

GAHC030005392022



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

Case No. : CrI.A./26/2022

Sh. Samuel TT Thanga
S/o T. Hauzaliana (L)
R/o Bawngkawn, Aizawl, Mizoram.

VERSUS

The State of Mizoram and Anr.
Aizawl2:The Officer-in-Charg

Advocate for the Petitioner : Mr C Lalfakzuala

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

Linked Case : I.A.(CrI.)/10/2023

Smt. Malsawmtluangi
D/o VZ Kapmawia
R/o Thingdawl
Hmar Veng
Mizoram.

VERSUS

The State of Mizoram and Anr.
r/b the Secretary to the Govt. of Mizoram
Excise and Narcotics Department
Govt. of Mizoram
Aizawl
Mizoram.

2:The Officer-in-Charge
Special Narcotics PS
Kolasib
Mizoram.

Advocate for the Petitioner : Mr. Joseph Lalchhanhima Renthlei
Advocate for the Respondent : P.P./Addl.PP
Mizoram

Linked Case : CrI.A./7/2023

Smt. Malsawmtluangi
D/o VZ Kapmawia
R/o Thingdawl
Hmar Veng
Mizoram.

VERSUS

The State of Mizoram and Anr.
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2:The Officer-in-Charge
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Advocate for the Petitioner : Mr. Joseph Lalchhanhima Renthlei
Advocate for the Respondent : P.P./Addl.PP
Mizoram

**BEFORE
HONOURABLE MRS. JUSTICE MARLI VANKUNG**

JUDGMENT & ORDER (CAV)

DATE : 02.02.2024

Heard Mr. Joseph L. Renthlei, learned counsel for the appellant Smt. Malsawmtluangi in CrI.A No.7 of 2023 and Mr. C Lalfakzuala learned counsel for the appellant Sh. Samuel T.T Thanga in CrI. A No. 26 of 2022, also heard Mrs. Mary L. Khiangte, learned Addl. PP for the state respondent in both the cases. The appellants are assailing their conviction under section 22(c) ND & PS Act arising from a common Judgment and Order dated 11.10.2022 passed by the learned Fast Track Court, Additional Sessions Judge, Kolasib District, in SC(K) No.198 of 2015 CrI. Tr. No.1267/2015 and the sentence order dated 25.10.2022 wherein both the appellants, on their conviction under section 22 (C) ND& PS Act were sentenced to undergo Rigorous imprisonment for a term of 10 years each and to pay a fine of Rs. 10,00,00/- each, in default to undergo R.I 1(one) year. Since the instant appeals are arising out of a common Judgment & Order, both the appeals are considered together.

2. The case of the prosecution in brief is that, on 29.05.2015, SI K. Lalmawizuala lodged a written FIR stating that information was received from reliable source indicated that there was a huge quantity of contraband drugs suspected to be Methamphetamine at B. SE Thingdawl Village, Kolasib District. Accordingly, the

authorized person SI K.Lalmawizuala of Spl. Narcotic PS with Police party accompanied by the Addl. SP CID (Crime) and the Officer in Charge of Spl. Narcotic PS proceeded to Thingdawl Hmar veng on the morning of 29.05.2015 to conduct search operation and intercepted one suspected person Malsawmtluangi (38) D/o VZ Kapmawia of Thingdawl Hmar veng at her residence.

3. The search party conducted searching of the residence of the suspected person Malsawmtluangi (38) D/O VZ Kapmawia of Thingdawl Hmar veng, and recovered one black Air-Bag from the bedroom, kept on the floor, hidden near the bed, which contained huge quantity of contraband drugs suspected to be Methamphetamine. On further checking, it was found that the bag contained 9 (nine) identical yellow packages and 1 (one) package covered with black polythene, total 10 (ten) packages. The same were seized on the spot in presence of the above mentioned two local reliable witnesses and prepared seizure memo. The total number of tablets was 58800 weighing 5.586 kgs with an estimated value of Rs. 176,46,000/- at local market. Statement of seizure witnesses were recorded on the spot in separate sheet. The accused Malsawmtluangi, stated that she had received the said contraband from one Samuel TT Thanga @Thangtea (35) S/o T.Hauzaliana of Kolasib College Veng, who was also arrested in the presence of local witnesses and his arrest intimation was given to his wife. From the light of the enquiry and based on their statements recorded, Special Narcotic PS Case No. 12/2015 Dt. 29.05.2015 U/s 22(c)/29 ND&PS Act was registered and duly investigated into.

4. The FSL examination report was received from the Dy. SP CID (Crime), vide No. SP/CRM/ST-109/2014/1990 dt. 10.07.2017 which indicated that the exhibit C (AZL)-328(1) to C (AZL)-328(10) were found to contain Methamphetamine. From the above circumstances and statements adduced, the involvement of the accused persons was found clearly proved for the violation of Section 8(c) of ND&PS Act, 1985. As such, a prima facie case u/s 22(c)/29 ND&PS Act, 1985 is found well established against the arrested accused persons (1) Malsawmtluangi (38) D/O VZ Kapmawia of Thingdawl Hmar Veng; (2) Samuel TT Thanga @Thanga S/o T. Hauzaliana of Kolasib College Veng; (3) Zomuana (29) S/o Lalthanmawia of Kolasib College Veng and chargesheet was accordingly submitted.

5. On 27.10.2015 the learned trial court framed charge U/s 22(c)/29 ND&PS Act, 1985 which was read over and explained to the three accused persons to which they all pleaded not guilty and claimed for trial.

6. The prosecution produced nine (9) witnesses at the time of evidence and on 24.11.2016, the three accused persons were examined as per Section 313 Cr.P.C in which they denied all the questions put before them. The learned trial court after hearing both the parties dropped the charge under section 29 ND&PS Act and acquitted the co. accused Sh. Zomuana while convicting both the appellants, Smt. Malsawmtluangi and Sh. Samuel TT under section 22 (c) ND&PS Act and sentenced them to undergo imprisonment as mentioned above. Aggrieved the appellants have filed the instant Criminal Appeals.

