

IN THE HIGH COURT OF MANIPUR

AT IMPHAL

Crl.A. No. 2 of 2021

1. Lalrozami Duhlian, aged about 28 years, W/o Sougaijam Robindro of Moreh Super Market Ward No. 2, P.O. & P.S. Moreh, District-Tengnoupal, Manipur-795131.
2. Sougaijam Robindro Singhm, aged about 29 years, S/o S. Ibotombi Sing of Kakching Wairi Thongam Leikai, P.O. & P.S. & District-Kakching, at present Moreh Super Market Ward No. 2, P.O. & P.S. Moreh, District Tengnoupal, Manipur-795131.

..... Appellants/Accused persons

- Versus -

The State of Manipur through Officer-in-charge NAB Police Station, Old Nambulane, Imphal West District, Manipur-795001.

.....Respondent/s

B E F O R E

HON'BLE MR. JUSTICE A. GUNESHWAR SHARMA

For the Appellants	::	Mr. H. Kenajit, Advocate.
For the respondents	::	Mr. Y. Ashang, PP.
Date of Hearing	::	2,13,15 & 16 March of 2023; 3, 4, 5,10,11,18,19,21,26 & 27 of April, 2023.
Date of Judgment & Order	::	27.12.2023

JUDGMENT & ORDER (CAV)

[1] Heard Mr. H. Kenajit, learned counsel for the appellants and Mr. Y. Ashang, learned PP for the State respondents.

[2] The present appeal has been filed by the appellants under Section 26 B of NDPS Act, 1985 read with Sub-section 2 of Section 374 of the Code of Criminal Procedure, 1973 praying for setting aside the judgment and order of conviction dated 27.11.2020 and sentence order dated 07.12.2020 passed by the learned Special Court (NDPS), Manipur in Special Trial No. 13 of 2019.

[3] Brief fact in nutshell arising in the present appeal is that in connection with FIR No. 30(04)2018 NAB PS dated 11.04.2018 u/s 22(c)/62/60(3) ND&PS Act, the charge-sheet dated 24.11.2018 was submitted against 8 (eight) accused persons u/s 22(c)/62/60(3)/25/29/21(b) ND&PS Act and 2 (two) accused persons were declared as absconders. Details of the accused persons are given as below:

A-1: Mr. Manjil Ahmed Laskar

A-2: Md. Abdul Latif

A-3: Mrs. Nasim Banu

A-4: Md. Abdul Wahab

A-5: Mrs. Chalmawii Duhlian

A-6: Mrs. Lalrozami Dulian [Appellant No.1 herein]

A-7: Mr. Sougaijam Robindro Singh [Appellant No.2 herein]

A-8: Mr. Munirnur Rahaman Barbhuiya

Absconder-1: Mr. Rabul Hussain

Absconder-2: Md. Hatim Ali @ Samu

[4] Vide order dated 25.11.2019 in Special Trial Case No. 13 of 2019, learned Special Court (NDPS), Manipur framed charges under Sections 22(c), 21(b) and 29 of ND&PS Act against the Accused Nos. 6 & 7 and discharged Accused Nos.

1, 2, 3, 4, 5 & 8. Accused Nos. 6 & 7 did not plead guilty and claimed for trial. As per record, the State did not challenge the discharge order of other accused persons. During the trial 5 (five) PWs were examined, exhibited 36 documents and 15 material objects. Vide judgement dated 27.11.2020, learned Special Court convicted the A-6 was convicted under Sections 21(b)/22(c) of ND&PS Act, 1985 and A-7 was also convicted under Section 29 read with Sections 21(b)/22(c) of ND&PS Act, 1985 and the accused persons were taken into custody. Vide order dated 07.12.2020, A-6 was sentenced to undergo imprisonment for 7 years RI with fine of Rs.50,000/- for the offence under Section 21(b) of ND&PS Act and also 12 years RI with fine of Rs.1,00,000/- for the offence under Section 22(c) of ND&PS Act. It was directed that both the sentences would run concurrently. Further, A-7 was sentence to undergo 12 years RI with a fine of Rs.1,00,000/- for the offences under Section 29 read with Sections 21(b)/22(c) of ND&PS Act. In default of payment of fines within 6 months, both A-6 & A-7 were directed to undergo imprisonment for another 6 months.

