

IN THE HIGH COURT OF BOMBAY

**Criminal Appeal No.420 of 2013
Criminal Application No.323 of 2018
Criminal Appeal No.420 of 2013**

**OKACHA MIKE
NIGERIAN NATIONAL, AGE: 68 YEARS
NIGERIAN PASSPORT NO.A00924025
R/AT : 23, KOE STREET, LAGOS, NIGERIA**

Vs

**1) UNION OF INDIA AND ANOTHER
INTELLIGENCE OFFICER OF CUSTOMS
AIR INTELLIGENCE UNIT
C S INTERNATIONAL AIRPORT
SAHAR, MUMBAI**

2) THE STATE OF MAHARASHTRA

A M Badar, J

Dated: March 14, 2019

**Appellant Rep by: Mr Ayaz Khan with Ms Zehra Charania, Adv.
Respondent Rep by: Mrs A A Mane, Adv. & Mr P H Gaikwad Patil**

**NARCOTICS Drugs and Psychotropic Substances Act, 1985 [NDPS Act] -
Appellant/accused has been convicted of offences punishable under
sections 21(c) read with 8(c) read with 28 read with 23 of the NDPS Act - he
is sentenced to undergo rigorous imprisonment for 13 years - in addition,
he is directed to pay fine of Rs.1 lakh and in default, to undergo further
simple imprisonment for 6 months:**

**Held: Merely for non-compliance of mandatory provisions of section 313 of
the Code of Criminal Procedure [CCP], accused is not entitled for acquittal -
failure of justice occasioned due to prejudice caused to the accused on this
aspect is required to be demonstrated - perusal of statement under section
313 of the CCP shows that the trial court has meticulously drawn all
incriminating circumstances available against the appellant/accused - those
incriminating circumstances were put to him in a simple, lucid and logical
manner - no substance is found in contention of the appellant/accused that
for want of putting evidence of PW8 Anil Mestry - panch witness to the
appellant/accused in his examination under section 313 of the CCP, he is
entitled for acquittal on that count alone - bare reading of this provision
makes it clear that no finding, sentence or order of the court can be faulted
with merely on the ground that there is error or omission in framing of the
Charge - error or omission in framing of the Charge can be taken advantage
of by the accused only if he demonstrates that such error, omission or
irregularity in framing of the Charge has resulted in failure of justice - in
the case in hand, it is not pointed out to this Court as to how failure of**

justice has occasioned because of mentioning of quantity of heroin as 2.890 kilograms, when according to the prosecution case, the quantity seized was 2700 grams - going by mathematical calculations also, it cannot be said that error or omission in the Charge framed against the appellant/accused has resulted in miscarriage of justice - the quantity of heroin still remained to be a commercial quantity, even if it is tested on the yardstick of quantity of contraband seized by the prosecution agency - in the result, error in mentioning the quantity of heroin in the Charge has not resulted in any failure of justice - cumulative effect of evidence of PW1 Sanjay Kumar, Intelligence Officer, coupled with that of PW8 Anil Mestry and contemporaneous documentary evidence in the form of Panchnama, unerringly points out that the grey coloured hard top strolley suitcase was in possession of the appellant/accused and he was having with him the baggage claim tag in respect of that bag - there is nothing in cross-examination of PW1 Sanjay Kumar, Intelligence Officer as well as PW8 Anil Mestry to doubt their evidence regarding seizure of the bulk as well as samples - on the contrary, evidence of PW8 Anil Mestry is very natural and because of fading memory, this witness was not recollecting actual weight and number of samples drawn without refreshing his memory in the witness box - in the case in hand, the prosecution has established the fact that the appellant/accused was in possession of the grey coloured hard top strolley suitcase which was containing 2700 grams of heroin with 38.9% purity - the appellant/accused was certainly knowing the fact that the bag in his possession was containing heroin as he failed to explain the fact which was specially within his knowledge - this witness [PW2 Bhalchandra Madan, Intelligence Officer] was not having any knowledge as to the events which took place prior to recording of the statement of the appellant/accused by him - as such, no overbearing importance can be given to the material elicited from cross-examination of this witness about his satisfaction with the answer given to him by the appellant/accused regarding contents of the grey coloured hard top strolley suitcase - this evidence cannot be used to infer that possession of the appellant/accused over heroin in the grey coloured hard top strolley suitcase was unconscious possession - in the case in hand, four samples each weighing 5 grams were kept in polythene pouches with zipper lock and thereafter, those four polythene pouches were kept in a separate envelope which was sealed with "AIU Seal no.132" - therefore, it cannot be said that the guidelines [Standing Order No.1 of 1989] regarding packing of the samples was not substantially followed by the prosecuting agency - similarly, other clauses of this Standing Order No.1 of 1989 are also seen to have been substantially complied by the prosecuting agency, as reflected from evidence of PW1 Sanjay Kumar, Intelligence Officer - therefore, case of the prosecution cannot be doubted on this aspect - in the case in hand, after proof of the fact that the appellant/accused was found in conscious possession of heroin weighing 2700 grams of 38.9% purity, the appellant/accused has not discharged the burden which rested upon him - rather, he has chosen to feign ignorance by answering the questions in his examination under

section 313 of the Code of Criminal Procedure by stating that whatever put to him is false or he does not know - the appellant/accused herein is the first time offender and as such he deserves to be imposed minimum sentence i.e. of 10 years instead of 13 years as ordered by the trial court - the appellant/accused is not having criminal antecedents and he has already undergone major part of substantive sentence of rigorous imprisonment imposed on him - therefore, the appeal deserves to be allowed partly by maintaining the conviction recorded by the trial court - as such, the following order : (i) conviction of the appellant/accused of offences punishable under sections 21(c) read with 8(c) read with 28 read with 23 of the NDPS Act is maintained (ii) however, the appellant/accused is directed to undergo rigorous imprisonment of 10 years as against that of 13 years imposed by the trial court - sentence of fine and default sentence imposed by the trial court is not interfered with (iii) in view of disposal of the appeal, Criminal Application No.323 of 2018 also stands disposed off (iv) the appeal is accordingly disposed of : HIGH COURT [para 8, 10, 14, 15, 16, 23, 25, 29, 30, 31, 32, 33]

Criminal Appeal disposed of

Case laws cited:

State of Rajasthan vs. Manoj Sharma and Another - (2009) 2 Supreme Court Cases (Cri) 591.....para 3, 12.....distinguished

Noor Aga vs. State of Punjab and Another - (2008) 16 Supreme Court Cases 417.....para 4, 5, 29, 30, 31..... relied upon

Abdul Rashid Ibrahim Mansuri vs. State of Gujarat - JT 2000(1) SC 471.....para 4, 30.....relied upon

State of Punjab vs. Hari Singh and Others - (2009) 4 Supreme Court Cases 200.....para 4, 8, 27.....relied upon

Inspector of Customs, Akhnoor, Jammu and Kashmir vs. Yashpal and Another - (2009) 2 Supreme Court Cases (Cri) 593.....para 4, 8.....distinguished

Yogesh Singh vs. Mahabeer Singh and Others - 2016 (10) Scale 219.....para 8.....relied upon

Nar Singh vs. State of Haryana - (2015) 1 SCC 496.....para 8.....relied upon

Shahejadhkhan Maheebkhan Pathan vs. State of Gujarat - 2012-TIOL-97-SC-NDPS.....para 33.....relied upon

JUDGEMENT

Per: A M Badar:

1. By this appeal, the appellant/accused is challenging the judgment and order dated 8th October 2012 passed by the learned Special Judge under

the Narcotics Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act for the sake of brevity) for Greater Mumbai, in NDPS Special Case No.118 of 2009, thereby convicting the appellant/accused of offences punishable under Sections 21(c) read with 8(c) read with 28 read with 23 of the NDPS Act. The appellant/accused is sentenced to undergo rigorous imprisonment for 13 years. In addition, he is directed to pay fine of Rs.1 lakh and in default, to undergo further simple imprisonment for 6 months.

