# Mohd. Ali & Anr Vs State

**Court:** Delhi High Court

**Date of Decision:** Jan. 6, 2020

**Acts Referred:** Constitution of India, 1950 â€" Article 136
Negotiable Instruments Act, 1881 â€" Section 138, 142, 142A, 142A(1), 142A(2), 145(2)
Companies Act, 1956 â€" Section 25
Code Of Criminal Procedure, 1973 â€" Section 177
Negotiable Instruments (Amendment) Ordinance, 2015 â€" Section 3, 4

**Citation:** (2020) 266 DLT 375

**Hon'ble Judges:** Vibhu Bakhru, J

**Bench:** Single Bench

**Advocate:** Azhar Qayum, Narender Kumar, Amit Gupta, Meenakshi Chauhan, Vikas Negi

**Final Decision:** Dismissed

## Judgement

Vibhu Bakhru, J

1. The appellants impugn the judgment dated 22.05.2017 passed Learned ASJ, Special Court (Central), NDPS Act, Tis Hazari Courts, whereby the

appellants have been convicted for the offence under section 20(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter

Ã¢â‚¬ËœNDPS ActÃ¢â‚¬â„¢). The appellants also impugn the order dated 26.05.2017, whereby they have been sentenced to rigorous imprisonment for a period

of ten years and a fine of Rs. 1 lakh each, under section 20(ii)(C) of the NDPS Act. It wasd irected that in the event of default in payment of fine,

appellant would undergo simple imprisonment for six months.

2. The impugned judgment was rendered in connection with a case arising from FIR no. 173/2014 under section 57 of the NDPS Act, registered with

PS Hazrat Nizamuddin Railway Station. The case set up by the prosecution is that on the intervening night of 26/27.10.2014, the appellants went to

Nizamuddin Railway Station to collect a parcel, which contained illicit substance. The appellants also possessed the Railway Receipt (bill/bilti) for the

said parcel. The officials of Railway Protection Force (RPF), who were on patrolling duty, saw the appellants sitting on a parcel and found them to be

acting in a suspicious manner. The said persons, on seeing the RPF staff, started moving away from there but were apprehended. A Railway Receipt

bearing no. 870279 issued from Bhubaneshwar, pertaining to the said parcel was shown by one of the appellants, namely, Mohd. Ali to the RPF

personnel. The same number was also found written on the said parcel. On examination of the parcel in the presence of Sh Ajay Chopra, Head Parcel

Clerk, it was found that the same contained fifty kilograms of ganja. The matter was reported to the local police and subsequently, the FIR in question

was registered. The case was investigated and a chargesheet was filed under section 21 of the NDPS Act. Both the appellants claimed that they

were not guilty and claimed trial.

3. Before the Trial Court, the prosecution examined thirteen witnesses in total. The Trial Court, after evaluating the evidence, found the accused

(appellants) guilty of the offence for which they were charged. It held that although there was an eleven-day delay in sending the sample to FSL; the

same did not lead to the inference that it was possible to tamper with the sample. The seals affixed by the IO and SHO were found intact by the FSL

and this was sufficient proof of the samples were received intact by FSL. The Trial Court further held that on the basis of the deposition of PW6, it

could be safely concluded that the case property was not tampered with in the malkhana.

4. The Trial Court further rejected the contention that the police had not joined any independent witnesses at the spot. The court held that PW-4, who

is a Parcel Clerk, is a government servant and his presence on the spot could not be doubted as he was posted at the office and was working at the

spot at the time of the recovery. Thus, he was held to be a reliable and an independent witness.

5. The Trial Court also rejected the defence that the prosecution had failed to place any material on record, which could establish a link between the

appellants or with Mahinder Singh or Krishna Murti (whose names were written on the Railway Receipt). Thus, there was no evidence, which could

lead to the inference of any conspiracy between such persons. The Trial Court observed that although there was no direct evidence of a conspiracy, it

was established that someone had sent the contraband under a fake name and thus, the burden lay on the appellants to show how came to possess the

receipt in question.

6. The appellants have challenged the impugned judgment on three grounds. First, that the prosecution failed to prove any link between the sender and

the receiver of the alleged parcel with the appellants. Second, that the Ld. Trial Court failed to appreciate that the seizing officers did not to join any

independent witness. Third, that the trial court failed to appreciate that there are material inconsistencies and contradictions between the testimonies of

the material witnesses inasmuch as their description of the spot proceedings is not similar.

Evidence

7. Before proceeding further, it is necessary to examine the testimony of the witnesses and the evidence obtaining in this case.

8. HC Ajit Kumar, reader to ACP Railway, was examined as PW-1. He deposed that on 27.10.2014, a report under section 57 of the NDPS Act, vide

the FIR in question (bearing No. 173/2014) under section 20 of the NDPS Act, was received in the office of ACP Railway at about 4 PM. The

concerned clerk made an entry of the same Ã¢â‚¬" entry no. 4603 dated 27.10.2014 Ã¢â‚¬" in the diary register. Thereafter, the said report was forwarded

to ACP office by SHO, PS Hazrat Nizamuddin Railway Station.

9. SI Abdul Latif, RPF Nizamuddin, was examined as PW-2. He deposed that on 26.10.2014, at about 11:30 PM, he was on patrolling duty with Satbir

Singh (PW-12), Ct. Chander Shekhar (PW-3) and Ct. Sujan Singh. He deposed that on reaching the parcel office, they saw two persons sitting over a

parcel and also checking the same. The said persons started moving but they were stopped by the staff. On inquiry, Mohd. Ali (one of the accused)

showed one receipt to Inspector Satbir (PW-12) and on checking the same, it was found that the said receipt bearing no. 870279 was issued regarding

a parcel consigned from Bhubaneshwar to Nizamuddin. The same number was found written on the said parcel. Thereafter, on suspicion, the

Inspector through Sh Ajay Chopra (PW-4), who was on duty at the concerned parcel shed, examined the said parcel. The said parcel contained layers

of packing. After unwrapping the layers, a carton box of khaki colour was found, which was sealed. On smelling, it was found that the same contained

ganja. He further deposed that both the accused failed to produce any document regarding carrying the parcel or license for the same. Thereafter,

both the accused were taken into custody under section 12 of the RPF Act, 2003. Personal search was conducted of the accused persons by PW-2.

