

**IN THE HIGH COURT OF ORISSA, CUTTACK**

**CRLA No.58 of 2017**

From the judgment and order dated 12.12.2016 passed by the Special Judge, Rayagada in C.T. Case No.119 of 2013.

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Anil Benia

.....

Appellant

-Versus-

State of Odisha

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Respondent

For Appellant:

Mr. J.R. Dash

For Respondent:

Mr. Arupananda Das  
Addl. Govt. Advocate

P R E S E N T:

THE HON'BLE MR. JUSTICE S.K. SAHOO

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Date of Hearing: 15.09.2022

Date of Judgment: 01.11.2022  
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**S.K. SAHOO, J.** The appellant Anil Benia faced trial in the Court of learned Special Judge, Rayagada in C.T. Case No.119 of 2013 for offence punishable under section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter 'N.D.P.S. Act') on the accusation that on 21.08.2013 at about 2.00 p.m. at Muniguda Railway station, he along with two others were found in possession of five airbags containing flowering and

fruiting tops of cannabis plant (ganja) of commercial quantity weighing 91 kgs. 350 grams in an auto rickshaw bearing registration no.OR-07J-6591 in the process of transporting the same to Titilagarh without having any authority or licence to possess it.

The learned trial Court vide impugned judgment and order dated 12.12.2016 found the appellant guilty under section 20(b)(ii)(C) of the N.D.P.S. Act and sentenced him to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/- (rupees one lakh), in default, to undergo further rigorous imprisonment for a period of one year.

2. The prosecution case, in short, is that on 21.08.2013 P.W.9 Ganapati Behera, S.I. of Police, Rayagada G.R.P.S., in absence of the IIC, was in charge of the said police station. On that day at about 5.00 a.m., he along with other G.R.P.S. personnel were performing patrolling duty near Muniguda Railway station area and at about 2.00 p.m., they found one auto rickshaw bearing registration No.OR-07J-6591 was coming in a high speed in the side of Muniguda Railway station. When they stopped the auto rickshaw, the driver of the auto rickshaw fled away, leaving the auto rickshaw. P.W.9 and other police staff found acute smell of ganja was coming out of the vehicle

loaded with airbags and they noticed two other persons were sitting inside the auto rickshaw and five airbags were loaded therein. Thereafter, P.W.9 called two independent witnesses, namely, Rasmikanta Behera (P.W.2) and Sansar Luhar (P.W.3) who came near the auto rickshaw and also found smell of ganja emitting from it. P.W.9 interrogated the two persons found present in the auto rickshaw who confessed that the airbags contained contraband ganja which they were taking to Titilagarh for disposal. P.W.9 asked both the accused persons about their names, who disclosed their names as Anil Benia (appellant) and Prafulla Lima. He further asked them whether they wanted to be searched in presence of a Magistrate or by him (P.W.9), to which both the accused persons gave their written option that they wanted to be searched in presence of a Magistrate. From the spot itself, P.W.9 intimated to Sub-divisional Magistrate, Gunupur over phone for deputation of one Executive Magistrate for the purpose of remaining present at the time of search and seizure. P.W.9 took steps to guard the auto rickshaw as well as two culprits till arrival of the Executive Magistrate. The Tahasildar, Muniguda, namely, Tapan Kumar Satapathy (P.W.7) was deputed by the Sub-divisional Magistrate, Gunupur and he arrived at the spot at 4.00 p.m. P.W.7 gave his identity to the