2. Facts in brief, leading to the prosecution and resultant conviction of the appellant/accused, can be summarized thus:

(a) In the night intervening 22nd March 2009 and 23rd March 2009, PW1 Sanjay Kumar, Intelligence Officer of Air Intelligence Unit of the Custom department was on duty at Chhatrapati Shivaji International Airport, Sahar, Mumbai (hereinafter referred to as "the Airport" for the sake of brevity. Appellant/ accused Okacha Mike, a Nigerian national was present at the Airport for flying from Mumbai to Accra by Flight No.ET 611 of Ethiopian Airlines which was to depart on 23rd March 2009. PW1 Sanjay Kumar, Intelligence Officer, noticed suspicious behaviour of the appellant/accused at the departure hall of Module 2C of the Airport. After the appellant/accused checked in at Customer Care Service Counter of the Ethiopian Airlines, PW1 Sanjay Kumar, Intelligence Officer, discreetly requested PW7 Mary Anastin, Customer Service Agent of the Ethiopian Airlines to keep aside the checked in bags of the appellant/accused. After the appellant/accused checked in and while he was proceeding for the security check, PW1 Sanjay Kumar, Intelligence Officer, intercepted the appellant/accused and took him to the Baggage Identification area of the Departure Hall of Module 2C of the Airport. In presence of panch witnesses PW8 Anil Mestry and Pradip Sawant, the appellant/accused identified his bags.

(b) The appellant/accused, in presence of panch witnesses, had produced following documents :

(i) Nigerian passport

(ii) Counterfoil of e-ticket with two receipts and two baggage claim tags bearing nos.0071 ET 733539 and 0071 ET 733540 bearing his name

(iii) Boarding pass of Flight No.ET 611 of Ethiopian Airlines for Seat No.22A for Addis Ababa in his name

(iv) Boarding pass of Flight No.947 of Ethiopian Airlines dated 23rd March 2009 from Addis Ababa to Accra in his name.

(c) In presence of panch witnesses, the appellant/accused identified his two bags which were containing security straps. Those bags were of following description :

(i) Grey coloured hard top strolley suitcase of 'Presidency' make with baggage identification Bag No.0071 ET 733539

(ii) Soft black coloured strolley bag of 'Travel M' make with baggage identification Bag No.0071 ET 733 540

(iii) Bag identification tags on both these bags were bearing name of the appellant/accused and those bags were tallying the baggage name tags found in possession of the appellant/accused

(d) The appellant/accused, upon being asked, declined that he was carrying any narcotics or other objectionable substance in the bags. However, the sniffer dog gave positive indication. Therefore, the appellant/accused was asked to open the bags in presence of the panch witnesses. Accordingly, he opened the grey coloured hard top strolley suitcase by removing security strap. Except clothes, the bags were found to be containing nothing. However, as the grey coloured hard top strolley suitcase was found unusually heavy, PW1 Sanjay Kumar, Intelligence Officer, suspected some concealment in the bottom of the said suit case. The appellant/accused repacked his bag and with his bags, the appellant/accused was escorted to the office of the Air Intelligence Unit. At the office of the Air Intelligence Unit, which was situated at 2C departure of the Airport, the appellant/accused in presence of the panch witnesses, again opened the grey coloured hard top strolley suitcase. He emptied contents of the said suit case. The Custom Officer and panchas noticed some concealment at the bottom of the said suit case. The false bottom of that suit case was removed. It was found to be containing two brown coloured polythene packets. The sniffer dog sniffed those packets and barked giving positive indication of presence of narcotics. By marking those packets as P1 and P2, they were weighed. Their weight was found to be 1660 grams and 1230 grams respectively. Those packets were cut open and found to be containing off-white coloured powder. By Narcotic Drug Detection kit, the contents of those packets were tested and found to be heroin. Two polythene bags, each weighing 15 grams, were then used for transferring contents of those packets. Accordingly, contents of both packets viz. P1 and P2 were transferred in two different polythene bags each weighing 15 grams. Then, both polythene bags with contents thereof were weighed and were found to be weighing 1575 grams and 1155 grams each. Net weight of the contents of both those polythene bags, as such, was found to be 2700 grams (gross weight 2730 grams - 30 grams, weight of two polythene bags). Thereafter, contents of both polythene bags were transferred in one polythene bag and it was mixed thoroughly. Then, four samples, each weighing 5 grams were taken therefrom in zipper lock plastic pouches and those samples were marked as S1 to S4 respectively.

(e) The appellant/accused was informed about his right to get his person searched before a Magistrate or a Gazetted Officer. He declined to exercise the said right. Other bags of the appellant/accused were also checked, but nothing objectionable was found therein. In personal search of the appellant/accused, US \$1211 and one camera was found, but the currency and the articles were returned to him apart from other bag and handbag.

(f) The zipper lock polythene bag containing the bulk was kept in the cardboard box and it was sealed with AIU Seal No.132. The appellant/accused as well as panch witnesses signed the label affixed to that cardboard box. Zipper lock polythene pouches of samples were separately seized by packing them in green envelopes. Those envelopes were sealed and were signed by the appellant/accused as well as panch witnesses. The bulk, clothes, empty packets and packing material were put in the grey coloured hard top strolley suitcase and it was seized. The travel documents such as counterfoil of Electronic Ethiopian Airlines ticket, Ethiopian Airlines Boarding Passes from Mumbai to Addis Ababa and that from Addis Ababa to Accra, two baggage claims and two identification tags bearing Nos.0071 ET 733539 and 0071 ET 733540 as well as passports came to be seized by putting them in a green envelope and sealing that envelope with AIU Seal No.132. Accordingly, Panchnama Exhibit 11 came to be drawn in presence of panch witnesses. Statement of the appellant/accused came to be recorded under Section 67 of the NDPS Act. He stated that at Airport, a Nigerian citizen named Effine met him and requested him to carry the said grey coloured hard top strolley suitcase to Lagos for monetary consideration of US \$500. Statement of PW7 Mary Anastin, Customer Service Agent, came to be recorded. Statement of panch witnesses were recorded and the appellant/accused came to be arrested. PW1 Sanjay Kumar, Intelligence Officer, then deposited seized articles viz. the bulk, the bag and three samples drawn from the bulk with the warehouse. Sample bearing mark S1 was delivered to the Deputy Chemical Analyst, Mumbai, along with the Test Memo. PW4 Manoj Puri, Assistant Chemical Analyser, analyzed the said sample on 3rd April 2009 and it was found to be containing 38.9% heroin in it. Call Detail Record of mobile number bearing no.9773211919 found in possession of the appellant/ accused came to be collected. Thereafter, PW1 Sanjay Kumar, Intelligence Officer, lodged the complaint.

(g) The Special Judge under the NDPS Act for Greater Mumbai framed the Charge for offences punishable under Sections 21(c) read with 8(c) read with 23 of the NDPS Act with accusation that the appellant/accused was found to be in possession and attempting to export out of India 2.890 kilograms of heroin in contravention of the provisions of the NDPS Act. The appellant/accused pleaded not guilty and claimed trial.