[5] The prosecution case is that on 10.04.2018 at about 11.30 am, the complainant Major Rishab Jung Rijal of 23 Assam Rifles of Kamai Post received a call from Bn Head Quarters that a Cruiser vehicle bearing Regd. No. AS11AC6710 was moving from Imphal to Silchar carrying illegal drugs. The vehicle was intercepted at mobile check post at Kamai. On checking the vehicle, 11.43 kg of WY tablets containing one lakh in number [50 plastic bags yellow in colour, each containing 10 smaller blue colour packets, each containing 200 pieces of pink round WY tablets, ie, $50 \times 10 \times 200 = 1,00,000$] were recovered and the driver- Manzil Ahmed Laskar (A-1) was arrested and handed over to the OC, NAB-PS for taking up further necessary legal

action. A-1 disclosed the involvement of the absconder Rabul Hussain. During the course of further investigation, the police arrested Md. Abdul Latif [A-2], Mrs. Nasim Bano [A-3 who is wife of A-2], Md. Abdul Wahab [A-4], Mrs. Chalmawii Duhlian [A-5 who is mother of A-6, mother-in-law of A-7], Mrs. Lairozami Duhlian [A-6 who is wife of A-7], Sougaijam Robindro Singh [A-7 who is husband of A-6], Hatim Ali @ Samu, and Muminur Rahaman Barbhuiya [A-8].

[6] During the course of investigation, arrested accused [A-4] Md. Abdul Wahab @ Wakip (25) years, S/o Md. Abdul Wahid @ Ibothem of Keirao Mayai Leikai, PS. Irilbung, District Imphal East disclosed that accused [A-5], Mrs. Chalmawii Duhlian (53) W/o Hashim of Dalpati Road, near Madras Mandir, Moreh Ward No. 2, PO/PS Moreh, Tengenupal District supplied the seized drugs through her daughter [A-6] Mrs. Lairozami Duhlian (27) W/o Sougaijam Robindro of Moreh Supermarket Ward No. 2 PO/PS Moreh, Tengenupal District and son-in-law [A-7], Mr. Sougaijam Robindro Singh (28) S/o Mr. S. Ibotombi Singh of Kakching Wairi Thongam Leikai A/p Moreh Supermarket Ward No. 2, PO/PS Moreh, Tengenupal District. He also revealed that they provided shelter to the accused [A-4], Md. Abdul Wahab before his arrest knowing that warrant of arrest had been issued against him by Hon'ble Judge ND & PS, Manipur. Accordingly, he obtained authorization u/s 41 (2) ND & PS Act from the SP/NAB.

[7] On 04.05.2018, I.O.[PW-1] along with his police party of NAB, PS and with accused Md. Abdul Wahab assisted by a team of Smt. Th. Brinda Dy. SP – NAB, Manipur have left for Moreh. Raid had been conducted at the house of [A-5] Mrs. Chalmawii Duhlian on the same day i.e. 04.05.2018 at around 7:00 am in presence of

witnesses, namely (i) Lunkhosat Doungel (33) S/o (L) Seigin Doungel of Motbung Bazar, PO & PS Motbung, KPI District (ii) PW-3, Leimapokpam Michael Singh (25) S/o (L) Ibomcha Singh of Top Moirang Kampu, PO & PS Porompat, Imphal East District and (iii) PW-2, Thomas Thokchom, MPS, Dy. SP (CDO), Moreh and seized the following items: (i) One MI mobile handset with SIM card No. 8991776066261823578 (ii) One Samsung mobile handset SM-C900F/DS (iii) One MI handset (iv) One SBI Bank Pass Book a/c No. 20292299584 (v) One UBI Cheque Book of a/c No. 0791050013891 and (vi) One UBI Cheque Book of a/c No. 0791010161817 on her production at 7:30 am of the say. Subsequently, she was arrested on the same day at around 7:35 am.

[8] Further, on her disclosure and pointing, raid had been conducted at the house of her son-in-law, [A-7] Mr. Sougaijam Robindro Singh located at Moreh Supermarket Ward No. 2 in presence of above witnesses and during the search, [A-6] Mrs. Lalrozami Duhlian W/o Mr. Sougaijam Robindro Singh were found in the said house and they were detained for verification and search. On searching their house, police recovered 5200 WY tablets and 100 gm of heroin powder and as such seizure memos dated 04.05.2018 were prepared at around 8:00 am along with other items. Subsequently, both of them were arrested on the same day in connection with the case. The seized drugs and articles were handed over to OC-NAB PS and deposited in the godown vide entry No. 35/NAB-PS/Manipur in connection with the case.

