

GAHC030000352017



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

Case No. : CrI.A./30/2017

F Lalbiakhlui
Dawrpui Vengthar, Aizawl

VERSUS

State of Mizoram
Aizawl

Advocate for the Petitioner : Mr V L Nghata Keivom

Advocate for the Respondent : Mr C Zoramchhana (PP./Addl.PP, Mizoram)

BEFORE
HONOURABLE MRS. JUSTICE MARLI VANKUNG

JUDGEMENT

Date : 03.05.2023

Heard Mr. Reuben Lalrinsanga, learned counsel for the appellant along with Mr. C. Zoramchhana, learned Public Prosecutor for the State respondent.

2. This is an appeal under Section 374 of Cr.P.C. read with Section 36B of ND & PS Act, 1985, against the Order dated 12.07.2017 passed by the learned Judge, Special Court (ND & PS Act), Aizawl in CrI. Tr. No.789/2015 u/s 20(b) (ii)

of ND & PS Act, 1985. Wherein the appellant was convicted u/s 20(b) (ii) of ND & PS Act and sentenced to undergo 10 years RI with fine of Rs.1,00,000/- (*Rupees one lakh*) id SI for 1(one) year.

3. Brief facts of the case is that on 11.03.2015 at around 9:00 A.M, a written report was received from S.I Lalsanga of Spl. Narcotic Police Station, to the effect that on 10.03.2015 @ 11:30 PM while performing duty, the Spl. Narcotic Personnel allegedly recovered 30 Kgs of ganja which was packed in 42 polythene packets and further kept inside 4 gunny bags from the possession of F. Lalbiakhlui, (35) D/o Thansanga of Dawrpui Vengthar, Aizawl, at Phunchawng on the main road of National High Way A44. Sample drawing and packing were allegedly done at the place of occurrence in presence of witnesses. The alleged illegal possessor F. Lalbiakhlui was arrested on 11.03.2015 at 9:00 a.m. The total value of the seized articles was estimated at Rs.1,20,000/- as per the local market rate. Hence, Spl. Narcotic PS Case No.7/15 dt.11.3.2015 U/s 20 (b)(ii) (C) ND & PS Act was registered and duly investigated into. During investigation, it was allegedly revealed that the said Ganja was from Champhai and taken to Phunchawng for sale. The FSL report declared that the seized articles were Ganja. A prima facie case under Section 20(b) (ii) (C) ND & PS Act, 1985 was found established against the accused F. Lalbiakhlui (35) D/o Thansanga of Tuikual North, Aizawl, charge sheet was submitted and she was sent to Court to

face trial.

4. During the trial, the learned Special Court, ND & PS, examined 4 Nos. of prosecutions witness and thereafter, the appellant/accused was examined under section 313 Cr.P.C on 28.9.2016, no defence witnesses were produced. The learned Trial Court heard both the parties and passed the impugned Judgment & Order dated 12.07.2017 convicting the appellant under section 20(b)(ii)(c) of ND & PS Act, 1985 and sentenced her to undergo R.I. 10 years and pay a fine of Rs.1 (one) lakh in default S.I. for 1 (one) year. Aggrieved, the instant appeal has been filed.

5. Mr. Reuben Lalrinsanga, learned counsel for the appellant submits that the learned Trial Court had erred in convicting the appellant under Section 20(b) (ii) of ND & PS Act, 1985 since the case I/O and Seizing Officer did not followed the mandatory provisions under the ND & PS Act, 1985. He submits that at the time of the alleged seizure of the seized articles Section 50 sub-section 4 was not followed while body search of the appellant, who is a female, was conducted. She was searched by the male S.I Lalsanga, who was also not a Gazette officer. He further submits that, though the S.A was recovered from the Taxi, the Taxi driver was not made an accused but was made a prosecution witness and the Taxi from where the seized article was not confiscated, which is not as per the

provisions of Section 60 sub-section 3 of ND & PS Act, 1985. He submits that the appellant was innocent since the seized articles belong to other passengers who have not been arrested. The learned counsel for the appellant also submits that at the time of making the inventory of the seized articles, the provisions of Section 52-A was not followed, there was no evidence of certifying the correctness of the inventory so prepared; nor was it taken in the presence of a Magistrate and the drawing of samples of such drugs or substances, was not in the presence of a Magistrate and there was no certifying the correctness of any list of samples so drawn.