An amount of Rs. 5,970/- and one mobile phone was recovered from accused Mohd. Ali and an amount of Rs. 720/-, one DL, badge and one mobile

phone was recovered from the accused Munna Bhai.

10. On weighing the recovered parcel, its weight was found to be 52 kg. Seizure memo cum arrest and personal search was prepared (Ex.PW2/A).

Thereafter, the custody of the accused and the recovered parcel was handed over to ASI Muninder Singh (PW-13). He checked the parcel and found

it containing ganja. Thereafter, Ct. Suresh (PW-9) brought the weighing machine and IO kit. Notice under Section 50 NDPS Act was prepared and

both the accused were informed of their rights regarding their search. The notices were served upon both the accused (Ex.PW2/B and Ex.PW2/C).

Subsequently, both the accused were searched but nothing was recovered from them.

11. He stated that, thereafter, the parcel was opened and seven packets were taken out of it. All seven packets were then weighed. The total weight

of the seven packets was found to be 50 kg. The IO then took out a sample of 500 gm from each of the seven packets. All these samples were

converted into pullandas and marked as A1 to A7. The remaining ganja was also converted into seven separate pullandas and marked as S1 to S7.

Thereafter, the IO filled up the FSL form and affixed his seal on all the pullandas and marked it as B1. The SHO also affixed his seal on the said

articles. Thereafter, IO seized the said articles (Ex.PW3/A) and handed over the copy of seizure memo, FSL form alongwith the abovementioned seal

and seized contrabands were deposited in malkhana. Thereafter, IO prepared a rukka and handed over the same to Ct. Suresh (PW-9), who went to

the Police Station for registration of the FIR. The statements of the witnesses were recorded. A copy of the FIR was taken to the spot and original

rukka was handed over to the IO. Thereafter, both the accused were arrested (Ex. PW3/E and Ex.PW3/F).

12. In his cross-examination, PW-2 deposed that they had seen the accused persons from the gate of parcel inward shed. He further stated that there

was no other person in the parcel shed except the police party, parcel babu and the accused persons. Parcel babu had come over there within 2-3

seconds after their arrival at the said spot. Thereafter, the Railway Receipt was handed over to parcel babu. At that time, no identity proof was asked

from the accused persons by the IO. It was deposed that they finally left the spot at around 8.30 AM and till then, Ajay Chopra (PW-4) remained with

them.

13. Ct. Chander Shekhar Singh, RPF, Nizamuddin, Delhi was examined as PW-3. He deposed that on 26.10.2017, at about 11:20 PM, he along with

Inspector Satbir (PW-12), SI Abdul Latif (PW-2) and Ct. Sujan Singh reached at Inward Parcel Office of Hazrat Nizamuddin Railway Station. There,

they found the two persons (the accused) taking turns to sit on the parcel and trying to check the contents of the parcel by putting their finger inside it.

Upon inquiry, one of the accused (Mohd. Ali) produced a copy of Railway Receipt and stated that the parcel belonged to them. Mohd. Ali further

stated that the said parcel had come from Bhubaneshwar and they had come to take delivery of the said parcel. Due to suspicion, said parcel was

opened and it was found to contain five layers of gunny bag containing brown colour taped packet. The said packet contained dried leaves which was

smelling like ganja. Both the accused were identified and they were arrested. During the personal search of the accused Mohd. Ali, a cash amount of

Rs. 5970/-and one mobile phone was recovered. Further, a cash amount of Rs. 720/-, one mobile phone, one DL and one badge was recovered from

accused Munna Bhai. On weighing the parcel, it was found to be 52 kg. Thereafter, ASI Muninder Singh opened the parcel and a checked it. He

affirmed that the parcel contained leaves.

14. It was further disclosed by the accused that they had brought one tempo bearing no. DL 1LQ 4372 for the purpose of taking parcel with them.

The said tempo was also seized by ASI Muninder Singh (Ex.PW3/J). It was further deposed by PW-3 that at the time of search of the accused

persons pursuant to the notice under section 50 of the NDPS Act, no further recovery was made from any of the accused.

15. In his cross examination, he deposed that one Parcel Babu was sitting alone at his table at the time of incident in the parcel godown. He had come

near the parcel box within 1-2 minutes when the accused persons were apprehended at the station.

16. Sh Ajay Chopra, who was working as Head Parcel Clerk at the concerned Railway Station, was examined as PW-4. He deposed that on

26.10.2014, at about 10.30 PM, two persons (the accused) had come to his office enquired to him about a parcel. After going through the record, PW-

4 confirmed them about the parcel. It was also deposed that in the meanwhile, he had also seen officials of RPF passing through and making inquiries

from the accused persons. The RPF officials then checked the parcel. There were 5-7 polybags containing some leaves and beads in them and the

RPF officials affirmed that is was ganja. It was further deposed that after the verifying the ganja, the local police weighed the same and it was found

to be 50 kg. It was further deposed that no narcotic substance was recovered from the personal search of the accused.

17. In his cross-examination, PW-4 deposed that 10-12 other staff members were present at the parcel office on the said day. He further deposed that

after 11 PM, the parcel babu had come to the office and he had given the charge to him. He was joined in the investigation by RPF staff at about

11.15 PM. The writing work was done by the police in his presence on the night of incident for about 2-3 hours. It was also deposed that the parcel

was under the charge of railway and it was not delivered to anyone by the railway.

18. HC Satpal Singh, who was posted as RPF at the concerned Railway Station at the material time, was examined as PW-5. He deposed that on

26.08.2014, at about 4:45 PM, Inspector Satbir Singh, SI Abdul Latif, Ct. Sujan Singh and Chander Shekhar had gone for patrolling on an information.

He deposed that a DD entry in this regard was made and a copy of the same was produced (Ex.PW-5/A).

