

GAHC030006282025



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

Case No. : CrI.A./27/2025

Sh. Jalal Hussain Barbhuiya
S/o Jainul Hoque Barbhuiya
Resident of Village - Kaptanpur Pt - III, P.S. Silchar, District Cachar, Assam-788119

VERSUS

The State of Mizoram
R/b the Public Prosecutor

Advocate for the Petitioner : Mr. Taher Ahmed Choudhury

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

Linked Case : I.A.(CrI.)./47/2025

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Advocates for the appellant : Mr. Taher Ahmed Choudhury

Advocates for the respondent : Mr. Mary L Khiangte, APP

BEFORE

HON'BLE MR. JUSTICE MRIDUL KUMAR KALITA

Date on which judgment is reserved : 03.02.2026

Date of pronouncement of judgment : 09.02.2026

Whether the pronouncement is of the : No.
operative part of the judgment ?

Whether the full judgment has been : Yes
pronounced?

JUDGMENT & ORDER (CAV)

(Mridul Kumar Kalita, J)

1) Heard Mr. Taher Ahmed Choudhury, learned counsel for the petitioner. Also heard Ms. Mary L Khiangte, learned Addl. Public Prosecutor.

2) This appeal under Section 415(2) of the BNSS, 2023 has been filed by the appellant, namely, Jalal Hussain Barbhuiya, impugning the Judgment dated 10.06.2025 and the order dated 25.06.2025 by which, the Court of learned Judge, Fast Track Court, Kolasib, convicted the appellant under Section 21(c) of the NDPS Act, 1985 and the appellant was sentenced to undergo rigorous imprisonment for 10 (ten) years and to pay a fine of Rs. 1,00,000/- (One Lakh),

in default of payment of fine to undergo further rigorous imprisonment for a period of 6 (six) months.

3) The facts relevant for consideration of the instant appeal, in brief, are that on 20.09.2023, one Mr. Lalengmawia, ASI, Saiphai Police Outpost, lodged an FIR before the Officer-in-Charge of Vairengte Police Station, *inter alia*, alleging that on the night of 19.09.2023 at about 10:00 p.m., one Bolero vehicle (white in colour) bearing registration No. AS-11-E-6535, coming from the Churachandpur, Manipur towards Silchar, was stopped at Saiphai Police Outpost. It is further alleged in the FIR that during search of the vehicle, 42 nos. of soap cases containing brown-coloured powder, suspected to be heroin, were recovered from the possession of the appellant.

4) On receipt of the aforesaid FIR, Vairengte P.S Case No. 39/2023 was registered under Section 21(c) of NDPS Act, 1985 and the investigation was initiated. After completion of the investigation, the charge-sheet was laid, under Section 21(c) of NDPS Act, 1985, against the present appellant, who was arrested at the spot of recovery of the contraband and he has been detained behind the bars since then. The appellant faced trial while remaining in custody.

5) The trial court i.e., the court of learned Judge, FTC-cum-Addl. Sessions Judge, Kolasib, after going through the materials on record and after hearing the learned counsel for both sides, on 13.03.2024, framed the charge against the appellant under Section 21(c) of the NDPS Act, 1985. When the said charge was read over and explained to the appellant, he pleaded not guilty to the same and claimed to be tried. During the trial, the prosecution side examined 4 (four) prosecution witnesses, including the first informant as well as the Investigating

Officer. The appellant was examined under Section 313 of the Code of Criminal Procedure, 1973, during which, he denied the truthfulness of the testimony of the prosecution witnesses. However, the appellant declined to adduce any evidence in his defence. Ultimately, by the Judgment dated 10.06.2025, the trial court convicted and sentenced the appellant in the manner as already described hereinabove. The aforesaid judgment has been impugned in this appeal.

6) Before considering the respective submissions of learned counsels for both sides, let us go through the evidence of the prosecution witnesses, which is available on record.

