

GAHC030001952020



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

Case No. : Crl.A./6/2020

Hrangkapthanga
s/o Chhuanmawia, Tahan, Mynmar, Temporary Residence of Bethel Veng, Champhai,
Mizoram

VERSUS

State of Mizoram and 2 Ors.
Mizoram 2:Superintendent of Police
Champhai
Mizoram

3:SI H Lalengmawia
Champhai
Mizora

Advocate for the Petitioner : Mr Lalremtlunga

Advocate for the Respondent : Mrs. Linda L Fambawl (PP/Addl.PP, Mizoram) for R1-R2

Linked Case : I.A.(Crl.)/8/2020

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s/o Chhuanmawia
Tahan
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c/o Bethel Veng
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Mizoram

Advocate for the Petitioner : Mr Lalremtlunga
Advocate for the Respondent :

BEFORE
HONOURABLE MRS. JUSTICE MARLI VANKUNG
JUDGEMENT

Date : 08.06.2023

Heard Mr.Lalremtlunga, learned counsel for the appellant and Mrs Linda L. Fambawl, learned Addl. Public Prosecutor for the state respondent.

[2.] The instant appeal is filed under Section 36B, ND&PS Act r/w Section 374(2) Cr.P.C to set aside and quashed the impugned Judgment & Order dated 03.12.2019 passed by the learned Judge, Special Court, ND & PS, Champhai and the impugned Conviction dated 04.12.2019 arising out of Criminal Trial No. 1839/2018 (D) under Section 22 (c) & 25 ND&PS Act r/w Section 14 of the Foreigners Act, 1946, wherein the appellant was convicted under sections 8/22 (c) ND& PS Act,1985 and sentenced to undergo Rigorous Imprisonment for a period of 10 years and pay a fine of Rs. 1 lakh, i.d. Rigorous Imprisonment for a period of another 1 (one) month.

[3.] The prosecution story of the case in brief is that on Dt. 28.09.2018, Mr. H.Lalengzama, SI of Police submitted a written First Information Report (FIR in short) to the Officer-in-Charge, Champhai Police Station to the effect that one vehicle Bolero Camper bearing No. MZ-01-N-4940 was being detained at Dunglelang on ground of strong suspicion of carrying contraband substances. In pursuant to the information Champhai police team rushed to Dunglelang village. On search of the vehicle, 169 bundles; each bundle contained 10 packets wherein one packet contained 200 tablets suspected to be methamphetamine were recovered/seized from the vehicle in hidden compartments/chamber made beneath the seats of the vehicle. Mr. H. Lalengzauva, S.I. police altogether recovered/seized 338000 nos. tablets of methamphetamine weighing 49 Kilograms. He submitted a report about the seizure of the drugs and the arrest of appellant to the officer-in-charge, Champhai Police Station. Champhai Police Station registered a case vide CPI.PS Case No.117/2018 under Section 22 (c) & 25 of ND & PS Act against the driver of the vehicle namely Mr. Hrangkapthanga (36) S/o Chhuanmawia/appellant, a permanent resident of Tahan, Myanmar, a temporary resident of Bethel Veng, Champhai, Mizoram.

[4.] Having collected evidences of illegal possession/ transportation of the Methamphetamine, the case I.O submitted the charge sheet against the appellant under Section 22 (c) & 25 of ND&PS Act, read with Section 14 of Foreigners Act.

[5.] The case was sent to Special Court of ND&PS Act on 27.11.2018 for

trial. The learned Judge, Special Court, ND&PS framed formal charges under Section 22(c) & 25 of ND&PS Act against the appellant, to which he pleaded not guilty and claimed to be tried. During trial, 6 (six) prosecution witnesses were examined. The appellant on examination under Section 313 Cr.P.C. denied all the evidence adduced against him.

[6.] The learned Trial Court after hearing both the parties found the appellant guilty of the charge under Section 8/22 (c) ND&PS Act and thereafter, sentencing him to undergo Rigorous Imprisonment for a period of 10 years and pay a fine of Rs. 1 lakh, i.d. Rigorous Imprisonment for a period of another 1 (one) month. Aggrieved by the aforesaid conviction and sentence order, the appellant has approached this Court and filed the instant appeal petition.

