

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 16th NOVEMBER, 2015

SINGLE BENCH : HON’BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

Crl.A. No.13 of 2015

Appellant : Nurul Haque,
S/o Late Sukhrul Haque,
R/o 2nd Galli, Jorethang Bazaar,
South Sikkim.

versus

Respondent : State of Sikkim

Appeal under Section 374(2) of
the Code of Criminal Procedure, 1973

Appearance

Mr. B. K. Gupta, Legal Aid Counsel for the Appellant.

Mr. S. K. Chettri, Assistant Public Prosecutor for the State-
Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1. This Appeal challenges the Judgment and Sentence dated 31-03-2015 meted out by the Court of the Special Judge (SADA), South

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Sikkim at Namchi, vide which the Appellant was convicted and Sentenced to suffer simple imprisonment for a period of 1 (one) year and a fine of Rs.25,000/- (Rupees twenty five thousand) only, under Section 9(d) of the Sikkim Anti Drugs Act, 2006 (for short 'SADA') with a default clause of imprisonment for 6 (six) months; for the offence under Rule 17(1) of the Sikkim Anti Drugs Rules, 2007 (for short "SADR") read with Section 14 of the SADA, he was sentenced to undergo simple imprisonment for a period of 6 (six) months and to pay a fine of Rs.15,000/- (Rupees fifteen thousand) only, also with a default stipulation, in Sessions Trial (SADA) Case No.21 of 2014. The Sentences of imprisonment were ordered to run concurrently.

2. While assailing the impugned Judgment and Sentence, the argument advanced by the Learned Legal Aid Counsel for the Appellant is that, besides the Learned Trial Court failing to appreciate the facts, circumstances and statement of the witnesses, it also failed to appreciate the legal principles in a proper perspective in that the mandatory provisions contemplated under Section 24 of the SADA to extend the option to the accused of being searched before a Magistrate or a Gazetted Officer was not complied with by the Prosecution. It was also argued that the evidence of P.W.3, Manoj Gupta and P.W.4 Milan Chettri, with regard to the time of alleged seizure of the controlled substances are at variance with that in the Seizure Memo. The Learned Trial Court erred in opining

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that the witnesses were confused about the date and that in the absence of a suggestion of foul play, this aspect could be overlooked. The Vehicle Entry Register maintained at the Melli Check Post, South Sikkim, was not produced before the Learned Trial Court to establish the time of Entry of the Motor Cycle into the State of Sikkim through the Melli Check Post. It was also put forth that the photographs of the Appellant and his Motor Cycle being M.O. III (collectively) were taken during the day contrary to the time shown on Exhibit 2, the FIR, being 2230 hours as the time of occurrence. Hence, in view of the anomalies in the Prosecution case, the impugned Judgment and Order of Sentence dated 31-03-2015 be set aside.

3. To the contrary, it was argued by Mr. S. K. Chettri, Learned Assistant Public Prosecutor, that the case is one of chance recovery and, therefore, the question of compliance of Section 24 of the SADA does not arise. To buttress this point, he has placed reliance on a decision of this Court dated 20-08-2015 in Crl.A.03 of 2015 being **Prakash Pradhan vs. State of Sikkim**, wherein it was held that as the case arose not on the basis of prior information but as a result of chance recovery hence Section 21 of the SADA would have no application. That, on the anvil of the ratio laid down in **Megh Singh vs. State of Punjab : (2003) 8 SCC 666**, even Section 24 of the SADA would not be attracted since the recovery was made from the

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vehicle and not the person of the Appellant. However, the Learned Assistant Public Prosecutor concedes that there are anomalies with regard to the time of seizure, as per the evidence of P.W.3 and P.W.4 and that as recorded in the Seizure Memo, Exhibit 3. Relying on paragraphs 18 to 20, 26 and 27 of the impugned judgment, the Learned Assistant Public Prosecutor submits that there is no illegality in the impugned Judgment of the Learned Trial Court and the same requires no interference.

4. The rival contentions put forth were duly considered by me as were the documents, the evidence and the impugned Judgment.

5. The question that arises for consideration before this Court is whether the Learned Trial Court erred in convicting and sentencing the Appellant despite non-compliance of the mandatory provisions of the SADA by the Police. In order to gauge this, it would be essential to briefly walk through the facts of the case.