7. The evidence adduced by the prosecution witnesses is briefly reproduced herein:

PW No. 1 SI K.Lalmawizuala, Special Narcotic PS is the person who filed the FIR. His deposition is to the effect that *on* 28.05.2015 at around 7 P.M, information was received at Special Narcotic P/S stating that the accused was suspected of being in possession *of* Methamphetamine at Thingdawl so they proceeded towards Thingdawl after authorization was obtained. They reached Thingdawl on the morning of 29.05.2015 and went straight to the residence of *the* accused Malsawmtluangi who was reportedly in possession *of the* illicit drugs. When they reached the said house along with civilian persons, they showed the authorization letter and entered the house, the accused was inside the house. They asked her if she was in possession of illicit drugs to which she replied in the affirmative. They just let her check their bodies after which, the female officer conducted checking on her body but found nothing. However, they recovered *one* black colour air-bag *and* one ruck- sack of grey colour containing suspected Methamphetamine inside her bedroom, the illicit drugs were kept in one black polythene packet and 9 brownish paper bag *inside* the aforementioned air-bag and rucksack. They weighed *the* S/A *which* was 5.586 kgs, they also *counted* the S/A which was nos. 58800 tablets, packing and sealing were *done at the spot*, in presence of the civilian witnesses. The accused Malsawmtluangi stated that the accused Samuel TT Thanga put the S/A in her house and that she was to earn some money if she could sell the drugs. Arrest of the accused Malsawmtluangi was made by female officer and they left the house but shortly after they left, they

received another information stating that the accused Samuel TT Thanga was spotted at the house of the accused Malsawmtluangi and so they went back and also arrested Samuel TT Thanga who admitted his involvement regarding the seized drugs. The accused Samuel TT Thanga admitted that he procured the S/A from Khaia from Myanmar. PW No.1 further deposed that he prepared the search and seizure form, arrest form, report of seizure and arrest, FIR and he submitted the same to the O/C for further investigation. The S/A was kept in Malkhana Custody under MR. No. 12/15 on the night of 29.05.2019. The next day they produced the S/A before the Judicial Magistrate 1st Class and drew samples before him in the presence of the accused and the seizure witnesses and recorded the statement of the seizure witnesses. In his cross examination he admitted the fact that on the night of 29.05.2015 the S/A was kept in their police Station Malkhana. The seizure witnesses boarded towards Aizawl on 30.05.2015. He denied the suggestion that the S/A was not recovered inside the bed room of accused Malsawmtluangi. He also admitted that he did not record the statements of the accused Malsawmtluangi and that the Malkhana register was not in the case record. He admitted that the accused No. 2 was arrested only on the basis of the statement of accused Malsawmtluangi and that no illicit article was seized from accused No. 2. He did not find the involvement of co-accused Muana. That the subsequent information received by them was not kept in writing.

8. PW No. 2, is ASI MC Ngursangzuali, her evidence is to the effect that on 29.05.2015, in pursuance of information received regarding the accused

Malsawmtluangi being in possession of Methamphetamine, they proceeded to Thingdawl. When they reached her house, she asked the accused Malsawmtluangi whether or not she wanted to be searched before a Magistrate or gazette officer, which she declined. She then conducted search on her body but recovered nothing from her physical possession. However, after showing her the authorization letter they conducted search inside her house and recovered 58,800 tablets (5.586 kgs) of suspected Methamphetamine from her bed room. Search and seizure, counting and weighing of S/A, sample drawing, packing and sealing were all done on the spot, in presence of the civilian witnesses. The accused Malsawmtluangi stated that the co-accused Samuel TT Thanga put the S/A in her house and that she was to earn some money if she could sell the drugs. On her own admission of guilt, PW No.2 arrested the accused Malsawmtluangi on the spot in presence of civilian witnesses. In her cross examination she admitted the fact that she did not record the statement of the accused Malsawmtluangi and admitted the fact that there is nothing on record made by her to suggest that the accused Samuel TT Thanga put the S/A in the house of accused Malsawmtluangi.

9. The two civilian witnesses, the PW No.3, Lalhmingthanga Pautu and PW No 4, R.Lalrinsanga, both from Thingdawl, Hmar veng, deposed to the effect that on 29.05.2015, they were called by the police personnel to witness the seizure of contraband drugs. Both of them proceeded towards the house of the said suspected person *i.e.* Malsawmtluangi D/o Kapmawia of Thingdawl Hmarveng. Before reaching

the residence of Malsawmtluangi, the police party were already there. Before entering the said house of Malsawmtluangi, one woman police personnel showed them a letter and read the contents to the accused. When they went inside the house, one police personnel informed the accused Malsawmtluangi whether she wanted to be searched before a Magistrate or gazette officer. But she answered in negative. The police personnel then conducted body search of the accused but they did not find anything on her body. However they recovered a black air -bag and rack- sack where they found suspected Methamphetamine which was separately packed in nine brown pouches and one black polythene. The police officer seized the said rack sack bag containing suspected Methamphetamine. Weighment of the S/A was taken and it was 5.585 kgs, the S/A was also counted and it was 58800 tablets. Sample were also drawn, sealing and packing of the said sample was done which they both witnessed and accordingly both put their signature on the seizure memo as well as on the S/A. In their cross examination, they both admitted that they were called by the raiding party to accompany them and to be the witnesses. When they reached the P.O. the police personnel were already in the house of accused Malsawmtluangi and the woman police was already inside the bed-room along with the accused Malsawmtluangi and the S/A Ex. M-I, was already placed in the floor of the room. After their entered, the woman police and the accused were called out from the room so as to conduct search. They both admitted that they do not know from where Ex. M-I was recovered. Both admitted that they knew that the S.A was carried from

Thingdawl towards Aizawl on 29.05.2015 and both were present while the sample was drawn on 30.05.2015 at Aizawl. Both admitted the suggestion that the accused Zomuana was not present at the P/O at the time of recovery of Ex. M-I and they did not know whether accused Zomuana had any involvement. They both admitted that accused Samuel TT Thanga was also not present at the P/O at the time of recovery Ex. M-I. On that night Samuel TT Thanga came to the house of Malsawmtluangi and Malsawmtluangi's mother informed the police, so they all went back to the house of Malsawmtluangi and arrested accused TT. Thanga but nothing was recovered from his possession. Both PW No.3 and PW No.4 admitted that they did not know the reason why Samuel TT Thanga went to the house of Malsawmtluangi. After Samuel TT Thanga was arrested, the police interrogated him and he informed the police that he had put Ex. M-I inside the house of accused Malsawmtluangi with a request to sell the same.