[7.] Mr. Lalremtlunga, learned counsel for the appellant submits that the Judgment & Order dated 03.12.2019 passed by the learned Judge, Special Court, ND&PS, Champhai is liable to be set aside since the seizure had taken place on the basis of prior information and that the ground of belief and information was suppose to be recorded under Section 42(2) ND&PS Act, which has not been done. He has pointed out that the date on Exhibit P-2 which is the grounds of belief is recorded as 27.09.2019 while the date when the information was received by PW-1 was on 27.09.2018. Grounds of belief cannot be after one year of the incident. He also submits that there was no proper civilian witness. The case I.O also did not mention that the inventory was placed before the Magistrate. He points out that the provisions of

Section 52 (a)(2) of ND&PS was not followed. The learned counsel further submits that the colour of the seized articles was mentioned to be yellowish in colour. However, in the report made by the Forensic report, the colour was dark red. He further points out that the question whether the seized articles was in conscious possession of the appellant was not asked under Section 313 Cr.P.C. The learned counsel also mentions that a certain number of the seized articles was sent to the FSL but there is no record as to where the other tablets that is seized on that day was kept while a total number of 3,38,000/- of Methamphetamine tablets is seized on that day.

[8.] The learned counsel also submits that there was no exhibit of the seized articles before the Court and none of the prosecution witnesses have mentioned of the production of the seized articles before the Court during Trial. He also led this Court through the Forensic report which is in the case record wherein the Forensic report was not signed by the Judge of the Trial Court. In support of his submission, he has cited the following cases:-

- (i) *Karnail Singh Vs. State of Haryana*, reported in 2009 (8) SCC 539
- (ii) *Mohinder Singh Vs. State of Punjab*, reported in 2018 AIR (SC) 3798
- (iii) *Ramesh Sahu & Anr. Vs. State of Assam*, reported in 2011 (5) GLT 108
- (iv) *State of Gujarat Vs. Ismail U. Haji Patel & Anr.*, reported in 2003 (12) SCC 291
- (v) *State of Punjab Vs. Hari Singh & Ors.*, reported in 2009 AIR (SCW) 1596

[9.] Mrs. Linda L. Fambawl, learned Additional Public Prosecutor, on the other hand submits that from the evidence given by PW-1, there is no procedural lapse under Section 42 of the ND&PS Act. PW-1 has clearly mentioned that the said

information was reduced in writing under Section and sent to the immediate superior officer as required under section 42(1) ND&PS Act. The grounds of beliefs have been clearly recorded in the FIR. That the date recorded was 28.09.2019 is clearly a clerical mistake and this point was not raised during the trial of the case before the Judge, Special Court, ND&PS. The learned Additional Public Prosecutor further mentions that the required two civilian witnesses have deposed in the Court as PW-2 and PW-3. Conscious possession of the seized articles has also been brought out on examination of the accused under Section 313 of the Cr.P.C., where the appellant/accused admitted that the vehicle belonged to him. Therefore, since the vehicle is having compartments where the seized articles were seized, it can be presumed that he was in conscious possession of the seized articles. Section 35 of the ND&PS Act cast the burden upon the appellant to prove that he was not having any knowledge or he was not having any conscious possession of the seized articles. No such evidence has been adduced by the accused/appellant. With regard to the difference of colour in the seized articles, she has cited the decision of the Apex Court in the case of **Jagdish Budhroji Purohit Vs. State of Maharashtra**, reported in **(1998) 7 SCC 270** (paragraph No. 4. where the Apex court held that the evidence establishes that the samples were received by the Chemical Examiner in a sealed condition and they were intact and the samples were in a fit condition for testing. That leaves no doubt about the material seized from the factory and examined by the Chemical Examiner being the same. The learned Additional Public Prosecutor further submits that the FSL report shows that

the tablets were received and were sealed and intact when they were produced before the FSL. The learned Addl. PP also submits that the FSL Officer had made his deposition in the Court wherein, cross examination of the FSL Officer was declined. Therefore, the genuineness of the seized articles cannot be questioned at this later stage.

[10.] With regards to the non-production of the seized articles, the learned Addl. PP submits that it has been explained by the learned Trial Court where the Trial Court noted that the seized articles were produced but due to the absence of the defense counsel, the matter was adjourned on that day, thereafter, it was not produced again. Therefore, it is clear that the seized articles had been produced before the Court. The evidence of PW-7 clearly shows that the inventory was prepared in front of the JMFC and there is no violation of Section 52A of the ND&PS Act.

