

**IN THE SPECIAL COURT ( ND&PS ACT): AIZAWL**

Crl.Tr. Ex.No. 112/2014

Ref: CPI Ex. Case No.215/2012, u/s 21 (b) of ND&amp;PS Act '85

State of Mizoram ..... Complainant.

Vs.

Zaikungi (44)

D/o Thanghnina

R/o Kanan Veng, Champhai ..... Accused

***P R E S E N T***

For the Prosecution	.....	C.Lalremruati, Addl.PP Penlui Vanlalchawii, A.P.P.
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For the defence	.....	J.N Bualteng, Advocate
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Date of hearing & Judgment	.....	7.10.2016
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***B E F O R E******SHRI. LIANSANGZUALA, JUDGE*****JUDGMENT AND ORDER****INTRODUCTION**

This case pertains to seizure of 8 grams of Heroin. The indictment of one woman to be in possession of the seized articles. Proof of such possession.

Procedure which may be adopted. Actual search on person made at the spot. Search and Seizure Memo prepared at the station. Some inconsistencies in evidences, whether fatal. Right of an individual under Section 50 ND & PS Act vis – a – vis the power of an Officer conducting a search.

#### THE FACTS

The history of the case in brief is that on 24-10-2012 at 6:00 AM, Lalthlamuana IE seized 8 grms of brown substance suspected to be Heroin kept in 2 plastic containers on being produced to him by ASI C. Vanlalruati at Excise Office, Champhai. It was allegedly seized from accused Zaikungi D/o Thanghnina, Kanan Veng, Champhai. He submitted a report of seizure and arrest to the O/C and the case was investigated into. During investigation, the case I.O found a prima facie case u/s 21 (b) of ND & PS Act for violation of Section 8 (c) of NDPS Act 85 for possession and transport and of heroin. He charged the accused accordingly and sent the accused persons to Court for trial.

#### PRESENT

The accused Zaikungi on bail is present. The learned Addl. PP C. Lalremruati assisted by learned APP Penlui Vanlalchawii are present. The learned Defence Counsel J.N. Bualteng is also present.

#### OPENING OF CASE

The learned Addl. PP open the case stating that the accused Zaikungi D/o Thanghnina, Kanan Veng, Champhai was arrested for an illegal possession and transportation of 8 grms of brown substance suspected to be Heroin kept in 2 plastic containers and she was charged u/s 21(b) of ND & PS Act for violation of 8 (c) of the same Act.

The Id. Addl. PP proposed to prove the case against the accused with the help of the evidence of list of witnesses submitted in the charge sheet and documents submitted in favour of the prosecution which were proposed to be taken in evidence in the course of trial.

#### CONSIDERATION OF CHARGE

Upon considering the case record and after hearing the accused and the Id. D/L and the prosecution, there appears reasonable ground for presuming that the accused has committed the offence.

The ramification and implications of pleading guilty was explained to the accused.

After the above explanation, charge u/s 21(b) of ND & PS Act is framed, read over and explained to the accused person Zaikungi in the language known to her to which she pleaded 'Not Guilty'.

#### EVIDENCE FOR THE PROSECUTION

The prosecution then led their evidences.

P.W. NO. 3 Inspector Lalthlamuana ENS Champhai identified the accused person and deposed that on 24.10.2012 at 6 am after preparing grounds of belief, he arrested the accused Zaikungi for illegal possession of suspected heroin kept in 2 plastic containers which were recovered from her trouser waist. He took weightment of S/A which was 8 grms. He drew sample, packed and sealed at the spot. He prepared seizure and arrest memo, report of seizure and arrest and he submitted the same to the OC for further investigation. He exhibited the grounds of belief, seizure and arrest memo, report of seizure and arrest, the seized articles and his signatures on them.

During cross examination, he admits that he arrested the accused at their office which was produced by their staff. That he had not obtained warrants of arrest and search warrant. That there was no civilian witnesses while the arrest was made. That he prepared a sample and weightment at their office. That after recovering the seized article, they mixed it up in one pack and sample was drawn from the same article. That after packing and sealing, he submitted the report of seizure along with sample drawn to the OC. He denied deposing falsely in the court.

