

IN THE HIGH COURT OF ORISSA, CUTTACK

CRLA No.535 of 2016

From the judgment and order dated 24.09.2016 passed by the Special Judge, Gajapati, Parlakhemundi in G.R. Case No.31 of 2013 (T.R. No.14 of 2014).

Pramod Das Appellant

-Versus-

State of Odisha Respondent

For Appellant: - Mr. B.R. Tripathy

For Respondent: - Mr. Manoranjan Mishra
Addl. Standing Counsel

CRLA No.572 of 2016

1. Pradeep Parida
2. Babaji Sahu Appellants

-Versus-

State of Odisha Respondent

For Appellants: - Mr. Soura Ch. Mohapatra
Mr. Satya Mohapatra
Mr. Puspamitra Mohapatra
Mr. Sambit Biswal

For Respondent: - Mr. Manoranjan Mishra
Addl. Standing Counsel

P R E S E N T:

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

Date of Hearing and Judgment: 04.08.2022

S.K. SAHOO, J. The appellant Pramod Das in CRLA No.535 of 2016 and the appellants Pradeep Parida and Babaji Sahu in CRLA No.572 of 2016 faced trial in the Court of learned Special Judge, Gajapati, Parlakhemundi in G.R. Case No.31 of 2013 (T.R. No.14 of 2014) for offences punishable under sections 20(b)(ii)(C)/25/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter 'N.D.P.S. Act') on the accusation that on 08.10.2013 at about 11.30 a.m. at Chaptapanka chowk, they were found transporting 71 kgs. 60 grams of contraband ganja in three jari bags through a white colour Indica car bearing registration No.OR-05-Z-9076 without having any licence or authority and they were knowingly using the said car for transportation of ganja and were party to criminal conspiracy.

The learned trial Court vide impugned judgment and order dated 24.09.2016 held the appellants not guilty of the offence under section 29 of the N.D.P.S. Act but found them guilty under sections 20(b)(ii)(C)/25 of the N.D.P.S. Act and

sentenced each of them to undergo rigorous imprisonment for a period of ten years each and to pay a fine of Rs.1,00,000/- (rupees one lakh) each, in default, to undergo further rigorous imprisonment for a period of one year for the offence on each count and the sentences were directed to run concurrently.

Since both the criminal appeals arise out of same judgment, with the consent of learned counsel for the respective parties, those were heard analogously and disposed of by this common judgment.

2. The prosecution case, in short, is that on 08.10.2013, as per the direction of the Inspector in-charge of Mohana police station Sri B.P. Minj (P.W.14), Sri Mrunal Kalo (P.W.13), the S.I. of Police of the said police station along with other police staffs, namely, Sri Jagadish Panda (P.W.1), the A.S.I. of Police, constable Rajib Sabar (P.W.10), constable Ramakanta Sabar (P.W.3) and two home guards were performing patrolling duty at Chapatapanka area and at about 11.30 a.m., they found that one white colour Indica car bearing registration No.OR-05-Z-9076 was coming from Adava side in a high speed. They intercepted the said vehicle and found that the appellants were the occupants of the said vehicle. They also found the smell of ganja was coming out of the vehicle. P.W.13

interrogated the occupants who revealed their names and the appellant Pramod Das was the driver of the vehicle, the appellant Pradeep Parida was sitting on the front seat and the appellant Babaji Sahu was sitting in the back side of the vehicle. The appellants confessed before P.W.13 that they were transporting the ganja in the vehicle to Berhampur for sale. The driver appellant Pramod Das opened the dickey of the vehicle and two jari packets containing ganja was found in it and another jari packet was also found on the back seat of the vehicle by the side of appellant Babaji Sahu. P.W.13 immediately informed about the detection to the Inspector in-charge of Mohana police station Sri B.P. Minj (P.W.14) and also to the Superintendent of Police, Gajapati over phone. The appellants further revealed that they collected the ganja from Raygada area and they were transporting the ganja at the instance of the owner of the vehicle to Paradeep. P.W.13 issued a single notice to all the appellants to give their options about their right to be searched in presence of a gazetted officer or a Magistrate and the appellants opted to be searched in presence of a gazetted officer. P.W.13 informed P.W.14 about the option given by the appellants and requested him to send a gazetted officer to the spot. P.W.13 directed P.W.10 to bring a weighman along with weighing machine and

