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IN THE HIGH COURT OF SIKKIM AT GANGTOK

Criminal Revision Petition No. 3 of 2007

The State of Sikkim

...Revisionist/Petitioner.

-Versus-

Shri Norbu Wangdi Bhutia,
Son of late Phurba Wangdi Bhutia,
Resident of Chumbung Busty,
Pelling, West Sikkim,
Presently posted as Assistant Engineer,
Power Department,
Ravangla, South Sikkim.

...Respondent/Accused.

For the petitioner: Mr. J. B. Pradhan, Public Prosecutor.

For the respondent: Mr. K. T. Bhutia, Senior Advocate with Ms.
Bandana Pradhan, Advocate.

Dates of Hearing : 27.05.2009.

Date of Judgment : 05.06.2009.

**PRESENT: HON'BLE THE CHIEF JUSTICE
MR. JUSTICE AFTAB H. SAIKIA
HON'BLE MR. JUSTICE A.P. SUBBA, JUDGE.**

JUDGMENT

(Saikia, CJ)

This Criminal Revision petition witnesses a challenge basically to the order dated 12.07.2007 passed by the learned Sessions Judge, South Sikkim at Namchi in Criminal Revision No. 06 of 2006.

2. The facts necessary for resolution of the point involved herein may be noticed in brief. On the basis of certain allegations of misappropriation in deposition of electricity charge payment with the State Bank of Sikkim, Ravongla collected by the Respondent, the State of

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Sikkim (for short, 'the State') initiated a criminal proceeding against the Respondent under Section 409/420/477A and the Respondent, being a public servant, it was necessary at that moment to obtain sanction under Section 197 of Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Cr. P.C.').

3. Accordingly, the charge sheet was filed against the Respondent on 27.09.2006 accompanied by the sanction order dated 26.07.2006 (for short, 'the initial order').

4. The initial order may be reproduced as under:

**"HOME DEPARTMENT
GOVERNMENT OF SIKKIM**

No: RC-1/2005/GOS/HOME II/2002/29/3077

Dated: 26/07/2006

SANCTION ORDER

WHEREAS, it is alleged that Shri Norbu Bhutia, Assistant Engineer (Revenue), Energy and Power Department, Government of Sikkim misappropriated the electricity arrears collected from the consumers.

AND WHEREAS, the said act of Shri Norbu Bhutia constituted the offence under sections 409, 420 and 477 Indian Penal Code 1860;

AND WHEREAS, on careful examination of the materials collected by the Investigating Officer of Sikkim Police during the course of investigation, both oral and written, it is found that there are sufficient material evidences for launching prosecution against Shri Norbu Bhutia under sections 409, 420 and 477 Indian Penal Code 1860;

NOW THEREFORE, in pursuance of clause (b) of sub-section (1) of Section 197 of the Code of Criminal Procedure, 1973 (2 of 1974), the State Government hereby accords sanction to prosecute accused Shri Norbu Bhutia, Assistant Engineer (Revenue), Energy and Power Department, Government of Sikkim under sections 409, 420 and 477 Indian Penal Code 1860 in the appropriate Court of Law having jurisdiction to try the case.

Sd/-

(D. P. SHARMA)

ADDITIONAL SECRETARY/HOME "



5. Since proper section was not incorporated in the initial order, the State later on by sanction order dated 01.11.2006 (for short, 'the fresh order') with the forwarding letter dated 01.11.2006 informed the Superintendent of Police, Vigilance, Gangtok that due to inadvertent typographical error, the initial order contained Section 477 IPC which ought to have been 477A IPC and accordingly, the fresh order incorporating Section 477A IPC had been sent.

6. For the sake of convenience the forwarding letter dated 01.11.2006 as well as the fresh order are reproduced below:

**"HOME DEPARTMENT
GOVERNMENT OF SIKKIM**

No: Gos/Home-II/2002/29/Part/3634 Dated:01/11/2006

To,

The Superintendent of Police,
Vigilance Police,
Gangtok.

Sir,

Kindly refer to Sanction Order No. RC-1/2005/Gos/Home-II/2002/29/3077 dated 26/07/2006 according sanction to prosecute accused Shri Norbu Wangdi Bhutia, Assistant Engineer, Revenue, Energy and Power Department, Government of Sikkim under sections 409, 420 and 477 IPC.

While examining a petition received from the accused requesting for the withdrawal of case bearing Vigilance Case No. RC-1 of 2005, it is found that the sanction for prosecution granted ought to have been under sections 409, 420 and 477A of IPC 1860 which, however, due to inadvertent typographical error has been written as 409, 420 and 477 IPC 1860.