accused persons and after giving written option to the accused persons, in his presence, the airbags were brought down and when those were opened, flowering and fruiting tops of the cannabis plant packed in polythene packets were found inside the airbags. The auto rickshaw so also the airbags were seized under seizure list Ext.3/2. On weighment, the five airbags seized were found containing 19 kgs. 660 grams, 20 kgs. 020 grams, 17 kgs. 980 grams, 18 kgs. 080 grams and 15 kgs. 610 grams of ganja and as such, the total became 91 kgs. 350 grams. P.W.5 collected samples of 25 grams in duplicate from each of the five packets and those were marked as A-1, A-2, B-1, B-2, C-1, C-2, D-1, D-2, E-1 and E-2. P.W.9 prepared paper slips containing the signatures of the independent witnesses, i.e. P.Ws.2 and 3, weighman Mohammad Nazar (P.W.4), P.W.7, the accused persons and of himself. One paper slip was kept in each of the sample packets and it was sealed and another paper slip was put over it. The bulk ganja packets were also sealed by using paper slips as per seizure list Ext.6. The sample packets were seized under seizure list Ext.14/1 in presence of the witnesses. While sealing the sample packets and bulk ganja packets, one rupee coin and wax were used. On personal search of the accused persons, one wrist watch and one silver ring were seized from

accused Prafulla Lima under seizure list Ext.15/1 in presence of the witnesses so also one mobile hand set and Rs.20/- were seized from appellant Anil Benia under seizure list Ext.16/1. The weighing machine and coin used for sealing were seized under seizure list Ext.17/1 and those were left in the zima of P.W.4. The appellant and the co-accused Prafulla Lima were arrested. P.W.9 brought the accused persons so also the seized articles to G.R.P.S., Rayagada and drew up the first information report (Ext.20) at Rayagada G.R.P.S. and in the absence of the IIC, he registered the case as G.R.P.S. Rayagada P.S. Case No.41 dated 21.08.2013 under section 21(b) of the N.D.P.S. Act.

P.W.9 himself took up investigation and preserved the seized articles in P.S. malkhana. On 22.08.2013 he sent a detailed report to the Superintendent of Police, Railway Police, Rourkela and forwarded the accused persons to Court. On the same day, P.W.9 seized the malkhana register under seizure list Ext.21 and kept the same in his own zima as per zimanama Ext.22. On 23.08.2013 P.W.9 sent the sample packets containing ganja marked as A-1, B-1, C-1, D-1 and E-1 to the R.F.S.L., Berhampur through S.D.J.M., Rayagada as per the orders of the learned Special Judge, Rayagada under forwarding report Ext.23. Constable No.255 Prafulla Nayak produced the sample packets

before R.F.S.L. and obtained acknowledgment. P.W.9 verified the ownership of the seized auto rickshaw and ascertained that it belonged to one Hari Saran Das of village-Nalabanta, P.S.-Aska, District-Ganjam. On 30.09.2013 P.W.9 seized the detailed report submitted to the office of the Superintendent of Police, Railway Police, Rourkela under seizure list Ext.25 and left the same in the zima of Sangita Toppo, Inspector, D.C.R.B. He received the chemical examination report vide Ext.27 and submitted charge sheet on 17.12.2013 against the appellant, co-accused Prafulla Lima and auto driver Kuna Panda showing him as absconder under section 21(b) of the N.D.P.S. Act.

3. The appellant along with co-accused Prafulla Lima were charged under section 20(b)(ii)(C) of the N.D.P.S. Act for illegal transportation of 91 kgs. 350 grams of contraband ganja in an auto rickshaw to which both of them refuted, pleaded not guilty and claimed to be tried.

During course of trial, the co-accused Prafulla Lima, who was granted interim bail for one month, did not surrender for which non-bailable warrant of arrest was issued against him and the case against him was splitted up and only the appellant Anil Benia faced the trial.

4. During the course of trial, in order to prove its case, the prosecution examined ten witnesses.

P.W.1 Prabin Kumar Kuanr who was the A.S.I. of G.R.P.S. was one of the members of the patrolling party and he stated about the detention of the vehicle, presence of the appellant and co-accused in the said vehicle and seizure of contraband ganja from the vehicle. He further stated about the seizure of station diary by P.W.9 as per seizure list Ext.1 and leaving the same in his (P.W.1) zima as per zimanama Ext.2.

P.W.2 Rashmikanta Behera who was the Station Master of Muniguda Railway station, did not support the prosecution case. He proved his signatures on some papers.