10. PW No. 5, PS Rokhuma deposition is to the effect that on 30.05.2015 he received S/A (exhibit) in respect of Spl. Narcotics P/S No. 12/15 dated 29.05.2015, U/S 22-(c) / 29 ND&PS Act, where the accused Samuel TT Thanga, Malsawmtluangi and Zomuana were arrested for illegal possession of Methamphetamine. The same was received by him which he entered as CMR No. 119/15 dated 30.05.2015 in their record book of Court Malkhana. In his cross examination he admitted the fact that there is no Malkhana register in the charge sheet showing the time when he received the S/A. He admitted the fact that he do not know from whom he received the seized

article and that he cannot say in what form he received the S/A. On re-examination he deposed that he do not know the names of the persons who had brought the seized article to him at Court Malkhana but he knew that they are males. Since he was in-charge of court Malkhana he received a lot of seized articles, as such it was very difficult to remember in what form the S/A was brought to him in the instant case.

11. PW No. 6, C.Lalhruaitluanga's evidence is to the effect that on 30.05.2015 under the instructions of O/C Spl. Narcotics P/S, he brought the exhibit sample to FSL, Aizawl for chemical examination. The same was received by staff of FSL Aizawl on that day. Ex. P-X is the sealed cover of exhibit sample which he brought to FSL Aizawl. On his cross examination by D/L he admitted the fact that he have done nothing except dispatching the exhibit sample to the FSL. He also could not say the time of dispatching the same.

12. PW No.7, Stephen Lalrinawma, Addl SP of CID Crime deposed to the effect that on 28.05.2015 he received a written information from O/C Spl. Narcotics that some persons at Thingdawl village Kolasib District were suspected of being in possession of Methamphetamine. Accordingly, he along with SI K.Lalmawizuala and party proceeded towards Thingdawl on 29.05.2015 after giving authorization to SI K.Lalmawizuala. Two civilian witnesses from the same locality were with them in the search and seizure. When they reached the resident of the said Malsawmtluangi at Thingdawl, the accused Malsawmtluangi was allowed to conduct cross checking of the

search party and she was shown the authorization U/S 41 (2) of ND & PS Act. She was asked whether she wanted to be searched before gazette officer or a magistrate to which she declined. ASI MC Ngursangzuali conducted the body search of Malsawmtluangi but nothing was found on her body. SI K.Lalmawizuala and party in the presence of witnesses after checking her residence, recovered and seized 58800 tablets of Methamphetamine from the bedroom of the accused kept in black air bag and grey coloured rucksack in the presence of civilian witnesses. The illicit drugs were kept in one black polythene packet and 9 brown paper bags inside the aforementioned air bag and ruck sack. The seized article was 5.586 kgs in weight. In his cross examination, he admitted the fact that he personally did not conduct search and seizure in the instant case and admitted that he was present at the time of weighing and counting of the seized article. However, he was not present at the time of drawing of samples and admitted the fact that the signature of the officer in charge, Spl. Narcotics Police Station is not present on the sealed package of the seized article.

13. PW No. 8 Lalmuanawma, Asst Director, FSL, Aizawl deposed to the effect that on 01.06.2015, the office of the FSL Aizawl, received exhibit samples A-I to A-IX and B-I for chemical examination in connection with SPL Narcotics P.S case No. 12/15 dt. 29.05.2015 U/S 22 (c) / 29 ND&PS Act. Accordingly, he examined Ex. A-I to A-IX and B-I and found that the exhibits to contained Methamphetamine. His cross examination, confirms that the S/A was Methamphetamine.

14. PW No. 9 Mr. R.Lalzarliana, Inspector of Police is the case I/O who submitted charge sheet and his evidence is to the effect that, on 29.05.2015 SI K.Lalmawizuala lodged an FIR stating that information was received from reliable source indicated that there was a huge quantity of contraband drugs suspected to be Methamphetamine at Thingdawl Village, Kolasib District. Accordingly, the authorized person SI K.Lalmawizuala of Spl. Narcotic PS with Police party accompanied by the Addl. SP CID (Crime) and the Officer in Charge of Special Narcotic PS proceeded to Thingdawl Hmarveng on the morning of 29.05.2015 to conduct search operation and intercepted one suspected person Malsawmtluangi (38) D/o VZ Kapmawia of Thingdawl Hmarveng at her residence. Before conducting search operation at the residence of suspected person, SI K.Lalmawizuala produced the authorization letter to the suspected person and offered himself to be searched by the suspected person in presence of two reliable local witnesses. And then in compliance to the provision of Section 50 of ND&PS Act 1985, the suspected person was informed of her right to be searched in presence of Magistrate or Gazette Officer, to which she declined as she was confident that the search will be conducted in presence of two respectable and reliable local witnesses. The Addl. SP, CID (Crime), a Gazette officer was present at that time of conducting the search. As the suspected person is a woman, body search was conducted by a woman police officer, but nothing incriminating/drugs was found from her body. The search party then conducted the search of the residence of the suspected person Malsawmtluangi and recovered one black Air- Bag which was kept

