



THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)
PRINCIPAL SEAT AT GUWAHATI

Criminal Appeal No.30/2022

MANDEL LALTHLANGAMA DURPUI ,
S/O T.T. VELA DURPUI,
VILLAGE FIANGPUI, PS HAFLONG, DIST DIMA HASAO, ASSAM.

.....Appellant.

-Versus-

THE STATE OF ASSAM
REPRESENTED BY PP ASSAM .

..... Respondent.

Criminal Appeal No.35/2022

LIENKHOKHAI CHANGSAN
S/O LATE LOMSUNG CHANGSAN
VILLAGE KHONGSAI
PS HAFLONG
DIST DIMA HASAO
ASSAM.

.....Appellant.

-Versus-

THE STATE OF ASSAM
REPRESENTED BY PP ASSAM

..... Respondent.

BEFORE
HON'BLE MR. JUSTICE ROBIN PHUKAN

Advocates for the Appellant : Mr. J. Laskar.
Advocate for the respondent : Mr. R. J. Baruah.
Addl. P.P. Assam.

Date of Hearing : 29.08.2023
Date of Judgment : 25.09.2023.

JUDGEMENT AND ORDER (CAV)

Heard Mr. J. Laskar, learned counsel for both the appellant and Mr. R.J. Baruah, learned Addl. P.P. for the State respondent.

2. As the Criminal Appeal No.30/2022 and Criminal Appeal No.35/2022 both are directed against the common judgment and order dated 05.01.2022 and as common questions of law are involved in both the appeals and common arguments advanced, and as agreed by the learned Advocates of both sides, it is decided to dispose of both these appeals by this common judgment and order.

3. In Criminal Appeal No. 30/2022, appellant, Sri Mandel Lalthlangama Durpari and in Criminal Appeal No. 35/2022, appellant Sri Lienkhokhai Changsan, have challenged the correctness or

otherwise of the judgment and order, dated 05.01.2022, passed by the learned Sessions Judge, Dima Hasao, Haflong in Sessions Special Case No. 66/2018, under sections 22(a)/22(c) of the NDPS Act. It is to be noted here that vide impugned judgment and order, dated 05.01.2022, the learned Sessions Judge, Dima Hasao, Haflong has convicted the appellant under sections 22(a)/22(c) of the NDPS Act, and thereafter, sentenced both of them to suffer rigorous imprisonment for a period of 01 year, under section 22(a) of the NDPS Act, and rigorous imprisonment for 10 years and also to pay a fine of Rs.50,000/- with default stipulation, under section 22(C) of the NDPS Act, and further directed that both the sentence will run concurrently.

4. The background fact, leading to filing of these appeals, is adumbrated herein below:-

“On 16.07.2018, S.I. Ramakanta Nath of Harangajao Police Station was conducting Naka Checking in front of Harangajao Police Station. Then at about 06.10 pm, he, along with police staff, had intercepted one Cruiser vehicle, bearing registration No.AS-11-CC-3660, which was coming from Silchar towards Haflong and then on checking the vehicle they found a bag containing 3 numbers of 100 ml TOSSEX bottles, 7 numbers of 100 ml QREX bottles, 1296 numbers of SPASORID POXIVON Capsules, which were suspected to be drugs items, one air fun and one amplifier from the possession of Mandel Lal Thlangama and Lienkhokhai Changsan. Then on being asked they failed to produce any documents, like prescription of Doctor and Cash Memo etc. Then S.I. Ramakanta Nath reported the matter to

Superintendent of Police, Haflong over phone and then Addl. S.P.(HQ) arrived at there and authorised S.I. Nath to conduct search and seizure of suspected Drugs items in front of him and witnesses present there. Thereafter, search and seizure was made in accordance of law and samples were drawn up and sealed and sent for Forensic Science Laboratory, Kahilipara, and a General Diary Entry (GDE), being Harangajao P.S. GDE No. 278, dated 16.07.2019, was recorded and the both the accused were arrested and forwarded to the Court. Thereafter, the S.I. had received the report from examination of samples, which indicates that the samples gave positive test for Drugs. On receipt of the report, S.I. Nath had lodged an FIR with the Harangajao P.S. upon which, Harangajao P.S. Case No. 09/2018, under section 22 of NDPS Act has been registered and investigation was carried out. On completion of investigation the I.O. laid charge sheet against both the accused/appellants to stand trial in the Court under section 22(a)/22(C) NDPS Act.

