrary view would be amending Section 53 and the relevant provisions of the NDPS Act and/or adding something which is not there, which is not permissible."</u>***

Emphasis applied

7.6.7.4 Essentially, the judgment in the case of **Mukesh**[18] overturns the previous judgments on rendered in the case of **Mohan Lal**[16] **and Varinder**[17].

7.6.8 Reverting to the topic, the withdrawal of the deposits with the SDO(Arrival)/malkhana in-charge should be got done properly and thereafter the extracts thereof taken and kept in the file. The contents should be opened panchnama-wise in the presence of independent witnesses by the investigating officer and contents in the capsules should be taken out and thereafter should be tested using the FTK/FDK and the results thereof noted. It is important to note at this juncture that the Standing Instruction No.1/88 dated 15.03.1988 and Standing Order No.1/89 dated 13.06.1989 have the force of law and should be strictly followed. The results of content upon testing using FTK/FDK should be positive for action to be initiated and to take the matter further. If the tested substance falls outside the ambit of the Act, no case is made out.

RE-SEALING EXERCISE

7.9 The re-sealing exercise should also be done panchnama-wise and while doing so, the initial packing material, envelope, slip, capsules' coverings, etc. should also form part of the re-sealing exercise. The entire exercise should be covered under a fresh panchnama. Since this exercise would be done at the airport, it is always preferable to carry out of the exercise under the camera and annex the video recordings to the complaint. This would not only be in compliance of the Hon'ble Supreme Court's judgment rendered in the case of **Shafhi Mohammad**[19] and also **Paramvir Singh Saini**[20] but also simultaneously rule out tampering or foul play.

RE-DEPOSIT AFTER TESTING

7.10 After completion of the aforesaid process, it should be ensured that the fresh panchnama-wise deposit is made (which should have reference to the previous panchnama) and the entire extract of the entries made by the SDO(A)/malkhana in-charge should be taken and kept in the investigation file.

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APPLICATION TO THE MAGISTRATE FOR DRAWAL OF SAMPLES PANCHNAMA-WISE IN COMPLIANCE OF THE JUDGMENT OF THE HON'BLE SUPREME COURT IN THE CASE OF UOI v. MOHANLAL[21]

8. Once the actions in para *supra* are completed, an application is to be moved to the Magistrate at the earliest for drawal of representative samples in terms of the judgment of the Hon'ble Supreme Court rendered in the subjected quoted case wherein it was held as under:

> *"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."***

8.1 On being allowed to draw representative samples, the investigation officer would draw samples in the presence of the Magistrate and this adds sanctity to the entire process. The required quantity as laid is drawn and should be duly put in a transparent zip lock containing the signatures of the drawing officer and the Magistrate and thereafter the same should be put in an envelope and should be sealed using the Court's seal properly.

8.1.1 The ingredients (except the Court's seal) required for the entire process is to be carried to the Court by the Officer on the given date. The Test Memo, in the prescribed format, is prepared and got attested by the Magistrate. The representative sample is drawn in duplicate. The seal of the Court should be affixed on the same and after completion of the entire process and checking it properly, the Court's seal should be handed over to the Court Officer. Thereafter the representative sample so drawn - one for the CRCL and one for the department - should be entered in the relevant registered maintained by SDO(A)/malkhana in-charge. Extracts of the entry should be taken and placed in the investigation file.

TRANSMISSION OF SAMPLES TO CRCL

8.2 The representative sample should be withdrawn from the SDO(A)/malkhana in-charge under proper entry and signature and should be sent by speed post(insured) to the CRCL if the same cannot be physically handed over**.** In the event of the sample drawn can be physically

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deposited, the same should be done and the acknowledgment obtained. Necessary entries can be made in the register maintained by SDO(A)/malkhana in-charge and the original kept in the investigation file.

ALTLERNATE MECHANISM

9. The initiation of the case by drawal of a panchnama starts with said passenger purging out the contraband containing the narcotic drug (mostly heroin or sometimes cocaine) and the capsules should be washed and stored separately. The purging may take place over a period of time covering different time periods/zones. The officer on duty is systematically required to note down the names of medical attendant, the nurse (male nurse in respect of male passengers) and the doctors attending upon the said passenger and the opening of the capsules should be invariably in the presence of independent witnesses and the aforesaid named herein. Thereafter, the same should be tested with the Field Testing Kit/Field Detection Kit and the substance should be identified. The panchnama should be drawn for different period/zones and signatories to the panchnama should include all the medical personnel involved and the independent witnesses. Generally, it is seen, on an average 70-100 capsules are purged out by an international passenger. Since the purging takes place over a period of time, the panchnama is to be done as per the duty roaster and the time period of the duty officer should invariably coincide with the time period of the medical personnel for proper synchronization. Should a mistake occur at any point of time, the case would get vitiated.

9.1 If the procedure as stated in para 9 is followed, the procedure set out for deposit, drawal of seized substance, application to the Magistrate, drawal of representative samples and transmission to the CRCL would be subsequently carried out as stated in para *supra.*

ISSUANCE OF A NOTICE

10. Subsequent to the drawl of the last panchnama, the passenger can be issued a notice to appear before the officer. The statement can be preferably be recorded in the hospital itself if the situation is conducive. Else, on account of the prevailing situation, the passenger may be asked to exercise his option to appear before the officer in his office. While exercising such option by the passenger, it may also be ensured that the passenger makes a request to accompany the officers in their vehicle. The investigation officer should ensure that there is sufficient time gap between the closing time of the panchanama and time given to the passenger to appear before the empowered officer. This is required so as to enable the passenger to take rest, ponder over and give his statement voluntarily.

10.1 It must be appreciated that airport is an enclosed high security area in contrast to

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interception of a person on a highway or a railway station. It needs to be recorded here that the power to arrest a person departing or arriving into India under section 42 or section 43 in case of an offence under the Act is of the investigating officer and there is no requirement of any prior approval as is required under section 104 of the Customs Act, 1962.

10.1.1 Alternatively, in case of a combined offence under the provisions of the Customs Act, 1962 as well as under the Act, the statements under section 108 and section 67 can be recorded separately or combinedly depending upon the case. In case of a combined statement under section 108 of the Customs Act, 1962 and section 67 of the Act, it should be invariably be recorded by the gazetted officer.

10.1.2 Needless to mention that the Central Government in exercise of the powers conferred by sub-section (1) of section 4 of the Customs Act, 1962 appointed *"all Officers of the Narcotics Control Bureau"* as "*Officers of Customs", vide* Notification No. 31/97-Cus. (N.T.) dated 7th July 1997 published *vide* number G.S.R.367(E) dated the 7th July 1997.

CATEGORIZATION OF OFFENCES UNDER THE CUSTOMS ACT, 1962

11. Offences under the Customs Act, 1962 are cognizable& non-cognizable and the said offences are also bailable and non-bailable. If the offences under the Customs Act, 1962 do indicate that the offences are cognizable and non-bailable, say the person is involved in smuggling 5 kilograms of gold valued at Rs.1,55,00,000/-(tariff value), the power to order for arrest the passenger is to be ordered, in exercise of the power vested under section 104 of the Customs Act, 1962 by the Principal Commissioner/Commissioner of Customs.

OFFENCES UNDER THE ACT

12. If there is no offence under the Customs Act, 1962, further proceedings cannot continue. However, if an offence is made out under the Act, the accused can be put under arrest under section 42 or 43 of the Act by the empowered officer without referring the matter to the Principal Commissioner of Customs or Commissioner of Customs. The officer, upon completion of the formalities under the Customs Act, 1962, if applicable, and under the Act can produce the accused before the Magistrate or Duty Magistrate and thereupon complete other formalities.

DIFFERENCE BETWEEN THE PROVISIONS OF CUTOMS ACT, 1962 AND THE ACT

13. It needs to be noted here that he (the person) becomes an accused under the Act but becomes an accused under the Customs Act, 1962 only upon filing a complaint before the competent court of law as held by the Larger Bench of the Hon'ble Supreme Court in the case

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of **K I Pavuuny v. Assistant Collector of Central Excise Collectorate HQ, Cochin.** The Hon'ble Supreme Court *vide* judgment dated 3rd February 1997 held as under:

> *"It would thus be clear that the appellant was not a person accused of the offence under the Act when he gave his statement under Section 108 of the Act on December 6, 1980 at 1.00 p.m. in the office of the Superintendent of Customs, PW-2. The question then is: as to when the appellant became an accused of the offence? This court in Veera Ibrahim V/s The State of Maharashtra [(1976) 2 SCC 302] had held in para 9* ***that an accusation which would stamp him with the character of such a person was labelled only when the complaint was filed against him by the Assistant collector of Customs complaining of the commission of the offences under Section 135 (a) and Section 135 (b) of the Act."***
>
> **Emphasis supplied**

CASES BOOKED IN RESPECT OF NON-SWALLOW CASES AT THE AIRPORT

14. As already stated, cases booked at an international airport can be conveniently divided into swallow and non-swallow cases. Having discussed the intricacies involved in the swallow cases, it is equally important to understand the intricacies involved in the non-swallow cases i.e. where the recovery and seizure is made from the concealment in the checked-in baggage or hand baggage. While the hand baggage poses no problem, the checked-in baggage requires efforts on the part of the investigating officer to link the checked-in baggage to the person/passenger. In the absence of the same, no case can be made out.

INTRICACIES IN NON-SWALLOW CASES: UNDERSTANDING BAGGAGE TAGS USED/ISSUED BY AIRLINES

15. In order to book an effective case at an international airport, it is essential that certain terminologies used by the airlines are understood. Before we venture into the same, it may be noted that the compliances required in non-swallow cases is as demanding as the swallow cases and there should be strict compliance at all stages of the cases.

15.1 Coming to the issue, we find that there are different types of baggage tags used by an airline in its day to day operation. For the purpose of this article, the same has been restricted to **baggage tag, rush tag and interline tag** and these tags are commonly used terms while working at an international airport.

15.2 Baggage tags have a lot of utility and contains plenty of information. Before moving to

the intricacies, a brief background on the baggage tag is essential for the purpose of this topic and they are as under: -

> *"@The adhesive label that gets wrapped around the handle of your suitcase at the check-in counter is known as an automated baggage tag (ABT). Introduced in the early 1990s, ABTs are made from silicon and plastic, resistant to moisture, oil, heat, cold and sunlight and designed to be rip-proof.*
>
> *The information printed on the ABT varies slightly from one airline to another but every tag has the passenger's name, flight number, date and destination.*
>
> *It might have the bag weight, place of origin and the booking reference.*
>
> *There's also a 10-digit number known as the IATA license plate code.*
>
> *The first digit is the Baggage Tag Issuer Code, the next three digits identify the carrier airline, followed by a rolling number that resets when it gets to the last digit.*
>
> *The bar code is what gets read by the scanner which then directs the bag to a particular destination and it appears twice, printed both horizontally and vertically so it can be read more easily."*

15.3 The baggage tags, generally contain the following information:

(i) Name of the traveller/passenger

(ii) Gender of the passenger

(iii) Number of checked-in baggage

(iv) Weight of the checked-in baggage

(v) Baggage tag number

(vi) Flight number for e.g. AI-102 New York to New Delhi (JFK - DEL)

(vii) Abbreviation of the airline (for e.g. AI = Air India)

(viii) Port of embarkation (here New York = JFK)

(ix) Port of disembarkation (here New Delhi - DEL)

(x) Departure time

15.4 Some of the airlines may capture additional information other than the above. This is coded and is reduced to a bar code, which can be read by a machine only. This baggage tag is on a prominent place, usually on the handle of the bag. The stub of this baggage tag is pasted

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on the boarding pass. During the course of handling of baggage, the chances of losing the baggage tag cannot be ruled out. Hence, the person manning the check-in counter also affixes a version of the baggage tag, which is oblong in nature on the baggage for identification. Essentially, the baggage tag is for the identification of the ownership of baggage and the contents of thereof. In case of similar/identical baggage (same colour, shape, size, make, brand, etc), the baggage tag helps the persons to identify his/her baggage.

LODGING OF 'PIR' ON ACCOUNT OF NON-ARRIVAL OF BAGGAGE

16. PIR stands for 'Property Irregularity Report.' The passenger, upon non-arrival of the checked-in baggage, makes a complaint and registers a complaint with the concerned airlines, leading to lodging of Property Irregularity Report (PIR) and this PIR has, *inter alia*, the details of the baggage tag and the value of the goods(usually new). The PIR is countersigned by the Customs Officer. The value of the new goods determines the payment of customs duty as the new goods in excess of the Baggage Allowance attracts appropriate Customs duty.

16.1 There are several reasons why a person travelling on a particular flight does not get his baggage delivered. Some of the reasons could be flights being cancelled and the passengers being accommodated in other flights and that flight has space for only passengers and not for baggage, as the additional load cannot be taken. There could be mis-reading of the baggage tag and its routing to a non-destination. Such cases are reported in large number during winters and there are diversion of flights at IGI Airport, New Delhi.

MIS-HANDLED BAGGAGE AND FILING OF PIR

17. Sometimes, the passengers on sensing heightened vigilance by the customs, do resort to leaving the baggage on the carousel without collecting the same. Such baggage are deposited by the concerned airlines by filing PIR. The identification of the baggage is done on the basis of baggage tag (small). In the alternative, if none exists or has been thrown away or removed, the inventorization of the baggage is done and is subsequently disposed off by the Customs in terms of the provisions of the Customs Act, 1962. Should the Customs Officer, during the inventorization come across prohibited goods (say contraband under the Customs Act, 1962 or under the Act), action is initiated based on the facts and circumstances of the case.

OTHER TYPES OF BAGGAGE TAGS

(i) RUSH TAG

18. One term which generally the officers come across is the "Rush Bag". A "rush bag" is a bag of a passenger that does not accompany him (baggage that comes with the passenger is

called accompanied baggage while which comes without the passenger is called unaccompanied baggage). By the term unaccompanied baggage, we mean here that that the baggage missed its original flight and is now flying unaccompanied without the passenger and may happen in a day or two. This is contrast to unaccompanied baggage of a passenger who transfers his residence on his relocating to India and such unaccompanied baggage can come before or after 30 days of relocation and is usually on account of 'Transfer of Residence'(TR) and such TR cases, though unaccompanied, are dealt with at the Unaccompanied Baggage Section of the Air Cargo Complex. Hence, the readers may note the difference at this stage.

(ii) INTERLINE BAGGAGE TAG

18.1 When a passenger has to reach a destination *via* two or more airlines i.e. Jaipur-Mumbai-Singapore-Japan, the term interline baggage is used. It means that checked baggage will be transported by two or more airlines (here Jaipur-Mumbai on the Indian network); Mumbai to Singapore (on Singapore Airlines) and on the last leg Singapore to Japan).

MOVEMENT OF CHECKED-IN BAGGAGE

19. It is essential to understand the movement of checked-in baggage. It starts with when the passenger present himself or herself, when travelling alone, to check-in at the specified counter operated for the said flights. Different counters are opened for different classes of travel and the passengers reports accordingly.

19.1 There are group travels too. Members of the group, when travelling together, may present all their checked-in baggage at one dedicated counter.

19.2 At baggage check-in counter, either computerized baggage tag, which is also known as destination tags are attached to each of the checked-in baggage and a portion of the same (also known as stub) is affixed on the boarding pass. The baggage tag captures the information as stated in para *supra*. The personnel manning the counter also affix a sticker type tag, which is smaller in size for identification of the baggage. Should the passengers on a particular flight or when the checked-in baggage of different flights on put on carousel, the chances of mixing of checked-in baggage of the same make, model, brand, type, size, etc. of is high and this small baggage tag affixed helps to resolve the ownership issues. It is common at the airport that when there is group travel or when known friends are travelling, say for further studies, at the same destination, the shifting of material from one bag to another bag is common. We shall address various issues on this aspect subsequently.

