

GAHC030004192022



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

Case No. : CrI.A./19/2022

Zorampari
D/o Lalrinliana (L)
R/o Lunglei Rahsi Veng,
Lunglei, Mizoram.

VERSUS

The State of Mizoram
Aizawl.

Advocate for the Petitioner : Mr. Jonathan Lalrintluanga

Advocate for the Respondent : Ms. Mary Lalruatkimi Khiangte (Addl.PP, Mizoram)

Linked Case : I.A.(CrI.)/15/2022

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Lunglei
Mizoram.

VERSUS

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Advocate for the Petitioner : Mr. Jonathan Lalrintluanga
Advocate for the Respondent :

BEFORE
HONOURABLE MRS. JUSTICE MARLI VANKUNG
JUDGEMENT

Date : 01-12-2023

Heard Mr. Jonathan Lalrintluanga, learned counsel for the appellant along with Ms. Mary L. Khiangte, learned Additional Public Prosecutor for the State respondent.

[2.] This appeal under Section 374 Cr.P.C., 1973 r/w Section 36B of ND&PS Act, 1985 is against the Judgment & Order dated 29.06.2022 and the Sentence Order dated 01.07.2022, passed by the learned Judge, Special Court, ND&PS Act, Aizawl in SR No. 88/2019 Ref: Special Narcotics P.S. Case No. 4/2019 under Section 21 (c) ND&PS Act, whereby the appellant was convicted and sentenced to undergo 10 years Rigorous Imprisonment and to pay a fine of Rs. 1 lakh, in default to undergo Rigorous Imprisonment for another 1 year.

[3.] The prosecution case in brief is that on 13.02.2019, an FIR was submitted to the Officer-in-charge, Special Narcotic Police Station, CID (Crime), Aizawl to the effect that on 13.02.2019, the informant received information of some persons were seen within the area of Chawnpui, Aizawl strongly suspected of committing an offence under the provision of ND&PS Act, 1985. The O.C. Narcotic P.S. was informed and the informant was authorized to enquire into the matter. On enquiring into the matter, the informant seized 273.9 grams of suspected Heroin from the possession of the

appellant/Zorampari. Accordingly, Special Narcotic Police Station Case No. 4/2019 dated 13.02.2019 under Section 21 (c) ND&PS Act was registered and duly investigated into. During investigation, the case I.O found prima facie case against the appellant/accused and accordingly, charge sheet was submitted against the accused under Section 21 (c) ND&PS Act. Thereafter, the learned Trial Court framed charge under Section 21 (c) ND&PS Act, to which the appellant/accused pleaded not guilty and claimed for Trial. During Trial as many as 6 (six) prosecution witnesses were examined, the appellant on examination under Section 313 Cr.P.C. where she denied all the incriminating evidence made out against her. Thereafter, three number of defense witnesses were examined. The learned Trial Court after hearing both the parties passed the impugned Judgment & Order dated 29.06.2023 and the Sentence Order dated 01.07.2022. Aggrieved by the above said orders, the appellant has filed the instant criminal appeal.

[4.] Mr. Jonathan Lalrintluanga, learned counsel for the appellant submits that the provisions of Section 41(2) has not been fully complied with in this case. He submits that the PW1 SI Lalbeithangi had taken down in writing the information received by her to which she received the authorization letter from the concerned O.C however section 41(C) requires that the grounds of belief should be recorded by the person issuing the authorization letter which has not been done so in the instant case. The learned counsel further submits that authorization letter was issued by the concerned was made on 23.02.2019 after the arrest of the appellant on 13.02.2019, while as per

the provisions of Section 41(2) ND&PS Act, authorization cannot be made after the arrest of the accused. He further submits that as per the evidence of PW-3, on his cross examination, he has admitted that no authorization letter was shown to him.

The learned counsel further submits that it is seen that the seized article was said to be kept in a bag, however, the inventory does not mention anything about the bag in which the seized article was said to be kept. The learned counsel also submits that the possession of the bag has not been established as per the evidence of PW-1, PW-2 and PW-3. In their cross examination it shows that the appellant was not in actual possession of the bag where the seized articles were seized, but that the bag was seized from the table.