19. HC Brij Pal, who was posted as MHC (M) at PS Hazrat Nizamuddin, was examined as PW-6. He deposed in his examination that SHO Inspector

Sunil Kumar had handed over the case property to him on 27.10.2014. The said property was deposited by him in malkhana. Thereafter, on

07.11.2014, the seven samples pertaining to the case were sent to FSL Rohini through Ct. Sohan Lal (PW-7). On 10.12.2014, seven sealed parcels

alongwith FSL result were received by him from ASI Maninder Singh, which were again deposited in the malkhana.

20. Ct. Rich Pal, who was examined as PW-8, deposed that he had participated in the investigation of the present case alongwith PW-9 and PW-13 at

the station on the day of incident. It was further deposed that the reply submitted by the accused persons to the notice served under section 50 of the

NDPS Act was scribed by ASI Muninder, as both the accused had stated that they were not in a position to write Hindi or English due to lack of

proper education. It was further deposed by him that a personal search of both the accused was conducted but no incriminating substance was

recovered from them. He further deposed that an auto was also seized on the information given by the accused (Ex.PW3/J).

21. In his cross-examination, he deposed that the information regarding this case was received at about 12.15 AM. He had no knowledge about

whether ASI Maninder Singh had shared the said information with senior officers or whether he had asked the SHO of the concerned Police Station

to accompany him in the raid in PW-8Ã¢â‚¬â„¢s presence. It was further deposed by him that the Booking Clerk and other staff of the concerned Railway

Station was present but no one of them was called by the IO at the time of search of the parcel, as they were in the outer portion. It was also deposed

that no CCTV camera was installed near the place of occurrence and no videographer/photographer was called at the spot to take pictures.

22. Ct. Suresh, RM at the concerned Railway Station, was examined as PW-9 and he deposed that on 27.10.2014, at about 12.15 AM, on receipt of

DD No.2A, he alongwith ASI Maninder went to inward siding parcel godown, H.N. Deen Railway Station where RPF staff including PW-12, PW-2,

PW-3, PW-4 and Ct. Sujan Singh met them. They produced one furd baramadagi and documents pertaining to the arrest of the accused persons.

23. HC Shakti Singh, who was posted at the Railway Station, was examined as PW-11 and he deposed that he alongwith ASI Muninder (PW-13)

progressed to PS GRP, Bhubaneshwar, East Coast Railway. They reached the office of Chief Parcel Supervisor (CPS) and served a notice under

section 91 Cr.P.C. to the CPS. In reply, (i) a photocopy of the railway receipt no. A-870289 dated 19.10.2014 (Ex.PW11/B); (ii) a photocopy of the

forwarding note against the said railway receipt (Ex.PW11/C); and (iii) a photocopy of loading summary no. 18477 dated 19.10.2014 was provided to

them. The said documents were duly certified and thereafter, were seized by the IO vide seizure memo (Ex.PW11/A). It is deposed that the said

railway receipt was in the name of one Krishna Murthy, R/o Plot no. 496, Janpat Road, Bapuji Nagar, Bhubaneshwar, Orissa.

24. Thereafter, they proceeded to the said premises in search of Krishna Murthy. After reaching at Janpat Road, they found that no plot number

existed which numbered 496. Upon inquiry in the locality, it was found that no person by the name of Krishna Murthy or such plot existed. The

statements of 2-3 public persons were recorded from the said area. At PS RPF, Bhubaneshwar, it was informed to them that no CCTV footage prior

to 06.11.2014 was found to be saved in the system. On 23.11.2014, IO made an inquiry from Sh. Ramesh Panda, the Loading Clerk and his statement

was recorded under section 161 Cr.P.C. It is further deposed that on 26.10.2014, the office of the CPS proceeded to Sunder Nagar, New Delhi in

search of Mahender Singh (who was stated as the recipient on the said parcel) but no person with the said name was found at Sunder Nagar. The

given address was also found to be fake/incorrect.

25. Inspector Satbir Singh was posted at Hazrat Nizamuddin Railway Station, RPF on 26.10.2014. He examined as PW-12. He deposed that on the

material day, in the afternoon, he alongwith SI Abdul Latif, Ct. Sujan Singh and Ct. Chander Shekhar were on patrolling and when they reached the

Parcel Siding Inverd Road, Nizamuddin Railway Station at about 11 PM, they saw two persons (the accused) sitting on a parcel. The said persons

were trying to check the contents of the said parcel. On inquiry, it was disclosed by the said persons they had come for release of the said parcel as

the same belonged to them. On suspicion, parcel babu was called and the parcel was examined in his presence. The parcel was found to contain

ganja. It is further deposed that the particulars of the parcel also matched with those of the railway receipt produced by the said persons.

26. ASI Muninder Singh was examined as PW-13. He deposed that on 27.10.2014, they took him to Sunder Nagar in search of one Mahender (R/o

222-C, Sunder Nagar, Nizamuddin) but neither the said house nor the said person could be located there. It was deposed that for this search, he was

accompanied by Ct. Suresh, Ct. Richpal and SI Dharamveer. On the next day, that is on 28.10.2014, at the instance of accused persons they went to

Narela. They were taken to a park situated between Pocket 4 and 5 by the accused persons, who stated that the person named Mahender had given

the railway receipt to them at the said place. Thereafter, a search was conducted for Mahender but he could not be found. PW-13 further deposed

that the mobile number Ã¢â‚¬" 9684788964, which was appearing on the railway receipt belonging to Mahender Singh Ã¢â‚¬" was also put on surveillance by

him on his return to the Police Station. It was deposed that thereafter, PW-13 alongwith HC Shakti Singh went to Bhubaneshwar for further

investigation. At the Chief Parcel Office, Railway Bhubaneshwar, it was informed by CPS to them that the said parcel was booked on 19.10.2014 and

the same was loaded in the Train no. 18477 (Utkal Express Puri to Haridwar). It was further deposed that a search was also conducted to find

Krishna Murthy at the address, which was appearing on the said railway receipt (496, Janpat Road, Bapuji Nagar, Bhubaneshwar). It was found that

no such house number existed there and no such person was residing in the said locality. Thereafter, on 22.12.2014, at Hazrat Nizamuddin Railway

Station, the statement of CPS Kishan Lal Meena was recorded, wherein he stated that on 26.10.2014, the said parcel was unloaded from Utkal Train

on platform no.2-3. It was further stated that as per the parcel receipt, the said parcel was containing books.