Accordingly, both the accused were produced before the learned Court below. Thereafter, hearing learned Advocates of both sides, the learned Court below had framed charges against both the appellants under sections 22(a)/22(C) NPDS Act, and on being read over the charges to the appellants, they pleaded not guilty. Then the prosecution side has examined as many as six witnesses in support of its case. Two more witnesses were also examined as Court witness on behalf of the Court. Thereafter, the learned Court below had examined the appellants under section 313 Cr.P.C. Thereafter, hearing

arguments of learned Advocates of both sides, the learned Court below had convicted both the appellants under section 22(a)/22(C) NDPS Act and sentenced them as aforesaid.”

5. Being highly aggrieved the appellants have preferred the present appeals on the following grounds that :-

- (i) there is delay of one day in lodging the FIR, while the occurrence took place on 16.07.2018, the FIR was lodged on 17.07.2018;
- (ii) the provisions of NDPS Act, specially section 50 of the NDPS Act has not been followed;
- (iii) there was also no independent witnesses of seizure;
- (iv) there was contradiction as to the place of recovery of the contraband substance. Some of the witnesses stated that the contraband substances were recovered from a small cartoon found on the roof top carrier of the vehicle and not from the conscious possession of the appellants;
- (v) the prosecution witnesses and also the court witnesses have miserably failed to prove that the recovery of the contraband substances from the conscious possession of the appellants;
- (vi) no charges under sections 22(a)/22(c) of the NDPS Act stands established against the appellants;
- (vii) the prosecution side has failed to prove compliance of sections 42/50/52/52A of the NDPS Act, while conducting search and seizure;

It is therefore, contended to set aside the impugned judgment and order.

6. Mr. Laskar, besides reiterating the points mentioned herein above, submits that the prosecution side has failed to bring home the charges under section 22(a)/22(c) of the NDPS Act against the appellants beyond all reasonable doubt. Mr. Laskar further submits that the provisions of sections 42/50/52/52A have not been complied with during search and seizure and while drawing representative samples by the concerned officer, and also the guidelines laid down by the Hon'ble Supreme Court in the case of **Union of India v. Mohanlal, (2016) 3 SCC 379**, has not been followed. Mr. Laskar also submits that there is glaring contradiction in the version of prosecution witnesses as to the recovery of contraband substances, as some witnesses stated that it was recovered from a small cartoon found on the roof to carrier of the vehicle and some stated that the same were recovered from the possession of the appellants. It is the further submission of Mr. Laskar that the version of the prosecution witnesses are not at all believable and that the search and seizure was not made in presence of Gazetted Officer and that the Addl. S.P.(HQ) was not present at the time of search and seizure and it cannot be said that the prosecution side had succeeded in establishing the charges against the appellants and therefore, it is contended to set aside the impugned judgment and order of conviction.

7. Whereas, Mr. R.J. Baruah, the learned Addl. P.P. has supported the impugned judgment and order of conviction. Mr. Baruah submits that the provision of section 42 NDPS Act was complied with as search was conducted in presence of Addl. S.P. (HQ). Mr. Baruah further submits that the said provision is not attracted as the place of

occurrence is a public conveyance and instead of section 42, section 43 NDPS Act is attracted here. To bolster his submissions, Mr. Baruah has referred following case laws:-

- (i) **S.K. Raju @ Abdul Hoque @ Jagga vs. State of West Bengal** reported in **(2018) 9 SCC 708**;
- (ii) **State of Punjab vs. Baljinder Singh & Anr.** reported in **(2019) 10 SCC 473**;
- (iii) **Surinder Kumar vs. State of Punjab** reported in **(2020) 2 SCC 563**;

Mr. Baruah also submits that the learned court below has rightly convicted the appellants and therefore, it is contended to dismiss these appeals and to maintain the judgment and order of conviction.

8. Having heard the submissions of learned Advocates of both sides, I have carefully gone through the memo of appeal and the grounds mentioned therein and also perused the impugned judgment and order and the record of the learned court below and also gone through the case laws referred by Mr. Baruah, learned Addl. P.P.

9. It appears from the record of the learned court below that the learned court below has framed following charges against both the appellants:-

- (a)** That, you, on 16.07.2018, at about 6.10 p.m., near Harangajao P.S. were found in possession of a bag containing 3 nos. of 100 ml Tossex bottles & 7 nos of 100ml Qurex bottles containing the psychotropic substances **Codine Phosphate** of 1.7811 gm.

(b) That, you, on the same day, time and place were found in possession of a bag containing 1296 nos. of Spasorid Poxivan Capsules containing the psychotropic substances **Tramadol** of 539.136 gm.

10. It also appears that in order to establish the charges against the appellants, the prosecution side has examined as many as six witnesses and the learned court also examined two more witnesses and the appellants also have examined two witnesses in support of their defence.

