

GAHC030002472020



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

Case No. : CrI.A./13/2020

Lallawmsanga
Vengsang, Champhai

VERSUS

State of Mizoram and Anr
Aizawl2:Lalsanlian

Advocate for the Petitioner : Mr Zoramchhana

Advocate for the Respondent : Ms Linda L Fambawl (PP/Addl. PP, Mizoram)

Linked Case : I.A.(CrI.)/14/2020

Lallawmsanga
Vengsang
Champhai

VERSUS

State of Mizoram
Aizawl

2:Lalsangliana
Champhai
Kehrawt Veng

Advocate for the Petitioner : Mr Zoramchhana
Advocate for the Respondent : Ms Linda L Fambawl

BEFORE

HON'BLE MRS. JUSTICE MARLI VANKUNG

Date of hearing : 12.10.2023

Date of judgment : **03.11.2023**

JUDGMENT & ORDER (CAV)

Heard Mr. Lalpianfela Chawngthu, learned counsel for the appellant along with Mrs. Linda L. Fambawl, learned Addl. Public Prosecutor.

2. This is an appeal against the Judgment & Order dated 27.11.2019, passed by the Special Court, ND & PS Act, Champhai wherein the appellant was convicted under Section 8/21(c) ND&PS Act and vide the court's Order dated 03.12.2019 was sentenced to undergo rigorous imprisonment for a period of 10 years and pay a fine of Rs.1 lakh in default rigorous imprisonment for a period of 6 (six) months.

3. The prosecution case in brief is that on 22.02.2018, Mr. Lalsangliana, S.I. of Police submitted a written FIR to the Police Station, Champhai to the effect that at around 2 P.M. he recovered 38 Hawng of heroin weighing 450.8 grams

from the Truck bearing registration No.MZ-02A-5102 driven by Vanlaltawka at Khankawn Police Check Post. Accordingly, Champhai Police Station registered a case by CPI PS case No.16/2018 under Section 21(c)/25/29 of ND & PS Act against the accused Vanlaltawka who was arrested on 22.02.2020, and the alleged owner of the seized articles namely Mr. Lallawmsanga/appellant who was arrested on 24.02.2020.

4. After investigation of the case, a prima facie case was found against the accused persons and charge sheet was accordingly filed against the accused persons under Section 21(c)/25/29 of ND & PS, Act. Thereafter the trial court, framed charge against the accused persons on 14.08.2018 under Section 21(c)/25/29 of ND & PS, Act, wherein both the accused persons pleaded not guilty and claimed for trial. During the framing of charge the accused No.1/Vanlaltawka had implicated the co-accused Lallawmsanga/appellant stating that the co-accused had requested him to carry the bag to Aizawl from the residence of his mother-in-law at Champhai. Not knowing that the contents was heroin he had carried the bag, which was discovered at the check point at Khankawn by the police duty.

5. During the trial of the case as many as 6 (six) prosecution witnesses were examined, thereafter, the accused persons were examined under 313 Cr.P.C. In

the examination under Section 313 Cr.P.C, the accused No.1/Vanlaltawka denied the evidence against him to the extent that though the seized articles were found in the vehicle driven by him, the seized articles actually belongs to the co-accused/appellant and that he had only picked up the Air bag from the house of the mother-in-law of co-accused/appellant at Vaihmun, Champhai, on the request of the co-accused/ appellant.

6. The appellant on the other hand on his examination under Section 313 Cr.P.C. denied all the incrimination evidence against him. After examination of the accused person under Section 313 Cr.P.C., 2 (two) defence witnesses were examined. The learned trial court after considering the evidence on record and after hearing both the parties, acquitted the accused No.1/Vanlaltawka of all the charges and convicted the appellant under Section 8/21 (c) of ND & PS Act and sentenced him to undergo rigorous imprisonment for a period of 10 years and pay a fine of Rs.1 lakh in default rigorous imprisonment for a period of 6 (six) months.