Reasons and Conclusion

27. It is apparent from the testimonies of the witnesses that the accused have been convicted solely on the allegation that they were found sitting on a

parcel located in the parcel office (parcel inward godown) and they had shown a receipt (bilti) corresponding to the parcel in question. Apart from the

above, there is no other material or evidence on the basis of which it could be concluded that the accused were in possession of the contraband

contained in the parcel in question.

28. There are also certain inconsistencies in the testimony of various witnesses although the same may not be of much relevance. However, there are

also certain loose ends that leave a considerable scope for doubt as to the prosecutionÃ¢â‚¬â„¢s case. The accused were apprehended by a team of the

Railway Police comprising of Inspector Satbir Singh (who deposed as PW12); SI Abdul Latif (who deposed as PW2); Ct. Chander Shekhar Singh

(who deposed as PW3); and one Ct. Sujan Singh. Ct. Sujan Singh was not examined as a witness.

29. Inspector Satbir Singh (PW12) had, inter alia, deposed that he along with SI Abdul Latif, Ct. Sujan Singh and Ct. Chander Shekhar was on

patrolling duty and on reaching Parcel Siding Inward Road, Nizamuddin Railway Station at about 23:00 hours (11 p.m.), they had seen two persons

(the accused herein) sitting on a parcel and attempting to check the contents of the said parcel. SI Abdul Latif and Ct. Chander Shekhar had also been

testified to the aforesaid effect.

30. HC Satpal Singh, who was then posted as Duty Officer at RPF Hazrat Nizamuddin, had deposed as PW5. He testified that on 26.08.2014 at about

04:45 p.m., Inspector Satbir Singh, SI Abdul Latif, Ct. Sujan Singh and Chander Shekhar had left for patrolling on receipt of information. A copy of the

DD entry in this regard was produced (Ex.PW5/A), which indicates that special/secret information had been received that prompted the said team to

proceed for checking and finding clue (suragsi patarsi). However, none of the witnesses that were examined by the prosecution had even remotely

indicated as to what the special/secret information was pursuant to which the said team was dispatched.

31. The Trial Court had observed that it was not necessary that the secret information was received in respect of the contraband in question.

However, the question as to what was the secret information that had prompted the team to proceed to search clues, remains unanswered. There is

also no information as to what steps were taken by the patrolling team take pursuant to the secret information. Nonetheless, the team continued

patrolling even seven hours after they had set out, on the basis of the secret information. None of the members of the patrolling team, who deposed as

witnesses, provided any information to account for their actions after 04:45 pm. Clearly, if they had proceeded on the information relating to certain

contraband, it would be essential for them to explain the actions taken by them to search for clues and/or apprehend the persons involved. However,

the case set up by the prosecution is that of a chance of recovery. It is stated that the accused were appearing suspicious and, therefore, the parcel

was examined. But no disclosure was made as to the nature of the special/secret information and the steps taken by the patrolling team in regard to

that information (which was their principal object for which they had set out for patrolling) raises certain doubts as to the case set up by the

prosecution.

32. Inspector Satbir Singh (PW12) had deposed that on reaching the parcel siding, the patrolling team consisting of himself, SI Abdul Latif, Ct. Sujan

Singh and Ct. Chander Shekhar had noticed the accused sitting on a parcel trying to check the contents of the parcel and were appearing suspicious in

nature. He had, inter alia, deposed as under:-

Ã¢â‚¬Å“Since they were looking suspicious and there was some doubt regarding their appearance, we called parcel babu and parcel was got examined.

The particulars on the parcel were also matching with the railway receipt produced by both the said persons.Ã¢â‚¬â€‹

33. It is apparent from the above that according to Inspector Satbir Singh, both the accused had produced the receipt. This testimony is inconsistent

with the testimony of the other members of the team Ã¢â‚¬" SI Abdul Latif and Ct. Chander Shekhar.

34. SI Abdul Latif (PW2) had deposed that they (patrolling team) had reached the parcel office (inward shed) and had seen one parcel lying there and

two persons sitting on it. He stated that on seeing the team, they had started moving away from there but had been stopped by Satbir Singh. On being

stopped, accused Mohd. Ali had taken out one receipt and shown the same to Inspector Satbir Singh. On checking the receipt, it was seen that the

receipt was bearing the number 870279, which was the number found written on the parcel on which the accused were sitting. It is relevant to note

that the testimony of Inspector Satbir Singh (PW12) is not consistent with the testimony of PW2 in this regard. He did not depose that he had stopped

the accused while they were moving away as according to his testimony, the accused were sitting on the parcel and on an inquiry, both of them had

produced a railway receipt. Ct. Chander Shekhar Singh (PW-3) had stated that they had seen a parcel box lying at the parcel office and two persons

Ã¢â‚¬Å“were time and again sitting on the said parcel and were checking the contents of the same by inserting their right finger in the parcel in a

suspicious manner.Ã¢â‚¬â€‹

35. In his cross-examination, he reiterated that they had seen the Ã¢â‚¬Å“accused sitting time to time and putting their finger in the parcelÃ¢â‚¬. The

expression Ã¢â‚¬Å“time to timeÃ¢â‚¬ clearly indicates that the patrolling team had observed the accused for some time and they were not sitting on the parcel

continuously but were doing so from time to time. However, this is not consistent with the testimony of PW2 or PW12. The aforementioned

inconsistencies in the testimony of PW12, PW2 and PW3 may appear to be minor and not material at first blush; however, considering that the

prosecutionÃ¢â‚¬â„¢s case, that the accused were in possession of the contraband, rests principally on the testimonies of the members of the patrolling

team having found the accused sitting on the parcel; the inconsistencies in their testimonies cannot be disregarded. As noticed above, there is also

inconsistency in the testimony as to who had produced the railway receipt. Whereas PW12 had deposed that both the accused had done so, PW2 and

PW3 had deposed that railway receipt had been produced by Mohd. Ali. It is also relevant to note that there is no other public witness that has

testified to the effect that the accused had produced the railway receipt. Whilst PW 12 (Inspector Satbir Singh) had deposed that Ajay Chopra (Parcel

Babu), who deposed as PW4 was also present there, PW4 has not testified that the railway receipt had been handed over by the accused in his

presence. On the contrary, he is quite clear in his testimony that no document was recovered from the accused in his presence.