P.W.3 Sansar Luhar who was the licensed Railway porter of Muniguda Railway station, did not support the prosecution case. He proved his signatures on some papers.

P.W.4 Mohammed Nazar, who was a dealer of lubricants also did not support the prosecution case. He proved his signatures on some papers.

P.W.5 Purna Chandra Sahoo who was the labourer in Muniguda Railway station, also did not support the prosecution case for which he was declared hostile.

P.W.6 Durga Prasad Dandasana was the constable No.54 attached to G.R.P.S. and he is also a witness to the seizure of ganja and stated about the preparation of seizure list.

P.W.7 Tapan Kumar Satpathy was the Tahasildar, Muniguda, who on receipt of a message from Sub-Collector -cum- S.D.M., Gunupur proceeded to the spot and he stated about the search and seizure of contraband ganja found in five airbags from the possession of the appellant and co-accused Prafulla Lima, collection of sample packets of ganja, sealing of the air bags and sample packets and preparation of the seizure lists in which he put his signatures.

P.W.8 Sadananda Pradhan was the A.S.I. of Police attached to Rayagada G.R.P.S. and one of the members of the patrolling party. He stated about the detaining of auto rickshaw and further stated about the presence of the appellant and the co-accused Prafulla Lima inside the vehicle. He further stated that the driver of the auto rickshaw fled away and the appellant so also co-accused Prafulla Lima confessed carrying ganja in the vehicle and disclosed their names. He also stated about the seizure of five airbags filled with ganja from the auto rickshaw. He further stated about the weighment of ganja, collection of samples of 25 grams of ganja in duplicate from each of the

packets and sealing of samples. He is a witness to the seizure list.

P.W.9 Ganapati Behera was the S.I. of Police attached to the Rayagada G.R.P.S. and in absence of the Inspector-in-charge, he was in charge of the police station. He stated about detaining of the auto rickshaw and presence of the appellant so also the co-accused Prafulla Lima inside the vehicle and running away of the driver, confession of the appellant and the co-accused to be carrying ganja in the vehicle, disclosure of their names, seizure of five numbers of airbags filled with ganja, weighment of ganja and collection of samples of 25 grams of ganja in duplicate from each of the packets and sealing of the packets, arrest of the appellant and the co-accused on 21.08.2013. He is the informant in the case so also the Investigating Officer, who on completion of investigation, submitted charge sheet against the appellant so also the co-accused persons.

P.W.10 Suresh Chandra Naik was the Inspector in-charge attached to Rayagada G.R.P.S., who produced the detailed report in connection with Rayagada G.R.P.S. Case No.41 of 2013 as per the direction of the Superintendent of Police, Railway, Rourkela.

The prosecution exhibited twenty eight documents. Ext.1 is the seizure list of station diary of Muniguda G.R. Beat House, Ext.2 is the zimanama of the said station diary, Ext.3/2 is the seizure list of auto rickshaw and five air bags containing ganja, Ext.4 is the written option given by co-accused Prafulla Lima, Ext.5 is the written option given by the appellant, Ext.6 is the seizure list of five air bags after weighment, Exts.7/4, 8/4, 9/4, 10/4 and 11/4 are the paper slips containing signatures of witnesses, Ext.12/1 is the seizure list of written option of the appellant, Ext.13/1 is the seizure list of written option of co-accused Prafulla Lima, Ext.14/1 is the seizure list of ten sealed exhibit packets, Ext.15/1 is the seizure list of personal belonging of co-accused Prafulla Lima, Ext.16/1 is the seizure list of personal belonging of the appellant, Ext.17/1 is the seizure of weighing machine and one coin used for sealing purpose seized from P.W.4, Ext.18/1 is the zimanama of the articles seized under Ext.17/1 given to P.W.4, Ext.19 is the spot map, Ext.20 is the first information report, Ext.21 is the seizure list of Malkhana register, Ext.22 is the zimanama of Malkhana Register, Ext.23 is the forwarding letter of exhibits to R.F.S.L., Berhampur, Ext.24 is the seizure list of acknowledgement of exhibits at R.F.S.L., Ext.25 is the seizure list of detailed report, Ext.26 is the

zimanama of detailed report, Ext. 27 is the chemical examination report and Ext.28 is the detailed report dated 22.08.2013.