hidden near the bed on the floor of the bedroom of suspected accused person which contained huge quantity of contraband drugs suspected to be Methamphetamine. On further checking, it was found that the bag contained 9 (nine) identical yellow packages and 1 (one) package covered with black polythene, total 10 (ten) packages. The same were seized on the spot in presence of the above mentioned two local reliable witnesses and seizure memo was prepared. It was found that, the seized items were packed in 9 (nine) different bundles and were carefully tied with brown tape and one loose bundle was covered with black polythene. Counting, weighing, packing and sealing were done on the spot in presence of two reliable local witnesses. It was also found that each bundle contained 5 (five) Smaller bundles wrapped with white tissue paper tied with rubber band. Each smaller bundle further contained 10 (ten) packets covered with blue polythene. Each blue polythene contained 200 tablets of suspected Methamphetamine, approximately weighing 20 grams. The total number of tablets was 58800 nos. weighing 5.586 kgs with an estimated value of Rs. 176,46,000/- at local market. Almost every tablet was pink in colour, but few tablets in each bundle were blue in colour and has inscription of either figure '88' or 'wy' on one side and figure '1' on the other side. Statement of seizure witnesses were recorded on the spot in separate sheet. Hence, Malsawmtluangi, who had possessed such amount of contraband drugs, was arrested by a woman police officer by preparing Arrest Memo during day light after informing the ground of her arrest in presence of two reliable witnesses and arrest intimation was given to her father.

From the light of the enquiry and based on the statement of the accused Malsawmtluangi, who said she had received the said contraband from one Samuel TT Thanga@ Thangtea (35) S/o T.Hauzaliana of Kolasib College Veng, who was also arrested in the presence of local witnesses and arrest intimation was given to his wife. Hence, Special Narcotic PS Case No. 12/2015 Dt. 29.05.2015 U/s 22(c)/29 ND&PS Act was registered and duly investigated into. Both the accused Malsawmtluangi and Samuel TT Thanga @Thangtea were kept at PS lock up after complying all formalities for the night and the seized articles were also kept at PS Malkhana for the night vide MR No. 12/15 Dt. 29.05.2015. On the 30th of May 2015 drawing of sample and packaging for FSL examination was done before the first Class Magistrate, Aizawl in the presence of both the accused as well as seizure witnesses. The sample exhibits were sent to FSL, Aizawl for examination vide No. D/Spl. Narcotic PS/15/89 Dt. 30.05.2015 under proper escort by Constable Lalhruitluanga of Special Narcotics PS Staff. The remaining exhibits are handed over to Aizawl Court Malkhana vide CR No. 119/15 Dt. 30.05.2015. The two accused persons were remanded to Police custody for 72 hours and during this remand period, after thorough interrogation, the accused Malsawmtluangi stated that she tried to sell the said Methamphetamine to earn Rs. 10 per tablet and received the said Methamphetamine from Khaia of Myanmar on 20.05.2015 and he asked her to sell and earn Rs. 10 per tablets and the said contraband drugs were delivered to her by Zomuana of College Veng, Kolasib. Following this, the third accused person Zomuana was arrested. On his interrogation,

Zomuana stated that he along with Samuel TT Thanga @Thangtea visited Matluangi in the morning of 29th May, 2015 and again visited Matluangi and delivered the said contraband drugs to her. The FSL examination report was received from the Dy. SP CID (Crime), vide No. SP/CRM/ST-109/2014/1990 dt. 10.07.2017 which indicated that the exhibit C (AZL)-328(1) to C (AZL)-328 (10) were found to contain Methamphetamine. From the above circumstances and statements adduced, their involvement has been clearly proved and they also violated Section 8(c) of ND&PS Act, 1985 which prohibited - possess, sell, purchased, transport, import interstate etc of any Narcotics Drugs or Psychotropic substances. As such, a prima facie case u/s 22(c)/29 ND&PS Act, 1985 was found well established against the arrested accused persons as Malsawmtluangi (38) D/o VZ Kapmawia of Thingdawl HmarVeng; (2) Samuel TT Thanga @Thanga S/o T. Hauzaliana of Kolasib College Veng; (3) Zomuana (29) S/o Lalthanmawia of Kolasib College Veng.

15. In his Cross examination he stated that through the alleged illicit article was recovered on 29.05.2015 however sample was not drawn on that day. He admitted the fact that he cannot recollect the date when he took the statement of the accused. He admitted the fact that there is no date above his signature on the statement of the accused Samuel TT Thanga recorded by him. He admitted the fact that he have not recovered or seized any documents or recorded conversation between the accused Samuel TT Thanga and Malsawmtluangi in relation to the instant case. He admitted the fact that nothing has been seized from the possession of accused Samuel TT

Thanga and admitted that he was not the person who arrested the accused Samuel TT Thanga. He admitted the fact that the exhibit/sample was not send by him to FSL. He admitted the fact that he was also present at the time of seizure in the house of accused Malsawmtluangi. On his re-examination, he stated that though he had stated in his cross examination that nothing has been seized from the possession of accused Samuel TT Thanga, the fact is that at the time of seizure, nothing was seized from the physical possession of accused, however, from the light of his investigation the owner of the S/A claimed by accused Malsawmtluangi was Samuel TT Thanga. Seizure of the S/A was done at Thingdawl on the eve of 29.05.2015. When they reached Aizawl it was already dark. Hence, it was not possible to draw sample before Magistrate 1st class on that day as such drawing of sample was done on 30.05.2015.

16. On examination of the appellants under section 313 CR.P.C they had both denied their involvement in the seizure of the seized articles. No defence evidence was adduced. Thereafter on hearing both the parties the learned Trial court passed the impugned Judgment and Order as already mentioned above.

Crl.A No.7 of 2023

17. Mr. Joseph L. Renthlei learned counsel for Smt. Malsawmtluangi appellant in **Crl.A No.7 of 2023** submits that the impugned Judgment and order is liable to be set aside since the prosecution has failed to prove the guilt of the appellant Smt.

Malsawmtluangi under section 22 (c) ND& PS Act.

