

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

DATED : 20st AUGUST, 2015

S.B. : HON'BLE MR. JUSTICE S. P. WANGDI, JUDGE

Crl.A. No.03 of 2015

Appellants : 1. Prakash Pradhan,
 Aged about 32 years,
 S/o Mon Bahadur Pradhan,
 R/o West Pendam,
 Sawney,
 P.O Singtam,
 P.S. Singtam,
 East Sikkim.

 2. Satish Agarwal,
 Aged about 38 years,
 S/o Gauri Shankar Agarwal,
 R/o Singtam Bazaar,
 P.O Singtam,
 P.S. Singtam,
 East Sikkim.

versus

Respondent : The State of Sikkim

Application under Chapter XXIX of Sub-
Section (2) of Section 374 of the Code
of Criminal Procedure, 1973

Prakash Pradhan and Another vs. State of Sikkim

Appearance

Mr. Ajay Rathi, Advocate with Ms. Pema W. Bhutia, Advocate for the Appellants.

Mr. Prakash Pradhan and Mr. Satish Agarwal, Appellants in person.

Mr. Karma Thinlay Namgyal, Additional Public Prosecutor with Mrs. Pollin Rai, Assistant Public Prosecutor and Ms. Parthana Ghataney, Advocate for the State-Respondent.

J U D G M E N T

Wangdi, J.

1. The Appellants herein were sent up for trial for the offences under Clause (d) of Section 9 of the Sikkim Anti Drugs Act, 2006 (for short “SADA, 2006”) read with Section 34 of the Indian Penal Code, 1860 (for short “IPC”) and under Sub-Rule (1) of Rule 17 of the Sikkim Anti Drugs Rules, 2007 (for short “SAD Rules, 2007”) read with Section 14 of the SADA, 2006 and Section 34 IPC, before the Court of the Special Judge (SADA), South Sikkim at Namchi, in Sessions Trial (SADA) Case No.02 of 2014 and upon conclusion of the trial, they were found guilty of the offences and accordingly each of them sentenced to undergo simple

Prakash Pradhan and Another vs. State of Sikkim

imprisonment of 4 (four) years and to pay a fine of ` 1,00,000/- (Rupees one lakh) only for the offence under Clause (d) of Section 9 of SADA, 2006 read with Section 34 IPC and, in default of payment of the fine, to undergo further simple imprisonment of 6 (six) months. For the offence under Sub-Rule (1) of Rule 17 of SAD Rules, 2007 read with Section 14 of SADA, 2006 and Section 34 IPC, they were directed to undergo simple imprisonment of 6 (six) months and each to pay a fine of ` 20,000/- (Rupees twenty thousand) only each and in default of payment of the fine, to undergo further simple imprisonment of 1 (one) month each. The sentences were to run concurrently duly setting off the period of imprisonments already undergone by them.

2. Stated briefly, the case of the prosecution is that on 28-10-2013, an FIR was lodged at the Melli Police Station, South Sikkim, by H/C 1811 Lakpa Tshering Sherpa, P.W.1, stating that when he was on duty along with H/C 1547 Tara Nanda Chettri, P.W.2 and Home Guard Balaram Chettri, at the Melli Check

Prakash Pradhan and Another vs. State of Sikkim

Post for the 0900 hours to 1300 hours shift, a private Bolero bearing registration No.SK01PA2028, had approached the Check Post from Siliguri, West Bengal. When the vehicle was checked, they found large quantity of contraband substances, namely, Lupicof Cough Syrup – 100 ml. and, (ii) Spasmo Proxyvon Capsules, under the seat and in the dashboard of the vehicle. On finding these, they detained the driver, the Appellant No.1 and the Appellant No.2, at the Check Post, for investigation.

3. Based on the above information submitted to the Station House Officer, Melli Police Station, namely, PI Karma Chedup Bhutia, Melli P.S. Case No.48(10)13 dated 28-10-2013, under Sections 9 and 14 of the SADA, 2006, was registered against the Appellants and the case handed over for investigation to SI Palden Bhutia, P.W.7.

4. Shorn of the other details, it will be sufficient to state that the Court of the Special Judge (SADA), South Sikkim, in which the charge-sheet against the Appellants was filed eventually found them guilty of the

Prakash Pradhan and Another vs. State of Sikkim

charges by the impugned judgment dated 19-12-2014 as already alluded to earlier.

5. In this Appeal, the Appellants assail the impugned judgment primarily on the following grounds:-

- (i) That compliance of Section 30 of the SADA, 2006, has been held as being not mandatory on an erroneous reading of ***Sajan Abraham VS. State of Kerala : (2001) 6 SCC 692***; and
- (ii) That mandatory provisions of Sub-Section (2) of Section 21 and Sub-Section (3) of Section 24 of the SADA, 2006, have not been complied with.

