

GAHC030001822020



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

Case No. : CRL.A(J)/6/2020

Salemthara
s/o Thangdeihgina, Champhai Vengthar, Mizoram

VERSUS

State of Mizoram
Aizawl, Mizoram

Advocate for the Petitioner : Ms. Lalngaihsaki Fanai (Amicus Curiae)

Advocate for the Respondent : P.P./Addl.PP, Mizoram

BEFORE
HON'BLE MRS. JUSTICE MARLI VANKUNG

Date : 08.03.2024

JUDGMENT & ORDER (CAV)

Heard Ms. Lalngaihsaki Fanai, learned *Amicus Curiae* appearing for the appellant along with Mrs.Linda L. Fambawl, learned Addl. Public Prosecutor for the state respondent.

2. This is a jail appeal against the Judgment & Order dated 24.06.2018

passed by the learned Judge, ND & PS Act in Crl. Trial No. 1303/2018 reference Champhai Excise Case No. 150/2018/CPI under Section 21(c) ND & PS Act wherein the appellant was convicted under section 21 (C) ND&PS Act and sentenced to undergo Rigorous imprisonment for a period of 10(ten) years and pay a fine of RS.10,000/- in default S.I for another 3(three) months.

3. Brief facts of the case is that an FIR was submitted on 24.06.2018 to the effect that Tuantuahkimi aged, 56 yrs, (2) Mangzakima, aged 19 yrs (instant petitioner) was arrested in connection with the seizure of 307 grams of heroin on 23.06.2018 at 9:30 P.M at New Champhai. Accordingly, the case was registered as Excise Case No.150/18/CPI under section 21(c) of ND & PS Act and duly investigated into. The S.A was seized from under the seat of the auto rickshaw and during the investigation, the driver of the auto-rickshaw was also made an accused in the case.

4. During investigation, the case I/O on interrogated the accused persons and examined the witnesses. On receiving the FSL report which confirmed that the seized articles was Heroin of 82% and 83% in purity, the case I.O found prima facie case against the 3(three) accused persons u/s 21(c) ND&PS Act and accordingly filed the charge sheet. The case was committed for trial to the Special Court, ND & PS Act. The learned Judge under ND&PS Act, framed

charge under section 21(c) of ND & PS Act, to which the appellant and the co-accused persons pleaded not guilty and claimed for trial. Thereafter as many as the 7 (seven) prosecution witnesses were examined. The accused persons were also examined under section 313 Cr.P.C. The learned Trial Court after hearing both the parties convicted the appellant u/s 21(c) ND&PS Act and acquitted the other 2 (two) co-accused. Aggrieved, the appellant has filed the instant appeal.

SUBMISSIONS OF THE LEARNED AMICUS CURIAE

5. Lalngaihsaki Fanai, learned Amicus Curiae for the appellant submits that the impugned Judgment & Order is liable to be set aside on various grounds. The learned Amicus Curiae submits that on the perusal of the evidence adduced by the prosecution witnesses, it is seen that the seized articles were not seized from the possession of the appellant, but were seized from under the seat of the Auto Rickshaw. The PW-No.1 who is the civilian witness, had also mentioned that in his cross examination that he was not present while the search of the Auto Rickshaw was conducted. He had also admitted that he does not remember from where the S.A was recovered. The learned Amicus Curiae also submits that though the civilian witness PW No.2, who is the Secretary of the Village Council of New Champhai, had stated that after the Seizing Officer weighed the substances, he repacked all the containers and properly sealed

them with the signatures of the civilian witnesses on each packages, however, these signatures were not exhibited in the court.

6. The learned Amicus Curiae for the appellant further submits that though the case I/O had mentioned that 15 grams each was drawn as sample from the seized articles, however on perusal of the FSL report, it is seen that the samples examined were weighed different grams and not 15 grams each. This discrepancy in the amount samples stated to be drawn by the case I/O and the grams mentioned in the FSL report makes the prosecution case doubtful. She further submits that the Assistant Director, FSL, Aizawl was examined in the court, he did not explain the difference in the weight of the samples examined by him.