7) The PW-1, namely, David Lalziriana, who is the Investigating Officer in this case, has deposed that on 20.09.2023, at about 9:45 a.m., a written FIR was received from ASI Lalengmawia, wherein it was stated that on the night of 19.09.2023, at about 10:00 p.m., one white-coloured Bolero vehicle bearing registration No. AS-11-E-6535, which was coming from Churachandpur, Manipur and proceeding towards Silchar, was detained at Saiphai Police Outpost. During checking of the said vehicle, 42 numbers of soap cases containing brown powder suspected to be heroin (No. 4) were recovered from the possession of the present appellant.

8) The PW-1 has further deposed that during the investigation, he examined the complainant and recorded the statements of the witnesses as well as the accused person (appellant). He also deposed that the samples of suspected heroin were drawn before the learned Judicial Magistrate First Class, Kolasib, Smt. Lallawmkimi. He has further deposed that the samples were then forwarded to the Forensic Science Laboratory, Aizawl, under proper escort with

forwarding letter No. D/351/VRT-PS/2023 dated 16.10.2023. He has deposed that the result of examination given by the Forensic Science Laboratory indicated that Exhibit CHE(KLB)-762(1) to Exhibit CHE(KLB)-762(3) were found to be heroin and the purity of each of the samples was found to be 79% at the time of examination. He further submitted that Exhibit CHB(KLP)-762(4) was also found to be heroin and the purity of the same was found to be 77% at the time of examination. He exhibited the arrest memo, the charge-sheet, the authorization for search and seizure index as Exhibit P-IV, Exhibit P-V, Exhibit P-VI and Exhibit P-VII respectively.

9) During the cross-examination by the learned counsel for the defence side, the PW-1 has deposed that the seized contraband was recovered from the belongings of the accused, but no other belongings of the accused were seized. He has also deposed that no vehicle was seized by him. He also deposed that only the accused (appellant) and the driver were present in the vehicle. He has also deposed that the contraband was seized on 19.09.2023, however, the sample of the same was sent to the Forensic Science Laboratory on 16.10.2023 for expert opinion. He has also deposed that during this period the seized substance was kept in the police malkhana. During his re-examination, PW-1 deposed that the weight of the seized substance was found to be 512 grams as mentioned in the seizure memo.

10) The PW-2, namely, Lalengmawia, ASI of Saiphai Police Outpost, has deposed that on 19.09.2023, at about 10:00 p.m., while he was on duty at Saiphai Police Outpost, one white-coloured Bolero vehicle bearing registration No. AS-11-E-6535, which was coming from Churachandpur, Manipur and proceeding towards Silchar, was stopped at the Saiphai Police Outpost/check

gate. He further deposed that they conducted a search of the said vehicle and recovered 42 numbers of soap cases containing brown powder suspected to be heroin (No. 4) from the possession of the accused Jalal Hussain Barbhuiya (present appellant). He further deposed that he had seized the contraband, but as they were not having a weighing machine at Saiphai Police Outpost, weighing of the seized contraband was done at Vairengte Police Station on the next date. He further deposed that the accused (appellant) was also produced before Vairengte Police Station on 20.09.2023 and a Police Station case was registered accordingly. He has exhibited the FIR as Exhibit P-I, the written grounds of belief as Exhibit P-II and seizure memo as Exhibit P-III and a copy of the report of the seizure as Exhibit P-III(A).

11) During cross-examination, the PW-2 has deposed that he is the complainant as well as the seizing officer of the case. He further deposed that the Investigating Officer is the arresting officer. He has also deposed that he did not obtain a search warrant from the competent authority before conducting the search; however, he had recorded the grounds of belief before conducting the search. He has further deposed that the seized substance was recovered from the vehicle. He has also deposed that the seized substance was inside the vehicle kept in the belongings of the accused, but no other belongings of the accused were seized. He has also deposed that the other belongings were handed over to his relatives. He has also deposed that the present appellant was not the owner of the vehicle and neither he was the driver of the vehicle. He has also deposed that the driver of the said vehicle was not arrested.

