

GAHC030002012022



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

Case No. : Crl.A./6/2022

Lalthakima
S/o T. Chhunga
R/o Khawzawl Vengthar, Champhai, Mizoram

VERSUS

State of Mizoram
Aizawl, Mizoram

Advocate for the Petitioner : Mr. Lalpianfela Chawngthu

Advocate for the Respondent : Mrs. Linda L Fambawl, PP/Addl.PP, Mizoram

JUDGMENT & ORDER (CAV)

[Soumitra Saikia, J.]

This criminal appeal arises out of the Judgment and Order dated 15.12.2021 passed by the learned Special Judge, NDPS Act, Champhai in SC Regn. No. 299/2019 arising out of Crl. Tr. No. 1702/2019.

2. The appeal was admitted on 20.05.2022 and LCR was called for. After receipt of the LCR, paper-book was prepared and served to the respective counsel. The matter has thereafter been listed before this Court and taken up for disposal in the presence of counsel representing both the parties.

3. The prosecution case as unfolded from the materials available on record, is that on 15.08.2019 the informant one SI Zirthanga Pachuau, Sector Officer, CID(SB), Champhai, lodged an FIR stating that on 15.08.2019 at about 3.30 PM a joint operation was conducted by CID(SB) led by Addl. Superintendent Police, CID (SB)-Champhai, Champhai and DEF staff led by SDPO Champhai and 8th Assam Rifles conducted random checking at Zokhawthar Road near Hringlangtlang Junction (between Mualkawi and Melbuk Village) for the peaceful celebration of 73rd India Independence Day, 2019. One Maxi Cab bearing Registration No. MZ-02A-4009 driven by Malsawmdawngliana (27), S/o: C. Dinthanga of Bawngkawan Aizawl coming from Zokhawthar side was stopped on suspicious ground and upon thorough checking of the said vehicle, the search party recovered from the said vehicle 30 (thirty) soap cases of brown powder weighing 378.7 grams suspected to be Heroin worth Rs. 15 Lakhs approximately in the local market. The said contraband items was seized from the joint possession of the driver Malsawmdawngliana (27) S/o: C. Dinthanga of Bawngkawn Aizawl and the second driver Lalthakima (41) S/o: T. Chhuma of Khawzawl Vengthar, namely, the appellant herein.

4. Pursuant to the investigations being carried out, charge-sheet was submitted and charges under one head were framed against both the accused persons including the appellant under Sections 21(c)/25/29 of the NDPS Act. The accused persons pleaded not guilty. As such, the matter went for trial.

5. The prosecution had examined 5 (five) witnesses but the defence did not present any witness. The Trial Court on the basis of the evidences adduced by the prosecution had held that the prosecution had succeeded in bringing home the charge against the accused persons under Sections 21(c)/25/29 of the NDPS Act, 1985. The Trial Court therefore convicted the accused persons for

possession of 378.7 grams of heroin under Sections 21(c)/25/29 NDPS Act. The Trial Court vide order dated 16.12.2021 sentenced the accused persons to undergo Rigorous Imprisonment for 12 (twelve) years each and to pay a fine of Rs. 1,00,000/- (Rupees twenty thousand) each. In default of payment of the fine, it was directed that they shall further undergo Simple Imprisonment for 2 (two) months each. It was further directed that the period of detention already undergone by the accused persons in connection with this case shall be set off against the sentence imposed.

6. Being aggrieved by the impugned Judgment dated 16.12.2021 passed by the Special Judge, NDPS Act, Champhai, Judicial District, Champhai, the present criminal appeal has been preferred on behalf of the accused No. 2 namely, Lalthakima @ Thatea. We have been informed that no appeal has been preferred by the accused No. 1.

7. P.W-1, Zirthanga Pachuau had identified the accused in the Court. He deposed that on 15.08.2019, a police team under his command and under the aegis of Addl. Superintendent of Police, namely Pu Laldingngheta, CID (SB) performed random checking of vehicles plying on national highway between Champhai and Zokhawthar particularly at a place called Hringlangtlang pend to check infiltration and influx of anti-social in the event of peaceful celebration of Independence day and also to deal with smuggling of contraband substances. During the random checking of vehicles at around 3.30 P.M. Maxi Cab Sumo bearing registration No. MZ02A-4009 which was coming from Zokhawthar was stopped by the police party. Inside the vehicle only driver and another person was seen. No other passengers or any luggage was found inside the vehicle. The sumo looked empty. He gave signals to stop them but the driver was looking nervous and uncomfortable and he therefore, strongly suspected that

something was wrong. P.W.1 requested the driver to switch off the car engine and open the bonnet cover of the vehicle. The driver replied that there was a mechanical problem and it was not possible to open the bonnet and further stated that due to the mechanical problem they were coming to repair the same. Upon being requested by the P.W.1 to show him how it was opened, the driver of the vehicle opened the bonnet and from there one carton box placed just close to the engine block was recovered. The P.W.1 thereafter instructed his team to request civilian witnesses from nearby localities particularly office bearers of YMA to be present before opening of the carton/box. The driver identified himself as Malsawmdawngliana and his friend as identified as Lalthakima as the second driver.

7.1 P.W.-1 has further deposed that when the civilian witnesses arrived, the carton/box was opened and 30 (thirty) numbers of soap cases of different colours were found. All of them contained substances suspected to be Heroin. After opening the carton/box and finding the suspected heroin, he immediately informed the matter to his Addl. Superintendent of Police by phone. Thereafter, in the presence of the Addl. S.P. and one Army Officer who was the Post Commander of 8th Assam Rifles from Zokhawthar, the seizure of the contraband substances was made by P.W.1. The contraband substances were weighed and it was found that it was altogether 378.7 grams. After weighing the contraband, the plastic containers were re-packed/ re-sealed in the presence of civilian witnesses and the team members. The P.W.-1 deposed that no body search was conducted but he still prepared Grounds of Belief so that the formalities were followed neatly. The P.W.-1 deposed that he had obtained authorization from Officer-in-Charge, Champhai Police Station prior to his team setting out for the operation of random checking, despite the fact that

he was Sub-Inspector of Police duly authorized under the Act to conduct such exercise of seizure etc. During the process of seizure of the contraband substances, the Addl. S.P., CID (SB), SDPO, Champhai and Army Post Commander were present along with civilian witnesses, Mr. Lalchhuanliana and Mr. Lalrintluanga, leaders of YMA from Mualkawi village.