19.3 After the passenger hands over the baggage to the officer manning the check-in counter and the officer affixes the baggage tag, as described herein, and puts the same on the belt and

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the same reaches the baggage make up area. Before it reaches the makeup area, the baggage are checked from the security angle and are cleared for being sent to the makeup area. The baggage handlers in the makeup area, using the bar code scanner scan the baggage tags and on the basis of the same, segregate the baggage based on the flight number/destination and then put it to a container for further being sent for being loaded on to the aircraft.

PASSENGER HOLD AND CARGO HOLD - DISTINGUISHED

20. At this stage it is to be understood, the aircraft can be divided into two portions (i) passenger hold and (ii) cargo hold.

20.1 Passenger hold is the area where the passengers are seated as per their entitlement i.e. economy class, premium economy class, business class or first class. There are cabin overheads for storing the hand carry baggage, which is generally limited to 7 kilograms of weight and is dimension specific. The size of the hand carry bag, being specific and defined and the hand carry baggage should be well within the dimensions prescribed, failing which it shall not be allowed to be carried as a hand carry baggage. The hand carry baggage is used by a passenger for carrying valuables, etui, passport, camera, purse, jewellery, documents, video camera, foreign exchange, traveller cheques, certificates and is not manifested by the airlines. Of course, subsequent to the immigration, the hand carry baggage is subjected to X-ray by the security force operating in that airport (say CISF in Indian Airports) and only upon clearance by the security force (say CISF), they are released to the passenger. It is important to mention that there is no baggage tag, as of now, attached to the hand carry baggage. On the other hand, the cargo hold is the area beneath the passenger hold and is, used, *inter alia*, to store the checked-in baggage of the passenger. Every checked-in baggage invariably is given a baggage tag and information, as mentioned in para *supra* are captured.

20.2 Coming to the issue relevant for this portion of the article is that a passenger should not accept anything given by any other passenger. If accepted, it could have serious consequences especially in foreign shores and may land a person in trouble. The passenger, in good faith, may help the other co-passenger and this may be a humanitarian gesture but may give a legal trouble. To understand this complex issue, we refer to the judgment rendered by the Hon'ble High Court of Bombay in the case of **Daisy Angus**[22]**.** This judgment is extracted for a proper understanding of the issue raised herein:

> ***"2.*** *Prosecution case in brief, is that the complainant M. Jaykumar Superintendent of Customs Department, was attached to Air Intelligence Unit of Customs at Sahar Airport, Bombay. On 21-11-2002 at about 9.45 p.m., the*

accused No. 1, who is appellant and accused No. 2 Yoram Kadesh, who was acquitted by the trial Court, had come with their baggage to the airport with the tickets for Bombay-Amsterdam-Berlin sector issued by North West airlines. The accused No. 2 Yoram Kadesh had two bags but they were not checked-in. However, the accused No. 1 had in all 2 bags, which were submitted for being checked-in. North West airlines was maintaining its own X-ray machines for screening the baggage, which were checked-in by the passengers. When, the baggage of accused No. 1 was being checked under the X-Ray machine, one Blue Coloured Delsey zipper suitcase was not cleared. Therefore, the said suitcase was opened and the articles therein were removed but still the bag was unusually heavy. In view of this, staff members of North West airlines immediately gave massage to the officers of Air Intelligence Unit of Customs at the Sahar Airport. Officers of Air Intelligence Unit immediately rushed to the spot. It was found that the said Delsey zipper suitcase was having false bottom with some concealment. It was also noticed that the accused No. 1 was accompanied by the accused No. 2 Yoram Kadesh, who was an Israeli national and both were travelling together to Berlin. The accused-appellant was having British and French passports. Two panch witnesses were called and they were informed that during the screening and physical check, the security staff had noticed some concealment in the false bottom of blue coloured Delsey zipper suitcase of the appellant. Appellant had identified the said suitcase, besides one more Polo trolley bag and one paper carry bag as belonging to her. On being questioned the appellant denied that she had concealed any narcotic drug in the said bag and she denied any knowledge if the said bag contained any narcotic drug. Thereafter, the appellant alongwith the baggage and the panchas were escorted to the office of A.I.U. for further investigation. As the accused No. 2 Yoram Kadesh was earlier seen in conversation with the appellant, he was also intercepted. He was having one black coloured polo trolley bag and one blue coloured zipper handbag. Both these bags were not checked-in and on checking no contraband articles were found in those two bags. False bottom of the Delsey zipper suitcase of the present appellant was ripped open and it was found that false bottom consisted of 3 large and 4 small packets containing brown coloured substance concealed in the specially made cavity in the False bottom. Contents of these

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packets were tested on the lonscan machine and test was positive for the presence of Hashish. Collective weight of the contents was found to be 10 kg. From each packet 3 samples of 5 gm. each were taken and the same were kept in small polythene bag, which was kept in the envelope and then duly sealed. During the course of investigation statements of the present appellant came to be recorded. According to her she was acquainted with the accused No. 2 Yoram Kadesh since 1999 and she had come to India on a short visit in the month of November, 2002. She had paid visit to her parents who were staying in Himachal Pradesh. She had planned to visit Australia for which she had taken ticket but that ticket was to lapse within two days. Therefore, she had given her ticket as well as passport to the accused No. 2 for re-validating her ticket. According to her, the accused No. 2 asked her whether she would join him upto Berlin as he had excess luggage to be carried to Berlin and he had also offered that she could enjoy holidays at his expense in Germany. Not only this he would make arrangement for his journey from Berlin to Australia at his cost. She accepted his proposal as she also wanted to meet some of her girl friends in Germany. This decision was taken when both the accused were in Delhi. According to her she was to join the accused No. 2 in Bombay. However, she missed her train on 19-11-2002 and she came late to Bombay. The accused No. 2 was staying in hotel Causeway. After getting address from him, she also went to the same hotel and stayed in the same room alongwith the accused No. 2. According to her, her bag was tom in the journey, therefore, the accused No. 2 offered to put her belongings in his Delsey zipper suitcase as they were to travel together. She agreed. However, she found that inner zipper of the bag was jammed up and, therefore, she packed some of her belongings into the bag. She questioned accused No. 2 Yoram Kadesh if there was anything objectionable in the said bag. However, he assured her that she should not worry since it consisted only gifts of incense sticks and he would himself carry bag alongwith him. Thus, though she admitted that she had checked-in that bag, she denied that she had any knowledge about the Hashish or any contraband drugs in the same. Thus, she denied conscious possession of the Hashish, which was found concealed in the false bottom of the said Delsey zipper suitcase. Thereafter statement of the accused No. 2 was also recorded. He also showed ignorance about the contents of the bag and he

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denied that he had owned that bag though he admitted that he had seen the bag in the room of the hotel, after he had come back at about 4.00 p.m. after confirmation of the tickets. Statement of the present appellant was recorded again. She also made written statement before the Special Judge and she took consistent stand that the said Delsey zipper suitcase was given to her by the accused No. 2 and she was not aware that it contained any contraband drug. The samples were referred to Chemical Analyser and it was confirmed that they were Hashish. After investigation, the complaint was filed by Jaykumar the Customs Superintendent.

24. *If we recaptulate (sic) all the facts and circumstances,* ***it would appear that when she checked-in at Hotel Causeway, she was having only shoulder bag and one cloth bag in the hand. Nobody had seen her carrying any Delsey zipper suitcase****. Nobody met her during her stay in the hotel.* ***According to her suitcase was given to her by the accused No. 2 to keep her belongings in the same as they have to travel together to Berlin as pointed out earlier. According to her, torn bag was left in the room but the investigating officer did not record the statement of the concerned sweeper to find out truth or otherwise, in that statement. The said suitcase itself was weighing about 19 kgs. Including that suitcase baggage of the accused No. 2 would be much more than 20 kgs****. This provides corroboration to her statement at the airport. She claimed that it was her bag and even after discussion with the accused No. 2 for some time, she told the airlines officer that bag belonged to her. It indicates that she did not suspect that there was any contraband or drug in the bag. Even though in his first statement before the Customs Officer, the accused No. 2 stated that he had seen the said suitcase in the room when, he came back from the airlines office at about 3.00 or 4.00 p.m., in his second statement when it was specifically put to him that whether the suitcase belonged to him, he only stated that he had seen the said suitcase in the room but specifically did not deny its possession or ownership over the same.* ***Not only the passport of accused No. 1 was with accused No. 2, even the baggage claim tags were attached to the ticket of accused No. 2, which indicates that accused No. 2 maintained his control and possession over the said bags. Once the bag was found in her possession, it will be presumed that she was in possession of the narcotic drug also and the burden of proving that she***

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was not in possession or was not in conscious possession was on her. She has to rebut that evidence and the standard of that proof is beyond the reasonable doubt. As explained by the Supreme Court, there should be strong doubt in the mind of the Court about possession of the accused over the narcotic drugs. Taking into consideration all the circumstances and the facts of the case, I find that appellant has rebutted that burden. Overall evidence on the record creates strong doubt about her conscious possession over the Hashish found in the false bottom of the said Delsey zipper suitcase. Taking into consideration all the circumstances, I find that the prosecution has failed to prove conscious possession of the present appellant over the said Hashish contained *in the Delsey zipper suitcase.*

25. *Next question is about confession made in the statement under section 108. It was argued on behalf of the prosecution that she admitted in her statement before the Customs officer that it was her first offence and it amounts to confession. Mr. Jethmalani vehemently contended that one sentence can not be chosen and picked up from her statement to hold that she had confessed the commission of offence. He rightly contended that whole of the statement has to be read to find out whether it was exculpatory or inculpatory statement. In view of the explanation given by her in the statement, it is clear that she nowhere admitted that Hashish, which was found concealed in the false bottom of the Delsey zipper suitcase was belonging to her or that she had kept the same or she was aware about the same. It appears that the learned trial Court itself referred to several authorities from Privy Council and the Supreme Court to support the contention that exculpatory statement can not be treated as confession.*

29. *In view of the evidence and the circumstances discussed above,* ***I find that the prosecution has failed to prove that the accused/appellant No. 1 had committed the offences. Therefore, the impugned judgment and order of conviction can not be sustained and the appeal has to be allowed****. In the result, the appeal is allowed. Impugned judgment and order of conviction and sentence are hereby set aside. The appellant/accused No. 1 Daisy Angus is hereby acquitted of the charges levelled against her and she be set at liberty forthwith if not required in any other case."*

Emphasis applied

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20.3 This case is an eye opener for the passengers – foreigners or Indians- travelling abroad. It is always advisable not to share the details of travel itinerary and befriend passengers for saving money on excess baggage or for any other reason. Gullibility is taken for a ride these days. Persons travelling abroad should understand the reality and the legal complications that arose in this case. This is equally applicable when travelling by the Railways or Bus or hitchhiking.

PRESUMPTION UNDER THE ACT

21. Reverting to the role of the prosecution, it is a settled law that the prosecution is required to prove the case "beyond reasonable doubt". Under the Act, while the prosecution may charge a passenger or any person caught with the contraband that he was in possession, as in this case, the Court **presumes the existence of the culpable mental state of the accused under section 35 of the Act.** Under section 54 of the Act, **there is a presumption that the accused has committed an offence under the Act in respect of narcotic drug or psychotropic substance or controlled substance for the possession.** **The presumption is rebuttable**. In the case of Daisy Agnus, while the prosecution was successful in proving that the seized substance was from her possession, it failed to prove that she had conscious possession and she, on the basis of the evidences, could successfully rebut the presumption.

21.1 Another vital point which is required to be noted in baggage cases pertains to cancellation or re-scheduling of flights or some flights being declared as 'technical'. The cancellation of flights subsequent to check-in of the baggage by the passengers is a real challenge. Sometimes, checked-in baggage are off loaded. In such situation, booking of cases under the Act requires careful understanding.

21.2 An interesting case which requires critical appreciation on the issues raised herein is the case decided by the Ld. Special Court for Narcotic Drug and Psychotropic Substances Act, 1985 at Great Mumbai in the case of **Lalrinpuia[23].** The facts of the case are as under:

> "*2. It is the case of the prosecution that as on 12.12.2017, at around 17.00 hours, the sleuth of the Narcotics Control Bureau, Mumbai Zonal Unit, Mumbai, received specific information that as on 13.12.2017 by early morning, an Indian passenger named Lalrinpuia resident of Aizawl, Mizoram bearing Indian Passport No. N8116083, is suspected to carry contraband banned under the NDPS Act in his checked-in baggage, travelling in the Flight No. ET 610 or ET 640, of Ethiopian Airlines. Accordingly the information was received by Intelligence Officer Sheelbhadra Samrat, who in turn noted the*

said information, took its print out and upon signing the information note had placed and produced it before In-charge Superintendent NCB Mumbai at Goa by fax. As per the directions of the In-charge Superintendent NCB Mumbai at Goa who in turn made his remarks on the information note overleaf and it was further handed over to intelligence officer Pankaj Kumar. The incharge superintendent, NCB Mumbai at Goa directed Pankaj Kumar to form a team and proceed as per NDPS Act and Rules.

3. Thereafter Complainant Pankaj Kumar initially collected flight manifest and had approached two persons working at CSI Airport, Mumbai, qua the officials of Ethiopian Airlines to act as panchas. Upon appropriate compliances, the sleuth of NCB, Mumbai mounted surveillance at the CSI Airport Mumbai . Complainant Pankaj Kumar thereafter laid a trap on the spot and the sleuth scattered at the CSI Airport, Mumbai. Thereafter Complainant Pankaj Kumar on arrival of the flight ET 610 of Ethiopian airlines at around 4.35 a.m. at the immigration clearance of the passengers identified one young passenger with matching passport and name Lalrinpuia as per the information received. Thereafter the suspect passenger was identified and followed upto the baggage area until he claimed his checked-in baggage, and as soon as the suspect/passenger picked up the baggage he was intercepted forthwith by the sleuth.

4. Upon introduction of the sleuth to the suspect/passenger he disclosed his name as Lalrinpuia and that he had arrived by the flight ET610. Accused was made aware of the information received. Thereafter appropriate compliances ***thorough search of his baggage was conducted, wherein initially 3.900 Kgs of off white colour substance was recovered from the false bottom surface of the maroon colour baggage. The package was wrapped in a brown colour paper envelope and the envelope was covering one yellow colour polythene packet with some off-white colour substance. The content was tested upon drug testing kit which showed result to be positive for Methaqualone. The said contraband was weighed on electronic weighing scale and the net weight of the said contraband was found to be 3.900 Kgs****. Accordingly samples were drawn for chemical analysis. Apart from the same, two boarding passes, one baggage tag, voter card, pan card and one IPhone-6, one with Vodaphone sim were seized. Panchanama got over by 08.45 hours in the*

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morning as on 13.12.2017. ***Thereafter upon the incriminating revelation of the accused Lalrinpuia he was put under arrest as on 14.12.2017 for his role in possession, transport, and attempt to commit offence thereby violating the provisions of the NDPS Act for the sections ibid.***

21.3 The Ld. Trial Court, after hearing the rival submissions, while acquitting the accused, has elaborately pointed out the deficiencies of the prosecution in not meeting the charges against the accused. The Ld. Court held as under:

"38. PW-1 Sheelbhadra Samrat states that on 12.12.2017 he was in receipt of an information at about 17.00 hours about an Indian national Lalrinpuia resident of Aizawl, Mizoram, travelling from Adis Ababa to Mumbai by flight ET 610 early morning as on 13.12.2017 and the said passenger is suspected to carry contraband with him thereafter he typed the said information on office computer and also requested the Superintendent to mount surveillance at CSI Airport Mumbai to identify the passenger for necessary action. Thereafter he took out printout, signed upon it and faxed it to incharge Superintendent, NCB Mumbai at Goa. He was in receipt of order from NCB Goa and thereafter he handed over the said order to PW.3 Pankaj Kumar.

