

GAHC030004562021



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

Case No. : CrI.A./20/2021

Sh. Paulamchin R/b His wife Zonunpari
Bawngkawn
Aizawl, Mizoram

VERSUS

State of Mizoram and Anr
Aizawl, Mizoram

Advocate for the Petitioner : Mr. Lalbiaknunga Hnamte
Advocate for the Respondent : P.P./Addl.PP, Mizoram

Linked Case : I.A.(CrI.)/24/2021

Paulamchin R/b his wife Zonunpari
Bawngkawn
Aizawl
Mizoram

VERSUS

State of Mizoram and Anr
MINECO
Aizawl
Mizoram

Advocate for the Petitioner : Mr. Lalbiaknunga Hnamte
Advocate for the Respondent : Mr. C Zoramchhana (P.P.
Mizoram)

**BEFORE
HONOURABLE MRS. JUSTICE MARLI VANKUNG
JUDGMENT**

Date : 14-05-2024

Heard Mr. Lalbiaknunga Hnamte, learned counsel for the appellant along with Mrs. Mary L. Khiangte, learned Additional Public Prosecutor for the State respondents.

[2.] This is an appeal filed under Section 374(2) Cr.P.C against the conviction Order dated 29.11.2021 passed in SR No. 166/2016 arising out of Criminal Trial No. 1434/2017 passed by the Special Judge, ND&PS Act, Aizawl, wherein the appellant on his conviction under Section 21(c) of the ND&PS Act, 1985, was sentenced to undergo 10 years Rigorous Imprisonment with a fine of Rs. 1 lakh, in default Rigorous Imprisonment for another 1 (one) year.

[3.] The prosecutor story in a nutshell is that on 09.06.2017 at 2:14 PM, the appellant was arrested by the respondent authorities at Muanna Veng, Thlanmual road, Aizawl, while he was riding on his Rodeo Scooty bearing Registration No. MZ-01/M-4630. On conducting search of the Scooty, the excise and narcotics personnel seized 266 grams of Heroin kept in 21 soap cases which was kept in a bag. The appellant was arrested and the involved Scooty vehicle was also seized. Accordingly, Ex-N-92/2017 under Section 21(c) of ND&PS Act, 1985 was registered against the appellant and duly investigated into. During investigation, inventory photographs and drawing of samples of seized Heroin under Section 52-A(2) of ND&PS Act was done in the presence of a Judicial Magistrate 1st Class on 10.06.2017. The statements of all available witnesses were recorded. FSL report dated 07.07.2017 was also received, which confirmed the purity of the seized Heroin to be 86% w/w at the time of the examination. 3 (three) other persons namely, Khaikhanlian, Liankhatpiang and Kamlang were also found to be involved and were arrested and made the co-accused. A *prima facie* case under Section 21(c)/23(c) of ND&PS Act was found well established against the appellant and the 3 (three) accused persons and accordingly, charge sheet

was submitted to the Special Court, ND&PS Act, Aizawl for the trial against Mr. Khaikhanlian and under Section 21(c) against the co-accused Paulamchin/appellant and under Section 29(1) r/w 21(c) of ND&PS Act against the co-accused Liankhatping and Kamlang.

[4.] On 23.03.2018, charges were framed against the accused persons under the said sections of law to which they pleaded not guilty and asked for trial. During trial, as many as 8 (eight) prosecution witnesses were examined. However, during the trial of the case, the 3 (three) co-accused persons had absconded and were said to flee to Myanmar. The instant appellant therefore, faced his trial alone and the Trial Court convicted the appellant into its Judgment & Order dated 29.11.2021 and vide its Order dated 30.11.2021. The appellant was sentenced to undergo Rigorous Imprisonment for 10 years and pay a fine of Rs. 1 lakh with default clause. Aggrieved, the appellant has approach this Court on trial.