7.2 It was further deposed that statements of the witnesses were recorded at the P.O and a seizure memo in respect of the heroin and the Maxi Cab Sumo was prepared.

7.3 During his Cross Examination, P.W.-1 has deposed that he seized the heroin and the maxi cab sumo with its ignition key. He deposed that he was not aware of the owner of the maxi cab sumo nor does he know about the previous criminal records of the two accused persons. He deposed that he was not concerned with the entries made by the case I.O in the charge-sheet regarding the particulars entered in respect of accused Lalthakima. He deposed that in his FIR, he did not mention the name of owner of the maxi cab sumo. He deposed that he does not know if the said sumo was produced before the Court or not and that it is a fact that nothing was recovered from the sitting compartment of passengers. He deposed that the heroin were seized from the sumo after around 10 to 20 minutes of the apprehension of the accused the civilian witnesses arrived. He deposed that the civilian witnesses were from the nearby locality. The recovery, seizure, repacking etc were done in the presence of civilian witnesses. He deposed that two accused persons neither claimed nor denied ownership of the seized heroin. He deposed that the seized heroin were more or less brown in colour.

8. P.W.-2, C. Lalchhuanliana, an independent witness identified the two accused persons in Court. P.W-2 deposed that on 15.08.2019 at about 3.30 PM,

Champhai Police CID requested him to associate him with them at Hringlangtkang Peng (national highway of Champhai to Zokhawthar) in connection with the present case. He deposed that the police team in collaboration with the Assam Rifles Personnel recovered a carton box/parcel from inside the bonnet cover of maxi cab sumo bearing registration No. MZ 02A 4009 driven by Malsawmdawngliana S/O C Dinthanga R/O Bawngkawn, Aizawl along with his friend Lalthakima S/O T Chhuma. The police recovered 30 plastic soap cases from inside the carton box weighing 378.7 grams. He signed on the seizure memo and he saw the police weighing the seized substances, repacking and resealing it. P.W-2 identified his signature as Ext. P-3 (b).

8.1 In his cross-examination of P.W.-2 deposed that when he reached the place of occurrence it might have been around 3.45 PM. He deposed that he could not say for sure if two accused persons were inside the vehicle or outside when he reached the place of occurrence. When he reached the place of occurrence, he was not told that the police team was about to search the vehicle. The PW-2 deposed that he did not remember the colour of the parcel. Colours of the soap cases are "*eng uk, sen uk, hring, eng etc.*" which translated to the Mizo language means "Dark yellow", "Dark Red", "Green", "Yellow" respectively. Colour of the heroin was "*a var lam deuh*" which translated to Mizo means "Probably it might be white". He deposed that the two accused persons never claimed ownership of the seized articles and that he did not know the owner of the vehicle. The two accused persons also never claimed ownership of the vehicle and the seized articles were also never recovered from the direct possession of the accused. P.W.-2 further deposed that his statement, which was submitted to the Court, was wrongly recorded by the SI Zirthanga Pachuau and that the name of the two accused were not written in the parcel where the

seized articles were kept. He admitted that he put his signature on two pieces of paper and denied the suggestion that he had deposed falsely.

9. P.W-3 was the Vice President of Mualkawi Branch of YMA at the relevant time of the incident. On the date of occurrence, at around 3.30 PM, he was requested by Champhai Police to associate himself with the present case. He deposed that the police was undertaking an operation conducting checking of vehicles on the national Highway between Champhai- Zokhawthar at a place called Hringlangtlang Peng. P.W. -3 deposed that the team comprised of Assam Rifles and CID Champhai personnel. P.W-3 deposed that the parcel/the carton was recovered from the bonnet cover close to the engine block and the box was not opened before his arrival. Upon the box being opened about 30 plastic soap cases all containing substances suspected to be heroin were recovered. Weight measured was found to be 378.7 grams and he put his signature on the seizure memo as a seizure witness. He identified Exhibit P 3(c) as his signature.

9.1 In his cross-examination, the P.W-3 deposed that police came to P.W-3 and picked him up from his residence. He was never disclosed about the owner of the vehicle by the police. His President informed him that he will have to go to the place of occurrence to act as a witness and it took him around 30 Minutes to 1 hr to reach the place of occurrence. He accepted the suggestion that before his arrival to the place of occurrence, he did not know what the police had done in connection with the accused and the seized articles. P.W-3 deposed that he was not aware of the accused where they were sitting when he reached the place of occurrence. Shortly, after his arrival, he saw the two accused persons but could not recollect their appearance. He deposed that he does not know the exact colour/parcel colour on which the seized article was kept and that the colour of the heroin was "Senbuang" which translated to Mizo means "Red

Brown". P.W.-3 saw the police taking weightment of the seized substances. P.W.-3 accepted the suggestion that the two accused persons never claimed ownership of the seized substances. He deposed that he was not present while the samples were drawn in the Court of the Magistrate and that he never saw two accused persons before the incident. He accepted the suggestion that he did not hear the police informing the two accused that they were about to search the vehicle. He was also unable to identify the arresting agency, if they were CID personnel or not. During his cross-examination he accepted the suggestion of the defence counsel that no sign/mark was fixed on the carton/ box/parcel to show that it belonged to the two accused persons. He did not accept the suggestion that he had deposed falsely.

