

**IN THE SPECIAL COURT OF ND&PS ACT
CRL.TR.(EX) 1054/2013**

Ref: Excise Case no. N-159/13, u/s 21(b) of ND&PS Act 1985

State of Mizoram	Complainant.
	Vs.	
Malsawmdawngliani D/o Hranghlira w/o Ramhlunthanga, Bawngkawn, Lunglei Rd.	Accused
For the State	Lalchhandama, Addl.PP Lalrinpuii, A.P.P.
For the accused	M.Zothankhuma, Advocate.

***BEFORE
LUCY LALRINTHARI
JUDGE***

1. The accused person Malsawmdawngliani has been facing trial in connection with the above criminal case in connection with seizure of 9.5 grams of Heroin and the court deliver the following judgment.

2. The prosecution story of the case in brief is that on 11.6.2013 at 8.00 AM at Forest Check Gate, Zemabawk, Inspector Malsawmkima seized 9.5 grams of yellowish powder suspected to be Heroin kept in 2 (two) pet bottles and in connection with the said seizure he arrested Malsawmdawngliani (41) d/o Hranghlura of Bawngkawn Lunglei Road, Aizawl.

In this regard, the seizing Officer submitted a report to the O/C, anti-Narcotic Squad, Aizawl, and a case Ex-N-159/2013 Dt. 1.6.2013 u/s 21(b) of ND & PS Act '85 was registered against the said accused person and the O/C endorsed the case to S.I. Lalnghahmawii for further investigation.

During the course of her investigation, Case I/O sent samples of the seized article to the FSL Mizoram for chemical examination. She also examined the accused person as well as the available witnesses and her investigation revealed that the seized articles were recovered from the possession of the said accused Malsawmdawngliani, and she meant it for sale. It is also learnt that accused Malsawmdawngliani bought 20 (twenty) cans of Heroin from Tiau, Myanmar at the

rate of Rs 1500/- per can. Case I/O also received FSL report from FSL Authority, Aizawl and the report confirmed that the seized article was heroin of 71.57% purity.

Therefore, having found a prima facie case well-established u/s 21(b) of ND & PS Act 1985 against the accused Malsawmdawngliani he submitted charge-sheet against her under the above section of law for violation of section 8(c) of the same Act.

3. As per procedure u/s 207/208 of Cr.P.C. all the excise reports and its connected papers were furnished to the accused and advocate M.Zothankhuma is appointed to defend the accused at the state's expense u/s 304 of Cr.P.C.

4. After hearing the Id. Addl.P.P. and the Id. Counsel for the defence, Charge u/s 21(b) of the ND & PS Act is framed, read over, and explained to the accused in her known language/vernacular language to which the accused pleaded not guilty to the charged frame against her and claimed for trial.

5. In order to prove the charged against the accused the prosecution examined as many as three witnesses out of a total of five witnesses listed. The followings are the evidences adduced.

EVIDENCES ADDUCED.

6. PW 1 is Shri. Lalkunga, Tuikual, he identified the accused and stated that on 11.6.2013 at around 5 AM Inspector Malsawmkima and party conduct checking at Lunglei road, near Forest Check Gate Zemabawk. In the meantime they also checked sumo and their passengers plying from Zokhawthar. So, Constable Saiengpuui Sailo checked the present accused person in the bathroom of Forest Checkgate, whom they suspected to be keeping illicit article. Consequently, she recovered two bottles containing suspected heroin from the accused person. Thereafter, Inspector Malsawmkima seized and takes sample of the SA and he arrested the present accused person. The seizing officer also weighted the SA and it was 9.5 grams. He also stood as one of the witness and he put his signature on the body of seizure memo. Exbt.P-1 is seizure and arrest memo and exbt.P-1 (a) is His signature. Exbt.M-1 is the seized article produced before this court. Exbt.M-1(a) is his signature.

On cross-examination he stated that he cannot say for sure as to whether the Excise officer appraised the accused person her right to be searched before Magistrate or a Gazetted officer. It is a fact that in the seizure index no seal or signature of the Magistrate is found. It is a fact that he was present along with the seizing officer at the time of seizure and arrest. It is a fact that the said sumo was fully

occupied by passengers who are not Excise or Mizoram police or any para-military forces. It is a fact that he did not see the signature of the accused in the seizure index.