[9] PW-1: Mutum Suraj Singh, S.I. of Police is the first Investigating Officer of the present case. Shri Thomas Thokchom, DSP, CDO/IW is the PW No. 2 who participated the whole raid conducted at the residence of the present accused No. 6

& 7 and Shri Leimapokpam Michael, PW-3, is also one of the attesting witnesses at the time of seizure from unauthorised possession of the present accused No. 6 and he participated the whole raid conducted at the residence of the present accused. PW No. 4 is W. Lukhoi Singh, Scientific Officer, Chemistry at FSL, Pangei who conducted test of amphetamine/methamphetamine and heroin No. 4 in connection with the present special trial and PW-5:Shri Ningthoujam Devdas Singh, S.I. of Police is the last I.O. of the case, who submitted charge sheet after getting expert opinion from the FSL, Pangei.

[10] PW No. 1 obtained search authorization letter from the SP, NAB PS for causing arrest of Mrs. Chalmawii Duhlian [A-5], her daughter Mrs. Lalrozami Duhlian [A-6] and her son-in-law Sougaijam Robindro [A-7] and after obtaining authorization letter, his police team assisted by Dy. SP Th. Brinda directly proceeded to Moreh on 04.05.2018 along with arrested accused person, namely Abdul Wahab. On reaching Moreh, they met and discussed with PW-2, Thomas Thokchom (MPS), DSP, CDO-Moreh for causing arrest of Chalmawii Duhlian, raided and cordoned her house. PW No. 1 requested two independent witnesses namely Lunkhosat Doungei and Leimapokpam Michael, who were standing nearby the house of Chalmawii to be witnesses in respect of search and warrant issued against Chalmawii and also requested Dy. SP, CDO-Moreh namely Thomas Thokchom to be a witness while searching the house. On searching their house, seized 5200 WY tablets and 100 gm of heroin powder.

[11] PW No. 2, namely Thomas Thokchom was posted as DSP CDO Moreh, on 04.05.2018, early in the morning, he got a call from the then SP Tengnoupal, Shri Ibomcha that a team of NAB PS would be coming to Moreh to make some arrests. He was told to arrange 3 (three) CDO teams including his team. The team from NAB reached CDO Complex Moreh led by the then DSP NAB, Th. Brinda. When they searched the House of one Mrs. Chalmawii Duhlian [A-5], some material objects were seized from her possession including one MI mobile handset, one Samsung mobile handset, one MI handset, one SBI Bank passbook in the name of one Mrs. Lalrozami Duhlian, one UBI Cheque-Book in the name of Lalrozami Duhlian, one UBI Cheque Book in the name of Chalmawii Duhlian. Further, the search was going on to the house of one Mr. Robindro and his wife Lalrozami Duhlian. From their house, some drugs were recovered and found in a polythene, there were 3 (three) more polythene bags containing 16, 6 and 4 packets of WY tablets. Each packet contained about 200 WY tablets. In total, it was 5200 tablets and 25 grams of heroin were also recovered.

[12] PW No. 3, namely Leimapokpam Michael, is one of the seizure witnesses at the time of search and seizure of huge quantities of WY tablets and heroin No. 4 from the unauthorized possession of the accused No. 6 at the residence of the present accused No. 6 & 7. In the cross-examination, PW-3 stated that he put signatures on seizures memo Ext.P-16, P-17 & P-18 at NAB PS at Imphal and never visited Moreh in his life. However, he was not declared as hostile and another independent witness Lunkhosat DOUNGEL was not examined as PW by the prosecution.

[13] PW No. 4, namely W. Lukhoi Singh, Scientific Officer, Chemistry at FSL Pangei, received one sealed paper envelope bearing Memo No. 18/B/NABPS/2018/EXP/30 dated 16.04.2018 through one special messenger, I. Chittaranjan Singh, SI NAB PS. On the same day, it was put up to their Director, FSL, Pangei to do the needful and the same was endorsed to him for conducting examination of their exhibit containing in the case FIR No. 30(4)2018 NAB PS U/S 22 (c)/62/60(3) NDPS act. On 21.04.2018, the sealed envelope was opened with his Assistants to conduct examination of the sample. It was found to contain 1 (one) sealed yellow paper envelope and in this envelope, one plastic packet was found to contain 500 WY tablets. Chemical Test of the samples were conducted in 3 (three) chemical reagents: (i) Marquise Reagent, (ii) Mandelin's Reagent and (iii) Confirmatory Test for amphetamine. By chemical test, it confirms the samples were amphetamines and which later confirms to be WY tablets and positive result for heroin powder.