12) The PW-3, Sh. Lalfakawma, has deposed that on 19.09.2023, at about 10:00 p.m., Saiphai Police had conducted a search and recovered 42 numbers of

soap cases containing brown powder suspected to be heroin from the possession of the accused, which were kept inside the Bolero vehicle (white-coloured) bearing registration No. AS-11-E-6535. He has also deposed that he was present when the search and seizure was made and also witnessed the police weighing and checking the seized articles. He exhibited his signatures on the seizure memo as Exhibit P-III(b).

13) During cross-examination, the PW-3 has deposed that he does not know the registration number of the vehicle from where the contraband was recovered. He has also deposed that he had seen the accused (present appellant) near the vehicle and no other person was there except the accused. He further deposed that he does not know whether the seized articles were recovered from the luggage of the accused or not.

14) The PW-4, namely, Sh. Lalfakawma, has deposed that on 19.09.2023, at about 10:00 p.m., Saiphai Police had conducted a search and recovered 42 soap cases containing brown powder suspected to be heroin from the possession of the accused, which were kept inside the Bolero vehicle bearing Registration No. AS-11-E-6535. He has deposed that he was present when the search and seizure was made and also saw the police weighing and packaging the seized substance. He had exhibited his signatures on the seizure list as Exhibit P-III(c).

15) During cross-examination, he also showed his ignorance about the registration number of the vehicle from where the seized substance was recovered. He also deposed that he does not know whether the seized substance was recovered from the luggage of the accused or not.

16) The trial court also examined Mr. Lalmuanawma, the Assistant Director of the Forensic Science Laboratory, Aizawl, as Court Witness No. 1. The said witness has deposed that on 25.10.2023, they received a parcel consisting of four exhibits packed in a polythene packet and enclosed in a paper envelope sealed with wax seal from the SDPO, Vairengte, in connection with Vairengte P.S. Case No. 39/2023 dated 20.09.2023 under Section 21(c) of the NDPS Act, 1985. He further deposed that the four exhibits contained brownish powder and their weight ranged between 2.28 – 2.99 grams. He further deposed that he examined all the exhibits and found them to be heroin with a purity of about 77%. He exhibited the Forensic Science Laboratory report as Exhibit C-VIII and his digital signature as Exhibit C-VIII(a).

17) During cross-examination, the Court Witness has deposed that he received all the four exhibits on 25.10.2023. He also deposed that the purity of three exhibits at serial No. 1 of the Forensic Science Laboratory report is 79% and the purity of the fourth exhibit is 77%.

18) After examination of prosecution witness, the appellant was examined under Section 313 of the Code of Criminal Procedure, 1973. During said examination, the appellant was asked only three questions, which are reproduced along with the answers given by the appellant herein below: -

"Q1. :- The evidence against you is that on 19.09.2023 @ 10:00 pm, you had possessed and transported 42 soap cases containing brown powder suspected to be heroin weighing about 512 grams with a motor vehicle - Bolero white colour B/R No AS 11 E 6535 from Churachanpur towards Silchar via Saiphai Police Outpost where you had been detained: Is it true?"

Ans: No, it is not true.

Q.2. :- What do you have to say regarding the allegation made against you.

Ans: I have no knowledge about the drugs.

Q.3. :- Do you have any defence witness?

Ans: No."

19) Mr. Taher Ahmed Choudhury, the learned counsel for the appellant has submitted that the trial court erred in arriving at the conclusion of guilt of the present appellant and also by sentencing him to undergo rigorous imprisonment of 10 (ten) years. He submits that the investigation in this case was not conducted in a fair manner, inasmuch as, the Investigating Officer has not mentioned any reason in the charge-sheet as to why the driver of the vehicle, from where the contraband was recovered was not made an accused. He further submits that the Investigating Officer was also wrong in not seizing the vehicle from where the contraband was recovered. He submits that in the Charge Sheet as well as in the evidence of prosecution witnesses, it has not been stated as to from which belongings of the appellant, the contraband was recovered.