7. Aggrieved by this conviction and sentence order the instant appeal has been filed.

8. Mr. Lalpianfela Chawngthu, learned counsel for the petitioner submits that the conviction and sentence of the appellant, dated 03.12.2019, by the learned

trial court in Special Court of Judge, ND & PS Act, Aizawl Judicial District, Champhai Mizoram is liable to be quashed and set aside since the mandatory provisions of section 42(1) ND & PS Act has not been complied with. He has led this court to the FIR dated 22.02.2018, where it is not mentioned that any written report was made at the time when the information was received. He further led this court to the evidence of PW-1 who is S.I. Lalsangliana. The learned counsel submits that, nowhere in deposition of the seizing officer PW-1 has it been mentioned that he had made a written report as mandated under section 42(1) ND & PS, Act and thus the instant Judgment & Order is liable to be set aside on the above ground. In support of his submission he has cited in the case of **Sh. Romanga Vs. State of Mizoram** in **2018 4 GLT 203 paras 11 & 14** wherein the Co-ordinate Bench of this Court set aside the conviction of the appellant due to the non-compliance of Section 52-A & Section 42 of ND&PS Act.

9. Mr. Lalpianfela Chawngthu, learned counsel for the appellant also submits that the learned Trial Court had erred in conviction of the appellant by depending solely on the statement made by the accused Mr. Vanlaltawka who had falsely implicated the co-accused/appellant when there is no other evidence that point towards the guilt of the appellant.

10. The learned counsel for the appellant, submits that the co-accused Vanlaltawka in his examination under Section 313 Cr.P.C, while admitting that heroin weighing 450.8 grams was seized from the motor vehicle truck B/r No MZ 02 A 5102 driven by him, he has stated that it belonged to the co-accused/appellant who had requested him to carry his air bag from his in-law's house at Vaihmun, Champhai. Thereafter, the learned counsel led this court to the examination of the co-accused/appellant under Section 313 Cr.P.C, who stated that the heroin seized by the police did not belong to him and he had not asked the **accused** Vanlaltawka to carry such contraband substances. That he knew nothing about the said heroin that were alleged to had been seized by the 'police from the said vehicle truck.

11. The learned counsel submits that the appellant has denied any knowledge of the seized articles which was seized from the vehicle of the accused Vanlaltawka and that the accused/appellant was not present in the said vehicle at the time of the seizure on 22.02.2018. He was arrested on 24.02.2018 only on the statement of the accused Vanlaltawka which is the only evidence made out against the appellant. The learned counsel for the appellant led this court the evidence of PW-1, who in his cross-examination admits that he does not known the owner of the seized article. The PW-1 had also admitted that there was no prove that the SA belonged to the appellant and that he did not know

the owner of the SA. He admitted that he did not take steps to prove that the S.A. belonged to the appellant. The learned counsel led this court to the evidence of PW-2 and PW-3 where neither of the witnesses have mentioned that the appellant was the owner of the seized articles, P.W-2 had also admitted that the mobile phone of the accused No.1/Vanlaltawka was not seized to prove that there was a telephonic conversation, as stated by the accused No.1 with the appellant.

12. The learned counsel for the appellant has also led this court to the evidence of the other prosecution witnesses 5 & 6 where, on cross-examination of the prosecution witnesses, the prosecution witnesses had admitted that they did not know the involvement of the appellant except from the statement of the co-accused No.1/Vanlaltawka.

13. The learned counsel for the appellant thus submits that as per Section 30 of the Indian Evidence Act, the statement of an accused cannot be used against another co-accused. He has also cited the following authorities in support of his submission in **Balkrishna Naik .Vs. State of Madhya Pradesh** reported in **2000 CrL. Law Journal 4797 : (2001) 1 JabLJ 90** and **Bidhi Chand Dhiman & Anr. Vs. Central Bureau of Investigation** reported in **2012 2 GLT 164 para 21.**

14. The learned counsel for the appellant also submits that from the evidence adduced, the appellant may be given the benefit of doubt since the S.A was not seized from the appellant there is no evidence to prove that the SA actually beyond reasonable doubt against eh appellant.

