THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 6th JULY, 2016

S.B. : HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

Crl.A. No.27 of 2014

Appellant : Rabin Pradhan,
Aged about 32 years,
S/o Shri Uber Prasad Pradhan,
R/o Dawreygoan Sumbuk,
South Sikkim.

versus

Respondent : State of Sikkim

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

Appearance

Mr. N. B. Khatiwada, Senior Advocate with Ms. Gita Bista and Ms. Monika Rai, Advocates for the Appellant.

Appellant in person.

Mr. Karma Thinlay Namgyal, Additional Public Prosecutor with Mr. S. K. Chettri, Assistant Public Prosecutor for the State-Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1. By Judgment and Order on Sentence, both dated 29-09-2014, in Sessions Trial Case No.106 of 2014, the Learned Sessions Judge, Special Division – I, East Sikkim at Gangtok, convicted the Appellant and

sentenced him to undergo rigorous imprisonment of five years, and to pay a fine of Rs.1,000/ (One thousand) only, under Section 5(b) of the Explosive Substances Act, 1908 (for short "E. S. Act"), read with Section 34 of the Indian Penal Code, 1860 (for short "IPC"), with a default clause of imprisonment. Aggrieved by both, this Appeal has been preferred.

2. P.W.3 Sangay Tshering Bhutia, a Constable at the Melli Check Post, South Sikkim, lodged a written Complaint Exhibit 2, on 06-02-2011, at around 1450 hours, to the effect that while he was on duty from 1200 hours to 1600 hours, at the Melli Check Post, along with Constable Chatur Singh Subba P.W.6 and Home Guard Bir Bahadur Rai, P.W.7, a motor cycle bearing registration no.WB 74 C 7154 driven by the Appellant, a resident of Sumbuk, South Sikkim, reached the Check Post at around 1430 hours. P.W.6 checked the army coloured bag (M.O.II) of the Appellant where sixteen numbers of detonators (M.O.III and M.O.VI) were found. Accordingly, a Melli P.S. Case was registered on the same date against the Appellant under Section 5 of the E. S. Act and investigation taken up by P.W.15 the Investigating Officer (for short "I.O."). Investigation revealed that on the morning of 06-02-2011 the Appellant had gone to the LANCO Energy Private Limited, Teesta Stage VI, 500 MV, Majitar, Rangpo, to supply meat where he met the accused, Deepak Rai, a Foreman of the Project and took sixteen numbers of detonators from him. When a search was conducted by the Police at the Melli Check Post the detonators were found hidden in his hand bag. At the Project premises Deepak Rai was found to be absconding. On

completion of investigation, Charge-sheet was submitted against the Appellant and the absconding accused Deepak Rai under Section 5 of the E. S. Act read with Section 34 of the IPC.

3. In the Sessions Court, Charge was framed against the Appellant under Section 5 of the E. S. Act read with Section 34 of the IPC and on a plea of **"**not guilty**"**, Prosecution witnesses were examined, the evidence on record duly considered and the impugned Judgment and Order on Sentence pronounced.

4. Before this Court, the arguments advanced by Learned Senior Counsel for the Appellant is that, according to P.W.1, the Appellant had been given the explosives by Deepak Rai, a Foreman working in his Project, after which he was never seen in the Project premises. P.W.4 has proved that M.O.II belongs to the said Deepak Rai, while P.W.5 the mother of Deepak Rai has deposed that her son had come home on 20-02-2011 and told her that he had given some blasting caps to one Rabin, for which the Police were on the lookout for him, after which he never returned home. At no point in the Prosecution evidence has it been reflected that the Appellant was working at the site. It was urged that the Appellant was unaware of the contents of M.O.II, as he was in a rush to reach home on account of a family bereavement, Deepak Rai put the bag on his bike asking him to give it to his brother, thereby ruling out actual, conscious and guilty possession or possession for disruptive activity. That, none of the Prosecution

witnesses could vouch for the seizure of the detonators from the Appellant. It was also put forth that out of the Prosecution witnesses examined, four were Police personnel and in such circumstances, the Court ought to have discarded their evidence, being interested witnesses. That, there are inconsistencies in the evidence of P.Ws 3, 6 and 7, with regard to the timing of their duties at the place of occurrence (for short "P.O."). It was expostulated that in the first instance, the I.O. P.W.15 registered the case and proceeded to investigate it himself which is illegal, therefore, the Prosecution case is vitiated on this ground. Hence, the prayer to set aside the impugned Judgment and Order on Sentence.