18. The learned counsel submits that the provisions of Section 52A of the ND & PS Act has not been complied within the instant case. He submits that though the PW-9 has stated that the drawing of the sample was done before the JMFC, there is no document annexed or exhibited by the case I/O, to show that the sample was done before the JMFC. He further submits that the statement of PW-9 stating that the drawing of the sample was done before the JMFC contradicts the statement of PW-2, who has stated that the search, seizure and sample drawing was done on the spot. The learned counsel has relied on the decisions of the Co-ordinate Bench of this Court in **Malsawmdawngkima, -Vs- State of Mizoram & Anr. dated 21.01.2022 in Crl.A. No.5/2020**, in the case of **Lalnilawmsanga, -Vs- State of Mizoram in Crl.Appl. No.15 of 2022 dated 17.03.202** and in **C. Lalzarliana & Anr Vs- State of Mizoram dated 21.01.2022 in Crl A/23/2019**, where the Co-ordinate Bench of this Court had held that the sampling of the seized Narcotics drugs & Psychotropic drug substances etc. should drawn before the Magistrate under Section 52A of the ND & PS Act and that non compliance to the provision of section 52A of the ND & PS Act the accused is entitled to be given the benefit of doubt.

19. The learned counsel for the appellant further submits that the evidence of PW-3 and PW4 shows that their deposition in-chief is contradictory to their cross-examination. In their examination-in-chief they had mentioned that the SA was

already kept on the floor when they reached the P.O. However, in the cross-examination, they stated that the police were already in the house for about an hour, then they entered the house again. Because of the contradictions in their depositions with their statements during their cross examinations, the statements of these 2 (two) seizure witnesses and their evidence adduced in the court cannot be relied upon. The learned counsel has submits that the PW-2 has stated that the drawing of sample was done on the spot while the other witnesses have stated that it was done before the JMFC, because of this in consistency the credibility of the witnesses is questioned. In support of his submissions he has cited **Suraj Mal v. State (Delhi Admn)** reported in **(1979) 4 SCC 725 para 2**

20. The learned counsel for the appellant further submits that PW.1 deposed that the S/A was kept in the Police Malkhana on 29.05.2015, however, the Malkhana Register was not exhibited in the Court. PW 5 deposed that the S/A was brought on 30.05.2015, however he does not know in what form it was bought. PW6 has deposed that Ex. P-X is the sealed cover of exhibit sample which he brought to FSL Aizawl and he knew nothing beyond that. There are many such contradictions in the deposition of the prosecution witnesses which makes the prosecution witnesses unreliable.

21. The learned counsel has further submits that the examination of the appellant under Section 313 Cr.PC is not as per the provisions of law. He submits that none of the incriminating evidence adduced against the appellant Malsawmtluangi was asked

or explained to her as mandated under section 313 Cr.P.C. The learned counsel has relied on the decision of the Apex Court in **Kalicharan v. State of U.P** reported in **2023 2 SCC 583** paras 27 & 29 and submits that if the circumstances leading to the incriminating evidence have not been asked, that the incriminating evidence not asked, should be excluded.

22. The learned counsel for the appellant has also pointed out that the learned trial court in the impugned Judgment and Order dated 11.10.2022 at para 19, had relied on the dissenting judgment of the Apex Court in **Tofan Singh -Vs- State of Tamil Nadu**, report in **2020 SCC OnLine SC 882** while convicting the appellant under section 22(c) ND& PS Act.

23. Mrs. Mary L. Khiangte, learned Addl. Public Prosecutor for the state respondent, on the other hand submits that even though the documents were not exhibited as per Section 52A of the ND & PS Act, however, this is not a mandatory provision and will not be fatal to the prosecution cases. She submits that, it is clear from the evidence adduce that the seizure was made in the presence of civilian witnesses and the very next day, it was produced before the JMFC on being transported from Thingdawl to Aizawl. She further submits that there was no argument made before the Trial Court with regards to non-compliance of Section 52A ND & PS Act and that such documents were not exhibited. She therefore submits that, these grounds cannot be now considered.

24. The learned Addl. Public Prosecutor also submits that both the independent witnesses have witnessed the seizure of the seize S.A., She submits that in the grounds of appeal there is no mentioned about non-maintenance of Malkhana register and non-production of documents under Section 52A of ND & PS Act. Therefore, these points are beyond the pleadings and the learned counsel for the appellant cannot go beyond the pleadings.

25. The learned Addl.P.P further submits that PW-6 has clearly stated that the SA was intact when it was brought to the FSL on the same day. She further submits that even though the question under Section 313 Cr.P.C was very general, the charge against the appellant was well explained at the time of framing of charge i.e. consideration of charge. She further submits that though the appellant had denied committing the offence under Section 313 Cr.P.C, she did not produce any defence witness to prove that she was in the shop as stated by her. She submits that the appellant was silent before the Trial with regard to the limited question asked under Section 313 Cr.P.C Court and cannot now bring up the said matter.

26. The learned Addl.P.P further submits that it is only Pw-2 who made the contradictory statement by stating that the sample drawn and sealing was done at the P.O. It is also clear that the seizure, sample drawing and sealing was done in the presence of the civilian witnesses. She further submits that these contradictions were not asked during the cross-examination of the other prosecution witnesses who had clearly stated that the sampling was drawn before the JMFC.

27. The learned Addl. Public Prosecutor thus submits that the prosecution has proved beyond reasonable doubt the guilt of the appellant and that the cross-examination does not show that the seized article was not seized from her possession. The SA was proved to be recovered from her bed-room. That the learned Addl. Public Prosecutor submits that PW -3 & Pw-4 are the independent witnesses who have clearly deposed that the seized article was seized from the bed-room of the appellant and that the sampling was done before the JMFC. She submits that the prosecution has made out a case beyond reasonable doubt and therefore the burden of prove of their innocence shift to the appellant. She submits that section 29 of the ND & PS Act was deleted only with regards to the co-accused Muana who was acquitted by the trial court. The learned Addl.PP also submits that from the evidence of Pw-3, during cross examination, though he had stated that they had previously entered the house of the appellant, it does not mean that they had conducted the search or that they had entered the bed-room of the appellant. She further submits that all the mandatory provisions under Chapter-V of the ND & PS Act have been complied with and prosecution has proved beyond reasonable doubt the guilt of the appellant and the appellant has not produced any evidence to prove her innocence under section 35 of the ND& PS Act. The learned Addl.Public Prosecutor relied on the decision of the Apex Court in **Balwinder Singh (Binda) -Vs- Narcotics Control Bureau** in Crl Appeal **No.1136 of 2014** reported in **2023 SCC OnLine SC 1213**.