5.] Mr. Lalbiaknunga Hnamte, learned counsel for the appellant submitted that from the evidence, it is seen that the Seizing Officer as per the FIR submitted, had prior information with regard to the possession of the contraband substances and therefore, had ample time to obtain authorization and under Section 41(1) ND&PS Act. However, there is no authorization or warrant under Section 41(1) of the ND&PS Act found in the record. Thus, the mandatory provisions of Section 41(1) ND&PS Act was not followed at the time of the arrest of the appellant. Further, the Seizing Officer had not recorded the grounds of belief mandated under Section 42(2) of the ND&PS Act when he conducted the search, seizure and arrest of the appellant. He further submits that the samples were seized from a private vehicle since it was seized from the Scooty bearing Registration No. MZ01/M/4630 and not public vehicle and therefore, cannot enjoy the benefits under Section 43 ND&PS Act by not following the provisions mandated under Section 42 of the ND&PS Act.

[6.] The learned counsel for the appellant further submits that PW-1 and PW-2

are the seizure witnesses for the prosecution but they were not present when the inventory was prepared. PW-5 is the JMFC before whom the inventory was done. It is seen that during the cross examination of PW-5, he has stated that he does not know the exact quantity of sample drawn though he had certified the correctness of the sample. It is also seen that the civilian witnesses were not present while the inventory was being prepared. He further submits that there is contradiction in the deposition of PW-5 where he had deposed that 4 (four) samples were drawn from each of the seized article in his presence. However, in the list of sample drawn which is exhibited as Exhibit P-9, only 2 (two) samples were drawn from the seized articles. The cross examination of PW-6 also shows that there is violation of Section 41 ND&PS Act since he did not obtain any authorization, warrant of arrest or search warrant from his superior officer . PW-7 is the case I.O who had stated that he drew only 40 mg of the seized article while there is a standing order that the sample drawn should not be less than 5 grams. The learned counsel further submits that in the FSL report made by the Assistant Director, Directorate of Forensic Science Laboratory, Mizoram, Aizawl none of the exhibits showed that the exhibits weight 40 grams. The weight of the sample differs from 13 mgs to 70 mgs. This makes it doubtful regarding the sample drawn before PW-5, who is the Judicial Magistrate 1st Class who in his cross examination had admitted that he did not know the amount of sample drawn. The learned counsel further submits that the co-accused persons Khaikhanlian, Liankhatpiang and Kamlangwere on acquitted even though the evidence points that the 3 (three) accused were the main culprit in the instant case. He further submits that the alleged seized article in question was under the control of the accused Khaikhanlian. He therefore submits that the prosecution had failed to establish their case and had not followed the mandatory provisions under the ND&PS Act at the time of seizure and arrest and at the time of making the inventory. For the above reasons, the impugned Judgment & Order dated 29.11.2021 may be set aside and the appellant may be set at liberty.

[7.] Mrs. Mary L. Khiangte, learned Additional Public Prosecutor, on the other hand submits that the inventory was made before the JMFC which is clearly stated by the Officer himself and there is no violation under Section 52A of the ND&PS Act. She further submitted that though the standing order for the sample drawn is 5 grams, drawing a lesser amount does not vitiate the case and in the instant case, the seized article was tested and found to be contraband substances, which is not a disputed fact, besides, the exact amount is not recorded. She further submits that the name of the person was not known at the time of making the information report and checking and search was then made wherein the seized article was found under the seat of the scooty of the appellant. The learned counsel submits that the seized article was seized from a public place when random checking was done and they did not know who possess the seized article or where the seized article was hidden and therefore, the search and seizure was done under Section 43 ND&PS Act. In support of her submission, she has cited the judgment of ***State, NCT of Delhi Vs. Malvinder Singh***, reported in ***(2007) 11 SCC 314*** (para 9).

