THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 31st AUGUST, 2019

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

Crl.A. No.27 of 2018

Appellant : Jabber Bardewa

versus

Respondent : State of Sikkim

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

Appearance

Mr. B. K. Gupta, Advocate for the Appellant.

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

J U D G M E N T

Meenakshi Madan Rai, J.

1. Aggrieved by the impugned Judgment dated 30-07-2018, convicting him of the offence under Section 7(a), read with Section 14 of the Sikkim Anti Drugs Act, 2006 (for short "SADA, 2006") and Section 9(d) of the SADA, 2006, and with the Order on Sentence, dated 31-07-2018, the Appellant assails both before this Court. The Appellant was ordered to undergo simple imprisonment for a period of six months and fined Rs.3,000/- (Rupees three thousand) only, under Section 7(a) read with Section 14 of the SADA, 2006. He was also sentenced to undergo simple imprisonment for a period of one year and

fined Rs.5,000/- (Rupees five thousand) only, under Section 9(d) of the SADA, 2006. The sentences were ordered to run concurrently

2. Learned Counsel for the Appellant advanced the argument that the provisions of Section 24(1) of the SADA, 2006, which requires the Appellant to be searched either before a Gazetted Officer or a Magistrate has not been complied with, the search and seizure was conducted sans either of them. P.W.2, the Head Constable who apprehended the Appellant was unaware of the search and seizure of controlled substances, although he claims to have found the Appellant in a state of slight intoxication at around 3 p.m. and detained him in the bus he was travelling in. Contrarily, the Seizure Memo records the time of search and seizure as 14.30 hours, half an hour prior to detention of the Appellant by P.W.2, while P.W.3 the Doctor claims to have medically examined the Appellant at 14.50 hours, also prior in time to the Appellant's detention. These circumstances are a ludicrous proposition in the Prosecution case for which the Appellant is entitled to the benefit of doubt. P.W.3 who medically examined the Appellant found no signs of intoxication and declared the Appellant clinically fit for detention. The Prosecution case is that P.W.3 witnessed the search of the belongings of the Appellant but he failed to recall or identify the Appellant or the controlled substances purportedly recovered from the Appellant. That, the evidence of P.W.6 raises doubts on the authenticity of the Prosecution case as he has variously

described the colours of the seized controlled substances as 'green' in his statement to the Police and 'blue' before the Learned Trial Court. Hence, on the anvil of the discrepancies enumerated above, the Prosecution case is doubtful and the Appellant deserves an acquittal.

3. In repudiation, the Prosecution strongly urged that, the presence of P.W.5 an independent witness at the time of search and seizure along with another witness and P.W.3, establishes recovery and seizure of the controlled substances. That, the allegation of non-compliance of Section 24(1) of the SADA, 2006, is an erroneous proposition as P.W.3 a Gazetted Officer and two other independent witnesses were present when search and seizure were carried out. That, 6 files of "Spasmo-Proxyvon plus" capsules containing 144 capsules, 17 loose "Spasmo-Proxyvon" capsules and 22 loose tablets of "Nitrosun 10" were recovered from the pocket of the Appellant and seized as proved by the evidence of P.W.5 and the Investigating Officer (I.O.) P.W.6,. The samples of the seized substances which were chemically analysed by P.W.1 is proof of the fact that they contained controlled substances. No explanation was furnished by the Appellant for being in possession of such a large quantity of controlled substances neither did he put any facts to rebut the case of the Prosecution or state that the controlled substances were for his own consumption. The only inference therefore is that substances were meant for sale and hence, the impugned

Judgment and Order on Sentence of the Learned Trial Court warrants no interference.

4. The rival contentions of the parties were heard at length. Meticulous perusal has been made of the evidence and documents on record as also the impugned Judgment and Order on Sentence.

5. Before embarking on an analysis of the evidence on record, a brief narration of the facts as per the Prosecution is essential. On 03-07-2016 at about 1405 hours, P.W.2 HC Lakpa Sherpa, deployed at the Rangpo Check Post telephonically informed P.W.4, the SHO of the Rangpo P.S., that during routine checking of incoming vehicles at the Rangpo Check Post, he suspected the Appellant, who was travelling in the Siliguri to Gangtok bound 'Apsara Bus', bearing Registration No.WB 73 B 8496, of being in possession of controlled substances. Based on the information Rangpo Police Station Case, FIR No.38(07)2016, Exhibit 7, dated 03-07-2016, under Sections 7(a)(b)/9(b)(d)/14 of SADA, 2006, was registered against the Appellant and endorsed to P.W.6 the I.O. for investigation.