7. PW 2 is Lalnghahmawii, SI of Excise, she identified the accused and stated that on 11.6.2013 at around 8 AM, Inspector Malsawmkima seized 9.5 grams of yellowish powder suspected to be heroin kept in two pet bottles from the possession of the accused at Forest check gate, Zemabawk. The case was registered as Exn. c/no. 159/13 dated 11.6.2013 u/s 21(b) of ND&PS Act. The case was endorsed to her for further investigation. During her investigation she prepared test memo for examination of the sample of the seized article. She also examined the seizing officer and the accused and she also examined other reliable witnesses and she recorded their respective statements. The accused stated to her that the seized article had been purchased by her from Tiau at the rate of Rs. 1500 per can as such she tried to sell at higher price. While she was trying to sell the seized article the excise personnel seized the articles at Zemabawk. Thereafter, she received FSL report they are found to be heroin of 71.57 % purity. Hence, she found prima facie u/s 21(b) of ND&PS Act against the accused person and she submitted complaint accordingly. Exbt.P-2 is complaint submitted by her and exbt.P-2(a) is her signature.

On crossed-examination the case I/O stated that all the statements that she had taken from the accused, witnesses, seizing officer are all true and correct. It is not a fact that there was no seizure of any can by the excise. She was not a party to the seizing party. She was not present in the Forest Check Gate, Zemabawk at the time the accused was searched and apprehended by the Excise. She was made the case i/o in the afternoon of 11.6.2013. It is wrong to suggest that the present case is fabricated case. She did not remember when she recorded the statements of the witnesses. It is a fact that she did not record the statement of the seizing officer. It was she who sent the sample of the SA to the FSL. She sent only one sample of the SA to the FSL and the report of the FSL was with regard to only one sample. She was not present at the time the SA was weighed or at the time the sample was taken. She did not know from which of two pet bottles, the samples of the SA was taken. However, as per their practice, they usually mixed the SA from the different pet bottles and take samples from the mixed SA. She did not know if either of the pet bottles contained any other substance not being heroin. It is a fact that she was not present at the time the SA was sealed. It is not a fact that she deposed falsely in the court today.

8. PW 3 is Malsawmkima, SI of Excise. He identified the accused and stated that on 10.6.2013 as per reliable information received by Excise and Narcotic they performed duty at Forest check gate Zemabawk at around 6 AM on the following day. The information stating that some quantity of illicit article being transported from Zokhawthar maxi cab service. On that particular morning they checked about 10 maxi

cabs coming from Champhai and Zokhawthar. At around 8 AM they also checked one maxi cab plying from Zokhawthar they checked the maxi cab and its passengers, in the meantime the present accused was being checked by one of the female constable and she found suspected heroin from her physical possession. Thereafter he take weighment of the seized article, it was 9.5 grams. He also seized the said article in presence of two witnesses. After sometime he took sample of the seized article and he packed and sealed in presence of two witnesses. Hence, he submitted the report to the O/C, Excise and Narcotic on the same day. Exbt.P-1 is seizure and arrest memo, exbt.P-1(b) is his signature. Exbt.P-3 is report of seizure and arrest, exbt.P-3(a) is his signature. Exbt.M-1 is the seized article, Exbt.M-1(b) is his signature.

On cross-examination he stated that he did not put down in writing the information he had received that illicit articles were going to be transported from Zokhawthar by maxi cab service. The accused was searched by Saiengpuui Sailo, witness no.2, who is excise constable. The other witness Lalkunga is also a constable in the excise department. He did not write down grounds of belief before stopping and checking the maxi cab. He did not know and also did not record the number of the maxi cab in which the accused was travelling. It is wrong to suggest that the accused was not travelling in a maxi cab.

It is a fact that when Saiengpuui Sailo searched the accused, the searched was carried out without him being able to see the same. He did not believe that the seized article was not seized by Saiengpuui Sailo from the accused. It is wrong to suggest that this is a fabricated case. The name SI Lalnghahmawii with regard to case i/o as recorded in exbt.M-1 was not written by him. The weighment and sample of the SA was taken by him at the PO. The weighment was taken after mixing the SA from the two pet bottles. Only one sample was taken by him from the mixed SA. It is not possible for either of the pet bottles not to contain heroin. He did not conduct any test before mixing the SA. However, from his experience and sight he could notice that both the pet bottles contained heroin.

It is a fact that he did not ask the accused whether she wanted to be searched before a Magistrate or a Gazetted officer. It is not a fact that he deposed falsely in the court today.

9. After the prosecution evidence is closed, the accused is examined u/s 313 of Cr.P.C. The following is the question and answers given by the accused.

Q 1. It is in evidence that you boarded Sumo(Maxi Cab) Champhai to Aizawl on 11.6.2013, What do you say?

Ans:- Yes, I boarded Night Sumo Service- Champhai to Aizawl on 11.6.2013.

Q 2. It is in evidence that the vehicle (Sumo Service) boarded by you was stopped at Forest Check Gate at Zemabawk at about 8:00 AM on 11.6.2013 by Excise personnel. What do you say ?

Ans:- Yes, the Excise personnels stopped the sumo at Forest Check Gate, Zemabawk.