10. P.W.-4, Lalmuanawma, who was the Assistant Director, FSL was not examined as a witness as the genuineness of the FSL report was not denied or objected too.

11. P.W.-5, SI VL Chama Ralte, who was the Investigating Officer of the case deposed that on 15.08.2019, the accused persons were arrested at Hringlangtlang Peng/junction on Zokhawthar-Champhai Highway by joint operation team comprising Officers from CID (SB), Champhai Police DEF and 8th Assam Rifles from a Sumo vehicle bearing No. MZ 02A 4009 driven by the accused No. 1, Malsawmdawngliana, S/O C Dingthanga R/O Bawngkawn, Aizawl and accompanied by the accused No. 2. P.W.-5 deposed that during the operation, the joint police team recovered the seized substance weighing 378.8 grams from the seized vehicle, which was concealed inside the bonnet cover of the said seized vehicle. P.W.-5 deposed that the two accused persons were arrested by him and produced before a Medical Officer, District Hospital for medical examination. Thereafter, he started interrogation of the two accused

persons. The following day, the two accused persons along with seized substances were produced before the Magistrate along with a prayer for drawing samples for sending it to FSL, Aizawl through SDPO Office, Champhai. It was deposed that P.W.-5 obtained permission for police remand of the two accused persons for a period of 24 hrs for further investigation and the interrogation continued. It was deposed by the P.W-5 that during interrogation, accused No. 1 stated that he was a driver of the Sumo vehicle plying between Aizawl and Zokhawthar and they stayed two days at Zokhawthar waiting for passengers. Accused No. 1 used to sleep in his Sumo at night while the accused No. 2 was staying in the residence of one Pi Tetei, Zokhawthar. P.W-5 stated that during interrogation, the accused No. 1 stated that on 15.08.2019 at about fore noon one female person namely Suitei from Khawmawi village came to him and offered him Rs. 10,000/- if he could carry heroin on his Sumo that will be delivered somewhere in Aizawl. He accepted the offer and the delivery was made in the residence of Pi Tetei. He disclosed his plan to the accused No. 2 and told everything about his plan to carry the heroin. The said cartons of soap were handed over by a person whose name was not known. On the same day at around 12.30 PM, they left Zokhawthar for Aizawl on the Sumo with the Heroin stashed inside the bonnet cover. At the place of occurrence, they were intercepted by the joint operation of the team of Police and Assam Rifles. P.W-5 deposed that during interrogation, accused No. 2 stated that he came along with the accused No. 1 from Aizawl to Zokhawthar on 12.08.2019 as a second driver and stayed at Zokhawthar in the residence of Pi Tetei. The accused No. 2 further stated that on 15.08.2019 at around 11 AM, accused No. 1 came to him and told him that they would be carrying heroin in a sumo towards Aizawl and for which he was offered Rs. 10,000/- as consideration. They left Zokhawthar

with the heroin when they were intercepted by the police at Hringlangtlang Peng and the heroin was recovered from inside the bonnet of the sumo vehicle. P.W-1 further stated that the statements of the two accused persons during interrogation revealed the same terms of negotiation between accused No 1 and one Ms. Suitei. It was further deposed by the P.W. 1 that the FSL report from Aizawl confirming the samples marked as Exhibit CHE(CPI-404)(1) to CHE(CPI-404)(30) to be heroin with purity of 85% each. Having collected strong evidence from the statements of seizing officer, seizure witnesses, statements of the two accused and FSL report, the charge-sheet was submitted against the two accused persons under Sections 21(c)/25/29 of the NDPS Act.

11.1 During cross-examination, the PW-5 deposed that he is the arresting officer of accused no 2. He deposed that he did not interrogate the two seizure witnesses. He deposed that he did not visit the PO in connection with the case. He deposed that accused no 2 is not the driver of the vehicle nor the owner of the same. He was the second driver to assist the driver namely accused no 1. He did not know whether accused no 2 drove the said vehicle while being apprehended. He deposed that accused no 2 did not have any knowledge of the consignment of the contraband substances before the accused no-1 informed him. This case arose from random checking and he is not sure whether accused no 2 was arrested on 2nd June 2019 in connection with the present case. He denied the suggestion that this case is not from random checking. He also denied the suggestion that the accused no 2 was kept in their custody on 7th June 2019 for interrogation with the present case. He deposed that the police party arrested accused no 1 and 2 together at Champhai P/S. He accepted the suggestion that the arrest witness of accused no 2 namely C. Hmingthangtluanga is not included in the list of witnesses. He deposed that

even though he is the investigating officer, he does not have any comment with regard to the report in the charge-sheet mentioning that the accused no 2 was already interrogated and arrested on 7 June, 2019. He does not know the amount/weight of the sample drawn from each 30 soap cases to be Sent to FSL, Aizawl.

11.2 In his cross-examination he stated that he did not know whether the forwarding letter to FSL department from Champhai SDPO Office is available on record. He deposed that that there is no photograph of the seized articles after it was packed and signed by seizing officer as well as the seizure witnesses. He deposed that there is no photograph of the sample packet to be seen on record. P.W-5 stated that he does not know whether the seizing officer examined his two seizure witnesses. He deposed that 21 (c) of NDPS Act is a heinous crime. He did not accept the suggestion that since he did not visit the place of occurrence nor interrogated/examined the seizure witnesses by person or through telephone call. He also did not accept the suggestion that the arresting agency/prosecution department did not take initiative in order to convict the accused and that the arresting agency did not have interest in this case. He stated that even though he mentioned in his brief story of the case in the column of Place of occurrence "During investigation of the case, the Place of occurrence, New Champhai to Zokhawthar road at Hringlang tlang junction was visited and examined" actually he did not visit the police officer and that he does not know whether the Seizing Officer visited the PO after the date of apprehension. He deposed that he did not give any wrong information in his report of the charge sheet copy including the date of apprehension and arrest of accused no 2. He deposed that the accused were judicially remanded on 17.8.2019. P.W-5 deposed does not know that if there was any documentary