36. SI Abdul Latif (PW2), in his cross-examination, has stated that they had seen the accused persons from the gate of the Parcel Inward Shed and

there was no person in the shed except the police party, Parcel Babu and the accused persons. He stated that the Parcel Babu came over there within

two or three seconds of their arrival. If the said testimony is correct, Parcel Babu (PW4) would have testified as to the recovery of or handing over of

the railway receipt in his presence. However, that is not his testimony.

37. It is also material to note that PW4 had testified that there were ten to twelve other staff members who were present in the parcel office on that

date. He had testified that his duty was from 03:00 pm to 11:00 pm and in his cross-examination, he confirmed that after 11 pm the other parcel babu

to whom he was to give charge, had come to the office. He testified that the RPF Team had come to the parcel office at 10:30 pm. But PW2 had

testified that he along with other officials on the patrolling duty had come to the parcel office at 23:30 hours (that is, 11:30 pm). PW12 had placed the

time of their arrival at 23:00 hours (11 pm). PW3 had testified that they had reached the parcel office at 23:20 hours. Although each members of the

patrolling team (PW2, PW3 and PW12) have indicated different times of their arrival at the parcel office, the same range from 23:00 to 23:30 hours

(that is, 11 pm or thereafter). It is material to note that the duty of PW4 had ended at 11 pm.

38. It is apparent from the above testimony that there is a serious controversy as to how many persons were present in the parcel office at the

material time. According to PW4, there were ten to twelve persons in the parcel office apart from him. Considering that his duty had come to an end

at 11 PM and the other incumbent whose name is not readily available had arrived, the parcel babu who was on duty from 11 pm onwards would also

be present at the parcel office. However, according to the testimony of PW2, there was no other person in the parcel shed (except the police party,

parcel babu and the accused persons). This is significant because admittedly, no other public person was asked to join the proceedings. If there were

several persons inside the parcel office or in the immediate vicinity thereof, their testimony would be relevant.

39. In view of the above, this Court is unable to conclude that there is no doubt as to the prosecutionÃ¢â‚¬â„¢s case regarding recovery of the railway

receipt from the appellant(s). It is conceded that but for the Railway Receipt, there would be little material to link the accused to the parcel in question

and consequently, to the substance found inside it.

40. In this regard, the Trial Court had taken note of the testimony of PW4. He had deposed that the accused had made inquiries about a parcel; he

had confirmed about receipt of the parcel. Thereafter, the accused persons had started carrying their parcel. However, PW4 has not deposed as to

what was the parcel number regarding which inquiries were made by the accused. He also did not testify that both the accused were sitting on the

parcel identified by him. Importantly, his testimony did not indicate that the accused were sitting on the parcel at any point of time.

41. This brings this Court to another important aspect of the case, that is, whether they were in possession of the parcel in question. Even if the

controversy regarding whether any of the accused had produced the railway receipt is ignored, the key question whether the accused were in

possession of the parcel in question, still remains to be addressed. Concededly, the parcel was in possession of the Railway Authorities. It is not the

prosecutionÃ¢â‚¬â„¢s case that the Railway Authorities had delivered the parcel to the appellants.

42. PW4 had testified that parcels could be delivered only to the person in whose name the same was received (to the person to whom it was

consigned). The parcel in question had been received in the name of one Mahender Singh. Thus, in any event, the accused could not take delivery of

the parcel in question since the railway receipt was not in their name. The accused were searched and there is no allegation that any letter of authority

purportedly issued by Mahender, was found in their possession. It is nobodyÃ¢â‚¬â„¢s case that the accused could take the delivery of the parcel without

any such authorisation. PW4 had also testified that ID proof of the person is checked before the parcel is delivered. In the present case, there is no

allegation that any identity proof other than that of the respective accused had been recovered from them.

43. In view of the above, not only were the accused not in possession of the parcel Ã¢â‚¬" since the same was in possession of the railway authorities Ã¢â‚¬

they were also not in a position to seek delivery of the same. Since railway receipt was not in the name of any of the accused, they were not entitled

for receiving the parcel in question. In the aforesaid view, this Court is unable to accept that in the facts obtaining in this case, the accused could be

held to be in possession of the contraband.

44. Mr Amit Gupta, learned APP had relied on the decision in the case of Mohan Lal v. State of Rajasthan: (2015) 6 SCC 222 in support of his

contention that actual physical possession of the contraband is not necessary and the fact that they had the railway receipt in their possession, was

sufficient to impute that they were in possession of the contraband in question.

45. In BlackÃ¢â‚¬â„¢s Law Dictionary 1163 (6th Edn. 1990), the word Ã¢â‚¬Å“possessionÃ¢â‚¬â€‹ is defined as under:-

Ã¢â‚¬Å“Possession. Ã¢â‚¬" Having control over a thing with the intent to have and to exercise such control. Oswald v. Weigel. The detention and control, or

the manual or ideal custody, of anything which may be the subject of property, for oneÃ¢â‚¬â„¢s use and enjoyment, either as owner or as the proprietor

of a qualified right in it, and either held personally or by another who exercises it in oneÃ¢â‚¬â„¢s place and name. Act or state of possessing. That

condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all other persons.

