

GAHC020005842022



**THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL
PRADESH)
KOHIMA BENCH**

Case No. : CRL.A(J)/7/2022

SHRI WILSON DOMEH
AGED ABOUT 42 YEARS,
S/O DAKHU DOMEH, VILLAGE OF ZEMAI,
PO/PS - SENAPATI, DISTRICT - SENAPATI,
MANIPUR

VERSUS

THE STATE OF NAGALAND
NAGALAND, KOHIMA

Advocate for the Petitioner : A. ZHO

Advocate for the Respondent : GOVT ADV NL

**BEFORE
HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HON'BLE MR. JUSTICE DEVASHIS BARUAH**

Date of Hearing : 06.12.2023
Date of Judgment : 11.12.2023

**JUDGMENT & ORDER
(CAV)**

(Michael Zothankhuma, J)

Heard Mr. A. Zho, learned counsel for the appellant and
Mr. K. Angami, learned Public Prosecutor (P.P.), Nagaland.

2. This is an appeal against the Judgment and Order dated

29.08.2022 passed by the Court of the Special Judge, NDPS Act Phek, in Sessions (Special) Case No. 01/21 in GR Case No. 35/2020, Pfutsero, arising out of P.S. Phek Case No. 09/20, by which the appellant has been convicted under Section 20(b) NDPS Act and sentenced to undergo rigorous imprisonment for fifteen years with a fine of Rs.2 lakhs. In default of the fine, he is to undergo rigorous imprisonment for two years.

3. The prosecution case in brief is that on the night of 29.10.2020, around 7:30 P.M., the Assistant Sub-Inspector (PW-1) along with Police Personnel were checking vehicles at Zuketsa road, when they spotted a Maruti Alto 800 bearing Registration No. NL 01P 2429 coming towards them. However, it suddenly turned around and went towards Lekromi Village. On pursuing the car they found it abandoned at Lekromi Village. On checking the car with one Senowelo (PW-2) who had come to the place where the abandoned car had been found, they found twenty (20) plastic packets of ganja weighing 200 Kgs. The ganja was seized and the vehicle taken to the Police Station, Pfutsero, where an FIR was lodged on 30.10.2020, consequent to which P.S. Phek Case No. 09/2020 was registered under Section 20(b) NDPS Act. The contraband was photographed and samples of the seized ganja was taken in the presence of the Judicial magistrate (PW-7) and sent to the FSL, Dimapur for examination. The FSL Report (Exhibit-5) confirmed that the contraband seized was ganja and after investigation of the case was concluded, the case I.O. (PW-6) submitted a charge-sheet, on finding a prima facie case under Section 20(b) of the NDPS Act against the appellant and co-accused, Lhuvekhü Venyo, who was the driver of the car.

4. Charge under Section 20(b) of the NDPS Act read with Section 34 of the IPC was framed against the appellant and the co-accused on 10.11.2021, to which they pleaded not guilty and claimed trial. The learned Trial Court examined seven (7) Prosecution witnesses. The appellant and the co-accused were thereafter examined under Section 313 of CrPC. After hearing the final arguments of the parties, the learned Trial Court, vide the impugned judgment and order, came to a finding that there was no evidence against the co-accused with regard to transporting the seized contraband which had been found in the abandoned car. The co-accused was accordingly acquitted of the charge framed against him. However, with respect to the appellant, the learned Trial Court came to a finding that he had hired the car and as such, was in conscious possession of the contraband ganja, despite the fact that he was not having physical possession of the same when the abandoned car was found.

5. The learned Trial Court having found the appellant guilty of constructive/conscious possession of the contraband, he was convicted under Section 20(b) of the NDPS Act and sentenced to undergo rigorous imprisonment for fifteen (15) years with a fine of Rs. 2,00,000/- (rupees two lakhs), in default further rigorous imprisonment for two (2) years.

6. Being aggrieved by the impugned Judgment and order passed by the learned Trial Court, the appellant has assailed the same on the ground that the appellant was neither the owner of the contraband nor was he in constructive/conscious possession of the

same. The learned counsel for the appellant submits that none of the prosecution witnesses have testified that the appellant was the owner of the ganja. He submits that the seized contraband had not been produced in the Court to prove that 200 Kgs of ganja had been seized by the Police. He further submits that the FSL Report dated 15.01.2021 shows that plant materials had been examined by the FSL, which proved that ganja had not been seized by the Police, in-as-much as, Section 2(iii)(b) of the NDPS Act defines ganja to be a flowering or fruiting top of the cannabis plant. As such, the contraband recovered by the Police was not ganja, as the FSL report did not specify that it had examined any flowering or fruiting top of a cannabis plant.