[11.] Having the submissions made by both the parties, the evidence adduced by the witnesses before the Trial court is briefly highlighted below for scrutiny.

[12.] PW-1, S.I. H. Lalengzama has deposed that on 27.09.2018 at around 10:45 a.m. while he was on duty at Champhai Police Station he received the information over Mobile phone from Dungtlang Police Out post that one Bolero Camper B/R No. MZ-01 N 4940 driven by the appellant was stopped on strong suspicion of carry certain contraband substances. On receiving the information he had put the said information in writing as mandated under Section 42(1) ND & PS Act and forwarded the same to his superior officer. Himself and his supporting staff then

proceed to the place of occurrence and he prepared the grounds of belief with 2 (two) witnesses. The appellant with his vehicle and the suspected contraband substances were detained/under stoppage of the Dungleang Police and the 10th Assam Rifles officials. On checking the vehicle in the presence of 2 (two) witness he found two secret chamber one beneath the seat and the other from the back seat wherein he found 169 bundles, each bundle containing 10 small packets. Each small packet contains 200 tables of suspected Methamphetamine. All together he recovered 3,38,000 tables of suspected Methamphetamine weighing 49 kgs worth approximately Rs. 6.76 crores at the local market. The appellant was arrested and after completion all necessary formalities. The appellant was also medical examined as required under Section 54 Cr.P.C.

[13.] During cross-examination he stated that the vehicle and the driver were stopped at the Dungleang Police Out Post and the 10th Assam Rifles Personnel were also present. That the contraband substance were not recovered from the vehicle till they reached at spot. The suggestion that the present/accused had unknowingly carried the contraband substances was denied because the vehicle was modified by erecting secret chamber purely to conceal the contraband substances. He stated that the sample was drawn in the court in his presence however he did not know the quantity of the samples which were drawn from the S.A. He also admitted that no colour photograph was present on the inventory and admitted that the appellant did not claimed ownership of the S.A.

[14.] PW-2, Mr.Kapfela, is the seizure witness who deposed that he saw the wooden secret chamber specially erected in the vehicle from where the police had recovered certain quantity of contraband substances "Methamphetamine". That after the police recovered all the packages containing the contraband substances they were taken to the office. There were 169 packages seized which weight 49 kgs. He identified the seizure memo and his signature under seizure memo. During cross examination he stated that the seized articles were yellowish mixing colour and that the S.A. was not produced in the court today. He also stated that he was not present when the inventory before the Magistrate and he did not know the amount of sample drawn from the S.A.

[15.] PW-3, Mr.Kaprothanga is the President of Dungtlang, Branch YMA and a seizure witness. He stated that when he reached the place of occurrence the accused/appellant with one Bolero Camper was detained. He also saw the police take out all the bundles/packages containing contraband substances from the vehicle which were kept in wooden secret chamber specially erected in the vehicle. He stated that 169 packets of contraband substances was recovered which weight 49 kgs. During cross examination he admitted that when he reached the P.O. the police personnel, the accused and the S.A. were already at the P.O. He saw Methamphetamine tablets and the colour which he saw was yellow, however, he did not open all the S.A. and he cannot say the colour of the instant S.A.

[16.] PW-5 is Lalmuanawma, Assistant Director, FSL, Aizawl. He deposed that

he received 169 samples from Champhai Police when he examined the samples he found that they contained Methamphetamine tablets and he submitted the report of his finding to Sub Divisional Police Officer, Champhai on 16th October, 2018. He identified his signature Exhibited as Exhibit 15 (a) and Exhibit P 5 and the copies of his finding report containing 8 pages. Cross examination was declined.

[17.] PW-6, K. Lalrinsanga who is the MVI who stated that the rear passenger seat was modified and were not of company made.