15. Mrs. Linda L. Fambawl, learned Addl. Public Prosecutor on the other hand submits that the mandatory provisions of Section 42 (1) of ND & PS Act has been followed which can be seen from the statement of PW-1, who has stated that all legal requirements have been observed. She has also led this court to Ext. P-3, which is a copy of the written information put down in writing, with regards to the information received and therefore, submits that the provisions of Section 42(1) ND & PS, Act has been fully observed.

16. The learned Addl. Public Prosecutor has also led this Court to the statement of the accused Vanlaltawka at the time of framing of charge, wherein the co-accused has been implicating the appellant right from the beginning, stating that the SA actually belong to the appellant. The statement of the accused Vanlaltawka on his examination under Section 313 Cr.P.C also states that the seized articles belonged to the appellant and that accused/appellant had requested the accused Vanlaltawka to carry his air bag from his in-law's house at Vaihmun, Champhai. That the accused Vanlaltawka came to know that

the said bag contained contraband substances only when the police intercepted him at Khankawn police check post since seized the said 38 soap cases, all containing heroin belonging to the co-accused/appellant was kept in the air bag of the co accused/appellant.

17. The learned Addl. Public Prosecutor submits that besides the prosecution evidence there are two Defence witnesses. Both the defence witnesses No.1 & 2 have also supported the statements made by the accused Vanlatawka on his examination under Section 313 Cr.P.C.

18. The learned Addl. Public Prosecutor also submits that the appellant at the time of examination under Section 313 Cr.P.C. has not given any explanation as to why the accused no.1 had implicated him by stating that the SA belonged to the appellant. For the above reasons, the learned Addl. Public Prosecutor submits that, it has been proved that the appellant was guilty of the offence of which he has been charged and submits that there is no reason to interfere of the Judgment & Order of the learned trial court.

19. I have heard and considered the submission of both the parties. On perusal of the Judgment & Order dated 27.11.2019 passed by the learned Special Court, ND & PS Act, Champhai District, the learned trial court had concluded that the evidence is not strong enough to convict the accused

Vanlaltawka and gave him benefit of doubt and exonerated him from the present case. 6 (five) nos. of Prosecution witnesses were examined.

20. The examination under section 313 Cr.P.C of the accused No.1/Vanlaltawka is reproduced below:

Q (1) The evidence against you is that accused no 2 is your close friend. Is it correct?

Ans:- No, it is correct. Younger brother of accused no 2 namely Lalenkawla is my friend.

Q (2). The evidence against you is that on 22.2.2018 you were carrying 38 soap cases all containing heroin weighing 450.8 grams on a motor vehicle truck B/r No MZ 02 A 5102 being driven by you towards Aizawl from Champhai. Is it correct?

Ans:-Yes, it is correct.

Q (3). The evidence against you is that Champhai Police on duty at Khankawn check post intercepted you and seized the said 38 plastic soap cases all containing heroin from the said truck you were driving for which you have not obtained any permission for carrying such contraband substances. Is it correct?

Ans :- Yes, I have not obtained any permission for carrying such contraband substances. I was carrying the said bag without knowing that it contained such contraband substances.

Q (4). The evidence against you is that the seized heroin were belonging to you. Is it correct?

Ans:-No it is not correct. The seized heroin were not belonging to me.

Q (5). Do you have any other thing to tell this Court?

Ans:- As I have said before, younger brother of accused no 2 namely Lalenkawla is my close friend. Accused no 2 was staying at Zuangtuiveng, Aizawl. Whenever I went

to Aizawl, I used to stay at his house. On the occasion complained of I was about to go to Aizawl with all the cattle on my truck B/r MZ 02 A 5102. Accused no 2 requested me over mobile phone to carry with me his air bag from his in-law's house at Vaihmun, Champhai. I proceeded to the said place and I met one boy from the family of accused no 2. He picked up one air bag from the house and handed over it to me. I never opened it. I just put it in my truck and with that bag I was proceeding to Aizawl. When I reached Khankawn police check post, the police intercepted me and seized the said 38 soap cases, all containing heroin. It was not belonging to me. The said air bag was belonging to accused no 2. When the police opened the said bag the content of it were the things I never knew it. The police told me that they were heroin. Only then I came to know that the said bag contained such contraband substances.