7. Mr. K. Angami, learned P.P. submits that the sealing and packing of the seized contraband was done in the presence of a Judicial Magistrate, First Class, and that photographs of the same were also taken. He also submits that the photographs have been exhibited by the prosecution witnesses before the learned Trial Court as Exhibit-P6 & P7. The learned P.P. further submits that evidence of the Magistrate First Class, before whom the contraband had been sealed and packed, shows that samples of ganja had also been drawn in her presence. The samples drawn were sent to the FSL for examination. He submits that the FSL Report, which is Exhibit-5, states that the contraband seized had given positive test for ganja. As such, the stand taken by the learned counsel for the appellants that the seized contraband was not ganja is disproved by the FSL Report, (Exhibit-5).

8. The learned P.P. also submits that evidence of the prosecution

witnesses proved that the contraband was seized from the abandoned car and that the same weighed 200 Kgs. Further, in view of Section 35 & 54 of the NDPS Act, which presumes the existence of the "culpable mental state" of an accused, with regard to an act charged as an offence under the NDPS Act, the evidence proved that the appellant was in constructive/conscious possession of the seized contraband as he had hired the vehicle for transporting the contraband. He submits that the same has been stated by the co-accused, who was the driver of the abandoned car and who had been acquitted by the learned Trial Court. He submits that as there is no infirmity with the judgment passed by the learned Trial Court, the same should not be interfered with.

9. We have heard the learned counsels for the parties.

10. The evidence of PW-1, who is an Assistant Sub-Inspector of Police, is to the effect that the incident occurred around 7:30 P.M. on 29.10.2020, when the police were conducting checks on vehicles at Zuketsa road. A white Maruti Alto bearing Registration No. NL 01P 2429, which was coming towards them suddenly turned around and went towards Lekromi Village. On chasing the vehicle, they found it abandoned at Lekromi Village. On checking the inside of the car they found 20 packets of ganja. The seized ganja was brought to the Police Station and the same was weighed, wherein it was found that it weighed approximately 200 Kgs. PW-1 identified the FIR which had been filed by him and the same was exhibited as Exhibit P-1. He also identified the co-accused Lhuvekhu. In his cross-examination PW-1 agreed to the suggestion that the vehicle of the co-accused, Lhuvekhu had been hired by the appellant and that

there were no independent witnesses when the contraband ganja was seized. He also agreed to the suggestion that the contraband ganja belonged to some other person and not to the co-accused, Lhuvekhu.

11. The evidence of PW-2, who is a farmer from Lekromi Village is to the effect that when he came out of his house at around 7:00-8:00 P.M. on 29.10.2020, he saw vehicles with their lights on. Thinking that vehicles may have broken down, he went down to give the people there tea. However, he saw that the Police had surrounded one Maruti Alto vehicle and packets of ganja were lying outside the vehicle. He did not see the accuseds. PW-2 also stated that he could identify the packet of ganja produced in the Court. He identified the seizure memo as Exhibit-P2 and the seized ganja packet as Exhibit-P3.

In his cross-examination, PW-2 stated that none of the accused were arrested when the seizure was made by the Police. He also stated that he did not know how many kilograms of ganja were seized except that there were twenty (20) packets of the same. He has further agreed to the suggestion that he did not know whether the contraband ganja kept outside the vehicle had been produced in the Court on that day.

12. The evidence of PW-3, a resident of Pfutsero, who works in an NGO, i.e, the Foundation for Ecological Security, is to the effect that some time in 2021 at around 11:00 P.M, he was asked by the appellant to drop the appellant and his driver to Pfutsero. As his vehicle was a taxi, his brother, Kevingulo dropped them to Pfutsero.

13. The evidence of PW-4, who is a retired Sub-Inspector of Police is to the effect that he had registered the present case, as he was the Registering Officer. He stated that he registered the FIR filed by the PW-1 in respect of the twenty (20) ganja packets seized from the abandoned Alto vehicle. PW-4 identified his signature in the FIR. In his cross-examination PW-4 agreed to the suggestion that twenty (20) packets of ganja weighing approximately 200 Kgs. were produced in the Police Station at Pfutsero. He also agreed to the suggestion that he did not weigh the seized contraband ganja and that the accused persons were not produced in the Police Station on the said date.

14. The evidence of PW-5, who was serving as a Station Rider posted at Pfutsero Police Station, is to the effect that on 30.10.2020 an FIR was lodged regarding seizure of contraband ganja from one Maruti Alto 800. PW-5 also stated that he was a witness to the arrest of the accused persons, i.e. the appellants and the co-accused, Lhuvekhu. In his cross-examination, PW-5 stated that co-accused was arrested on the following day and not on the day of the incident. He also agreed to the suggestion that the appellant surrendered himself before the Police.