39. Upon cross examination PW-1 Sheelbhadra Samrat stated although he had deposed that ***the information note mentions for arrival of the accused by flight ET 610, but the informer had given both the flight numbers****. The Ld. advocate for accused has invited the attention of this Court on the aspect of timings of the fax. PW-1 Sheelbhadra Samrat upon anvil of cross examination states that the fax receipt pertaining to information note sent by myself shows timings to be 6.48 p.m. but he further volunteers that he had sent it at about 17.07 hours. Now in order to substantiate the said contention that PW-1 Sheelbhadra Samrat had sent the said fax at 17.07 hours nothing is placed on record. Moreover the prosecution itself has relied on the fax receipt Exh.24 and admittedly PW-1 Sheelbhadra Samrat has stated that it reveals for timings at 6.48 hours. Surprisingly post making endorsement on the information note with orders/noting on the same PW.5 Jitendra Ranjan also states that he faxed the information note on the same day at 6.48 hours. Thus the timings of sending fax from NCB Mumbai office to NCB Goa office are one and the same. PW.5 Jitendra Ranjan upon cross examination had stated that copy of fax (Exh. 38) was received by him and it bears for true date and*

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time. Thus, this particular aspect went unexplained as the correspondence from PW-1 Sheelbhadra Samrat with that of PW-5 Jitendra Ranjan is not fortified with regard to dispatch and receipt of facts at the NCB Goa Office end. ***Although the information note shows for the timing as 17.00 hours and PW-1 Sheelbhadra Samrat upon anvil of cross-examination has voluntarily stated that the information note was sent by him by 17.07 hours is not substantiated by any document, more especially in the light of the fact that PW-1 Sheelbhadra Samrat has categorically admitted that the timing on the fax receipt Exh.24 pertaining to information note shows timing to be 6.48 p.m.*** *and also the timing upon fax note received by way of directions from the superiors shows for the same timing i.e. 6.48 p.m. Thus, this particular factum with regard to dispatch and receipt of the fax lies under the shadow of suspicion.*

40. Also another aspect in this regard is on perusal of Exhibit-20 it reflects ***that it has all the details of the accused alongwith his passport no, name, and in specific two flight nos. ET610 and ET640 were shown for the accused to board. It is to be noted that in the said note Exhibit-20 it is nowhere mentions regarding the arrival time of the flight ET610 or ET640 on 13.12.2017****. PW-1 Sheelbhadra Samrat admits that after receiving the information* ***he had not made any enquiry about the flight timings nor had he inquired about the originating Airport and the destination Airport of the either flights, from Ethiopian Airlines or from Airline / Airport Authorities. Similarly even PW-3 Pankaj Kumar states that the originating destination of flight was inquired by him on the basis of google and surprisingly he states that the flight time of ET610 was at early morning post 2.00 am., while he doesn't remember the timings pertaining to flight ET640. This particular aspect being crucial is also not answered by the agency as in this regard prior to proceeding for raid it was incumbent upon the complainant to have inquired about the flight timings of the either flight. On the contrary surveillance was mounted only after the arrival of flight ET610. Therefore, in this regard, not only the flight timings but the very aspect with regard to the line of action seems to be slippery. Therefore, in this regard, the benefit of such speculation has to be extended to the accused.***

41. Another crucial aspect in the instant case is with regard to the safe custody

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and ***that in narcotic cases safe custody of the brass seal and other raiding material are of prime importance and there has to be substantive evidence corroborated by the contemporaneous record. That it is an admitted fact that in the present case there is no contemporaneous record regarding the movement of the seal maintained as on the relevant date of incident****. That PW-3 Pankaj Kumar in his examination-in-chief states that on 13.12.2017* ***he has received the brass seal of Narcotics Control Bureau for the purpose of raid from personal assistant of the zonal director as he being the custodian.*** *Contradicting the said version PW.4 Lav Kumar Singh upon anvil of cross examination states that the custody of brass seal is with the Zonal Director.* ***While PW.5 Jitendra Ranjan states that custody of the seal depends upon the zonal policy and generally it is with Superintendent****. It is* ***pertinent that on the relevant day neither Zonal Director nor Superintendent were present in the office as per the PW.3 Pankaj Kumar and apart from the same the timing for proceeding for raid being at about 12.00 a.m., the factum of handing over the paraphernalia and the brass seal to the raiding party lies under speculation.*** *Nor any record pertaining to handing over/depositing of the paraphernalia is shown by way of contemporaneous record and PW.3 Pankaj Kumar categorically states that no such movement pertaining to the official brass seal was maintained.*

42. Further, Ld. advocate for accused has also alleged for tampering of samples. Upon anvil of cross examination PW.3 Pankaj Kumar categorically ***stated that bulk and the samples held under seizure are to be compulsorily deposited with the godown and in the instant case the samples sent for CA were never deposited in the godown. PW.4 Lav Kumar Singh states that the sample was deposited on 13.12.2017 at 17.50 hours*** *and on the said day the superintendent and the zonal director were not present in the office.* ***It can be winnowed from the evidence of PW-3 Pankaj Kumar that that as sample S1 was not with the godown and since its seizure until PW.2 Dhananjay Some resumed his duties as on 15.12.2017 the samples were in the custody of PW.3 Pankaj Kumar. Therefore the fact that why PW-3 Pankaj Kumar kept the sample S1 in his custody when it could have been well deposited in the godown and thereafter sent for analysis has went unexplained.*** *And admittedly in the present case there is no document on record regarding the*

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safe custody of the sample S1. ***And therefore it is evident that the chain of custody came to be compromised by the agency. But it is pertinent that the Ld. advocate for accused has not disputed the C.A. report and that the CA is not examined.***

43. Ld. Adv. for the accused has drawn the attention of this Court to the vital and material aspect that the independent panch witnesses being not examined. Ld. SPP has invited the attention of this Court at the report filed by prosecution vide Exh. 51 that the agency had duly corresponded with the station manager of Ethiopian Airways and in turn reply was sought, which stated that the said employees have left their job with Ethiopian airways and their whereabouts are not known. It is evident that the entire incident is merely narrated by PW.3 Pankaj Kumar and considering his testimonial evidence two major aspects one with regard to spot of incident qua carrying of maroon colour trolley bag by accused and baggage claim factum in panchanama requires independent corroboration more especially in the light of the fact that the aspect pertaining non seizure of baggage tag which could have connected the accused deserves consideration and the same is missing in the prosecution's case.

44. Apart from the testimonial evidence of the prosecution witnesses, and the evidence on record discussed hereinabove, the Ld. advocate for accused has invited the attention of this court on the contradiction pertaining to the panchanama. It is the case of the prosecution during the panchanama they have seized the mobile phones. But nothing i.e. chats, messages call records etc. in order to link the accused with that of the absconding accused has been placed on the record of this Court in order to substantiate the theory laid by the prosecution and that of modus of investigation*. Considering the same apart from the contradictions it does not stand to be proved by the prosecution that accused carried the contraband at the proved place of occurrence and that it was seized from their Possession, Control and Authority under panchanama Exh.29 lie under speculations, more especially when the independent panch witnesses are not examined by the prosecution and the testimonial evidence of PW-3 Pankaj Kumar does not inspire that confidence in order to convict the accused****. Therefore the evidence tendered by the prosecution in the given case does cannot be said to have demonstrated that***

there was physical link between the accused with the object in question qua the contraband, leading to the conclusion establishing a mental awareness of the object and an intention to exercise exclusive control over the same and thus the same does not derive for statutory presumption of culpable mental state. On going through the entire evidence adduced by the witnesses, it creates doubt on the fact with regard to the entire investigation of the case and that accused has the real knowledge of the nature of the substance shown to have kept in his possession, more especially the accused has declined to have claimed such baggage.

*45. Palpably**, it is true that the all the material prosecution witness, more especially PW-1, PW-3 and PW-5 have supported the prosecution story, but the evidence of the PW-1, PW-3 and PW-5 while under the cross examination there are material omissions and contradictions which have been brought on record by the Ld. Advocate for the accused are crucial and deserve consideration more especially the non-seizure of the claim tag and the unexplained factum of travel by accused by one flight and his baggage to have come by another flight cannot link the accused with the alleged trolley baggage.** It is true that an accused has a profound right not to be convicted of an offence which is not established by the evidential standard of proof 'beyond reasonable doubt'. But the Hon'ble Supreme Court of India has settled the position and held that the doubts would be called reasonable, if they are free from a zest for abstract speculation. Law cannot afford any favorite other than truth and to constitute reasonable doubt, it must be free from an over emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. **The prosecution is expected to prove its case beyond reasonable doubt, but not with absolute certainty and such reasonable doubt as discussed above has grown from the evidence adduced by prosecution. Thus, under the above circumstances, this Court has come to the conclusion that the prosecution has miserably failed to discharge its burden in the case and the accused is entitled to get the benefit of the lapses on the part of prosecution.***

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*46. From the backdrop of the aforesaid facts and events**, this Court holds that the prosecution has failed to prove that accused have committed the offence as alleged by the prosecution. The criminal act of the accused cannot be held to meet with the penal consequences prescribed under Section 22(c), 23, and 28 wherein the accused has contravened in relation to a Narcotic Drug involving commercial quantity, nor is any attempt to commit offence propagated in the entire prosecution evidence that the accused in connivance with other unknown individual/s, either for selling, peddling, including the import/export of the contraband and attempted to have transgressed the provisions under the NDPS Act for the Sections ibid."***

Emphasis applied

RECEIPT OF TEST REPORT ALONG WITH REMANANT SAMPLE FROM CRCL

22. The Test Report from the CRCL gives a clear finding as to whether the recovered and seized substance(s) fall(s) under the purview of the Act or not. The same forms the basis of the complaint and is admissible evidence in the Court of Law. Should the Test Report suggest/indicate that the substance does not fall under the purview of the Act, no case is made out and the Ld. Court should be apprised of the findings of the CRCL immediately.

NEUTRAL SUBSTANCES TO BE TAKEN INTO ACCOUNT

22.1 For the purpose of determination of small quantity or commercial quantity, the entire substance (neutral substance + the narcotic/psychotropic substance) is to be into account in terms of the Larger Bench judgment of the Hon'ble Supreme Court of India in Criminal Appeal No. 722 of 2017 in the case of Hira Singh[24]. Accordingly, the judgment rendered in E. Micheal Raj[25] stands overruled.

MIS-MATCH BETWEEN THE RESULS OF FTK/FDK AND CRCL REPORT

22.2 The initial tests conducted on the spot using the FTK/FDK is only an indicator and not a final authority. The final authority is the Final Chemical Analysis report submitted by the CRCL.

22.3 In a situation of mis-match between the results of FTK and the Final Chemical Analysis Report of the CRCL/FSL, the investigating officer is duty bound to bring the same to the notice of the Ld. Trial Court. The Investigating Officer on coming to know of the fact that the seized substance falls outside the ambit of the Act, he should inform the Hon'ble Trial Court immediately so that the accused can come out on regular bail. Meaning thereby the

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person arrested should not languish in jail for no fault of his. Prolonged custody, when not required in a situation where the seized substance falls outside the ambit of the Act, infringes Article 21 of Constitution of India. To illustrate the above proposition, we may conveniently refer to the case of **Robin Singh[26] ,**the petitioner sought regular bail in FIR No. 363 dated 25.12.2020, under s22 (C), s61 and s85 of the Act, registered at Police Station Jhabhal, District Tarn Taran. It was contended that the petitioner is in jail over 6 months and although it is alleged that intoxicant tablets were allegedly recovered from the petitioner yet the recovered substance is neither a narcotic drug nor a psychotropic substance and, therefore, does not fall under the Act. In view of the above, especially when the recovered substance did not fall under the Act, the Hon'ble High Court of Punjab and Haryana extended the concession of regular bail to the petitioner.

22.3.1 Similarly, we find that in the case of **Ragib Rais Shaikh @ Sameer[27]**, the facts, in brief, are that on secret information that a person is likely to arrive at the tipped spot at Nerul, on completing the procedural formalities, the raiding team reached the spot at the given time. The person, who arrived on the spot, was identified by his dubious behaviour and was apprehended. On personal search, one plastic pouch containing crystal powder, was recovered from his pant pocket. The police officers of the raiding team suspected the substance to be '**Mephedrone',** the weight of which was found to be 67 grams. On completion of formalities, the complaint was lodged invoking s8A and s22 of the Act, to which s.29 was added at a later stage. The report received from the Assistant Chemical Analyser, Directorate of Forensic Science Laboratories, Mumbai, after analysing the said substance, which had an appearance in form of off-white crystals and declared the same as **'Ephedrine' and contained 14.84% of ephedrine**, a controlled substance. While releasing the petitioner on bail, the Hon'ble High Court of Bombay observed and held as under:

> *"8.* ***In light of the report of the Chemical Analyser, the Applicant cannot be punished under Section 22, which provides punishment for contravention in relation to psychotropic substances.*** *The Applicant is also charged under Section 29, which provides for abetment and criminal conspiracy, which though may be read with reference to Section 25-A.* ***The substance seized, being analysed as 'Ephedrine', the quantity is immaterial and cannot be a matter of consideration while establishing the charge under Section 25-A as the quantity is relevant only as regards the substance which falls under the category of 'Narcotic Drugs' and 'Psychotropic Substances'****. As far as bar imposed under Section 37(1) is concerned, it comes into picture when a person*

is accused of an offence punishable under Section 19 or Section 24 or Section 27-A and for the offence involving commercial quantity. ***Since the substance seized from the Applicant, which is now identified as a 'controlled substance', prima facie, the offence committed by him do not fall in any of the said category. As far as the controlled substance as defined in Section 2(viid) is concerned, where no quantity is categorised as small or commercial quantity, the twin requirements contemplated in sub-section (1) of Section 37 need not be adhered to, before releasing the Applicant on bail."***

23.3.2 It should be remembered that the initial report suggesting the testing to fall under narcotic substances or psychotropic substances should be noted carefully, as the commercial quantity and small quantity is different for each of the substance. Furthermore, as against the narcotic drugs or psychotropic substances recovered and seized, which on Final Chemical Analysis report of CRCL falls under category of 'controlled substances', the accused is entitled to bail as the provisions of section 37 of the Act is inapplicable to 'controlled substances'. It is also to be kept in mind that commercial quantity is different for different substances. To illustrate, "Ecgonine' is the substance, as per FTK/FDK, and the quantity seized is 75 grams. The commercial quantity for Ecgonine is 50 grams. The Final Chemical Analysis report categorically indicates that the substance is 'cocaine', for which commercial quantity prescribed is 100 grams. On account of the Final Chemical Analysis report, the said passenger would become eligible to bail under section 37 of the Act as the rigours of section 37 is not applicable now.

INAPPLICABILITY OF CONCEPT OF SMALL AND COMMERCIAL QUANTITY TO CONTROLLED SUBSTANCES

The concept of small and commercial quantity is not attracted to the substances regulated under 2013 Order. Hence, the provisions of section 37 are not applicable to the controlled substances. In Bail Application No. 2677/2020 decided on 5th January 2022 in the case of Tinimo Efere Wowo[28], the Hon'ble High Court noted that the petitioner is facing prosecution for charges under section 9A of the Act, dealing with controlled substance and 25 A of the Act and hence it is not covered under the rigours of s37 of the Act. There is no categorization of small quantity or commercial quantity in controlled substances. Therefore, concept of commercial quantity is applicable only to narcotic drugs and psychotropic substances and not to controlled substances. Equally true is the situation for the recovery and seizure of 15 grams of cocaine which falls under the intermediate quantity and hence the rigours of section 37 of the Act are not applicable to the facts of the case. Hence a case of bail was bail was made out and for which reliance was

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made on the decisions in the case of Niranjan Jayantilal Shah[29] .