evidence to prove that the accused were medically examined before they were remanded in judicial custody. He stated that even though SI Zirthanga Pachuau is the Seizing Officer, apart from taking him (P.W.5) through the process of seizing and investigation, he is also unofficially an investigating officer. He deposed that from the documentary evidence of Property search and Seizure form u/s 165 Cr PC Zirthanga Pachuau is also an investigating officer in the present Case. He deposed that he does not have any comment as regards with the date of the signature given by the investigating officer on the Property search and seizure form which is 15.7.2019. He deposed that on the date of apprehension, the DEF Champhai, CID 9SB) and 8th Assam Rifles were present at the time of apprehension of the two accused. He deposed that the P.W-5 submitted the final report. He deposed that the accused had been charged only u/s 21(c) ND&PS Act. He denied the suggestion that the accused persons were arrested on 07.06.2019 and then on 15.08.2019 due to entrapment by charging them u/s 21(c) ND&PS Act. He denied the suggestion that Exhibit 1 to Exhibit 5 dated 16.08.2019 by which he had sent samples to FSL and Exhibit A1-A9, B1-B9, C1-C9, D1-D3 are not the same samples that he had sent to FSL. He stated that he did not know whether the accused No. 1 and 2 had any previous case before. He deposed that the owner of the seized Article as claimed by the accused, during the course of his investigation, had been called to the police station for interrogation, however, no case was made against them.

11.3 The P.W.-5 was re-examined by the Special P.P, wherein he deposed that the accused persons were arrested on 15.08.2019 but because of clerical mistake he had written that accused No. 2 was arrested on 07.06.2019. The P.W-5 further stated that because of misunderstanding the question put to him earlier, he had deposed that there was no photograph of the sample packed

seen on record. However, on re-examination, he deposed that Exhibit P-15 is the photograph showing CJM and the accused (No. 1) and the seized items. P-16 is the photograph showing the second accused person and the constables of P.W.5 standing inside the Court of the CJM. Exhibit 17 is the photograph showing samples being drawn.

12. The accused persons were examined under Section 313 Cr.P.C. and they denied the charges brought against them. No other explanation was given.

13. The learned counsel for the appellant submits that the entire process of investigation which was carried on by the arresting agency is contrary to the expressed provisions of law inasmuch as the P.W-1 who is the informant is also the seizing officer and the Investigating Officer. This fact was not noticed by the Special Judge, NDPS, Champhai and therefore, the Judgment dated 15.12.2021 and Sentence order dated 16.12.2021 is liable to be set aside and quashed. The learned counsel for the appellant submits that from the evidence adduced it is clear that the statements of the accused were recorded by the seizing officer and not by the I.O. Referring to the property search and seizure form, the learned counsel for the appellant submits that P.W-1 has signed as the Investigating Officer, which shows that the articles were seized by the P.W-1 and he is also the investigating Officer. It is further submitted that upon a perusal of the FIR dated 15.08.2019 it is revealed that the P.W-1 is also the informant. It is therefore submitted that the P.W-1 is not only the informant and the Seizing Officer but he is also the investigating Officer and therefore, the same is contrary to the provisions of law. For this proposition, the learned counsel for the appellant has pressed into service the Judgment of the Apex Court rendered in *Megha Singh Vs. State of Haryana*, reported in (1996) 11 SCC 709 and *State by Inspector of Police NIB, Tamil Nadu Vs. Rajangam*, reported in (2010) 15

SCC 369 to contend that the informant and the investigating officer could not have been one and the same person. He also relied upon the Judgment in Gauhati High Court rendered in *Sh Romanga Vs. State of Mizoram*, reported in 2018 (4) GLT 203. He submits that the said Judgment has clearly held that the informant, seizing officer and the investigating officer cannot be one and the same person. The investigating Officer has to be a person other than the seizing officer and the informant.

13.1 It is further urged by the learned counsel for the appellant that the entire process of search and seizure and the consequential filing of the charge-sheet leading to the trial and conviction of the accused person is violative of Section 42 of the NDPS Act as the provisions of Section 42 has not been complied with. It is submitted that the secret information received by the concerned Officer has not been reduced into writing as is required under Section 42 of the NDPS Act. Referring to the "Grounds of Beliefs", the learned counsel for the appellant submits that while recording his grounds of belief, the P.W.-1 stated that he has reason to believe from reliable information received from his source that the vehicle bearing registration No. MZ02A-4009 driven by Malsawmdawngliana S/o C. Dinthanga of Bawngkawn, Aizawl coming from Zokhawthar, is being used for selling or keeping for exchanging psychotropic substances. The learned counsel for the appellant submits that this document only reflects the grounds of belief without disclosing as to the nature of secret information received by the informant. Perusal of the said documents does not reveal recording of any secret information and therefore, the provision of Section 42 has not been complied with. It is further submitted that this communication was not forwarded to the higher authority within 72 hours as required under the Provisions of the Act. Any secret information that may have

been reduced into writing and forwarded to the higher authorities was never produced as an evidence during trial. In support of this contention, the learned counsel for the appellant relies upon the Judgment of the Apex Court in *Karnail Singh Vs. State of Haryana*, reported in (2009) 8 SCC 539.