P.W.13 called the two independent witnesses, who were passing on the road to be present at the time of search and seizure. At 2.50 p.m., the S.D.P.O. R.Udayagiri Sri Rabindra Kumar Sethi (P.W.11) arrived at the spot to act as gazetted officer and the weighman Sri Simanchal Sahu (P.W.7) also arrived. P.W.11 gave his identity to the appellants and the police party gave their personal search to the appellants and then the appellants individually gave their search to the raiding party and no such incriminating material was found from the personal search of the appellants. Then they searched the vehicle and recovered three jari packets containing ganja and with the help of P.W.7, they weighed the three packets which came to 20 kg. 590 grams, 20 kg. 390 grams and 30 kg. 080 grams approximately and the entire seized ganja was around 71 kg. 60 grams. P.W.13 drew the samples at the spot i.e. 50 grams from each bag and marked as A1, A2, B1, B2, C1, C2 and then he mixed the contraband ganja of all the three jari bags homogeneously and drew two sample packets of 50 grams each from the homogeneous mixed ganja and marked as 'S1' and 'S2'. Then the sample ganja and bulk ganja packets were sealed properly by P.W.13 by using his personal brass seal in presence of the gazetted officer and independent witnesses and then the seizure list (Ext.5/2) was

prepared. P.W.13 seized the weighing machine on the production of P.W.7 and prepared the seizure list (Ext.7/3) and left the weighing machine and his personal brass seal in the zima of P.W.7 as per zimanama (Ext.12). P.W.13 seized the vehicle from the possession of the appellants as per the seizure list (Ext.6/2). P.W.13 prepared the specimen seal impression slip (Ext.15) and also prepared the F.I.R. (Ext.16) at the spot and then he and the other police staff returned to Mohana police station along with the seized articles and the appellants and P.W.13 presented the written report before the P.W.14 and handed over the seized articles to him.

On the basis of such first information report, Mohana P.S. Case No.81 dated 08.10.2013 was registered under sections 20(b)(ii)(C)/25/29 of the N.D.P.S. Act against the appellants and also against the owner of the vehicle bearing registration No.OR-05-Z-9076 so also against one Manoj Nayak and Salil Majhi.

P.W.14 took up investigation of the case and received the seized articles from P.W.13 which the latter had seized from the appellants and prepared another seizure list (Ext.1). During course of investigation, P.W.14 examined P.W.13 and other witnesses like seizure witnesses, visited the spot, prepared the spot map (Ext.18). P.W.14 kept the seized mal

item in the P.S. Malkhana and arrested the appellants and he submitted the detailed report to the D.P.O., Gajapati and forwarded the appellants to the Court. P.W.14 sent the samples being collected by P.W.13 to R.F.S.L., Berhampur through the Special Court and the Court received the chemical examination report (Ext.19). P.W.14 ascertained the name of the owner of the vehicle as Kishore Chandra Dash and the appellants confessed before him that they procured ganja nearly 71 kgs. and 60 grams from one Saila Majhi @ Ramesh Majhi. Consequent upon his transfer, P.W.14 handed over the charge to P.W.15 on 22.03.2014. On 27.03.2014 at about 10.00 a.m., P.W.15 seized the Malkhana register and station diary entry of Mohana police station on the production of P.W.13 in presence of the witnesses and prepared a seizure list (Ext.13). On 30.03.2014, P.W.15 seized the detailed report from the Head Moharir, D.C.R.B., D.D.O., Gajapati in presence of witnesses and prepared the seizure list (Ext.14). P.W.15 obtained the N.B.W. in respect of accused persons Kishore Chandra Dash, Manoj Naik and Salil Majhi @ Ramesh Majhi. On 05.04.2014, on completion of investigation, P.W.15 submitted charge sheet against the appellants under sections 20(b)(ii)(C)/25/29 of the N.D.P.S. Act.

3. The appellants were charged under sections 20(b)(ii)(C)/25/29 of the N.D.P.S. Act for illegal transportation of 71 kgs. 60 grams of contraband ganja contained in three jari bags in a white colour Indica car bearing registration No.OR-05-Z-9076 without having any licence or authority and they knowingly used the said Indica car for transportation of ganja and were party to criminal conspiracy, which they refuted, pleaded not guilty and claimed to be tried.

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

P.W.1 Jagadish Panda who was the A.S.I. of police attached to Mohana police station was one of the members of the patrolling party and he stated about the detention of the vehicle, presence of the appellants in the said vehicle and seizure of contraband ganja from the vehicle.

P.W.2 Purna Chandra Behera was the constable attached to Mohana police station and he is also a witness to the seizure of ganja as per seizure list vide Ext.1.

P.W.3 Ramakanta Sabar was the constable attached to Mohana police station and he was a member of the patrolling party. He stated about the detention of the vehicle, presence of

the appellants in the said vehicle and seizure of contraband ganja from the vehicle.

P.W.4 Saroj Kumar Patnaik and P.W.5 Anuja Kumar Bisoi are the two independent witnesses and also witnesses to the seizure but they have not supported the prosecution witnesses. They stated that they put their signatures at the police station at the instance of the police but the prosecution has not declared them hostile.

P.W.6 Susanta Pal did not support the prosecution case.

P.W.7 Simanchal Sahu who was the weighman did not support the prosecution case. He proved his signature on the zimanama (Ext.12).