5. *Per contra*, Learned Additional Public Prosecutor, opened his arguments with a Judgment of the Hon'ble Apex Court in ***Mohammad Usman Mohammad Hussain Maniyar and Others*** vs. ***State of Maharashtra***[1] where it has been laid down that once the Prosecution has proved its case, the burden shifts on the accused to show that he was in possession of the explosives for a lawful purpose. That, there is no dispute with regard to the seizure. The argument of the Appellant with regard to the time of duty of P.W.3 is to be read in conjunction with the evidence of P.W.6 and P.W.7, in any event, according to Learned Counsel the discrepancy with regard

to time is minor and it is established Law that minor discrepancies which do not shake the Prosecution case should not be given undue

1. (1981) 2 SCC 443

consideration. To fortify this submission, he has placed reliance on ***Gurbachan Singh*** vs. ***Satpal Singh and others***[2]. That, the Appellant was aware that the bag contained explosives which he was carrying clandestinely for an unlawful purpose, besides not being a licence holder. On this count, reliance was placed on ***State of T.N.*** vs. ***Sivarasan alias Raghu alias Sivarasa and Others***[3]. He has also raised the contention that the Appellant in his statement under Section 313 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C.") has nowhere explained that Deepak Rai had kept the explosive in his bag, thereby leading to an adverse inference under Section 114 *Illustration* (g) of the Indian Evidence Act, 1872. He has placed reliance on ***Joseph s/o Kooveli Poulo*** vs. ***State of Kerala***[4], ***Mani Kumar Thapa*** vs. ***State of Sikkim***[5] and ***Naval Kishore Singh*** vs. ***State of Bihar***[6]. He concludes that, the Judgment of the Learned Trial Court is a reasoned one and therefore, ought to be upheld.

6. I have heard the submissions put forth by Learned Counsel at great length and given due consideration. The records of the Learned Trial Court including the evidence and impugned Judgment and Order on Sentence have also been perused by me. I have also perused the Judgments relied on by both Learned Counsel.

7. What arises for determination by this Court, are as follows;

---

2. (1990) 1 SCC 445
3. (1997) 1 SCC 682
4. (2000) 5 SCC 197
5. (2002) 7 SCC 157
6. (2004) 7 SCC 502

(i) Has the Prosecution been able to establish that M.O.III and M.O.VI are explosive substances?

(ii) Whether the Prosecution has proved that the Appellant was in possession of the explosive substances?

(iii) Whether the Prosecution has proved its case beyond a reasonable doubt?

8. In ***Mohammad Usman Mohammad Hussain Maniyar (supra)*** [1], it was held that –

> **"13.** In order to bring home the offence under Section 5 of the Explosive Substances Act, the prosecution has to prove : (*i*) that the substance in question is explosive substance; (*ii*) that the accused makes or knowingly has in his possession or under his control any explosive substance; and (*iii*) that he does so under such circumstances as to give rise to a reasonable suspicion that he is not doing so for a lawful object.
>
> **14.** The burden of proof of these ingredients is on the prosecution. The moment the prosecution has discharged that burden, it shifts to the accused to show that he was making or possessing the explosive substance for a lawful object, if he takes that plea.**"**

9. Thus, the parameters of bringing an offender to book under Section 5 of the E. S. Act have been clearly elucidated. The cardinal principle of criminal jurisprudence that the Prosecution is required to prove its case beyond a reasonable doubt is no more *res integra*. On the anvil of the said principle and the parameters set out above, let us explore whether the Prosecution has been able to answer the first question set out hereinabove. In order to do so, it would be

essential to firstly refer to Section 2 of the E. S. Act. This Section defines what an explosive substance is and reads as follows;