14. The learned counsel for the appellant submits that between seizure and sampling of the alleged contraband goods to be sent for FSL, there was a gap of 13 days and in this period of 13 days, no evidence was adduced by the prosecution to show that the alleged contraband goods/items were kept in safe custody during the period. It is further submitted by the learned counsel for the appellant that there is no record to show on which date samples were sent to FSL and details of sample sent. It is submitted that no forwarding letter was produced during trial to show on which date and how the samples were taken out from the seized alleged contraband items when they were sent to FSL for due examination. The learned counsel for the appellant submits that these lapses into the investigation carried out is fortified by the evidence of the investigating officer during cross-examination wherein, he stated that he did not know the weight of the samples drawn. The learned counsel for the appellant submits that in view of such lapses and lack of evidence during trial, it is clear that there is no evidence to prove the case of the prosecution that the samples which were sent for FSL examination were drawn from the alleged contraband items/goods. In support of his contentions, he relies upon a Judgment of this Court passed in *Bhim Ram & Ors. Vs. State of Assam* reported in 2012 (1) GLT 416. The learned counsel for the appellant submits that the appellant was not in conscious possession of the seized alleged contraband items/goods. The learned counsel referring to the depositions of the witnesses submits that the sealed packet/carton was supplied by one Mrs. Suitei in the house of Ms. Pi. Tetei. The

learned counsel for the appellant submits that it is evident from the deposition of the witnesses that the sealed carton was stated to be a box of medicines which was to be delivered in Aizawl at the contact number provided on the top of the Box. The learned counsel for the appellant submits that said Pi. Teiti and her sister were initially arrested but thereafter released by the investigating agency as no evidence is available before the Trial Court inspite of their names being mentioned by both the accused persons including the present appellant. The learned counsel for the appellant further submits that from the depositions of the independent witnesses it is evident that the case sought to be projected by the prosecution is not supported by the independent witnesses. Under such circumstances, the learned counsel for the appellant submits that the appellant was not in the conscious possession of the alleged contraband items and therefore the benefit of doubt ought to have been given to the appellant by the Trial Court and that not having been done the impugned Judgment and order of sentencing ought to be interfered and set aside. In support of his contentions in respect of seizure of the contraband items which were not from the conscious possession of the appellant, the learned counsel for the appellant relies upon the Judgment of the Allahabad High Court rendered in (2002) CriLJ 4274 (Munna Vs The State and Anr). The learned counsel for the appellant further submits that in view of the evidences adduced it is apparent that the accused person was never in the conscious possession of the alleged contraband good/items which are stated to have been seized from the said vehicle driven by the appellant. The learned counsel for the appellant sums up the arguments to contend that in view of non-compliance of the mandatory provisions of Section 42 of NDPS Act read with the lapses of the prosecution during investigation as regards sampling of the alleged contraband items or goods and forwarding them

to the FSL and no record in that respect having been produced as evidence during trial, the impugned Judgment dated 15.12.2021 and Sentence Order dated 16.12.2021 ought to be interfered with and set aside and the accused be set at liberty forthwith.

15. Per contra, the learned Addl. Public Prosecutor, Mizoram strongly opposes the arguments of the learned counsel for the appellant. The learned Addl. PP submits that there is no infirmity in the impugned judgment passed by the learned Trial Court. The learned Trial Court has carefully considered each and every bit of evidence adduced before the Court and has thereafter, rendered the Judgment dated 15.12.2021 and sentence order dated 16.12.2021. As such, the said Judgment does not require any interference by this Court in the present appeal. The learned Addl. PP submits that the samples were drawn in the presence of a Judicial Magistrate and thereafter weighed and sent to FSL for testing. The FSL report was received on 17.09.2019 which confirms that the items sent for testing contained heroin with purity 85% w/w. The learned Addl. PP submits that the seizure was made during a random search at the place of occurrence on 15.08.2019. As such the provisions of Section 42 are not applicable in cases of search and seizure made during random checking. Nevertheless as a matter of abundant caution, the informant had reduced into writing the "Grounds of Belief" and the same was duly communicated to the higher authorities. Referring to the evidence adduced by the informant as P.W-1, the learned Addl. PP submits that a plain reading of the deposition of P.W-1 reveals that it was a case of random search although the grounds of belief were reduced into writing as a matter of record and furnished to the higher authority. As such, the learned Addl. PP disputes the contentions of the learned counsel for the appellant that the information received from the reliable source was

never reduced into writing or communicated to the higher authority before initiating the search and seizure. The learned Addl. PP in support of her contention relies upon the Judgment of the Apex Court rendered in *Karnail Singh Vs. State of Haryana*, reported in (2009) 8 SCC 539 and *Mukesh Singh Vs State (Narcotic Branch of Delhi)* reported in (2020) 10 SCC 120. The learned Addl. PP submits that in terms of the mandate of Section 25 and Section 54 of the NDPS Act, there is a presumption of culpable mental state against the appellant. As such when the carton box was recovered from the engine of the sumo vehicle which was driven by the appellant along with other accused, there is no question of the accused persons not being in conscious possession of the seized contraband articles. The learned Addl. PP submits that from the evidence adduced it is clear that no other passenger or person was available in the vehicle save and except the accused persons. As such, it is for the defence to discharge their burden of the presumption as prescribed under Section 24 and 54 of the Act and which during trial they had failed to do so. Under such circumstances, where the defence had failed to dislodge the statutory presumption prescribed under the Act, there is no question of giving benefit of doubt to the appellant of not being in conscious possession of the alleged contraband goods.

16. The learned counsels for the parties have been heard. The evidence available on record as well as the LCR called for from the concerned court has been carefully perused.

17. In order to deal with the grounds urged on behalf of both the parties, it is apposite to refer to the judgments pressed at the bar to appreciate the law laid down by the Apex Court and the High Courts. In *Megha Singh (Supra)*, in the facts of the case, the accused therein was apprehended with a pistol and

live cartridges. The pistol was without licence. No independent witness was examined to support the case of the prosecution. In the evidence before the learned Trial Court, the Apex Court found that there was discrepancy between the depositions of PWs 2 and 3 and, therefore, in the absence of any independent corroboration, the Apex Court held that these did not inspire confidence about the reliability of the prosecution case. That apart, the complainant who was the Head Constable also proceeded with the investigation and examine witnesses under Section 161 Cr.P.C. The Apex Court held that such practice should not be resorted to so that there may not be any occasion to suspect fair and impartial investigation.