7. The learned Amicus Curiae for the appellant further submits that though the appellant in his examination under Section 313 Cr.P.C. had not denied the incriminating evidence that on 23.06.2018, he went to Zokhawthar and came back with 22 Hawng/22 plastic containers all containing heroin. That the Excise & Narcotics officer with his constables intercepted him and seized the heroin from his possession at a place called Helipad Hnuai in presence of witnesses. That he possessed/transported such contraband substances without obtaining any permission. He has however, also explained that he was asked by his elder

brother to collect the S.A at Zokhawthar from an old lady and that he did not know the contents of the S.A which he had hidden under the driver's seat of the Auto rickshaw. The learned Amicus Curiae submits that, his admissions made under Section 313 Cr.P.C. cannot be the ground for the conviction of the appellant, since he has explained the circumstances.

8. The learned Amicus Curiae also submits that the mandatory provisions of Section 52A of the ND & PS Act. has not been properly followed and that Section 42(2) has also not been followed.

For the above reasons, the instant appellant is liable to be acquitted by setting aside the impugned Judgment & Order dated 24.06.2018 passed by the learned Judge, ND & PS Act

9. The learned Amicus Curiae has relied on the Judgment of the Apex Court in **Noor Aga -vs- Punjab & Anr.** reported in **(2008) 16 SCC page 417**, submitting that the learned Apex court had taken in consideration the fact that the presumption of innocence of the appellant has to be taken into account being its human right and that the learned Apex Court had also allowed the appeal considering the discrepancies found in the case in filing that the investigation of the case and that the prosecution has failed to prove the case beyond the reasonable doubt.

SUBMISSIOS OF THE LEARNED ADDL.PP

11. Mrs. Linda L. Fambawl, learned Additional Public Prosecutor on the other hand submits that the seized articles were chance recovery when there was a random checking conducted by the excise personnel. The civilian witnesses were called at the time of the seizure of the seized articles. She submits that since this was a chance recovery and the seized article was seized from a public vehicle which is a public place under section 43 ND & PS Act and therefore, Section 42 of the ND&PS Act is not required to be followed in the instant case. She submits that the contraband substance was also seized from under the seat and not from the body of the accused persons. Thus, Section 41 and Section 42 ND&PS are not applicable in the instant case.

12. The learned Additional Public Prosecutor also submits that it is clear that the instant appellant is the main accused in the case since he had admitted to the incriminating evidence made out against him in his examination under Section 313 Cr.P.C. His admission made under Section 313 Cr.P.C. is confirmed and corroborated by the prosecution evidence in the seizure of the seized articles. With regards to the discrepancies in the drawing of the samples, she mentions that the case I.O (PW-5) has only stated in his cross examination that

about 5 grams of the seized contraband substance was drawn out and it is not the exact amount. It can be seen in the FSL report that the amount mentioned is not exact but it is also above and they are all above 15 grams. Therefore, there is no reason to doubt that the FSL report had examined the contraband substance seized from the instant appellant. She also submits that with regards to the signature on the sample which was supposedly to have been made by the civilian witnesses after the packages were repacked. This issue was not raised or questioned by the defence during the cross examination in the Trial Court and therefore, cannot now be raised at this stage. She further submits that this being a chance recovery, where the seized article was seized from under the driver seat of the Auto rickshaw, Section 50 will not come into play and therefore, there is no violation of the mandatory provisions of ND&PS Act in the instant case. That the provisions of section 52A of ND & PS Act has also been complied with and the withdraw of the samples and preparation of inventory was done in the presence of JMFC.