ACCOUNTAL OF REMNANT SAMPLES SENT BY CRCL

23.4 The remnant samples returned by the CRCL should be properly accounted by the SDO(Arrival)/malkhana in-charge and the reference to the same should be made in the complaint and the proof of the same should form part of the complaint.

COMPLETION OF INVESTIGATION AND FILING OF COMPLAINT

24. The time limit for filing a complaint in respect of small and intermediate quantity is 60 days while in respect of commercial quantity is 180 days. If the prosecution fails to file the complaint within the stipulated period, the accused shall be entitled to statutory bail under section 167(2) of the Cr. P.C., 1973. The complaint should be filed along with the CRCL Test Report and should be discussed prominently in the complaint.

24.1 The investigating officer should remember that in a composite case i.e. where there is violation of the provisions of Customs Act, 1962 and the Act, it should be ensured that the investigation is conducted at the quickest possible time.

24.2 Needless to mention at this juncture that the Customs Act, 1962 does not have any provisions for extension of investigation by the Court and a complaint has to be filed within a period of 60 days, failing which the accused shall be entitled to default bail/statutory bail.

24.3 Should be investigating officer require an extension for completion of investigation under the Act, it is essential that he the material facts requiring an extension are brought to the notice of the Public Prosecutor. In terms of proviso to section 36A(4) of the Act, the Ld. Trial Court may extend the said period **up to one year** on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days. It is emphasized here that it is the duty of the Public Prosecutor to apply for an extension and that well before the expiry of the period. The investigating officer cannot approach the Ld. Trial Court directly. The Ld. Trial Court is bound to issue notice and hear the accused and then pass the Order in this regard. It should be remembered that the complaint should be kept ready for being filed should the Ld. Trial Court refuse an extension.

24.3.1 For a complete analysis of the concept of default bail, readers may see by the same author under the topic "Statutory Bail under Sec. 167(2) of the Criminal Procedure Code, 1973 vis-a-vis the Provisions of the NDPS Act, 1985: An Analysis" by visiting the following link https://doij.org/10.10000/IJLMH.112886.

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24.4 A composite complaint can be filed for the offences under the Act and the Customs Act, 1962. Alternatively, the complaint filed for the offences under the Customs Act, 1962 in the Court of CMM (in metros)/CJM(in non-metros) can be got transferred to the Ld. Trial Court for NDPS Act by making a suitable application.

CASES INVOLVING CONTROLLED SUBSTANCES – LD. TRIAL COURT JUDGMENTS

25. Readers may note that 'Controlled substances' (hereinafter referred to as 'CS') have dual use and hence they are being **'controlled'** and Regulations have been, *inter alia,* put in place to oversee the production, manufacture, sale, import and export. First, we look into the different aspects of CS. In order to book effective cases against the offenders, it is essential to know the Regulations put in force and simultaneously have a broad idea on the licit and illicit uses of the controlled substances. This becomes essential for the reason that in the event of the empowered officers booking a case on controlled substances, they would be in a position to take the investigation to a logical conclusion. While it is a fact the concept of "commercial quantity" and "small quantity" is not applicable to controlled substances and hence the offenders/accused do get enlarged on bail yet if the empowered officer is duly armed with the entire illicit uses and licit uses and is able to unearth the entire conspiracy and the persons behind the illicit manufacture of drugs, in such cases, the empowered officer would be in a position to invoke other sections of the Act and charge the entire gang/syndicate of the offences of section 29 of the Act i.e. Punishment for abetment and criminal conspiracy. If the person has allowed the "*premises, house, room, enclosure, space, place, animal or conveyance, knowingly permits it to be used for the commission by any other person of an offence punishable under any provision of this Act to be used for commission of an offence"*, the empowered officer would be in a position to invoke section 25 of the Act as well. It is required to be specially recorded here that the provisions of section 37 of the Act do not refer to the controlled substances and hence this section (i.e. section 37) becomes inapplicable despite the seizure in huge quantity. However, readers may note that the punishment prescribed under section 25A of the Act for the contravention of the order made under section 9A of the Act shall be punishable with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine which may extend to one lakh rupees. The next question that naturally follows is as to whether the offenders who have been booked were indeed awarded a period of imprisonment for a term of 10 years or not. To have a proper understanding on the issue, we can safely place our reliance on some of the cases, which are only illustrative in character, decided by the Ld. Trial Court,

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Sl. No	Title of the case	Place of seizure and quantity involved	Decision of the Special Judge - NDPS Patiala House Courts : New Delhi
1	NCB v. Amanda Yoliswa Thandeka Jalisa[30] Case No. SC/351/19 Crime No. VIII/21/DZU/2019	On 05.06.2019 on the basis of secret information, accused was intercepted at IGI Airport while she was going to Johannesburg and during examination of her baggage 12 kg of pseudoephedrine was recovered.	Relying on the judgment in the case of Karamjeet Singh v. State (Delhi Admn.) (2001) 9SCC 161, the Ld. Court *vide* judgment dated 25th July 2022 held as under: *"The aforementioned judicial dicta therefore, makes it clear that the sole purpose of punishing an offender is not retribution alone and that the courts while sentencing an offender must make an attempt, within the parameters of the law, to afford an opportunity to the offender to reform himself and lead the life of a normal, useful member of society. In the present case, the convict has no previous criminal antecedents and it does appear from the totality of the attendant circumstances and material on record that she is not hardened criminals. She may be forced due to her economic condition to indulge in the illegal trafficking of controlled substance. No doubt poverty is not a justification for commission of crimes but in the considered opinion of this court, imposing a harsh sentence will also not subserve the interests of justice. The convict has admitted her guilt stating that due to her financial hardship she agreed to become the carrier. It is also to be borne in mind that the convict has the sole responsibility to take care of her family. She being foreign national is unnecessary liability on our jail and she is required to be deported back to her country and she is in custody since 05.06.2019 i.e. for more than three years. Thus taking into consideration the nature of offence (particularly that the amount of controlled substance involved is only 12 Kg), social and economic status of the convict and the reason for which she appear to have committed the offence, this court hereby sentences the convict Amanda Yoliswa Thandeka Jalisa to the imprisonment for a period already undergone by her and to pay a fine of Rs. 50,000/¬ and in default thereof to undergo simple imprisonment for a period of three months with direction to immediately deport her to her country following entire procedure and legal provisions in this regard. Fine not paid. Since the accused has been convicted by this court, she is required to be deported back to her country. Let copy of the order be also sent to FRRO for making compliance in this respect. On the request of Ld. Defence Counsel jamatalashi articles of the convict be handed over to FRRO. The case property stands confiscated to NCB and they will be at liberty to dispose the same as per the prescribed rules after the expiry of period of appeal/revision. The accused is directed to furnish bond u/s 437A CrPC within a week in the sum of Rs.10,000/- with one surety of like amount"*
2	Case No. SC/84/19 NCB v. Robinson Okechukwu Okafor[31]	Accused was apprehended at his house no. RZC-2/174, 2nd Floor, Gali No. 4 near Shiv Mandir, Mahavir Enclave, New Delhi and 25.200 kgs of Pseudoephedrine Hydrochloride was	Relying on the judgment in the case of Karamjeet Singh v. State (Delhi Admn.) (2001) 9SCC 161, the Ld. Court *vide* judgment dated 28th May 2019 held as under: *"10 The aforementioned judicial dicta therefore makes it clear that the sole purpose of punishing an offender is not retribution alone and that the courts while sentencing an offender must make an attempt, within the parameters of the law, to afford an opportunity to the offender to reform himself/herself and lead the life of a normal, useful member of society. In the present case, the convict has one previous criminal*

		seized on 14.12.2018	*antecedents. He might have been forced due to his economic condition to indulge in the illegal trafficking of controlled substance. No doubt* *poverty is not a justification for commission of crimes but in the considered opinion of this court, imposing a harsh sentence will also not subserve the interests of justice. The convict has admitted his guilt stating that due to his financial hardship he agreed to become a carrier.* *It is also to be borne in mind that the convict has the sole responsibility to take care of his wife and two children. He being a foreign national is unnecessarily liability on our jail and he is required to be deported back to his country. Thus taking into consideration the nature of offences (particularly that recovery from accused is a controlled substance i.e. '25.200 kgs of ephedrine hydrochloride') social and economic status of the convict and the reason for which he appears to have committed the offences, this court hereby sentences the convict to undergo sentenced to undergo rigorous imprisonment for a period of six months and to pay a fine of Rs. 1,50,000/- and in default thereof to undergo simple imprisonment for a period of 90 days with direction to immediately deport him to his country following entire procedure and legal provisions in this regard. NCB to take all steps in this regard. Fine not paid. Benefit of section 428 Cr. PC be given to convict.* *11 Since, he has been convicted by this court, he is required to be deported back to his country. Let copy of the order be also sent to FRRO for compliance in this respect."*
3	Case No. SC/471/18 NCB v. Ms. Memory Chikakwiya & Other[32]	On the basis of information dated 25.10.2018, accused Ms. Memory Chikakwiya was intercepted at IGI Airport, Terminal 3 near gate no. 3 (departure area) and during examination of her brown colour bag having mark Tony, 14.5 kgs of ephedrine hydrochloride was recovered which was concealed in 13 plywood games of children. It is also the case of the prosecution that the accused was to travel to Adis Ababa by Ethiopian Airlines through Flight No. ET-687. Further, accused Ms. Memory Chikakwiya	Relying on the judgment in the case of Karamjeet Singh v. State (Delhi Admn.) (2001) 9SCC 161, the Ld. Court *vide* judgment dated 10th April 2019, it was held as under: *10. The aforementioned judicial dicta therefore makes it clear that the sole purpose of punishing an offender is not retribution alone and that the courts while sentencing an offender must make an attempt, within the parameters of the law, to afford an opportunity to the offender to reform himself/herself and lead the life of a normal, useful member of society. In the present case, the convict has no previous criminal antecedents and it does appear from the totality of the attendant circumstances and material on record that he is not a hardened criminal. He might have been forced due to his economic condition to indulge in the illegal trafficking of controlled substance. No doubt poverty is not a justification for commission of crimes but in the considered opinion of this court, imposing a harsh sentence will also not subserve the interests of justice. The convict has admitted his guilt stating that due to his financial hardship he agreed to become a carrier. It is also to be borne in mind that the convict has the sole responsibility to take care of his wife and two children. He being a foreign national is unnecessarily liability on our jail and he is required to be deported back to his country. Thus taking into consideration the nature of offences (particularly that recovery from co-accused is a controlled substance i.e. '14.5 kgs of ephedrine hydrochloride') social and economic status of the convict and the reason for which he appears to have committed the offences, this court hereby sentences the convict to undergo rigorous imprisonment for the period already undergone by him and to pay a fine of Rs. 50,000/- and in default thereof to undergo simple imprisonment for a period of one month with direction to immediately deport him to his country following entire procedure and legal provisions in this regard. NCB to take all steps in this regard. Fine not paid. Benefit of*

		disclosed about the house number of accused Robinson Okechukwu Okafor @ Prince and also identified him. On 14.12.2018, accused Robinson Okechukwu Okafor @ Prince was arrested and 25.200 kgs of ephedrine hydrochloride was recovered from his house and a separate case was registered by NCB against him. In the present case allegations against him are for conspiracy under section 29 of NDPS Act only.	*Section 428 Cr. PC be given to the convict.* *11. Since, he has been convicted by this court, he is required to be deported back to his country. Let copy of the order be also sent to FRRO for compliance in this respect."*
4	Case No. SC/28/2019 NCB v. Ms. Norest Gwatidzo[33]	On the basis of information dated 14.11.2018, accused was intercepted at IGI Airport, Terminal 3 near gate no. 5 and during examination of her baggage, 15 kgs of pseudoephedrine hydrochloride was recovered which was concealed in the trolley bags. It is also the case of the prosecution that the accused was to travel Adis Ababa by Europian Airlines through Flight No. ET-687	Relying on the judgment in the case of Karamjeet Singh v. State (Delhi Admn.) (2001) 9SCC 161, the Ld. Court *vide* judgment dated 30th March 2019, it was held as under: *"11. The aforementioned judicial dicta therefore makes it clear that the sole purpose of punishing an offender is not retribution alone and that the courts while sentencing an offender must make an attempt, within the parameters of the law, to afford an opportunity to the offender to reform himself/herself and lead the life of a normal, useful member of society. In the present case, the convict has no previous criminal antecedents and it does appear from the totality of the attendant circumstances and material on record that she is not a hardened criminal. She might have been forced due to her economic condition to indulge in the illegal trafficking of controlled substance. No doubt poverty is not a justification for commission of crimes but in the considered opinion of this court, imposing a harsh sentence will also not subserve the interests of justice. The convict has admitted her guilt stating that due to her financial hardship she agreed to become a carrier. It is also to be borne in mind that the convict has the sole responsibility to take care of her five minor children. She being a foreign national is unnecessarily liability on our jail and she is required to be deported back to her country. Thus taking into consideration the nature of offences (particularly that recovery from her is a controlled substance i.e. '15 kgs of pseudoephedrine hydrochloride') social and economic status of the convict and the reason for which she appears to have committed the offences, this court hereby sentences the convict to undergo rigorous imprisonment for the period already undergone by her and to pay a fine of Rs. 50,000/- and in default thereof to undergo simple imprisonment for a period of one month with direction to immediately deport her to her country following entire procedure and legal provisions in this regard. NCB to take all steps in this regard. Fine not*

			paid. Benefit of Section 428 Cr. PC be given to the convict."
5	NCB v. Ms Nastor Farirai Ziso[34] Case No. SC/411/19 Crime No. VIII/27/DZU/2019	On 13.07.2019 at IGI Airport, Terminal III, New Delhi, accused Nastor Farirai Ziso was apprehended and she was found in possession of 19.300 kg of substance which tested positive for pseudoephedrine at the spot when tested with the help of field testing kit.	Relying on the judgment in the case of Karamjeet Singh v. State (Delhi Admn.) (2001) 9SCC 161, the Ld. Court vide judgment dated 30th March 2019, it was held as under: "*The aforementioned judicial dicta therefore makes it clear that the sole purpose of punishing an offender is not retribution alone and that the courts while sentencing an offender must make an attempt, within the parameters of the law, to afford an opportunity to the offender to reform himself and lead the life of a normal, useful member of society. In the present case, the convicts have no previous criminal antecedents and it does appear from the totality of the attendant circumstances and material on record that she is not hardened criminal. She may be forced due to her economic condition to indulge in the illegal trafficking of controlled substance. No doubt poverty is not a justification for commission of crimes but in the considered opinion of this court, imposing a harsh sentence will also not subserve the interests of justice. The convict has admitted her guilt stating that due to her financial hardship she agreed to become the carrier. It is also to be borne in mind that the convict has the sole responsibility to take care of her family. Consisting of her old mother and three children, one son who is aged 06 years is suffering from cancer. She being foreign national is unnecessarily liability on our jail and she is required to be deported back to her country. Thus taking into consideration the nature of offence (particularly that the amount of controlled substance involved is only 19.300 Kg), social and economic status of the convicts and the reason for which she appears to have committed the offence, this court hereby sentence the convict (Ms Nastor Farirai Ziso) to undergo rigorous imprisonment for a period which has been already undergone by her and to pay a fine of Rs. 40,000/- and in default thereof to undergo simple imprisonment for a period of two months with direction to immediately deport her to her country following entire procedure and legal provisions in this regard. Fine not paid.* *Since accused has been convicted by this court, she is required to be deported back to her country. Let copy of the order be also sent to FRRO for making compliance in this respect."*

25.1 It is equally important to note at this juncture that the title of the cases referred to in the Table in para *supra* categorically reveal that all the persons who have been convicted are carriers or popularly called "***foot soldiers".*** The foot soldiers have been pushed into international drug trafficking/drug trade for the lure of money and the domestic pharmaceutical companies, whether legal or illegal are responsible for "supplying" the seized CS.