6. As per the Prosecution, a Complaint, Exhibit 1 was received at the Melli Police Station, South Sikkim, from P.W.1, HC Lakpa Tshering Sherpa, at around 2300 hours on 14-07-2014, informing therein that he was conducting the usual vehicle checking at the Check Post along with P.W.2 and another Police Personnel. At around 2230 hours a Motor Bike driven by the Appellant bearing

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registration No.WB-20-W 4475 reached the Melli Check Post from West Bengal side. On checking the carry bag of the Appellant, 4 (four) bottles of Nelcof TM Cough Syrup were found therein. On further checking, 10 (ten) bottles of the same Cough Syrup were recovered from under the seat of the Motor Bike without any medical prescription. On the said Complaint, the case was duly registered and taken up for investigation. The investigation having been completed, Charge-Sheet was filed against the Appellant under Sections 9(b) and 14 of the SADA. The Learned Trial Court framed charges against the Appellant under Section 9(d) of the SADA and Rule 17(1) of SADR read with Section 14 of the SADA. The Prosecution evidence commenced on a plea of “not guilty” by the Appellant. In a bid to prove its case, the Prosecution, examined 7 (seven) witnesses including P.W.5, Santosh Kumar Rai, the Investigating Officer (for short “I.O.”) of the case. On consideration of the evidence on record, the Learned Trial Court convicted and sentenced the Appellant, as aforesaid, hence the Appeal.

7. Without further ado, the obvious may be reiterated, i.e., the basic tenet of Criminal Law requires the Prosecution to prove its case beyond a reasonable doubt against the Accused. It is settled Law that if even an iota of doubt arises in the Prosecution case which cannot be dispelled by evidence, the Court is required to lean in favour of the Accused.

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8. While broaching the subject of the matter at hand, the first glaring anomaly in the Prosecution case is with regard to the time of seizure of the controlled substances. According to P.W.3, he had seen the Appellant on 14-07-2014 at the Melli Police Station where the Appellant had been detained by the Police along with his Motor Cycle. The witness affirmed that he had affixed his signature on Exhibit 3 (Seizure Memo) at around 7 to 7.30 a.m. P.W.4, who is allegedly another seizure witness, also stated that he had seen the Appellant at the Melli Police Station on the morning of 14-07-2014. From the evidence of P.W.3 and P.W.4, it appears that they were present at the Melli Police Station on the morning of 14-07-2014 and signed on Exhibit 3 then.

9. *Per contra*, while perusing Exhibit 3, the date of Property Seizure is recorded as “14/7/14” but the time therein is recorded as “2315 hours” leaving a huge discrepancy in the time of seizure as described by P.W.3 and P.W.4 and that recorded in Exhibit 3. The evidence of P.W.5, the I.O., does not explain away this discrepancy. His evidence in fact establishes that he was not present at the time when the Motor Cycle and the Appellant were detained and the search and seizure carried out.

10. In view of the above anomalies, it is clear that the Prosecution has not been able to establish the correct time of seizure of the controlled substances.

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11. The next leg of the vehement argument of the Learned Legal Aid Counsel for the Appellant, was that the Appellant was not extended the option of being searched either before a Gazetted Officer or a Magistrate as provided under Section 24 of the SADA, although P.W.6, a Police Inspector and, therefore, a Gazetted Officer, was present at the Police Station. The evidence of P.Ws 1, 2, 5 and 6 would go to show that no such option as mandated by Section 24 of the SADA was extended to the Appellant.

12. Section 24 of the SADA deals with conditions under which search of persons are to be conducted and is similar to Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short “NDPS Act”).

13. The importance of the application of Section 50 of the NDPS Act while carrying out search of a person, suspected to be in possession of narcotic or psychotropic substances has been settled in a plethora of decisions of the Hon’ble Apex Court. It is also settled law that where there is a chance recovery of such substances, the provisions of Section 50 of the NDPS Act would not apply. It is further settled law that Section 50 of the NDPS Act applies in cases of personal search of a person and does not extend to search of a vehicle or a container or a bag or for that matter premises.

14. In the said context, it would be beneficial to refer to the decisions in **State of Punjab vs. Baldev Singh : AIR 1999 SC 2378** and **Megh**

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Singh (supra), where it is settled that the application of Section 50 of the NDPS Act is only in cases of search of a person as contrasted to search of premises, vehicles or articles.

15. However, in ***Yasihey Yobin and Another vs. The Department of Customs, Shillong : 2014 (1) Scale 39***, it was held that where the line of separation is thin and fine between search of a person and an artificial object, the test of inextricable connection is to be applied and then conclusion is to be reached as to whether the search was that of a person or not.

16. The test of inextricable connection was noticed earlier in the case of ***Namdi Francis Nwazor vs. Union of India and Another : (1998) 8 SCC 534*** wherein it was held that if the search is of a bag which is inextricably connected with the person, Section 50 of the NDPS Act will apply.

17. While arguing on this aspect, Learned Legal Aid Counsel for the Appellant fairly pointed out to Exhibit 4 being a report of the Sub-Inspector addressed to the Superintendent of Police, South District at Namchi, furnishing reasons for non-compliance of the provisions of Section 24 of the SADA. That, as per the Report, the search and seizure of controlled substances were made from the Appellant, under Section 100 of the Code of Criminal Procedure, 1973 (for short “Cr.P.C.”) as laid down in Section 24(2) of the SADA as it

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was not possible to search the Appellant either before a Gazetted Officer or a Magistrate on the possibility of the Accused absconding.