PROCEEDINGS BEFORE THE TRIAL COURT

13. Having heard the submissions of both the parties, the proceedings before the trial court/evidence adduced by the prosecution witnesses are briefly re-

visited

14. PW No.1 BS Kailiana is the Financial Secretary of New Champhai Branch YMA, his deposition is to the effect that on the night of 23.06.2018 he was invited by the Champhai Excise and Narcotics Officials to act as a witness in connection with the present case. By that time, the excise officer had detained one auto rickshaw and the accused persons. The Excise Officer took him to the auto rickshaw and opened the seat of the auto rickshaw from where he took out 4 bundles wrapped with black polythene bag inside the seat. Since there was no adequate proper light at the P.O, the excise officer took the said polythene bag to the residence of P.W. No.1. The Excise Officer then opened the said four black polythene bags and found 22 plastic soap containers all containing substances suspected to be heroin. The excise officer took measurement of the S.A. which was 307 grams in weight. The seizure and arrest memo was prepared on the spot and he put his signature as the seizure witnesses. On cross examination, he admitted that he cannot recall from where the excise personnel recovered the S.A and that he did not know or witness the excise personnel giving a copy of seizure memo to the accused person. He admitted that when he reached the P.O. he did not witness the excise personnel conducting actual search of the vehicle.

15. P.W. No.2 Dalsuanmanga is the Secretary of the Village Council Court, New Champhai. This deposition is to the effect that he was called to act as a witness in connection with the instant case. On reaching the P.O. the excise officer informed him that he was about to search the auto- rickshaw on strong suspicion of carrying contraband substances. The Excise Officer opened the front seat of auto-rickshaw from where he recovered 4 bundles wrapped with black polythene paper. The said bundles were taken to the house of Ngunsianthanga (father of PW-1), the said bundles were cut opened and inside the bundles were smaller packages of around 22 numbers. Inside the small packages they found surf power light substance. The said substance was suspected to be heroin. The weighment of the seized articles was done on the spot and altogether it weighed 307 grams. The seizure and arrest memo was prepared on the spot and his put his signature on the same. He further stated that the officer who took weight of the substances repacked all the containers and properly sealed it with their signatures on each of the packages.

On cross examination, he stated that when he reached the P.O., he saw the auto rickshaw with the passengers still sitting inside the auto rickshaw without the driver. As far as he knew there were about 4 persons.

16. PW No.3. J. Lalhruaitluanga's deposition is to the effect that he has a

witness to the arrest of the instant appellant Salemthara who appeared before the Excise Station Officer.

17. PW No. 5 J. Laltlanmawia is the seizing officer, his deposited is to the effect that on 23.06.2018 at around 8:00 p.m. the Champhai Excise & Narcotics Team under his command performed patrol duty as usual to conduct random checking of public service vehicles that were plying at New Champhai area, particularly the area located at the junction of Zokhawthar main road and Tlamsam road for entering the Champhai town. At around 9:30 pm while they were on the main road, they spotted one auto- rickshaw proceeding towards them with 2 passengers. He halted the auto rickshaw driven by accused No.3. On simple and preliminary checking of the vehicle he found one black rucksack just beneath the driver seat easily visible. Being suspicious he instructed his constable to invite civilian persons from nearby to act as witnesses. After the arrival of the witnesses, he opened the said bag from which he found 4 polythene packets or opening the polythene packets he found 22 plastics soap cases all containing substances suspected to be heroin. He arrested the accused No.1 /appellant and also seized the articles. Thereafter, he took the seized article to the nearby house where he was also accompanied by civilian witnesses. Both the accused Nos.2 & 3 were also with them inside the house. He took weight of the substances and did repackage of the packets and sealed

the same. He prepared the seizure memo in the presence of the civilian witnesses. He stated that he repacked the packets with the help of Mombati and on it affixed seizure index duly sealed with the signatures of the civilian witnesses to prevent the packets from tampered with. He submitted the same to the O/C, Champhai Excise & Narcotics Station and also produced the accused No.1. On the same night, he submitted his report about the seizure of the contraband substances and the arrest of accused Nos. 1 to O/C, Champhai Excise & Narcotics Station.