6. The Appellant and his family, it was revealed during investigation, were residents of Singtam. The morning of the incident he had gone to Siliguri to purchase controlled substances worth Rs.1,500/- (Rupees one thousand and five hundred) only, for personal consumption and sale, which he concealed in his trouser pocket. On his return journey in the bus

the facts as cited in Exhibit 7 *supra*, the FIR transpired. Pursuant thereto the I.O. reached the spot and in the presence of P.W.3 and two independent witnesses recovered controlled substances comprising of M.O. II five strips of Nitrosun 10 tablets, M.O.III plastic packet containing eight blue "Spasmo-Proxyvon plus" capsules, M.O.III'A' six files of "Spasmo-Proxyvon" capsules, M.O.IV loose "Spasmo-Proxyvon" capsules, M.O.V Nitrosun 10 tablets in strips, from the possession of the Appellant. These were sealed and later forwarded to RFSL, Ranipool for chemical analysis. Thereafter, Charge-Sheet came to be filed against the Appellant under the above provisions of law.

7. The Learned Trial Court framed Charge under Section 7(a) read with Section 14 of the SADA, 2006 and under Section 9(d) of the same Act on which counts the Appellant entered a plea of "not guilty" upon which the trial commenced. For convenience, the said provisions of law under which Charge was framed are extracted hereinbelow;

> **"Prohibition of certain operations**
>
> **7. No person shall –**
>
> **(a) sale (sic, sell), stock for sale or trade in any controlled substance; or**
>
> **……."**

> **"Punishment for offence for which no punishment is provided**
>
> **14. Whoever contravenes any provisions of this Act or any rule or order made thereunder for which no punishment is separately provided in this chapter, shall be punishable with imprisonment for <u>a term which may extend to six months, or with fine which may extend to twenty thousand rupees, or with both</u>."** [emphasis supplied]

> **"Punishment for contravention of controlled substances**
>
> **9. Whoever, contravenes any provision of this Act or any rule or any order made thereunder shall be punishable – .....**
>
> **(d) where the contravention involves a person using a mode of transport or any other form of conveyance, either inter-State or intra-State, such person shall be liable to imprisonment for a term which may extend to five years or with fine which may extend to one lakh rupees, or with both, and the vehicle as used, shall be liable to be seized and confiscated, which may be released on payment of twenty thousand rupees;**
>
> ....."** [emphasis supplied]

8. The Prosecution is to establish beyond a reasonable doubt that the Appellant was carrying the controlled substances for sale, or was stocking the articles for sale or trading. For the second offence, the Prosecution is also required to establish that the controlled substances were being transported either inter-State or intra-State. As Section 7 does not provide for penalty, the provisions of Section 14 have been invoked which have already been extracted hereinabove. Section 16 is also relevant for the present purposes as the SADA, 2006, carries a reverse burden of proof with a culpable mental state of the accused. For convenient reference the provision is extracted hereinbelow;

> **"Presumption of culpable mental state**
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> **16. (1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the court shall presume the existence of such mental state but it shall be a defense for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.**
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> ***Explanation***: In this section "culpable mental state" includes intention, motive, knowledge of a fact and belief in, or reason to believe a fact.

> **(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability."** [emphasis supplied]

9. The provisions of Section 24 of the SADA, 2006, which deal with conditions under which search and seizure of suspects can be conducted is akin to Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act, 1985). Section 24 of the SADA, 2006, specifically provides for conditions under which search of persons viz., suspects shall be conducted and reads as follows;

> **"Conditions under which search of persons shall be conducted**
>
> 24. (1) When any officer duly authorized under Section 21 is about to search any person under the provisions of Section 20, Section 21 or Section 22, **he shall, if possible, take such person to the nearest gazetted officer of any of the departments mentioned in Section 21 or to the nearest Magistrate**.
>
> ....." **[emphasis supplied]**

Since other Sub-Sections of this Section are superfluous for the present purpose, they are not being extracted herewith. Section 24(1) thus lays down *inter alia* that when the authorised Officer is to search the Appellant, he shall do so in the presence of a Gazetted Officer or a Magistrate. The evidence on record is to be carefully assessed to verify whether there was compliance of the mandatory provision of the Statute.

10. P.W.3 is the Doctor who was posted at the Rangpo PHC. The Prosecution asserts that he is the Gazetted Officer

before whom the search and seizure ensued. Indubitably he holds a Gazetted rank. P.W.3 stated that he received a written requisition from P.W.6 the I.O., vide Exhibit 3, on the relevant day requesting him to be present at the Rangpo Check Post to witness the search of the belongings of an individual, in connection with a case under SADA, 2006. He does not deny his presence at the Check Post for the above stated purpose, but was unable to recollect the details of the bus or the controlled substances that were recovered by the Police at the relevant time and whether the articles were already at the Check Post or seized from the Appellant at the spot. Above all, he failed to identify the Appellant as the person from whom the alleged recoveries were made. In other words, neither was the identity of the Appellant established by P.W.3 nor were the alleged seized articles said to be controlled substances, identified by him. The evidence of P.W.3 read along with P.W.5 and P.W.6 indeed establishes the fact of presence of P.W.3 at the place of seizure. P.W.6 sought the presence of P.W.3 vide Exhibit 3 which is not denied. Vide Exhibit 8, P.W.6 also obtained a written option of the Appellant as to whether he sought to be searched in the presence of a Magistrate or a Gazetted Officer. The Appellant consented to be searched in the presence of a Gazetted Officer, though the consent is rather unhappily worded, nevertheless it suffices for the present purpose. Thus far the evidence of P.W.3, P.W.5 and P.W.6 pertaining to the presence of P.W.3 and P.W.5 at the place of seizure is not demolished.