P.W.8 Krushna Chandra Jamadar was the Head Moharir at D.P.O., Paralakhemundi. He stated that the Inspector in-charge of Mohana police station (P.W.15) seized the detailed report from him in connection with the case and prepared the seizure list (Ext.14).

P.W.9 Ludinga Jambu was the constable attached to Mohana police station and he stated about the seizure of malkhana register of Mohana police station and one original

station diary from P.W.13 under seizure list (Ext.13) and also seizure of detailed report from P.W.8 as per seizure list (Ext.14).

P.W.10 Rajib Sabar who was the constable attached to Mohana police station was one of the members of the patrolling party and he stated about the detention of the vehicle, recovery of three bags of ganja from the vehicle. He was sent to Mohana village to bring weighing apparatus and he stated that P.W.7 weighed the contraband articles in presence of the S.D.P.O. (P.W.11).

P.W.11 Rabindra Kumar Sethi was the S.D.P.O., R.Udayagiri, in whose presence, the weighment was made and samples were drawn.

P.W.12 Dillip Kumar Pradhan was the constable attached to Mohana police station and he stated about the seizure of malkhana register and station diary on production of P.W.13 under seizure list Ext.13 and also seizure of detailed report on production of P.W.8 under seizure list Ext.14.

P.W.13 Mrunal Kalo who was the S.I. of Police attached to Mohana police station is also the informant in the case. He stated that on the date of occurrence, as per the direction of the then I.I.C. (P.W.14), he along with P.W.1, P.W.3, P.W.10 and two home guards went to Chapatapanka area on

patrolling duty. He further stated that at about 11.30 a.m., they intercepted one white colour car bearing registration No.OR-05-9076 in which the appellants were the occupants and three jari packets containing contraband ganja was found in the vehicle. He stated about the weighment of the contraband ganja taken by P.W.7 and drawal of sample packets and its seizure and also about the seizure of the vehicle. He further stated that they brought the seized articles and the appellants to the police station and he lodged the first information report before the Inspector in-charge of Mohana police station.

P.W.14 Binaya Prakash Minj was the Inspector in-charge attached to Mohana police station who registered the case on the report of P.W.13, took up investigation, kept the seized mal items in the P.S. Malkhana and arrested the appellants. He submitted the detailed report to the D.P.O., Gajapati and forwarded the appellants to the Court and made prayer before the Court to send the samples to R.F.S.L., Berhampur for chemical examination and ascertained the name of owner of the vehicle to be Kishore Chandra Dash and on his transfer, he handed over the charge to P.W.15.

P.W.15 Ashok Kumar Parida was the Inspector in-charge of Mohana police station. He seized the Malkhana register

and station diary of Mohana police station and also seized the detailed report from P.W.8 and on completion of investigation, he submitted the charge sheet on 05.04.2014.

5. The prosecution exhibited twenty two documents. Ext.1 is the seizure list dated 08.10.2013 prepared by P.W.14 on receiving seized articles from P.W.13, Exts.2, 3 and 4 are the personal search lists dated 08.10.2013 of appellants Pramod Das, Pradeep Parida and Babaji Sahu respectively, Ext.5/2 is the seizure list dated 08.10.2013 of the seized ganja packets so also sample packets, Ext.6/2 is the seizure list dated 08.10.2013 of Indica car, Ext.7/3 is the seizure list dated 08.10.2013 of weighing machine, Ext.8/2 is the search notice to the appellants, Ext.9/2 is the personal search slip of the appellants, Exts.10/2 and 11/2 are the personal search slips of the officials and witnesses, Ext.12 is the zimanama dated 08.10.2013 of the weighing machine and brass seal given to P.W.7, Ext.13 is the seizure list dated 27.03.2014 of Original Malkhana Register and Station Diary, Ext.14 is the seizure list dated 30.03.2014 of detailed report, Ext.15 is the specimen seal impression slip, Ext.16 is the plain paper F.I.R., Ext.17 is the zimanama of Original Malkhana Register and Station Diary, Ext.18 is the spot map, Ext.19 is the chemical examination report, Ext.20 is the

true copy of Malkhana register showing the entry regarding the keeping of seized articles in the malkhana, Ext.21 is the page no.167 of the station diary book maintained from 29.09.2013 to 28.10.2013, Ext.21/1 is the entry regarding the case matter made on dated 08.10.2013, Ext.21/2 is the entry Sl. No.181 regarding the case matter on dated 08.10.2013 and Ext.22 is the detailed report dated 09.10.2013 submitted by P.W.14 to the Superintendent of Police, Gajapati.

The prosecution also proved four material objects. M.O.I to M.O.IV are the sample packets.

No witness was examined on behalf of the defence.

6. The defence plea of the appellants was one of complete denial. It is further pleaded by the appellant Pramod Das that while he was returning after visiting Majhigharani temple of Rayagada, police detained him and falsely entangled in the case.