18. The following day i.e. 24.6.2018 at 9:30 a.m. accused Nos. 2 & 3 appeared at the Station Office, he examined both accused Nos. 2 & 3 interrogated them. From their interrogation he found that the accused Nos. 2 & 3 were also involved in the present case and arrested them and thereafter submitted a report of the arrest. All the 3 accused persons were then produced to the Medical Officer, District Hospital Champhai for medical examination as mandated under Section 54 Cr.P.C. PW No.5 exhibited the arrest and seizure memo of the accused person his report of the seizure and arrest, the medical examination report.

19. PW No.6, C. Zodinpuui is the officer to whom the case was entrusted for investigation by the O/C, Champhai Excise & Narcotic Station. She stated that

the instant case germinated on 23.06.2018 at around 9:30 pm when the 3 accused persons were arrested by S.I., J. Laltlanmawia, Excise & Narcotics, Champhai at New Champhai for the recovery/seizure of 22 hawng/plastic soap cases containing 307 grams of heroin.

20. During her investigation she examined the seizing officer and his witnesses and also recorded their statements. She produced the 3 accused persons and seized heroin before the Judicial Magistrate 1st Class Champhai District. She drew representatives samples of the seized substances in front of the JMFC and also applied for certifying correctness of the inventory. She sent the representative samples marked as exhibits C(CPI)-286(1) to C(CPI)-286(22) to Forensic Science Laboratory Aizawl for chemical analysis. She interrogated the three accused persons. On interrogation the three accused persons made the following statements: The accused No.1./Salemthara (appellant) stated that he himself went to Zokhawthar/Tiau on 23.6.2018 and purchased the seized substances (22 plastic soap cases) at the rate of Rs.15,000/- per hawng/1 plastic soap cases, he was unable to pay all the price of it and he came back with a credit of Rs.60,000/- to be paid later to the owner of the heroin. He took a precautionary measure and come back on foot by taking the road leading to Tlangsam, the appointed place for meeting together. He informed his mother

accused No.2 to wait for him at Tlangsam and then they would be able to reach their house safely. He had informed his mother to come in a auto rickshaw for transportation of the heroin. However, on their way home, they were intercepted by the Champhai Excise & Narcotics team and the contraband substances was seized. Accused No.2 mother of the accused No.1 stated that, her son had informed her to arrange for an auto rickshaw, so she arranged the auto rickshaw belonging to accused No.3 however, on their way back they were unfortunately intercepted by the excise personals who seized the contraband substances. The accused no.3 Mangzakima stated that he had only transported the S.A. since she was waved and stopped by the accused Nos. 1 & 2. He stated he had no idea that the accused Nos. 1 & 2 were carrying such contraband substances. The accused No.2 however stated that the accused No.3 knew everything about the contraband substances.

From interrogation of the accused persons and the other witnesses, PW No.6 found prima case against the 3 accused persons. She had also received the FSL report which confirmed to that the seized articles were heroin in the purity of more than 80%. She thus submitted the charge sheet finding prima facie case against the 3 accused persons under Section 21(c) ND & PS Act. She identified an exhibit she exhibited from copy to details of the accused persons, copy of the inventory of the seized contraband substances, the photograph of the seized

substances a copy of the complaint sheet the release of sample drawn. During cross examination she admitted that she had drawn representativessamples from each of the soap case/hawng weighting about 15 mgs each.

22. PW No. 7 Lalmuanawma is the Assistant Director, FSL deposed to the effect that he received the samples from Champhai Excise in connection with CPI Excise case No.150/2018 under Section 21(c) ND & PS Act for examination of the exhibit samples. He had examined all the samples using various scientific method and the exhibits were found to be heroin. He identified exhibits P-9 as a report which contains 2 pages during cross examination he admitted that he received 22 samples which were properly packed and sealed. The purity of the samples was ranging from 82 % to 85 % W/w.