P.W. NO. 1 C.Lalmuanpuia Excise Champhai identified the accused person and stated that on 24.10.2012, they were on duty covering Mualkawi area and were conducting search on vehicles coming from Zokhawthar and ASI C.Vanlalruati recovered 2 plastic containers containing suspected heroin from the trouser waist of the accused Zaikungi and they produced her at Excise Station, Champhai and she was arrested by Inspector Lalthlamuana as there was no lady officer to make arrest. Weightment was taken which was 8 gms, sample was drawn, packing and sealing were also done at the station in presence of the accused and he put his signature on the seizure and arrest memo as one of the

witnesses. He exhibited the seizure and arrest memo and his signature on it and the seized article. On cross examination, he admitted that the accused Zaikungi was arrested by a male Excise Officer whose name is Inspector Lalthlamuana. That while making recovery of the S/A there were no civilian witnesses. That he had not put his signature in the exbt.M-1. He did not recollect the colour of the suspected heroin recovered by seizing officer. He denied deposing false before the Court.

P.W. NO. 2 H. Rampanliana Constable of Excise identified the accused person and stated that on 24.10.2012, they were on duty covering Mualkawi area and were conducting search on vehicles coming from Zokhawthar and ASI C.Vanlalruati recovered 2 plastic containers containing suspected heroin from the trouser waist of the accused Zaikungi and they produced her at Excise Station, Champhai and she was arrested by Inspector Lalthlamuana as there was no lady officer to make arrest. Weighment was taken which was 8 gms, sample was drawn, packing and sealing were also done at the station in presence of the accused and he put his signature on the seizure and arrest memo as one of the witnesses. He exhibited the seizure and arrest memo and his signature on it and the seized article. On cross examination, he admitted that the accused Zaikungi was arrested by a male Excise Officer whose name is Inspector Lalthlamuana. That while making recovery of the S/A there were no civilian witnesses. That he had not put his signature in the exbt.M-1. He did not recollect the colour of the suspected heroin recovered by seizing officer. That he did not remember the seizing officer having obtain search warrant / warrant of arrest from the superior officer. He denied deposing false before the Court.

P.W. NO. 4 Jerry Lalremmawia of Excise, Serchhip identified the accused person and stated that on 24.10.2012 at 6:00 Am Inspector Lalthlamuana seized suspected heroin from the trouser of Zaikungi. The said Zaikungi had kept the suspected heroin in two plastic containers. Weighment of the S/A was taken and it was 8 gms. Drawing sample, sealing and packing were done in presence of witnesses at the spot. The said Inspector Lalthlamuana arrested Zaikungi and he produced her along with the S/A to O/c Excise Station Champhai. The said Inspector Lalthlamuana sent exhibit sample to FSL, Aizawl through superintendent of excise Champhai for chemical examination. As he was detailed to investigate the case, he examined the accused person and witnesses. He

received FSL report through O/C Excise Station Champhai. The FSL report reveals that the exhibit C (CPI) -414 was found to be heroin purity of 70.46 %. Accordingly, from his investigation and from the report of FSL examination, he found a prima facie case against the accused Zaikungi and he charged her U/s 21 (b) of ND & PS Act 85' for violation of 8 (c) of the same Act. He exhibited the complaint sheet U/s 190 (1)(A) Cr.PC/ charge sheet, report of seizure and arrest, FSL report containing two pages, Grounds of belief, Seizure and arrest memo and his signatures on them. He also exhibited the seized article (heroin kept in two plastic containers). On cross examination, he admitted that there is only one civilian witness and all the other witnesses are excise personnels. That he did not include the expert as a witness. That he recorded the statement of only one witness Lalmuanpuia and did not record the statement of the civilian witness. That the time of recording of grounds of belief was not recorded. That he did not know whether the accused was asked whether she preferred to be checked before gazette officer or Magistrate First Class. That he did not know whether any permission was obtained before her body was checked for recovery of any seized articles. He denied deposing falsely in the Court.

#### EXAMINATION OF ACCUSED U/S 313 CrPC.

The question and answer given in the examination of accused may be reproduced below:-

Q. It appears from the evidence that Heroin was seized by Excise from your pants pocket on 24.10.2016. What do you have to say for yourself?

=> It is not true.

#### DEFENCE EVIDENCE

The Learned Defence Counsel submitted that they have no defence evidence.

#### ARGUMENT

Argument was conducted on 29.09.2016.

The Learned Addl. PP submitted that the prosecution had proven that the accused was in illegal possession of the seized articles. That the seizure was made from the pocket of the accused in presence of witnesses. The learned Defence Counsel submitted that search was made without following the

procedure laid down in Section 50 ND & PS Act. That there was no civilian witnesses and the case I.O could not have any grounds of belief at the time of arrest. As such, she may be acquitted.

#### ANALYSIS OF EVIDENCES

I have carefully perused the case record in its entirety. I have examined and considered all the evidences and the arguments advanced from both sides.