You are therefore requested to approach the Hon'ble Court for necessary correction in the Sanction Order. A fresh sanction order incorporation section 477A IPC in place of 477 IPC is enclosed.

Yours faithfully,

Sd/-

(D. P. SHARMA)

SPECIAL SECRETARY/HOME



**"HOME DEPARTMENT
GOVERNMENT OF SIKKIM**

No: RC-1/2005

Dated: 01/11/2006

SANCTION ORDER

WHEREAS, it is alleged that Shri Norbu Wangdi Bhutia, Assistant Engineer (Revenue), Energy and Power Department, Government of Sikkim misappropriated the electricity arrears collected from the consumers.

AND WHEREAS, the said act of Shri Norbu Wangdi Bhutia constituted the offence under sections 409, 420 and 477A Indian Penal Code 1860;

AND WHEREAS, on careful examination of the materials collected by the Investigating Officer of Sikkim Police during the course of investigation, both oral and written, it is found that there are sufficient material evidences for launching prosecution against Shri Norbu Wangdi Bhutia under sections 409, 420 and 477A Indian Penal Code 1860;

NOW THEREFORE, in pursuance of clause (b) of sub-section (1) of Section 197 of the Code of Criminal Procedure, 1973 (2 of 1974), the State Government hereby accords sanction to prosecute accused Shri Norbu Wangdi Bhutia, Assistant Engineer (Revenue), Energy and Power Department, Government of Sikkim under sections 409, 420 and 477A Indian Penal Code 1860 in the appropriate Court of Law having jurisdiction to try the case.

Sd/-

(D. P. SHARMA)

SPECIAL SECRETARY/HOME

7. The learned trial Judge by his order dated 16.11.2006, while considering the fresh order, held that omission of "A" after Section 477 IPC was a typographical error and such mistake on the part of the prosecution was genuine and accordingly the fresh order was accepted and placed on record.

8. Being aggrieved by the acceptance of the fresh order by the trial Court, the Respondent herein approached the learned Sessions Judge by preferring a revision petition being Criminal Revision Petition No. 06 of 2006 and the learned Sessions Judge by his impugned order dated



12.07.2007 held that there being no provision under Cr. P.C. for substitution or replacement of the initial order filed along with subsequent sanction order with the charge sheet. The fresh order was accordingly set aside, but he ordered the trial Court to proceed with the initial order which was filed along with the charge sheet.

9. The operative part of the impugned order passed by the learned Sessions Judge reads as under:

"Therefore there being no provision under the Code of Criminal Procedure for substitution or replacement of sanction order filed along with charge sheet by subsequent sanction order and correctness and legality of the sanction order can be considered only after affording an opportunity to the prosecution to examine the sanctioning authority and affording opportunity of cross-examining the sanctioning authority by the accused the order of the learned trial Court cannot be sustained in law and the same is hereby set aside with the direction to the learned trial Court not to take on record the new sanction order dated 01.11.2006 but to proceed with the original sanction order dated 26.07.2006 which had been filed along with the charge sheet."

10. Pursuant to the impugned order dated 12.07.2007, the trial Court proceeded with the case with the initial order. However, the trial Court by order dated 01.09.2007 found that the initial order also prima facie had a mistake not only with the Section involved but also in the name of the accused which was shown as 'Norbu Bhutia' instead of his original name, 'Norbu Wangdi Bhutia', and accordingly held that the initial order with its inherent mistake was invalid and a bad sanction. Observing that it would be a futile exercise to proceed with the case on invalid sanction, the trial Court discharged the accused under Section 239 Cr. P.C..

11. The petitioner has assailed the above order dated 12.07.2007 in this revision petition, as under:

"8. That aggrieved by the said impugned order dated 12.7.2007 passed by the Ld. Sessions Judge,

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South & West Sikkim at Namchi, the Prosecution beg to file the Revision Petition on the following amongst other:

GROUND S

- I. The Ld. Sessions Judge has erred in law in not appreciating the fact that the Cr. P. C., 1973 does not prescribe any particular form or format for issuing a sanction order under Section 197;
- II. The Ld. Sessions Judge has acted contrary to law is not considering the sanction order dated 1.11.2006 issued by the State Government of Sikkim after correcting the minor clerical mistakes in the sanction order dated 2.7.2007;
- III. The Ld. Sessions Judge has failed to appreciate that an order of sanction Under Section 197 Cr. P. C. is only a mechanism for the State Government to ensure that a Criminal Case against a Public servant is not vexatious in nature and if there are evidence to suggest that the State Government had considered the matter, the requirement of Section 197 Cr. P. C. is complied.
- IV. The Ld. Sessions Judge has failed to appreciate that in the Criminal Case against the Respondent/Accused, the State Government had gone through the entire evidence placed before it by the investigating agency and accorded the sanction to prosecute him after satisfying itself of there being prima-facie case to launch the Prosecution against him;
- V. The Ld. Sessions Judge had erred in law by not appreciating the legal position that minor clerical errors in the sanction order do not render it invalid as a Sanction Order even if found to be defective can be proved by independent evidence to be adduced by the Prosecution during the trial of the case.
- VI. The Ld. Sessions Judge has therefore, erred in law in directing the Judicial Magistrate, South and West at Namchi not to take the sanction order dated 1.11.2006 on the record of G.R. (Vig.) Case no. 65 of 2006."

12. Surprisingly although the petitioner/the State assailed the order dated 12.07.2007 with the grounds as already quoted above, no such specific assailment has been made against the subsequent order dated



01.09.2007 save and except only mentioning in paragraph 9 and making a prayer in IV, which read as under:

"9. That this impugned order being dated 1.9.2007 this Revision petition is filed within the period of limitation prescribed by the Indian Limitation Act, 1963.

.....
IV. be pleased to set aside the impugned order dated 12.7.2007 passed by the Ld. Sessions Judge, South and West Sikkim at Namchi in Cr. Revision Petition No. 6 of 2006 and the consequential order dated 1.9.2007 passed by the Ld. Judicial Magistrate, South Sikkim at Namchi in G. R. (Vig.) Case No. 65 of 2006"

13. In the backdrop of the above facts, we have extensively heard Mr. J.B. Pradhan, the learned Public Prosecutor for the State as well as Mr. K.T. Bhutia, learned Senior Counsel assisted by Ms. Bandana Pradhan, learned Counsel for the Respondent.

14. We have also meticulously perused the impugned order dated 12.07.2007 and also the subsequent order dated 01.09.2007 placed on record although the same has not been specifically put under challenge herein. The records have also been brought to our close scrutiny.

15. In support of the revision petition, Mr. J.B. Pradhan, learned Public Prosecutor has contended that the learned Sessions Judge committed a grave error of law in rejecting the fresh order whereby the petitioner corrected only a minor clerical mistake by way of putting the correct section, i.e. 477A IPC instead of 477 that appeared in the initial order. Since by the fresh order, the State simply corrected the inadvertent typographical error, the revisional Court below ought not to have set aside the fresh order.

16. The basic thrust of the argument of the learned Public Prosecutor is that the mere omission of the relevant section even in the initial order

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would not vitiate the proceeding. Pressing into service all the grounds so taken by the petitioner namely grounds No. I to VI as already reproduced hereinabove challenging the order dated 12.07.2007, the learned Public Prosecutor has submitted that the minor clerical errors will not render the initial order invalid. If it is found to be defective or irregular, it is upon the prosecution to prove the same by independent evidence to be adduced by the prosecution during the trial of the case.

17. Even the learned Public Prosecutor has gone to the extent in contenting that no sanction is necessary to prosecute the Respondent, as in the instant case he did not actually act in the capacity as a public servant. In support of his submission, the learned Public Prosecutor has relied upon the case of *P.K. Pradhan vs. State of Sikkim* reported in (2001) 1 SCC 704 and *Prakash Singh Badal vs. State of Punjab* reported in (2007) 1 SCC 1.

18. Advancing another argument, the learned Public Prosecutor has submitted that by not putting the relevant section which has been claimed to be an act of inadvertent typographical mistake, it cannot be said that there was no application of mind. Referring to paragraph 47 of *Prakash Singh Badal's* case (supra), it is submitted on behalf of the State that the law requires that before the sanctioning authority, all materials must be placed so that the sanctioning authority can apply its mind and take a decision. Whether there is an application of mind or not, that would depend on the facts and circumstances of each case and there cannot be any generalized guidelines in that regard.

19. In the instant case, according to the learned Public Prosecutor, the fresh order has been issued basically on satisfaction of the materials on record so produced before the sanctioning authority and on clear perusal



of those materials only, it has been issued on the ground that in the initial order, the proper section was not incorporated and that also only 'A' in the Section 477 IPC was dropped and by taking corrective measure this fresh order has been issued by correcting the minor clerical mistake and accordingly Section 477 has been substituted by '477A'. It is further submitted that the issuance of the fresh order will not in anyway prejudice the interest of the respondent as it is evident on the face of the order/record itself that Section '477' has only been rectified as Section '477A' which even carries a much lesser punishment.