The pharmaceuticals companies which had manufactured the controlled substances have not been identified and hence it appears the entire supply chain has not been broken. It is necessary for the empowered department to dwell into the source and link them to the carriers and such pharmaceutical companies and the person(s) responsible should also be prosecuted. Until this is done, these pharmaceutical companies get emboldened and engage other carriers for carrying out their illicit/illegal business/transactions.

DETAILED ANALYSIS OF CASE OF OKAFOR CHUKWUKA UGOCHUKWU v. NCB AND CRL.A. 1041/2016 LAYA EMILYN v. NCB BOTH DECIDED BY THE HON'BLE HIGH COURT OF DELHI ON 13TH MAY 2020

25.2 It is essential to note the pitfalls that have crept in the prosecution's case and ensure that such mistakes are not committed in future cases booked by the investigating agencies. For a detailed analysis on various issues raised in this article, it is necessary to refer to CRL.A. 1186/2015 and CRL.M.A. 41216/2019 and CRL.M.(BAIL) 1943/2018 and CRL.M.(BAIL) 2070/2019 in the case of **Okafor Chukwuka Ugochukwu v. NCB and CRL.A. 1041/2016** in the case of **Laya Emilyn v. NCB,** both decided by the Hon'ble High Court of Delhi on 13th May 2020 where the appellants filed the appeals impugning a judgment dated 17th September 2015 passed by the Special Judge, NDPS Court, New Delhi in the case titled as "Narcotics Control Bureau v. Laya Emilyn Mananquil & Anr.", whereby the appellant, Okafor Chukwuka Ugochukwu was convicted of an offence punishable under section 29 of the Act and the appellant Laya was convicted of committing offences punishable under sections 21(c), 23(c) and 29 of the Act. The Hon'ble High Court, after hearing the rival submissions, made a detailed analysis on the prosecution's case and overturned the Ld. Trial Court's judgment. It is interesting to note that they were acquitted two days' short of the prison sentence inflicted by the Ld. Trial Court. It is not the author's contention that the contraband seized is not cocaine or a substance not falling under the Act. What is emphasized is that the prosecution's case should be error free and should withstand scrutiny of law at all judicial levels.

Issue	**Observations of the Hon'ble High Court of Delhi**
Issues connected to search of the person (Laya) and her alleged baggage	It is a settled proposition that search of a female has to be carried out only an empowered officer. Readers may refer to the judgment of the Division Bench of the Hon'ble High Court of Bombay in the case of the Mrs. Veenela Tilak v. Shri Shahasane Asstt. Collector of Customs and Anr - 1997 ALL MR (Cri.) 368 and followed by the Hon'ble High court of Bombay in Bail Application No. 1051/2016 decided on 24th April 2017 in the case of Heena Bharat Shah v. State of Maharashtra. Also see Mamta v. State of Delhi -2021 SCC OnLine Del 4570 **OPENING OF THE BAGGAGE OF THE PASSENGER BY THE TEAM MEMBERS WHEN HER PERSONAL SEARCH IS BEING TAKEN** Laya's alleged baggage was opened in her absence. Such an action was viewed negatively by the Hon'ble Court. This issue was crystallized and succinctly analysed in para 50 of the judgment as

under:

"50. ……..***Whilst PW-1 denied the suggestion that the baggage of Laya (accused) was searched while she was away with the lady official to the toilet area; it is apparent that the search of Laya's baggage was conducted almost simultaneously. While, PW-3 (Savitri Jaswani) had searched Laya at a public convenience located outside the airport, the other officers had opened her bag and searched the same."***

OBTAINING OF KEY OF THE LOCK – TO BE RECORDED IN THE PANCHNAMA

Another important aspect which is required to enforced by the investigative agency is with reference to opening of the locked baggage and the sourcing of the key to open the closed baggage. It should always be ensured that the key is handed over by the person whose baggage is required to be searched and the handing over the key should be categorically mentioned in the panchnama.

We find the Hon'ble High Court of Delhi has recorded this in Laya's case:

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

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

It is a settled provision of criminal law jurisprudence that the defence is required to punch holes in prosecution's case to drive home the point that the prosecution has not proved its case beyond reasonable doubt.

MARKINGS/TRADE MARK/SIGNS/COLOUR/SIZE, ETC. OF THE BAGGAGE TO BE MENTIONED ACCURATELY

	Staying with the baggage, the colour of bags, the trade mark, markings, signs, etc. available on the baggage is required to be mentioned clearly in the panchnama after being identified to the passenger (at the International/domestic airport or railway station, bus terminal) or to the person in other places (i.e. linkages to the person when recovered from the boot of the car/truck/vehicles and other conveyances with cogent proof and conscious knowledge).
Language issues at different stages of the proceedings	On this issue, it would be extremely useful to extract from the judgment of acquittal of the Hon'ble High Court of Delhi: *"53. PW-14 also deposed that all the written proceedings were done at the NCB office and not at the airport. Although PW-12 had also deposed that they had gone to Nawada Metro Station Uttam Nagar; both the public witnesses (PW-12 and PW-14) are consistent in their testimony that they had accompanied the NCB officials to the NCB office. This is not the prosecution's case. Although PW-12 and PW-14 have signed the seizure memo in English, neither of them are proficient in English. PW-14 testified that on the date of the incident, he had written his statement in Hindi and then the NCB officials had written it in English. He then identified the said statement as PW-1/C as the statement written in English, which was written after he had written the same in Hindi.* ***He then changed his testimony and stated that the statement written in English (PW-1/C) was written in English and readout to him and thereafter, he had written his statement in Hindi. The statement allegedly written by PW-14 on the date of the incident in Hindi is not on record."***
Linking of baggage tag to the accused	The Hon'ble High Court of Delhi. On the issue, observed as under: *"54. The seizure memo (PW-1/C) indicates that "Boarding pass dt 13/5/2010 with tag No. 449845" was seized. Although the seizure memo does not indicate so, PW-1 had deposed (in his cross examination) that the boarding pass did not have the luggage tag pasted on it and volunteered that the luggage tag filed on judicial record was affixed on the luggage. Apart from PW-1 and PW-3 testifying that Laya had collected her bags from the conveyor belt, none of the witnesses have deposed as to how the bag in question was identified as the one that was checked in by Laya.* ***Concededly, the bag from which contraband was allegedly collected did not contain any document that would indicate the same as belonging to Laya. Surely, she would have the corresponding baggage tag with her."***

	Emphasis supplied On account of the fact that the investigative agency failed to link the baggage to the passenger (Laya) and the inconsistent testimonies that have cropped in, Laya, who testified as Defence Witness No. 1 stated that "*she had two blue-coloured bags and the bags produced in court did not belong to her. She was not specifically cross-examined on this testimony."*
Inconsistencies in the panchnama *vis a vis* irregularities noticed	The Hon'ble High Court of Delhi held as under: *"56.* ***The fact that the seizure memo bears the signatures of the independent witnesses is quite meaningless in view of the fact that (a) none of them have testified that they had signed the same at the spot but testified – contrary to the case of the prosecution – that all documents (apart from the notice) were prepared at the NCB office; (b) that neither of the public witnesses were proficient in English; (c) that the testimony of PW-12 regarding the recovery of contraband from cardboard boxes is contrary to the facts as stated in the seizure memo; and (d) the alleged statement made in Hindi by PW-14, is not on record. In addition to the above, their evidence inspires no confidence as apart from contradicting themselves, their testimony is wholly inconsistent with the case set up by the prosecution on several counts.*** *PW-12 had stated that from the airport, the NCB officials had taken Laya and him to Newada Metro Station. In his cross examination, he had described the proceedings in some detail including that he had called the person to whom the cocaine was required to be delivered from his phone. He had also written some facts on his hand (which he claimed was only a date) at the time of his testimony. He testified that YR Yadav and NCB team had stayed with him outside the airport at VIP parking area near gate no.2 till Laya had arrived and none of them had left the spot. PW-14 deposed that a lady official had searched the bag from which contraband was recovered. All of these assertions are inconsistent with the Prosecution's case.* ***57. In view of the above, there are significant doubts as to the case set up by the prosecution."*** ***Emphasis applied***
Examination of a female accused of an offence under the Act	While recording a statement of a female, care should be taken that it is generally done by an empowered lady officer. While search of a female has to be done by only an empowered lady officer, there is nothing in the Act which prevents male empowered male

	officer from recording the statement. However, it should be ensured that there is a lady empowered officer present if the statement is recorded by an empowered male officer and lady officer present should subscribe to the fact that the statement was recorded in her presence and she should put her dated signatures on all pages of the statement. Coming to the case, the Hon'ble High Court of Delhi held as under: *"77. In the present case, there is little doubt that the statement of Laya had been recorded while she was in effective custody of the officials of NCB. Although it had been suggested that she was served with the notice under Section 67 of the NDPS Act and had voluntarily come to the office of the NCB, it is obvious that this contention is without any merit. There is no doubt that Laya had little choice in the matter. She had been apprehended at the airport and had been served with the summons (allegedly) to appear before the NCB officials forthwith. It has also been established that Laya was effectively in the custody of Savitri Jaswani, IO, who remained present with Laya all throughout. She remained with Laya even while her statement under Section 67 was recorded. Insp. Akhilesh Kumar (PW-6) had testified that he had recorded the voluntary statement of accused (Laya), who appeared at the office of DZU. He also testified that Shri Vikash Kumar, IO was present while the statement was being recorded. Thus, there were atleast three NCB officials present in the room where she was detained, while her statement was being recorded. Curiously, Laya's statement is in two parts. According to PW-6, the first part was concluded at about 3:30 PM.* ***It is important to note that the last portion of the first part of the said statement is in question and answer form. The questions posed by PW-6 were dictated and are also recorded by Laya by her own hand. This also indicates that PW-6 had at least partly dictated the statement, which is alleged to be the voluntary statement of Laya. In the first part of her statement, which is stated to have been concluded at around 3:30 PM, Laya had disclosed the name of Okafor and his address. PW-6 had testified that during recording of the statement he did not give any information to the IO. However, after conclusion of the statement, Laya was arrested and her second part of the statement was recorded after she had identified Okafor, who had been produced before her.***

	78. Considering the circumstances, this Court has serious doubts whether the statement of Laya can be stated to be voluntary. She had been apprehended at the airport and there is no doubt that she was compelled to accompany the officials of NCB to their office. She had been allegedly searched earlier. She was accompanied by Savitri Jaswani and she remained in the presence of at least two other NCB officials, namely, Insp. Akhilesh Kumar Mishra (PW-6) and IO Vikash Kumar. She had also been interrogated while she was in the vehicle on the way to the airport to the NCB office. ***79. The prosecution's case regarding Laya's disclosure of Okafor and his address and their actions are also inconsistent.*** *80. If the testimony of PW-6 is accepted, he had not disclosed the contents of Laya's statement to the IO and the first part of the statement – where she had disclosed the name and address of Okafor – was concluded at 3:30 PM. Thus, the name of Okafor and his address would have been known to the other officials of NCB only after 3:30 PM on 15.05.2010. However, PW-10 (S. R. Yadav) had immediately, on reaching the NCB office (which is about 2:00 PM), directed that a team be constituted for apprehending the co-accused Okafor.* *81. It is also important to note that PW-10 had testified that the IO Sanjay Rawat had produced Laya before him and he was present when her statement was being recorded. He testified that IO Sanjay Rawat had not recorded the information regarding disclosure of Okafor or his residential address separately. In his cross-examination, PW-10 stated that Laya's statement was written by Insp. Akhilesh Mishra in presence of IO Sanjay Rawat and on her dictation. He stated that he was present in the room while the statement was being recorded. She had disclosed information regarding one Nigerian Okafor and his residence. The IO Sanjay Rawat had not recorded the said information in writing separately. Except in the statement of the* accused (Laya*), the said information was not recorded in any other document. And, he (PW-10) was not given the copy of the information. However, Sanjay Rawat had testified that he had left the NCB office at 2.15 PM to apprehend Okafor on the instructions of PW10.* *82. There are significant inconsistencies in the testimonies*

	of various witnesses as to how Laya's statement was recorded. According to PW-6, she had written down the statement herself. He had recorded her statement in the presence of IO Vikash Kumar. PW3 (Savitri Jaswani) had stated that she was also present along with Laya. However, PW-10 Shri Yadav had stated that she had dictated her statement which was written by Akhilesh Mishra and the same was in presence of the IO Sanjay Rawat. Further, he was present in the room as well" **Emphasis applied**
Other inconsistencies noted by the Hon'ble Court	Noting the other inconsistencies in the case, the Hon'ble High Court went on to hold as under: *"94. There is yet another important aspect that was completely ignored by the Trial Court. According to the prosecution, Laya was* ***accosted while she was trying to arrange taxi at the airport****. PW-1 had testified that she was speaking to someone on her mobile phone.* ***Two mobile phones were also seized****. The report submitted by PW-1 as well as the seizure memo (PW-1/C) also records that she was speaking on the phone. However, PW-1 and PW-10 – contrary to the statement allegedly recorded at the material time – testified that she was trying to speak to somebody. Be that as it may,* ***the fact is that Laya was in possession of two phones and obviously, she would have been in touch with somebody if she was speaking on the phone or trying to contact somebody. However, no investigation was done to even determine as to who Laya was in touch with. In order to sustain an allegation of conspiracy, it must be established that there was some meeting of minds of the co-conspirators.*** *Clearly, examination of call record details would indicate whether Laya was in touch with Okafor.* ***However, the fact that no such material/evidence has been brought on record, raises considerable doubt whether they were ever in touch with each other. In the circumstances, the prosecution has failed to establish that there was any meeting of minds between Okafor and Laya to sustain an allegation of conspiracy.*** While acquitting both the appellants, the Hon'ble High Court held as under: *"95. In view of the above,* ***this Court is unable to sustain the conviction of Okafor. He is, accordingly, acquitted of the charges for which he was convicted (commission of an***

	offence under Section 29 of the NDPS Act). Accordingly, Laya is also acquitted of committing an offence under Section 29 of the NDPS Act and her conviction is set aside. *"96. Laya's conviction for commission of an offence punishable under Section 21(c) of the NDPS Act also cannot be sustained, as there was no charge framed against her for committing the said offence.* *97. As noted above, there is considerable doubt as to the manner in which the contraband was recovered and the chain of custody of samples has also not been established. The possibility of tampering with the same also cannot be ruled out. Thus, her conviction for committing of an offence punishable under Section 23(c) of the NDPS Act also cannot be sustained.* *98. Accordingly, the appeals are allowed. The appellants are acquitted.* *99.* ***Laya and Okafor are two days short of completing their prison sentence****. They shall be released forthwith. The Jail authorities shall act on the basis of the order as uploaded on the website of this court without any further communication."*

Part -II

OUTCOME IN NON-BAGGAGE CASES BOOKED BY THE INVESTIGATING AGENCIES

26. We now come to cases booked by the investigating agencies in areas other than the international/domestic airports.

26.1 The natural question that follows after having a holistic view is as to what is the fate of the other cases booked by other investigating agencies and whether the investigating agencies have been in a position to secure conviction? In short, what is the outcome in non-baggage cases booked by the investigating agencies?

ACQUITTAL RECORDED BY THE LD. TRIAL COURTS ON ACCOUNT OF NON-COMPLIANCE OF MANDATORY PROVISIONS AND OTHER REASONS

27. In order to understand the issue in proper perspective, it is convenient to refer to the judgments rendered by the Ld. Trial Courts in the following cases, which have dismissed the cases of the prosecution on account of non-compliance of sections 42, 50, 57 of the Act. Furthermore, there were delay in sending the samples to the forensic lab coupled with the fact that there were inconsistencies in the version of the prosecution witnesses and the prosecution

witnesses did not support one another.