20) He submits that in the seizure list which has been prepared in this case, the seizing officer has only seized the contraband and it has been shown to have been seized from the possession of the appellant, without clarifying as to from where it was seized. He submits that no other belongings of the appellant or any other items including the vehicle have been seized in this case.

21) He further submits that the trial court did not consider the independent witnesses as credible, and in the impugned judgment, it has been specifically stated by the trial court that due to the contradiction in their statement, they are not worthy of any reliance. However, in spite of that, by relying on the testimony of the first informant as well as the Investigating Officer, the trial court rendered the impugned judgment of conviction. He further submits that the trial court was also wrong in placing reliance on judgment of the Apex Court in the case of "**Kashmiri Lal vs. State of Haryana**", reported in **(2013) SCC 595**, inasmuch as, in the said case, no independent witnesses were examined, however, the witnesses given by the Police was found to be reliable in that case. Whereas, in the instant case though the independent witnesses were examined, they were found to be unreliable by the trial court.

22) The learned counsel for the appellant has further submitted that the trial court also erred in not considering the fact that the seizing officer did not comply with the mandatory provisions of procedural requirement as prescribed in Section 50 of the NDPS Act, 1985. He submits that though it was deposed by both the Investigating Officer as well as the first informant that the contraband was seized from the possession of the appellant. However, the appellant was not informed about his rights guaranteed under Section 50 of the NDPS Act, 1985. Hence, he submits that the conviction of the appellant under Section 21(c) of the NDPS Act, 1985 was not justified on this ground alone. In support of his submission, the learned counsel for the appellant has cited a ruling of the Apex Court in the case of "**Arif Khan @ Agha Khan vs. State of Uttarakhand**", reported in **(2019) 3 SCC (Crl.) 176**.

23) The learned counsel for the appellant has also submitted that the

prosecution side has not been able to prove the foundational facts required for shifting the burden on the accused under Section 54 of the NDPS Act, 1985. He submits that the evidence of the prosecution side could not establish as to from where the contraband was seized. It only speaks about the fact that it was seized from the belongings of the appellant, without specifying as to what were those belongings. He submits that under such circumstances, the prosecution side has failed to relieve the initial burden of establishing the foundational facts in this case.

24) He also submits that though the Investigating Officer, while deposing as PW-1, exhibited the written grounds of belief before conducting search and seizure as Exbt. P-II, stating that he could not get time to obtain search warrant from the competent authority before conducting the search. However, he submits that the authorization for search under Section 41(2) of the NDPS Act, 1985 was issued by the Officer-In-Charge of Vairengte Police Station on 19.09.2023, whereas the FIR was lodged on 20.09.2023. He submits that therefore in the written note prepared by the Investigating Officer under the heading "ground of belief", the statement made by him that "*there is no time to obtain search warrant*" is not believable.

25) The learned counsel for the appellant has further submitted that in the instant case, the examination of the appellant under Section 313 of the Code of Criminal Procedure, 1973 was not conducted properly by the trial court. He submits that during the said examination the trial court put only one question wherein, entire acquisition made by the prosecution side against the appellant was put to him without specifying as to what incriminating evidence have been deposed by which witness against him.

26) He further submits that the trial court also did not specify as to from which belonging of the appellant, the seized contraband was recovered. It had only indicated that the appellant had possessed and transported 42 soap cases containing brown powder suspected to be heroin. He submits that the purpose of Section 313 of the Code of Criminal Procedure, 1973 is to enable the accused to get notice of the incriminating evidence against him so that he gets an opportunity of properly explaining the same. However, in the instant case, same was not done. He submits that it was incumbent on the trial court to put each incriminating material appearing in evidence against the accused specifically, distinctly, and separately, however, same was not done by the trial court.

27) He submits that the Apex Court in the case of "***Raj Kumar @ Suman vs. NCT of Delhi***", reported in ***2023 AIR (SC) 3113*** had laid down the guidelines to be followed by trial court while recording the statement of the accused under Section 313 of the Code of Criminal Procedure, 1973, however, same was not followed in the instant case, which amounts to a serious irregularity, which would vitiate trial. Hence, he submits that on this ground alone, the appellant is entitled to be acquitted.