[14] PW No. 5, namely Shri Ningthoujam Devdas Singh, SI of Manipur Police, who was posted at Nambol P.S. as 2nd O.C. On 14.06.2018, when he was serving as SI, he took over the present case as the 2nd IO as the first IO, namely M. Suraj Singh was transferred from NAB PS and as soon as he took over the case record, he went through the whole case records. On 11.08.2018, he collected the expert opinion which was sent to the FSL, Pangei by his predecessor. Both the results gave positive result of Amphetamine and heroin No. 4. After receiving the expert opinion report, he consulted his superior officer and started preparing for filing charge sheet under

Sec.173 Cr.PC. After completion of investigation, he prepared the final charge sheet and on 11.11.2018 he submitted the same to the then OC, NAB who further forwarded to the Director, Prosecution for taking further step for submission before the Special Court (NDPS), Manipur for the trial and disposal of the case.

[15] After hearing both the parties at length, learned Special Court (ND&PS), Manipur passed the conviction order dated 27.11.2020 against A-6 & A-7 and vide order dated 07.12.2020 awarded the sentences.

[16] Mr. H. Kenajit, learned counsel for the appellants challenged the order of conviction on seven main grounds, namely, (i) Non-compliance of mandatory provisions of Section 41(2) & 42(1) & (2) of ND&PS Act; (ii) Seizure not established; (iii) Expert did not support the seized items as claimed by PW-1; (iv) Difference in the weight and number of tablets; (v) Basis of the investigation not established; (vi) Important witnesses not produced; and (vii) Trial Court erred in applying law and introduced facts not stated by PWs.

[17] Firstly, it is vehemently argued by Mr. H. Kenajit, learned counsel for the appellants that there is non-compliance of the mandatory provisions of Sections 41 and 42 of ND&PS Act. As per the deposition of PW-1: SI Mutum Suraj, first IO of the case, on the disclosure of Abdul Wahab [A-4], Mrs. Chalmawii Dulkan [A-5] was involved in the present case. On her [A-5] further disclosure statement, her son-in-law S. Robindro Singh [A-7] and her daughter Mrs. Lalrozami Dulkan [A-6] were also involved in the present case. A-5, A-6 and A-7 were all arrested on 04.05.2018 at

Moreh vide Exts. P-11, P-12 & P-13 respectively. It is pointed out that information of involvement of A-6 & A-7 could not have been received prior to arrest of A-5 on 04.05.2018. Mr. H. Kenajit draws the attention of this Court to Authorization to search premises u/s 41(2) of ND&PS Act dated 03.05.2018 [Ext.P-7] issued by SP/NAB to PW-1 to search the premises of A-5, A-7 & A-6. It is stated that information with respect to involvement of A-6 & A-7 on 03.05.2018 is impossible, as A-5 was arrested on 04.05.2018. It is submitted that house search authorization against A-6 & A-7 is not established. Further, the documents for recording the information received by SP/NAB under Section 41 of Act were not produced. As per PW-1, on disclosure of A-4 on 08.04.2018 at 1730 hours, the seized drugs were sent to A-4 by A-7 from Moreh. A-4 was arrested on 01.05.2018 vide Ext. P-10. It is stated that PW-1 did not comply the provisions of Section 42(1) & (2) of the Act for his failure to take down such information from A-4 in Ext.P-7 and to send a copy within 72 hours to his immediate superior. No document is produced in this regard. It is stated that Ext.P-7 is forged and inadmissible with respect to information of involvement of A-6 & A-7, as the same was prepared on 03.05.2018 before having information on 04.05.2018 from A-5. Learned counsel emphasises that there is complete non-compliance of mandatory provisions of Sections 41 and 42 of ND&PS Act and the trial is vitiated.

[18] Reliance is placed on the decision of **State of Punjab v. Balbir: (1994) 3 SCC 299 @ Pr 25**, where Hon'ble Supreme Court held the provisions of Section 41(2) and Section 42(1) & (2) of ND&PS Act are mandatory in nature and contravention of the same would affect the prosecution case and vitiate the trial.

Reference is also made to the Constitution Bench judgement of the Hon'ble Supreme Court in the case of **Karnail Singh v. State of Haryana: (2009) 8 SCC 539 @ Pr 35** holding that normally the requirement of writing down the information received and sending a copy to the superior officer under Sections 42(1) and 42(2) of the Act should precede the entry, search and seizure by the police officer. But in special circumstances involving emergent situations, recording of information and sending a copy to superior officer may be postponed for a reasonable period even after search, entry and seizure. It is further held that total non-compliance is impermissible, whereas delayed compliance with satisfactory explanation will be acceptable. Learned counsel cites case laws reported as **2012 CrilLJ 1855 (All)**, **1996 LegalEagle (Bom) 458** and **(2004) 12 SCC 201** on the same proposition of non-compliance of Section 42 of the Act. It is submitted that entry, search and seizure made at the residence of A-6 & A-7 are in contravention of the mandatory provisions of Section 41 and Section 42 of ND&PS Act. Accordingly, the trial is vitiated and conviction cannot be sustained on this ground alone.