[5.] The learned counsel submits that the Officer who did the test of the sample was not examined as a witness under such circumstances the FSL report purportedly prepared by him is not admissible and thus the seized articles have not been proved to be contraband substances. He further submits that the Standing Order 1 of 1989 which requires that the quantity of sample to be taken for chemical test should not be less than 5 grams in respect of all narcotic drugs and psychotropic substances save in the case of opium, ganja and chras, has not been followed. As per the inventory, only 0.5 grams of the sample was taken for examination in the FSL which is not sufficient for conducting any chemical test. It is also not clear whether the 0.5 grms were taken from each of the containers or from a total of the S/A. The learned counsel also

submits that the place of storage of the seized articles from the time it was seized to the time when samples were collected is not shown and that there is no explanation as to where and how the seized contraband articles were kept after being seized. No register is maintained to show whether or not, the S/A was kept in the Malkhana. In support of his submissions, the learned counsel has cited the following authorities: (i) *Alamo Latha Vs. State of Assam*, reported in (2013) 3 GLR 301 (para 12), (ii) *Makhan Singh Vs. State of Haryana*, reported in (2015) 12 SCC 247 (para 11 & 16) to show that the possession of bag was not proved submitting that there has to be annexes between the seized articles and the accused person and (iii) *Chanam Ranjit Meitei Vs. Union of India*, reported in (2010) 1 GLR 118 (para 23), wherein it was held that under the provisions of Section 55, there should be a proper record of the seized articles and in the instant case there is no Malkhana registration maintained.

[6.] The learned counsel further submits that as per the photograph which has been enclosed in the charge sheet and exhibited before the Court, this is not as per the provisions of Section 52-A, ND&PS Act. PW-5, who is the Judicial Magistrate 1st Class has also admitted in his cross examination, that the provisions of Section 52-A has not been followed. The learned counsel thus submits that the prosecution has to prove beyond reasonable doubt the guilt of the accused and in support of his submissions which they have failed to do so in the instant case. The learned counsel has also relied on the decision of the Apex in *Hanif Khan alias Annu Khan Vs. Central Bureau of*

Narcotics through Inspector L.P. JHA, reported in (2020) 16 SCC 709 (para 8 & 9).

The learned counsel also submitted that though the appellant previously had a case at Lunglei of similar nature she was acquitted of the charge by the trial court.

[7.] Ms. Mary L. Khiangte, learned Additional Public Prosecutor, on the other hand submits that the said standing orders where 5 grams of the samples has to be taken is not a statutory law but merely a guideline and drawing 0.5 grams does not prejudice the accused. She submits that there is no mention as to how drawing of this .5 grams, would prejudice the appellant. She further submits that the authorization was as per the required provisions of law, since the seized article was seized on 13.02.2019 and authorization was issued on 13.02.2019. She further submits that PW-6 has explained the dates wherein the date of authorization which was mistakenly recorded as 23.02.2019, should actually be written as 13.02.2019, this was actually a clerical mistake and an explanation to that effect was made by PW-6. This has not been countered in the cross examination of PW-6. With regards to whether the bag belongs to the accused/appellant, the learned Additional Public Prosecutor submits that the accused/appellant was in closeproximity with the bag from amongst the other persons. Due to her close proximity, it was obvious that she was the owner of the bag. She further submits that during the examination of the accused under Section 161 Cr.P.C., she has not denied the ownership.

[8.] The learned Additional Public Prosecutor further submits that it is for the

appellant/accused to prove her innocence as provided under Sections 35 & 54 of the ND&PS Act. In support of her submissions, she has cited *Balwinder Singh (Binda) Vs. Narcotics Control Bureau*, reported in *2023 SCC Online SC 1213*. The learned Additional Public Prosecutor further submits that the appellant appears to be a habitual offender, since she also had a case pending against her in Criminal Case No. 329/2021, where she was charged for a similar offence.

[9.] I have heard the submissions made by both the parties and I have also perused the documents on record.

[10.] The deposition made by the prosecution witnesses and defense witnesses is herein briefly highlighted and scrutinized.