The law, in general, recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical

control over a thing, at a given time, is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power

and the intention at given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive

possession of it. The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing,

possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.Ã¢â‚¬â€‹

46. BlackÃ¢â‚¬â„¢s Law Dictionary (supra) defines the word Ã¢â‚¬Å“possessÃ¢â‚¬â€‹ in the context of Narcotic Drug Laws as under:-

Ã¢â‚¬Å“Term Ã¢â‚¬Å“possessÃ¢â‚¬, under narcotic drug laws, means actual control, care and management of the drug. Collini v. State. Defendant

Ã¢â‚¬Ëœpossesses Ã¢â‚¬â„¢ controlled substance when defendant knows of substanceÃ¢â‚¬â„¢s presence, substance is immediately accessible, and defendant

exercises Ã¢â‚¬Ëœdominion or controlÃ¢â‚¬â„¢ over substance. State v. Hornaday.Ã¢â‚¬â€‹

47. It is well settled that the possession is of two kinds: actual possession and constructive possession. A person who has direct physical control over

any property is in actual possession of the same. A person could be in constructive possession if he exercises dominion and control over the property

even though he is not in direct physical control of it. In the present case, the accused did not have physical possession of the contraband. They had no

direct control over the parcel as the same had not been delivered to them. The actual control of the parcel was with the railway authorities.

48. Even though a person lacks actual or physical possession of the contraband, nonetheless he may be held liable, if it is found that he is in

constructive possession of the contraband. In cases where it is established that an individual exercises dominion and control over the controlled

substance, the doctrine of constructive possession allows imputing possession even though an individual may lack actual or physical possession.

49. In State v. Reeves: 209 N.W.2d 18 (IOWA) 1973, the Supreme Court of Iowa held that to prove possession of a drug within the meaning of the

relevant statute, the State was required to prove three elements: Ã¢â‚¬Å“(1) the accused exercised dominion and control (i.e., possession) over the

contraband, (2) (the accused) had knowledge of the [contrabandÃ¢â‚¬â„¢s] presence, and (3) the accused had knowledge that the material was a

narcotic.Ã¢â‚¬â€‹

50. The Court further held that the State need not prove actual possession and proof of constructive possession would be sufficient.

51. It is apparent from the above that constructive possession of contraband would be sufficient to secure the conviction under Section 20 of the

NDPS Act.

52. In view of the above, the principal question to be addressed is whether the accused were in constructive possession of the contraband.

53. In Gunwantlal v. State of Madhya Pradesh: (1972) 2 SCC 194, the Supreme Court had considered the question whether a charge of possession of

a firearm could be sustained where the accused was not in physical possession of the said firearm. The Supreme Court had observed as under:

Ã¢â‚¬Å“The concept of possession is not easy to comprehend as writers of Jurisprudence have had occasions to point out. In some cases under Section

19(1)(f) of the Arms Act, 1878 it has been held that the word Ã¢â‚¬Å“possessionÃ¢â‚¬ means exclusive possession and the word Ã¢â‚¬Å“controlÃ¢â‚¬ means

effective control but this does not solve the problem. As we said earlier, the first precondition for an offence under Section 25(1)(a) is the element of

intention, consciousness or knowledge with which a person possessed the firearm before it can be said to constitute an offence and secondly that

possession need not be physical possession but can be constructive, having power and control over the gun, while the person to whom physical

possession is given holds it subject to that power and control. In any disputed question of possession, specific facts admitted or proved will alone

establish the existence of the de facto relation of control or the dominion of the person over it necessary to determine whether that person was or was

not in possession of the thing in question. In this view it is difficult at this stage to postulate as to what the evidence will be and we do not therefore

venture to speculate thereon.Ã¢â‚¬â€‹

54. The question whether the accused is in constructive possession of an illicit substance is a matter to be determined based on the evidence obtaining

in each case. The Courts in United State of America have commonly used two tests for determining whether the accused is in constructive possession

of a controlled substance: the Ã¢â‚¬Å“proprietary interest testÃ¢â‚¬â€‹ and the Ã¢â‚¬Å“proximity testÃ¢â‚¬â€‹.

55. The proprietary interest test is used where the illicit substance is found in places where the accused has any proprietary interest. If an accused is

found to have any proprietary interest in an area where illicit substance is found, it may establish his exclusive dominion and control over the illicit

substance. This test is effectively used where the accused is the only person who is present in the area. If drugs are found in a house, which is owned

and occupied by the accused and no other person lives in the said house, it may be sufficient to establish that he exercises dominion and control over

the drugs in question. Obviously, this must be coupled with the fact that he had the knowledge of the illicit substance. Similarly, where the drugs are

found in a vehicle driven by its owner and there is no other passenger in the vehicle, the owner would be in constructive possession, if not actual

possession, of the drugs in question.

56. The second test which is commonly used is the Ã¢â‚¬Ëœproximity testÃ¢â‚¬â„¢. If the accused is found in the proximity of the drugs; has access to the

drugs; and has the intention to control it, the same would be sufficient to conclude that the accused is in constructive possession of the drugs.

However, the courts have cautioned that none of the aforesaid two tests are dispositive to the question of constructive possession. For example, drugs

may be found in a house owned by an individual but the same may belong to a house guest living in the said house at the material time. In such

circumstances, the house guest would be in possession of the drugs although they are found in the premises over which owner has full dominion and

control.

57. In Dirks v. State: 386 P. 3d 1269 (Alaska Ct. App. 2017), Dirks was driving a car and a gun was found in the rear seat of the said car. Dirks was

charged with possessing a firearm while impaired by alcohol. The gun found belonged to the passenger in the car and not to him. In the circumstances,

the Alaska Court of Appeals reversed his conviction as it found that he (Dirks) was not in constructive possession of the firearm.

58. In Alex v. State: 127 P.3d 847 (Alaska Ct. App. 2006), Alex was sitting in a vehicle next to the driver, when it was stopped by a police officer. He

disclosed that there was a gun under his seat. He argued that the gun did not belong to him, however, he was convicted.

59. Both Alex and Dirks were convicted by a Jury, who, inter alia, were instructed as under:-

Ã¢â‚¬Å“The law recognizes two kinds of possession: actual possession and constructive possession. Actual possession means to have direct physical

control, care, and management of a thing.