28) The learned counsel for the appellant further submits that the trial court has erred in ignoring the procedural lapses committed by the Investigating Officer which goes to the root of the case as the investigation has not revealed specifically as to from where the contraband was recovered. He further submits that the trial court also committed procedural lapse by not properly following the mandate of Section 313 of Code of Criminal Procedure, 1973 causing serious prejudice to the appellant. Accordingly, he submits that the petitioner is entitled to get benefit of doubt and acquitted of the charge leveled against him.

29) On the other hand, Ms. Mary L Khiangte, the learned Addl. Public Prosecutor representing the State respondent has submitted that there is no error in the judgment impugned in this appeal. She submits that the trial court has rightly arrived at the finding of guilt of the present appellant and considering the quantity of contraband involved in this case has appropriately sentenced the appellant with rigorous imprisonment of ten years and fine of Rs. 1,00,000/- with default stipulations.

30) The learned Addl. Public Prosecutor submits that as regards the objection raised by the learned counsel for the appellant regarding the non-compliance of the mandate of Section 50 of the NDPS Act, 1985 is concerned, the said provision is not applicable under the facts and circumstances of this case, as no personal search of the appellant was conducted in this case. She submits that the mandate of Section 50 of the NDPS Act, 1985 is applicable only when personal search of the accused is made. However, in this case, the contraband was recovered from the belongings of the appellant which was kept inside the vehicle in which he was travelling. The belongings were kept inside the vehicle.

31) She further submits that though the trial court did not rely on the testimony of independent seizure witnesses, there were sufficient material on record for the trial court to arrive at the guilt of the appellant basing on the testimony of the Investigating Officer as well as the first informant. She submits that the Investigating Officer as well as the first informant, in their evidence, have categorically stated that the seized contraband i.e., 512 grams of heroin was recovered from the present appellant. She submits that the trial court has correctly relied on the *ratio decidendi* in the case of "**Kashmiri Lal vs. State of Haryana**" (*supra*), inasmuch as, the Apex Court has clearly laid down that

the evidence of Police cannot be viewed with distrust every time and even in the absence of independent witnesses, Court may arrive at conviction of the accused if the testimonies of police witnesses are found to be reliable and trustworthy.

32) The learned Addl. Public Prosecutor further submits that as regards objection of not following the mandate of Section 313 of the Code of Criminal Procedure, 1973 by the trial court is concerned, the appellant was given sufficient notice of the incriminating materials appearing in the testimony of prosecution witnesses in the question No. 1 posed by the trial court to the appellant, during such examination. She submits that in the said question, the trial court has clearly stated regarding the fact of the recovery of contraband, from the possession of the appellant at the time when the search was made. She further submits that the prosecution side has established the foundational facts, in the instant case, necessary to shift the burden under Section 54 of the NDPS Act, 1985 to the appellant. She further submits that the appellant, has failed to adduce any defence evidence to relieve that burden. Hence, she submits that the impugned judgment should not be interfered with by this Court in this appeal.

33) I have considered the submissions made by the learned counsel for both sides and have gone through the materials on record including the records of the trial court. I have also gone through the rulings cited by learned counsel for the appellant in support of his submissions.

34) In the instant case, only four prosecution witnesses were examined. Out of those, only two were independent witnesses. The trial court has discarded

their testimony as unreliable, and rightly so. Both the independent witnesses, i.e., PW-3 and PW-4 have deposed, during their cross-examination that they have not seen any other person apart from the appellant near the vehicle, whereas, the informant as well the Investigating Officer have deposed that apart from the appellant the driver was also there in the said vehicle from where the contraband was recovered. Further, both the PW-3 & PW-4 have deposed during cross-examination that they do not know as to whether the contraband was recovered from the belonging of the accused (appellant) or not. As such their testimony is of no use for the prosecution case and has been rightly discarded by the trial court.