23. Thereafter, the appellant was examined under Section 313 Cr.P.C, wherein the appellant had admitted that he had gone to Zokhawthar on 23.06.2018 and came back with 22 hawng/22 plastic containers on containing heroin. He also admitted that the said contraband substances were seized by the Excise & Narcotics Officer from his possession at a place called Helipad hnuai at the presence of the witnesses. He admitted that he possessed the contraband substances without obtaining any permission. The appellant thereafter explained that during the relevant period his mother who was made the accused

No.2 had gone to a village Zimpui, Myanmar. Meanwhile, his brother namely, Dalthansanga was seriously ill and was admitted at District Hospital, Champhai and he had called for his mother. While he was planning to take his mother to Champhai, his other elder brother namely Lawmsanga, told him to go to Zokhawthar and meet an old lady who will send something for him. Accordingly, he went and collected the bag from the old lady after which he took his mother with the bag towards Champhai by taking the Kucha road leading to Tlangsam, on the way they saw the accused No.3 Mangzakima who was an Auto rickshaw driver and they used his Auto Rickshaw. The appellant further stated that he had concealed the bag inside the seat of the driver without being seen by his mother or the driver of the Auto-rickshaw. He did this because of his elder brother had instructed him to conceal the bag all along the way. They proceeded towards Vengthar in the Auto rickshaw and his elder brother Lallawmsanga came and met them near Lalpa Grape Huan. His elder brother was leading the way and they were following him in the Auto rickshaw when on the way, his brother was stopped by the Excise & Narcotics duty near Helipad huan and on checking his car they found nothing. The Excise & Narcotics staff on duty then searched the Auto rickshaw and found the bag inside the driver's seat. He stated that he came to know the content of the bag was heroin only at that time. He had stated that the accused No.3, Mangzakima, was

an Auto rickshaw driver by profession and was not involved in the present case. He also explained that his elder brother namely, Lallawmsanga is presently detained in District Jail, Champhai in connection with an offence under Section 21(c) ND & PS Act vide Champhai P.S. case No.16/2018 dated 22.02.2018.

24. No defence evidence witnesses was produced by the appellant.

DISCUSSION OF EVIDENCE AND FINDINGS

25. From the deposition of the prosecution witnesses and the statement made by the appellant under Section 313 Cr.P.C, it is seen that, the seizing officer PW-No.5 has clearly stated that the Auto rickshaw was stopped as a result of the random checking of public services vehicle plying at New Champhai area which was not questioned by the defence counsel. Thus since the S.A. was seized from a public vehicle which is a public place the seizure of the contraband substance and arrest was done under section 43 ND & PS Act, thus the issue of violation of section 42 ND & PS Act those not arise in the instant case.

26. It is also seen that the S.A. was seized from under the seat of the Auto-rickshaw. On simple and preliminary checking the seizing officer found one black big rucksack just beneath just under the driver seat easily visible. Being suspicious that it contains contraband substances, he invited civilian persons from nearby to act as witnesses. PW No.1 & PW No.2 have clearly deposed how

they were called and made to be a witness to the seizure of the S.A. which was seized from under the seat of the driver seat of the Auto rickshaw.

The seizing officer further deposed how after the arrival of the witnesses he opened the bag which he found for polythene packets which contains the S.A. Both the civilian witnesses have also deposed that they witnessed the said bundles being cut opened and inside the bundles were smaller packages of around 22 numbers where they found surf power like substance. The civilian witnesses also deposed that the weighment of the seized articles was done on the spot and altogether it weighed 307 grams. The seizure and arrest memo was prepared on the spot. They further stated that the officer who took weight of the substances repacked all the containers and properly sealed it with their signatures on each of the packages. The credibility of the civilian witnesses is not shaken on their cross examination. The fact that after repacking the S.A. it was said to be duly signed by the witnesses , but their signatures were not exhibited before the learned trial court. This court however finds that no such questions were raised by the defence counsel in the trial court and thus this court finds no reason to doubt that both the seizure witnesses have confirmed that it was re-packed and sealed in their presence.