The prosecution also proved ten material objects. M.O.I to M.O.V are the sealed bulk ganja and M.O.VI to M.O.X are the sample packets.

5. The defence plea of the appellant is that he was waiting at the railway station and the police brought him and foisted the case against him.

No witness was examined on behalf of the defence.

6. The learned trial Court after assessing the oral as well as documentary evidence on record has been pleased to hold that the presence of the accused persons and the seizure of ganja has remained unimpeached and the possession of the same by the accused persons cannot be doubted in view of the fact that one of the co-accused of the case being the driver of the auto rickshaw fled away from the spot leaving the auto rickshaw in a suspicious circumstance. It was further held that the presumption under sections 35 and 54 of the N.D.P.S. Act regarding the culpable mental state of the appellant so also regarding commission of an offence under the N.D.P.S. Act are succinctly established. It was further held that the seizure of contraband materials regarding quantity of contraband and

presence of the accused persons cannot be doubted and no fault can be found with the I.O. in ensuring the compliance of section 50 of the N.D.P.S. Act for which the veracity of the prosecution case cannot be suspected. Accordingly, the appellant was held guilty under section 20(b)(ii)(C) of the N.D.P.S. Act.

7. Mr. J.R. Dash, learned counsel appearing for the appellant contended that the independent witnesses, i.e. P.Ws.2, 3, 4 and 5 have not supported the prosecution case and basing on the evidence of the official witnesses, which are discrepant in nature, the order of conviction has been passed. He also highlighted that since the informant (P.W.9) is also the Investigating Officer of the case, who on completion of investigation submitted charge sheet, the appellant has been seriously prejudiced. Though it is the specific prosecution case that a one rupee coin was used for sealing the sample packets so also the bulk ganja packets, but neither the said coin was produced in Court with the seized articles at the first instance nor during trial. The malkhana register was also not produced. It is argued by Mr. Dash that the safe custody of the seized articles after its seizure and before its production in Court is a doubtful feature and therefore, the impugned judgment and order of conviction should be set aside.

Mr. Arupananda Das, learned Addl. Government Advocate, on the other hand, supported the prosecution case and contended that even though independent witnesses have not supported the prosecution case but in view of the settled position of law that the conviction can be based upon the evidence of the official witnesses and in a case of this nature where there are no such material contradictions or improbability features noticed in their evidence, no fault can be found with the impugned judgment. It is further argued that the seized articles along with the sample packets were kept in P.S. malkhana and malkhana register was also seized as per seizure list Ext.21 and non-production of malkhana register or copy thereof before the learned trial Court cannot be a ground to disbelieve the prosecution case as there is nothing on record that during the retention of the seized articles in the malkhana or prior to that, there was any chance of tampering with the same. Learned counsel further submitted that when the seized articles were produced and a prayer was made to send the sample packets for chemical examination, the learned Special Judge, Rayagada noticed that not only the five bulk ganja airbags marked as Exts.A to E but also ten sample packets were properly sealed and intact and accordingly, direction was issued to the learned

S.D.J.M., Rayagada to receive the same and keep the seized five bulk ganja airbags and five nos. of sample packets i.e. A-2, B-2, C-2, D-2, E-2 in safe custody and to send the other five sealed sample packets, i.e. A-1, B-1, C-1, D-1 and E-1 to the Deputy Director, R.F.S.L., Berhampur for chemical examination and opinion. It was further argued that on the basis of such direction issued, the learned S.D.J.M., Rayagada forwarded the sample packets A-1 to E-1 to the Chemical Examiner and the forwarding report also indicates the sample packets were properly sealed. The Chemical Examiner in its report Ext.27 also indicated that the impression of the seal which was found on the parcel corresponded to the seal impression forwarded and the exhibits were found to be fruiting and flowering tops of cannabis plant known as ganja and therefore, it cannot be doubted that the articles which were seized at the spot from the possession of the appellant and the co-accused were the very articles which reached the Chemical Examiner and there was no tampering with the same. Learned counsel for the State further argued that since the appellant was found in the auto rickshaw along with the co-accused persons and one of them fled away from the spot, who was the driver of the auto rickshaw and the other co-accused jumped bail during trial and absconded and the