28. The learned counsel for the appellants in rebuttal submits that even though the

points regarding non production of Register of Malkhana and the documents under Section 52A ND & PS Act were not asked in the Trial court, these are questions of law which can be raised at any time even if not raised before the Trial Court.

29. I have heard and considered the submissions made by the rival parties and the evidence adduced by the prosecution witnesses is herein examined meticulously.

30. From the evidence adduced by the prosecution witnesses it is an admitted fact that the search and seizure of the contraband substance was done on 29.05.2015. The deposition of PW No. 8 Lalmuanawma, Asst Director, FSL, Aizawl that the exhibit samples A-I to A-IX and B-I received on 01.06.2015, for chemical examination contained Methamphetamine is not disputed.

31. On scrutiny of the evidence adduced by the prosecution witness this court finds that the civilian witnesses PW No.3 and PW No.4 have deposed that search and seizure was done in their presence however, in their cross examination both admitted that when they reached the P.O, the police personnel were already in the house of accused Smt. Malsawmtluangi and the woman police was already inside the bed-room along with the accused Smt. Malsawmtluangi and the S/A Ex. M-I, was already placed on the floor of the room. They both admitted that they do not know from where Ex. M-I was recovered when they reached the P/O.

32. PW 2 who is the ASI who, had also conducted the search and seizure of the S/A along with PW.No.1. She deposed that drawing of the sample of the contraband

substance was done on the spot, however, the seizing officer/PW No.1 and the other two civilian witnesses/ PW no.3 and PW no.4 have both deposed that the drawing of the sample was done the next day *i.e* on 30.05.2015 in the presence of the Judicial Magistrate First Class (JMFC).PW9 also deposed that drawing of sample was done on 30.05.2015.

33. Besides the discrepancy in the deposition of PW No.2 with the PW No.1, PW No.3, PW No.4 & PW No.9, with regards to the place and time when the drawing of the sample was done, this court finds that, none of the prosecution witnesses have deposed of any application made to the Magistrate to draw samples in the presence of the Magistrate, On perusal of the documents on record, there is no application to the Magistrate to draw samples in the presence of the Magistrate or an application to certify the correctness of the list of samples so drawn, found. There is also no document certifying the correctness of the list of samples so drawn. Thus, this court is of the considered view that the procedure prescribed under section 52A of the ND & PS Act, has not been followed in the instant case.

34. The Apex court in **Union of India v. Mohanlal**, reported in **(2016) 3 SCC 379** had observed that;

“15. It is manifest from Section 52-A(2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory, (b) certifying

photographs of such drugs or substances taken before the Magistrate as true, and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

19. There is in our opinion no manner of doubt that the seizure of the contraband must be followed by an application for drawing of samples and certification as contemplated under the Act. There is equally no doubt that the process of making any such application and resultant sampling and certification cannot be left to the whims of the officers concerned. The scheme of the Act in general and Section 52-A in particular, does not brook any delay in the matter of making of an application or the drawing of samples and certification. While we see no room for prescribing or reading a time-frame into the provision, we are of the view that an application for sampling and certification ought to be made without undue delay and the Magistrate on receipt of any such application will be expected to attend to the application and do the needful, within a reasonable period and without any undue delay or procrastination as is mandated by sub-section (3) of Section 52-A (supra). We hope and trust that the High Courts will keep a close watch on the performance of the Magistrates in this regard and through the Magistrates on the agencies that are dealing with the menace of drugs which has taken alarming dimensions in this country partly because of the ineffective and lackadaisical

enforcement of the laws and procedures and cavalier manner in which the agencies and at times Magistracy in this country addresses a problem of such serious dimensions.

31.1. No sooner the seizure of any narcotic drugs and psychotropic and controlled substances and conveyances is effected, the same shall be forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application under Section 52-A(2) of the Act, which shall be allowed by the Magistrate as soon as may be required under sub-section (3) of Section 52-A, as discussed by us in the body of this judgment under the heading "seizure and sampling". The sampling shall be done under the supervision of the Magistrate as discussed in Paras 15 to 19 of this order."

35. A coordinate bench of this court in C. Lalzarliana & Anr. Vs- State of Mizoram (supra), Malsawmdawngkima -Vs- State of Mizoram & Anr (supra) and Lalnilawmsanga Vs- State of Mizoram (supra) had also referred to the above observation of the Apex court while allowing the criminal appeals.

36. On further scrutiny of the prosecution evidence, this court also finds that the seizing officer PW No.1, deposed that the S/A was kept in Police Malkhana Custody under MR. No. 12/15 on the night of 29.05.2019. He further deposed that they boarded for Aizawl the next day. However the Police Malkhana Register or person receiving the S/A for safe custody at the police Malkhana, were not produced before the trial court. PW No.3 and PW No.4 in their cross examination admitted that they knew that the S.A was carried from Thingdawl towards Aizawl on 29.05.2015. PW

No.5 is the officer in charge of the Court Malkhana, who deposed that on 30.05.2015, he received S/A (exhibit) in respect of Special Narcotics P/S No. 12/15 dated 29.05.2015, U/S 22-(c) / 29 ND&PS Act, which he entered as CMR No. 119/15 dated 30.05.2015 in their record book of Court Malkhana. On his cross examination he admitted the fact that there is no Malkhana register in the charge sheet showing the time when he received the S/A. He admitted the fact that he cannot say in what form he received the S/A. PW No.9 is the case I.O who has deposed that the seizure of the S/A was done at Thingdawl on the eve of 29.05.2015. When they reached Aizawl it was already dark, hence, it was not possible to draw sample before Magistrate 1st class on that day as such it was produced the next day.