27.1 The cases having reference to State of Maharashtra as the prosecuting agency have been decided by the Ld. Additional and Sessions Judge (NDPS) for Greater Mumbai while other cases have been decided by the Ld. Additional and Sessions Judge (NDPS), Dwarka Courts, New Delhi. In respect of case listed at Sl. No.5, the prosecuting agency is the Air Customs, CSI Airport, Mumbai and has been reflected in this Table, despite being a baggage case. The cases mentioned herein are not exhaustive but are only illustrative in nature.

SL. NO.	**Name of the prosecuting agency**	**Name of the person prosecuted**
1	The State of Maharashtra (At the instance of Anti Narcotic Cell, Mumbai, vide C.R. No. 150/2007) NDPS SPECIAL CASE NO. 59 of 2012 (CNR : MHCC020053062012) Decided on 30th May 2019	Imran Siraj Sayyed
2	The State of Maharashtra (At the instance of Anti Narcotic Cell, Mumbai, vide C.R. No. 181/2014). NDPS SPECIAL CASE NO. 100 of 2014 (CNR NO :MHCC02-007142-2014) Decided on 30th May 2019	1. Smt. Shahnaj Khalil Sayyed & 2. Smt. Fatima Yasin Shaikh
3	The State of Maharashtra (At the instance of Pydhonie Police Station, Mumbai, vide C.R. No. 200/2014) NDPS SPECIAL CASE NO. 42 of 2015 (CNR NO: MHCC02-005942-2015) Decided on 29th May 2019	1. Rajiya Abdul Kadar Shaikh 2. Anwar Ali Abdul Ali
4	The State of Maharashtra (At the instance of Anti Narcotic Cell, Mumbai, vide C.R. No. 30/2017) NDPS SPECIAL CASE NO. 125 of 2017 (CNR NO: MHCC02-012573-2017)	Abdul Gani Abdul Latif Jivani @ Papa Bakri

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	Decided on 29th May 2019	
5	Shri. Vishal Kumar Shrivastava, Intelligence Officer, Air Intelligence Unit, Chatrapati Shivaji International Airport, Sahar, Mumbai – 400 099. NDPS SPECIAL CASE NO. 44 of 2014 (CNR NO: MHCC02-003459-2014) Decided on 28th May 2019	Mubarak Mamudu
6	The State of Maharashtra (At the instance of ANC Bandra Unit, Mumbai Vide C.R.No.274/15) N.D.P.S. SPECIAL CASE NO.100 of 2016 (CNR No.MHCC02-007551-2016) Decided on 16th March 2020	1.Hirabai Yashwant Shinde & 2.Sabir Allanoor Mansoori
7	The State of Maharashtra (At the instance of Pydhonie P.Stn. Vide C.R.No.337/15) N.D.P.S. SPECIAL CASE NO.219 of 2015 (CNR No.MHCC02-017026-2015) Decided on 14th February 2020	Mohd. Ali Vali Shaikh
8	The State of Maharashtra (At the instance of ANC Azad Maidan Unit, Mumbai Vide C.R.No.20/17) N.D.P.S. SPECIAL CASE NO.116 of 2017 (CNR No.MHCC02-011014-2017) Decided on 7th February 2020	1.Nanso Daniel Nazeque & 2.Obiorah Ekwelor
9	The State of Maharashtra (at the instance of ANC, Bandra Unit, Mumbai). N.D.P.S. SPL.CASE NO.54 of 2014 (CNR No. MHCC020040552014) Decided on 30th August 2021	1.Ramshiromani Adyaprasad Pandey 2.Santoshkumar Ramraj Singh 3.Vidyaprasad Ramsevak Tiwari

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10	The State of Maharashtra (at the instance of ANC Worli Unit, Mumbai) N.D.P.S. SPL.CASE NO. 128/2015 MHCC020110712015 Decided on 12th July 2021	Mohd. Ismail Mohd. Rashid Shaikh
11	The State of Maharashtra) (at the instance of ANC Ghatkopar) Unit Mumbai vide C.R. No.29/2018 N.D.P.S. SPL.CASE NO.196 of 2018 MHCC020145752018 Decided on 8th April 2022	Akil Bashir Shaikh
12	The State of Maharashtra) (At the instance of ANC,) Worli Unit, Mumbai) vide C.R. No.40/2018 N.D.P.S. SPL.CASE NO.26 of 2019 MHCC020023922019 Decided on 4th April 2022	Kasim Mohd. Sidhik Shivani @ Mufti) @ Imran Mufti
13	The State of Maharashtra) (at the instance of D.N. Nagar) police station Mumbai) vide C.R. No.106/2017 N.D.P.S. SPL.CASE NO.87 of 2018 MHCC020061052018 Decided on 24th March 2022	Kedrick Odo Bartho
14	The State of Maharashtra through Anti Narcotic Cell, Azad Maidan Unit, Mumbai. (Vide C. R. No.277/15) NDPS SPECIAL CASE NO. 85 of 2016 Decided on 10th August 2018	1.Jirofer Okoye 2. Chenedu Okonkoa Paul
15	The State of Maharashtra	1.Shaikh Munawar Anwar Husain

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	(At the instance of Worli Police Station C.R. 56/2015) NDPS SPECIAL CASE NO. 6 of 2017 decided on 23rd July 2018	2. Nitesh Devji Galchar
16	The State of Maharashtra (At the instance ANC Unit Azad Maidan C.R. 74/2011) NDPS SPECIAL CASE NO. 115 of 2011 Decided on 29th June 2018	Smt. Saribabi Kasim Shaikh (since deceased; case stood abated against her) Smt. Zohara Salim Shaikh
17	The State of Maharashtra (At the instance of Anti Narcotic Cell, Azad Maidan Unit, Mumbai, C.R.No.369/2009). N.D.P.S. SPECIAL CASE NO.31 of 2010 CNR NO. : MHCC02-001117-2010 Decided on 21st March 2020	1.Baban Nagesh Vani @ Babadya 2.Fajal Shabbir Shaikh 3.Bilal Samshuddin Shaikh @ Chhotu 4.Haiderali Abdulsattar Shaikh (Separated) 5.Hamid Jamil Shaikh, 6.Mustaq Ahmed Esak Shaikh (Abated) 7.Shadab Salim Sayyed, (Abated) 8.Shaukatali Samshuddin Shaikh @ Munna, 9.Ershad Samshuddin Shaikh

18	The State of Maharashtra] (At the instance of Anti Narcotic Cell,] Kandivali Unit, Mumbai, C.R.No.67/2012).] N.D.P.S. SPECIAL CASE NO.110 of 2012 CNR NO. : MHCC02-007210-2012 Decided on 21st Feb 2020	Bhupesh Kumar Gopi Singh
19	The State of Maharashtra] (At the instance of Anti Narcotic Cell,] Ghatkopar Unit, Mumbai, C.R.No.99/2016).] N.D.P.S. SPECIAL CASE NO.18 of 2017 CNR NO. : MHCC02-002056-2017 Decided on 18th Feb 2020	Vayanktesh Govind Vemula,
20	The State of Maharashtra] (At the instance of Anti Narcotic Cell,] Ghatkopar Unit, Mumbai, C.R.No.212/2014).] N.D.P.S. SPECIAL CASE NO.108 of 2014 CNR NO. : MHCC02-008183-2014 Decided on 14th Feb 2020	Mehmood Ismail Thaiyyum @ Bam
21	The State of Maharashtra (At the instance of Anti Narcotic Cell, Kandivali Unit, Mumbai, C.R.No.234/2013). N.D.P.S. SPECIAL CASE NO.139 of 2013 CNR NO. : MHCC02-009593-2013 Decided on 11th Feb 2020	Smt. Shahajaha Imtiyaz Khan
22	The State of Maharashtra] (At the instance of Anti Narcotic Cell, Mumbai, C. R. No.231/2011). N.D.P.S. SPECIAL CASE NO.81 of 2012 CNR NO. : MHCC02-006076-2012 Decided on 31st Jan 2020	Smt. Johra Salim Shaikh,
23	The State of Maharashtra (At the instance of Dongri Police Station,	Mohd. Izaz Abdul Latif Shaikh

	Mumbai, C.R. No.328/2016). N.D.P.S. SPECIAL CASE NO.1 of 2017 CNR NO. : MHCC02-000004-2017 Decided on 24th Dec 2019	
24	State . FIR No. 951/2018 PS: Uttam Nagar U/s. 20 (b) (ii) (B) NDPS Act CNR No.DLSW01-014047-2019 Decided on 11th July 2022	Bharat Kumar @ Mogli
25	State FIR No. 79/2013 PS Raja Garden Metro State Vs. Sanjeev Kumar CNR No. DLWT02-004470-2016 Cr. Case No. 69943/2016	Sanjeev Kumar
26	State SC No. 441555/2016 FIR No. 81/2016 PS: Bindapur U/s. 20 (b) (ii) (B) NDPS Act CNR No DLSW01-010118-2016. Decided on 2nd July 2022	Amit Kumar

27.2 Case listed at sl. No.9 of the Table above paints a grim picture of the manner in which innocent persons are made to face trial for no fault of theirs. It is one of the rare cases where the prosecution witness (PW-4 in this case) was issued a notice by the Ld. Trial Court under section 340 of the Criminal Procedure Code, 1973 read with section 344 of the Criminal Procedure Code, 1973. In this case, the Ld. Trial Court held as under:

> *"26. I have gone through the above authorities and find that Hon'ble Supreme Court has taken view in most of the above cases that,* ***acceptance or rejection of evidence by itself is not a yardstick to turn the evidence as false.*** *But it is to be seen that, from the evidence whether the truth is coming out glaringly and* ***to the knowledge of the witness he has made a false statement before the***

court. In recent times, there has been tendency of making false statement before the court and therefore, cases of perjury are increasing and unless action is taken by the court , this tendency cannot be controlled or checked. *However, it is also observed by Hon'ble Supreme Court that in exceptional cases and circumstances the court should initiated an enquiry into the perjury or contempt proceedings. The court should be satisfied that false statement has been made deliberately and a person cannot be charged for perjury merely on the basis of suspicion. The court has also to see whether it is expedient in the interest of justice to initiate an enquiry or otherwise.*

27. Considering the evidence of PW-4 and his cross examination, and more particularly ***observations made by this court during his cross-examination that, from the images which have appeared in the CCTV footage it is clear that, PW-4 and accused no.1 were seen in the premises of Vedant Complex.*** *Under these circumstances,* ***I have come to the conclusion that, PW-4 appears to have made false statement before the court, having knowledge that if his evidence is accepted he will be helping the prosecution in proving its case****. Similarly,* ***I find it expedient in the interest of justice to at least initiate an enquriy in this matter by issuing show cause notice to PW-4 and to find out whether he is really responsible for committing the offence of perjury. Hence, with reference to point no.3(a) I have recorded a finding that Ld Defence Counsels have made a case for initiating an enquiry against PW-4 Abdul Rauf Shaikh by issuing him show cause notice. Consequently, with reference to point no.3(b), I also record a finding that a notice is required to be issued to PW-4 u/s. 340 r/w. 344*** *of Cr.P.C to find out whether any further action is required to be taken against him according to law. Hence, point no.3 is answered in the affirmative.*

28. In view of above observations and my finding against points no.1 to 3(a) (b), I have not (sic) other alternative to give benefit of doubt to accused persons in the case as the prosecution has not been above to prove the seizure of the contraband on the basis of evidence on record when both the panch witnesses have turned hostile and the possibility of false implication of the ***accused in the case cannot be ruled out and therefore, the accused nos. 1 to 3 in the case are entitled to be acquitted."***

DRAWING OF PANCHNAMA ON THE SPOT – A NECESSITY

28. Apart from the above, the panchnama is generally required to be drawn on the spot. There would be practical difficulties in crowded places which may prevent the empowered officer from properly drawing the panchnama on the spot as the crowed could turn violent and the security of the person accused of the offence cannot be guaranteed safety and security. Be that as it may, the empowered officer would be in the know how regarding the place of interception and persons involved and hence the videography of the scene of crime assumes significance and this would not only assist the empowered department in clearing all the misconceptions/inconsistencies that have crept (or that would creep in) but would also be in compliance of the Hon'ble Supreme Court's judgment in **Shafhi Mohammad**[33] wherein it was held as under:

> *"1. Notice was issued to consider the question whether in every case of recovery when possession itself is an offence, the investigator must videograph the scene of recovery and whether in every other case the scene of crime should also be videographed during investigation.*
>
> *3. Mr A.N.S. Nadkarni, Additional Solicitor General, has accordingly put in appearance and made his submissions. He has also submitted a note to the effect that such videograph will indeed help the investigation and such concept is being used in some other advanced countries. The National Institute of Justice which is an agency of U.S. Department of Justice in its report has noted the perceived benefits for using the "body-worn cameras" and also the precautions needed in doing so. The British Transport Police has also found body-worn cameras as deterrent against anti-social behaviour and tool to collect evidence. He also referred to judgment of this Court in Karnail Singh v. State of Haryana [Karnail Singh v. State of Haryana, (2009) 8 SCC 539 : (2009) 3 SCC (Cri) 887] , wherein reference to use of technology during search and seizure under the Narcotic Drugs and Psychotropic Substances Act, 1985 has been made. Reference has also been made to the Information Technology (Amendment) Act, 2006, particularly, Section 79-A. In Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra [Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra, (1976) 2 SCC 17] , this Court noted that new techniques and devices are the order of the day. Audio and video tape* technology has emerged as a powerful medium through which *a first-hand information can be gathered and can be crucial evidence.*

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4. The ***learned Additional Solicitor General has also drawn our attention to the Field Officers' Handbook issued by the Narcotics Control Bureau, Ministry of Home Affairs, Government of India, inter alia, suggesting that logistic support be provided to the search teams****. It further suggests that all recovery and concealment methods should be videographed simultaneously. The said handbook also suggests that permission should be taken under Section 52-A of the Narcotic Drugs and Psychotropic Substances Act, 1985 for pre-trial disposal of the contraband. Further, reference has been made to the Narcotic Drugs and Psychotropic Substances (Amendment) Bill, 2016 moved by a private member in the Lok Sabha. He submits that in his view such Bill will advance the interests of justice and he will advise the Government of India to consider and oversee adoption for these measures in the country by investigating agencies.*

5. Mr A.I. Cheema, learned Amicus points out that the second proviso to Section 54-A CrPC provides for videography of identification process in circumstances specified in the said provision. He also stated that there should be videography of confessional statement under Section 164 CrPC. He states that such measures can also be adopted for recording dying declarations, identification processes and the post-mortem."