6. The learned counsel also submits that from the evidence of the seizure witness it is seen that when there were 4 (four) gunny bags of the alleged seized articles and samples were taken from only 2 bags out of 42 small bags. The learned counsel also pointed out that while the seizure was made there were no independent witnesses and therefore the mandatory provisions of Section 100 sub-section 4 of Cr.P.C was not followed. In support of his submissions the learned counsel cited the following cases;

State of Punjab Vs. Surinder Rani alias Chhindi reported in **(2000) 10 SCC 429 : 2001 SCC (CrI.) 1487: 1999 SCC Online SC 892, Arif Khan @**

Agha Khan Vs. State of Uttarakhand reported in **Criminal Appeal No.273 of 2007 & J.H. Goldena Vs. The State of Mizoram** reported in **Crl. A. No.23 of 2018.**

7. Mr. C. Zoramchhana, learned Public Prosecutor on the other hand submits that even though the search of the appellant, who is a female was not done by female officer, however, since nothing was found on the body there was no prejudice caused to her. He also submits that confiscation of the car is not necessary since the Taxi driver is not the accused in the case. The learned Public Prosecutor also mentions that though it is admitted that the provisions under Section 52-A was not followed and no inventory was made as per the provisions of the Act, this was not challenged before the Trial Court. He also submits that by not following the provisions of Section 52-A ND & PS Act, 1985 the trial itself is not vitiated as noted by this Court's Judgment & Order in **J.H. Goldena Vs. State of Mizoram (Supra)**. The learned Public Prosecutor also mentions that in the Trial Court the grounds that there was no independent witness was not raised by the appellant and that the seizure without an independent witness in this case did not cause any bias to the case.

8. The learned Public Prosecutor also mentions that as per Section 35 of the ND & PS Act, 1985, the onus is upon the appellant to prove her innocent and

from the cross-examination nothing pointing toward the innocent of the appellant was asked, nor did the appellant produce any witnesses in the Trial Court. He submits that even though the appellant in her examination under Section 313 Cr.P.C had mentioned that she was not present in the vehicle and that the real accused persons had run away, nothing of this sought was reflected in the cross-examination.

In support of his submissions, the learned Public Prosecutor has cited the following cases :

Madan Lal & Another Vs. State of H.P. reported in **(2003) 7 SCC 465**, in the case of **Baldev Singh Vs. State of Haryana** reported in **(2015) 17 SCC 554**.

9. Having heard the submissions made by both the parties, the prosecution evidence & documents produced is carefully scrutinised.

10. The evidence of the prosecution witnesses are briefly highlighted herein, PW No.1 Lalsanga, S.I of Police has stated that on 10.03.2015 while the special Narcotic P/S staff performed confidential duty at Phunchawng, they stopped one vehicle suspecting it to possess contraband drugs by one of the occupant the instant appellant/accused. The ground of belief was prepared and body search of the appellant/accused was conducted but nothing was found on her body,

however, they recovered suspected Ganja from the vehicle which the appellant/accused kept in four gunny bags. Weighment was taken and the seized article was found to be 30 kgs. Sample was drawn and packing and sealing was done in the presence reliable witnesses at the spot. The appellant/accused was not arrested as it was already dark and she was a female. However, the next day at around 9:00 a.m. after preparing arrest memo she was arrested after informing of her grounds of arrested. The P.W. No. 1 exhibited arrest memo, seizure memo, grounds of belief, the FIR and the S.A. exhibited as M-1. On cross-examination he denied that the appellant/accused was the sole passenger in the said Taxi. He also admitted that 42 sample packages packed and sealed by him contained a small quantity of dry plants with fruit tops and leaves, he denied that he had filed the charge-sheet against the appellant/accused due to the pressure from high authority.

11. PW No.2 is Zoramliana who identified the accused and deposed that he was a Taxi Driver and on 11.03.2015 while he was heading home, he was stopped by one person at Bawngkawn requesting him to take her and her properties to Rangvamual. The appellant/accused told him that she had shifted her residence to Rangvamual from Bawngkawn and she had kept her properties at I.T.I. He then took her to I.T.I. Veng where she put her properties at the back of the Taxi after which they headed towards Rangvamual. Before she had

unloaded her properties, the C.I.D (Crime) came and search her properties. He did not know the content of the 4 gunny bags before it was recovered and seized, wherein 4 gunny bags contained the suspected Ganja. He deposed that weighment was taken at the spot and the seized articles was 30 kgs, the sample was drawn, packed and sealed at the spot in his presence and he put his signature as a seizure witness. During cross-examination he deposed that the quantity of a sample drawn by the seizing officer was not known to him. That 2 (two) packets with taken out by the police office on the spot and in his presence. He did not see exhibit P-3 being fill up by seizing officer and he did not received any description with regard to exhibit P-3 and its utility there off.

12. Pw-3 is Chawngmingthanga is a Govt. servant and he stated that on 10.3.2015 at around 10 p.m., the Police officer seized suspected Ganja weighing 30 kgs. kept in 4 riza (Buara) bags from the possession of appellant/accused at Phunchawng main road. And that he put his signature on the body of the seizure memo as well as on the form for the seized article as a seizure witness. He was present when weighment was done and sample was taken from each bag, sealed and packed. During cross-examination he stated that he was one of the raiding parties being posted as Special Narcotic, Aizawl, he also stated that he does not know whether sample were taken by the seizing officer from all the 42 polythene packets on the spot or not.