37. From the above depositions, there are discrepancies as to where the S.A was kept after it's seizure and production before the Judicial Magistrate First Class. A Co-ordinate Bench of this Court in **Malsawmdawngkima, -Vs- State of Mizoram & Anr (Supra)** had allowed the Criminal appeal and observed that;

“This Court in Bhim Ram &Ors.vs. State of Assam, reported in 2012 (1) GLT 416 in the given facts of that case held that safe custody of samples is important and due care is required to be taken otherwise, the accused person will be entitled to be given the benefit of doubt. In Lalruatpuii Bawitlung vs. Union of India, reported in 2017 (5) GLT 29, this Court in the given facts of that case came to a finding that there was no evidence as to where the seized articles and samples which were drawn were kept till it was deposited with the Anti-smuggling Unit, Customs Division, Aizawl. Under the circumstance, the benefit of doubt was given to the accused person.”

38. This court also finds that on perusal of the examination of the appellant Smt.

Malsawmtluangi under section 313 Cr.P.C, the question put to her was "Based on the evidence, the Methamphetamine was seized from you while it was in your possession, is it true?" to which she replied "It is not true." And when asked if she had any other thing to ask she had replied that she was not at home but was at the shop. This court finds that no detail of the manner in which the search was conducted in the residence of the appellant was asked nor was she informed from where the seized articles was recovered for her to give a proper explanation to the events that were said to have taken place by the prosecution witnesses. This court finds that the Apex court in from **Kalicharan v. State of U.P., (supra)** held that:

"27. Questioning an accused under Section 313Cr.P.C is not an empty formality. The requirement of Section 313Cr.P.C is that the accused must be explained the circumstances appearing in the evidence against him so that accused can offer an explanation. After an accused is questioned under Section 313Cr.P.C, he is entitled to take a call on the question of examining defence witnesses and leading other evidence. If the accused is not explained the important circumstances appearing against him in the evidence on which his conviction is sought to be based, the accused will not be in a position to explain the said circumstances brought on record against him. He will not be able to properly defend himself."

.....

31. Therefore, in the facts of the case, by reason of omission to frame a proper charge in terms of Section 213CrPC, and by reason of not putting important circumstances appearing in the evidence in the statement under Section 313 caused serious prejudice to the accused. The prejudice, in the facts of the case, has occasioned a failure of justice."

39. In the instant case too, this court finds that the questions asked during the consideration of charge cannot be said to be sufficient for the appellant to explain the circumstances appearing in the evidence against her. All the relevant circumstances appearing in the evidence against the accused person such as to when and from where the S/A was found or whether she had made the statements incriminating herself, were asked. This court thus finds that the appellant could not have had the opportunity to say what she wanted to say in respect of prosecution case against her. This court is however also of the considered view that the statements said to be made by her before the seizing officer PW1 and the case I.O PW 9 cannot be used against her unless proved.

40. The Apex court in **Balwinder Singh (Binda) -Vs- Narcotics Control Bureau (supra)** held 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.”

41. Thus, in light of the above observations of the Apex Court and upon consideration of the discrepancies found in the depositions of the prosecution witnesses and also the non compliance of the requirements laid down under section 52 A of the ND& PS Act and the non-compliance of section 313 Cr.P.C as mentioned in the foregoing paragraphs, this court is of the considered view that the prosecution have failed to establish their case against the appellant beyond reasonable doubt. As such, the appellant is found to be entitled to be given the benefit of doubt. Under such circumstances there is no requirement for the appellant Smt. Malsawmtluangi to adduce her evidence to prove her innocence under section 35 of the ND & PS Act.

42. In view of the above discussions and findings this court find the sufficient grounds have been made out to set aside the Judgment and Order dated 11.10.2022 passed by the learned Fast Track Court, Additional Sessions Judge, Kolasib District, in SC(K) No.198 of 2015 CrI Tr. No.1267/2015 and the sentence order dated 25.10.2022 against the appellant Smt. Malsawmtluamgi and accordingly she is set at liberty forthwith unless wanted in any other case.

Crl.A. No. 26 of 2022

43. Mr. C. Lalfakzuala learned counsel for Sh. Samuel T.T. Thanga appellant in Crl. Appl.No.26 of 2022 submits that there is no incriminating prosecution evidence against the appellant. The learned counsel led this court to the prosecution adduced before the trial court

The learned counsel submits that PW No-1 is the Seizing Officer and his deposition is to the effect that the SA was not recovered from the appellant Sh. Samuel T.T. Thanga, but it was recovered from the house of the co-accused Malsawmtluangi. PW No. 2 is the Seizure witness who on cross examination, admitted that nothing was found to connect the appellant with the SA which was seized from the house of co-accused Malsawmtluangi. The only evidence is what was alleged to be stated by the said co-accused Malsawmtluangi.

44. PW No. 3 and PW-4 are the Seizure Witnesses and from their cross examination it is seen that the police were already at the P.O, and had already checked the bag, the SA was already on the floor when they arrived at the P.O., thus there was no civilian eye witness regarding the recovery of the S.A.

45. PW-5: on cross examination has admitted that there is no Malkhana register seized, it is not known whether the S.A was kept loosely in the bag and on cross examination, Pw-5 has admitted that he does not know what form the SA was brought. PW-6: deposed that all he knew was that he delivered the sealed packet to

the FSL for examination.

PW-7: is the witness who had issue the authorization.

Pw-8 only proves that the S.A. contains Methamphetamine.

46. PW 9 is the case I.O who has relied solely on the statement of the co-accused Smt. Malsawmtluangi. The learned counsel submits that the statement made by the co-accused Smt. Malsawmtluangi has to be proved since nothing was seized from the appellant. That the statements alleged to be made by the appellant before the case I.O is untrue cannot be used against the appellant as evidence. The learned counsel further submits that a perusal of the examination-in-chief under Section 131 Cr.PC shows that none of the incriminating question were asked to the appellant.

47. The learned counsel for the appellant further submits that the benefit of doubt was given to the co-accused Muana, who was acquitted of the charge under section 22(c) r/w section 29 ND & PS Act and therefore, the same benefit of doubt should be given to the appellant, when both the seizure witnesses had admitted that the seizure of the S.A was already done when they reach the P.O. and nothing was recovered from the appellant. The learned counsel also submits that when Section 29 of the ND & PS Act has been dropped while acquitting the co-accused Muana, then not there can be no conviction under Section 22(c) of ND & PS Act. That no conspiracy has been proved against the appellant.