(h) In order to bring home the guilt to the appellant/accused, the prosecution has examined in all eleven witnesses. Complainant Sanjay Kumar, Intelligence Officer, is examined as PW1. Bhalchandra Madan, Intelligence Officer, who recorded statement (Exhibit 30) of the appellant/accused and who arrested the appellant/accused is examined as PW2. Subal Sai, Superintendent of Customs, is examined as PW3. Assistant Chemical Analyser Manoj Puri, is examined as PW4. Pranay Mitra, Deputy Central Intelligence Officer is examined as PW5. Rajesh Varma, Superintendent of Air Intelligence Unit is examined as PW6. Mary Anastin, Customer Service Agent of Ethiopian Airlines is examined as PW7. Panch

witness Anil Mestry is examined as PW8. Meena Chadda, Superintendent of Customs is examined as PW9. Anilkumar Bhalerao, Superintendent of Warehouse Strong Room at the Airport is examined as PW10. Prakash Shardul, In-charge Superintendent of the Strong Room is examined as PW11.

(i) Defence of the appellant/accused was that of total denial. However, he did not enter in the defence.

(j) After hearing the parties, by the impugned judgment and order, the learned trial court came to the conclusion that the appellant/accused was found in possession of 2.890 kilograms of heroin when he was to board Flight No.ET 611 of Ethiopian Airlines for Accra via Addis Ababa and he had attempted to export the said substance out of India. Accordingly, the appellant/accused came to be convicted sentenced, as indicated in the opening paragraph of this judgment.

3. I have heard Mr. Ayaz Khan, learned counsel appearing for the appellant/accused. I have also perused written notes of arguments submitted by the learned counsel for the appellant/accused. The learned counsel for the appellant/accused has vehemently argued that the Charge itself is wrong. The learned trial court has charged the appellant/accused for possessing and attempting to export 2890 grams of heroin. This is contrary to the case of prosecution, as even according to the prosecution, quantity of contraband seized was 2700 grams. The learned counsel placed reliance on judgment of the Honourable Supreme Court in the matter of *State of Rajasthan vs. Manoj Sharma and Another (2009) 2 Supreme Court Cases (Cri) 591* to demonstrate that deficiency in Charge must result in acquittal. Judgment of the learned Single Judge of this court in the matter of *Pukhrambham Surchandsingh Ibohan Singh vs. The State of Maharashtra Criminal Appeal No.211 of 2003 dtd.4th June 2008* is also relied by the learned counsel to point out that framing of wrong Charge is fatal to the prosecution.

4. The learned counsel for the appellant/accused further argued that the learned trial court has not asked any questions pertaining to evidence of PW8 Anil Mestry - panch witness, and as such, entire evidence of this witness needs to be ignored. What remains, then, is only evidence of interested witness PW1 Sanjay Kumar, Intelligence Officer, who happens to be the complainant. Therefore, the appellant/accused needs to be acquitted of the offence with which he is charged. It is further argued that evidence of PW2 Bhalchandra Madan, Intelligence Officer, who recorded statement of the appellant/accused, shows that, this witness was satisfied with the answer of the appellant/accused that the appellant/accused was not aware about contents of the bag. This fact is also reflected from the statement at Exhibit 30. In this view of the matter, the learned trial court, ought to have put questions about conscious possession to the appellant/accused, while examining him under Section 313 of the Code of Criminal Procedure. PW2 Bhalchandra Madan, Intelligence Officer, has not carried out further

investigation in respect of knowledge of the appellant/accused about contents of the bag. Burden to prove conscious possession is always on the prosecution and the accused can discharge the burden of establishing unconscious possession by relying on material available in evidence of the prosecution, by eliciting answers from prosecution witnesses in cross-examination, so also by entering in the witness box. According to the learned counsel for the appellant/accused, in the case in hand, material available in evidence adduced by the prosecution so also from the prosecution case, is sufficient to hold that the appellant/accused has established unconscious possession of the contraband. Reliance is placed on judgment of the Honourable Supreme Court in the matter of *Noor Aga vs. State of Punjab and Another (2008) 16 Supreme Court Cases 417* in order to substantiate the contention that conscious possession is required to be proved in the wake of presumption of innocence of the accused. Relying on this judgment, it is further contended that presumption under Section 35 and 54 of the NDPS Act can be drawn only when in the trial, the circumstances are fully established and initial burden rests on the prosecution. Further reliance is placed on judgment in the matter of *Abdul Rashid Ibrahim Mansuri vs. State of Gujarat JT 2000(1) SC 471* and judgment in the matter of *State of Punjab vs. Hari Singh and Others (2009) 4 Supreme Court Cases 200*. It is argued that burden of proof casted on the accused can be discharged by relying on material available in the prosecution evidence. It is further argued that omission to put questions relating to conscious possession of the contraband by the accused is fatal to the prosecution case. Reliance is also placed on judgment in the matter of *Inspector of Customs, Akhnoor, Jammu and Kashmir vs. Yashpal and Another (2009) 2 Supreme Court Cases (Cri) 593* to point out object of examination of the accused under Section 313 of the Code of Criminal Procedure and to buttress the contention that if questions relating to conscious possession are not asked to the accused and if evidence of material witness is not brought to the notice of the accused, then the accused is entitled for acquittal.

5. The learned counsel further argued that connection of the appellant/accused with the grey coloured check-in bag is not proved by the prosecution. That bag (Article 9) was not shown to PW7 Mary Anastin, Customer Service Agent. Baggage tag affixed to the handle cannot be removed without damage. Handle of that bag was found missing when it was produced before the court. It was found inside the bag. The baggage tags were produced separately before the court and the bag was produced separately. As admitted by PW1 Sanjay Kumar, Intelligence Officer, such bags are easily available in the market. In support of this contention, reliance is placed on judgment of the learned Single Judge of this court in the matters of *Mrs. Zainab Bte Yousuf vs. Union of India and Anr. Criminal Appeal No.162 of 2007 dtd.30th January 2009* and *Mr. Tetsuo Hirayama vs. The Union of India and Anr. Criminal Appeal No.325 of 2007 dtd.30th January 2009*. Relying on these judgments it is argued that in absence of

the security straps on the baggage as well as when the baggage identification tags were not found on the baggage when the bags were produced in the court, prosecution case becomes suspect. It is further argued by the learned counsel that Standing Order No.1 of 1989 in respect of drawing of samples and other formalities is not followed by the prosecution in the instant case. Reliance is placed on *Noor Aga vs. State of Punjab* (supra) to submit that the Standing Order has been made under the statute, and therefore, its compliance is mandatory.

6. I have also heard the learned counsel appearing for the respondent no.1. She argued that the learned trial court be directed to correct the Charge and to put evidence of PW8 Anil Mestry by recording further statement of the appellant/accused under Section 313 of the Code of Criminal Procedure. I have also perused written notes of arguments tendered by the learned counsel for the respondent no.1.

7. I have carefully considered oral arguments advanced by the learned counsel appearing for the parties, written notes of arguments placed on record by them as well as the judgments relied by them.

8. At the outset, let us examine whether material brought on record from evidence of PW8 Anil Mestry - panch witness was not put up to the appellant/accused when he was examined under Section 313 of the Code of Criminal Procedure, and therefore, prejudice is caused to the appellant/accused as material circumstances were not put up to him. In the matter of *State of Punjab vs. Hari Singh* (supra) the Honourable Apex Court has held that the provision of Section 313 is mainly intended to benefit the accused and as its corollary to benefit the court in reaching the final conclusion. Omission to put material circumstances to the accused vitally affects the prosecution case. Similar is the observation of the Honourable Supreme Court in the matter of *Inspector of Customs, Akhnoor, Jammu and Kashmir vs. Yashpal and Another* (supra). In that case, it was found that there was no reference to any of the incriminating material, and therefore, the appeal challenging acquittal was dismissed by the Honourable Supreme Court. At this juncture, it is apposite to quote observations of the Honourable Apex Court in the matter of *Yogesh Singh vs. Mahabeer Singh and Others 2016 (10) Scale 219*. It is held, thus, in paragraphs 48 and 49 of the said judgment :

*"48 It was further contended by the learned counsel for the respondents that material questions regarding marriage, on which the prosecution had allegedly relied upon, were not put to the accused under Section 313 Cr.P.C., thereby causing great prejudice to them. We feel that there is no weight in this submission of the learned counsel for the respondents since the purpose of Section 313 is only to bring the attention of the accused to all the inculpatory pieces of evidence to give him an opportunity to offer an explanation if he chooses to do so. As has been succinctly held by this Court in *Raj Kumar Singh @ Raju @ Batya Vs. State of Rajasthan, (2013) 5 SCC 722*:*

"In a criminal trial, the purpose of examining the accused person under Section 313 Cr.P.C., is to meet the requirement of the principles of natural justice i.e. audi alterum partem. This means that the accused may be asked to furnish some explanation as regards the incriminating circumstances associated with him, and the court must take note of such explanation."