appellant failed to satisfactorily discharge the burden of possession of such contraband articles, the learned trial Court has rightly utilized the provisions under sections 35 and 54 of the N.D.P.S. Act against the appellant in holding him guilty and since there is no illegality or infirmity in the impugned judgment, the appeal should be dismissed.

**Conviction basing on the evidence of the official witnesses:**

8. All the independent witnesses i.e. P.Ws.2, 3, 4 and 5 have not supported the prosecution case and they have stated that they did not know the appellant. They have been declared hostile by the prosecution under section 154 of the Evidence Act and cross-examined by the learned Special Public Prosecutor. Even if a witness is characterized as a hostile witness, his evidence is not completely effaced. The said evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony, if corroborated by other reliable evidence. The part of evidence of a witness as contained in examination-in-chief, which remains unshaken even after cross-examination, is fully reliable even though the witness has been declared hostile. The learned Special Public Prosecutor has failed to bring out anything from the cross-examination he made to the

witnesses to lend corroboration to the evidence of the official witnesses. The witnesses have stated that their signatures were taken in blank papers and they did not know as to why their signatures were taken. Therefore, the evidence of these witnesses is no way helpful to the prosecution and cannot be acted upon in any way.

Even though the independent witnesses examined in the case have not supported the prosecution case, but the same cannot be a ground to discard the prosecution case in toto. If the statements of the official witnesses relating to the search and seizure are found to be cogent, reliable and trustworthy, the same can be acted upon to adjudicate the guilt of the appellant. This Court will have to appreciate the relevant evidence and determine whether the evidence of the official witnesses is believable after taking due care and caution in evaluating their evidence.

**Whether the appellant is prejudiced as the informant (P.W.9) is also the Investigating Officer:**

9. In the case of **Mukesh Singh -Vrs.- State (Narcotic Branch of Delhi) reported in (2020) 79 Orissa Criminal Reports (SC) 924**, which is a five-Judge Constitution Bench decision constituted to decide the correctness of the ratio

laid down in the case of **Mohan Lal -Vrs.- The State of Punjab reported in (2018) 72 Orissa Criminal Reports (SC) 196**, it was held that whether the investigation conducted by the concerned informant was fair investigation or not is always to be decided at the time of trial. The concerned informant/investigator will be cited as a witness and he is always subject to cross-examination. There may be cases in which even the case of the prosecution is not solely based upon the deposition of the informant/informant -cum- investigator but there may be some independent witnesses and/or even the other police witnesses. The testimony of police personnel will be treated in the same manner as testimony of any other witness and there is no principle of law that without corroboration by independent witnesses, his testimony cannot be relied upon. It has also been held that there is no reason to doubt the credibility of the informant and doubt the entire case of the prosecution solely on the ground that the informant has investigated the case. Solely on the basis of some apprehension or the doubts, the entire prosecution version cannot be discarded and the accused is not to be straightway acquitted unless and until the accused is able to establish and prove the bias and the prejudice. While concluding, it was observed that in a case where the

informant himself is the investigator, by that itself cannot be said that the investigation is vitiated on the ground of bias or the like factor. The question of bias or prejudice would depend upon the facts and circumstances of each case. It was held that merely because the informant is the investigator, by that itself the investigation would not suffer the vice of unfairness or bias and therefore, on the sole ground that informant is the investigator, the accused is not entitled to acquittal. The matter has to be decided on a case to case basis. It was held that a contrary decision in the case of **Mohan Lal** (supra) and any other decision taking a contrary view that the informant cannot be the investigator and in such a case the accused is entitled to acquittal are not good law and they are specifically overruled.