[8.] The learned Additional Public Prosecutor further submits that Section 42 refers to arrest between sunrise and sunset and no such warrant is required at the time of seizure and arrest in the instant case. The examination of the accused under Section 313 Cr.P.C shows that he was in unconscious possession of the seized article. With regard to the acquittal order of the co-accused persons, nothing was seized from their possession while the seized article was clearly seized from the Scooty driven by the appellant. In view of the above, the learned Additional Public Prosecutor submits that there were no grounds to set aside the judgment and order of the learned Trial Court passed in SR No. 166/2016 arising out of Criminal Trial No. 1434/2017 passed by the Special Judge, ND&PS Act, Aizawl.

[9.] Having heard the submissions made by the learned counsels for both the parties, this Court find it fit to first highlight and analyze the prosecution evidence adduced before the learned Trial Court

[10.] PW-1, Debby Lalrinsangi has deposed to the effect that on 09.06.2017 while she was learning to ride a Scooty with her friend at Zuangtui road. One black Scooty driven by Paulamchin was coming from their opposite direction, who was being chased by the Excise personnel and the Excise personnel requested us to witness the search and checking of Paulamchin/appellant, who was stopped by the Excise personnel. In their presence, they recovered 21 soap cases containing Heroin from the Scooty. The said Heroin was seized and weightment was taken at the P.O. The seized article weight 266 grams. The Excise personnel also seized the Scooty and also arrested the accused/appellant. Packing and sealing was also done in her presence on the spot. She put her signature on the body of the seizure and arrest memo and identified Exhibit P-1 as the seizure and arrest memo.

In her cross examination, she admitted that she does not remember whether the Excise Officer had obtained search warrant or arrest warrant. She admitted that she did not know whether the Scooty belonged to the accused/appellant or not and that she did not know the true owner of the Scooty.

[11.] PW-2, Lalbiaksanga is the person who was with PW-1 and was learning to ride a Scooty at Zuangtui road when the accused/appellant Paulamchin was riding towards them from the opposite direction, being chased by the Excise personnel. On being stopped, the Excise personnel had requested him to witness the seizure and checking of Paulamchin and his Scooty. In his presence, they recovered 21 soap cases containing Heroin from the Scooty. The said seized Heroin was seized at the P.O. and weight 266 grams. They also seized the Scooty driven by Paulamchin/appellant and also arrested him. The packing and sealing was done in his presence at the spot and he put his signature on the body of the seizure and arrest memo. Exhibit P-1 is the seizure and arrest memo. The cross examination and the reply made by the instant witness is the same as those of PW-1.

[12.] PW-3, Lalchhanliana who deposed to the effect that on 09.06.2017 at around 6:00 PM, he was called by YMA President, Tuikual South Branch who

requested him and Mr. H. Lalropuia to witness arrest of accused persons at the office of Commissionerate of Excise & Narcotics near Tennis Court. PW-3 and Mr. H. Lalropuia went to the Excise Office, where the S.I. F. Lalnuntluanga informed them that they seized 266 grams of Heroin from the accused Paulamchin and the Excise personnel had detained three accused persons Khaikhanlian, Liankhatpiang and Kamlang who were involved in the said articles. The arrest of the said three persons were done in his presence and he put his signature on the seizure memo, which is exhibited as Exhibit P-2. Nothing serious was asked during the cross examination.

[13.] PW-4 is H. Lalropuia, who was the person who had accompanied PW-3 to the Excise Office. His statements and his cross examination is the same as that of PW-3.

[14.] PW-5 is T. Lalhmachhuana, MJS, who was the Judicial Officer before whom the inventory was made. His deposition is to the effect that on 10.06.2017, he received an application to certify the correctness of inventory photographs and drawing of samples of seized illicit drugs in connection with Excise Case No. N-92/17 dated 10.06.2017. On the same day, S.I. C. Lianchungnunga made an inventory of the seized articles before him and the report of the inventory are as follows:-

“A.1. Name of drugs : Heroin

2. Quantity : 266 grams

3. Mode of packing : Packed inside 21 polythene pockets kept in 7 green soap cases, 6 blue soap cases, 5 pink soap cases and 3 red soap cases.