15. The evidence of PW-6, who was serving as Unarmed Branch Sub-Inspector and was the I.O. of the case, is to the effect that Pfutsero P.S. Case No. 0009/2020 under Section 20(b) NDPS Act was registered on the basis of an FIR dated 30.10.2020 submitted by PW-1. The case was endorsed to him for investigation. PW-6 stated that the contraband ganja weighing approximately 200 Kgs. was seized in the presence of independent witnesses from Maruti

Alto 800 bearing Registration No. NL 01P 2429. The owner of the seized vehicle was identified through RTO Vehicle Registration app. The driver, Lhuvekhu was arrested from his residence and on interrogation, the driver Lhuvekhu stated that the contraband belonged to the appellant. Further the appellant had hired him to transport the contraband to Pfutsero. In pursuance to the statement made by the co-accused driver, a raid was conducted at the house of the appellant. However, he could not be arrested. On 02.11.2020, the appellant surrendered himself before the Police Station. PW-6 further stated that on interrogation of the appellant, the appellant's statement was found to corroborate the statement of the co-accused, as the appellant stated that he hired the vehicle of the co-accused, Lhuvekhu with the intention to transport the contraband to Pfutsero. Further the appellant revealed his intention to transport the contraband to the co-accused, only after they had crossed PWD Colony, Pfutsero. As checking was going on by the Police, the appellant instructed the driver to turn the vehicle towards Lekromi Village and on reaching the place they fled, after leaving the car behind. After noticing that the Police had gone, the appellant contacted a person at Kade Village and asked him to pick them up and drop them to Pfutsero town. The accused were thereafter brought before the Court and placed in judicial custody. The seizure list was prepared by the OC, Pfutsero and produced before the Court. Sealing and packing of the contraband was also done in the presence of the Judicial Magistrate, First Class and photographs were also taken. The exhibits were forwarded to the SP, Phek and expert opinion was sought for from the FSL. The FSL Report confirmed that the contraband seized was ganja.

16. PW-6, in his evidence further states that the appellant was also involved in another criminal case, vide PS Pfutsero Case No. 0009/2012 under Section 20(b) of the NDPS Act. PW-6 exhibited the charge-sheet as Exhibit-P4, the FSL Report as Exhibit-P5, the photographs of the place of occurrence and the sample drawn before the Magistrate as Exhibit-P6 & P7 respectively.

17. The evidence of PW-7, who was serving as Judicial Magistrate First Class, Phek, is to the effect that the samples were drawn in her presence. PW-7 also identified her signature as Exhibit-P7(A), which is a photograph of the sample drawn before the Magistrate.

18. The examination of the appellant under Section 313 of the Code of Criminal Procedure is to the effect that he has no knowledge with regard to recovery of the contraband from the white Maruti Alto car bearing Registration No. NL 01 2429 as he had gone to Kohima with his son. He heard that Police were searching for him and thus, he went to the Police Station to find out why they were searching for him. However, he was arrested as he was alleged to be the owner of the seized ganja. The appellant further states that he had no knowledge about any statement being made by him before the Police that the contraband ganja belonged to him.

19. The examination of the co-accused, Lhuvekhu under Section 313 of the Code of Criminal Procedure is to the effect that he was driving the vehicle on the orders of the appellant and they had turned the vehicle on seeing the Police at the instance of the appellant. The co-accused, Lhuvekhu also stated that he was not aware why the appellant had hired the vehicle. Further he was also not aware that the loaded goods were contraband ganja.

20. The learned Trial Court had framed four questions to be decided, which are as follows :

- "i. Whether the contraband seized from the abandoned car is ganja.*
- ii. Whether the seized contraband of 20 packets weighed 200 kilograms.*
- iii. Whether Wilson had culpable mental state in the possession and control of huge quantity of ganja.*
- iv. Whether Lhuveku aided Wilson in assisting and transporting of the ganja."*

21. With regard to the first question, the learned Trial Court came to a finding that as the contraband had been seized from the vehicle and the FSL Report had confirmed the same to be ganja, the seized contraband found in the Car was ganja. While coming to the above finding, the learned Trial Court had considered the fact that the I.O. (PW-6) had testified that he had prepared the samples of the contraband and sent the same to the FSL for chemical analysis. The FSL Report had thereafter proved that the seized contraband was ganja. On considering the finding made by the learned Trial Court on this issue, we find that there is nothing to connect the FSL Report dated 15.01.2021 with the seized contraband, inasmuch as, the FSL Report dated 15.01.2021 had not been exhibited. As can be seen from the evidence of the prosecution witnesses, only PW-6 (IO) stated he was exhibiting the FSL Report as Exbt.P-5. However, while exhibiting an alleged FSL Report as Exbt.P-5, there is nothing the FSL Report dated 15.01.2021 was exhibited . The memo number of the FSL Report was necessary due to the fact that though there is a FSL Report in the Lower Court's records bearing No. PHQ/IGP/CID/FSL/DMR/NAR/66/97/C-945/2020 dated 15.01.2021 issued by the Office of the Forensic Science Laboratory, Nagaland,