Ordinarily if a police officer is the informant in a case, in the fairness of things, the investigation should be conducted by some other empowered police officer or at least the investigation should be supervised by some other Senior police officer as the informant police officer is likely to be interested in the result of the case projected by him. However, if the informant police officer in the exigencies of the situation conducts investigation and submits final form, it cannot be per se illegal. Investigation into criminal offences should be fair,

unobjectionable and should not percolate the apprehension in the minds of the accused that it is carried out unfairly and with designed motive. An onerous and responsible duty is cast on the investigating officer to conduct the investigation avoiding any kind of fabrication of evidence and his impartiality must dispel any suspicion. His prime duty is to bring out the real truth to instill confidence of the public and rule out the sense of being partitioned or to suppress. Any extraneous force and/or influence in the investigation process may result into tainted and unfair investigation. Thus the investigating agency should not be influenced by any extraneous influence and investigation must be done judiciously, fairly, transparently and expeditiously to secure the rule of law. The defence has to prove in what way such investigation is not impartial or it was unfair, biased or has caused prejudice to the accused.

P.W.9 has stated that he was the Sub-Inspector of Police at Rayagada G.R.P.S. and in the absence of I.I.C., he was in-charge of the police station. P.W.9 detected the case while he was performing patrolling duty with other G.R.P.S. personnel, conducted search and seizure and investigated the case and submitted charge sheet. Nothing has been brought out from his evidence to show that he was not impartial or his investigation

was unfair and he was biased and therefore, on the basis of some apprehension or the doubts, it cannot be said that the investigation made by P.W.9 has caused serious prejudice to the appellant.

**One rupee coin, malkhana register used for sealing not produced in Court:**

10. P.W.9 specifically stated that he sealed the packets and bags by means of one rupee coin and wax. He further stated that the coin used for sealing purpose belonged to him and it was a one rupee coin and such coins are normally available with everybody.

The prosecution is required to prove the proper sealing of seized articles and complete elimination of tampering with such articles during its retention by the investigating agency. Burden of proof of entire path of journey of the articles from the point of seizure till its arrival before chemical examiner has to be proved by adducing cogent, reliable and unimpeachable evidence. The brass seal used in sealing the contraband articles should be kept in the zima of a respectable person and it is required to be produced before the Court at the time of production of the seized articles and sample packets for verification by the Court. In the case in hand, no brass seal was

used for sealing purpose, but it was just a one rupee coin which was available with anyone. The evidence of P.W.9 regarding use of one rupee coin for sealing purpose is corroborated by the other official witnesses like P.W.7 and P.W.8. No question has been put to P.W.9 by the learned defence counsel as to why he did not use any brass seal, but one rupee coin for sealing purpose. Unless I.O. is asked a pertinent question in that respect, no adverse inference can be drawn against his conduct on surmise.

P.W.9 specifically stated that he was in charge of P.S. Malkhana and seized articles were kept in the Malkhana. He further stated that he seized P.S. Malkhana register at the P.S. under seizure list Ext.21. No question was put to the I.O. challenging that the seized articles were not kept in sealed condition in the P.S. Malkhana. P.W.9 has specifically stated that the entire operation of seizure was completed by 10 p.m. and therefore, there was no time left to produce the appellant and the seized articles on that very day in Court. The seized articles were produced on the next day before the learned Special Judge, Rayagada and a prayer was made by P.W.9 to send the sample packets for chemical examination. The learned Special Judge, Rayagada noticed and reflected in the order sheet that not only