"49 We feel that no such prejudice has been caused to the accused on account of the failure of this Court to examine them under Section 313 on the facts alleged by the prosecution since they were not incriminating in nature. In any case, Nar Singh Vs. State of Haryana, (2015) 1 SCC 496, is an authority for the proposition that accused is not per se entitled for acquittal on the ground of non-compliance of mandatory provisions of Section 313 Cr.P.C."

Similarly, in the matter of Nar Singh vs. State of Haryana (2015) 1 SCC 496 it is held thus :

"32....When there is omission to put material evidence to the accused in the course of examination under Section 313 CrPC, the prosecution is not guilty of not adducing or suppressing such evidence; it is only the failure on the part of the learned trial court. The victim of the offence or the accused should not suffer for laches or omission of the court. Criminal justice is not one-sided. It has many facets and we have to draw a balance between conflicting rights and duties."

"33 Coming to the facts of this case, the FSL report (Ext.P-12) was relied upon both by the trial court as well as by the High Court. The objection as to the defective Section 313 CrPC statement has not been raised in the trial court or in the High Court and the omission to put the question under Section 313 CrPC, and prejudice caused to the accused is raised before this Court for the first time. It was brought to our notice that the appellant is in custody for about eight years. While the right of the accused to speedy trial is a valuable one, the Court has to subserve the interest of justice keeping in view the right of the victim's family and society at large."

It is, thus, clear that, merely for non-compliance of mandatory provisions of Section 313 of the Code of Criminal Procedure, accused is not entitled for acquittal. Failure of justice occasioned due to prejudice caused to the accused on this aspect is required to be demonstrated.

9. Be that as it may, I have carefully perused evidence of PW8 Anil Mestry - panch witness in this case. Incriminating circumstances against the appellant/accused deposed to by this witness are to the effect that in his presence, the appellant/ accused was asked to identify his bags, he identified two bags and both those were having baggage tags on them. He further deposed that counter tags of those baggage tags were with the appellant/accused. His evidence is to the effect that baggage identification tags affixed to the bags and the baggage claim tags which were with the appellant/accused were tallied and were found matching. This witness further deposed that grey coloured hard top strolley suitcase of the

appellant/accused was found heavy after its contents were removed by the appellant/accused. As per his version, the appellant/accused was then taken to the office of the Air Intelligence Unit and there he opened that grey coloured hard top strolley suitcase, which was found to be having false bottom. As per version of this witness, upon removal of the false bottom, two brown packets containing white powder were detected and contents of those packets were found positive for presence of narcotic. He has also deposed in respect of giving indication by the sniffer dogs. Evidence of PW8 Anil Mestry further shows that contents of both the packets were mixed and four samples, each weighing 5 grams, were then drawn. This witness has spoken about packing and sealing the bulk as well as samples. He has also deposed about identification of the bulk, samples, grey coloured hard top strolley suitcase and travel documents.

10. In this context, I have carefully perused statement of the appellant/accused recorded under Section 313 of the Code of Criminal Procedure by the learned trial court. Perusal of statement under Section 313 of the Code of Criminal Procedure shows that the learned trial court has meticulously drawn all incriminating circumstances available against the appellant/ accused. Those incriminating circumstances were put to him in a simple, lucid and logical manner. In all, eight-two questions were framed in simple language and were asked to the appellant/ accused in his examination under Section 313 of the Code of Criminal Procedure by the learned trial Judge. Each and every circumstance is found to be separately put to the appellant/ accused in clear terms. Questions at Serial Nos.10, 12, 13, 14, 16, 17, 18, 19, 20, 23, 25, 28, 29, 30, 31, 33, 34, 35, 38, 39, 40 and 41 put to the appellant/accused during the course of his examination under Section 313 of the Code of Criminal Procedure, covers entire incriminating circumstances spoken to by PW8 Anil Mestry against the appellant/accused. Therefore, no substance is found in contention of the appellant/accused that for want of putting evidence of PW8 Anil Mestry - panch witness to the appellant/accused in his examination under Section 313 of the Code of Criminal Procedure, he is entitled for acquittal on that count alone.

11. The next contention of the learned counsel for the appellant/accused which is required to be dealt with at this stage is regarding alleged framing of wrong Charge against the appellant/accused. In submission of the learned counsel for the appellant/accused, Charge contains description of contraband as heroin weighing 2890 grams. Infact, according to the prosecution case, quantity seized was only 2700 grams of heroin. I have stated prosecution case in detail in opening paragraphs of this judgment. Prosecution case, as reflected from the complaint filed by PW1 Sanjay Kumar, Intelligence Officer as well as evidence of PW1 Sanjay Kumar, Intelligence Officer, shows that initially two brown packets found in the grey coloured hard top strolley suitcase were weighed by marking them as P1 and P2. Packet P1 weighed 1660 grams where as packet P2 weighed 1230 grams. Total weight, as such, was 2890 grams. This was gross weight of the

packets and contents thereof. After transferring contents of those two packets in two separate polythene bags, contents of those two polythene bags excluding the weight of those two polythene bags, came to 2700 grams. Thus, the net quantity of heroin found in the grey coloured hard top strolley suitcase was 2700 grams. However, perusal of the Charge at Exhibit 5 shows that the appellant/accused was charged for possessing and attempting to export 2.890 kilograms of heroin. This, according to the appellant/accused, has vitiated the entire proceedings.

12. In the matter of *State of Rajasthan vs. Manoj Sharma and Another* (supra), acquittal of the respondents for offence under NDPS Act was under challenge. The Honourable Supreme Court had noted that the accused was found in possession of 25 grams of opium which is small quantity and he came to be convicted in terms of Section 27 of the NDPS Act. So far as co-accused Mohammed Rafiq is concerned, the Honourable Supreme Court in the said matter has observed that deficiency in Charge framed against him is elaborately dealt with by the High Court. It is, thus, clear that the said case proceeded on its own facts. In the matter of *Pukhrambham Surchandsingh Ibohan Singh vs. The State of Maharashtra* (supra), the learned Single Judge of this court has noted that the appellant/accused was charged for conscious possession of net 636 grams of cocaine in contravention of provisions of Section 8 of the NDPS Act, and thereby, making him liable for punishment for the offence punishable under Sections 20 and 22 of the NDPS Act. The learned Single Judge further noted that Section 20 of the NDPS Act deals with cannabis which could be hashish or charas and Section 22 thereof pertains to psychotropic substances. It is further observed in the said judgment that it was found that the appellant therein was in possession of heroin, as per the forensic evidence adduced by the prosecution, and as heroin is not a psychotropic substance, it was not covered by Sections 20 or 22 of the NDPS Act. On this premise, the appeal came to be allowed by the learned Single Judge of this court.