[19] Secondly, Mr. H. Kenajit, learned counsel for the appellants submits that the seizure of the drugs was not established beyond all reasonable doubt. The house of A-6 & A-7 is double storied. In the seizure memo Ext.P-17 of drugs and other materials from A-6, neither PW-1 nor PW-2 mentioned the exact location or part of the house where the contrabands were seized. PW-3: Leimapokpam Michael is one of the independent witnesses to the seizure memos Ext.16, Ext.P-17 & Ext.P-18 and arrest memos Ext.P-11, Ext.P-12 and Ext.P-13 at Moreh. He stated in cross-

examination that he put his signatures on Ext.16, Ext.P-17 & Ext.P-18 at NAB/PS, Imphal and never visited Moreh, Tengnoupal District in his life. PW-3 was not declared hostile by the prosecution. The seizures are not proved. It is stated that materials seized during illegal search in violation of Section 50 of the Act and cannot raise presumption of unlawful conscious possession of the contraband by the accused. Learned counsel cites the case laws of **State of Punjab v. Baldev Singh: (1999) 6 SCC 172**; **Kashmir Singh v. State of Punjab: 2006 SCC OnLine P&H 307 (FB)**; and **Eze Val Okeke @ Val Eze v. NCB: 2004 Legal Eagle (Del) 1087** in this regard. Independent witness, ie, PW-3 did not support the official witnesses and other independent witness Lunkhotsat Doungel was not examined.

[20] Reference is made to the decision in the case of **Union of India v. Jarooparam: (2018) 4 SCC 334 @ Pr.12** holding that when independent witness did not support the prosecution story and inconsistent statements will vitiate the trial. It is stated that official witness PW-2 (DSP, who was part of the raiding party and claimed to be Gazetted Officer) alone cannot establish and prove the seizure memos. In his examination-in-chief, PW-2 stated that 5200 tablets and 25 gm of heroin were recovered and he put his signatures in all seizure memos and arrest memos and in all extracted contrabands. It is submitted that deposition of PW-2 is contradictory to seizure memo, Ext.P-7 where 100 gm (25+10+65) of heroin powder was recovered from the possession of A-6. Hence, PW-2 did not corroborate Ext.P-17 and the statement of PW-1 of recovery and seizure of 100 gm of heroin powder from the possession of A-6.

[21] Thirdly, Mr. H. Kenajit, learned counsel for the appellants has submitted that the expert witness did not support the seized items as claimed by PW-1. As per deposition of PW-1, he prepared the sample from the seized contrabands by dividing it equally meaning thereby that no homogeneous mixture of alleged seized contraband was prepared. There is a difference in the weight of the seized contraband (100 mg) and the weight of the sample received by expert (102 mg). It is stated that this creates a doubt whether the contraband allegedly seized by from the possession of the appellants and the sample received by the expert is of different kind and weight. In seizure memo Ext.P-17, each WY tablet weighs 100 mg without indicating any colour, shape and marking. However, in examination report Ext.P-35, samples marked as A1 and B1 both contain 16 round and red colour tablets each, having logo of '1' on one side and '88' on reverse side each weighing 102 mg. Sample marked as C1 contains 6 round and red colour tablets each, having logo 'WY' on each tablet weighing 102 mg. However, in Ext.P-17 such marking, colour, shape and logo are not mentioned by PW-1 creating a doubt on the seizure and sample sent to FSL.

[22] In the case of **Narayan Velichappada v. Sub Inspector of Police: 2007 Legal Eagle (Ker) 2863= 2007 (4) ILR(Ker) 694**, the sample of seized contraband sent for analysis, Ext.P-5 is arrack and as per chemical report Ext.P-6, the sample received is two bottles of Karnataka arrack. There is difference between arrack distilled in Karnataka and Kerala. The quantity mentioned are also different. Two bottles of 375 ml and 350 ml were sent for analysis and as per chemical report, sample contained 300 ml of Karnataka arrack. It was held that such evidence is not legally

acceptable and accordingly acquitted the accused. Referring to this case, Mr. H. Kenajit, learned counsel for the appellants submits that in the present case also, the seized contrabands and the sample sent for testing are different in shape, size, colour and logo. Hence, the chemical analysis report Ext. P-35 cannot be used for conviction of A-6 & A-7 as such evidence is not legally admissible.