Q 3. It is in evidence that you concealed two plastic bottles containing heroin at your thighs (kapkar), what do you say?

Ans:- The plastic bottles were not recovered from my possession, but on the ground near the place where I urinated.

Q 4. It is in evidence that you told the case I/O that you have purchased the seized heroin from Tiau at the price of Rs 30,000/- What do you say?

Ans:- No, the seized article does not belong to me.

Q 5. Do you have any other thing to say before the court?

Ans:- The seized article does not belong to me. It was seized near the bath-room.

Q 6:- Do you want to adduce defence evidence?

Ans:- No.

A R G U M E N T S

10. Heard the Id. P.P as well as the Id counsel for defence. The Id. Counsel for defence submitted that the prosecution failed to bring home the charge against the accused. Sumo Service is a passengers vehicle and the investigating agency did not obtained search warrant before searching the vehicle not, did they write down their grounds of belief before searching the vehicle. This is against the mandatory provision of section 42 and 50 of the ND + PS Act. While searching the body of the accused, she is not asked if she wanted to be searched before the Magistrate or the Gazetted Officer which is the right of the accused at the time of search. Besides, there is no civilian witness at the time of search and seizure, the two seizure witness are the excise constables. As the P.O is a passenger's vehicle. There will be many civilians who can be used as witnesses, but the seizing officer did not utilized the civilians for seizure witnesses, only the constables accompanying the checking party are used as seizure witness, this created a doubt. The accused also stated that the seized article is not seized from her physical body, but from the bath room near she urinated. There are many passengers at the vehicle, and two bottles were found where the passengers urinated and the accused is simply alleged as the owner, there is no proof that the seized article belongs to the accused.

On the other hand, the Id. PP submitted that, all the pw's have stated the seized article belongs to the accused. It is very much likely that the accused saw the checking party and therefore, as an excuse to tear off the heroin she is carrying went to the bath –room and left the two pet bottles containing heroin to the bath-room. And there is no other person in the vehicle suspected of carrying the said heroin except the instant accused. Though it is true that all the witnessed are interest parties, excise personnel's, it does not mean that the accused is not guilty and therefore prayed to punish the accused as per law.

DECISIONS AND REASONS.

11. The ND & PS Act being special law, the law is very stringent. Section 41,42,43, and 50 are about seizure and arrest. In the instant case, the accused was boarding passengers vehicle. Many other passengers are available at the time of arrest and seizure. But the investigating agency did not have a single civilian witness. All the witnesses cited are the excise personnel. And this creates a doubt. The PWs stated that the seized articles are concealed in the thighs of the accused. However, the accused stated that the seized articles are seized on the ground near the bath-room where she urinated. And the seized articles did not belong to her. Had there been any civilian witness to ascertain that it was seized from the persons of accused, it would have been different. When there are many passengers and there is no civilian witnessed that the seized article are recovered from the person of the accused, and only the excise people/personnel certified that it was seized from the person of the accused. It is very doubtful.

Where doubt is created and that doubt is with regard to mandatory provisions then the benefit of doubt must go to the accused. (Kabul V. state of Rajasthan 1992 Or LJ 1491 at 1501 (Raj) When the legislation has given some safeguards to the accused persons, the prosecution agency has no right or authority to take away that right or to disobey the provisions of the act. Therefore, on non-compliance of these provisions great prejudice has been caused to the accused. Held, that in order to avoid any mischief by the investigating officer and in order to see that a fair investigation is done, these provisions have been made in the legislation. Non-compliance of several provisions of the Act creates doubt and suspicion in the fairness of the investigation

The prosecution witnesses clearly stated that they do not have a search warrant and they did not write down their grounds of belief. In interpreting the statute, the court always presume that the legislature insert every part thereof for a purpose that every part of the statute should have effect.

Hence, in the instant case, the prosecution fails to bring home the charges against the accused.

Hence, the accused is acquitted from the charge section of 21(b) of ND & PS Act 1985. Bail bond is liquidated and bailers are set free.

However. Seized article is to be destroyed immediately.

Given under my hand and sealed of this court today the 18th of July 2014.

Give copy of this order to all concern.

Sd/- LUCY LALRINTHARI
Special Judge,
ND & PS Act.

Memo No. _____ND&PS/ : Dated Aizawl, the 23rd July, 2014.

Copy to: -

1. Malsawmdawngliani C/oM.Zothankhuma, Advocate.
2. Public Prosecutor, Aizawl.
3. Superintendent, Excise Prosecution, Aizawl.
4. O/C, Excise Station, ANS, Aizawl
5. i/c Judicial Section.
6. Excise GR.
7. Guard File.
8. C.R

PESHKAR