[11.] PW-1, S.I. Lalbelthangi deposed that on 13.02.2019, she received information that a huge amount of contraband drugs was to be transit within the area of Chawnpui Veng near Ebenezer Hospital. She reduced the information into writing and submitted it to the O/C Special Narcotic P.S., who then issued her the authorization under Section 41(2) ND&PS Act. Herself and her party reached the P.O and saw the accused, Zorampari sitting inside the tea stall with a multi-coloured bag beside her. The accused was detained inside the tea stall with her bag and they took her to the balcony with two civilian witnesses since the P.O was crowded. In the presence of the civilian witnesses, PW-1 searched the bag of the accused and recovered 20 soap cases of Heroin. When weighed, the seized contraband weighed 273.9 grams, the packing and sealing of the same was also done. Thereafter, she

arrested the accused and submitted her FIR and report of seizure and arrest to the O/C Special Narcotic P.S. The seizure memo was exhibited as Exhibit P-1, the information report was exhibited as Exhibit P-II, the authorization was letter exhibit as Exhibit P-12, the arrest memo, report of seizure and arrest and the FIR were exhibited as Exhibit 13, 14 & 8 respectively.

During cross examination, she admitted that there was no document to show that she had submitted her information report immediately to the O/C Narcotic PS after she received her information, since no receipt by the O/C was seen in the case record. She admitted that she cannot say the exact time of arrest of the accused or the time spent by her in between the information and the arrest of the accused. She admitted that the issuing date of authorization was dated 23.02.2019. She admitted that the statement of the seizure witnesses were recorded by her at the Police Station. She admitted that she did her inventory at the Police Station and submitted the same to the O/C Special Narcotic P.S. She admitted that the civilian witnesses were not present at the time of drawing of samples. She also admitted that nothing was to be seen on the bag to identify that the bag belonged to the accused. On re-examination, she explained that the date of authorization must have been wrongly entered by mistake since the date when the incident happened was on 13.02.2019.

[12.] PW-2, Remruatzauva is the seizure witness who deposed that she was informed by the police personnel of the seizure of Heroin at the canteen near Ebenezer Hospital and she was requested to stand as a witness. When she went to

the PO, she saw the accused sitting inside the canteen and the police personnel were also present. The police personnel did all the formalities as per law but since the location was crowded, they took the accused with her lady's purse to the balcony and she had followed them. They recovered and were 20 soap cases containing Heroin bag of the accused which was seized and the weight taken. The contraband substances weighed 273.9 grams and the packing was done in her presence. She identified the seizure memo as Exhibit P-1.

During cross examination, she stated that she did not know whether or not the bag was carried by the accused. She also admitted that she has no point to ascertain that the bag belonged to the accused and admitted that the bag may belong to someone else and not the accused. She admitted that the SA or sample of the SA was not produced in the Court.

[13.] PW-3 is Lalthianghlina is also the seizure witness. He deposed that he was informed by the Police that they suspected one person was possessing illicit drugs at a canteen near Ebenezer Hospital and he was requested to be a witness. When he went to the PO, he saw the accused sitting inside the canteen and kept one lady's bag on the table. The location being crowded, the police took her to the balcony and when the bag was searched, they recovered 20 soap cases containing Heroin. Thereafter, being a witness, he put his signature as a seizure witness. During the cross examination, he admitted that he did not personally know whether the bag belonged to the accused, Zorampari. He admitted that the suspected bag was placed on the

table of a canteen near Ebenezer Hospital. He did not know whether the police personnel already knew that the bag was containing Heroin before they conducted their search. He admitted that besides the police personnel, he saw three female personnel being apprehended by the police at the P.O. He also admitted that none amongst the three female persons were carrying the suspected bag, that he did not personally know whether the bag belonged to the accused or not, that when he went to the room upstairs there were 7 persons including himself and the police personnel, that the seized bag containing the heroin was not produced in the court.