6. Mr. Ajay Rathi, Learned Advocate, appearing on behalf of the Appellants, strongly argued that provisions of Sub-Section (2) of Section 21 and Sub-Section (3) of Section 24 of the SADA, 2006, require mandatory compliance. Failure in doing so would vitiate the entire trial against the Appellants entailing their acquittal. It is submitted that since these provisions are in *verbatim* reproduction of Sub-Section

Prakash Pradhan and Another vs. State of Sikkim

(2) of Section 42 and Sub-Section (3) of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short “NDPS Act”), the principles enunciated by the Hon’ble Supreme Court on these provisions would have full application.

7(i). The fatal consequence that would befall upon prosecution cases for non-compliance of these provisions, as per him, has been laid down in (a) **State of Punjab VS. Baldev Singh : (1999) 6 SCC 172**; (b) **Karnail Singh VS. State of Haryana : (2009) 8 SCC 539**; (c) **Rajinder Singh VS. State of Haryana : (2011) 8 SCC 130**; and (d) **Gurjant Singh alias Janta VS. State of Punjab : (2014) 13 SCC 603**. It is his submission that the Trial Court fell in error in relying upon **Sajan Abraham (supra)** in holding that compliance of Section 30 of the SADA, 2006, which is an *in verbatim* reproduction of Section 57 of the NDPS Act, did not require mandatory compliance, a decision which has since been over-ruled in **Karnail Singh (supra)**. It is contended that inapplicability of the provision was held in the facts of that case and certainly did not lay down the proposition that it was not at all mandatory.

Prakash Pradhan and Another vs. State of Sikkim

(ii) As per the Learned Counsel, a bare reading of the FIR and the charge-sheet would reveal that the prosecution had failed to comply with the mandatory provisions of Sub-Section (2) of Section 21, Sub-Section (3) of Section 24 and Section 30 of the SADA, 2006, thereby rendering the entire prosecution case *non est* and a nullity in the eyes of law.

(iv) The other contention which Mr. Rathi would press is the fact that although the FIR, Exhibit 2, was lodged at 10.15 a.m. by P.W.1, H/C 1811 Lakpa Tshering Sherpa, seizure of the contraband substances was admittedly made at 1200 hours as was evident from the seizure memos, Exhibits 3 and 4. It is his submission that before any case is registered under the NDPS Act or SADA, 2006, seizure of the contraband substances is a pre-requisite. The fact that the seizure was made after the case was registered would in his submission vitiate the case of the prosecution at the very inception.

8(i). Mr. Karma Thinlay Namgyal, Learned Additional Public Prosecutor, on the other hand, urged

Prakash Pradhan and Another vs. State of Sikkim

that the provisions of Sections 42 and 50 of the NDPS Act which have been bodily lifted and incorporated as Sections 21 and 24 in the SADA, 2006, and which the Appellants stress upon, pertain to cases based upon prior information. The present case, however, is not such but, is of chance recovery by the Police at the Check Post while making routine checks of vehicles.

(ii) In support of his submission, reliance has been placed upon from the following decisions:-

- (a) ***Megh Singh VS. State of Punjab : (2003) 8 SCC 666;***
- (b) ***State of Haryana VS. Jarnail Singh and Others : (2004) 5 SCC 188;***
- (c) ***State of H.P. VS. Pawan Kumar : (2005) 4 SCC 350; and***
- (d) ***Babubhai Odhavji Patel and Others VS. State of Gujarat : (2005) 8 SCC 725.***

(iii) On the contention as regards the seizure of the contraband substances after the FIR was lodged, it is contended that even this was on account of chance recovery of the contraband substances as would appear from the records. It is urged that in a case of chance

Prakash Pradhan and Another vs. State of Sikkim

recovery, there can be no question of a case being registered preceding the recovery.

9. I have carefully considered the rival submissions and perused the evidence on records.

10(i). Taking up the first ground raised on behalf of the Appellants on the proposition laid down in **Sajan Abraham (supra)**, I am inclined to agree with Mr. Ajay Rathi that the Trial Court fell in error and mis-construed the decision. The cases of **Sajan Abraham (supra)** and **Abdul Rashid Ibrahim Mansuri VS. State of Gujarat : (2000) 2 SCC 513**, were referred to a Constitution Bench of five Judges in **Karnail Singh (supra)** in view of an apparent conflict in the two judgments as regards the rigors of Sections 42, 50 and 57 of the NDPS Act. While deciding the reference, it was held that “a careful examination of the facts in *Abdul Rasid* and *Sajan Abraham* shows that the decisions revolved on the facts and do not really lay down different propositions of law” and ultimately at paragraph 35, it was concluded “that *Abdul Rasid* did not require literal compliance with requirements of Sections 42(1) and 42(2) nor did *Sajan Abraham* hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all”.