7. The learned trial Court after assessing the oral as well as documentary evidence on record has been pleased to hold that the evidence of the informant (P.W.13) is found corroborated by the gazetted officer (P.W.11), P.W.3 and P.W.10. It is further held that the evidence of the informant and other official witnesses is found to be clear, cogent and clinching

in material particulars regarding seizure of the white colour Indica car with huge quantity of ganja from the possession of the appellants, who were found inside the car. It is further held that the evidence of P.Ws.1, 3, 10, 11 and 13 cannot be disbelieved on the point of search and seizure of contraband ganja from the possession of the appellants merely because some independent witnesses have not supported their testimonies. It is further held that the first part of the prosecution case regarding exclusive and conscious possession of ganja by the appellants on the relevant date, time and place is well proved and basing upon suspicion only and without any rebuttal evidence, the evidence of the official witnesses cannot be discarded which is otherwise clear, cogent, trustworthy and believable. It is further held that there is no infraction of section 55 of the N.D.P.S. Act merely because the Inspector in-charge of Mohana police station did not put his personal seal upon the seized articles and there is also sufficient compliance of the provision under section 57 of the N.D.P.S. Act. It is further held that the action taken by the informant at the spot and the subsequent two I.Os. indicate that the provisions under sections 43, 50, 52-A, 55 and 57 of the N.D.P.S. Act have been complied with. It is further held that there is no evidence that transportation of illegal ganja was

made in pursuance of criminal conspiracy of the appellants with each other and as such the learned trial Court acquitted the appellants of the charge under section 29 of the N.D.P.S. Act, however found all of them guilty under sections 20(b)(ii)(C) and 25 of the N.D.P.S. Act.

8. Mr. Soura Chandra Mohapatra, learned counsel being ably assisted by Mr. Satya Mohapatra, Mr. Puspamitra Mohapatra and Mr. Sambit Biswal, Advocates appearing for the appellants in CRLA No.572 of 2016, namely, Pradeep Parida and Babaji Sahu contended that the evidence of the official witnesses to the search and seizure, the manner of collection of sample and sealing of the articles are discrepant and when independent witnesses have not supported the prosecution case, it would be very risky to convict the appellants on the basis of the evidence of the official witnesses only in a case of this nature. It is argued that the independent witnesses like P.Ws.4, 5 and 7 have not been declared hostile by the prosecution and since their version has remained unchallenged, it gives a death knell to the prosecution case. Reliance was placed in the case of **Sumit Kumar Behera -Vrs.- State of Odisha reported in (2019) 74 Orissa Criminal Reports 848** on this point. According to Mr. Mohapatra, learned trial Court has not given any reasons as

to why the evidence of the aforesaid three independent witnesses are not acceptable particularly when the prosecution has not challenged their version. He argued that when in view of the unchallenged testimony of the independent witnesses, two different versions are coming forth, the appellants are entitled to get benefit of doubt. He further argued that some of the official witnesses have not stated at all about the sealing of the seized articles including the sample packets at the spot much less about the use of any paper slips to seal it, there are discrepancies in the manner in which the gunny bags were found inside the car and even the presence of the appellants inside the car. It is argued that when the seized articles were produced before the Inspector in-charge of Mohana police station, there is no evidence that it was resealed by the Inspector in-charge. The evidence of P.W.14, the Inspector in-charge is totally silent that the seized articles were produced before him in sealed condition with paper slips. The seizure list Ext.1 is also silent in that respect and thus, there is no evidence regarding compliance of section 55 of the N.D.P.S. Act. It is argued that the Malkhana register entry does not indicate that the sample packets were kept in police Malkhana with the bulk quantity of ganja in three jari bags and there is no evidence as to where those sample

packets were kept after its production in police station and before those were dispatched to the Court and thus, in view of the Malkhana register entry, the keeping of seized articles in safe custody is a doubtful feature. It is argued that neither the brass seal, which was used for sealing nor the specimen seal impression on paper was produced at the time of production of seized articles i.e. bulk quantity of ganja in three bags so also the sample packets in the Court for comparison. Learned counsel submitted that the order sheet of the learned Magistrate indicates that the sample packets were handed over to P.W.13 Mrunal Kalo for its production before the Chemical Examiner but the evidence of P.W.13 is completely silent on this aspect. The Chemical Examination Report indicates that the sample packets were produced by the constable C/48 G.K. Panda, who has not been examined in the case. Learned S.D.J.M. handed over the sample packets to P.W.13 as per the order sheet on 09.10.2013 for its production before the Chemical Examiner but it was received in the office of the Chemical Examiner on 15.10.2013 which would be evident from the C.E. Report. No explanation has been offered by the prosecution about such delay and who kept the sample packets during that intervening period and in what condition and where. In the C.E. Report also there is nothing to

show that the sample packets were having paper slips when those were received. The Investigating Officer (P.W.14) stated that he came to know about the detection at 5.25 p.m. on 08.10.2013 and therefore, the evidence of the other witnesses that P.W.14 arranged the weighman (P.W.7) and gave intimation to the S.D.P.O. (P.W.11) to visit the spot and to remain present at the time of search and seizure is doubtful. It is further argued that the ingredients of the offence under section 25 of the N.D.P.S. Act are not made out and when the evidence adduced by the prosecution relating to the search and seizure, sealing of the articles, its production in Court are discrepant in nature, it is a fit case where benefit of doubt should be extended in favour of the appellants.