28.1 The Division Bench of the Hon'ble High Court of Calcutta, very recently had an occasion to deal with the issue of videography of crime scene in **the case of Kalu Sk. @ Kuran**[34] and it was observed as under:

*"****Disturbing features were noticed in a number of cases including the present one involving recovery of narcotic substance under N.D.P.S. Act****. Firstly,* ***the seizure list did not contain signatures of all the accused persons who were alleged to have been arrested from the spot where the recovery was made.*** *Secondly, presence of independent witnesses at the time of seizure appeared* ***to be doubtful, as the said witnesses in their statements before the Magistrate under Section 164 of the Code of Criminal Procedure did not support the seizure****. Noticing such discrepancies in the present and other cases, this Court was constrained to issue directions upon the Superintendent of Police of Murshidabad Police District to take steps in the matter including initiation of disciplinary proceedings/suspension of police officers connected with the investigation of the case."* ***Emphasis supplied***

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28.1.1 The Hon'ble High Court went on note and issue directions as under:

> *"This Court takes judicial notice of the fact that all police officers are ordinarily equipped with smart phones and other electronic gadgets which would enable them to videograph recovery. When technology is available at the lay level we see no reason why it shall not be utilized to instil fairness, impartiality and confidence in the investigative process.* ***Videography as a modern tool of investigation has been well-recognised in law.*** *In fact, the Field Officers' Handbook issued by Narcotics Control Bureau, inter alia, directs the search team to carry video camera amongst other equipments for the purpose of search.1 In chapter 6 relating to "Recovery and Seizure" video recording of seizure of narcotics has been mandated as under:-*
>
> > *"Video:- A lot of times the witnesses and suspect allege foul play by the search team during the trial proceedings alleging that they were not present at the time of recovery. To avoid such a situation, all recovery and concealment methods should be videographed simultaneously if possible, recording the presence of the owner/occupant of the premises and the witnesses. This acts as a deterrent later during trial proceedings."*
>
> ***Unfortunately, even in cases conducted by NCB, such directives are mostly observed in the breach.***
>
> *The observations made in Shafhi Mohammad (2018) 5 SCC 311 as well as the guidelines in the Field Officers' Handbook issued by the Narcotics Control Bureau reinforce our view regarding mandatory videography of recovery proceedings under NDPS Act. Technology has advanced considerably and equipments like smartphones and other electronic devices enabling videography are ordinarily available with seizing officers. Hence, lack of availability of technology or awareness is a non- issue.*
>
> *Accordingly, we direct as follows:-*
>
> > *(i) In all cases involving recovery of narcotic substance particularly recovery of narcotic above commercial quantity, seizing officers shall make a video recording of the entire procedure unless for reasons beyond the control of seizing officers, they are unable to do so;*

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(ii) Reasons for failing to videograph the recovery proceeding must be specifically recorded in the investigation records particularly contemporaneous documents including seizure/inventory list;

(iii) Superior Police Officer not lower than the rank of Additional Superintendent of Police shall monitor recovery of narcotic substance above commercial quantity within their territorial jurisdiction and ensure due compliance of statutory provisions regarding search and seizure including compliance of the directives (i) and (ii) relating to videography of recovery and/or recording of adequate reasons for departure from such procedure;

(iv) ***Non-compliance of the directives (i) and (ii) relating to videography of recovery and/or failure to record just reasons in contemporaneous documents for its non- compliance would attract departmental proceeding so far as the seizing officer is concerned;***

(v) Director General of Police shall issue necessary directions for due compliance with the aforesaid directives;

(vi) Superintendent of Police/Commissioner of Police in each district/commissionerate shall undertake training programmes to spread awareness and capacity building of officers regarding compliance of statutory requirements in the matter of search and seizure of narcotic substance under NDPS Act and compliance of the aforesaid directives relating to videograph of recovery including collection, preservation and production of such electronic evidence in Court.

We are also of the considered view all Central agencies empowered under the NDPS Act to search and seize narcotic substance ought to comply with the aforesaid requirement of videography of recovery proceedings."

Emphasis supplied

28.1.2 In compliance of the directions issued by the Hon'ble High Court, the Director General of Police, West Bengal has issued the following directions and the same has been recorded in the subject case by the Hon'ble High Court of Calcutta in its Order dated 6th July 2022 as under:

"All the Superintendents of Police/Commissioners of Police are directed to

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issue appropriate instructions to the field functionaries so that the above directives are strictly complied with. They are requested to organise intensive training module on regular basis so as to spread awareness and capacity building of the officers regarding compliance of the statutory requirement while conducting search and seizure of narcotic substance under NDPS Act and videograph of recovery etc. ADG, CID WB is hereby appointed as Nodal Officer for the preparation, capacity building and implementation of videograph in investigation by way of organising in-service training programme at regular interval."

28.1.3 The Division Bench went on to note the following in its Order dated 6th July 2022 as under:

"Response in the form of affidavit has also been filed by the Assistant Director, Narcotic Control Bureau, Kolkata Zonal Unit with regard to directives (i) to (vi) in the aforesaid order.

We have perused the affidavit. In the affidavit it is stated all the concerned officers of the NCB have been directed to start videography in the seizure cases as soon as possible with regard to directives No.(i), (ii) and (iv)."

CULTIVATION OF CANNABAIS

29. On the issue of illegal cultivation of cannabis, a great deal of confusion prevails in the mind of the investigative agencies. Uprooting of cannabis plant from agricultural land has been termed as "Ganja" and various persons have been prosecuted wrongly. Consequently, they have been granted bail by the Hon'ble High Courts. In order to understand the issue in proper perspective, it is imperative to look into the definition of "Ganja", defined " under s2(iii)(b) of the Act, which is as under:

"ganja, that is, the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever name they may be known or designated;"

29.1 A cursory reading of the definition of "ganja" makes it clear that it is **the flowering or fruiting tops of cannabis plant, excluding the seeds and leaves when not accompanied by the tops**. In the context of booking of cases for illegal/illicit cultivation of cannabis plant, it is seen that the cultivators have been booked for the offences punishable under sections 20(b), 22 and 8(c) of the Act. In many cases, the uprooted cannabis plant did not have any fruiting part which makes it apparent that the plant had not attained the flowering stage and what was present

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in the seized contraband was only the leaves and seeds and the entire plant in an uprooted condition did not fall within the definition of the term "ganja''.

29.2 Furthermore, the seizing officer in a situation of where the cannabis plant had flowering or fruiting tops, the same had to be segregated to arrive at a conclusion whether the offence falls under the category of "small quantity" or "commercial quantity".

29.3 Reading of the definition of "Ganja" extracted herein would reveal that the seeds and the leaves are excluded from the definition of word "Ganja". Readers may note that this exclusion is available only when ''Ganja'' is not accompanied by the flowering tops or the fruiting tops. The aforesaid view also gets fortified by the decision of the Hon'ble High Court of Bombay in the case of **Raju Mohanrao Rathod**[35] wherein it was held as under:

> *"12. A bare reading of the above definition would make it manifest that the seeds and the leaves are excluded from the operation of the definition of word "ganja" only when the same are not accompanied by the flowering tops or the fruiting tops. The report of the C.A. Reveals that greenish leaves, seeds and stalks were noticed at the time of analysis. Thus, when the leaves and seeds were accompanied by the fruiting tops then it will have to be said that the seized stock was of ganja."*

29.4 The Hon'ble Madras High Court had an occasion to deal with the issue in Criminal Appeal 685 of 2004 decided on 9th September 2009 in the case of K.V. Ramasamy[36] and in para 18 it was held as under:

> *"18. The first thing to be noted is that as per the report, apart from flowering top, seeds, leaves, stem was found in the samples. The definition of Ganja excludes the seeds and leaves when not accompanied by the tops. Therefore, when the Ganja is seized, with the flowering or fruiting tops, seeds and leaves, totally it has to be taken as Ganja. If the seeds and leaves are separate, not accompanied with the flowering or fruiting tops, they could not be termed as Ganja. This makes it clear that mainly the flowering or fruiting tops of the cannabis plant is a ganja. As far as the stem is concerned, it is doubtful whether it could be regarded as ganja. Normally, the plant includes stem and therefore the cannabis plant must be with stem and also with other parts such as flowering or fruiting tops, seeds and leaves. Therefore, when a cannabis plant is seized, if it contains flowering or fruiting tops, seeds and leaves being accompanied, it is not necessary to mention separately, it contains stem also.*

As mentioned above stem also is part of the plant. At the same time, like seeds and leaves, stem is not accompanying the flowering top and broken stem is available, it could not be termed as ganja. The stem may be long or short, normally it is long thin part of the plant.''

29.5 Section 8(c) of the Act prohibits **production, manufacturing, possession, sale, purchase, transportation, warehousing, concealment, use or consumption, import inter-State, export inter-State, import into India, export from India or transhipment, of narcotic drugs or psychotropic substances,** in contrast to section 8 (b) **which prohibits cultivation of opium, poppy or any cannabis plant.**

29.6 Cultivation of cannabis plant is prohibited under section 8(b) of the Act. While making a seizure of cannabis plant in an agricultural field, it should be remembered that the plant without the flowering or fruiting tops do not fall well within the definition of 'ganja'. In such cases, the punishment for cultivation of cannabis plant is covered under section 20(a) of the Act for the offence under section 8(b) of the Act. The punishment that can be inflicted in such cases is "*rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine which may extend to one lakh rupees"* Charging a person for cultivation of cannabis plant under section 20(b)(ii)(A)/(B)/(C) of the Act is legally not tenable and on account of wrong invocation, the persons become entitled to bail and ultimately acquittal. Hence, the classification of the offence becomes important. In a case booed by an investigative agency, the charge sheet for seizure of huge quantity of 'ganja' was filed as a psychotropic substance leading to the quashing of the charge sheet.

PRECAUTIONS TO BE TAKEN IN RESPECT OF ILLICIT CULTIVATION OF CANNABIS

29.7 Be that as it may, in cases of illicit/illegal cultivation of cannabis is concerned, the following precautions are to be taken:

(i) The survey number of the land (or any identifiable document in the Revenue records known by any name) is to be identified

(ii) Whether the land is being cultivated by the landowner or by a tenant is to be got verified from the land records maintained by the Revenue Officers. The Revenue Records should be made part of the panchnama proceedings and it is advisable that the Revenue Officers are made party to the proceedings;

(iii) The verification so done from the Revenue Officers should also be confirmed from other owners/tenants of the adjoining land to rule out the escape route

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(iv) The uprooting should be done methodically and weighment of the same should be done methodically and after removing the soil;

(v) The panchnama proceedings should categorically indicate the weight of the uprooted plants correctly (in wet conditions) as the weight of the uprooted plant would decrease subsequently (in dry conditions) and this should be adequately taken care of and reflected in the panchnama proceedings.

29.8 To illustrate, we may conveniently refer to case numbered as SPL.C.C. NO.1103/2019 decided on 19th April 2022 in the case of **State By Sulibele P.S**[37] wherein it is the case of the prosecution that on 28.8.2018 at 3.30 pm., when the complainant was in the police station he received a credible information that the accused herein *"**has grown ganja in the vacant space"** attached to his own house.* He has informed the matter to the ACP., Hosakote and the Circle Inspector of Police, Nandagudi. Thereafter, he along with gazetted officer, Principal of I Grade College, Sulibele went to the spot along with staff and panchas. The accused herein tried to escape from the spot. He was surrounded by the staff and panchas and was apprehended. On enquiry, he revealed that the said vacant space belongs to his father who died 6 months ago. There three big plants were found. It was uprooted. **On weighing the plant, it weighed 3 Kgs., 450 grams**. Thereafter, under mahazar the said **ganja plants were seized**. Accused was arrested along with a report produced before the Station House Officer. The said report is the basis to register the case against the accused in Cr.No.89/2018 for the offence punishable under **section 20 of NDPS Act. The Ld. Trial Court held as under:**

> *"26. Here in the instant case the investigation officer has not reduced the information into writing and sending a copy thereof to the superior officer. There is **total non compliance of Sec.42(1) & 42(2) of NDPS Act. The evidence collected during search is in violation of law cannot be admissible**. **Further, there is inordinate delay in submitting the seized contraband for chemical analysis**. As per the investigation papers the articles were subjected to inventory on 3.9.2018, but it was sent to FSL on 27.9.2018. the FSL report received in the case is on 3.8.2019.*
>
> *27. PW.2 is the gazetted officer in whose presence search and seizure is done. He has stated that at the time of seizure of ganja plant he was present. But the accused was not present when the procedure of seizure is held. He also denies the suggestion made by the prosecution that on seeing the police accused ran away and he was chased and brought to the place by the police. He also states*

that he is ignorant of Sy., No., and Katha No., of the property and who is the owner of the place where ganja plant was grown. Similarly Pws.3 and 4 who are the govt., officials and panch witnesses to the case, though they have stated about their presence about drawing mahazar, but they failed to state about the presence of accused at the time of seizure. They have denied the suggestion made by the prosecution that accused ran away from the spot on seeing the police, thereafter, he was chased and secured by the police. ***They failed to identified the accused before the court, they failed to speak about the property no., and ownership of the place of incident. Though the prosecution has examined the independent witnesses to prove the seizure but they failed to speak about the identity of the accused and his presence at the time of seizure.***

28. Yet another essential aspect in the case is the ganja plant which was uprooted and seized by the IO., ***does not indicate the segregation made by the IO.*** *Under the definition of ganja, stem, stick would not fall, flower and stalk has to be segregated out of the bulk, then only the contraband would fall within the definition of cannabis would attract. Let me now refer to Sec.2(ii) cannabis (hemp)*

means:—

(b) ganja, that is, the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever, name they may be known or designated.

Here in this case the contraband seized with seeds, flowers, stem, stick is not segregated. ***Actually what is the percentage of contraband there is no detail report. Further no report is submitted to higher officer on conclusion of raid reporting the seizure of contraband. The superintendent of PW.1 has not given any permission in writing to conduct the raid.*** *In the Mahazar the Sy.No., of the land where the ganja plant is grown is also not referred to. The RTC of the place of incident is secured bythe investigating agency but it does not depict the name of accused herein in column No.9 of RTC State By Sulibele P.S vs Lakshmana @ Lakshmi Narayana K on 19 April, 2022 about possession. The neighbours were not examined to ascertain that the accused has grown the ganja in the backyard of his house. Impression of seal should*

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not be retained with the IO. The seal which was issued at the time of seizure is not handed over to panchas after the seizure. The raiding officer has failed to state as to what he has done with the seal after the seizure. All these circumstances in the case creates doubt as to the case of prosecution. In the result, I proceed to hold ***that the prosecution has failed to prove the growth of ganja by the accused in his backyard by placing probable, cogent convincing evidence. In the result accused is entitled for benefit of doubt and an order of acquittal. Consequently, point for consideration is answered in the negative.***

*"****Here in this case the contraband seized with seeds, flowers, stem, stick is not segregated. Actually what is the percentage of contraband there is no detail report.*** *Further no report is submitted to higher officer on conclusion of raid reporting the seizure of contraband. The superintendent of PW.1 has not given any permission in writing to conduct the raid. In the Mahazar the Sy.No., of the land where the ganja plant is grown is also not referred to. The RTC of the place of incident is secured by the investigating agency but it does not depict the name of accused herein in column No.9 of RTC about possession. The neighbours were not examined to ascertain that the accused has grown the ganja in the backyard of his house. Impression of seal should not be retained with the IO. The seal which was issued at the time of seizure is not handed over to panchas after the seizure. The raiding officer has failed to state as to what he has done with the seal after the seizure. All these circumstances in the case creates doubt as to the case of prosecution. In the result****, I proceed to hold that the prosecution has failed to prove the growth of ganja by the accused in his backyard by placing probable, cogent convincing evidence. In the result accused is entitled for benefit of doubt and an order of acquittal."***

OVERTURNING OF JUDGMENTS OF CONVICTION BY THE HIGH COURTS

30. We have noted some inconsistencies in the cases booked. Overturning of the judgments of the Ld. Trial Court is not uncommon. To take the matters further, we now refer to the CRL.A.167/2013, CRL.M.A.Nos.12446/13 & 3396/17 decided on 24th August 2017 by the Hon'ble High Court of Delhi in the case of **Mohammad Burhan**[38] wherein an appeal was filed against the judgment dated 22nd September 2012 of Ld. Addl. Sessions Judge in Sessions Case No.09A/08 by which the appellant – Mohammad Burhan was held guilty for committing

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offences punishable under sections 21(c) and 29 of the Act . By an order dated 25th September, 2012, he was sentenced to undergo RI for ten years with fine of Rs. 1 lakh each under sections 21(c) and 29 of the Act and the sentences were to operate concurrently. The Hon'ble High Court overturned the conviction recorded by the Ld. Addl. Sessions Judge. The reasons for the overturning the conviction recorded by the Ld. Addl. Sessions Judge are as under:

> *"8.* ***Secret information allegedly received on 17.08.2007 by PW-3 (Kamal Kumar) on phone was recorded on a loose sheet / paper****. It was not reduced into writing in any register duly maintained in the office. The investigating agency has failed to explain as to why such information was not recorded in the duly maintained register to avoid its manipulation. Though recording of the secret information under Section 42 of NDPS Act in the register is not mandatory, however, to ensure that such an information was received and to attach certain sanctity to it,* ***it is impressed in number of cases that such an important information should be recorded in a duly maintained register having serial number. This is never done by the Investigating Officers for the reasons known to them.*** *PW-3 (Kamal Kumar) informed that the secret information was not received by him from the secret informer directly; it was received in the control room of the office****. It is unclear as to why the secret information was received only by PW-3 (Kamal Kumar) when other senior officers were available in the office. The secret information did not reveal the names of the culprits. It is silent as to what was the quantity of the contraband being carried by a specific individual. The prosecution has not been able to establish as to from where the appellant and his associate - Arif Butt had originated their journey and when they both came into contact with each other.***
>
> *9.* ***No Call Detail Records have been placed on record to ascertain if both - the appellant and Arif Butt were acquainted with each other or were in constant touch. It is unclear as to when both of them hatched conspiracy to procure huge quantity of contraband. The investigation is silent as to from where the contraband was procured; by whom it was procured; for what consideration it was purchased. It is also not ascertain as to whom the contraband was to be delivered. The Investigating Officer did not wait to find out as to, to whom the appellant and his associate were to deliver the contraband. Arif Butt was not found in possession of any contraband. His***

> ***motive to remain present with the appellant is not established.*** *The appellant retracted the confessional statement allegedly made by him under Section 67 of NDPS Act on 01.09.2009. It was revealed by him that he was in possession of mobile No.999777904, however, no efforts were made by the investigating agency to collect Call Detail Records pertaining to the mobile in question.* ***The appellant was a resident of Aligarh. Nothing incriminating was recovered from his residence in the followup action. The Investigating Officer was unable to disclose the number of the vehicles used to reach the spot. For no plausible reasons, log books pertaining to the vehicles used for apprehension of the appellant were not produced or proved."***

30.1 The Hon'ble High Court further went on record in para 12 of its judgment as under:

> ***"12. The investigation conducted by the investigating agency is not up-to-the-mark and suffers from apparent defects and material irregularities. Appellant's conviction on the solitary statement of the Investigating Officer who is interested in the success of his case cannot be sustained in the absence of any independent corroboration."***

30.2 The aforesaid judgment is a clear indicator in which mandatory provisions are not complied with. It is emphasized here at the cost of repetition that the quantum of seizure has nothing to do with securing a conviction under the Act. Both are poles apart. While the quantum of seizure may be good for statistical purposes and cutting of the supply chain/link, it is essential that the empowered officers strictly comply with the mandatory provisions, failing which the Ld. Trial Courts are bound to acquit the offenders and even if conviction is secured, the Hon'ble High Courts, would overturn the judgment of conviction, as has been brought in above.

31. We may further refer to another judgment of the Hon'ble High Court of Delhi wherein the shortcomings in the investigation were exposed. In CRL.A. 918/2017 & CRL.M. (BAIL) 7406/2020 & CRL.M.A. 7951/2020 in the case of **Nitesh Amrut Bhai Patel** and **Rafiq Ahmed Shaikh**[39] the appellants were convicted by the Ld. Trial Court for the offence punishable under section 23 read with section 29 of the Act.

RECEIPT OF INFORMATION – TO BE REDUCED INTO WRITING AND CANNOT BE DELEGATED

30.3 Before moving further to the facts of the case, readers may further note that the information received by an empowered officer should be reduced into writing by that officer and that should not be delegated to any other empowered officer for the purpose of being

reduced into writing. Such delegation, being impermissible under the Act, should not be resorted to. At this juncture, it is required to be noted that the word "person" has been used in section 41(2) and 42(1) of the Act i.e. *"if he has reason to believe from personal knowledge or information given by any person and taken in writing".* Here the word "person" is used as an ''informant''(i.e. who gives or passes on information) and it is in this context essential that the officer who receives the information should himself reduce the same in writing and should not pass on the information to the subordinate officers/staff on account of the fact that the advocate representing the accused could agitate the matter before the Trial Court in trial proceedings or for grant of bail before the Trial Court or in jurisdictional High Court. This is contrast to the use of the word "person" in section 42(1)(d) of the Act and the use of the word "person" is in a different context i.e. the officer on the basis of reasons to believe that a person who has committed any offence punishable under this Act can be detained and searched.

ROUTINE INFORMATION SHOULD NOT BE PASSED ON AS 'SECRET' INFORMATION

30.4 It is further equally important to remember that routine information received from the courier companies (i.e. FedEx, DHL, etc.) **should not be passed off as "secret information".** The Hon'ble High Court of Delhi in the subject case elaborately analysed and held as under:

> *"36. Thus, even though the parcel in question was booked on 24.02.2011, Fedex did not dispatch it to its destination but detained the same as it appears that the security staff had found that there was some suspicious substance in the said parcel. It is apparent* ***that this information was provided to NCB and the security staff had also informed its concerned employees that an NCB team would come and take the said parcel. Clearly, the said parcel was not intercepted by NCB while it was on his way in the normal course, to its destination.*** *The courier service provider (Fedex) had detained the said packet and information in this regard had been provided to NCB. Notwithstanding the same, no investigation as to the discovery and storage of the parcel in question was conducted.* ***The security staff of Fedex who had detected the same were not examined by the officials of the NCB. Nor any inquiries were conducted to ensure that the parcel remained untampered after it was detained. However, NCB built a case that the information received was secret and had sought to present the case as if the parcel was intercepted while on its way to its destination in the normal course.*** *But for the independent witnesses – PW4 and PW5, who were also employees of Fedex –*

revealing the above in their cross examination, the fact that the parcel in question had been detained by Fedex would not have been disclosed.

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

30.5 Coming to the case, the appellants challenged the conviction on four grounds as stated herein:

(i) "the learned trial court has erred in convicting the appellants solely on the basis of self incriminating statements of the appellant Nitesh Patel, which were not made voluntarily.

(ii) the case set up by the prosecution is not supported by evidence on record.

(iii) the sample tested by the CRCL is not the sample of the seized substance allegedly sent to the said laboratory.

(iv) the case has not been properly investigated."

30.6 In conclusion, the Hon'ble High Court of Delhi, after hearing the rival submission, exposing the short comings in the prosecution's case and the points that have been left out in during the course of investigation, indicating shoddy investigation, held as under:

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

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

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

115. Further, Mushahid Ali's (PW8's) testimony – and his statement (ExPW1/Z8) – seeks to establish that he could identify the parcel dispatched by Sagar Iyer (PW8) as the parcel dispatched by him to Ahmedabad on the basis of the Proforma Invoice, Airway Bill in question and VISA manifest report (Ex PW1/B1 an Ex PW1/B2), which is impossible in the given facts. Clearly, his statement/testimony could not be relied on to provide the link evidence or ascribe any corroborative value.

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

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

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

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

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

(iii) no documents were collected to establish that any courier was

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dispatched by Rafiq from Mumbai to Chennai;

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

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

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

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

(viii) according to Mushahid Ali, he had delivered the parcel to Kasim Bhai and subsequently (two-four day later) accepted the parcel from him for being dispatched to Ahmedabad but no inquiries were made from him; althoughPW1 stated that she had issued summons to Kasim Bhai on 01.07.2011, the same are not on record and in any view, PW1 conceded that the summons were not followed through as the address was incomplete;

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

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

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

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

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was produced.

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

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

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

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

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

FOLLOW UP ACTION – PRECAUTIONS TO BE TAKEN

31 On the basis of disclosures, further action in the shape of follow up actions are initiated. The follow up action so initiated shall be in tune with the initial proceedings. In short, the timings are essential to the follow up actions initiated by the empowered officers/departments.

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To illustrate this point, we can safely refer to the latest Division Bench judgment of the Hon'ble High Court of Calcutta in the case of **Gopal Teli & Others**[40]

> *The fact of the case "as alleged against the appellants is to the effect that on 31.12.2008 at 4:00 p.m., Bibhas Mondal (P.W. 1) and Sankar Das Sinha (P.W. 8), Intelligence Officer attached to N.C.B., Kolkata received information and recorded that 36 kgs. of good quality of heroin would be transported in a vehicle which would reach Panagarh, Burdwan in the midnight at 31.12.2008 and thereafter, Gopalnagar, Bongaon in the early hours of 01.01.2009. Rabi Sekhar Pandey would board the vehicle at Panagarh and the contraband would be handed over to one Bishu who would pay the vehicle fare and commission to Rabi Sekhar Pandey. Pursuant to such information and after obtaining necessary movement order, N.C.B. officers proceeded to various places around Bongaon, North 24-Parnagas and Nadia district. A team of officers under the leadership of S.D. Sinha (P.W. 8) lay ambush at Gopalnagar near Kali Temple. At 6:00 a.m. on 01.01.2009, they noticed a truck bearing registration No. RG 27G 2106 coming from Chakdah side which stopped near Kali Temple. Two persons in a motor bike came from Bongaon side and stopped there. One person got down from the truck and started talking with the persons on the bike in a suspicious manner. At that moment, N.C.B. officers intercepted them. On interrogation, the persons disclosed their identities. Two independent witnesses, namely, Milan Das and Amit Pal were requested to join the search. In presence of the independent witnesses, N.C.B. officers searched the truck and from a hidden cavity found in the backside of the driver's cabin 19 packets containing brown coloured powder like substance were recovered. The weighment of 18 packets was found as 2 kgs. each while 1 packet weighed 1 kg, that is, 37 kgs. in all. On testing the brown coloured substance by drug detention kit, it responded to heroin." It is further the case of prosecution that "on the basis of statement made by Rabi Sekhar Pandey that he had stored 10.5 kgs. of heroin at his residence at Panagarh, a follow up action was initiated and Girish Nandan Pandey (P.W. 7) recovered 9.225 kgs. heroin from the tenanted apartment of Rabi at Panagarh in the presence of wife of the landlord, namely, Sushmita Bhadra and one Balai Saha. Seizure was effected in the presence of Sonu Pandey, brother-in-law of Rabi Sekhar Pandey. Statements of Sushmita*

Bhadra and Milan Das were also recorded under Section 67 of N.D.P.S. Act. During enquiry, Consumer Application Form (C.A.F.) of mobile No. 9614610665 (alleged to be of Biswanath) and 9635641678 (alleged to be of Rabi Sekhar Pandey) were obtained from the service provider, Aircell. Call detail records between 25.12.2008 to 02.02.2009 were also collected. Chemical examination report was received and complaint was filed by Asutosh Pahari (P.W. 2) against the appellants."

31.1 The Hon'ble High Court analysing the recovery in the follow up action held as under:

"Examination of Exhibit-24 show on the disclosure of Rabi Sekhar Pandey that he had kept 10.5 kgs. of heroin in his rented house at Panagarh, follow up action had been undertaken by P.W. 7. As per prosecution case, Rabi Sekhar Pandey had been apprehended at Gopalnagar in the truck carrying 37 kgs. heroin. Thereafter, notice under Section 67 of N.D.P.S. Act was issued upon him to attend N.C.B. office. Pursuant to the said notice, he came to the N.C.B. office at 12:30 hours*. Thereafter, his statement was recorded under Section 67 of N.D.P.S. Act by P.W. 3, (Exhibit-5).* ***Perusal of the said statement (Exhibit-5) would show recovery of the contraband had already been made from the residence of Rabi Sekhar Pandey prior to the recording of the statement****. If so, how could disclosure statement of Rabi Sekhar be the trigger for follow up action and recovery as claimed by prosecution?* ***Furthermore, so-called recovery is completely shrouded in mystery. P.W. 7 claimed he was instructed by a superior officer to search the tenanted premises****. Identity of the superior officer has also not been disclosed. Identity of the officer accompanying P.W. 7 in the search is also unknown. His signature is also not appearing from the seizure list (Exhibit-16). Though it is claimed assistance of police of local Police Station was taken, no police officer is examined. Most importantly, no effort was made by the prosecution to examine Sushmita Bhadra, wife of the landlord, although her statement was recorded under Section 67 of N.D.P.S. Act. Other independent witness, Balai Saha was also not examined.* ***In view of the aforesaid lacunae in the prosecution case, I am hesitant to rely on the sole version of P.W. 7 to hold recovery of 9.225 kgs. of heroin from the tenanted premises of Rabi Sekhar Pandey has been proved beyond doubt."***

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FOLLOW UP ACTION – PRECAUTIONS TO BE OBSERVED

32. Follow up action, arising out of the initial proceedings, should be properly conducted and the timings are to be properly recorded. In the absence of the same, the prosecution's case is bound to come under legal scrutiny.

CONCLUSIONS

33. The sum and substance of the article is that mere seizure of contraband falling under the Act does not *ipso facto* lead to a conviction. There are many cases booked at the international airports and in other places which have resulted in the conviction. Equally true is the fact that empowered departments have failed to secure a conviction despite huge seizures.

33.1 It is always a must that the investigation should be conducted in all earnestness and should be complete in all aspect. The empowered officers should remember that higher the punishment, stricter would be scrutiny of the evidences by the Ld. Trial Court

33.1.1 While the presumption is rebuttable and which has been done in the case of Daisy Agnus[22] and Lalrinpuia[23] , it needs no emphasis that the investigation has not been conducted in the manner it ought to have been conducted and therefore, having regard to the seriousness of the offence, the prosecution has failed utterly in proving the charges. Needless to mention, the cross-examination of the witnesses has exposed the weakness of the prosecution's case.

33.2 The complaint should be free of all the loopholes should be plugged and the draft complaint or charge sheet, as the case may be, should be read and re-read a number of times. The linkages (including chain of custody of seal movement/sample and chain of custody of electronic devices) should be explicit and well documented. Any shortcoming in the prosecution's case is going to hit the prosecution badly. All the persons who participated in the proceedings, right from the time of interception till the time of filing of complaint should be mentioned and this should include the medical personnel, doctors, etc. as mentioned initially. The prosecution witnesses should prepare themselves before attending the court and should depose correctly and truthfully and face the questions put up during cross-examination properly.

34. For the general public/readers, it is an eye opener that while travelling, especially abroad, it should be borne in mind not to accept any freebee or any parcel on behalf of anybody and should any person succumb to such temptation, he or she, if caught, is bound to face the legal consequences of his or her action.

SOLUTIONS

35. The investigating agencies who have booked cases listed herein have not been successful

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in securing a conviction in these cases, **primarily on account of non-compliances of mandatory provisions coupled with the fact that the chain of custody in respect of samples have not been proved. Furthermore, there has been serious inconsistencies in the depositions by the prosecution witnesses and the prosecution witnesses have not supported one another and therefore, the cracks in the prosecution's version have come out during the course of trial.** The cross examination of the prosecution witnesses has been one of the weakest points for the prosecution. In entirety, the efforts of the empowered department have not been satisfactory and consequently leading to the acquittal in the majority of the cases booked by them and conviction rate is abysmally low. The need of the hour is capacity building and training and proper monitoring of the cases booked at all level.

36. To overcome this situation, the empowered departments should organize trainings for the empowered officers on their own or get in touch with specialised training institutes like the National Academy of Customs, Indirect Taxes and Narcotics (NACIN) and the Zonal Training Institutes of NACIN or various Judicial Academies for getting their empowered officers trained. Updation of the provisions of the law is a prerequisite and key to securing a conviction. While it is a fact that the seized narcotic drugs, psychotropic substances or controlled substances under the Act would be confiscated to the State yet it has no value if the person involved in illicit trafficking gets a discharge or an acquittal owing to the lapses on the part of the prosecution. It cannot be said with certainty that the acquitted person would not indulge in illicit trafficking again. The sooner the empowered department realize the gravity the better it is for them.

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