[14.] PW-4 is Vanlalhriata, JMFC. He deposed that he received endorsement from CJM, Aizawl to certify the correctness of inventory photographs and drawing of samples of seized illicit drugs in connection with the instant case. He stated that the Inspector, Vanlalbiaka Joute made an inventory of the seized articles before him. He compared the inventory of the SA made by the Inspector, Vanlalbiaka Joute and the SA was produced before him and he found them to be true and correct. Therefore, he certified the inventory is as per the seizure documents and the consignment of seized articles and he put his signature. During cross examination, he admitted that the bag which was used for keeping the SA was not produced before him. The SA was kept in a transparent polythene. He admitted that he did not certify the bag seized by the police personnel. He admitted that at the time of drawing samples, no civilian were present nor was the accused produced before him at the time of drawing of samples. He also admitted that at the time of giving certification

and regarding correctness of the photographs of the SA, no witnesses were present.

[15.] PW-5, S.I. H. Lalnunmawia is the case I.O who stated that during his investigation, he examined the complainant and the seizure witnesses and also interrogated the arrested accused. The accused admitted that she brought the Heroin from one Lalzingpuii of Myanmar, while she was waiting for the purchaser, she was arrested and the Heroin was recovered from her possession. He stated that on 14.02.2019, sample was drawn before the Court of JMFC, Aizawl District and on 14.02.2019 the samples drawn were forwarded to Director, FSL Aizawl. The FSL report was received on 11.03.2019, in which the exhibits were found to be Heroin. The purity was about 78% w/w. On finding *prima facie* against the accused under Section 21(c) ND&PS Act, he had submitted the charge sheet on 15.04.2019 which was identified the final form/charge sheet along with the FSL report. During cross examination, he stated that he did not take part in the investigation of the case except for what is stated by him in his examination-in-chief.

[16.] PW-6, VanlalbiakaJoute, had deposed that on 13.02.2019, PW 1 had submitted her information report regarding huge amount of contraband substance was in transit between ChawnpuiVeng and Ebenezer hospital. He issued the authorization letter which is dated 23.02.2019 by mistake when the date of issue of the authorization letter was 13.12.2019. On the same day PW1 seized the S/A and on the following day he made an application for preparing the inventory. After comparing the SA his inventory and the S.A, PW5/JMFC had certified its correctness and put his

signature. Two photographs were taken by PW5. Samples of the S/A were drawn in the presence of PW5. The Authorization, application for correctness of inventory, inventory of S/A, Photographs and list of samples drawn were exhibited and identified by the PW6. On cross examination he stated that he never knew the accused before the instant case and did not know whether she had any previous case under ND& PS Act.

[17.] The appellant on examination under Section 313 Cr.P.C. has denied the prosecution evidence made out against her and has explained that at that time, since so many people were in the vicinity of Ebenezer Hospital, the police also called her along with others to the upper stair of one Tea stall. She was therefore alleged to be the accused and brought to their Police Station and she was innocent in the case. As they have a well established tailoring shop Viz. Mizoram Dress in Lunglei, she did not need to indulge with selling of contraband items.

[18.] DW-1, Lalthazuali has deposed that she along with several other persons were sitting in the tea stall near Ebenezer Hospital. While they were having tea, the police came to the tea stall and suspected that contraband articles were kept inside the bag, which was placed on one of the tables. The police summoned several of the persons who were inside the tea stall to the upper floor of the building and around seven or eight persons including herself and the accused person were summoned to the upper floor. They were told that the bag found in the tea stall contained Heroin and the police asked each of us if the bag belonged to them but

none of them claimed ownership. The police personnel insisted that the bag belonged to one of us and finally put the blame on the accused, even though she did not claimed ownership of the bag. DW-1 further deposed that she wanted to help the accused since she was falsely accused and they had exchanged their phone numbers after she was released on bail. The accused had contacted her/DW-1 and they met a couple of times. She deposed that she has come before the Court on the request of the accused to relay the actual incident that took place on the date of arrest of the accused. During cross examination, she admitted that at the time of seizure and arrest she was sitting inside the tea stall and the accused was also sitting inside the tea stall but they did not share the same table. She admitted that the involved bag was kept on the table of the accused. She also admitted that she did not follow the accused when she was taken to the upper floor of the building by the police personnel. She admitted that she did not know whether the accused had similar case or not.