18. In *Karnail Singh Vs. State of Haryana*, reported in (2009) 8 SCC 539, the Apex Court has held that under Section 42 (1) and (2), there is a statutory requirement of writing down and conveying the information to the superior officer prior to entry, search and seizure. The Apex Court held that total non-compliance of the requirement of Section 42(1)(2) is impermissible but delayed compliance with satisfactory explanation about the delay will be acceptable compliance of Sections 42 and 43. The Apex Court also explained the distinction between Section 42 and 43, it was held that Section 42 recordings the reasons for belief and for taking down of information received in writing with regard to the commission of any offence before conducting search and seizure. Section 43 does not contain any such provision and as such while acting under Section 43 of the Act, the empowered officer has the power of seizure of the articles, etc. and the arrest of a person who is found to be in possession of any narcotic drug or psychotropic substances in the public place where such possession appears to be unlawful. However, the Apex Court also held that in special circumstances and emergent situations, recording of information is not practical prior to search

and seizure and would be detrimental to effectiveness of the search and seizure concerned. In such situations, the requirement of writing down and conveying the information to the superior officer, may be postpone by a reasonable period which may even be after the search, entry and seizure.

19. In *State by Inspector of Police, Narcotic, Intelligence Bureau, Maduari, Tamil Nadu Vs. Rajangam*, reported in (2010) 15 SCC 369, the Apex Court held that investigation by the very officer who registered crime is not considered conducive to fair and impartial investigation. The Apex Court relying on *Megha Singh (Supra)* held that any investigation conducted by the Investigating Officer, who himself was the complainant or who registered the crime, the Apex Court did not interfere with the order of acquittal on that ground by the High Court.

20. In *Bhim Ram Vs. State of Assam*, reported in 2012 2 GauLJ 259, the learned Single Judge of the Gauhati High Court held that there is no evidence that the seized contraband articles were kept in the malkhana till the sample packets were sent for chemical examination. The learned Single Judge held that there was no evidence to the effect that the said independent witness accompanied the police team to the police outpost and the seized ganja and sample were put under the safe custody of the in-charge of the police outpost. Under such circumstances, the learned Single Judge interfered and set aside the judgment and order convicting and sentencing the appellants. The learned Single Judge relied upon the judgment of the Apex Court in *State of Rajasthan Vs Gurmail Singh*, reported in (2005) 3 SCC 59 wherein it was held that if link evidence adduced by the prosecution is not satisfactory, accused is entitled to acquittal in view of the loopholes in the prosecution case.

21. In *Sh Romanga Vs. State of Mizoram*, reported in 2018 (4) GLT 203, the Single Bench of the Gauhati High Court held that while examining the appeal

against the conviction and sentence by the learned Trial Court on the evidence available, in that case held by relying on the Judgment of the Apex Court in *Rajangam (Supra)* as well as *Union of India Vs. Mohanlal & Anr.*, reported in (2016) 3 SCC 379 held that where investigation is conducted by the same officer who registered crime, it cannot be considered to be a fair and impartial investigation. The learned Single Judge also held by relying on the Judgment of the Apex Court in *Karnail Singh(Supra)* that there was nothing in the evidence to show that the secret information received by the concerned officer had been reduced to writing as required under Section 42 of the NDPS Act. Under such circumstances, the learned Single Judge held that the trial Court proceedings have been vitiated due to non-compliance of these provisions and therefore, the conviction and sentencing was set aside and quashed.

22. In *Munna Vs State of Allahabad*, reported in (2002) CriLJ 4274, a Division Bench of the Allahabad High Court held that the non-compliance of provisions of Section 42 to reduce into writing the information received by the Officer concerned and thereupon sent a copy thereof to the superior official will affect the veracity of the prosecution case and consequently interfere with the conviction made by the learned trial Court.

23. In *State of A.P. Vs. Gangula Satya Murthy*, reported in (1997) 1 SCC 272, while examining an appeal arising from the Division Bench of High Court of Andhra Pradesh whereby the conviction by the learned Sessions Court of the respondent under Sections 302 and 376 of the IPC had been interfered and set aside. One of the questions which arose was the report of chemical examiner which is available in the records and whether it can be used in evidence. The Apex Court held that under Section 293 it was enable the Court to use the said document-which is the report of the chemical examiner, in evidence. And

consequently proceeded to allow the appeal preferred by the State by setting aside the order of acquittal and restoring the conviction and the sentence passed on the respondent by the learned trial Court.

24. *In State of Punjab Vs. Balbir Singh*, reported in (1994) 3 SCC 299, the Apex Court after examining several judgments in respect of the prescription under Sections 41, 42, 50, 52 and 57 of the NDPS Act set out the conclusions in paragraph-25. The Apex Court held that under Section 42(1), the empowered officer if he has a prior information given by any person that should necessarily be taken down in writing but if he has reason to believe from his personal knowledge that offences under Chapter- IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

25. In *Mukesh Singh Vs. State (Narcotic Branch of Delhi)* reported in (2020) 10 SCC 120, having doubted the correctness of the decision of this Court in *Mohan Lal Vs State of Punjab*, reported in (2018) 17 SCC 627 where taking a view that in case the investigation is conducted by a police officer who himself is the complainant, the trial is vitiated and the accused is entitled to acquittal, the matter was referred to a larger Bench and subsequently it came to be placed before the Constitution Bench of the Apex Court. The Apex Court held that where the informant himself is the investigator, that by him cannot be said that the investigation is vitiated on the ground of bias or like factor. The question of bias or prejudice would depend on the facts and circumstances in each case.