13. Such is not the case in hand. According to the prosecution case, the appellant/accused was found in possession of heroin. He is not charged either for the offence punishable under Sections 20 nor for the offence punishable under Section 22 of the NDPS Act. He is correctly charged for the offence punishable under Sections 21(c) read with 8(c) of the NDPS Act as well as under Sections 28 read with 23(c) of the NDPS Act. Correct penal provisions of the NDPS Act were applied while framing of the Charge. The discrepancy is merely in respect of weight of heroin. Though according to the prosecution case, it was 2700 grams, the Charge was for 2.890 kilograms.

14. At this juncture, provisions of Section 464 of the Code of Criminal Procedure dealing with effect of omission to frame, or absence of, or error in Charge becomes relevant. Section 464 of the Code of Criminal Procedure reads thus :

"464 Effect of omission to frame, or absence of, or error in, charge :

(1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may -

(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommended from the point immediately after the framing of the charge.

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit: Provided if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction."

Bare reading of this provision makes it clear that no finding, sentence or order of the court can be faulted with merely on the ground that there is error or omission in framing of the Charge. Error or omission in framing of the Charge can be taken advantage of by the accused only if he demonstrates that such error, omission or irregularity in framing of the Charge has resulted in failure of justice.

15. In the case in hand, it is not pointed out to this court as to how failure of justice has occasioned because of mentioning of quantity of heroin as 2.890 kilograms, when according to the prosecution case, the quantity seized was 2700 grams.

16. Even if we test the argument advanced in this regard by examining evidence of the Chemical Analyst, then also, it cannot be said that wrong mentioning of the quantity in the Charge has resulted in failure of justice. The appellant/accused was charged and ultimately convicted for possession and attempt to export the contraband in commercial quantity. Undisputedly, commercial quantity, so far as heroin is concerned, is just 250 grams. Out of samples drawn after effecting seizure vide Panchnama Exhibit 11, sample S1 which was duly packed, sealed and labeled, was sent for chemical analysis through PW2 Bhalchandra Madan, Intelligence Officer. PW4 Manoj Puri, Assistant Chemical Analyser, has conducted chemical analysis of the said sample. After performing various tests, he found that the sample was containing 38.9% heroin and accordingly, the prosecution has placed on record Chemical Analyzer's Report at Exhibit 41A. Thus, the sample drawn from the bulk, after due analysis, was found to be containing 38.9% heroin. The quantity seized by the prosecution was 2700 grams, which after chemical analysis was found to be containing 38.9.% of heroin. If bulk quantity of 2700 grams seized by the prosecution is considered, then going by forensic evidence in respect of its heroin contents

at 38.9%, the bulk is obviously containing more than 250 grams of heroin. Precisely, going by heroin content of 38.9% in 2700 grams of bulk, net heroin contents must be not less than 1000 grams. Thus, going by mathematical calculations also, it cannot be said that error or omission in the Charge framed against the appellant/accused has resulted in miscarriage of justice. The quantity of heroin still remained to be a commercial quantity, even if it is tested on the yardstick of quantity of contraband seized by the prosecution agency. In the result, I am of the considered opinion that error in mentioning the quantity of heroin in the Charge has not resulted in any failure of justice.

17. Now let us examine whether evidence of the prosecution shows that grey coloured hard top strolley suitcase from which heroin was allegedly recovered was proved to be in possession of the appellant/accused at the relevant time. For this purpose, prosecution is relying on evidence of PW1 Sanjay Kumar, Intelligence Officer as well as that of PW8 Anil Mestry and PW7 Mary Anastin, Customer Service Agent of the Ethiopian Airlines. It is in evidence of PW1 Sanjay Kumar, Intelligence Officer, that at about 3.00 a.m. of 23rd March 2009, upon noticing suspicious movement of the appellant/accused, he requested PW7 Mary Anastin, Customer Service Agent, of the Ethiopian Airlines to keep aside his check-in baggages. Then, he intercepted the appellant/accused and found that the appellant/accused was having counterfoil of Ethiopian Airlines e-ticket to which baggage claim tags in his name were affixed. Similarly, as stated by PW1 Sanjay Kumar, Intelligence Officer, the appellant/accused was possessing one boarding pass in his name for flight of Ethiopian Airlines from Mumbai to Addis Ababa and one boarding pass for flight from Addis Ababa to Accra. PW1 Sanjay Kumar, Intelligence Officer, testified that in presence of PW8 Anil Mestry - panch witness, the appellant/accused identified two check-in baggages out of which one was grey coloured hard top strolley suitcase whereas the another was a black coloured soft bag. PW1 Sanjay Kumar, Intelligence Officer, has categorically deposed that both these bags were secured with the Air India security strap and were having baggage identification tags. PW1 Sanjay Kumar, Intelligence Officer, was specific in stating that baggage claim tags found with the appellant/accused and which were bearing his name and other details were tallied with baggage identification tags affixed to the grey coloured hard top strolley suitcase and black coloured soft bag. His evidence shows that then sniffer dog sniffed the grey coloured hard top strolley suitcase and signaled for presence of narcotic substance therein. He, then, removed the security strap of that bag and the appellant/accused emptied the contents thereof. Upon noticing its bottom heavier, as stated by PW1 Sanjay Kumar, Intelligence Officer, the appellant/accused was escorted to the office of Air Intelligence Unit with his bags. There, again, grey coloured hard top strolley suitcase was emptied and after removal of false bottom, two brown packets containing off-white powder came to be recovered. PW1 Sanjay Kumar, Intelligence Officer, has spoken about net weight of contents of those two

brown packets as 2700 grams. After completing formalities of drawing samples, packing, sealing and labeling the bulk as well as samples, PW1 Sanjay Kumar, Intelligence Officer, had effected seizure of the contraband. His evidence also shows that counterfoil of e-ticket, boarding passes, baggage claim tags and baggage identification tags produced by the appellant/ accused were kept in one green envelope. As per his version, this was done after baggage identification tags bearing nos.ET 733539 and ET 733540 were removed from grey coloured hard top strolley suitcase and black coloured soft bag. Passport produced by the appellant/accused was kept in another envelope. As stated by PW1 Sanjay Kumar, Intelligence Officer, both these envelopes were sealed with "AIU 132" seal. While in the witness box, PW1 Sanjay Kumar, Intelligence Officer, has identified seized baggage identification tags which were marked as Exhibit 18 and Exhibit 19. This witness has also identified e-ticket with itinerary receipt containing name of the appellant/accused as well as baggage claim tags ET 733539 and ET 733540. These documents were marked as Exhibit 15 Collectively upon identification by PW1 Sanjay Kumar, Intelligence Officer. Thus, chief-examination of PW1 Sanjay Kumar, Intelligence Officer, shows that baggage identification tag bearing no.ET 733539 which was affixed to the handle of grey coloured hard top strolley suitcase was removed from the suitcase and it was seized. In a similar way, baggage claim tag bearing no.ET 733539 which was produced by the appellant/accused before this witness came to be seized. Thus, the appellant/accused was found to be in possession of baggage claim tag bearing no.ET 733539, the counter part of which was found affixed to the grey coloured hard top strolley suitcase, in the form of baggage identification tag. Both these tags were containing name of the appellant/accused thereon. "Possession" is a polymorphous term which carries different meanings in different contexts. In a given case, possession need not be physical possession but can be constructive having power and control over the article. In the case in hand, possession of the baggage claim tag bearing no.ET 733539 of the grey coloured hard top strolley suitcase by the appellant/accused indicates that he was in possession of that suitcase. PW1 Sanjay Kumar, Intelligence Officer, has duly identified the grey coloured hard top strolley suitcase as the very same bag which was in possession of the appellant/accused at the Airport from which heroin came to be recovered.