Mr. B.R. Tripathy, learned counsel appearing for the appellant Pramod Das in CRLA No.535 of 2016 adopted the argument of Mr. Soura Chandra Mohapatra, Advocate and contended that the appellant may be given benefit of doubt.

Mr. Manoranjan Mishra, learned Additional Standing Counsel, on the other hand, submitted that lacunas, if any, in the prosecution case and the inconsistencies do not go to the root of the matter to discard the entire prosecution case. The law is well settled that even on the evidence of official witnesses,

conviction can be sustained and when the contraband articles were recovered from a car in which the appellants were found and they have not adduced any rebuttal evidence, it can be said that they had the culpable state of mind, which can be presumed under section 35 of the N.D.P.S. Act and presumption of commission of offence can be drawn under section 54 of the N.D.P.S. Act on account of their failure to account the possession satisfactorily. Learned counsel further submitted that it is a usual feature that the independent witnesses do not support the prosecution case in such cases but the learned trial Court has accepted the version of the official witnesses rightly and the C.E. Report confirms that whatever was seized from the possession of the appellants was nothing but ganja and as such there is no illegality or infirmity in the impugned judgment and therefore, the appeal should be dismissed.

9. Law is well settled that even though the independent witnesses have not supported the prosecution case which is usual feature in a case of N.D.P.S. Act, the same cannot be a ground to discard the entire prosecution case, if on the basis of the evidence of the official witnesses, the Court comes to a finding that the accusations that has been levelled against the accused is proved beyond all reasonable doubt. Before accepting

the evidence of the official witnesses only and convicting the accused on the basis of such evidence, the Court must be satisfied that the same is clear, cogent, trustworthy and reliable. If the evidence is discrepant in nature and it creates doubt in the mind of the Court regarding the implication of the accused persons, then benefit of doubt is to be extended in their favour.

Effect of independent witnesses not being declared hostile by prosecution:

The submission regarding the unchallenged testimony of three independent witnesses raised by the learned counsel for the appellants is to be discussed first. P.W.4 has stated that he did not know the appellants and he put his signatures shown to him at the police station at the instance of the police and his signatures have been marked as Exts.2, 3, 4, 5, 6 and 7. He specifically stated in the chief examination that nothing was written on the papers when he signed the same and he further stated that nothing was written on the papers in which his other signatures i.e. Exts.8, 9 and 11 are appearing. P.W.4 has not been declared hostile by the prosecution.

P.W.5 has also stated similarly that he has put his signatures on plain papers at the police station at the instance of

the police and he has also not been declared hostile by the prosecution.

P.W.7 as per the prosecution case is the weighman but he stated that the papers were blank when he signed the documents and put his signature as Ext.7/2. He specifically stated that he has not seen weighing of sample and collection of sample. This witness has also not been declared hostile by the prosecution.

In the case of **Sumit Kumar Behera** (supra), it has been held as follows:

"9. Two independent witnesses have been examined in the case and they are P.W.1 and P.W.2. Both the witnesses have not stated anything against the appellants. P.W.1 has stated that the spot is about 1 km. away from Iswari Dhaba and the spot was P.W.D. Bunglow Chowk of Podamari. He further stated that the bags were kept in front of P.W.D. I.B., which were seized and carried to Berhampur. P.W.2 has also stated that ten bags of contraband ganja were seized in front of P.W.D. I.B., Podamari. None of these witnesses have stated anything regarding the seizure of ten jerry bags containing contraband ganja from a car in front of Iswari Dhaba. They have not been declared hostile by the prosecution. If a witness resiles

from his earlier statement given either to police or before the Magistrate, the Public Prosecutor can declare him as a hostile witness and with the permission of the Court, can put any questions to him which might be put in the cross-examination by the defence counsel in view of section 154 of the Evidence Act. If the Public Prosecutor fails to do so, the defence can take advantage from such unchallenged testimony to strengthen the defence plea. Of course, the Public Prosecutor can advance his argument that even though a particular prosecution witness has not been declared hostile but his evidence is not otherwise trustworthy and should be discarded and then it is for the Court to decide the acceptability of such argument. In case of **Raja Ram** (supra), it has been held that when P.W.8 has not been declared hostile by the Public Prosecutor for reasons only known to him, the evidence of P.W.8 is binding on the prosecution and such testimony cannot be sidelined. Basing on the ratio laid down in the aforesaid Supreme Court judgment, I am of the humble view that the evidence of P.W.1 and P.W.2 cannot be totally sidelined and their evidence creates doubt with regard to the prosecution case that the contraband ganja was seized in front of Iswari Dhaba from a car and the appellants were found in the car."