[19.] DW-2, Zorampari is the accused who deposed that she was present in the tea stall when the suspected bag was containing Heroin. She stated that she along with several persons were summoned to the upper floor of the building and they had asked them whether the bag belonged to anyone of them to which none of them claimed ownership. She stated that though she did not claimed ownership of the bag, the police finally put the blame on her merely because she was sitting closest to the bag and she was arrested and put into custody. She stated that she has a similar case registered under ND&PS Act at Lunglei only because her phone number which she had

not used for over 4 months was written on a parcel which allegedly contained Heroin. That she was running a tailoring shop at Lunglei, which was quite profitable and that she was earning sufficient income from the shop.

[20.] DW-3, C. Lalmuanpuui has deposed that on the day of the incident she was in the tea stall when a woman carrying a bag who was accompanied by a man entered the tea stall and they sat next to them. After some time, the woman left the tea stall stating that she would return shortly, and she did not take the bag with her. Thereafter, the man also left the place. After some time, the police personnel came to the tea stall and suspected that contraband articles were kept inside the bag, which was placed on their table. The police then summoned several people inside the tea stall to the upper floor of the tea stall which included herself and the accused. The police interrogated all of them and the police personnel put the blame on the accused since the bag was placed closest to her inside the tea stall. During cross examination, she denied the suggestion that she had made-up the story that a woman carrying a bag who was accompanied by a man entered the tea stall and sat next to them.

[21.] From the above evidence adduced in the court, this court finds that PW-1, S.I. Lalbelthangi has deposed that she reduced into writing the information received and submitted it to the O/C Special Narcotic P.S., who then issued her the authorization under Section 41(2) ND&PS Act. On re-examination, she has also explained that the date of authorization must have been wrongly entered by mistake since the date when the incident happened was on 13.02.2019 and not on

23.02.2019.PW6 has also clarified that the date of authorization was by mistake recorded as 23.02.2019. Nothing was asked in the cross examination to refute this explanation. It is also seen that the information report was exhibited as Exhibit P-II. Thus this court finds that the mandatory provision under section 41(2) of ND& PS Act has been followed.

[22.] With regards to the amount of sample drawn which is said to be . 5gms, for chemical test which is not as per the Standard Order 1 of 89, this court finds that though PW5 who is the case I.O had deposed that the FSL report certified that the seized articles were found to be Heroin, it's purity was found to be about 78% w/w.However it is seen that the concerned officer did not testify before the learned trial court and therefore whether or not there is a mandatory requirement that samples of not less than 5 gms is required for examination of narcotic drugs and psychotropic substances is not clarified. This court finds that since the Officer who did the test of the sample was not examined as a witness, under such circumstances, the FSL report exhibited as Exhibit -10 cannot be given due weightage to prove that the seized articles are contraband substances.

[23.] This court also finds that it is an admitted fact that there were many people at the P.O when the bag from where the S/A was recovered was seized. It is also an admitted fact that the said bag was not in the possession of the appellant, PW1 stated that it was near the appellant/accused while PW2 and PW3 have stated that it was on a table. PW1 has admitted on cross examination that nothing was to be

seen on the bag to identify that the bag belonged to the accused. Both the seizure witnesses PW2 and PW3 on cross examination have admitted that they did not know whether the bag belonged to the accused/appellant or not. Pw3 has also admitted that besides the police personnel he saw three female persons apprehended by the police at the P.O. The accused/appellant has claimed that she was innocent when examined under section 313 Cr.P.C and had stated that she was called along with others to the upstairs of the Tea Stall where she was alleged to be the owner of the bag and brought to the police station. It is seen that the two defense witness have also deposed that they were taken to the room upstairs and asked whether the bag belonged to them and that the police finally put the blame on the accused/appellant. The prosecution evidence shows that PW 1 who is the seizing officer had made the appellant the accused only due to her close proximity with the bag. It is seen that the case I.O had found prima facie case against the accused appellant only when she admitted on interrogation that *she brought the Heroin from one Lalzingpuii of Myanmar, while she was waiting for the purchaser, she was arrested and the Heroin was recovered from her possession*. It is however a settled principle of law that any statement made before the police cannot be used against her in evidence. It is also seen that the said multi-coloured bag was not produced or exhibited in the court. Thus this court finds that the prosecution evidence has failed to establish a coherent link between the seized bag and the accused appellant.