4. Marks & Numbers : CL-1 to CL-21

5. Country of origin : Myanmar

B. Rodeo Scooter UZO 125 (Black) B/R No. MZ-01-M-4630.”

[15.] After comparing the inventory prepared by S.I. C. Lianchungnunga and the seized articles produced before him, P-W 5 certified the inventory of the seized articles to be true and correct and he put his signature. He exhibited the

application for correctness of the inventory photographs and drawing of samples as Exhibit P-7, the inventory of seized articles as Exhibit P-8, the list of samples drawn as Exhibit P-9 and the photographs of the seized articles as Exhibit P-10. In his cross examination, he admitted that no civilian witnesses were present when the seized articles and the accused were brought before him to prove whether the seized articles belonged to the accused or not. He did not remember whether the weighing scale which was used for weighing the seized articles was tested before weightment. He admitted that he did not know the exact quantity of the samples drawn from each pack of the seized articles by the Excise personnel. He admitted that the accused persons did not put their signatures in the photographs in inventory. He admitted as he did not know whether the rubber seal which was used for sealing the seized articles is produced before the Court or not.

[16.] PW-6, S.I. F. Lalnuntluanga is the Seizing Officer who deposed to the effect that on 09.06.2017, he received information from source that a huge quantity of Heroin was transported to Aizawl from Zokhawthar and that Heroin was in transit at somewhere around Zuangtui. He reduced the information into writing and submitted it to O/C ANS. After that, he along with his party went to Zuangtui, MunnaVeng. They spotted one Scooty coming from Zemabawk and since they suspected the Scooty and its driver for possessing contraband drugs, they halted the Scooty. The Scooty was rided by Paulamchin/appellant. After calling the civilian witnesses, they conducted search upon the Scooty and recovered one bag under the Scooty seat. Inside the bag, they recovered 21 soap cases containing Heroin. PW-6 seized the said Heroin and also arrested Paulamchin. On interrogation, Paulamchin stated that the owner of the seized article was staying at his residence at Bawngkawn. They then went to the residence of Paulamchin where the other co-accused Khaikhanlian, Liankhatpiang and Kamlang represents. He brought all the accused to their office and on interrogation, he found that they were all involved in the transportation of the seized articles and therefore, he arrested them. He exhibited

Exhibit P-1 as the seizure and arrest memo of Paulamchin/appellant, Exhibit P-2 as the seizure memo of the other three co-accused persons, Exhibit P-3 as the information report and Exhibit P-4 as the report of the seizure and arrest.

In his cross examination, he admitted that he did not obtain authorization, warrant of arrest and search warrant from his superior officer. He admitted that the seized article was recovered from under the seat of the Scooty and not from the physical possession of the accused/appellant. He admitted that while he made the seizure and arrest memo, he had asked the accused/appellant Paulamchin whether the seized article belonged to him or not and Paulamchin had stated that the seized article belonged to the co-accused Khaikhanlian.

[17.] PW-7 is S.I. C. Lianchungnunga. His deposition is to the effect that on 09.06.2017 at 2:14 PM, S.I. F. Lalnuntluanga seized 266 grams of Heroin kept in 21 soap cases and a black Rodeo Scooty bearing Registration No. MZ-01 M-4630 with its documents and its ignition key and arrested Paulamchin in connection with the seizure and on the same day at 6:00 PM, the said Officer also arrested Khaikhanlian, Liankhatpiang and Kamlang in connection with the above seizure. The case was endorsed to him for investigation. He prepared the inventory of the seized article before Mr. T. Lalhmachhuana, JMFC, Aizawl and also drew samples of the seized article and sent the same to FSL for chemical analysis. He received the FSL report which revealed that the sample drawn and marked as Exhibit C(AZL)-290(1) to C(AZL)-209(21) were found to be Heroin and the purity of each about 86% w/w at the time of examination. He examined all the accused persons and also examined all the available witnesses and he found that the accused Khaikhanlian had imported and possessed Heroin and the accused Paulamchin also possessed the said Heroin. The accused Liankhatpiang and Kamlang had abetted the accused Khaikhanlian and accused/appellant Paulamchin for selling of the seized Heroin. From his investigation, he found that the seized Scooty bearing Registration No. MZ-01 M-4630 was used for carrying and concealment of the seized Heroin. He thus found prima facie case under