13. Pw-5 is the case I/O Mr. K. Lalmawizuala, he has stated that on 11.03.2015 at around 9:00 A.M, a written report was received from S.I. Lalsanga of Spl. Narcotic Police Station to the effect that 10.03.2015, Spl. Narcotic Police Station personnel conducted covert duty on the main road of NH highway A-44. They recovered and seized suspected Ganja which was packed in 42 polythene and further kept inside gunny bags from the possession of F. Lalbiakhlui D/o Thansanga of Dawrpui Vengthar, Aizawl. Taking weight, drawing of sample, sealing and packing were done in presence of witnesses at the spot. However, arrest was made the next day i.e. 10.03.2015 by S.I Lalsanga as the accused is a female person and it was night time. On investigation, he examined the accused as well as witnesses and sample of the seized articles were sent to FSL Aizawl for chemical examination. It was found to be Ganja. Accordingly, he found a prima facie case U/s 20(b)(ii)(C) ND & PS against the accused. He exhibited the final form along with his signature, arrest memo along with his signature, FSL report containing 4 pages, index A detail, grounds of belief, report of arrest, FIR under section 154 Cr.PC, endorsement, FIR submitted by S.I Lalsanga and the seized articles. On cross-examination, he stated that the accused had no prior criminal records. That 42 sample packages already packed and sealed by the Seizing Officer were sent to FSL by the DSP, CID (Crime) and nothing else.

14. The appellant on her examination under section 313 Cr. P.C denied that the seized contraband substance belonged to her, she stated that she did not even travel in the vehicle that carried the goods and that the owners fled the scene and ran away.

15. It is seen that only four prosecution witnesses have been examined wherein PW1 has stated that a body search of the appellant was conducted but nothing was found on her body. The learned Addl. Public Prosecutor also submits that the body search of the appellant was not done by a female officer however no prejudice was caused to her since nothing was found on her body. From the above it is clear that when the body search of the appellant who was a female was done, it was not done by a female officer. The conditions under which search of persons shall be conducted as laid out in subsection 4 of section 50 was not followed:

Section 50 (4) provides that *"No female shall be searched by anyone excepting a female"*.

16. The Apex court in **State of Punjab vs. Surinder Rani** (supra) has held that:

"5. The sub-section is a mandatory and cannot be diluted even on the ground that a female was not available at the time of search. In the present case PW2 Gulmid Singh has admitted in his examination-

in- chief that the respondent was searched by him as then no female was present. In fact he called the assistance of two female constables. PW2 admitted that those two female constables reached on the spot only one hour after the search was made. The search is therefore vitiated.

6. In view of the apparent violation of section 50(4) the order of acquittal does not warranty any interference by the superior court. We, therefore, dismiss the appeal.”

17. With regards to whether Section 52 -A of the ND & PS Act was followed or not, the evidence of PW1 and the seizure witnesses PW 2 and PW3 all show that the weighment and packing was done on the spot itself and it was not done before a Magistrate. None of the witnesses have mentioned of any application made to a Magistrate.

18. The Apex Court in Union **of India v. Mohanlal, (2016) 3 SCC 379** has held that;

“31.1. No sooner the seizure of any narcotic drugs and psychotropic and controlled substances and conveyances is effected, the same shall be forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application under Section 52-A(2) of the Act, which shall be allowed by the Magistrate as soon as may be required under sub-section (3)

of Section 52-A, as discussed by us in the body of this judgment under the heading "seizure and sampling". The sampling shall be done under the supervision of the Magistrate as discussed in Paras 15 to 19 of this order."

It is also seen that the seizure witness PW-2 during cross-examination deposed that the quantity of a sample drawn by the seizing officer was not known to him. That 2 (two) packets were taken out by the police office on the spot and in his presence. The other seizure witness PW3 is not a civilian witnesses and he on cross examination stated that he does not know whether sample were taken by the seizing officer from all the 42 polythene packets on the spot or not.

19. The Apex Court in **Abdul Rashid Ibrahim Mansuri v. State of Gujarat, (2000) 2 SCC 513 22** had observed that ;

"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 the prosecution case or in the prosecution evidence are such as to give reasonable assurance to the court that the 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.”

20. In the instant case this court also finds that though the appellant did not produce any witnesses in the trial court, in her examination under section 313 Cr.P.C has denied that the seized contraband substance belonged to her and she further stated that owners had fled the scene. The seizing officer, PW1, in his cross examination denied that the appellant/accused was the sole passenger in the said Taxi. This has created a doubt/raises question in one's mind, of the possibility that the seized 4 nos. bags of contraband substance seized from the Taxi could have belonged to the other passenger and the benefit of doubt is in favour of the appellant.

21. From the above findings and discussions this court finds that there has been a violation of section 50(4) and section 52(A) of the ND& PS Act. The violation of section 50(4) of the ND & PS Act, where the appellant being a female was subject to body search by a male seizing officer cannot be viewed lightly. For the stated reasons and considering views of the Apex Court as mentioned above , this court is constrained to hold that there are sufficient grounds to set aside the impugned order dated 12.07.2017 passed by the

learned Judge, Special Court (ND & PS Act), Aizawl in Crl. Tr. No.789/2015 u/s 20(b) (ii) of ND & PS Act, 1985. The appellant who has been in jail custody since 12.07.2017 is acquitted of the aforesaid charge and set at liberty forthwith unless required in some other case.

22. Crl.A./ 30/2017 accordingly stands allowed and disposed of

23. LCR is to be returned.

JUDGE

Comparing Assistant