
(2011) 08 GAU CK 0075
In the Gauhati High Court
Case No : Criminal A. No. 22 of 2011

Shri Tluangcheuva

APPELLANT

Vs

The State of Mizoram

RESPONDENT

Date of Decision : 25-08-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21

Citation : (2011) 08 GAU CK 0075

Hon'ble Judges : H. Baruah, J

Bench : Single Bench

Advocate : C.V.L. Auva, for the Appellant; Dinari T. Azyu, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

H. Baruah, J.—Heard Dr. C.V.L. Auva, learned Counsel for the Appellant. Also heard Mrs. Dinari T. Azyu, learned Addl. Public Prosecutor for the State Respondent.

2. Appellant herein stood charged u/s 21(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (ND & PS) for possessing of 74 grams of heroin before learned Special Judge, ND & PS Act, Aizawl in Criminal Trial (Ex) No. 2096 of 2010.

3. The learned Special Judge after due trial convicted the Appellant u/s 21(b) of the ND & PS Act, 1985 and sentenced him to suffer Rigorous Imprisonment for 4 years with fine of Rs. 2,000/- in default R.I. for 1(one) month. Period of detention is ordered to be set off.

4. Being aggrieved by the impugned judgment and order of conviction and sentence the Appellant preferred this appeal from jail challenging its correctness and legality.

5. For the purpose of disposal, it would be appropriate to put the case of the

prosecution at this stage as appearing in the face of the record. On 17.8.2010 at 9:30 p.m. Sub Inspector Malsawmkima arrested the Appellant, a citizen of Myanmar and another named Biakluaithang, who is also a Myanmar and seized from their possession 74 grams of heroin kept in plastic container in presence of civilian witnesses. The aforesaid incident of seizure was reported to the Officer-in-charge of Anti Narcotic Squad (ANS) who registered a case against the arrested persons as indicated above being Excise Case No. 236 of 2010 on 18.8.2010 u/s 21(b) of ND & PS Act, 1985 and endorsed the investigation to one Zothantluangi Chenhrang, Sub-Inspector. The aforesaid investigating officer took sample from the seized article for the purpose of sending it to FSL for chemical analysis. It is also appearing in the face of the records that the aforesaid Zothantluangi Chenhrang, the I.O. also recovered 3 packets of heroin kept in 3 plastic container disguised as balls of yarn from one Buangthanga at whose instance the Appellant and Biakluaithang concealed the heroin at a residence situated at I.T.I. Veng which were seized by Central Anti-Drug Squads (CADS) of Y.M.A on being produced by a lady. Having found prima facie case against the present Appellant and another, I.O. filed charge sheet u/s 21(b) of the ND & PS Act, 1985. It would be appropriate to state at this stage that Biakluaithang being a minor, he was forwarded to Juvenile Court. A charge was framed u/s 21(b) of the ND & PS Act, 1985 after hearing the prosecution and the defence having found prima facie materials to presume that the Appellant did commit the offence. Appellant pleaded not guilty to the charge when read over and explained to him.

6. Prosecution to substantiate the charge against the Appellant brought 4 (four) witnesses altogether unto the witness box including the investigating officer. Appellant was examined u/s 313 Code of Criminal Procedure Defence examined none. Defence case is of one denial. The learned Trial Judge after meticulous appreciation of the facts and circumstances and the evidence on record both oral and documentary found the Appellant guilty u/s 21(b) of the ND & PS Act, 1985 and accordingly convicted and sentenced him as indicated above.

7. This appeal is filed mainly on three grounds. (1) that the impugned judgment and order of conviction and sentence cannot sustain in law, in view of non compliance of mandatory provisions contained in chapter v. of the Act, 1985, existence of glaring discrepancies appearing in the testimony of the witnesses, testimony of PW 1, PW 2 and PW 3 in particular overlooking which the learned trial Judge recorded an erroneous finding against the Appellant. (2) that the learned Trial Judge committed procedural irregularity which prejudiced the Appellant. Learned Trial Court examined the case I.O (PW-4) and allowed cross examination of PW-3 after examination of the Appellant u/s 313 Code of Criminal Procedure; and (3) that the learned Trial Judge failed to adhere to mandate of Section 313 Code of Criminal Procedure