[23] Fourthly, Mr. H. Kenajit, learned counsel for the appellants has raised the question of difference in the weight and number of tablets. PW-1 has stated that packet containing 3200 WY tablets is marked as 'A' and took out 32 tablets from it for sampling, ie, Mark 'A' contains 3168 tablets; packet containing 88 tablets is marked as 'B' and took out 8 tablets from it, ie, Mark 'B' contains 792 tablets; and packet containing 1200 tablets is marked as 'C' and took out 12 tablets from it for sampling, ie, Mark 'C' contains 1188 tablets. Likewise, one blue colour soap case weighing 25 gm of heroin powder is marked as 'D' and took out 2 gm from it for sampling, ie, Mark 'D' contains 23 gm of heroin powder; one pink colour soap case weighing 10 gm of heroin powder is marked as 'E' and took out 2 gm from it for sampling, ie, Mark 'E' contains 8 gm of heroin powder; and one transparent polythene packet weighing 65 gm of heroin powder is marked as 'F' and took out 2 gm from it for sampling, ie, Mark 'F' contains 63 gm of heroin powder. Marks D, E & F contain 94 gm of heroin powder in total after drawing of samples. However, during the trial 250 WY tablets were found missing and only 85 gm of heroin powder was found. It is stated that the difference in the weight of alleged seized heroin powder and number of tablets and those produced before the court creating serious doubt as to whether any contraband was actually

seized from the house of the appellant. OC, NAB/PS never turned up before the court to explain the missing contrabands in spite of specific direction in this regard. Relying on the decision of **Narayan Velichappada (supra)**, it is submitted that the conviction of A-6 & A-7 could not be sustained.

[24] Fifthly, it is stated that the basis of the investigation is not established. The present case has been initiated on the complaint made by one Major Rishab Jung of 23 Assam Rifles upon seizure of one lakh pieces of WY tablets from a cruiser vehicle at Kamai, Tamenglong. The FIR and the complaint were never proved by any of the witnesses including the IO of the case. Mr. H. Kenajit, learned counsel for the appellants submits that there is no basis for prosecuting the appellants. He refers to the decision of **N Chandrasekhar Nair v. State [Kerala High Court: Crl. Appeal 148 of 2000(A) order dated 23.12.2015]: Indiankanoon.org/doc/112636475/**, it was held that when investigation in a case proceeded on the basis of a FIR regarding commission of a cognizable offence, the complainant or any person who knows the facts must be examined to prove the complaint. On failure to do so, the prosecution must collapse necessarily and the accused is entitled for acquittal. It is stated that on failure to examine the complainant Major Rishab Jung and non-exhibition of FIR during the trial is fatal and A-6 & A-7 are entitled for acquittal.

[25] Sixthly, Mr. H. Kenajit, learned counsel for the appellants has highlighted the effect of non-production of important witnesses. It is stated that the prosecution has failed to produce two important witnesses to prove the seizure of the contrabands [Ext.P-17] from the appellants. Independent eyewitness listed at Sl. No. 24, namely

Lunkhosat DOUNGEL and unlisted witness, namely SI Ph. Bulbul of NAB/PS, who delivered the samples to FSL were not examined by the prosecution. Non-examination of SI Bulbul has created a doubt on the genuineness of Ext.P-33, the acknowledgement receipt of case exhibits from him by FSL. It is also submitted that independent witness Lunkhosat DOUNGEL should have been produced to prove the seizure of the contrabands [Ext.P-17] from the appellants when the other independent witness PW-3 denied having visited and signed at Moreh. SI Ph. Bulbul should also be examined to prove that the sample of alleged seized contraband was not tampered and the seized sample was actually sent for testing. Attention is drawn to the provisions of Section 114(g) of the Evidence Act of adverse inference against the person who withholds important evidence. Reliance is placed on **Prabhat v. State of Maharashtra: (2013) 10 SCC 391 @ Pr.11** where Hon'ble Supreme Court held that non-examination of injured witness and its non-explanation is not a minor discrepancy and is a serious flaw in the prosecution story entitling acquittal of the accused in the trial.

