



F.R.  
A.

**IN THE HIGH COURT OF SIKKIM AT GANGTOK**  
(Constitutional Writ Jurisdiction)

**WRIT PETITION (Cr1.) 01 OF 2009**

Sunil Dass Rai (Minor)  
Through his father  
Shri Harkaman Rai  
S/o Late Shri Bhagat Dass  
R/o Temi Dara Gaon  
P.O. Temi (South Sikkim).

...Petitioner.

-versus-

1. State of Sikkim,  
Service through the Chief Secretary,  
Government of Sikkim,  
Gangtok (Sikkim).

2. State of Sikkim,  
Service through the Secretary,  
Home Department,  
Government of Sikkim,  
Gangtok (Sikkim).

3. State of Sikkim,  
Service through the Secretary,  
Law Department,  
Government of Sikkim,  
Gangtok (Sikkim).

4. Sonam Detchu Bhutia (O.C.),  
P.S. Namchi,  
Namchi, South Sikkim.

...Respondents

**For Petitioner** : Mr. Gulshan Rai Nagpal, Advocate

**For Respondents** : Mr. Karma Thinlay, Additional Public  
Prosecutor

**Date of Hearing** : 02.11.2009

**Date of Judgment** : 02.11.2009

A



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

**JUDGMENT AND ORDER (ORAL)**

***Saikia, CJ***

Heard Mr. Gulshan Rai Nagpal, learned Counsel for the Petitioner as well as Mr. Karma Thinlay, learned Addl. Public Prosecutor for the State.

2. By means of this application filed under Articles 226/227 of the Constitution of India read with Sections 397 and 482 of the Code of Criminal Procedure, 1973 (for short, 'Cr. P.C.'), the petitioner has sought for quashment of the order dated 03.02.2009 passed by the learned Judicial Magistrate (South) at Namchi (for short, 'the learned Magistrate') in Crl. Police Act Case No. 10 of 2009 by which cognizance has been taken to initiate the impugned criminal proceeding under Section 169 (1) (b) of Sikkim Police Act, 2008 (for short, 'the Act') against the petitioner, who is admittedly a minor and school student of 10<sup>th</sup> Class.

3. For the sake of convenience, the relevant provisions of Section 169 (1) of the Act is reproduced as under:

"169. (1) Any person who commits any of the following offences on any road, or street or thoroughfare, or any open place, within the limits of any area specially notified by the State Government or a Local Government for the purpose of this Section, to the inconvenience,



annoyance or danger of the residents or passers-by shall, on conviction by a Court, be liable to a fine:

- (a) .....
- (b) being found intoxicated and/riotous;
- (c) .....
- (n) .....

(2) The State Government may, by notification in the Official Gazette, prescribe a minimum amount of fine that shall be imposed on a person on conviction for any offence mentioned in sub-section (1)."

4. The relevant facts of the case in brief would be necessary for proper disposal of this petition, which are narrated hereunder.

5. The petitioner was, on 15.2.2009, served with a summon to appear before the Court of the learned Magistrate on 17.02.2009 to answer the charges under Section 169 of the Act, whereby the petitioner was also given opportunity to file an application for plea bargaining under Section 265B Cr. P.C. On his appearance, pursuant to such summon, the petitioner came to know that on 15.11.2008, the Namchi Police registered a Non F.I.R. Case No. 164 (II) 08 against him and the police also submitted prosecution report in the concerned Court.

6. On the basis of the prosecution report, the learned Magistrate took cognizance of the offence under Section 169 (1) (b) of the Act against the petitioner. A criminal proceeding was initiated and forwarded the same to the Juvenile Justice Board,



South District at Namchi (for short, 'the Board') where the case was registered as J.J.B. Case No. 2 of 2009.

7. On 17.2.2009, the petitioner along with his engaged learned Counsel appeared before the Board, being presided over by the Principal Magistrate, and filed an application praying that he might be discharged as no cognizance could be taken for committing any alleged offence under the Act at the relevant time of the commission of offence i.e. on 15.11.2008 as the Act did not provide any penal provision as required under Section 169 (2) of the Act. However, by impugned orders dated 17.02.2009 and 19.03.2009, the prayer for passing necessary orders for cancellation of cognizance already taken was rejected and the learned Magistrate proceeded with the case and issued summons to the witnesses.