the five bulk ganja airbags marked as Exts.A to E but also ten sample packets were properly sealed and intact and accordingly, direction was issued to the learned S.D.J.M., Rayagada to receive the same and keep the seized five bulk ganja airbags and five nos. of sample packets i.e. A-2, B-2, C-2, D-2, E-2 in safe custody and to send the other five sealed sample packets, i.e. A-1, B-1, C-1, D-1 and E-1 to the Deputy Director, R.F.S.L., Berhampur for chemical examination and opinion. The learned S.D.J.M., Rayagada forwarded the sample packets A-1 to E-1 to the Chemical Examiner and the forwarding report also indicates the sample packets were properly sealed. The Chemical Examiner in its report Ext.27 also indicated that the impression of the seal which was found on the parcel corresponded to the seal impression forwarded. In such a situation, mere non-production of malkhana register during trial cannot be a ground to discard the prosecution case or to doubt that the seized articles were not kept in safe custody prior to its production in Court and that there was possibility of tampering with the same particularly when paper slips containing signatures of independent witnesses, accused persons including the Executive Magistrate (P.W.7) were used for sealing the airbags and sample packets.

**Section 35 and 54 of N.D.P.S. Act:**

11. The defence plea of the appellant is that he was waiting at the railway station and the police brought him and foisted the case against him. In view of the evidence of official witnesses, such plea is not acceptable. The appellant and co-accused Prafulla Lima were found in the offending auto rickshaw and five airbags containing flowering and fruiting tops of cannabis plants (ganja) were found from it. The auto rickshaw driver ran away when the official witnesses on suspicion detained it.

Section 35 of the N.D.P.S. Act speaks about culpable mental state and section 54 of the N.D.P.S. Act states about presumption to be drawn from the possession of illicit articles. Section 35 of the N.D.P.S. Act requires the defence to prove that the accused had no such mental state with respect to the act charged as an offence by the prosecution. The accused is to prove that he was not in conscious possession of the contraband articles, if it is proved by the prosecution that he was in possession thereof. Section 35(2) of the N.D.P.S. Act requires the accused to prove beyond reasonable doubt that he had no culpable mental state which can be discharged only by adducing cogent and reliable evidence which must appear to be believable

or showing circumstances which might lead the Court to draw a different inference. An initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift. The prosecution has to prove the fundamental facts so as to attract the rigors of section 35 of the N.D.P.S. Act. In view of section 54 of the N.D.P.S. Act, the accused is to account satisfactorily about the possession of the contraband articles. If the prosecution proves the search and seizure of the contraband articles from the accused to have been conducted in strict compliance of all the mandatory provisions and other directions provisions as far as possible, the burden shifts to the accused to account it satisfactory otherwise presumption shall be raised against him that he has committed an offence under the Act. When the evidence of the official witnesses has remained unshaken that the appellant was found in the auto rickshaw from which contraband ganja was found in five airbags and the appellant has not rebutted such presumption under sections 35 and 54 of the N.D.P.S. Act by bringing into evidence, therefore, the learned trial Court is justified in holding that presumption is to be drawn against him for his illegal possession and transportation of ganja in the seized auto rickshaw.

**Conclusion:**

12. In view of the foregoing discussions, when the evidence of the official witnesses relating to search and seizure of contraband ganja from the exclusive and conscious possession of the appellant while transporting the same in a auto rickshaw is found to be clinching and trustworthy and that the seized bulk contraband ganja and sample packets were sealed properly and produced in Court on the next day of seizure with the appellant and the co-accused and there is absence of any materials to show tampering with the seized articles during its retention in the police station and after the production of seized articles, the packets were verified by the Courts and the seals were found to be intact and in view of the finding of the chemical examination report (Ext.27), I am of the humble view that the prosecution has successfully established its case beyond all reasonable doubt against the appellant and I find no illegality or infirmity in the impugned judgment and order of conviction. The sentence that has been imposed on the appellant for the conviction under section 20(b)(ii)(C) of the N.D.P.S. Act is the minimum sentence. Therefore, there cannot be any interference with the same. However, in view of the financial condition of the appellant as

appears from the case records, the default sentence for non-payment of fine is reduced from rigorous imprisonment for a period of one year to rigorous imprisonment for three months.

Accordingly, the criminal appeal being devoid of merits, stands dismissed.

Lower Court records with a copy of this judgment be sent down to the learned trial Court forthwith for information.

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**S.K. Sahoo, J.**

Orissa High Court, Cuttack  
The 1<sup>st</sup> November 2022/Pravakar