If the Public Prosecutor is not prepared to own the testimony of the witness examined by him, he can seek the permission of the Court as envisaged in section 154 of the Evidence Act at any stage of the examination, nonetheless a discretion is vested with the Court whether to grant the permission or not. Section 154 does not in terms, or by necessary implication confine the exercise of the power by the Court before the examination-in-chief is concluded or to any particular stage of the examination of the witness. It is wide in scope and discretion is entirely left to the Court to exercise the power when the circumstances demand. Therefore, by not declaring the aforesaid three independent witnesses hostile and not seeking permission of the Court as per section 154 of the Evidence Act, the prosecution has left their evidence unchallenged and uncontroverted and therefore, such evidence cannot be totally ignored and it would be difficult not to accept their statements made in Court during trial and it cannot be said at the outset that whatever they have stated in Court are false statements.

Discussion on the version of official witnesses to the search and seizure:

The evidence of P.W.1, the A.S.I. of Police indicates that while he was performing M.V. duty along with others as per the instruction of the Inspector in-charge of Mohana police station, they detained one white colour Indica car in which the appellants were there and on the rear seat, he found three plastic bags were kept. He has not stated about the sealing of either ganja packets in which bulk quantity were there or the sample packets. He has also not stated that seal impression was given on the paper slips which were pasted on the batch.

The next official witness P.W.3 is a constable and he has stated that one jari bag was kept near the person, who was sitting in the rear seat and two jari bags were there in the dickey of the car. This statement runs contrary to the evidence of P.W.1 as to where the jari bags were found. Though P.W.3 has stated about the weighing of the seized articles and particularly the collection of the samples therefrom but his evidence is also silent regarding sealing of either the bulk quantity of ganja or the sample packets. His evidence is also silent about any paper slip impression given on the packets.

The evidence of P.W.10, the constable is completely silent that the appellants were present inside the car and his

evidence is also silent about the sealing of the seized articles at the spot.

P.W.11 was the S.D.P.O., R.Udayagiri in whose presence the weighment was made and samples were drawn but his evidence is also silent regarding sealing of bulk quantity or the sample packets with the personal brass seal of the informant (P.W.13).

When the sample packets were produced before the learned S.D.J.M., Paralakhemundi in sealed condition, in the order sheet, it has not been mentioned that paper slips with seal were found in it. Therefore, the evidence of the official witnesses regarding the sealing of the seized articles and the manner in which it was sealed and the exact place where the ganja packets were found inside the car are discrepant.

P.W.13, the informant has stated that he not only weighed the three packets of ganja but also drew samples in duplicate from each of the packets. He also stated that he left his personal brass seal in the zima of Simanchal Sahu (P.W.7), the weighman but his evidence is also silent that the bulk quantity of ganja and the sample packets were sealed at the spot and that his own brass seal was used for sealing the articles and in the preparation of paper slips.

The evidence of P.W.13 indicates that he returned to Mohana police station along with the seized articles and the appellants and presented the written report before the Inspector in-charge Sri Binay Prakash Minz (P.W.14), who re-seized the seized articles as per the seizure list Ext.1 but the evidence of P.W.14 is silent that when the seized articles were produced, those were in sealed condition. Though it is the prosecution case that the seized articles along with the sample packets were kept in police Malkhana on 08.10.2013 and it was produced in Court on the next day i.e. on 09.10.2013 but the Malkhana register entry, which has been marked as Ext.20 only indicates that three bulk quantity of ganja packets were kept in the Malkhana. Therefore, there is no evidence as to where the sample packets were kept before its production in Court.

Law is well settled that the prosecution has to adduce cogent, reliable and unimpeachable evidence to substantiate that the seized articles were properly sealed and there was no chance of tampering with the packets during its retention at the police station and that the seized articles were the very articles produced before the Magistrate for sending the same to the Chemical Examiner. When in view of the entry in the Malkhana register, the prosecution is not offering any explanation as to

where sample packets were kept if not kept in P.S. Malkhana and with whom, the safe custody of the seized articles becomes doubtful.

Admittedly, the personal brass seal of P.W.13 which is stated to have been used for sealing the bulk quantity of ganja so also the sample packets was not produced in Court either at the time of production of the articles at the first instance or during trial. Though specimen seal impression of P.W.13 vide Ext.15 was prepared but the same was not produced on 09.10.2013 either before the learned Special Judge, Paralakhemundi or before the learned S.D.J.M., Paralakhemundi for making necessary comparison with the seal impression, which was appearing in the sample packets or the bulk quantity of ganja kept in three packets. Handing over the brass seal to a reliable person and asking him to produce it before the Court at the time of production of the seized articles in Court for verification are not empty formalities or rituals but is a necessity to eliminate the chance of tampering with the articles while in police custody.