20. On the contrary, Mr. Bhutia, the learned Senior Counsel for the Respondent has asserted that the fresh order has been issued without application of mind by the authority concerned because at the relevant time i.e. on 01.11.2006, the entire materials were before the trial Court as those were submitted along with the charge sheet and the initial order. On this count alone, the fresh order is non-est in the eye of law.

21. It is contended by the learned Senior Counsel that by the impugned order dated 12.07.2007, although the learned Sessions Judge set aside the fresh order, the trial Court was directed to proceed with the initial order and pursuant to such order, the trial Court by its order dated 01.09.2007, on due consideration of the initial order, rightly and correctly found that there was not only one mistake that to be found in the section, but also mistake was apparent as regards the name of the Respondent. In the initial order, the name of the Respondent was shown as 'Norbu Bhutia' which ought to have been 'Norbu Wangdi Bhutia'. That being so, the learned trial Court rightly held that it would be a futile exercise to proceed with the case on invalid sanction while the entire trial would be void ab initio.



22. To bolster up his submission, Mr. Bhutia, the learned Senior Counsel has relied upon the judicial authority in a case of *Mohd. Iqbal Ahmed vs. State of Andhra Pradesh* reported in AIR 1979 SC 677, wherein in paragraph 3 (at p. 679), it was held that the grant of sanction was not an idle formality or an acrimonious exercise but a solemn and sacrosanct act which affords protection to government servants against frivolous prosecution and must therefore be strictly complied with before any prosecution can be launched against the public servant concerned.

23. The learned Senior Counsel has also referred to a decision of Andhra Pradesh High Court rendered in *M. Gopala Krishnaiah vs. The State* (1988 Cri. L.J. 651), wherein the sanction order to prosecute the appellant was found to be invalid as the sanctioning authority appeared to have not applied its mind independently.

24. Prima facie, a bare reading of the fresh order which has already been quoted hereinabove, would manifestly reflect that the sanctioning authority did not apply its mind and the same was passed mechanically. The reason of this observation is very simple. It is revealed from the record that on the date 01.11.2006 there was no materials whatsoever before the concerned sanctioning authority as during that period the entire records were placed before the trial Court along with the initial order. The necessity of submission of the fresh order under challenge, it appears, was felt only after filing of the initial order along with the charge sheet and the entire records before the trial Court, wherein it was noticed by the prosecution that Section 477 IPC mentioned in the initial order ought to have been Section 477A. So it is evident that on 01.11.2006 neither any records nor any substantial materials were made available before the sanctioning authority for issuance of the sanction order. That

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apart, most interestingly, the name of the Respondent i.e. 'Norbu Wangdi Bhutia' was recorded as 'Norbu Bhutia' in the initial order, but for the reasons best known to the sanctioning authority, there was no mention to incorporate the correct name of the Respondent in the forwarding letter dated 01.11.2006 as has already been extracted hereinabove.

25. A close perusal of the forwarding letter dated 01.11.2006 will indicate that the authority intended only to correct the Section i.e. "477A" instead of "477" and there was no whisper even as regards the correct name of the Respondent in the said forwarding letter dated 01.11.2006. The entire process, so adopted by the sanctioning authority, appears to be simply mechanical, superficial and lacks total application of mind.

26. A bare reading of the operative part of the impugned order would go to show that the learned Sessions Judge, having quashed the fresh order, directed the trial Court to proceed with the initial order which was filed along with the charge sheet. Amazingly, the State has made a challenge to the entire impugned order which also contains the direction to proceed with the initial order, as if they do not want that the trial Court should proceed with the initial order, being aware of the fact that the initial order had inherent defect.

27. Admittedly, pursuant to the impugned order, the trial Court proceeded with the case against the Respondent with the initial order and as apparently since the initial order was found to be defective due to wrong quotation of Section and omission in mentioning the correct name, the trial Court, holding the sanction to be an invalid one, discharged the Respondent by its order dated 01.09.2007.

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28. As has already been quoted and noticed, the pleadings in this Criminal Revision petition do not see any challenge to the order dated 01.09.2007 save and except the prayer No. IV wherein it is prayed to set aside the impugned order and the consequential order dated 01.09.2007 passed by the trial Court.

29. Even, in the filing of the instant revision petition before this Court also, it appears that State has acted purely mechanically and without application of mind and the same is evident ex-facie from the drafting of the petition itself.

30. Be that as it may, though basically there is no challenge against the order dated 01.09.2007, since the same has been put on record, this Court has also taken up the order dated 01.09.2007 for judicial scrutiny and consideration in its revisional jurisdiction.