[26] Seventhly, it is pointed out wrong application of law and introduction of facts not stated by the witnesses by the Trial Court. It is stated that the case laws referred by the Trial Court while convicting the appellants are not applicable in the present case as the facts in those cases are different. In those cases, IO tried to get independent witnesses and none were willing to do so and as such independent witnesses were not present as seizure witnesses. Accordingly, the police witnesses were believed by the court. In the present case, out of the two independent seizure

witnesses, PW-3 did not support the seizure during the cross examination and other independent witness was not examined to corroborate the prosecution story. Examination of PW-2, a police officer of the raiding party, could not corroborate and prove the seizure of contrabands from the appellants, vide Ext.P-17. It is also emphasised that the trial Court has wrongly presumed that seizure of the alleged contrabands from A-6 was at the instance of A-7, while in fact none of PWs stated so. As bodies of the searching party by authorised persons was not done before entering dwelling house, the required formalities of the search were not followed. Moreover, PW-2 did not corroborate the quantity of seized contrabands as he stated seizure of 5200 WY tablets and 25 gm of heroin powder from the possession of A-6. As per PW-1 and Ext.P-17, the seizure of 5200 WY tablets and 100 gm of heroin powder were recorded. PW-2 claimed himself as a Gazetted Officer in police uniform, but he was present there as a raiding party [(2014) 5 SCC 345]. In the case of **ASSO v. State of Madhya Pradesh: (2011) 14 SCC 448**, it was held that when prosecution witness is not declared hostile and completely dislodging the prosecution case, it amounts to the prosecution accepting the testimony of such witness. It was further held that this fact can be relied upon, in addition to other facts, to acquit the accused. Mr. H. Kenajit, learned counsel for the appellants submits that PW-2 & PW-3 have not been declared hostile and non-examination of another independent witness would establish that the seizure of the contraband from the possession of the appellants is not proved. It is prayed that the conviction of the appellants be set aside.

[27] Per Contra, Mr. Y. Ashang, learned PP has refuted the allegation of non-compliance of mandatory provisions of Sections 41 and 42 of ND&PS Act. It is stated that the Authorisation letter dated 03.05.2018 under Section 41(2), ie, [Ext.P-7] for house search of A-5, A-6 & A-7 was not forged, as the same was prepared on the basis of disclosure of A-4 who was arrested on 01.05.2018. The provisions of Section 42 is not applicable. It is also pointed out that the IO of the case submitted the full report dated 05.05.2018 of arrest and seizure of the accused person on 04.05.2018 [Ext.P-1] to the SP/NAB PS within 48 hours as stipulated u/s 57 of the Act. Reliance is placed on the decisions reported as **(2003) 8 SCC 449, (2000) 1 SCC 329, (2008) 8 SCC 313** regarding applicability of Sections 41 and 42 of the Act.

[28] Learned PP has stated that both A-6 and A-7 never denied house search in their statement recorded u/s 313 CrPC. They also did not deny seizure of the contrabands from their possession and their signatures on Ext.P-17 and Ext.P-18. The double storied building belongs to both A-6 and A-7 and any seizure would be from their conscious possession. Moreover, the seized non-contraband items were taken on zima by the appellants. It is submitted that the appellants cannot deny the seizure memos, Exts.P-17 & 18. It is stated that Section 50 of the Act is not attracted in the present case. Learned PP refers to the following cases regarding the seizure, namely, **(1979) 4 SCC 274, (2015) 6 SCC 222 and (2011) 3 SCC 521**.

[29] Regarding non-exhibition of FIR, learned PP explains that the FIR is not disputed by any of the parties during the trial. However, chargesheet is exhibited as Ext.P-37 and it is submitted upon completion of the investigation on the basis of the

FIR. It is stated that the trial is not affected by such act. Reliance is placed on the cases reported as **(1972) 3 SCC 280** and **(2010) 10 SCC 374** to highlight that FIR is not a substantial piece of evidence and its non-exhibition is not fatal.

[30] Learned PP submits that the credibility of the police witness cannot be questioned on ground of simply being policeman and deposition of PW-2 cannot be discarded with regard to proof of seizure memos Exts.P-17 & 18 for recovery of contrabands from A-6 & A-7. Reference is made to the decisions reported as **AIR 2014 SC 394** and **(2015) 17 SCC 554 @ Pr.11**. It is pointed out that all listed witnesses are not required to be examined as held in **(2010) 10 SCC 374** and **(2017) 1 SCC 529**. It is submitted that no adverse inference could be drawn against the prosecution due to non-examination of all witnesses.

[31] Mr. Y. Ashang, learned PP has further submitted that there is no lapse in sending the samples to FSL. The IO did not mention the colour, shape and logo of the contrabands in the seizure memo Ext. P-17. The samples were sent to the FSL with forwarding letter dated 05.05.2018 [Ext.P-31] and was duly received intact by FSL vide acknowledgement dated 05.05.2018 [Ext.P-33] and Chemical Report dated 09.07.2018 [Ext.P-35] gave positive findings of methamphetamines and heroin powder. Missing of some of the remnants of the sample is not fatal to the prosecution case. It is also averred that minor contradictions, omissions and discrepancies would not discredit the prosecution witnesses as held in **AIR 2014 SC 394**. Finally, it is prayed that the appeal be dismissed being devoid of merit.