Dimapur, there is no mark exhibiting any such document. There is no signature of the learned Trial Court Judge on the above said FSL Report date 15.01.2021. Thus, there is no document exhibited as Exhibit P-5. The above may be an unintentional mistake committed on the part of the learned Trial Court. The Memo No.DEF/PK/CB-68/2020-21/05 dated 17.11.2020 advising the examination of 10 parcels, which were samples to be examined by the FSL, as reflected in FSL Report dated 15.01.2021 has also not been exhibited before the learned Trial Court. There is nothing to show that the above letter No.DEF/PK/CB-68/2020-21/05 dated 17.11.2020 mentioned in the FSL Report dated 15.01.2021 (which has not been exhibited) was in relation to the samples taken from the 20 packets of contraband ganja seized by the police, inasmuch as the FSL report dated 15.01.2021 only speaks of 10 envelopes, which are Exhibit A to J.

22. No evidence has been led with regard to whether the samples had been taken out from all the 20 packets of seized contraband and put in 10 envelopes for examination by the FSL. Thus there is a doubt that 20 packets of contraband ganja approximately weighing 200 kilograms had been seized from the car. As such, the link between the examination of ganja carried out in terms of the FSL report dated 15.01.2021 and the contraband ganja found in the car has not been proved by the prosecution. Keeping in view the fact that the prosecution has not been able to prove that the contraband seized from the car had been sent to the FSL for examination and as no FSL Report had been exhibited and in the absence of the signature of the learned Trial Court Judge proving that a particular document was the FSL Report, we are of the view that the

prosecution has not been able to prove that the seized contraband was ganja.

23. With regard to the second issue, we find that only PW-2 (civilian seizure witness) has stated that he could identify the packet of ganja produced in the Court, which was exhibited as Exbt.-3. Further, no other witness other than PW-2 has acknowledged the seizure memo. The maker of the seizure memo (Exbt-2) is PW-1. PW-1 should have exhibited Exbt-2. However, the same has not been done and neither has PW-1 identified his signature in Exbt-2. No other prosecution witness has identified the seized contraband. The evidence of PW-2 is to the following effect :-

“ I can identify the packet of ganja produced in the Court. The Exbt.-2 is the Seizure Memo and Exbt.P2(a) is my signature. Exhibit-3 is the seized packet of ganja”

24. When we look at the list of Court Exhibits, which have been reflected in the Appendix of the impugned judgment and order passed by the learned Trial Court, we find that the learned Trial Court has made a list of 10 Exhibits which includes signatures. The 10 Exhibits are as follows :

“List of Prosecution/Defence/Court Exhibits

A. Prosecution :

Sr. No.	Exhibit Number	Description
1.	Exhibit P-1	Sou-motu FIR
	Exhibit P-1(a)	Signature on the FIR
2.	Exhibit P-2	Seizure Memo
3.	Exhibit P-2(a)	Signature on the seizure memo
4.	Exhibit P-3	Seized packet ganja
5.	Exhibit P-4	Chargesheet
6.	Exhibit P-4(a)	Signature of the I.O

7.	Exhibit P-5	FSL Report
8.	Exhibit P-6	Photograph of place of occurrence
9.	Exhibit P-7	Photograph of sample drawn before Magistrate
10.	Exhibit P-7(a)	Signature of the Magistrate.

However, as can be seen from the preceding paragraphs, the only FSL Report which is in the Lower Court's record is the FSL Report dated 15.01.2021 and the same has not been exhibited. Further, the evidence of PW-2 does not indicate that the FSL Report dated 15.01.2021 was supposed to be Exbt.-P5.

25. As can be seen from the above "List of Prosecution/Defence/Court Exhibits" the Court describes Exhibit P-3 as "Seized packet ganja".

The above appears to indicate that only one packet of ganja (contraband) had been produced in the Court and not 20 packets, which had been seized by the police.

The evidence of all the witnesses, including PW-7, who is the Magistrate before whom samples of the contraband were drawn, does not reflect that Section 52 A of the NDPS Act has been followed by the prosecution with regard to the seizure of the contraband. No inventory of the seized contraband has been made under Section 52A.