31. The initial order, as it appears, is not a valid sanction. It transpires that neither the correct name nor the correct provision of the law has been quoted in the initial order.

32. True it is that mere omission of the relevant section in the sanction order would not vitiate the proceeding, but the sanction order on the face of it, needs to reflect the basic facts constituting offence and those facts must be placed before the sanctioning authority for its consideration to grant sanction to the prosecution. In the instant case, having carefully gone through the initial order, we are constrained to hold that the sanctioning authority did not comply with the requirements of Section 197 Cr. P.C.

33. For a ready reference, Section 197 may be quoted as under:

"197. Prosecution of Judges and public servants.- (1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction -

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government;

Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of Article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression "State Government" occurring therein, the expression "Central Government" were substituted.

(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

(3) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section will apply as if for the expression "Central Government" occurring therein, the expression "State Government" were substituted.

(3A) Notwithstanding anything contained in sub-section (3), no Court shall take cognizance of any offence, alleged to have been committed by any member of the Forces charged with the maintenance of public order in a State while acting or purporting to act in the discharge of his official duty during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force therein, except with the previous sanction of the Central Government.

(3B) Notwithstanding anything to the contrary contained in this Code or any other law, it is hereby declared that any sanction accorded by the State Government or any cognizance taken by a Court upon such sanction, during the period commencing on the 20th day of August, 1991 and ending with the date immediately preceding the date on which the Code of Criminal Procedure (Amendment) Act, 1991, receives the assent of the President, with respect to an offence alleged to have been committed during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in the State, shall be invalid and it shall be competent for the Central Government in



such matter to accord sanction and for the Court to take cognizance thereon.

(4) The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held."

34. It is established that the granting of sanction under Section 197 Cr. P.C. is neither an empty nor an idle formality. It is the requirement of the law that provisions stipulated therein are to be observed with complete strictness. To comply with the provisions of Section 197, as quoted above, it must be proved that sanction was given in respect of the facts constituting the offence charged. At the same time, it can be said that Section 197 does not require the sanction to be in any particular form. However, it is desirable that facts should be referred to on the face of the sanction itself. One must get clear indication from the perusal of the sanction order that the sanctioning authority has given due consideration to the relevant materials so placed before it and after consideration of all circumstances of the case, it has granted sanction to the prosecution. It is also correct to say that the order of sanction need not contain the detail reasons in support of granting sanction. However, it is essential that basic facts that constitute the offence must be apparent on the impugned order itself and the record must bear out the reasons in that regard. (See *State of Bihar & Anr. vs. Shri P.P. Sharma & Anr.* reported in AIR 1991 SC 1260).

35. In the case in hand, from the meticulous inspection of the initial order, as already quoted above, it would clearly transpire ex-facie that the sanctioning authority did not consider the relevant materials at the time of granting sanction so as to comply with the provisions of Section 197 Cr. P.C..

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36. That being so, from the facts and circumstances of the case, we have no hesitation to hold that the initial sanction was itself not a valid sanction and in that view, with improper and invalid sanction, the prosecution of the respondent would be a nullity and the trial can be said to be without jurisdiction. We do further hold that the continuation of the proceeding without legal sanction is a gross abuse of process of law.

37. For the reasons, discussions and observations mentioned above, we do not find any illegality or irregularity in passing the impugned order dated 12.07.2007 passed by the learned Sessions Judge, South & West Sikkim at Namchi in Criminal Revision Petition No. 6 of 2006 and the consequential order dated 01.09.2007 passed by the learned Judicial Magistrate, South Sikkim at Namchi in G.R. (Vig.) Case No. 65 of 2006 warranting any interference with the same by this Court under the provisions of Section 401 read with Section 482 Cr. P.C.,

38. In the result, the Criminal Revision Petition stands dismissed.

39. LCR be sent down forthwith.

pm & jks



Judge



Chief Justice.

IN THE HIGH COURT OF SIKKIM AT GANGTOK

Criminal Revision Petition No. 3 of 2007

The State of Sikkim

...Revisionist/Petitioner.

-Versus-

Shri Norbu Wangdi Bhutia

...Respondent/Accused.

C.A.V: 27.05.2009.

DRAFT JUDGMENT

BEFORE

**HON'BLE THE CHIEF JUSTICE
MR. JUSTICE AFTAB H. SAIKIA
HON'BLE MR. JUSTICE A.P. SUBBA, JUDGE.**

HON'BLE MR. JUSTICE A.P. SUBBA, J.

For kind consideration and approval.

I agree -
[Signature]
n.6.09.

[Signature]
(Justice Aftab H. Saikia)
Chief Justice
04.06.2009