> **"2. Definitions**.—In this Act,—
>
> (a) the expression "explosive substance" shall be deemed to include any materials for making any explosive substance; also any apparatus, machine, implement or material used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance; also any part of any such apparatus, machine or implement;
>
> (b) the expression "special category explosive substance" shall be deemed to include research development explosive (RDX), penta erythritol tetra nitrate (PETN), high melting explosive (HMX), tri nitro toluene (TNT), low temperature plastic explosive (LTPE), composition exploding (CE) (2, 4, 6 phenyl methyl nitramine or tetryl), OCTOL (mixture of high melting explosive and tri nitro toluene), plastic explosive kirkee-1 (PEK-1) and RDX/TNT compounds and other similar type of explosives and a combination thereof and remote control devices causing explosion and any other substance and a combination thereof which the Central Government may, by notification in the Official Gazette, specify or the purposes of this Act.**"**

10. Section 2 is thus self-explanatory.

11. P.W.12 and P.W.13 are the Junior Scientific Officer and the Senior Scientific Officer (Physics) of the Central Forensic Science Laboratory, Kolkata. M.O.V(1) to M.O.V(4) are the four numbers of electronic detonators seized by the I.O., P.W.15, from LANCO Pvt. Ltd., Teesta Stage VI, Majitar, Rangpo, for sample match with M.O.VI which were the six detonators along with M.O.III ten other detonators seized by the Police allegedly from the possession of the Appellant, totaling to sixteen. Firstly, P.W.12 has stated that M.O.V(1) to V(4) were marked in the laboratory by him as 3041B1 to 3041B4. On examination, he found

that the four articles tested positive for the presence of Penta Erythritol Tetra Nitrate (PETN) which is an explosive substance used in detonators. P.W.12 has also stated that the four M.Os were blasted and deformed. P.W.13 in his evidence stated that he examined six detonators forwarded to him but the six electronic detonators M.O.VI on comparison with M.O.V(1) to (4) were dissimilar. Although he claims to have "carefully and thoroughly" examined the six detonators, he concludes that due to non-availability of manufacturing and licensing details the case was referred to the Directorate of Explosive Controller to ascertain the final finding. Consequently, there is no conclusive evidence to the fact that M.O.VI contained explosive substances. It is true that merely by looking at the M.Os, it can be assumed that they are detonators, but as the M.Os were forwarded for expert opinion, the Prosecution through the expert ought to establish this point beyond a reasonable doubt, however the report is inconclusive. Reverting to the evidence of P.W.12, he has stated, *inter alia*, that, ***"****Memo No.-0418/POL/CID/11/1376 dated: 22.06.2012 along with one sealed cloth packet was received by me through the Director, CFSL, Kolkata on 26.6.2012, in connection with Melli P.S.Case* ***No.03/2011 dated:6.2.2011*** *U/S 5 of the Explosive Substances Act, 1908, which was forwarded by Sr. Superintendent of Police, CID Branch, Gangtok****."*** It points to the fact that M.O.V(1) to (4) were received by him were in connection with the Melli Police Case dated 06-02-2011, although there is no explanation forwarded as to what the Police were doing with the M.Os from the

date of seizure till 22-06-2012, almost four months. That having been said, on perusal of the evidence of P.W.13 he has, *inter alia*, stated that, **"***On 30.5.2011 I received one sealed cloth cover box through Directors, CFSL Kolkata along with a memo No.0418/POL/CID/Photo/II/711 dated: 28.5.2011 regarding case* ***No.03(2)2011 dated:31.3.2011****, Melli Police Station U/S 05 of the Explosive Substances Act, 1908 which was forwarded by Sr. Superintendent of Police, CID Branch, Gangtok.***"** The above would reveal that the explosives received by P.W.13 were in connection with a Melli P.S. Case dated 31-03-2011 and not pertaining to the instant case which is dated 06-02-2011, leading to another doubt in the Prosecution case. Therefore, from the evidence of P.W.13 who embarked on examining M.O.VI, firstly, it has not been established that the detonators indeed contained any explosive substance as has been established by P.W.12 in the case of M.O.V(1) to M.O.(V)4. Secondly, it has not been established that M.O.VI pertained to the case in question.