The order sheet of the learned S.D.J.M., Paralakhemundi indicates that P.W.13 was present and he produced four sealed envelopes which were marked as Exts.A1,

B1, C1 and S1 and the learned Magistrate kept the sample packets in a paper cartoon, which was kept in a white cloth bag and stitched and the personal seal impression of the learned Magistrate was given on it. The copy of the forwarding report was handed over to P.W.13 and he was asked to produce the paper cartoon before the Deputy Director, R.F.S.L., Berhampur at an earliest with an intimation to the Court but most peculiarly the evidence of P.W.13 is completely silent that he produced the sample packets before the learned S.D.J.M., Paralakhemundi or he was handed over the paper cartoon containing the sample packets in a sealed condition to be produced before the Chemical Examiner. The Chemical Examination Report, which has been marked as Ext.19 indicates that one parcel was received in the Office on 15.10.2013 through C/48 G.K. Panda. Admittedly, the said constable G.K. Panda has not been examined in the case and no evidence has been adduced by the prosecution as to why there was such an inordinate delay in producing the sample packets before the Chemical Examiner and where the paper cartoon was kept from 09.10.2013 till 15.10.2013. The Chemical Examination Report further indicates that there are four numbers of sealed paper packets marked as Exts.A1, B1, C1 and S1 were

found inside the parcel but it is not mentioned that any paper slips containing any seal was there in those sample packets.

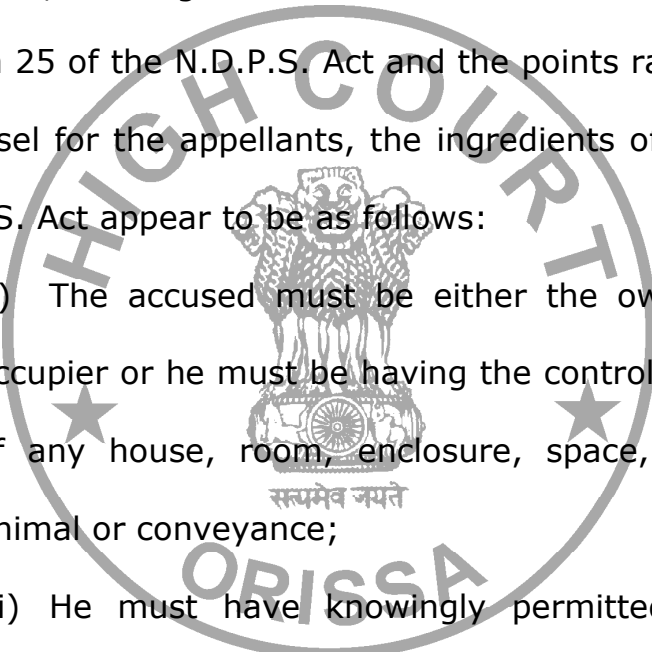
The evidence of P.W.3, the constable indicates that the Inspector in-charge (P.W.14) had sent the weighman with the weighing machine and he was Simanchal Sahu (P.W.7). P.W.11, the S.D.P.O., R. Udayagiri has stated that on receipt of the information from the Inspector in-charge of Mohana police station i.e. P.W.14 over phone about the detection of the N.D.P.S. Act case, he proceeded to the spot. It is the prosecution case that both the weighman (P.W.7) and the S.D.P.O. (P.W.11) were present at the time of weighment of the seized articles and preparation of the seizure list Ext.5/2. The seizure list was prepared on 10.10.2013 at 3.30 p.m., but most peculiarly the I.O. (P.W.14) has stated that at about 5.35 p.m. on 08.10.2013, he came to know about the detection of the case. If at that point of time according to P.W.14, for the first time, he came to know about the detection of the case, then question of arranging a weighman by him or giving intimation to the S.D.P.O. at a prior point of time does not arise.

Section 55 of the N.D.P.S. Act deals with police to take charge of articles seized and delivered and it states, inter alia, that an officer-in-charge of a police station shall take charge

of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him and to affix his seal to such articles but the evidence of P.W.14 is totally silent on this vital aspect rather he has stated that he has not mentioned the Malkhana sl. no. in the sample packets vide M.O.I to M.O.IV which were sent to R.F.S.L., Berhampur.

Charge under section 25 of the N.D.P.S. Act:

10. Now, coming to the conviction of the appellants under section 25 of the N.D.P.S. Act and the points raised by the learned counsel for the appellants, the ingredients of section 25 of the N.D.P.S. Act appear to be as follows:

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- (i) The accused must be either the owner or occupier or he must be having the control or use of any house, room, enclosure, space, place, animal or conveyance;
 - (ii) He must have knowingly permitted such house, conveyance etc. to be used for the commission of an offence punishable under any provision of N.D.P.S. Act by any other person.