[32] This Court has considered the rival submissions made at bar, the case law cited, the materials on record and the impugned order of conviction.

[33] This Court is of opinion that non-exhibition of FIR and non-examination of the complainant will not be fatal so as to vitiate the trial, as the chargesheet and other relevant materials are exhibited. Minor contradiction and discrepancies will not affect the trial.

[34] It is the settled proposition of law as held in the cases of **Balbir Singh (supra)** and **Karnail Singh (supra)** that the provisions of Section 41(2) and 42 of ND&PS Act are mandatory. Under Section 41(2) only the empowered officer can give authorisation to his subordinate officer to carry out the arrest of a person or search the premises as mentioned therein. The information received has to be recorded. Under Section 42(2) the empowered officer who takes down such information as per Section 42(1), shall forward forthwith a copy of such writing to his immediate superior. Total non-compliance is impermissible but any reasonable delay in forwarding may be condoned.

[35] In the present case, as per deposition of PW-1, the involvement of A-5 was disclosed by A-4 and then A-5 disclosed the involvement of A-6 & A-7. As per Ext.P-10, A-4 was arrested on 01.05.2018 and A-5, A-6 & A-7 were arrested on 04.05.2018 vide Exts.P-11, 12 & 13 respectively. But Ext.P-7, the authorization to search premises of A-5, A-6 & A-7 u/s 41(2) of the Act was issued by SP/NAB PS on 03.05.2018. There is contradiction in Ext.P-7 with the deposition of PW-1, because

the involvement of A-6 and A-7 was disclosed by A-5. Since A-5 was arrested on 04.05.2018 as per Ext.P-11, the information for authorisation of house search with respect to A-6 & A-7 could not be taken down on 03.05.2018, a day prior to the arrest of A-5. Moreover, the writing of the information so received by the SP/NAB PS and by the IO were not produced and the same is in contravention of the mandatory provisions of Section 41 and Section 42 of ND&PS Act. This Court is of opinion that Ext.P-17, authorization of house search u/s 41(2) with respect to A-6 & A-7 does not satisfied the rigour of the statute. This alone will vitiate the trial.

[36] The seizure memos Exts.P-17 & 18 of recovery of the contrabands and other items are not duly proved by the prosecution. Independent seizure witness PW-3 has admitted that he signed Exts.P-16, 17 & 18 at NAB PS, Imphal and he never visited Moreh in his life. Admittedly, the seizures were made at Moreh. PW-3 did not corroborate the seizures. The other independent seizure witness namely, Lunkhosat DOUNGEL was not examined to prove the seizures and no explanation was given for this lapse. The non-examination of the vital witness will cast a shadow of adverse inference against the prosecution and he cannot substitute the role of independent witness. Examination of police witness PW-2, who was a member of raiding party will not improve the case of the prosecution. Taking of the non-contraband items from seizure memos by the appellants will not amount to the admission of recovery contraband items, as the prosecution has to prove such seizure in a proceeding under a stringent statute. PW-2 did not support the seizure of 100 gm of heroin powder in Ext.P-17 and he stated about recovery of 25 gm of heroin powder. This Court is of the

opinion that the seizure memos Exts.P-17 &18 are not proved beyond all reasonable doubt.

[37] There are difference in the samples of seized contrabands and the samples sent for examination to FSL. In Ext.P-17, the colour, shape logo are not mentioned. But, the sample examined at FSL described colours, shape and logo. The sample contraband of WY tablets sent to FSL weighs 100 mg each while the sample tested at FSL weighs 102 mg each. There is a dispute whether the sample sent was really examined or not due to these unexplained discrepancies. The only conclusion possible is that what is examined is the not the sample sent for testing. Accordingly, it is held that the positive test result of FSL, Ext.P-35 cannot be relied to convict the appellants.

[38] From the above discussions, this Court is of the considered opinion that there are serious lapses in the prosecution case and non-compliance of the mandatory statutory provisions and the conviction of A-6 & A-7 cannot be sustained in the eye of the law. The accusations against the appellants are not proved beyond all reasonable doubts.

[39] Accordingly, the judgment & order of conviction dated 27.11.2020 passed by learned Judge, Special Court (NDPS), Manipur in Special Trial Case No. 13 of 2019 and the order on sentence dated 07.12.2020 are set aside. Appeal is allowed. The appellants be released from custody, if not required in any other case.

[40] Send a copy of this order to learned Judge, Special Court (NDPS),
Manipur for information.

JUDGE

FR/NFR

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