Section 21(c) and 23(c) ND&PS Act against the accused Khaikhanlian and also found a prima facie case under Section 21(c) against the accused Paulamchin/appellant and found prima facie case under Section 29(1) r/w 21(c) ND&PS Act against the accused Liankhatpiang and Kamlang. Accordingly, he submitted the charge sheet. He exhibited Exhibit P-5 as the complaint sheet, Exhibit P-6 as the FSL report, Exhibit P-7 as the application for inventory, Exhibit P-8 as the inventory of the SA, Exhibit P-9 as the list of sample drawn and Exhibit P-10 as the photographs of SA.

In his cross examination, he admitted that he was not present at the time of seizure and arrest of the accused persons, however, he recorded the statement of all the seizure witnesses. He admitted that the seizure witnesses were not present at the time of making inventory before the Magistrate to prove whether the SA belonged to the present accused or not. He admitted that he prepared the complaint sheet and submitted it to the Court from the statement of the seizure witnesses, Seizing Officer and the accused and from the FSL report. He admitted that at the time of making inventory before the Court, he drew two samples from each soap cases about 40 mg each.

[18.] In the examination of the accused under Section 313 Cr.P.C, the accused/appellant admitted that he was apprehended on 09.06.2017 while he was riding a Scooty bearing Registration No. MZ-01 M-4630 at Muanna Veng. He admitted that the Excise & Narcotics recovered 21 soap cases of Heroin under the seat of his driven Scooty. Further, he stated that it was possessed without his knowledge and he had no involvement in the seized Heroin. He stated that he had no knowledge on the weight of the seized Heroin and explained that his guest had used his Scooty vehicle during night time and when he was taking back his Scooty, he found that there was the seized Heroin under the seat of the Scooty. He had no involvement in the matter.

[19.] Having heard the submissions made by both the parties, it is seen that PW-6, who is the Officer of Excise & Narcotics Department in the rank of Sub-Inspector was informed from a source of the transportation of huge quantity of

Heroin. He immediately reduced the information into writing and submitted to the OC ANS. The said information report is exhibited as Exhibit P-3. There is nothing in the cross examination by the defence counsel in the Trial Court to discredit the statement. Therefore, this Court finds that the provisions of Section 42(1) has been duly complied with. This court also finds that the seizing officer PW-6 is an Officer define under Section 41(2) of the ND&PS Act. On reading of Section 41(2), it is found that a separate authorization for the arrest and search is not required even though the seizure was not from a public place since the Scooty bearing Registration No. MZ01/M/4630 is a private vehicle.

[20.] For the above reasons, this Court finds that it has not been proved that the mandatory provisions under Section 41(2) nor Section 42(1) have been violated in the instant case. It is also seen that two civilian witnesses i.e., PW-1 & PW-2 were present at the time of the seizure of the seized articles. Nothing was asked during the cross examination before the Trial Court to doubt the presence or the seizure witnessing who witnessed the seizure of the contraband substances. With regard to whether the inventory and sample was drawn in compliance with Section 52-A(2) of the ND&PS Act, it is seen that PW-5 is the learned JMFC who has clearly stated that the inventory and sample was drawn in his presence. Even though during cross examination, the JMFC had stated that he did not know the weight of the sample drawn, it is clearly prove that the sample was drawn in the presence of the JMFC and it may not be mandatory for the learned JMFC to remember the exact weight of the sample drawn. It is also seen that the inventory and the sample was drawn on the same day that the seizure and arrest was done which is on 09.06.2017. The inventory before the learned JMFC is duly exhibited as Exhibit P-8 while the application for correctness of the inventory, photographs and drawing of samples is exhibited as Exhibit P-7. Exhibit P-9 is also the list of samples drawn.