Therefore, merely because the informant is the investigation by that itself the investigation would not suffer the unfairness or bias and therefore, on the sole ground the informant is the investigator, the accused did not entitle to acquittal. The Apex Court held that contrary decision of the Supreme Court in *Mohal Lal (Supra)* and any other decision taking a contrary view that the informant cannot be investigated and in such a case the accused is entitled to acquittal are not good law and they are specifically overruled. The Apex Court held that observations in *Bhagwan Singh Vs. State of Rajasthan*, reported in (1976) 1 SCC 15, *Megha Singh (Supra)* and *Rajangam (Supra)* and the acquittal of the accused by the Supreme Court on the ground that as the informant and the investigator was the same, it has vitiated the trial and the accused cannot be entitled to acquittal are to be treated to be confined to their own facts. The Apex Court held that it cannot be said that in the aforesaid decisions, the Supreme Court had laid down any general proposition in law that in each and every case where the informant is the investigator there is bias caused to the accused and the entire prosecution is to be disbelieved and the accused is entitled to acquittal.

The Apex Court further went to hold that the testimony of police personnel will be treated in the same manner as testimony of any other witness and there is no principle of law that without corroboration by independent witnesses his testimony cannot be relied upon. The presumption that a person acts honestly applies as much in favour of a police officer as of other persons and it is not a judicial approach to distrust and suspect him without good grounds therefore.

26. Upon careful perusal of the Judgments cited at the bar, it is seen that the Apex Court in its Constitution Bench Judgment rendered in *Mukesh Singh (Supra)* had laid to rest the controversy whether informant, Seizing Officer and

the Investigating Officer can be one and the same person. The Apex Court in the said Judgment has authoritatively settled the controversy by holding that there is no expressed bar under the NDPS Act or the Cr.P.C to conclude that the informant and the Seizing Officer and the Investigating Officer cannot be one and the same person.

27. In view of the Apex Court rendered in *Mukesh Singh (Supra)*, the arguments made by the learned counsel for the appellant that the investigating officer being one and the same and the trial Court not having taken note of the law laid down by the Apex Court and consequently the trial Court proceedings are vitiated, cannot be accepted. These arguments in view of the authoritative finding laid down by the Apex Court in *Mukesh Singh (Supra)* is therefore rejected.

28. The second argument of the counsel for the appellant that the secret information received by the investigating agency was not reduced to writing on the evidence available in this case also cannot be accepted. The evidence on record reveals that this search and seizure was made during a random checking of vehicles plying on a National Highways between Champhai and Zokhawthar particularly at a place called Hringlangtlang Pend on the eve of the Independence Day. The search was made at around 3.30 PM which is before sunset. P.W.-1, the seizing officer, in his deposition stated that upon looking inside the vehicle, he found no other passenger except the driver and the present appellant. Looking at the driver, he found him nervous and he suspected something was wrong. He requested the driver to switch off the engine and open the bonnet. After the bonnet was opened, seizure of contraband articles from a box/carton under the bonnet was recovered. In his deposition, he stated that the recovery, seizure and repacking was done in the presence of the civilian

witnesses.

These arguments of the counsel for the appellant also cannot be accepted in view of the fact that the evidence of the independent witnesses support the prosecution case that the contraband articles were recovered from a box/carton from under the bonnet of the Sumo vehicle which is driven by the accused No. 1 and in which the present appellant is also present.

29. As held in *Mukesh Singh (Supra)* by the Apex Court that the testimony of police personnel will have to be treated in the same manner as any of the witnesses. From the evidence, it is seen that the testimony of the seizing officer, P.W.-1, was not shaken during cross-examination. That apart, the independent witnesses also support the testimony of the P.W.-1, the seizing officer. In that view of the matter, this contention of the counsel for the appellant cannot be accepted and the same is, therefore, rejected.

30. The arguments of the appellant that there is no evidence that the sample articles were the articles examined by the FSL as there is no forwarding report also cannot be accepted in view of the evidence available on record which shows the seized items were produced before the Judicial Magistrate and in the presence of Judicial Magistrate, the accused person and the independent witnesses; four samples were taken out of the seized article and were forwarded to the FSL report. This is also found to be recorded in the Judgment. That apart, from the evidence adduced, it is seen that there is no dispute raised by the appellant during trial regarding the correctness of the FSL report. Consequently, the argument sought to be raised by the appellant cannot be accepted in view of the fact that the sampling and weighing was conducted in the presence of and independent witnesses as well as in the presence of accused persons themselves before the Judicial Magistrate.

31. That apart, this Court in Cri. Appeal No. 21/2015 dated 03.03.2016 has already held that FSL report may be relied upon in evidence without examination of the chemical examiner. In this context, the apex Court has laid down the law in *Gangula Satyamurty*, reported in AIR 1997 SC 1588.

32. In view of the law holding this field as noticed above, the arguments of the appellant that the FSL report could not have been used in evidence without examination of the chemical examiner namely P.W-4 is hereby rejected.

33. In so far as the arguments advanced on behalf of the appellant that the appellant was not in conscious possession, this Court finds from the evidence that an offer of Rs. 10,000/- was made for carrying and delivering of the goods from Zokhawthar to Aizawl by the appellant and the other accused persons. While it is true that there is no evidence to suggest that the contraband was put in the carton/box by the accused persons or by some other persons in their presence, however, the fact remains that the accused persons accepted the delivery of the carton from Zokhawthar to Aizawl stated to contain some medicines. If the accused persons believed that the box contained medicine, there was no occasion for the accused persons to conceal the said box under the bonnet of the vehicle near the engine block. At the time of the seizure, there is evidence on record to show that there was no other passengers in the vehicle except the accused persons. From the evidence available before the learned Trial Court it is seen that at no stage the accused persons denied the recovery of the contraband articles which was seized from the finding vehicle in which only the accused persons were found. The consistent plea of the accused persons was that it was not recovered from their conscious possession. Under such circumstances, the accused persons have failed to explain as to why the said box was required to be concealed near the engine block under the bonnet.