Careful study of the evidences reveals that the evidences of the Prosecution Witness No 1 & 2 corroborated each other to the point that ASI C.Vanlalruati recovered 2 plastic containers containing suspected heroin from the trouser waist of the accused Zaikungi and they produced her at Excise Station, Champhai and she was arrested by Inspector Lalthlamuana as there was no lady officer to make arrest. The seizing and arresting Officer also stated in his cross examination that the arrest was made at their office on being produced by their staff. Thus, it appears that the initial search and recovery was made by ASI C. Vanlalruati from the trouser waist of the accused. At this point, attention maybe directed to the fact that the search was conducted by an Officer other than the empowered Officer.

Meanwhile, the evidences of P.W. No. 3 and 4 stated that the drawing of sample, sealing and packing were done in the presence of witnesses at the spot. However, the evidences of P.W. no. 1 & 2 clearly stated sample were drawn and packing and sealing were done at the station in presence of the accused.

An anomaly is again obvious in the evidences of the case I.O which made a reference to the existence of civilian witness. However, all the other witnesses denies the existence of any civilian witnesses at the time of recovery. What is conspicuous in its absence is any other reference to a civilian witness in any of the materials submitted in the case record. In any case, the civilian witness was not listed as a witness in the list of witnesses.

Another aspect which must be addressed is the fact that both the Prosecution Witness no 1 & 2 stated that ASI C. Vanlalruati recovered 2 plastic containers containing suspected heroin from the trouser waist of the accused Zaikungi. ASI C. Vanlalruati is not arrayed among the list of witnesses to support the case of the prosecution.

Thus, there are manifest discrepancies and inconsistencies in the evidences. Further, the search was made by Officer other than empowered Officer and in contravention of Section 50 of ND & PS Act. The accused was not given option to be search in front of a gazetted officer or magistrate. Any procedure as contemplated by the amendment of 2001 was also not adhered to.

Relevant extract from the following judgements of the Hon'ble Supreme Court may be reproduced.

**In Vijaysinh Chandubha Jadeja –vs- State of Gujarat [AIR 2011 SC 77]**, the Hon'ble Supreme Court held as undergone:-

*"We are of the firm opinion that the object with which right under Section 50(1) of the ND&PS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimize the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate".*

Closely following the above judgement, the Hon'ble Supreme Court held **In Narcotics Central Bureau -vs- Sukh Dev Raj Sodhi [ AIR 2011 SC 1939]** further stated as under:-

*"The requirement under Section 50 of ND&PS Act is not complied with by merely informing the accused of his option to be searched either in the presence of a gazette officer or before a Magistrate. The requirement continues even after that and it is required that the accused person is actually brought before the gazette officer or the Magistrate and the Constitution Bench made it clear that in order to impart authenticity, transparency and creditworthiness to the entire proceedings, an Endeavour should be made by the prosecuting agency to produce the suspect before the nearest Magistrate. No infirmity in findings of the High Court. Appeal dismissed".*

### FINDINGS

The evidences are therefore burdened with fatal inconsistencies and contradictions. This heightened the doubt cast upon the seizure by the unwarranted search on the person of the accused conducted by an Officer other than Empowered Officer without following the mandated procedure. Beside not following the only safeguard available against search of the person of an individual (Especially in case of female), the evidences were contradictory to each other.

As such and due to the above reasons, it is my irresistible conclusion that the Prosecution failed to prove the charge against the accused Zaikungi. I therefore have no difficulty in holding that the accused Zaikungi is not guilty of the charge under section 21(b) ND & PS ACT.

### ORDER

Hence, for all the above reasons, I hereby acquit the accused Zaikungi D/o Thanghnina, Kanan Veng, Champhai from the charge under section 21(b) ND & PS ACT.

The accused Zaikungi D/o Thanghnina, Kanan Veng, Champhai is hereby set at liberty.

Bail bond is cancelled.

The seized articles are allowed to be destroyed. The concerned Officer-in-Charge is directed to take an early action with the Drug Disposal Committee for disposal of the seized articles according to law.

Case is disposed.

Give copy to all concerned.

Sd/- LIANSANGZUALA  
Judge,  
Special Court, ND&PS Act.



Memo No. \_\_\_\_\_ND&PS/ : Dated Aizawl, the 7<sup>th</sup> October, 2016.

Copy to: -

1. Accused, Zaikungi C/o J.N. Bualteng, Advocate.
2. Addl.PP
3. Superintendent, Excise Prosecution, Aizawl
4. O/C, Excise & Narcotics Station, Champhai.
5. i/c Judicial Section.
6. i/c Malkhana Police.
7. Guard File.
8. C.R

**PESHKAR**