18. PW1 Sanjay Kumar, Intelligence Officer, was crossexamined at length and it was brought on record from his evidence that the grey coloured hard top strolley suitcase was not having the baggage identification tag at its handle. He stated in cross-examination that if such tag is removed from the bag, then it gets damaged. It is brought on record from his crossexamination that Exhibits 18 and 19 are damaged from the backside. Thus, cross-examination of this witness cemented version of PW1 Sanjay Kumar, Intelligence Officer, that the baggage identification tags were removed from the grey coloured hard top strolley suitcase as well as black coloured soft bag at the time of the seizure. Because of removal of those

tags, they were damaged from the backside. PW1 Sanjay Kumar, Intelligence Officer, in his cross-examination admitted that there is no proof to show that the tags were removed. However, this statement in the cross-examination does not lead us anywhere because PW1 Sanjay Kumar, Intelligence Officer has categorically stated that the baggage identification tag was removed from the bag at the time of its seizure. Even Panchnama Exhibit 11 shows that those tags came to be seized. Oral evidence of PW1 Sanjay Kumar, Intelligence Officer, is clear on this aspect.

19. Cross-examination of PW1 Sanjay Kumar, Intelligence Officer further shows that handle of the grey coloured hard top strolley suitcase (Article 9) was in broken condition and was inside the bag. He stated that this fact is not mentioned in Panchnama Exhibit 11. He further stated that inside that grey coloured hard top strolley suitcase, there were no documents showing its connection with the appellant/accused. This material is hardly of any assistance to the defence. It is not necessary to record inconsequential aspects in the panchnama. Similarly, it is not necessary that the bag possessed by the accused must contain the documents showing his ownership of that bag. Suffice to state that ocular evidence coming on record from PW1 Sanjay Kumar, Intelligence Officer unerringly points out that the appellant/accused was in possession of the grey coloured hard top strolley suitcase which was deposited at check-in baggage by him with the customer service agent of Ethiopian Airlines and ultimately, identified by him to be belonging to him, before the panch witness, in presence of PW1 Sanjay Kumar, Intelligence Officer. Belonging of the baggage identification tag bearing no.ET 733539 with baggage claim tag bearing no.ET 733539 found in possession of the appellant/accused unerringly points out that the grey coloured hard top strolley suitcase belongs to and was in possession of the appellant/accused at the Airport.

20. PW1 Sanjay Kumar, Intelligence Officer, has spoken about preparation of panchnama on effecting seizure. The panchnama proved by him as well as PW8 Anil Mestry is at Exhibit 11. Perusal of this contemporaneous document shows that the appellant/accused was found in possession of baggage claim tag bearing no.ET 733539 apart from another bearing no.ET 733540. This baggage claim tags were bearing name of appellant/accused Okacha Mike. The panchnama further shows that grey coloured hard top strolley suitcase was having baggage identification tag no.0071 ET 733539 bearing particulars such as name of appellant/accused Okacha Mike. Recitals in the panchnama reveals that travel documents found in possession of the appellant/accused including boarding passes, two baggage claim as well as two baggage identification tags bearing nos.0071 ET 733539 and 0071 ET 733540 came to be seized and were kept in a green coloured envelope which was then sealed with AIU Seal No.132. In another envelope, the passport was kept and it was sealed in the similar manner. Thus, version of PW1 Sanjay Kumar, Intelligence Officer, is fully corroborated by contemporaneous documentary evidence.

21. Evidence of PW8 Anil Mestry, as stated in foregoing paragraphs, is to the effect that the appellant/accused identified two bags which were having baggage identification tags. The counter part of those tags was found with the appellant/accused and upon being tallied, both parts matched, and therefore, the fact that those bags belonged to the appellant/accused got confirmed. This panch witness identified the appellant/accused. He has identified the grey coloured hard top strolley suitcase (Article 9) as the very same bag which was in possession of the appellant/accused. He has also identified the documents at Exhibit 15 which were travel documents including baggage claim tags bearing nos.ET 733539 and ET 733540. PW8 Anil Mestry has further identified baggage identification tags bearing nos.ET 733539 and ET 733540 marked as Exhibits 18 and 19 seized vide Panchnama Exhibit 11. Nothing could be elicited from cross-examination of this witness to disbelieve his version about seizure of the grey coloured hard top strolley suitcase from the appellant/accused which was having baggage identification tag bearing no.ET 733539 from which heroin came to be seized by PW1 Sanjay Kumar, Intelligence Officer. In cross-examination he stated that keys of the bags were obtained from the accused but he did not know as to what happened to those keys. He has further stated that the grey coloured hard top strolley suitcase was having inbuilt lock and no enquiry was made from the appellant/accused in respect of code number of the number lock on the bag. He, further, stated that the handle of the bag was in broken condition. These aspects are not touching to the core of the prosecution case and as such, cannot be used to doubt the prosecution case. The seizure was effected on 23rd March 2009 and the witness was deposing on 14th August 2012. Therefore, some concession is required to be given so far as memory of this panch witness is concerned. Broken handle of the grey coloured hard top strolley suitcase is also totally inconsequential aspect. Suffice to state that PW8 Anil Mestry has also corroborated version of the complainant in respect of possession of the appellant/accused over the grey coloured hard top strolley suitcase which is confirmed by documentary evidence in the nature of the baggage identification tag and baggage claim tag bearing name of the appellant/accused.

22. PW7 Mary Anastin, at the relevant time was working as Customer Service Agent of Ethiopian Airlines. Her evidence also shows that she had affixed baggage identification tags to the bags of the passenger and had given counter part thereof to the passenger. She has stated about keeping aside the two bags as per instructions of the Custom Officer. Her evidence, however, is not of much assistance to the prosecution because she has failed to identify the appellant/accused and the grey coloured hard top strolley suitcase was not shown to her. In cross-examination, she accepted the fact that baggage identification tags are affixed to the handle of the bag and once affixed, those cannot be removed without some damage to it. However, this admission is not helpful to the defence as PW1 Sanjay Kumar, Intelligence Officer, who effected the seizure, has stated in cross-

examination that the baggage identification tags at Exhibits 18 and 19 are damaged from the backside.

23. Cumulative effect of evidence of PW₁ Sanjay Kumar, Intelligence Officer, coupled with that of PW₈ Anil Mestry and contemporaneous documentary evidence in the form of Panchnama at Exhibit 11, unerringly points out that the grey coloured hard top strolley suitcase was in possession of the appellant/accused and he was having with him the baggage claim tag in respect of that bag. That baggage claim tag Exhibit 15 perfectly matched baggage identification tag Exhibit 18 which was removed from the grey coloured hard top strolley suitcase while effecting seizure and the same came to be seized by putting it along with other documents in an envelope which was subsequently sealed. In the light of this evidence, contention advanced on behalf of the appellant/accused that baggage identification tags at Exhibits 18 and 19 were produced in the court separately and the bag at Article 9 was produced separately is having no merit. The baggage identification tag was rightly not kept with the handle of the bag as there was chance of missing it with passage of time during pendency of the trial. With this evidence, a finding can be safely recorded that the appellant/accused was possessing the grey coloured hard top strolley suitcase - Article 9 - on 23rd March 2009 at the Airport and from the said bag off-white coloured powder weighing 2700 grams came to be seized.