[18.] PW-7, S.I. V.L. Chama Ralte deposed that on 27.9.2018 night, he took up the case for investigation, where on that day at around 10:45 Am there was a seizure of 338000 tablets of methamphetamine from the possession of the appellant/convict weighing 49 Kgs and packed in 169 bundles. The Champhai police station registered the case vide CPI PS Case No. 117/2018 dated 27.09.2018 under Section 22 (c)/25 ND&PS Act. Since the appellant/accused was a Foreigner, Section 14 of Foreigners Act was added to the charge section. On investigation, he drew representative samples of the said substances before the JMFC, Champhai District Court. He then sent samples to the Forensic Science Laboratory, Aizawl for chemical analysis. He also re-examined and interrogated the appellant/accused and the appellant/accused stated that he had a friend at Myanmar named Siama, who told him to make modification of his vehicle to enable his vehicle for carrying certain goods as requested. He made secret chambers beneath the rear seat of his vehicle and another secret chamber at the back of the seat. On 24.9.2018 he went down to Aizawl and the next day he went to

Farkawn village from where he went further upto Tiaukai (Myanmar - India Border area).Late at night, two bikes came from Burma and brought some bundles with them. They loaded the bundles in his vehicle and he left Tiau Kai. On entering Dungtlang village, he was checked by the police and the contraband substance kept in the secret chamber of his vehicle was seized. He was offered Rs 50000 for carrying such contraband substance by the said Siama. The PW stated that from his investigation, on further interrogation of the appellant/accused, the appellant/accused admitted that he had smuggled the contraband substances by taking the road of Khawbung village from Burma to India. The FSL report confirmed that the contraband substance contained Methamphetamine. He found that the appellant/accused had mensrea/criminal intention of carrying such contraband substances for which he had modified the rear seat of his vehicle for sealing such contraband substances. Finding prima facie case against the appellant/accused under Section 22(c)/25 ND&PS Act, he submitted the charge sheet. Exhibit P7 is the application for re-interrogation of the appellant, Exhibit P 8 is a copy of the inventory of seized articles, Exhibit P 9 is application for judicial remand of the accused, Exhibit P 10 is copy of the forwarding note in respect of the details of persons kept under custody, details of exhibits nature of examination and specimen of the seal used on the packing with certificate of authority, Exhibit P 11 is copy of application for inspection of the vehicle, Exhibit P 12 is copy of the case diary u/s 217 Cr.P.C. In his cross-examination, he stated that after making an application he drew the samples of

the seized articles before the JMFC, where the seizure witnesses were not present at that time. He stated that he drew four tablets each from each bundles. The total amount of the samples he drew was 676 tablets. He admitted that no colour photography was present in the inventory and admitted that he did not cite the JMFC before whom he made inventory as a prosecution witnesses. He also admitted that he prepare the list of samples without mentioning the number of samples tablets and without any description/details of the seized substances. That the exercise of sealing and packing of the bundles and samples were done in the police station and no photographs was produced in the Court to show the said exercise with the picture of JMFC and sealing and packing of the seized articles.

[19.] On examination the appellant under 313 Cr.P.C., the accused/appellant stated that he knew the accused Lalthansiamia, who was also a driver by profession. He denied the evidence that on 25.09.2018, two motor bikes from Myanmarside came to him with certain contraband substances on their bike that the bikers loaded the contraband substances into his vehicle Bolero Camper. He denied the evidence that on 27.09.2018, the Champhai Police at Dungtlang had recovered 49 Kgs of Methamphetamine (3,38,000 tablets) from his vehicle. He denied making any secret chamber box inside his vehicle but stated that he was not alone since Mr. Khupa (same person as Lalthansiamia) was with him in the vehicle but the police released him from Champhai Police Station.

[20.] This court finds that on the issue whether the mandatory provisions of

section 42(1) ND&PS Act have been followed or not, the prosecution witness, PW no.1 has clearly testified that on receiving the information, he had put the said information in writing as mandated under Section 42(1) ND & PS Act and forwarded the same to his superior officer. He also recorded his grounds of belief. With regard to the date of the written information wherein the information was received on 28.09.2018, however, the date of the ground of believe was shown as 27.09.2019 at Expt-2, this court finds that this point was not raised or questioned in the trial court further it is seen at Expt. P-1 that the information report in writing under section 42(1) is dated 28.09.2018 wherein the information was received on 27.09.2018 which is within the mandated 72 hours. This Court thus find it prudent to accept the explanation that there was a clerical mistake when the date in the grounds of belief was recorded as 27.09.2019 at Expt -2. For the above reasons the court is of the view that there was no violation of section 41(2) ND & PS Act in the instant case.