11. It is not in dispute that here in this case, the I.O. (P.W.-4) had seized 3 nos. of 100 ml Tossex bottles & 7 nos. of 100ml Qurex bottles and 1296 Spasorid Poxivan Capsules, from a bag, allegedly, found in possession of the appellants on 16.07.2018, at about 6.10 p.m., near Harangajao P.S. vide seizure list **(Exhibit-6)**. The evidence of the I.O. also reveals that the thereafter he had drawn representative samples and sent the sample to Directorate of Forensic Science (DFS) for examination, and thereafter, he collected the report of such examination.

12. The appellants have not disputed the report of DFS (Exhibit-2) which indicates that the sample gave positive test for **Codine Phosphate** and **Tramadol**. The prosecution side has examined the Chemical Examiner of Directorate of Forensic Science, Kahilipara, Assam as P.W.5. His evidence reveals that on examination of the samples, received in connection with Harangajao P.S. GDE No. 278 dated 16.07.2018, he had examined the same and found that Exhibit-DN-390/2018 (a) and DN-390/2018 (b) gave positive test for **Codine**

Phosphate, and the amount of Codine Phosphate in the Exhibits were found to be 180.7mg and 177.0 mg respectively. And he also found Exhibit-DN-390/2018 (C1) to DN-390/2018 (C5) gave positive test for **Tramadol**, and the amount of Tramadol in each Exhibit is found to be 41.6mg. His report **(Exhibit-2)** also appears to be consistent with his evidence.

13. Now, it is to be seen from where these contraband substances were recovered. In this regard the evidence of P.W.1, 2, 3, 4 and C.W.1 and 2 are relevant. P.W.4 - Shri Ramakanta Nath is the informant of this case who lodged the FIR- Exhibit-1. He was working as Officer-In- Charge of Harangajao P.S. on 16.07.2018. His evidence reveals that on that day, at about 6 pm, they stopped one Cruiser vehicle, bearing registration No. AS-11 CC-3360, which was coming from Silchar to Haflong. And during checking, they found 3 numbers of 100 ml TOSSEX bottles, 7 numbers of 100 ml QREX bottles, 1296 numbers of SPASORID POXIVON Capsules, one Air Gun and one Amplifier from the possession of Mandel Lal Thlangama and Lienkhokhai Changsan. Then on being asked they failed to produce any documents like prescription of Doctor and Cash Memo etc. Then he reported the matter to Superintendent of Police, Haflong over phone and then Addl. S.P.(HQ) was directed to supervise the same and as directed by Addl. S.P., he made seizure vide seizure list (Exhibit-6) and examined the witnesses. He also testified that later on, he endorsed S.I. Rakmat Ali Mazarbhuyan for further investigation. It is elicited in cross-examination of this witness that the contraband substances were found inside a bag and the bag was

beneath the seat of the cruiser vehicle and both the accused themselves identified and claimed the bag belonging to them.

14. P.W.1 - Shri Chinglen Singla was also a Police Officer of Harangajao P.S. and his evidence also lends support to the evidence of P.W.4, but, according to him, the bag was found in possession of accused Mandel Lal Thlangama. He has not implicated the other accused, namely, Lienkhokhai Changsan. His evidence also reveals that on 16.07.2018, at about 6 pm, they stopped one Cruiser vehicle bearing registration No. AS-11 CC-3360, which was coming from Silchar to Haflong and on checking they found 3 numbers of 100 ml TOSSEX bottles, 7 numbers of 100 ml QREX bottles, 1296 numbers of SPASORID POXIVON Capsules, one Air Gun and one Amplifier from the possession of accused Mandel Lal Thlangama. He also testified that on being asked the accused failed to produce any documents like prescription of Doctor and Cash Memo etc. Then the matter was reported to Superintendent of Police, Haflong over phone and then Addl. S.P.(HQ) was directed to supervise the same and Addl. S.P. arrived at there and the O/C had seized the contraband substances following due procedure of law in presence of witnesses. Cross-examination of this witness also reveals that the contraband substances were inside a bag which was in possession of accused Mandel Lal Thlangama.

15. P.W.2 - Shri Bishnu Basumatary is a Home Guard and P.W.3 – Shri Kambuga Rongmei is a Police Constable and at the relevant point of time they were serving at Harangajao P.S. and they were also part of the team, who conducted Naka Checking in front of the P.S. on the relevant date. P.W.2 testified that the contraband

substances were recovered from a bag being carried by the accused persons, who were travelling together, and accordingly, the same were seized. It is elicited in his cross-examination that the bag containing contraband substances was with the accused persons inside the vehicle.