26. Section 52A of the NDPS Act provides the procedure to be followed prior to disposal of the seized narcotic drugs and psychotropic substances. Section 52A(2) provides that where any narcotic drugs, psychotropic substances, controlled substances or conveyances have been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under Section 53, the officer referred to in Sub-Section (1) shall

prepare an inventory of such narcotic drugs, psychotropic substances, controlled substances or conveyances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs, psychotropic substances, controlled substances or conveyances or the packing in which they are packed, country of origin and other particulars as the officer referred to in Sub-Section (1) may consider relevant to the identity of the above in any proceedings under this Act and make an application, to any Magistrate for the purpose of:-

- (a) certifying the correctness of the inventory so prepared; or
- (b) taking, in the presence of such magistrate, photographs of such drugs, substances or conveyances and certifying such photographs as true; or
- (c) allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of samples so drawn.

Section 52A(3) provides that where an application is made under Sub-Section (2), the Magistrate shall, as soon as may be, allow the application.

Section 52A(4) provides that every court trying an offence under the NDPS Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.

27. In the present case, the evidence of the prosecution witness

does not show that all the 20 packets of contraband were produced before the Court, inasmuch as, the photographs which have been exhibited as Exbt.6 & 7 only shows 10 samples being packed in 10 envelopes. Further, the big packets seen in Exbt-P7, which if it is assumed to be the seized contraband, shows that there are only 10 packets. The evidence of the prosecution witnesses however is to the effect that 20 packets of ganja had been seized. As such it cannot be said that 20 packets of ganja had been seized by the Police. The inventory, photographs of drugs and any list of samples drawn which are certified by the Magistrate, if produced before the Court can be used as primary evidence in respect of such offence under the NDPS Act. In the event of no such inventory being made, the prosecution was duty bound to produce all the seized drugs before the Court and exhibit the same to prove that the same, had been recovered/seized from the car. However, the same does not appear to have been done.

28. As stated earlier, there is nothing to show that all the seized contraband have been produced before the learned Trial Court. As Section 52A(2) of the NDPS Act has not been complied with and as the photographs (Exbt.6 & 7) do not show that 20 packets of ganja had been seized or that 20 packets of samples had been drawn before the Magistrate First Class, for being sent to the FSL for examination, we hold that the prosecution has not been able to prove that 200 kilograms of ganja kept in 20 packets have been seized by the police.

29. In the case of *Mangilal vs. State of Madhya Pradesh*, reported in **2023 SCC OnLine SC 862**, the Supreme Court has

held that Sub-Section (2) of Section 52A of the NDPS Act mandates a competent officer to prepare an inventory of such narcotic drugs with adequate particulars and the inventory, photograph or list of samples drawn with certification of a Magistrate would constitute primary evidence. The Supreme Court further held that the best evidence would have been the production of the seized materials during trial which should be marked as material objects. The Supreme Court further held that omission on the part of the prosecution to produce the bulk quantity of the seized drugs would create a doubt in the mind of the Court on the genuineness of the samples drawn from the allegedly seized contraband.

30. In the case of **Union of India vs. Jarooparam**, reported in **(2018) 4 SCC 334**, the Supreme Court has held in paragrapha 10 & 11 as follows :

"10. Omission on the part of the prosecution to produce the bulk quantity of seized opium would create a doubt in the mind of the Court on the genuineness of the samples drawn and marked as A, B, C, D, E, F from the allegedly seized contraband. However, the simple argument that the same had been destroyed, cannot be accepted as it is not clear that on what authority it was done. Law requires that such an authority must flow from an order passed by the Magistrate. On a bare perusal of the record, it is apparent that at no point of time any prayer had been made by the prosecution for destruction of the said opium or disposal thereof otherwise. The only course of action the prosecution should have resorted to is for its disposal is to obtain an order from the competent court of Magistrate as envisaged under Section 52-

A of the Act. It is explicitly made under the Act that as and when such an application is made, the Magistrate may, as soon as may be, allow the application (see also Noor Aga v. State of Punjab, (2008) 16 SCC 417: (2010) 3 SCC (Cri) 748).

11. There is no denial of the fact that the prosecution has not filed any such application for disposal/destruction of the allegedly seized bulk quantity of contraband material nor was any such order passed by the Magistrate. Even no notice has been given to the accused before such alleged destruction/disposal. It is also pertinent here to mention that the trial court appears to have believed the prosecution story in a haste and awarded conviction to the respondent without warranting the production of bulk quantity of contraband. But, the High Court committed no error in dealing with this aspect the case and disbelieving the prosecution story by arriving at the conclusion that at the trial, the bulk quantities of contraband were not exhibited to the witnesses at the time of adducing evidence.