8. Challenging the impugned orders dated 03.02.2009, 17.02.2009 and 19.03.2009 and also the initiation of the entire criminal proceeding against the petitioner who was admittedly held to be a juvenile, the learned Counsel appearing for the petitioner has forcefully argued that at the time of alleged act of offence on 15.11.2008, the provision for punishment so contemplated under Section 169(2) of the Act as already noted above has not been notified and as such initiation of the criminal proceeding against the petitioner by taking cognizance under Section 169 (1) (b) without having a penal provision in force under Section 169 is not

A



tenable in law. Since the punishment for such offence has not been in force on the relevant date, the entire proceeding is without jurisdiction and an abuse of the process of the Court and accordingly, it is submitted, the impugned orders and the entire proceeding are liable to be set aside and quashed.

9. The basic thrust of argument advanced on behalf of the petitioner is that although the Act came into force on 04.08.2008 on the publication of the same in the Sikkim Government Gazette itself, Section 169 (2) of the Act has not brought into force and the same has been enforced only on 04.03.2009 by the Notification dated 20.02.2009 published in Sikkim Government Gazette dated 04.03.2009, which reads as under:

“ GOVERNMENT OF SIKKIM  
HOME DEPARTMENT  
GANGTOK

No. 09/Home/2009

Dated: 20.02.2009

#### NOTIFICATION

In exercise of the powers conferred under sub-section (2) of section 169 of the Sikkim Police Act, 2008, the State Government hereby prescribes the following minimum amount of fine that shall be imposed on a person on conviction for any offence mentioned in sub-section (1) of section 169 of the said Act:-

(1) Whoever commits any offence under sub-section (1) of section 169 of the Sikkim Police Act, 2008 shall be punishable with fine which may extend to rupees five hundred.

(2) Whoever having been convicted of an offence under this section is again convicted of any offence under the same section, shall be punishable, for the second and

A.



for each subsequent offence, with double the penalty provided for that offence.

BY ORDER.

N.D. CHINGAPA, IAS  
CHIEF SECRETARY  
F.NO.Home/Conf/127/2007/(2)Part ”

**10.** We have meticulously gone through the factual situation as well as the provisions of law laid down under Section 169 of the Act as indicated above. It appears that it is correct that on the date of the alleged offence committed by the Petitioner on 15.11.2008, although Section 169 is in force, the penal provision i.e. Section 169 (2) has not been notified. In other words, the offence in question alleged to have been committed under Section 169 (1) (a) was not subject to any punishment as required under Section 169 (2) of the Act.

**11.** That being the position, we are of the firm view that the initiation of the impugned criminal proceeding has resulted in contravention of the provision of law contemplated under Section 169(2) of the Act.

**12.** We, accordingly, hold that in absence of any penal provision, none of the act mentioned under Section 169 of the Act can be termed as an offence within the meaning of the Indian Penal



Code (for short, 'IPC') or the General Clauses Act, 1897. Unless an offence is made punishable, no act or omission can be said to be an 'offence' and taking cognizance of the same would be palpably without jurisdiction.

**13.** IPC defines 'offence' under Section 40 as under:

“ 'Offence' – Except in the Chapters and sections mentioned in clauses 2 and 3 of this section, the word “offence” denotes a thing made punishable by this Code.”


**14.** 'Offence' has also been defined under the General Clauses Act in Section 3(38) which is:

“ 'offence' shall mean any act or omission made punishable by any law for the time being in force;”

**15.** The essence of the definition of 'offence' as quoted above is the punishability by law. In other words, the test of anything being an offence is that it must be punishable under the law for the time being in force.

**16.** In view of the above, we have no hesitation to interfere with the criminal proceedings being J.J.B. Case No. 02 of 2008 now pending before the Juvenile Justice Board (South) at Namchi. Accordingly, the impugned criminal proceeding as well as the impugned orders dated 03.02.2009, 17.02.2009 and 19.03.2009 stand quashed and set aside.

**17.** In the result, the writ petition stands allowed.





18. However, having considered the facts and circumstances of the case, there shall be no order as to costs.

  
Judge.

  
Chief Justice.

rsr/jks