18. This report has to be disbelieved as Section 100 Cr.P.C. mandates that the search is to be made in the presence of 2 (two) respectable persons of the locality. If P.W.3 and P.W.4 are such persons, then their evidence, indubitably reflects that they signed on Exhibit 3 on the morning of 14-07-2014 in contradiction to the time shown on Exhibit 3 which is 2315 hours making their presence at the time of seizure doubtful. Secondly, the I.O. was evidently not present at the time of search and seizure as apparent from the evidence of P.W.1 and P.W.2 and the I.O. himself, therefore, the question of him apprehending the absconcion of the Accused during search and seizure does not arise. In fact, a careful perusal of Exhibit 4 and the evidence of P.W.5 would establish that the two are contrary to each other inasmuch as in Exhibit 4, the I.O. has informed the Superintendent of Police that he proceeded to search the Accused Person as per the provision under Section 24(1) of the SADA, while before the Court, he has stated that the Accused had already been apprehended along with concerned drugs by the Melli Police and brought to the Melli Police Station. At the same time, it is worth pointing out that P. W.1 and P.W.2 are a Head Constable and a Lance Naik respectively and in the first instance not empowered to carry out search and seizure in terms of Section 21 of the SADA. In

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this regard, it would do well to peruse the provisions of Section 21 of the SADA which deals with power of entry, search, seizure and arrest without warrant of authorization. The Officer authorized to carry out the above duties is required to be an Officer superior in rank to a Peon, Helper or Constable.

19. Reverting back to the principle of inextricable connection, the evidence of P.W.1 and P.W.2 undisputedly point to the fact that, they suspected the Appellant of carrying drugs and as such, accosted him and checked his bag. If this be the position, the recovery was not a chance recovery. Chance recovery would be one as has been clearly elucidated in ***Gurjant Singh alias Janta vs. State of Punjab : (2014) 13 SCC 603;***

“13. where a police officer in the normal course of investigation of an offence or suspected offences as provided under the provisions of CrPC and in the course of such investigation when a search is completed and in that process happens to stumble upon possession of a narcotic drug or psychotropic substance, the question of invoking Section 50 would not arise.”

20. Since the search was conducted on a suspicion of the Appellant being in possession of controlled substances and not otherwise, it was the duty of P.W.1 and P.W.2, not being Empowered Officers under the SADA, to take him to the Empowered Officer. The Empowered Officer for his part was to have extended the option as provided under Section 24 of the SADA by giving the Appellant an option to be searched either before a Gazetted Officer or a

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Magistrate. It is also apparent from the evidence of P.W.1 and P.W.2 that the Appellant was carrying the bag which was subjected to a search and hence was inextricably connected to the Accused thereby requiring the Searching Officer to extend the option as per the provisions of Section 24 of the SADA.

21. In ***Gurjant Singh*** (supra) the Hon'ble Apex court held that Section 50 of the NDPS Act makes it imperative and obligatory and casts a duty on the Investigating Officer (Empowered Officer) to ensure that search of the suspect is conducted in the manner prescribed by Section 50 by intimating to the person concerned about the existence of his right, that if he so required he shall be searched before a Gazetted Officer or a Magistrate. The Protection provided in the Section is sacrosanct and indefeasible, it cannot be disregarded by the Prosecution except at its own peril.

22. The non-production of the Register of Vehicular Movement maintained at the Melli Check Post would be another negative inference against the Prosecution in terms of Section 114(g) of the Indian Evidence Act, 1872.

23. In consideration of the entire facts and circumstances and in view of the discussions above, I am of the considered opinion that the ratiocination of the Learned Trial Court that it was a chance recovery does not stand to reason in the face of the evidence on record. The impugned Judgment and Sentence cannot be sustained.

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24. Consequently, the impugned Judgment and Sentence of the Learned Trial Court is set aside.

25. The Appellant is acquitted of the offences under Section 9(d) of the SADA and Rule 17(1) of the SADR read with Section 14 of the SADA.

26. Fine, if any, deposited by the Appellant be returned to him forthwith.

27. Motor Cycle bearing registration No.WB 20 W 4475, if confiscated, also be released to the Appellant forthwith.

28. No order as to costs.

29. A copy of this Judgment be transmitted to the Learned Trial Court for information and compliance.

30. The original records related to this case be returned to the Learned Trial Court.

Sd/-
(Meenakshi Madan Rai)
Judge
16-11-2015

Approved for reporting : **Yes**

Internet : **Yes**