[24.]

A Co-ordinate Bench of this court in *Alamo Lotha Vs. State of Assam*

(supra) has observed as follows;

“12. As stated earlier the seized contraband were produced before the CJM only on 16.8.2006, the prosecution has to explain how it could be produced after a gap of two days. The prosecution has to explain where and how the seized contraband articles were kept after being seized on 13.8.2006 at 3.30 p.m. till their production before CJM on 16.8.2006. Where were the contraband kept on the night of 13.8.2006, whole day and night of 14.8.2006 till production on 16.8.2006 before the Magistrate? Were they kept in the safe personal custody of O.C. PW7 or in the Malkhana? The O.C., PW7, who was also I.O. of the case, in his deposition made no statement as to how, where and whose custody the seized contraband were kept. He has never stated in his evidence that they were kept under his personal care and custody or in the custody of his subordinate official or he specifically authorized some official to take care and custody of the contraband nor has he stated that he kept the contraband in the Malkhana. Had the seized contraband were kept in the Malkhana it was incumbent upon the; prosecution to produce the Malkhana register to show/prove that it was kept in safe custody of the police Malkhana. Keeping of the seized contraband in safe custody from the time of seizure till production before the CJM or Magistrate and drawing, packeting and sealing of sample for sending it to FSL, is a statutorily cast duty of the O.C. He cannot escape from this duty and responsibility merely showing that he produced the seized contraband and sent the sample of the contraband to the FSL. The prosecution took no care to produce the Malkhana register. It is a serious irregularity on the part of the prosecution which may result in to quashment of conviction and sentence. In this regard, I am persuaded to refer to the State of Rajasthan v. Gar mail Singh, (2005) 3 SCC 59. It was a case where the prosecution claimed that seized articles were kept in Malkhana till it was taken over but the Malkhana register was not produced in support thereof. It was in such situation, considered as a serious infirmity in the prosecution case. Section 55 of the NDPS Act is exhaustive in regard to taking charge of articles seized and keeping them in custody

by police. The said section is reproduced below for the sake of appreciation and ready reference:

“55. Police to take charge of articles seized and delivered.— An officer in-Charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the Officer in-Charge of the Police Station.”

[25.] This court is in agreement with the above observation and finds that in the instant case, the S/A was seized on 13.02.2019 and it was on the following day i.e on 14.02.2019, that PW-6 made an application for preparing the inventory. After comparing the S/A his inventory and the S/A, PW5 had certified its correctness and put his signature on 14.02.2019. However there is no explanation as to where the S/A was kept before making the inventory and therefore holds that the provisions of section 55 of the Nd & PS Act has not been followed.

[26.] Though the learned Addl. PP has referred to sections 35 & 54 of the ND&PS Act, that it is for the appellant/accused to prove her innocence, this court finds that the prosecution needs to first establish their case against the accused. It is a well-settled principle of the criminal jurisprudence that more stringent the punishment, the more heavy is the burden upon the prosecution to prove the offence.

[27.] For the aforesaid reasons, this court is of the considered opinion that the conviction of the appellant under section 21 (c) ND &PS Act in its Judgment &

Order dated 29.06.2022 and the Sentence Order dated 01.07.2022, passed by the learned Judge, Special Court, ND&PS Act, Aizawl in SR No. 88/2019, cannot be upheld and the accused appellant should be given the benefit of doubt and be acquitted on benefit of doubt. The impugned Judgment dated 29.06.2022 and the Sentence Order dated 01.07.2022, is accordingly set aside.

[28.] The accused appellant is set at liberty forthwith unless his further detention is required in connection with any other case.

[29.] The CrI.A No.19 of 2022 stands allowed and disposed of. Send back the LCR.

JUDGE

Comparing Assistant