31. In the present case, the prosecution has apparently produced only one seized packet of ganja which is exhibited as Exbt.P-3. Thus, in terms of the judgment of the *Jarooparam (supra)*, the fact that Exbt.6 & 7 does not show that 20 packets of ganja had been seized or that 20 samples had been made from the seized ganja and due to absence of any inventory under Section 52A of the NDPS Act, we find that the prosecution has not been able to prove that the police had seized 20 packets of ganja.

32. In respect of the third issue, the learned Trial Court had come

to a finding that the appellant was in conscious possession of the contraband ganja, though he was not caught with physical possession of the same. The finding made by the learned Trial Court was on the basis of the evidence of PW-6 (IO), who had given his testimony based on his investigation and in view of the evidence of PW-3, which is to the effect that he had received a call from the appellant at around 11 p.m. in 2021 to drop the accused and his driver to Pfutsero, which was done by his brother Kewengulo. The learned Trial Court had also referred to Section 35 and 54 of the NDPS Act to come to a finding that the appellant was in conscious possession of the seized contraband and thus guilty of having committed the offence under Section 20(b) NDPS Act.

33. Section 35 of the NDPS Act provides that the Court shall presume the existence of a mental state of an accused in any prosecution for an offence under the NDPS Act, which requires a culpable mental state of the accused. However, it shall be a defence for the accused to prove that he had no such mental state with respect to an offence in that prosecution. Section 54 of the NDPS Act provides that it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under the NDPS Act in respect of any narcotic drug or psychotropic substance or controlled substance etc. Thus, the presumption of a culpable mental state, regarding the guilt of an accused, can be presumed until proven otherwise under Section 35 and 54 of the NDPS Act. However, the same does not take away the burden of the prosecution to first prove the foundational facts against the accused. It is only when the foundational facts of a case are proved by the prosecution, that the reverse burden of proof comes into

play.

34. In the case of **Naresh Kumar vs. State of Himchal Pradesh**, reported in **(2017) 15 SCC 684** the Hon'ble Supreme Court has held that the presumption against an accused of culpability under Section 35 and Section 54 of the NDPS Act to explain possession satisfactorily are rebuttable. It does not dispense with the obligation of the prosecution to prove the charge beyond all reasonable doubt. The presumptive provision with reverse burden of proof does not sanction conviction on the basis of preponderance of probability. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. In the present case, the prosecution has failed to establish the foundational facts with regard to the seizure of the contraband and proof of the same being ganja.

35. In the present case, the appellant was not present when the contraband was seized by the police. No prosecution witnesses have identified the appellant being in the place of seizure. The evidence of PW-3 has been relied upon by the learned Trial Court to come to a finding that the appellant was in conscious possession and control of the seized contraband on the ground that the appellant and the co-accused were dropped by the driver of PW-3 on the night of the incident. The evidence of PW-3 is to the effect that sometime in 2021 at around 11 p.m., he had been asked by the appellant to drop him and his driver to Pfutsero. PW-3 has nowhere stated that the appellant had asked him to drop him to Pfutsero on the night when the contraband was recovered from the car i.e, on 29.10.2020. PW-3 has stated that it was sometime in "2021". Further, PW-3 has not

been declared a hostile witness. As the evidence of PW-3 had been admitted as evidence by the learned Trial Court, without taking into account the fact that the recovery of contraband ganja had been made on 29.10.2020, while the appellant and his driver had been dropped to Pfutsero in the year 2021 at around 11 p.m, there being a gap between the date of seizure of the contraband and the actual dropping of the appellant and his driver to Pfutsero village, the evidence given by PW-3 cannot be relatable to the seized contraband and as such, the learned Trial Court could not have come to any adverse findings against the appellant on the basis of the evidence of PW-3. The above being said, the evidence of the I.O is only based on his investigation and his evidence would have been only on the basis of the statements given to him by the witnesses. However, statements given to a police officer under Section 161 Cr.P.C is not admissible as evidence and can only be used for contradicting the evidence given by the said witness and for omissions. It cannot be relied upon for convicting an accused.

36. In the case of *Parvat Singh and others vs. State of Madhya Pradesh*, reported in **(2020) 4 SCC 33**, the Hon'ble Supreme Court has held that statement under Section 161 CrPC is inadmissible in evidence and cannot be relied upon for conviction. As such the evidence of PW-6, who is the I.O., which is based upon the statements made by the witnesses during investigation, cannot be the basis for coming to a finding that the appellant was guilty of the offence, as the statements made under Section 161 CrPC are inadmissible.