A person not in actual possession may have constructive possession of a thing. Constructive possession means to have the power to exercise dominion

or control over a thing. This may be done either directly or through another person or persons.Ã¢â‚¬â€‹

60. In Alex v. State (supra), Judge Mannheimer (Alaska Court of Appeals) pointed out potential problems with the aforesaid instructions and in

particular, with the words Ã¢â‚¬Å“have the power toÃ¢â‚¬. He pointed out that the said expression would have wider ramifications on construing whether a

person was in constructive possession of an illicit substance. He referred to the case of Harvey v. State, 463 So. 2d at 708. In that case, Carolyn

Harvey was in her motherÃ¢â‚¬â„¢s house, when it was searched and drugs were discovered. However, there was no evidence that she exercised

dominion and control over the drugs. Judge Mannheimer observed that in such case, she may have power over the drugs because she knew that they

were in the house and also had access to it, but the same did not amount to either actual or constructive possession of the drugs. It is relevant to

mention the illustration was used by him to point out the problem of imputing constructive possession merely on the basis of the power to access.

61. He cited another illustration of beer kept in a refrigerator of a house, which was in the knowledge of the children staying there. Undoubtedly, they

would have physical power to get the beer and, therefore, in terms of the instruction given to the Jury, they would be in constructive possession of

alcohol and consequently, guilty of the offence of such possession. This illustration brings into a sharp focus the error in imputing constructive

possession, simply because the substance is in close proximity of an individual and he has the physical power to grab the same. Thus, mere power of

physical access to illicit substance, in certain circumstances, would not be sufficient to impute constructive possession. The person must also have a

right to access it. In this case, even if the children had the intention or the animus to grab the beer from the refrigerator, the same would not be

sufficient to impute that they possessed the substance (beer). Thus, in given cases, proximity to the substance, knowledge of it and the intention to

take possession, may not be sufficient to impute constructive possession of the illicit substance.

62. According to Judge Mannheimer, mere access to the substance would also not be sufficient to impute constructive possession. He observed that

Ã¢â‚¬Å“Shoppers walking down the aisle of a store do not Ã¢â‚¬Ëœpossess Ã¢â‚¬â„¢ all of the merchandise lying before them on the shelves, nor do museum

visitors Ã¢â‚¬Ëœpossess Ã¢â‚¬â„¢ all of the artwork they pass within reach of.Ã¢â‚¬â€‹

63. However, there may be cases where there is no legal right to access the substance, yet a person may be in constructive possession of the same.

An illustration on point would be where an illicit substance is kept in a vehicle stolen by the accused. Even though, the accused may not have any legal

right to the vehicle in question, nonetheless he would be in possession of the illicit substance since the same is in his dominion and control.

64. It is also contended by Mr Gupta that knowledge of an illicit substance would be sufficient to impute possession. However, the principle of

imputing possession on the basis of knowledge has limited application. Mere knowledge of the existence of illicit substance would not be sufficient for

holding that the person, who is aware of the illicit substance, is possessed of the same. Although knowledge of the illicit substance is necessary for

imputing the offence of possession, the mere fact that the person is aware of the illicit substance, would not be sufficient to impute constructive

possession in all cases. In a given case, the knowledge of the substance may have a wider implication.

65. As an illustration, if a person hides the contraband by burying it in a public place, he would have knowledge of the location of the illicit substance to

the exclusion of all others. The fact that he has knowledge of its existence gives him the dominion and control over the substance to the exclusion of

all others. In such a case, he may be held to be in constructive possession of the illicit substance. However, this is also for the reason that he has

access to the place where it is hidden.

66. In cases where a person was in actual possession of the illicit substance in the past and had concealed it, it could be inferred that he continues to

be in possession of the illicit substance even though he is not in physical possession of the same. In several cases, where the accused has discarded

the illicit substance just immediately prior to his arrest, the Courts have found the accused to be possessed of the same.

67. In People v. Herbert: 59 Cal. App. 158, 210 P. 276 (1922), the California Court convicted the defendant for the possession of narcotics. In that

case, the defendant had accepted money from a decoy for selling drugs. He was arrested when he returned to deliver the drugs. The arresting officer

had felt that the defendant had thrown some object away and search revealed that several packets containing morphine and cocaine had been thrown

on pavement. In People v. Sinclair: 129 Cal. App. 320, 19 P.2d 23 (1933), the defendant was driving an automobile and it was found that he has

instructed his co-defendant to drop the window and throw out the illicit substance. The Court held that:

Ã¢â‚¬Å“[A]ppellant was in the exclusive control of the automobile; he bargained for the sale of the morphine, and accepted the money

therefore; he picked up the person having physical possession of the morphine; and the morphine was subject to and under appellantÃ¢â‚¬â„¢s

dominion and control because it was thrown out of the automobile when appellant so directed.Ã¢â‚¬â€‹

68. In the matter of Welfare of: M.V.L., Child, File No. CO-98-292 (an unpublished opinion except as provided by Minn. Stat. Ã‚Â§ 480 A. 08, subd. 3

(1996)), the Court of Appeals in the State of Minnesota upheld the conviction of the appellant for possessing a BB Gun, even though he was not in

actual possession of the same. In that case, the BB Gun was found on the desk of the classroom of the appellant. The appellant was not in exclusive

control over the classroom or the desk as the same was accessible to other students as well. Nonetheless, his conviction was upheld and the record

showed that: Ã¢â‚¬Å“(1) the BB gun was found wrapped up in M.V.L.Ã¢â‚¬â„¢s sweatshirt; (2) M.V.L. was seen looking at the BB gun; (3) M.V.L.