21. The examination of the accused/appellant under Section 313 Cr.P.C. wherein the appellant has stated that,

“Q (1). The evidence against you is that you had previously been arrested and convicted in connection with offence under ND&PS Act. Is it correct?”

Ans:-No, it is not correct.

Q (2). The evidence against you is that accused no 1 is your close friend. Is it correct?”

Ans:-Yes, it is correct.

Q (3). The evidence against you is that you came to Champhai from Aizawl during the festival of Christmas in the year 2017. By that time you stayed along with your mother at Champhai Vengthar. You bought 38 hawng/38 plastic soap cases containing heroin from Mrs.Kimi R/o Khawmawi village, Is it correct?”

Ans:-No it is not correct.”

Q (4). The evidence against you is that you kept the said heroin and concealed somewhere inside the house of your in-laws at Vengthar Champhai. Is it correct?”

Ans:-No it is not correct. I just left some of my wearing apparels at my in-laws house

and nothing about heroin.

Q (5). The evidence against you is that Champhai police recovered 38 soap cases all containing heroin weighing 450.8 grams from one vehicle truck B/rNo MZ 01 2 A 5102 driven by accused no 1 at Khankawn police checked post on 22.2.2018 at around 2:00 PM. The said heroin were belonging to you and was being carried/transported by accused no 1 on the said vehicle under your instruction and indirect control, Is it correct?

Ans:-No, the heroin seized by the police were not belonging to me and I never let accused no 1 to carry such contraband substances. I knew nothing about the said heroin that were alleged to had been seized by the 'police from the said vehicle truck

Q (6). Do you have any other thing to tell this Court?

Ans:-On the occasion complained of I was at Aizawl. CID personnel came to me and said that Officer in charge Bawngkawn P/s wanted me. I went to the police station and was detained one night at the lockup. The following day I was taken to Champhai. That is all I have to say to this court."

Thereafter 2 nos. of Defence witnesses adduced their evidence.

22. On scrutiny of the prosecution evidence this court finds that, it is not disputed that on 22.02.2018 at around 2:00 P.M, the police party recovered 38 plastic soap cases filled with heroin kept in one air bag from behind the driver seat of the said vehicle. This court finds that the evidence exhibited as EXt-P-3, proves that the seizing officer PW-1 had made a written report as mandated under section 42(1) ND & PS, Act

23. It is seen that the accused Vanlaltawka on examination under Section 313 Cr.P.C, has explained that *it was the co- accused/appellant who was the owner*

of the seized articles who requested him over mobile phone to carry his air bag from his in-law's house at Vaihmun, Champhai. The accused Vanlaltawka picked up one air bag from the house and he just put it in his truck, he never opened it and as he was proceeding to Aizawl, when he reached Khankawn police check post, the police intercepted him and seized the said 38 soap cases, all containing heroin. Only then he came to know that the said bag contained contraband substances.

24. However, it is seen that the co- accused/appellant on his examination under section 313 Cr.P.C has denied the statement made by the accused Vanlaltawka and stated that *the heroin seized by the police did not belong to him and he did not ask the **accused no1** to carry such contraband substances. He knew nothing about the said heroin that were alleged to had been seized by the 'police from the said vehicle truck.*

25. Thus this court finds that statements of the accused persons under section 313 Cr.P.C have conflicting interest, wherein the accused Vanlaltawka has implicated the appellant. Further, in the case of **Dehal Singh v. State of Himachal Pradesh; AIR 2010 SC 3594**, the court held that the statement of the accused under section 313, Cr.P.C. is recorded without administering oath. Therefore, it cannot be treated as evidence within the meaning of section 3 of

the Evidence Act, 1872. Thus a statement u/s 313 Cr.PC is not substantive evidence but it can be used for appreciating evidence led by prosecution to accept or reject it. It is however, not a substitute for the evidence of prosecution therefore, the statement made by the accused Vanlaltawka fully implicating the appellant cannot be used against the appellant unless corroborated by the prosecution evidence.