There is no evidence that any of the appellants was the owner of the car. Though P.W.14 has stated that he

ascertained the owner of the vehicle is one Kishore Chandra Dash but no documentary evidence has been produced in that respect. Mere ownership of the vehicle in which transportation of contraband articles was found is by itself not an offence. The words 'knowingly permits' are significant. Thus, it is for the prosecution to establish that with the owner's or driver's knowledge, the vehicle was used for commission of an offence under the N.D.P.S. Act by another person. However, once the prosecution establishes the ownership as well as grant of permission by the accused to use his house or vehicle etc. by another person for commission of any offence under the N.D.P.S. Act, the burden shifts to the accused and he has to give rebuttal evidence to disprove such aspects. In the case in hand, even if the prosecution case is that the appellants were the occupiers of the vehicle is taken into account, but there is absence of material that they permitted the vehicle to be used for the commission of the offence under the N.D.P.S. Act by any other person.

In view of the foregoing discussions, I am of the humble view that the prosecution woefully failed to bring home the charge against the appellants under section 25 of the N.D.P.S. Act.

Applicability of sections 35 and 54 of the N.D.P.S. Act:

11. Adverting to the contention of the learned counsel for the State regarding applicability of sections 35 and 54 of the N.D.P.S. Act, section 35 of the N.D.P.S. Act deals with presumption of 'culpable mental state' and it provides that in any prosecution for an offence under N.D.P.S. Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state. 'Culpable mental state' as per the explanation to section 35 includes intention, motive, knowledge of a fact and belief in or reason to believe, a fact. Culpable mental state of an accused has to be proved as a fact beyond reasonable doubt and not merely when its existence is established by a preponderance of probabilities. The accused is to prove that he was not in conscious possession of the contraband, if it is proved by the prosecution that he was in possession thereof and he is also to prove that he has no such mental state with respect to the act charged as an offence.

In the case of **Abdul Rashid Ibrahim Mansuri -Vrs.- State of Gujarat** reported in **A.I.R. 2000 Supreme Court 821**, it is held as follows:-

"22. The burden of proof cast on the accused under section 35 can be discharged through different modes. One is that, he can rely on the

materials available in the prosecution evidence. Next is, in addition to that he can elicit answers from prosecution witnesses through cross-examination to dispel any such doubt. He may also adduce other evidence when he is called upon to enter on his defence. In other words, if circumstances appearing in prosecution case or in the prosecution evidence are such as to give reasonable assurance to the court that appellant could not have had the knowledge or the required intention, the burden cast on him under Section 35 of the Act would stand discharged even if he has not adduced any other evidence of his own when he is called upon to enter on his defence."

In the case of **Noor Aga -Vrs.- State of Punjab** reported in **(2008) 16 Supreme Court Cases 417**, it is held as follows:-

"58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied,

would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is 'beyond all reasonable doubt' but it is 'preponderance of probability' on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.

59. With a view to bring within its purview the requirements of section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provision being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt."

The appellants have taken a plea of denial and they have not admitted that either they were present in the car or carrying any contraband articles. The prosecution has failed to prove the foundational facts so as to attract the ingredients of the offences and therefore, sections 35 and 54 of the N.D.P.S. Act will no way be helpful to the prosecution.

12. In view of the foregoing discussions, when there are glaring discrepancies in the evidence of official witnesses relating to the manner of collection of samples, seizure and sealing of the articles, when the independent witnesses have given a total different version and their evidence has remained unchallenged and uncontroverted, when there is doubt that the sample packets were kept in safe custody before its production in Court, when neither the brass seal nor the paper slip containing seal impression was produced before the Court at the time of production of the bulk quantity of ganja so also the sample packets for its comparison, when no explanation has been offered as to why there was delayed production of the sample packets before the Chemical Examiner and in whose custody, the sample packets were kept and the evidence is lacking relating to compliance of section 55 of the N.D.P.S. Act, in my humble view, the conviction of the appellants under section 20(b)(ii)(C) so also section 25 of the N.D.P.S. Act is also not sustainable in the eye of law.

Accordingly, both the Criminal Appeals are allowed. The impugned judgment and order of conviction and sentence passed by the learned trial Court is hereby set aside. The appellants are acquitted of the charges under sections

20(b)(ii)(C) and 25 of the N.D.P.S. Act. The appellants who are in jail custody shall be released forthwith if their detention is otherwise not required in any other case.

The trial Court records with a copy of this judgment be sent down to the concerned Court forthwith for information and necessary action.

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S.K. Sahoo, J.

Orissa High Court, Cuttack
The 4th August 2022/RKMishra