16. P.W.3 also testified that the contraband substances were recovered from a bag being carried by the accused persons, who were travelling together and they carried one Air Gun and one small cartoon. It is elicited in cross-examination that the contraband substances were found in the cartoon, which was at the roof top carrier of the vehicle.

17. Thus, it appears that this witness had stated a different story that the contraband substances were found in a small cartoon which was on the roof top carrier of the vehicle. But, he is categorical in stating that the cartoon belongs to the accused persons. However, in view of categorical statement of the P.W.4, 1 and 2 the evidence of P.W.3 that the contraband substances were found in a small cartoon on the roof top carrier of the vehicle is found to be not at all believable. But, it raises reasonable suspicion about the prosecution version.

18. C.W.1, Shri Salim Ahmed Barbhuyan and C.W.2-Shri Paulomthang Vaiphei were passengers of the cruiser vehicle and they were travelling from Silchar to Harangajao on the relevant date and time. Both these witnesses have testified that- on 16.07.2018, they were travelling in a Cruiser vehicle from Silchar to Haflong and on the way the vehicle was stopped near Harangajao P.S. and police

recovered a bag and found 3 numbers of 100 ml TOSSEX bottles, 7 numbers of 100 ml QREX bottles, 1296 numbers of SPASORID POXIVON Capsules, one Air Gun and one Amplifier from the possession of both the accused persons and seized the contraband substances vide seizure list (Exhibit-6) and Material Exhibit -1 are the contraband substances, and also seized the Amplifier and Air Gun vide seizure list-Exhibit-5, and Material Exhibit 2 are the Air Gun and Amplifier. It is elicited in cross-examination of C.W.1 that the seized articles were found beneath their seats. On the other hand it is elicited in cross-examination of this witness that the seized articles were recovered from the rear/backside of the vehicle and he don't remember if the seized articles/items were being carried in the carrier of the vehicle.

19. From the evidence discussed above, it becomes apparent that though P.W. 2, 3 and 4 including C.W. 1 and 2 testified that the seized contraband substances were recovered from both the appellants, yet, the evidence of P.W.1 reveals that the bag containing contraband substances were recovered from the possession of appellant Mandel Lal Thlangama. The seizure list, - Exhibit-6, also reveals that the contraband substances were seized from the possession of Mandel Lal Thlangama. Thus, the evidence of P.W.1, together with P.W. 2, 3 & 4 and also with the C.W.1 and 2 goes a long way to establish that the seized contraband substances were recovered from the possession of appellant Mandel Lal Thlangama. But, in view of the evidence of P.W.1 and the seizure list, Exhibit-6, the evidence of P.W.2, 3, 4 and C.W.1 and 2 that the contrabands

were found in joint possession of both the appellants, fails to inspire confidence.

20. It is to be mentioned here that the appellant also adduced evidence in defence denying their involvement with the offence charged and examined one Marjit Singha as D.W.1 and one Ajem Hrangkhoh as D.W.2. D.W.1 is the driver of the Cruiser vehicle. His evidence reveals that the appellants are innocent and that they have been falsely implicated in the case and that the seized articles were not belonging to them. However, in cross-examination of D.W.1 it is elicited that police, during checking, all the passengers were asked to go to P.S. and except the two accused rest were allowed to go, and in his presence open the bag and found some medicine and seized the same. And according to D.W.2 the bag, from where the contraband substances were recovered, was not belonging to the accused persons and they are innocent. It is however elicited in his cross-examination that all the passengers were taken to the police station and there police seized some medicine and the driver of the vehicle left the police station leaving the two accused persons. Thus, the evidence so adduced by D.W. 1 and 2, have failed to outweigh the evidence of the prosecution side, which are found to be clear and cogent in respect of recovery of contraband substances from the possession of the appellant Mandel Lal Thlangama.

21. It is to be mentioned here that no charge sheet was laid against the appellants under section 29 of the NDPS Act and no charge of abatement and criminal conspiracy was also framed against the appellants and no evidence also led before the court below in that regard. Thus, in the given facts and circumstances on the

record, it cannot be said that the prosecution side has succeeded in establishing the charges against the appellant Lienkhokhai Changsan. Rather, reasonable suspicion creeps in mind about the involvement of the appellant Lienkhokhai Changsan with the charges and on such count I am of the considered opinion that he is entitled to benefit of doubt.