No explanation to that effect is seen in the statement made of the accused during their examination under Section 313 CrPC. In view of all of the above, the arguments of the learned counsel for the appellant that the appellant was not in conscious possession cannot be accepted and is therefore rejected.

34. The contention of the learned counsel for the appellant is that the independent witnesses did not support the recovery of the contraband seized articles from the appellant also cannot be accepted as the same is contrary to the evidence adduced before the Trial Court. The evidence of P.W.3, who was an independent witness clearly reveals that the seized articles were recovered from under the bonnet of the seized vehicle. Perusal of the evidence available on record revealed that the evidence adduced in chief by the P.W.2 & 3 could not be shaken during the cross-examination. As such, the evidence on record clearly does not support the contention raised by the learned counsel for the appellant and the same is therefore rejected. In view of the discussions made above, the further contention of the appellant that independent witnesses did not support the case of the prosecution also fails and is therefore rejected.

35. In so far as the third argument of the learned counsel for the appellant is concerned that the contraband items were not recovered on the conscious possession of the appellant. It is seen from the evidence adduced that the seized contraband articles were recovered from under the Bonnet of the Sumo vehicle which was inside a box/carton. Under the 313 examination of the accused/appellant, no explanation was provided for as to how and why the seized articles were kept in the bonnet of the vehicle when there are only two persons travelling in the sumo vehicle without any other passenger. There is also no evidence laid by the defence that the seized articles were never recovered from the vehicle and/or were planned by the investigating agency.

Under such circumstances, the recovery of the seized contraband articles from under the bonnet of the Sumo vehicle is not denied by the accused persons. It is also seen that the FSL report never been questioned before the learned trial Court. As such as has been held by the Apex Court in *Gangula Satya Murthy (Supra)*, the report relied upon by the Court without examination of the Officer conducting the tests where no dispute was raised before the learned Trial Court in respect of the said report, there is no infirmity in the trial Court accepting the said report of the FSL where the results of the tests of the samples drawn from the seized articles are found to be positive for heroin.

36. In *Mohan Lal Vs. State of Punjab*, reported in (2015) 6 SCC 222, the Apex Court while examining an appeal under NDPS Act elaborately dealt with the interpretation of the term “possession” under NDPS Act as well as with reference to the Opium Act, 1878. The Apex Court held as under:

“The concept of possession is basically connected to “actus of physical control and custody”. Attributing this meaning in the strict sense would be understanding the factum of possession in a narrow sense. With the passage of time there has been a gradual widening of the concept and the quintessential meaning of the word “possession”. There is a degree of flexibility in the use of the said term and that is why the word “possession” can be usefully defined and understood with reference to the contextual purpose for the said expression. Over the years, courts have refrained from adopting a doctrinaire approach towards defining possession. A functional and flexible approach in defining and understanding the possession as a concept is acceptable and thereby emphasis has been laid on different possessory rights according to the commands and justice of the social policy. Thus, the word “possession” in the context of any enactment would depend upon the object and purpose of the enactment and an appropriate meaning has to be assigned to the word to effectuate the said object. (Paras 11 and 15) The term “possession” ordinarily consists of two elements. First, it refers

to the corpus or the physical control and the second, it refers to the animus or intent which has reference to exercise of the said control. Coming to the context of Section 18 of the NDPS Act, it would have a reference to the concept of conscious possession. The legislature while enacting the said law was absolutely aware of the said element. The word "possession" refers to a mental state as is noticeable from the language employed in Section 35 of the NDPS Act. It includes knowledge of a fact. That apart, Section 35 raises a presumption as to knowledge and culpable mental state from the possession of illicit articles. The expression "possess or possessed" is often used in connection with statutory offences of being in possession of prohibited drugs and contraband substances. Conscious or mental state of possession is necessary and that is the reason for enacting Section 35 of the NDPS Act, 1985."

37. As such it has been held that the word "possession" refers to the mental state as is noticeable from the language employed in Section 35 of the NDPS Act. It includes knowledge of a fact. The evidence before the learned Trial Court in the present appeal clearly reveal that the appellant along with his companion who were driver/traveller in the Sumo did not offer any other explanation for the recovery of the packets/carton from under the bonnet near the engine block of the vehicle containing the seized contraband articles in their 313 statement. There was no argument before the learned Trial Court denying the recovery itself. The only argument was that it was not recovered from their conscious possession. The evidence adduced before the learned Trial Court do not suggest that a box was inserted inside the engine without the knowledge of the appellant and his companion. As discussed above, the argument of the learned counsel for the appellant that the contraband seized articles were not recovered from their conscious possession fails and therefore cannot be accepted.

38. Upon due consideration of the evidences adduced before the Trial Court as well as the law and the principles laid down by the Apex Court in the Judgments discussed above, we find that the prosecution has *prima facie* established the charge brought against the accuseds. However, the accused persons, including the appellant herein had failed to discharge the burden to rebut the presumption under Section 35 of the NDPS Act. From the evidence brought on record, it has been established that the appellant, along with his companion, had transported the seized contraband articles consciously and with knowledge. The learned Special Judge, NDPS Act, Champhai, in our view, has correctly appreciated the evidences on record while rendering the Judgment and Order dated 15.12.2021 holding the appellant and the other accused persons guilty of the offences charged with and had accordingly convicted them under Section 21(c)/25/29 of the NDPS Act and sentenced them to rigorous imprisonment for a period of 12 years with fine of Rs. 1,00,000/- (Rupees twenty-thousand) each and in default of payment of fine, directed to further undergo Simple Imprisonment for 2 (two) months each. We do not find any justifiable ground to interfere with the findings and conclusions reached by the learned Trial Court.

39. In view of the above discussions, we find no merit in this appeal and the same is accordingly dismissed.

40. Return the LCR.

JUDGE

JUDGE

Comparing Assistant