8. Primarily on the above 3 (three) grounds amongst other the judgment and order of conviction and sentences is challenged by the Appellant. Dr. C.V.L. Auva, learned Counsel for the Appellant after leading me through evidence of PW-1, PW

2 and PW 3, strenuously submits that the testimony of PW-1 & 2 in particular appear to be contradictory in material particulars in respect of recovery and seizure of the yarn ball from the possession of the Appellant and another. Dr. C.V.L. Auva tries to impress upon this Court that in view of glaring contradictions appearing in the testimony of the witnesses as indicated above, conviction of the Appellant cannot sustain. According to Dr. C.V.L. Auva the factum of seizure of heroin from the possession of the Appellant, from the facts appearing on the face of the record, appears that on 17.8.2010 one person was apprehended by CADS of YMA from whom heroin was recovered and at his instance the CADS members became successful in locating the residence of the lady situated at I.T.I. Veng where from 4 Nos. yarn ball were recovered which allegedly contained heroin. Dr. C.V.L. Auva, the learned Counsel for the Appellant resting on these facts and evidence appearing on the face of the record tries to attract the attention of this Court that the contradictory testimony of PW-1 & PW-2 in regard to recovery and seizure of heroin from the possession of the Appellant cannot hold good. Dr. C.V.L. Auva also submitted that PW-3 the seizing officer also contradicted himself in respect of seizure of heroin. In his cross examination he categorically stated that heroin was seized from YMA Office from over a table. Taking assistance of evidence of PW-3, Dr. C.V.L. Auva submits that claim of prosecution that seizure was made from the possession of the Appellant cannot be accepted. It is doubtful from whose possession heroin had been seized when evidence speaks for its seizure from over a table. It is therefore, strenuously argued by Dr. C.V.L. Auva that the impugned judgment and order of conviction and sentence under the facts and circumstances and evidence on records cannot be sustain in law.

9. In regard to procedural irregularity it is submitted by Dr. C.V.L. Auva that the learned Special Judge committed error and illegality allowing the defence to cross examine PW-3 after examination of the accused under 313 Code of Criminal Procedure He also brings to the notice of the court, the evidence of PW-4 and contends that the same was also recorded after examination of the accused u/s 313 Code of Criminal Procedure Records of the court below do not even divulge further examination of the Appellant u/s 313 Code of Criminal Procedure after cross examination of PW-3 and examination of PW-4. No. opportunity was given to the Appellant to give a reasonable answer to the circumstances appearing in the evidence of PW-3 and PW-4. Therefore, the conviction recorded against the Appellant would be illegal, Mr. Auva submits. On the other hand, learned Counsel for the Appellant also submits that the learned Special Judge disregarded the mandate of Section 313 Code of Criminal Procedure No. circumstance appearing in the evidence of the prosecution witnesses was put to the Appellant to explain such circumstance and therefore conviction awarded u/s 21(b) of the ND & PS Act, 1985 would not be sustainable. It is brought to the notice of this Court that only three questions were put to the Appellant by the Trial Judge in regard to the charge framed against him. Those 3(three) questions do not primarily reflect any circumstance appearing in the evidence of prosecution witnesses. According to Dr. CVL Auva, on this score

alone, the impugned judgment and order of conviction and sentence is liable to be set aside and quashed.

10. Mrs. Dinari T. Azyu, learned Addl. Public Prosecutor representing the State Respondent in her usual fairness concedes to the submissions advanced by Dr. C.V.L. Auva that there is procedural irregularity in the trial of the accused. Appellant was not afforded opportunity by the trial court to explain the circumstances appearing in the evidence of PW 1 to PW 4. Though an examination was done u/s 313 Code of Criminal Procedure, the same was not in consonance of the mandate of Section 313 Code of Criminal Procedure, Mrs. Dinari submit.

11. Taking note and facts of the circumstances and the evidence both oral and documentary appearing in the face of the record this Court is of considered view that the judgment and order cannot legally sustain against the Appellant. It is accordingly set aside and quashed. The case is remanded back to the trial court for recording a fresh decision after examination of the accused u/s 313 Code of Criminal Procedure and after advancing argument by either side. Such exercise shall be completed within a period of one month from the date of receipt of the records.

12. Appellant would however be at liberty to apply for bail before the learned Special Judge from Jail which would be disposed in accordance with law.

13. Appeal stands allowed and disposed of.