37. In this case there is nothing to show the connection between the appellant with the seizure of the contraband drugs. In the case

of **Mohan Lal vs. State of Rajasthan**, reported in **(2015) 6 SCC 222**, the Hon'ble Supreme Court has held that the term "possession" consists of two elements. First it refers to the physical control and secondly it refers to the animus or intent which has reference to exercise of the said control. The Hon'ble Supreme Court in the above case held that in terms of Black's Law Dictionary, the term "possession" in the context of narcotic drugs laws means actual control, care and management of the drug. Possession, as an element of offence of contraband is not limited to actual manual control upon or about the person, but extend to things under one's power and dominion. In the present case, the evidence does not show that the appellant was the owner of the seized contraband or that he had dominion and control over the seized contraband.

As such, we are of the view that the learned Trial Court could not have come to a finding that the appellant was in conscious possession and control of the contraband goods, as the connection between the appellant and the contraband cannot be said to have been proved on the basis of the evidence of PW-3 and PW-6.

38. With regard to whether the co-accused Lhuvekhu had aided the appellant in assisting and transporting of the contraband, the learned Trial Court had come to a finding that except for the appellant hiring the vehicle of the co-accused for transporting ganja, there was no incriminating evidence against the co-accused with regard to whether he had the knowledge and intention to assist and transport the contraband in his vehicle. Further, as the co-accused had stated that he was not aware that the goods loaded in the vehicle was ganja and as the appellant had stated before the police that there was no involvement of the co-accused, the learned Trial

Court came to a finding that there was absolutely no evidence against the co-accused, to hold that he was in any manner having the mental state to commit the offence of assisting and transporting the contraband in connivance with the appellant.

39. On scrutiny of the impugned Judgment and Order we find that there is no discussion made by the learned Trial Court regarding the production of the seized contraband in the Court. Further the evidence of the Prosecution Witnesses shows that it is only a civilian witness (PW-2) who has exhibited the seizure memo which had been made by PW-1. PW-1, who is the seizing officer, has not exhibited the seizure memo and neither has he identified the seizure memo in his evidence. PW-2, who had exhibited the seizure memo was not the person who had recovered or seized the *ganja*. He was only a witness to the seizure. In fact, in his evidence, PW-2 had stated that he reached the vehicle and found Police had surrounded the vehicle and some packets of ganja were lying outside the vehicle. The seizure memo which is Exhibit-P2 shows that there was another civilian witness named Zaseveyo. However, the said Zaseveyo was not made a witness in the charge-sheet and as such, he was not examined during trial.

40. On a perusal of the examination of the appellant under Section 313 of the Code of Criminal Procedure, we find that the questions put to the appellant are not in relation to the evidence adduced. It is more in the form of an interrogation, to find out whether they were involved in the transportation of the ganja which was apparently found in the abandoned car. In the case of ***Rajkumar vs. State (NCT) of Delhi***, reported in ***2023 SCC Online 609***, the Hon'ble

Supreme Court has held that while examining the accused under Section 313 of the Code of Criminal Procedure the accused should be drawn to every inculpatory material so as to enable him to explain it as the same is a basic fairness of a criminal trial. Failure in this area may gravely imperil the validity of the trial itself. The Hon'ble Supreme Court further held that in the event of evidentiary material not being put to the accused, the Court must ordinarily eschew such material from consideration. The Hon'ble Supreme Court in the above case at para 17 has summarized the law laid down by them in various cases and as such, para 17 of the said judgment is reproduced below as follows:-

"17. The law consistently laid down by this Court can be summarized as under:

(i) It is the duty of the Trial Court to put each material circumstance appearing in the evidence against the accused specifically, distinctively and separately. The material circumstance means the circumstance or the material on the basis of which the prosecution is seeking his conviction;

(ii) The object of examination of the accused under [Section 313](#) is to enable the accused to explain any circumstance appearing against him in the evidence;

(iii) The Court must ordinarily eschew material circumstances not put to the accused from consideration while dealing with the case of the particular accused;

(iv) The failure to put material circumstances to the accused amounts to a serious irregularity. It will vitiate the trial if it is shown to have prejudiced the accused;

(v) If any irregularity in putting the material circumstance to the accused does not result in failure of justice, it becomes a curable defect. However, while deciding whether the defect can be cured, one of the considerations will be the passage of time from the date of the incident;

(vi) In case such irregularity is curable, even the appellate court can question the accused on the material circumstance which is not put to him; and

(vii) In a given case, the case can be remanded to the Trial Court from the stage of recording the supplementary statement of the concerned accused under [Section 313](#) of CrPC.

(viii) While deciding the question whether prejudice has been caused to the accused because of the omission, the delay in raising the contention is only one of the several factors to be considered."