24. Judgment in the matter of Mrs.Zainab Bte Yousuf vs. Union of India and Anr. (supra) proceeded on peculiar facts of that case. The bag involved in that matter was not having security strap of Air India. However, in the case in hand, evidence adduced by the prosecution and particularly coming on record from mouth of PW₁ Sanjay Kumar, Intelligence Officer, shows that security straps were found affixed to both bags including the grey coloured hard top strolley suitcase from which seizure was effected. Even the security strap removed from that bag was produced before the court and PW₈ Anil Mestry has identified that strap Article D-9 as the one which was removed from the grey coloured hard top strolley suitcase - Article 9. In the matter of Mrs.Zainab Bte Yousuf vs. Union of India and Anr. (supra) the baggage identification tags were not found on the baggage when those bags were produced in the court. In the case in hand, evidence adduced by the prosecution is to the effect that the baggage identification tags were removed from the bags and came to be seized by putting them in an envelope and sealing that envelope. Hence, this judgment is not helpful to the appellant/ accused in any manner.

25. Now let us examine whether the prosecution has established the fact that heroin was detected in the grey coloured hard top strolley suitcase found in possession of the appellant/ accused. PW₁ Sanjay Kumar, Intelligence Officer of Air Intelligence Unit has deposed in tune with the prosecution case on this aspect. His evidence shows that after removing false bottom of the grey coloured hard top strolley suitcase, two brown

packets which he marked as P1 and P2 came to be recovered. Those were weighing 1660 and 1230 grams respectively, totaling 2890 grams. Net weight of the contents of off-white powder found in those packets was 2700 grams as per version of PW1 Sanjay Kumar, Intelligence Officer. It is in his evidence that the off-white powder found in those packets was tested by drug detection kit and it was found to be containing heroin. As stated by this witness, four samples each weighing 5 grams were drawn after mixing the contents of both the packets thoroughly. Samples were collected in four transparent polythene zipper pouches and those pouches were marked as 'S1' to 'S4'. This witness testified that each sample was kept in separate green coloured envelope which was sealed with 'AIU 132' seals and signatures of panch witness and the appellant/accused were obtained thereon. This witness further stated that balance quantity of 2680 grams was kept in polythene pouch with zipper lock and that polythene pouch was closed by wrapping cello tape around it. Signatures of panch witness and the appellant/accused were obtained on that pouch and it was put in the cardboard box which was closed with cello tape and by wrapping jute string. It was also sealed with seal number 'AIU 132'. As stated by this witness, signatures of panch witness and the appellant/accused were obtained on the label tagged to that cardboard box. In the similar fashion, PW8 Anil Mestry - panch witness has also spoken about weighment of the bulk, drawing of samples, packing, sealing and labeling the bulk as well as four sample packets. As this witness had entered in the witness box after few years of the incident, he was not recollecting the weight and number of samples drawn from the bulk. However, while in the witness box by perusing Panchnama Exhibit 11, he had correctly stated that four samples each weighing 5 grams were drawn and those were kept in polythene zipper pouches and those pouches were kept in different envelopes. PW8 Anil Mestry has also testified about packing, sealing and labeling the bulk weighing 2680 grams as well as seizure of documents and preparation of Panchnama Exhibit 11. There is nothing in crossexamination of PW1 Sanjay Kumar, Intelligence Officer as well as PW8 Anil Mestry to doubt their evidence regarding seizure of the bulk as well as samples. On the contrary, evidence of PW8 Anil Mestry is very natural and because of fading memory, this witness was not recollecting actual weight and number of samples drawn without refreshing his memory in the witness box.

26. PW10 Anilkumar Bhalerao, Superintendent of the Ware House has spoken about deposit of packets containing bulk, three samples as well as the grey coloured hard top strolley suitcase in the strong room of the warehouse of the Customs Department. Version of PW2 Bhalchandra Madan, Intelligence Officer, shows that PW3 Subal Sai, Superintendent of the Customs Department had given him letter as well as sample bearing mark 'S1' on 23rd March 2009. The sample was in sealed condition and he was to carry it to the office of the Deputy Chief Chemist. It is in evidence of PW2 Bhalchandra Madan, Intelligence Officer, that he prepared three test memos Exhibit 32 in triplicate and put sample of seal number 'AIU 132' on

it. Then he deposited forwarding letter Exhibit 27 with the test memo Exhibit 32 and sample in sealed condition to the Office of the Deputy Chief Chemist. On this backdrop, it is in evidence of PW4 Manoj Puri, Assistant Chemical Analyser, working with the Deputy Chief Chemist that he received sealed sample bearing seal number 'AIU 132' on 23rd March 2009 itself and he conducted chemical analysis in respect of the contents of that sample on 3rd April 2009. Version of this witness, who is having 29 years of experience in chemical analysis of narcotics, drugs and psychotropic substances, shows that he conducted several tests on contents of sample 'S1' and ultimately found it to be containing heroin with 38.9% purity. Version of this witness is corroborated by his report Exhibit 41A which describes various tests conducted by him on contents of seized sample packet 'S1' to arrive at the conclusion that the same is heroin with 38.9% purity. Thus, Chemical Analyser's Report given on test memo Exhibit 32 as well as report Exhibit 41A given by PW4 Manoj Puri, Assistant Chemical Analyser, is sufficient to hold that off-white powder weighing 2700 grams seized from the grey coloured hard top strolley suitcase was heroin with 38.9% purity. It is, thus, clear that, the appellant/accused was found to be in possession of the grey coloured hard top strolley suitcase (Article 9) on 23rd March 2009 at the Airport and that bag was containing 2700 grams heroine with 38.9% purity. It is, thus, proved that the appellant/ accused was found to be in possession of heroin with 38.9% purity weighing 2700 grams.

27. The learned counsel appearing for the appellant/accused has vehemently argued that the prosecution has failed to prove the fact that the appellant/accused was in conscious possession of heroin in commercial quantity. At this juncture, it is apposite to reproduce paragraphs 14 and 15 from the judgment of the Honourable Supreme Court in the matter of State of Punjab vs. Hari Singh (supra) which read thus :

"14 Section 15 makes possession of contraband articles an offence. Section 15 appears in chapter IV of the Act which relates to offence for possession of such articles. It is submitted that in order to make the possession illicit, there must be a conscious possession. Section 15 deals with punishment for contravention in relation to poppy straw. It is highlighted that unless the possession was coupled with requisite mental element, i.e. conscious possession and not mere custody without awareness of the nature of such possession, Section 15 is not attracted."

"15 "9 The expression `possession' is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in Superintendent & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja and Ors. (AIR 1980 SC 52), to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the context of all statutes.

10. The word `conscious' means awareness about a particular fact. It is a state of mind which is deliberate or intended.

11. As noted in *Gunwantlal v. The State of M . P . (AIR 1972 SC 1756)* possession in a given case need not be physical possession but can be constructive, having power and control over the article in case in question, while the persons whom physical possession is given holds it subject to that power or control.

12. The word `possession' means the legal right to possession (See *Health v. Drown (1972) (2) All ER 561 (HL)*). In an interesting case it was observed that where a person keeps his fire arm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. (See *Sullivan v. Earl of Caithness (1976 (1) All ER 844 (DC)*).

13. Once possession is established the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles. This position was highlighted in *Madan Lal and Anr. v. State of Himachal Pradesh (2003) 7 SCC 465*."

28. The prosecution has already proved the fact that the appellant/accused was found to be possessing 2700 grams of heroin with 38.9% purity on 23rd March 2009. Thus, possession of the appellant/accused over heroin in commercial quantity is proved by the prosecution. It is now for the appellant/accused to establish that he was not in a conscious possession of heroin. The fact as to how the appellant/accused came in possession of the grey coloured hard top strolley suitcase containing heroin is a fact which was specially within his knowledge and as such, it is for him to point out that he was not in conscious possession of heroin. It is submitted on behalf of the appellant/accused that no questions regarding conscious possession of heroin were asked to the appellant/accused in his examination under Section 313 of the Code of Criminal Procedure. However, perusal of the statement of the appellant/accused under Section 313 of the Code of Criminal Procedure shows that the learned trial court has framed and put to the appellant/accused the questions regarding detection of heroin in the grey coloured hard top strolley suitcase found in possession of the appellant/accused and the appellant/accused was informed about detection of heroin in his possession by the learned trial court. He was asked to explain as to what he has to say about this fact coming on record from evidence of the prosecution. He was further asked as to what he wanted to say about seized property which was containing heroin and which came to be seized from him. However, the appellant/accused gave answer to the effect that these facts put to him are either false or those are not true.