Prakash Pradhan and Another vs. State of Sikkim

(ii) This conclusion was arrived at taking into consideration the facts and situations obtaining in those cases. Thus, in paragraph 35 certain guidelines have been prescribed which the Courts may apply to deal with such circumstances. Be that as it may, these observations are made only to answer the issue raised by the Appellants but, is of no relevance and inconsequential in deciding the Appeal for the reasons that shall follow hereafter.

11.(i) As submitted by the Learned Additional Public Prosecutor, the contention of mandatory compliance of Sections 21 and 24 of the SADA, 2006, which is the main thrust in the Appeal, pertain to cases of prior information as would appear from those very Sections. Sections 21, 24 and 30 of the SADA, 2006, are provided under Chapter V prescribing the procedure in dealing with offences under the SADA, 2006. The provisions commencing from Section 20 are in *verbatim* reproduction of the provisions of Section 41 onwards which also are provided under Chapter V of the NDPS Act.

Prakash Pradhan and Another vs. State of Sikkim

(ii) The power of entry, search, seizure and arrest, has been vested upon such Officer empowered by the Government as would appear from Sub-Section (1) of Section 21 of the SADA, 2006. For convenience, we may reproduce Section 21 of SADA, 2006:-

“21. (1) Any such officer (being an officer superior in rank to a peon, helper or constable) to the departments of drugs control, excise, police or any other department of the Government as is empowered in this behalf by general or special order of the Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset –

- (a) enter into and search any such building, conveyance or place;
- (b) in case of resistance, break open any door and remove any obstacle to such entry;
- (c) seize any drug or substance or any other article and any animal or conveyance which he has reason to believe to be liable for confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act; and
- (d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Prakash Pradhan and Another vs. State of Sikkim

Provided that if such officer has reason to believe that a search warrant or authorization cannot be obtained without affording, any opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search any building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.”

The words “if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any controlled substance” appearing in Sub-Section (1) of Section 21 above eminently signify the circumstances under which the actions set out under Clauses (a) to (d) thereunder are initiated.

(iii) While Sub-Section (3) of Section 24 of the SADA, 2006, contemplates a situation where a search is about to be made by an Officer duly authorised under Sub-Section (1) of Section 21 or Section 22, Section 30, provides for a situation “whenever any person makes any arrest or seizure under this Act,”.

(iv) On a conjoint reading of these provisions, there can be no manner of doubt and makes it

Prakash Pradhan and Another vs. State of Sikkim

abundantly clear that those contain procedures where the duly empowered Officer has prior information of the commission of an offence punishable under SADA, 2006, having been committed.

12(i). In the Constitution Bench decision of **Baldev Singh (supra)**, this appears to have been made amply clear leaving no ambiguity. While dealing with the scope of Section 50 of the NDPS Act which is equivalent to Section 24 of the SADA, 2006, it has been held as under:-

“12. On its plain reading, Section 50 would come into play only in the case of a search of a person as distinguished from search of any premises etc. However, if the empowered officer, without any prior information as contemplated by Section 42 of the Act makes a search or causes arrest of person during the normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under the NDPS Act is also recovered, the requirements of Section 50 of the Act are not attracted.” [underlining mine]

(ii) This proposition has been relied upon in **Megh Singh (supra)** as would appear from paragraph 16 which is reproduced below:-

“16. A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag, or premises. (See *Kalema Tumba v. State of Maharashtra* [(1999) 8 SCC 257], *State of Punjab v. Baldev Singh*

Prakash Pradhan and Another vs. State of Sikkim

[(1999) 6 SCC 172] and *Gurbax Singh v. State of Haryana* [(2001) 3 SCC 28]. The language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in *Baldev Singh case* [(1999) 6 SCC 172]. Above being the position, the contention regarding non-compliance with Section 50 of the Act is also without any substance. [underlining mine]

(iii) In *Babubhai Odhavji Patel (supra)* on facts which somewhat the same as in the present case, it has been observed as follows:-

“5. The counsel for the appellant further contended that the search was conducted at 5.30 a.m., that is, before the sunrise and the PSI should have obtained a warrant or authorisation for conducting the search of the vehicle. This plea also is without any merit. The contraband substance, namely, the opium was recovered from the tanker when the usual search of suspected vehicle carrying such contraband was being conducted by the police officials. The police party had no previous information that any contraband substance was being concealed in any building, conveyance or enclosed space and they have to conduct a search pursuant to such information. Then only they require a warrant or authorisation as contemplated under Section 42 of the NDPS Act. If it is a chance recovery, the procedure contemplated under Section 42 cannot be complied with and the evidence of PW 2 would clearly show that it was a chance recovery.