12. Now, coming to the next question, it is in the evidence of P.W.3 that while he was on duty along with P.W.6 and P.W.7 at Melli P.S. from 1200 hours to 1400 hours, the Appellant came on the bike and on checking they found sixteen numbers of live detonators inside a bag carried by the Appellant without any document. This evidence of P.W.3 is duly supported by the evidence of P.W.6 and P.W.7. Pursuant to such recovery, P.W.3 lodged the FIR Exhibit 2. As per the I.O. P.W.15, he seized the sixteen detonators M.O.III and M.O.VI, out of which six were taken out as controlled substances. That, when he made the seizures,

P.W.8 and P.W.14 were the witnesses to the seizure. A perusal of the evidence of P.W.8 and P.W.14 sadly fails to support the Prosecution assertion. P.W.8 states that he became a witness on the insistence of the Police and he had not seen the Appellant carrying M.O.II, which allegedly contained M.O.III and M.O.IV. On the relevant day, he found M.O.II lying on the table at the Police Check Post and could not say to whom it belonged. Although he admits that M.O.III were seized in his presence but could not state where M.O.III was obtained from. M.O.IV according to him is the cloth cover bearing his signature but since no parcel covered by M.O.IV was opened in the Court room, this aspect of the Prosecution evidence needs no consideration. P.W.14 the other witness to the seizure of articles, on the basis of which Exhibit 4 the Seizure Memo was prepared, has also admitted that on the relevant day, he had not seen the Appellant carrying M.O.II and to confound the above statement he had stated that when he reached the P.O. he did not see M.O.II in the Police Station either. According to him, two detonators were seized but he failed to identify the same, giving a new twist to the Prosecution case. He admits that he did not sign on any paper on the relevant day. This is contrary to the evidence of the I.O. P.W.15 who had stated that Exhibit 4(c) was the signature of P.W.14, which was affixed in his presence. On perusal of Exhibit 4, the signature of P.W.14 has been marked as Exhibit 4(c), identified by the I.O. P.W.15 also as Exhibit 4(c), while the witness in his evidence-in-chief claims it to be Exhibit 4(b), that too not affixed on the day of seizure of the two

detonators, which for their part have remain unidentified. Hence, the evidence of P.W.8 and P.W.14 have failed to establish beyond a reasonable doubt that the seizures of the concerned M.Os were made in their presence. Although P.W.3, P.W.6 and P.W.7 were at the P.O., besides P.W.3, who has stated that P.W.15 seized sixteen numbers of live detonators, P.W.6 and P.W.7 have failed to support this evidence neither have they stated that two independent witnesses, i.e., P.W.8 and P.W.14 were present when the seizures were made by P.W.15. In fact, although P.W.7 identified M.O.II and M.O.III, he was not able to state where M.O.VI, i.e., six numbers of detonators were. Hence, the Prosecution has failed to evince any cogent evidence to establish seizure of M.O.III and M.O.VI in view of the discussions which have been put forth hereinabove, thereby negatively answering the second question.

13. This leads us to the third question, before dealing with which, it may be pointed out that one of the arguments forwarded by Learned Senior Counsel for the Appellant was that, the entire trial is vitiated on account of registration of the case by P.W.15 and investigation of the matter by P.W.15 himself. This is not a tenable argument. The Complaint was lodged by P.W.3 and as the SHO of the Melli P.S., P.W.15 has drawn up the formal FIR, Exhibit 3 and registered the Melli P.S. Case. Since he is not the Complainant, the question of the trial being vitiated, in my considered opinion, does not arise.

14. The other argument forwarded was that P.W.3 in Exhibit 2 has stated that he was on duty at the check post from 1200 hours to 1600 hours, but in his evidence before the Trial Court he has stated that he was on duty from 1200 hours to 1400 hours which leads to a doubt in the Prosecution case. Having considered this argument, it would be worthwhile to point out that in ***State of Punjab*** vs. ***Ramdev Singh***[7], the Hon'ble Apex Court held, *inter alia*, that the court should not lean in favour of acquittal by giving weight to irrelevant or insignificant circumstances or by resorting to technicalities or by assuming doubts and giving benefit thereof where none reasonably exists. In the instant case, it may be pointed out that even assuming that P.W.3 was not on duty at 1430 hours it is manifest that he was still present at the Melli Check Post and merely because he was off duty does not mean that he stops being a Policeman. Therefore, this argument of Learned Senior Counsel for the Appellant bears no weight while at the same time this is irrelevant to the matter in hand, considering the preceding discussions.