41. The examination of the co-accused, Lhuvekhu under Section 313 is also in the interrogatory form. However, the examination of the co-accused under Section 313 CrPC is with regard to whether the appellant was in the vehicle at the relevant point of time with goods. Questions to be asked during examination under Section 313 CrPC have to be only with regard to the evidence recorded against the accused to enable them to give an explanation of the same. It cannot be used for trying to find answers to questions not based on evidence. As stated in the forgoing paragraphs, PW-1, who is the Seizing Officer has not identified the seized ganja and had not identified the seizure memo, i.e. Exhibit-P2. In this regard, we have to keep in view the fact that the explanation given under Section 313 CrPC cannot be used as a basis for convicting an accused, let alone the explanation given by a co-accused, unless the same corroborates some other evidence. In the case of **Ashok Debbarma vs. State of Tripura**, reported in (2014) 4 SCC 747, the Hon'ble Supreme Court has held that statements under Section 313 CrPC solely by themselves are not enough for conviction. They can be used for corroboration along with other evidence for conviction. In view of the above, the explanation given by the co-accused with regard to the appellant being in the vehicle with the seized goods at the relevant point of time, during his examination under Section 313 CrPC, which is not corroborated by any other

evidence, cannot in our view, be the basis for coming to a finding that the appellant is guilty of the offence.

42. The facts of the case thus show that the prosecution had to prove the case against the appellant by way of circumstantial evidence, wherein every other possible hypothesis regarding the innocence of the appellant could not find place, in the chain of evidence that had been recorded by the learned Trial Court. However, in the present case the prosecution has not been able to exclude the possibility of the appellant being innocent. Further, they have not been able to prove the seizure of the contraband and that the same was ganja. In the case of **Sharad Birdhichand Sarda vs. State of Maharashtra**, reported in **(1984) 4 SCC 116** the Hon'ble Supreme Court has held that the following conditions must be fulfilled before a case against an accused can be said to be fully established:-

- "(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established.*
- (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,*
- (3) the circumstances should be of a conclusive nature and tendency.*
- (4) They should exclude every possible hypothesis except the one to be proved, and*
- (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human possibility the act must have been done by the accused."*

43. The above being said the learned Trial Court should have framed a specific charge under Section 20(b)(ii)(C) NDPS Act, as the seized contraband was approximately 200 Kgs of ganja, which is commercial quantity. However, the learned Trial Court had only framed charge under Section 20(b) and convicted the appellant under Section 20(b) NDPS Act. Section 20 of the NDPS Act states as follows:-

"20. Punishment for contravention in relation to cannabis plant and cannabis,- Whoever, in contravention of any provisions of this Act or any rule or order made or condition of licence granted thereunder,-

(b) produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable-

[(i) where such contravention relates to clause (a) with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine which may extend to one lakh rupees; and

(ii) where such contravention relates to sub-clause (b),-

(A) and involves small quantity, with rigorous imprisonment for a term which may extend to [one year], or with fine, which may extend to ten thousand rupees, or with both;

(B) and involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees;

(C) and involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees.

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

A reading of Section 20 of the NDPS Act, read with the Notification specifying small quantity and commercial quantity, would show that Section 20(b)(ii)(A) applies to seizure of ganja

which is up to 1Kg, while Section 20(b)(ii)(B) applies to seizure of ganja over 1 Kg till 20 Kgs. Section 20(b)(ii)(C) NDPS Act would relate to seizures above 20 Kgs of ganja.

44. Thus, on the above count also, the learned Trial Court has committed an error in framing charge only under Section 20(b) NDPA Act and convicting the appellant under Section 20(b), while sentencing him in terms of Section 20(b)(ii)(C) NDPS Act. Section 211(4)(5) of CrPC provides that the law and Section of law against which the offence is said to have been committed shall be mentioned in the charge:-

"211(4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case."

However, as can be seen in the present case, the learned Trial Court has not framed the charge under the specific provision of the NDPS Act, but has framed a very general charge, encompassing different punishments.

45. In view of the reasons stated above, we find that the prosecution has not been able to the initial burden beyond all reasonable doubt to prove the guilt of the appellant under Section 20(b) of the NDPS Act. Accordingly, we do not find the impugned Judgment passed by the learned Trial Court to be sustainable. We set aside the impugned Judgment and Order dated 29.08.2022 passed by the Court of Special Judge, NDPS Act Phek, in Sessions

(Special) Case No. 01/2021. The appellant is accordingly acquitted of the charges framed against him and he be released from judicial custody, if not wanted in any other case.

46. Send back the LCR.

47. The appeal is accordingly allowed.

Sd/-
JUDGE

Sd/-
JUDGE

Comparing Assistant