26. On perusal of the evidence adduced by the prosecution witnesses it is seen that PW1, who was the officer who intercepted the vehicle driven by the accused Vanlaltawka wherein the seized articles of gms of Herion was seized He has deposed that on 22.2.2018 while he was on duty at Champhai Police Station, he received a phone call from his colleagues about the illegal consignment of contraband substances by a Truck b/r MZ-02 A 5102 driven by the accused Vanlaltawka. The Truck and the contraband substances driven by the accused Vanlaltawka was being detained. On reaching the P.O he requested the accused Vanlaltawka to take out the contraband substances he was carrying, wherein accused took out one black air bag from behind the seat of the truck containing the contraband substances. The PW-1 prepared his grounds of belief and had also invited two civilian witnesses. With the aid of 2 civilian witnesses, the recovery seizure and weightment of the contraband substances was done. The weight of the S.A was 450.8 grams. After completing the

procedure, the accused and the seized article were taken to Champhai Police Station, where the accused was formally arrested on 22.2.2018. He then submitted the FIR to the Officer-in-charge, Champhai, Police Station. The accused Vanlaltawka on enquiry stated before PW-1 that he carried the bag with the contraband substances from Champhai on the request made by the co-accused, Lallawmsanga/appellant, who is the owner of the bags that contained the contraband substances which was packed in 30 plastic soap cases.

27. During cross examination, he admitted that the S.A was recovered and seized from the vehicle driven by the accused Vanlaltawka, he admitted that he did not know the owner of the contraband substances. He also admitted that at the time of recovery of the seized article the co-accused/appellant was not present at the P.O. He admitted that he does not know where and who was the co-accused/appellant at the time of the incident. He also admitted that, though, the accused Vanlaltawka stated that the owner of the contraband article was the co-accused/appellant, however, there is no prove or evidence in order to ascertain that the owner of the contraband articles was the co-accused/appellant. He also admitted that he did not take any steps in order to prove the contraband articles belong to the co-accused/appellant. PW-2 & PW-3 are the civilian seizure witnessed.

28. Pw-2 and PW-3 are the civilian seizure witnesses. The deposition of PW 2 reveals that what he knew of the involment of the appellant is only through hearsay of the accused Vanlaltawka and during cross examination, PW-3 admitted that there was no other persons except the accused Vanlaltawka when the seized articles was seized .

29. Pw-4 –Mr.Lalmuanawma is the Assistant Director, Forensic Science Laboratory, Aizawl, who deposed that on 27.02.2018 he had received samples of contraband substance which were marked as Exhibits C(CPI)-77(1) to C(CPI)-77(38) were found to be heroin with purity of 79%.

30. Pw-5 –Mr. HP Vanlalchaka is the Officer-in-Charge, Champhai Police Station, who gave authorisation as per section 41 ND & PS Act, to Mr. Lalsangliana, S.I. of Police to proceeds to the place of occurrence and take necessary action.

31. Pw. 6-Zoremsanga is the S.I. of Police who stated that on 22.02.2018 at around 2:00 P.M., he had received information from police personnel on duty at Khankawn Police check post about the suspicious truck vehicle carrying cattle driven by the accused Vanlaltawka. The vehicle was detained and the police party under the command of S.I. Lalsangliana rushed to the P.O. The police party recovered 38 plastic soap cases filled with heroin which was kept in one

air bag from behind the driver seat of the said vehicle. The S.A. was 450.8 grams estimated to cost of 19 lakhs as per prevailing local market. On preliminary enquiry, the accused Vanlaltawka stated that the bag containing the contraband substances was taken by him from the residence of the mother-in-law of the co-accused Lallawmsanga/appellant at New Champhai, with the promised made to him, to be paid Rs.2000 as a consideration for carrying the bag. After completing all the procedures, he produced the accused Vanlaltawka to the O/C Champhai Police Station for further action. On interrogation, the accused Vanlaltawka again stated that the said bag was collected by him from the house of mother-in-law of the accused/appellant. From the statement made by the accused Vanlaltawka who revealed that the contraband substances belongs to Lallawmsanga/appellant. He arrested the co-accused/appellant. The co-accused/appellant stated before him that he was staying at Champhai, when he made a request to a person well known to him named Pi Kimi, to deliver certain quantity of heroin. Pi Kimi delivered 38 plastic soaps containing contraband substances. He had left the contraband substances in the house of his mother-in-law at New Champhai. He then requested the accused Vanlaltawka to bring the said contraband substances and promised to pay him Rs.2000/- as a consideration. Pw-6 finding prima facie case against the accused/appellant person under section 21(c)25/29 ND & PS Act submitted his

charge sheet.