affirmatively acknowledged the presence of the BB gun by asking another student if he had seen it; (4) when the other student

acknowledged seeing the BB gun, M.V.L. asked him not to tell anyone; and (5) M.V.L. did not surrender possession of the BB gun or report

its location to school authorities when he discovered it.Ã¢â‚¬â€‹

69. In State v. Shigemura: 552S.W.3d 734 (2018), the Missouri Court of Appeals considered the case where the premises of the accused was

searched by police officials. During the search, certain controlled substance (Morphine, oxycodone, and amphetamine) were found. After search,

while walking to their vehicles, the officers noticed a package protruding from the mailbox of the accused. The package was retrieved and the said

package contained 106 grams of methamphetamine worth $12,000. The accused was convicted. He appealed against this conviction and argued that

the State had not presented sufficient evidence to prove that he had access and control over the package and its contents. He contended that he did

not actually possess package when it was discovered and he did not have any exclusive control and access over the common areas where the mail

box was located. In this regard, the Court observed as under:-

Ã¢â‚¬Å“although the mailbox was associated with ShigemuraÃ¢â‚¬â„¢s apartment, the mailbox was accessible to any passersby as well as Leisure, who also

stayed at the apartment. Shigemura reasons that his non-exclusive access to the mailbox precludes any finding that he constructively possessed the

package. See Anderson, 386 S.W.3d at 191. We agree that had the State presented no facts other than the presence of the package in the mailbox,

the evidence would not have supported a jury finding, beyond a reasonable doubt, that Shigemura possessed the methamphetamine and cocaine

located within the package.Ã¢â‚¬â€‹

70. However, the Court was of the view that there was other evidence that connected the appellant to the package in question. It was noticed that the

appellant had voluntarily handed over the package to the officers and had consented to the same being opened; thus, acknowledging control or

dominion over the package. It is important to note that apart from other evidence, one of the facts that persuaded the Court to link the package to the

appellant was a fact that the package was addressed to the appellant.

71. In the facts of the present case, there is little evidence to support that the appellants were in constructive possession of the package in question.

Although they were found in proximity to the package, the same was in an office where multiple packages were kept. The appellants had no

legitimate right over the said package as the same could not be delivered to them without them presenting the railway receipt in their name or due

authorisation from the person named therein. There is no evidence that the appellants were ever in actual possession of the drugs stated to have been

found in the package. There is also no evidence to establish that the appellants had knowledge of the contents of the package. Even if it is assumed

that they had the knowledge, the same would not be sufficient to impute possession as they had no manner of accessing the drugs. They did not

exercise any dominion and control over the said package.

72. As noticed above, knowledge without dominion or control is not sufficient to impute constructive possession. Even if it is accepted that the

appellants intended to take possession of the package, that too is insufficient to impute that they were in possession of the package in question at the

material time. Mere intention to take possession does not constitute the offence of possession of illicit substances.

73. The prosecution alleges that the accused were in constructive possession of the contraband on the basis of the RR Receipt allegedly handed over

by the accused to the patrolling party. It was contended by Mr Gupta that even though the railway receipt did not entitle the accused for delivery of

the contraband, the evidence clearly indicated that they were in knowledge of the same and existence of knowledge coupled with the animus, would

establish knowledge of the contraband. And, the same would amount to them being in constructive possession of the contraband.

74. Undeniably, in certain circumstances, knowledge of illicit substance may lead to the inference of possession. As observed herein before, if an illicit

substance has been concealed by a person and he is aware of the place where it is concealed and has access to the same, he would undoubtedly have

possession of the same. In Mohan Lal v. State of Rajasthan (supra), the Supreme Court after referring of various other case laws, observed as

under:-

Ã¢â‚¬Å“21. From the aforesaid exposition of law it is quite vivid that the term Ã¢â‚¬Å“possessionÃ¢â‚¬ for the purpose of Section 18 of the NDPS Act could

mean physical possession with animus, custody or dominion over the prohibited substance with animus or even exercise of dominion and control as a

result of concealment. The animus and the mental intent which is the primary and significant element to show and establish possession. Further,

personal knowledge as to the existence of the Ã¢â‚¬Å“chattelÃ¢â‚¬ i.e. the illegal substance at a particular location or site, at a relevant time and the intention

based upon the knowledge, would constitute the unique relationship and manifest possession. In such a situation, presence and existence of possession

could be justified, for the intention is to exercise right over the substance or the chattel and to act as the owner to the exclusion of others.Ã¢â‚¬â€‹

75. The said observations must be understood in its context. Clearly, where a person has a right or the power to exercise control over the substance to

the exclusion of the others and intends to do so; his knowledge of the illicit substance and the intention to exercise control in given facts may

established his possession of the substance. However, he must have access or right over the substance to the exclusion of others. Even if he does not

have legitimate right, he must be in a position to exercise control over the substance to the exclusion of the others. Mere knowledge and intention

without the means to exercise any control in the past, present or future, would not be sufficient to establish possession.

76. In the present case, there has been no investigation was carried out to establish that the accused had knowledge that the parcel contained

contraband. The parcel in question had been sent from Bhubaneshwar. It is stated that the investigation had revealed that the name of the consignor is

(one Sh. Krishna Murthy) was fake and so was his address. Therefore, there was no evidence as to the identity of the person who had sent the

parcel. The CCTV Footage of the consigning office was not available since the investigating officer had delayed making any inquiries regarding the

same. He had made inquiries almost a month after the incident and the CCTV Footage of the parcel booking office at Bhubaneshwar was maintained

only for a period of 21 days. There is also no evidence as to the identity of the intended consignee (Mahender Singh). Apparently, the investigations

did not reveal that any person by that name resides at the given address. There is also no material to indicate that the accused had any contact with

any person in Orissa, which could establish a link with the consignor. The knowledge that the parcel contained contraband is imputed to the accused

only on the basis of the railway receipt allegedly handed over by them. It is the prosecutionÃ¢â‚¬â„¢s case that since the accused had the receipt, they

must be aware that the parcel contained contraband.

77. This Court is of the view that in absence of any link with the consignor and any other material, the mere fact that the accused were found sitting

on a parcel with the railway receipt would not be sufficient to establish beyond any reasonable doubt that they had knowledge that the parcel

contained contraband. As observed earlier, mere knowledge of the contraband is also insufficient to impute constructive possession. In addition to

having knowledge of the contraband, the said knowledge must also result in access to the contraband or dominion over it. In this case, the accused had

no access to the said contraband since they could not have taken delivery of the same in their own name.

78. The punishment for possessing contraband is severe. The tests to establish commission of the offence must be equally stringent. The requisite

standard of proof must be met. This Court is unable to accept that the prosecution has established beyond reasonable doubt that the accused

(appellants) were in possession of the contraband in question.

79. In view of the above, the appellants are directed to be released forthwith, if not required in any other case.

80. All pending applications are also disposed of.