22. I have considered the submissions of learned Advocates of both sides in the light of facts and circumstances discussed herein above, and I find the evidence of learned counsel for the appellants bereft of merit, so far it relates to non compliance of section 42 and 50 are concerned at the time of seizure. As discussed earlier, the contraband substances were recovered and seized while the same were being carried in a 'public conveyance'. In that view of the matter the section to be attracted is not 42 and 50 of NDPS Act. Rather section 43 is attracted herein this case and Mr. R.J. Baruah, the learned Addl. P.P. has rightly pointed this out during argument and the case law, **S.K. Raju @ Abdul Hoque @ Jagga (supra)** so referred by him also supported his submission. It is to be noted here that in the said case it has been held by Hon'ble Supreme Court that:-

"An empowered officer under Section 42(1) is obligated to reduce to writing the information received by him, only when an offence punishable under the Act has been committed in any building, conveyance or an enclosed place, or when a document or an article is concealed in a building, conveyance or an enclosed place. Compliance with Section 42, including recording of information received by the empowered officer, is not mandatory, when an offence punishable under the Act was not committed in a building, conveyance or an enclosed place. Section 43 is attracted in situations where the seizure and arrest are conducted in a public place, which includes

any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public."

23. Here in this case the contraband substances were recovered from a bag not from the person of the accused. And as such, to the considered opinion of this court, section 50 of the NDPS Act is not attracted herein this case. Though Mr. Laskar, the learned counsel for the appellants submits that non compliance of section 50 NDPS Act vitiates trial yet, I find the same bereft of merit. Explaining the object of the section 50 of NDPS Act Hon'ble Supreme Court has held in the case of **Baljinder Singh (supra)** that "*Section 50 of the Act affords protection to a person in matters concerning "personal search" and stipulates various safeguards.*"

24. However, there is substance in the submission of Mr. Laskar, the learned counsel for the appellants that the mandatory provision of section 52 A of the NDPS Act was violated here in this case and the representative sample was not drawn in presence of the Magistrate and the law laid down by Hon'ble Supreme Court in the case of **Union of India v. Mohanlal, (2016) 3 SCC 379**, has not been followed. In the case of **Mohanlal (supra)** Hon'ble Supreme Court has held as under.

"15. It is manifest from Section 52-A(2)include (supra) that upon seizure of the contraband the same has to be forwarded either to the officer- in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory, (b) certifying photographs of such drugs or substances taken before the Magistrate as true, and (c) to draw representative

samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-sections (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.

25. In the case of **Mangilal vs. The State of Madhya Pradesh** reported in **2023 LiveLaw (SC) 549** Hon'ble Supreme Court has held as under:-

"6. The obvious reason behind this provision is to inject fair play in the process of investigation. Section 52A of the NDPS Act is a mandatory rule of evidence which requires the physical presence of a Magistrate followed by an order facilitating his approval either for certifying an inventory or for a photograph taken apart from list of samples drawn."

26. Again in the case of **Simarnjit Singh vs. The State Of Punjab**, in Criminal Appeal No. 1443 of 2023 (Arising out of S.L.P.(Crl.) No. 1958 of 2023) decided on 9 May, 2023 Hon'ble Supreme Court has held that –"drawing samples from all the packets at the time seizure is not in conformity with the law laid down by this Court in the case of **Mohanlal (2016) 3 SCC 379**, This creates a serious doubt about the prosecution's case that substance recovered was a contraband."

27. Now, advertent to the facts and circumstances here in this case, I find that after recovery of contraband substances the officer concerned i.e. P.W.4 never approached the Magistrate for certifying the correctness of the inventory, certifying photographs of such drugs or substance taken before the Magistrate as true and for grant of permission to draw representative sample so drawn in his presence. Thus, the entire process of drawing of samples was not in conformity with Section 52A of the NDPS Act and the law laid down by Hon'ble Supreme Court in the case of **Mohanlal (supra)**. This creates a serious doubt about the prosecution's case which is not free from suspicion and the same cannot be said to be established beyond all reasonable doubt, in the given background, especially in view of the evidence of P.W.1 and P.W.3.

28. The learned court below has totally ignored this aspect in the impugned judgment. Thus, the impugned judgment and order, so passed by the learned court below, has failed to withstand the legal scrutiny and on such count it requires interference of this court. The

appellants are entitled to be acquitted of both the charges on benefit of doubt.

29. In the result, I find sufficient merit in these appeals and accordingly, the same stands allowed. The impugned judgment and order of conviction in both the appeals No. 30/2022 and 35/2022, stands set aside and quashed. Both the appellants are acquitted on benefit of doubt. Both the appellants, if languishing in jail hazoot, shall be released forthwith. Send down the record of the learned court below forthwith with a copy of the judgment and order.

J U D G E

Comparing Assistant