48. In support of his submissions the learned counsel has relied on the following authorities: ***Sujit Biswas v. State of Assam*** reported in **(2013) 12 SCC 406** para 20/17, ***Suraj Mal v. State (Delhi Admn.)*** reported in **(1979) 4 SCC 725 para 2** and ***K.R. Purushothaman v. State of Kerala*** reported in **(2005) 12 SCC 631 para 18/19.**

49. The learned Addl. Public Prosecutor on the other hand submits that PW No. 1 and PW No. 9 have already stated that the appellant had admitted his involvement in the instant case which has also been affirmed by the co-accused Malsawmtluangi. The learned All. Public Prosecutor submits that even if Section 29 ND & PS Act has been dropped, however she submits that section 35 & 36 ND & PS Act transferred the burden of prove on the appellant. The learned Additional PP further submits that the foundation of facts have been made out, there is preponderance of probability of the involvement of the appellant as indicated by accused No.1 Smt. Malsawmtluangi. The case I/O PW-9, deposed that during interrogation the appellant admitted his guilt. In the cross examination no questions were asked for indictment of Sh. Samuel T.T. Thanga.

50. The learned Addl. PP further submits that the FSL examination report was received from the Dy. SP CID (Crime), vide No. SP/CRM/ST-109/2014/1990 dt. 10.07.2017 which indicated that the exhibit C(AZL)-328(1) to C(AZL)-328(10) were found to contain Methamphetamine. As such, while seizure was made on dt. 29/05/2015, there was no undue delay for sending seized contraband items to FSL.

More so, seized Methamphetamine is also exhibited in the court marked as K. M-1 and was affirmed by all the prosecution witnesses. Further, no defence evidence to elicit any doubt on seized contraband items was adduced in the course of proceedings.

51. The learned PP submits that PW No. 9, who is the Case IO has deposed to the effect that on 30th May 2015 drawing of sample and packing for FSL examination was done before Lalramsanga, Magistrate 1st Class, Aizawl in presence of both the accused as well as seizure witnesses. The PW No. 3 and 4 the two seizure witnesses corroborated the statements of the Case IO. The learned Addl. PP further contended that drawing of sample of the seized article which actually belonged to the appellant Samuel TT Thanga was rightly done and even if it was not done, section 52-A of ND & PS Act was not mandatory and per se do not vitiate the proceedings.

52. On perusal and analysis of the evidence adduced against the appellant Sh. Samuel T.T. Thanga, the prosecution witnesses PW No.1, PW No.2, PW No.3 and PW No.4 stated that the Methamphetamine was seized from the house of the co. accused Smt. Malsawmtluangi. The evidence shows that nothing was seized from the appellant. The appellant was arrested when he went to the house of the co. accused Smt. Malsawmtluangi by PW. No.1 based on the statement said to be made by the co-accused Smt. Malsawmtluangi that she had received the contraband substance from the appellant Sh. Samuel T.T. Thanga. However, it is seen that PW No.1 in his cross examination admitted the fact that she did not record the statement of the accused Malsawmtluangi and admitted the fact that there is nothing on record

made by her to suggest that the accused Samuel TT Thanga put the S/A in the house of accused Malsawmtluangi.

This court also finds that PW9, the case I.O had found prima facie case against the appellant based only on the alleged confession/statement said to be made by the Smt. Malsawmtluangi and the appellant himself during interrogation.

53. The Apex court in **Balwinder Singh (Binda) -Vs- Narcotics** Control Bureau (supra) observed that *any confessional statement made by an accused to an officer invested with the powers under Section 53 of the NDPS Act, is barred for the reason that such officers are "police officers" within the meaning of Section 25 of the Evidence Act, a statement made by an accused and recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act."*

54. This court is of the considered view that the same observation is applicable in the instant case and the statements made by the appellant before the case I.O PW 9 cannot be used against the appellant in the absence of any other incriminating evidence.

55. It is seen that the Apex court while allowing the appeal in **SujitBiswas v. State of Assam**, (supra) observed that :

"Graver the crime, greater should be the standard of proof. An accused may appear to be guilty on the basis of suspicion but that cannot amount to legal proof. When on the evidence two possibilities are available or open, one which goes in the favour of the

prosecution and the other benefits an accused, the accused is undoubtedly entitled to the benefit of doubt. The principle has special relevance where the guilt or the accused is sought to be established by circumstantial evidence."

56. This court thus finds that the same observation will be applicable in the instant case and find that the prosecution has failed to prove the nexus between the seized contraband substance, seized from the house of the co-accused Smt. Malsawmtluangi, with the instant appellant, especially when the charge under section 29 ND&PS Act has been dropped against the appellant while nothing was seized from his possession.

57. This court also finds that the questions put forth to the appellant in his examination under section 313 CR.P.C are very general and sketchy and cannot be said to be sufficient for the appellant to explain the circumstances appearing in the evidence made out against him.. The question asked was "Based on the evidence, it appears that the Methamphetamine tablets seized were obtained from Myanmar by you and they belong to you. Is this true ?" to which the appellant had replied " it is not true".

58. In view of the above discussions and findings this court is of the considered view that the prosecution have failed to prove the guilt of the appellant under section 2(c) ND& PS Act,1985 beyond any reason doubt. The appellant is thus entitled to be given the benefit of doubt and the sufficient grounds have been made out to set aside the Judgment and Order dated 11.10.2022 passed by the learned Fast Track Court,

Additional Sessions Judge, Kolasib District, in SC(K) No.198 of 2015 CrI Tr. No.1267/2015 and the sentence order dated 25.10.2022 against the appellant Sh. Samuel T.T Thanga. Accordingly he is set at liberty forthwith unless wanted in any other case.

Thus both, CrI App. No.7 of 2023 and CrI.App.No.26 of 2022 stand allowed and disposed of.

JUDGE

Comparing Assistant