35) The trial court relied upon the testimony of the PW-1 & PW-2 for coming to the finding that the seized contraband was recovered from the possession of the present appellant and for arriving at such a conclusion has relied upon the judgment of the Apex Court in the case of "***Kashmiri Lal vs. State of Haryana***" (*supra*). There is no dispute over the legal proposition that the non-examination of independent witness does not automatically lead to the conclusion that prosecution case is vitiated and that police cannot be cited as prosecution witnesses. It is also true that the evidence of prosecution witnesses cannot be viewed with distrust merely because such witnesses happen to be police personnel. However, it is equally true that whatever police witnesses depose may not be taken as gospel truth without examining its credibility and reliability.

36) In the instant case PW-1 is the Investigating Officer of this case, who is a police officer. Whereas, PW-2 is the informant of this case, who is also a police officer. Both of them have deposed, during their examination in chief, that the

seized contraband was recovered from the possession of the present appellant. During their cross-examination, both of them deposed that the seized contraband was recovered from the belonging of the appellant. However, none of them specified as to from which belonging of the appellant, the seized contraband, which are kept in 42 numbers of soap cases, was recovered. Whether it was a trunk, or suitcase, or briefcase, or carry pack, or a back pack or from the body or apparel of the accused person? Nothing was clarified by any of the above mentioned two witnesses. By merely stating that the contraband was recovered from the possession of the accused, without clarifying as to from where it was recovered is not sufficient to arrive at the conclusion that same was recovered from the possession of the appellant. This is more so, when the testimony of PW-1 & PW-2 shows that there was one more person, i.e., the driver in the said vehicle. His testimony was of vital importance in this case. If the said driver is not involved in the offence alleged in this case, he could have been the best witness to testify as to from where the contraband was recovered. However, no whisper about the role of the driver has been made either in the Charge Sheet or in the testimony of the prosecution witnesses. More over both the PW-1 & PW-2 had deposed that apart from the accused, one driver was also there in the said vehicle, whereas, the PW-3 & PW-4 have not stated anything about the driver in their deposition. As such, the testimony of not only PW-3 & PW-4 but also of PW-1 & PW-2 becomes unreliable and unworthy of any credence. This Court is, therefore, of the considered opinion that the prosecution side has miserably failed to prove the factum of possession of the contraband by the appellant. Under such circumstances the appellant is entitled to get the benefit of doubt, which this Court, hereby gives to him. As such on that count only the impugned judgment is liable to be set aside.

37) In view of the discussions made in the forgoing paragraphs this Court does not deem it necessary to discuss other contentions raised by the learned counsel for the appellant during hearing of this appeal. However, this Court is constrained to observe that the manner in which trial Court has recorded the examination of the appellant under Section 313 of the Code of Criminal Procedure, 1973 is not in conformity with the law laid down by the Apex Court in this regard in various judgments including in the case of "**Raj Kumar @ Suman vs. NCT of Delhi**", (supra). It is the duty of the trial court, during examination of an accused under Section 313 of the Code of Criminal Procedure, 1973, to put each material circumstance appearing in evidence against the accused specifically, distinctively and separately to him. The material circumstance means the circumstance or material on the basis of which the prosecution is seeking his conviction. While putting questions to the accused, the trial court should specify which incriminating evidence by which prosecution witness is there on record against the accused so as to enable the accused to explain such circumstances appearing against him in evidence. In the instant case, the trial court has failed to do so.

38) For the discussions made and reasons stated in the forgoing paragraphs, the impugned judgment of conviction and sentence imposed on the appellant by the trial court is hereby set aside and the appellant is acquitted of charge under Section 21(c) of the NDPS Act, 1985 on getting benefit of doubt.

39) This appeal is accordingly allowed.

40) The appellant shall be released forthwith, if not required to be detained in connection with any other case.

41) Let a copy of this judgment be sent to the trial court.

JUDGE

Comparing Assistant