27. PW No. 6, the case I/O had clearly stated how the provisions of Section

52A ND & PS Act was followed. She had clearly stated that she had drawn representatives samples of the seized substances in front of the JMFC and also applied for certifying correctness of the inventory, she has exhibited the copy of the inventory as exhibit P-8. There was nothing asked during the cross examination of the case I/O. with regards to the correctness of the inventory made by the case I/O/ PW No.6 nor was any question asked questioning any non-compliance of the provisions laid down under Section 52A ND & PS Act. This court thus finds that there is no apparent violation of Section 52A of ND & PS Act

28. With regards to the quantity of the S.A. sent to FSL for examination, It is seen that PW 7 who is the Assistant Director, FSL, Aizawl, in his cross examination has stated that he received 22 samples that were properly packed and sealed and that the purity of the samples was ranging from 82% to 85 % W/w. It is seen that the case I/O had mentioned that she had drawn about 15 grams of the S.A. as representatives samples from each of the soap case/hawnga perusal of the FSL report shows that 22 samples weight between grades about 15 mgs to 33 mgs. The exact weight/amount has not been mentioned and only the approximate weight is mentioned this slight discrepancy in the amount/weight along in my considered opinion, will not vitiate the prosecution case.

29. The appellant in his statement under 313 Cr.P.C. had admitted the incriminating evidence appearing against him by admitting that he had kept the S.A. under the driver seat of the Auto rickshaw. His explanation in a nutshell, was that he acted under the instruction of his other elder brother namely Lawmsanga, and accordingly, he went and collected the bag from an old lady which he hide the S.A under the seat of the driver without being seeing by his mother or the driver of the Auto-rickshaw. He stated that he came to know the content of the bag was heroin only when the Excise & Narcotics staff on duty then search the Auto rickshaw and found the bag inside the driver's seat.

30. However, from the above explanation given by the appellant this court finds that it is apparent that the appellant was aware that the bag contained some contraband substance which he had to hide under the driver's seat without being seen by the other two persons. The statement under section 313, Cr.P.C. cannot be the sole basis for conviction of the accused however, on the instant case, the prosecution has otherwise established the seizure of the S.A, which is proved to be heroin, from under the driver's seat in the presence of two reliable witnesses. There are three accused persons in the instant case, wherein, the trial court has acquitted the other two accused persons. Thus on conjunction of the prosecution evidence which has proved the seizure with the irrevocable admission made by the appellant under section 313 Cr.P.C, this court

is of the opinion that, even though it was not seized from his actual possession, it can be deemed that he had conscious possession of the S.A. as provided under Section 35 ND & PS Act. The burden of prove that he was not in conscious possession of the S.A. then lies upon the appellant however, that no defence witness has been produced to support his statement that he was not in a conscious possession of the S.A.

31. It is also noted that the learned Amicus has relied on the Judgment of the Apex Court in **Noor Aga -vs- Punjab & Anr. (supra)** however, it is seen that considering the facts and circumstances in **Noor Aga (Supra)** case may not be the findings of the Apex Court in **Noor Aga (Supra)** and the case may not be appropriately applicable in the instant case. The Apex Court in **Noor Aga (supra)** case mainly had considered the propriety of relying fully upon the statement made by the appellant under Section 108 of the Customs Act and also the correctness of the conviction of the appellant in the absence of any civilian witnesses to witness the seizure of the seized contraband substances.

32. Thus, from the above observations and findings made by this court, this court finds that there appeared to be no sufficient grounds to interfere with the Judgment & Order passed by the learned Judge, ND & PS Act dated 24.06.2018 in Crl. Trial No.130/2018 reference Champhai Case No.150/2018/CPI and is

constraint to dismiss the instant appeal.

33. Accordingly, Cr. A. No.6 of 2020 stands dismissed and disposed of.

35. In appreciation of the assistance provided by the learned Amicus Curiae, his/her fee is fixed at Rs.7,500/- (*Rupees seven thousand five hundred*) only to be paid by the Mizoram State Legal Services Authority.

JUDGE

Comparing Assistant