6. The counsel for the appellant would further contend that there was violation of Section 50 of the NDPS Act as the appellant was searched without being informed of the option of search before a gazetted officer or Judicial Magistrate. It is important to note that no narcotic substance was recovered on the person of the appellant. Even if it is assumed that a search was made on the person of the appellant by PW 2, no evidence in that behalf was made use of by the prosecution to sustain the charge against the appellant. The counsel for the appellant placed reliance on *State of Punjab v. Baldev Singh* [(1999) 6 SCC 172]. That decision has

Prakash Pradhan and Another vs. State of Sikkim

no application to the facts of the present case and even according to the said decision, if at all there is any violation of Section 50, it will not vitiate the trial but would render the recovery of the illicit article suspect. In the present case no article was found on the person of the appellant but was recovered from the tanker lorry. Therefore, the recovery itself is not tainted with any procedural irregularity." [underlining mine]

(iv) On this, we may also usefully refer to ***Jarnail Singh (supra)***.

(v) Thus, the case at hand not being one that culminated on the basis of prior information but, as a result of a chance recovery, Section 21 of the SADA, 2006 would have no application. On the anvil of the ratio laid down in ***Megh Singh (supra)***, even Section 24 of the SADA, 2006, would not be attracted since the recovery was made from the vehicle and not from the person of the Appellants. The arguments put forth by the Learned Counsel for the Appellants thus appear to be clearly misplaced.

13(i). The other aspect of the matter is the contention that the requirement of FIR and a case being registered being pre-requisites for an offence under SADA, 2006. In my considered opinion, this also would not sustain for the reasons aforesaid and the

facts emerging from the evidence of P.Ws 1, 2 and 4 as well as the FIR, Exhibit 2. The evidence clearly would reveal that at 10.15 a.m. the questioned vehicle had entered the Melli Check Post where during routine check the Police stumbled upon the contraband substances. This was followed by the Appellants being taken to the Check Post and detained there and then the FIR being lodged by P.W.1 at the Melli Police Station situated some distance away from the Check Post leading to the Station House Officer registering Melli P.S. Case No.48(10)13 dated 28-10-2013, under Sections 9 and 14 of the SADA, 2006, against the Appellants and, P.W.7 to whom the case was marked for investigation, then proceeding to the Melli Check Post where he seized the contraband substances vide seizure memos, Exhibits 3 and 4, at 1200 noon.

(ii) The sequence of events narrated above thus not only explain abundantly the reason as to why the seizure of the contraband substance took place after the FIR was lodged and the case registered against the Appellants, but also convincingly reconcile the lapse of time between 10.15 a.m. to 12 noon. The contention,

Prakash Pradhan and Another vs. State of Sikkim

therefore, appears to be devoid of any merit and is accordingly rejected.

14. Finally, the Learned Counsel for the Appellants, contended rather feebly that the entire prosecution was vitiated as the provisions of Section 165 of the Code of Criminal Procedure, 1973 (for short “Cr.P.C.”) was also not complied with. However, the submission does not appear to be of any substance. It has been held in ***State of Punjab vs. Balbir Singh : (1994) 3 SCC 299*** that non-compliance of Section 165 Cr.P.C. would not *per se* render a search illegal and vitiate the trial as failure to comply with the provisions would only amount to an irregularity. All that the Court has to bear in mind is the effect of such failure while appreciating the evidence in the facts and circumstances of each case.

15. In the case at hand except for raising the objection as a technical flaw, it is neither the case of the Appellants that they have been prejudiced nor any prejudice has found to have been caused by the alleged non-compliance of Section 165 Cr.P.C.

Prakash Pradhan and Another vs. State of Sikkim

16. For the reasons aforesaid, I find no merit in the Appeal.

17. In the result, the Appeal is dismissed.

18. Resultantly, the Appellants shall report before the Court of the Special Judge (SADA), South Sikkim at Namchi, on 21-08-2015 at 10.30 a.m. for execution of the sentence passed by it in the impugned judgment.

19. No order as to costs.

20. A copy of this judgment and the original records be transmitted forthwith to the Court below for information and compliance.

(S. P. Wangdi)
Judge
20-08-2015

Approved for reporting : **Yes**

Internet : **Yes**