[21.] On the issue whether the provisions of section 52A was followed, it is seen that PW 7 has deposed that he prepared the inventory in the presence of Thomas Lalrammawia, Judicial Magistrate, Champhai and Exhibited Expt P-8 as the inventory prepared. On perusal of the inventory of sized articles at Ext-P-8, it is seen that the signature of the Judicial Magistrate with seal is present thus it can be safely said that the inventory was made in the presence of a Judicial Magistrate though the PW no.7 admitted that he prepared list of sample without mentioning number of the samples tablets and also number of the pack of samples and without any description/details of

the seized substance. It may also be noted that a co ordinate bench of this court in **J.H. Goldena Vs. The State of Mizoram reported in Crl. A. No.23 of 2018**, held that by not following the provisions of Section 52-A ND & PS Act, 1985 the trial itself is not vitiated.

[22.] With regards to the colour of the Seized article, it is seen that the seizure witness PW no.2 mentioned them to be yellowish mixing with white colour, while the Forensic report on 16th October 2018 mentioned the seized samples tested in the Forensic Laboratory as dark red. The parcel consisted of 169 exhibits packed and sealed in a polythene packets and enclosed together in a paper box sealed with wax seals. It is seen that the Assistant Director, FSL, Aizawl deposed in before the trial court as PW-5. He deposed that he received 169 samples from Champhai Police when he examined the samples he found that they contained Methamphetamine tables and he submitted the report of his finding to Sub Divisional Police Officer, Champhai on 16th October, 2018. Thereafter, cross examination was declined by the defense counsel in the trial court, thus the appellant is debarred from raising the issue of the difference in colour of the seized article at this stage when it was not an issue questioned in the trial court. Further, in ***Jagdish Budhroji Purohit Vs. State of Maharashtra (Supra)***, the Apex Court did not consider the submissions made by the learned counsel for the accused/appellant regarding the admissibility of reports, exhibits 61 to 67 and submitted that no weight should be attached to them as they do not contain any data regarding the test applied by the Chemical Examiner for finding

out the contents of the samples examined by him. The contention of the learned counsel for the appellant/accused in the case was also that the substance was seized from the factory and sent by PWs 1 and 3 to the laboratory was of white colour but in the reports of the Chemical Examiner, it is stated that the colour of the samples examined by him was grey. The evidence establishes that the samples were received by the Chemical Examiner in a sealed condition and they were intact. The samples were in a fit condition for testing. That leaves no doubt about the material seized from the factory and examined by the Chemical Examiner being the same. It was urged that the appellant is an old man, therefore, some leniency should be shown to him by reducing the substantive sentence to the period already undergone. The Apex Court held that a huge quantity of psychotropic substances was found from the possession of the appellant. A person who indulges in an activity of this type does not deserve lenient.

[23.] With regards to whether the appellant was in conscious possession of the seized contraband substance, it is noted that from the evidence adduced by the prosecution witness, the contraband substance was seized from secret chambers made in the vehicle which belonged to the appellant and the appellant was the driver of the vehicle when the contraband substance was seized. This incriminating evidence was asked to the appellant under section 313 Cr.P.C which was flatly denied. However in view of section 35 of ND&PS Act, it can be presumed that the appellant was caught in possession of the contraband substance and it is for the appellant to prove that the

seized article of 49 Kgs of Methamphetamine (3,38,000 tablets) was not a conscious possession, because how he came to be in possession is within his special knowledge.

The Apex court in **Megh Singh vs. State Of Punjab (2003) 8 SCC 666** held that *"once possession is established the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles."*

In the factual scenario of the present case possession has been established. It has however, not been shown by the accused-appellant that the possession was not conscious in the logical background of Sections 35 and 54 of the ND & PS Act.

[24.] In view of the above findings this court is of the considered view that no sufficient cause has been made out that warrants the interference of this court against the Judgment & Order dated 03.12.2019 passed by the learned Judge, Special Court, ND&PS, Champhai convicting the appellant under section 8/22 (C) ND&PS, Act, 1985 and the impugned sentence order dated 04.12.2019 arising out of Criminal Trial No. 1839/2018 (D) .

[25] Accordingly Crl. Appeal No.6 of 2020 stands dismissed and disposed of.

JUDGE

Comparing Assistant