15. The next grievance that Learned Senior Counsel for the Appellant had was that the Learned Trial Court in its Judgment has held that **"**W*hile recording the 313 Cr.P.C. statements of the accused, he could not explain as to whom the said bag belongs to and how the said bag come to be in his possession*.**"** Placing reliance on ***Nagaraj*** vs. ***State, Rep. by Inspector of Police, Salem Town, Tamil Nadu***[8] it was argued that the Apex Court had held that refusal by the

7. (2004) 1 SCC 421 8. 2015 CRI.L.J. 2377 (SC)

accused to answer or give an unsatisfactory answer would not justify the Court to return a finding of guilt. In this context, we may usefully refer to Paragraph 15 of the cited Judgment where it was held as follows;

> **"15.** In the context of this aspect of the law it is been held by this Court in *Parsuram Pandey* v. *State of Bihar* [(2004) 13 SCC 189] that Section 313 CrPC is imperative to enable an accused to explain away any incriminating circumstances proved by the prosecution. It is intended to benefit the accused, its corollary being to benefit the Court in reaching its final conclusion; its intention is not to nail the accused, but to comply with the most salutary and fundamental principle of natural justice i.e. audi alteram partem, as explained in Arsaf Ali v. State of Assam [(2008) 16 SCC 328]. In Sher Singh v. State of Haryana [(2015) 1 SCR 29] this Court has recently clarified that because of the language employed in Section 304B of the IPC, which deals with dowry death, the burden of proving innocence shifts to the accused which is in stark contrast and dissonance to a person's right not to incriminate himself. It is only in the backdrop of Section 304B that an accused must furnish credible evidence which is indicative of his innocence, either Under Section 313, CrPC or by examining himself in the witness box or through defence witnesses, as he may be best advised. Having made this clarification, refusal to answer any question put to the accused by the Court in relation to any evidence that may have been presented against him by the prosecution or the accused giving an evasive or unsatisfactory answer, would not justify the Court to return a finding of guilt on this score. Even if it is assumed that his statements do not inspire acceptance, it must not be lost sight of that the burden is cast on the prosecution to prove its case beyond reasonable doubt. Once this burden is met, the statements under Section 313 assume significance to the extent that the accused may cast some incredulity on the prosecution version. It is not the other way around; in our legal system the accused is not required to establish his innocence. We say this because we are unable to subscribe to the conclusion of the High Court that the substance of his examination Under Section 313 was indicative of his guilt. If no explanation is forthcoming, or is unsatisfactory in quality, the effect will be that the conclusion that may reasonably be arrived at would not be dislodged, and would, therefore, subject to the quality of the defence evidence, seal his guilt. Article 20(3) of the Constitution declares that no person accused of any offence shall be compelled to be a witness against himself. In the case in hand, the High Court was not

> correct in drawing an adverse inference against the Accused because of what he has stated or what he has failed to state in his examination Under Section 313, Cr PC.**"**

16. Based on this decision, it would not be incorrect to hold that the observation of the Learned Trial Court on this aspect was erroneous. I am inclined to agree with the argument of Learned Senior Counsel for the Appellant that the Appellant is not required to put forth any ground or give a clarification, if he is not so inclined.

17. The argument of conscious possession and unlawful purpose put forth by the Prosecution holds no water in the absence of any clinching proof or for that matter any proof of the same. P.W.5 the mother of the accused Deepak Rai, a witness declared hostile by the Prosecution, has stated that her son had come home on 20-02-2011 during the naming ceremony of his son and told her that he had given some blasting caps to the Appellant, for which the Police were looking for him. Thereafter, he left home and he never returned. Despite this statement if one is to assume that the bag belonged to the Appellant, it has to be proved that M.O.III and M.O.VI were indeed explosives and the explosives belonged to the Appellant of which he was in conscious possession and he was going to use it for an unlawful purpose. None of the above counts have been established by the Prosecution by way of evidence.

18. From the totality of the facts and circumstances it is evident that the Prosecution has failed to prove its case beyond a reasonable doubt.

19. Accordingly, the impugned Judgment and Order on Sentence is set aside. The Appellant is acquitted of the offence under Section 5(b) of the Explosive Substances Act, 1908 read with Section 34 of the IPC. He is discharged from his bail bonds.

20. Copy of this Judgment be forwarded to the Learned Court below for information and compliance.

21. Records of the Learned Trial Court be remitted forthwith.

Sd/-
(Meenakshi Madan Rai)
Judge
06-07-2016

Approved for reporting : **Yes**

Internet : **Yes**

ds