29. In the matter of *Noor Aga vs. State of Punjab and Another (supra)* the Honourable Apex Court has upheld constitutional validity of Sections 35 as well as 54 of the NDPS Act. It is further held in the said judgment that presumption as envisaged by Sections 35 and 54 of the NDPS Act would

operate in the trial only in the event the circumstances contained therein are fully satisfied. In the case in hand, the prosecution has established the fact that the appellant/accused was in possession of the grey coloured hard top strolley suitcase which was containing 2700 grams of heroin with 38.9% purity. The appellant/accused was certainly knowing the fact that the bag in his possession was containing heroin as he failed to explain the fact which was specially within his knowledge.

30. In submission of the learned counsel for the appellant/ accused unconscious possession of heroin is demonstrated by the appellant/accused from evidence of PW2 Bhalchandra Madan, Intelligence Officer, who has recorded alleged confession (Exhibit 30) of the appellant/accused. The burden on the appellant/ accused stands discharged by material elicited from cross-examination of PW2 Bhalchandra Madan, Intelligence Officer, in the light of ratio of judgment in the matters of Abdul Rashid Ibrahim Mansuri vs. State of Gujarat (supra) and Noor Aga vs. State of Punjab and Another (supra). It is seen from evidence of PW2 Bhalchandra Madan, Intelligence Officer, that he was entrusted with the task of recording statement of the appellant/accused and accordingly, he recorded confession Exhibit 30. As per this confessional statement which was subsequently retracted, the appellant/accused met a Nigerian national by name Effine and on the request of said Effine, he agreed to carry the grey coloured hard top strolley suitcase for a consideration of US \$500. Subsequently, this statement came to be retracted by the appellant/accused by submitting application Exhibit 33 before the learned Special Judge under the NDPS Act. Averments in the application at Exhibit 33 are to the effect that the appellant/ accused was accosted at the Airport where he was assaulted and kept confined in a room for about 2 to 3 hours. Thereafter, by bringing some luggage, he was forced to accept that luggage. From cross-examination of PW2 Bhalchandra Madan, Intelligence Officer, it is brought on record that the appellant/accused has stated that he was not aware about contents of the grey coloured hard top strolley suitcase and this witness was satisfied with the answer given by the appellant/accused. Thereafter, he did not carry out any further investigation in respect of knowledge of the appellant/accused about contents of the grey coloured hard top strolley suitcase. On this aspect, it needs to be noted that PW2 Bhalchandra Madan, Intelligence Officer, was given limited role to record the statement of the appellant/accused and to reach the sample packet to the office of the Deputy Chief Chemist. Cross-examination of PW2 Bhalchandra Madan, Intelligence Officer, further shows that, he was not having any personal knowledge as to what happened prior to 6.00 a.m. of 23rd March 2009. Interception of the appellant/accused and detection of heroin in the grey coloured hard top strolley suitcase carried by him took place at about 3.00 a.m. of 23rd March 2009. Cross-examination of this witness further shows that at the time of preparation of Panchnama Exhibit 11, he was attending his duty elsewhere and as such, he was not even a witness to the Panchnama Exhibit 11. It is, thus, seen that this witness was not having any

knowledge as to the events which took place prior to recording of the statement of the appellant/accused (Exhibit 30) by him. As such, no overbearing importance can be given to the material elicited from cross-examination of this witness about his satisfaction with the answer given to him by the appellant/accused regarding contents of the grey coloured hard top strolley suitcase. This evidence cannot be used to infer that possession of the appellant/accused over heroin in the grey coloured hard top strolley suitcase was unconscious possession.

31. It is argued that Standing Orders are not followed while drawing samples. For this purpose, reliance is placed on judgment in the matter of *Noor Aga vs. State of Punjab and Another* (supra) wherein it is held by the Honourable Apex Court that guidelines issued should not only be substantially complied with, but also in a case involving penal proceedings vis-a-vis a departmental proceeding, rigours of such guidelines may be insisted upon. Standing Order No.1 of 1989 and more particularly Clause No.2.9 thereof deals with procedure for storage of samples. As per this Standing Order, the sample in duplicate should be kept in heat-sealed plastic bag as it is convenient and safe. In the case in hand, four samples each weighing 5 grams were kept in polythene pouches with zipper lock and thereafter, those four polythene pouches were kept in a separate envelope which was sealed with "AIU Seal no.132". Therefore, it cannot be said that the guidelines regarding packing of the samples was not substantially followed by the prosecuting agency. Similarly, other clauses of this Standing Order No.1 of 1989 are also seen to have been substantially complied by the prosecuting agency, as reflected from evidence of PW1 Sanjay Kumar, Intelligence Officer. Therefore, case of the prosecution cannot be doubted on this aspect.

32. It is apposite to note that Section 35 of the NDPS Act provides for presumption of culpable mental state. It also provides that an accused may prove that he had no such mental state with respect to the act charged as an offence. Similarly, Section 54 of the said Act places the burden of proof on the accused as regards possession of the contraband to account for the same satisfactorily. In the case in hand, after proof of the fact that the appellant/accused was found in conscious possession of heroin weighing 2700 grams of 38.9% purity, the appellant/accused has not discharged the burden which rested upon him. Rather, he has chosen to feign ignorance by answering the questions in his examination under Section 313 of the Code of Criminal Procedure by stating that whatever put to him is false or he does not know.

33. Now let us examine whether the sentence imposed on the appellant/accused by the learned trial court is appropriate. He is sentenced to suffer rigorous imprisonment for 13 years apart from direction to pay fine of Rs.1 lakh and in default to undergo further simple imprisonment for 6 months. In the matter of *Shahejadkhan Mahebubkhan Pathan vs. State of Gujarat* (2013) 1 Supreme Court Cases 570 = **2012-TIOL-97-SC-NDPS** the

Honourable Apex Court had brought down the substantive sentence of rigorous imprisonment for a period of 15 years to 10 years and default sentence of 3 years to 6 months in somewhat identical situation in offence punishable under the NDPS Act. It is the duty of the court to keep in view the nature of offence, circumstances in which it was committed, the position of the offender and other relevant considerations such as pecuniary circumstances of the accused. For certain offences, the NDPS Act has provided minimum sentence as well as maximum fine amount. The appellant/accused herein is the first time offender and as such, I am of the considered opinion that he deserves to be imposed minimum sentence i.e. of 10 years instead of 13 years as ordered by the learned trial court. The appellant/accused is not having criminal antecedents and he has already undergone major part of substantive sentence of rigorous imprisonment imposed on him. Therefore, the appeal deserves to be allowed partly by maintaining the conviction recorded by the learned trial court. As such, the following order:

ORDER

- i) Conviction of the appellant/accused of offences punishable under Sections 21(c) read with 8(c) read with 28 read with 23 of the NDPS Act is maintained.**
- ii) However, the appellant/accused is directed to undergo rigorous imprisonment of 10 years as against that of 13 years imposed by the learned trial court. Sentence of fine and default sentence imposed by the learned trial court is not interfered with.**
- iii) In view of disposal of the appeal, Criminal Application No.323 of 2018 also stands disposed off.**
- iv) The appeal is accordingly disposed off.**