[21.] A perusal of the mentioned exhibits, there is no indicate any reason to doubt the nature in which the inventory was made or the samples that were drawn.

From the list of sample drawn exhibited as Exhibit P-9, it shows that sample Nos. 1 & 2 were drawn from each seized article and the seized articles mentioned were packed and the mode of packing as deposed by PW-5 is packed inside 51 polythene bags kept in 7 green cases, 6 blue soap cases, 5 pink soap cases and 3 red soap cases. In view of the above, I do not find any notable discrepancy in the description of exhibits made by the Directorate of Forensic Science Laboratory which was exhibited in the Court as Exhibit P-6, with regard to the differences found in the weights of the samples drawn, it is seen that during the cross examination, the case IO had mentioned that he had drawn about 40 mg each and this is not an exact amount but had mentioned that it is 'about'. Thus, in the description of the exhibits in Exhibit P-6, it is not expected that it should be exactly 40 mg and it was also been mentioned that they weight about a certain amount and not the exact weight. This Court thus finds that the some difference in the weight mentioned will not vitiate the case nor raised any doubt on whether the FSL report is the seized article since the inventory and drawing of sample was duly done in the presence of the learned JMFC on the same day of the seizure. This Court also finds that there was no question put to PW-7 who had drawn samples before the JMFC in the Trial Court regarding the difference in the weights.

[22.] This Court also finds that it is proved that the SA was seized from under the seat of the vehicle driven by the appellant in the presence of true civilian witnesses. The Apex court in ***Balwinder Singh (Binda) Vs. Narcotics Control Bureau*** in **Crl Appeal No. 1136 of 2014** with ***Satnam Singh Vs. Narcotics Control Bureau*** in **Crl.Apl. No. 1933 of 2014**, reported in **2023 SCC OnLine SC 1213** held in **Satnam Singh Vs. Narcotics Control Bureau** that ;

“31. Thus, it can be seen that the initial burden is cast on the prosecution to establish the essential factors on which its case is premised. After the prosecution discharges the said burden, the onus shifts to the accused to prove his innocence. However, the standard of proof required for the accused to prove his innocence, is not pegged as

high as expected of the prosecution. In the words of Justice Sinha, who speaking for the Bench in Noor Aga³⁸ (supra), had observed that:

“58. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is “beyond all reasonable doubt” but it is “preponderance of probability” on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.”

32. The essence of the discussion in the captioned case was that for attracting the provisions of Section 54 of the NDPS Act, it is essential for the prosecution to establish the element of possession of contraband by the accused for the burden to shift to the accused to prove his innocence. This aspect of possession of the contraband has to be proved by the prosecution beyond reasonable doubt.”

Thus, in view of the above cited case, this Court finds that since it is shown that the contraband substance was seized from the vehicle driven by the appellant and the procedures mandated under section 41, 42 and 52-A of the ND&PS Act have been complied with, it can be presumed under Section 35 of the ND&PS Act that the accused knew of the seized articles which were seized from under the seat driven by him and therefore, the onus is on the appellant to prove and adduce evidence showing that the SA was not in his conscious possession. However, in the instant case though the appellant in his examination under Section 131 Cr.P.C has stated that the S.A belonged to his guest who had used his scooty vehicle during the night time. Nothing was asked in the cross examination of the prosecution witnesses by the defence to implicate or suggest the involvement of any other person or that points towards the plea that the appellant was not in conscious possession of the SA. No defence evidence was adduced.

[23.] In view of the above findings, this Court finds that there is no grounds to interfere with the Judgment & Order dated 29.11.2021 passed by the Judge, ND&PS

Act in SR No. 166/2017.

[24.] Criminal Appeal No. 20/2021 stands dismissed and disposed of.

JUDGE

Comparing Assistant