32. During the cross examination he stated that at the time of arrest of the accused/appellant, the appellant did not denied ownership of the seized contraband substances. However, he admitted that he did not have any prove or evidence to ascertain that the co-accused/appellant was the actual owner of the seized articles. He also admitted that he did not have any evidence to show that the accused Vanlaltawka had transported the S.A which was collected from a Pi Kimi and also to show that the accused/appellant had left the S.A at the resident of his mother in law of New Champhai. He admitted that the co-accused/appellant was arrested on being framed only from the statement of the accused Vanlaltawka.

33. From the above prosecution evidence given by the case I.O, this court finds that the case I.O/ PW6, has relied only on the statement made by the accused Vanlaltawka fully implicating the appellant, for which he admitted in cross examination that he did not have any proof. Further Section 30 of the Indian Evidence Act provides that the confession of one accused can be used against others if the confession implicates the maker substantially to the same extent as the other co-accused person against whom it is sought to be taken into consideration. However, in the instant case the accused Vanlaltawka is

trying to throw the main blame on the other accused/appellant.

34. It is also seen that there are 2(two) Defence witnesses who have implicated the appellant.

DW-1- Thangkaptluanga is the Handyman of the accused Vanlaltawka. He deposed that on 22.02.2018, when they were near Mualbuhvum area, the accused Vanlaltawka received a phone call from the co- accused/appellant Lallawmsanga where the accused Vanlaltawka told him that the co-accused/appellant Lallawmsanga wanted him to carry a bag for him. DW-1 entered the house from where they were to collect the bag. There was an old lady and one small boy in the house, as asked, the small boy got the black air bag from the bed room and gave it to the accused Vanlaltawka. The bag was kept in the vehicle, on the way they were stopped at Khankawn Police check gate. They thought that the bag contained mere clothes as they did not open the bag and were surprised to find that there was a contraband substance inside the bag. He was released shortly since he told the police that he attends school while the accused Vanlaltawka was apprehended by the police. During cross examination, the witness again stated that the bag belonged to the accused/appellant and that he did not mention about the illegal contents of the bag.

35. DW-2 – C. Hrangkamlova, he deposed that he had met the accused Vanlaltawka, who were stopped near the resident of the co- accused Lallawmsanga, when he asked Vanlaltawka, what he was going to do, he said that he was going towards accused Lallawmsanga's relative, he saw accused Vanlaltawka carry bags of accused Lallawmsanga/appellant from the resident to the vehicle.

36. This court however finds that there was no mention of the presence of DW1, by the prosecution witnesses therefore not substantiated by the prosecution evidence. The prosecution have stated that only the accused Vanlaltawka was present at the time of seizure. DW2's evidence is also found not substantiated.

37. In view of the above findings and discussions, wherein both the seizing officer, PW-1 and the case I/O PW-6 have candidly admitted during their cross examination that they do not have any prove that the seized contraband substance, which was seized from the vehicle of the acquitted accused Vanlaltawka, belonged to the appellant, this court is of the considered view that the prosecution has failed to prove the guilt of the appellant under Section 8/21 (c) of ND & PS Act and accordingly set aside and quash Judgment & Order dated 27.11.2019, passed by the Special Court, ND & PS Act, Champhai wherein

the appellant was convicted under Section 8/21(c) ND&PS Act and vide the court's Order dated 03.12.2019 was sentenced to undergo rigorous imprisonment for a period of 10 years and pay a fine of Rs.1 lakh in default rigorous imprisonment for a period of 6 (six) months.

38. The appellant/Sh. Lallawmsanga is thus set at liberty and shall be released forthwith unless wanted in any other case.

39. Crl.A No 13 of 2020 is thus allowed and stands disposed of.

40. LCR to be returned.

JUDGE

Comparing Assistant