The Prosecution is however to prove the exact place of seizure. P.W.5 the seizure witness stated that he went to the "Check Post" where he saw the Appellant was also present and later P.W.3 also arrived there, i.e., at the Check Post, upon which the search and seizure of the controlled substances was made. P.W.3 on this count has also stated that he went to the Rangpo Check Post. The evidence of P.W.3 and P.W.5 do not corroborate the evidence of P.W.6 the I.O. as regards the place of search and seizure. P.W.6 deposed that, on arrival of P.W.3, he conducted the search of the person of the accused, who was on a seat in the middle portion of the bus, during the course of which he recovered M.O.II, M.O.III, M.O.IIIA, M.O.IV and M.O.V. Thus on comparison of the evidence of P.W.3 and P.W.5 with P.W.6 an anomaly emerges about the place of seizure as evident *supra*. It is now settled law that minor discrepancies which are insignificant do not affect the Prosecution case, on this aspect the Hon'ble Supreme Court in ***Shamim*** vs. ***State (Government of NCT of Delhi)***[1] held as follows;

> **"12.** ..... The prosecution evidence may suffer from inconsistencies here and discrepancies there, but that is a shortcoming from which no criminal case is free. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. ....."

However, in the instant matter the discrepancy as detailed above is neither insignificant nor can it be brushed aside as it goes to the root of the Prosecution case. The benefit of this anomaly has to be extended to the Appellant.

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[1] (2018) 10 SCC 509

11. That having been said, Exhibit 4 the Property Seizure Memo reveals that another witness besides P.W.5 appears to have signed on the document in proof of seizure of the controlled substances. This observation finds fortification in the evidence of P.W.6, the I.O., who stated that he seized the above described controlled substances in the presence of two independent witnesses besides P.W.3. The Prosecution has produced P.W.5 who was one of the alleged independent witness who identified Exhibit 4(b) as his signature on Exhibit 4 the Property Seizure Memo. The second independent witness whose name appears in Exhibit 4, Shyam Chhetri, was not produced by the I.O. despite the I.O. No reasons for such non-production of the witness was furnished by the Prosecution. As per P.W.5 the recovery and seizure of the controlled substances was made by the Police in his presence and that of P.W.3 the Doctor, he makes no reference to a third witness in his evidence, thereby, casting a doubt on the presence of any other person during seizure at the relevant place. On the other hand, P.W.3 for his part makes no mention of the presence of either P.W.5 or any other witness at the time of the alleged search and seizure. This witness has only specified that when he went to the Rangpo Check Post the Police seized the articles from a person who he was unable to indentify before the Court. The absence of the alleged second independent witness leads this Court to draw an adverse inference under Section 114(g) of the Indian Evidence Act, 1872. It may thus be stated that although the search and

seizure was made before P.W.3 a Gazetted Officer, but the Prosecution case finds no substantiation on the failure of P.W.3 to identify the accused or establish the search and seizure.

12. That apart, under Section 7 of the SADA, 2006, prohibits the sale, stocking for sale or trading in controlled substances. The Prosecution contended that the Appellant failed to explain the reason for his possession of the Material Objects detailed hereinabove, it is worthwhile therefore to revert to the principle of rebuttable presumption. The provisions of Section 16 of the SADA, 2006, will only come into play should the Prosecution be successful is establishing proof against the Appellant beyond a reasonable doubt. It is then and only then that the burden shifts on the accused.

13. In ***Mohan Lal*** vs. ***State of Punjab***[2], the Hon'ble Supreme Court while considering a matter under the NDPS Act, 1985 held as follows;

> **"13.** Unlike the general principle of criminal jurisprudence that an accused is presumed innocent unless proved guilty, the NDPS Act carries a reverse burden of proof under Sections 35 and 54. But that cannot be understood to mean that the moment an allegation is made and the F.I.R. recites compliance with statutory procedures leading to recovery, the burden of proof from the very inception of the prosecution shifts to the accused, without the prosecution having to establish or prove anything more. The presumption is rebuttable. Section 35(2) provides that a fact can be said to have been proved if it is established beyond reasonable doubt and not on preponderance of probability. The stringent provisions of the NDPS Act, such as Section 37, the minimum sentence of ten years, absence of any provision for remission, do not dispense with the

[2] 2018 SCC OnLine SC 974

> requirement of the prosecution to establish a prima facie case beyond reasonable doubt after investigation, only after which the burden of proof shall shift to the accused. The case of the prosecution cannot be allowed to rest on a preponderance of probabilities.**"**

In this context, we may also refer to the ratio in ***Hanif Khan @ Annu Khan*** vs. ***Central Bureau of Narcotics through Inspector L. P. Ojha***[3] wherein the Hon'ble Supreme Court observed as follows;

> **"**…… He is presumed to be guilty consequent to recovery of contraband from him, and it is for the accused to establish his innocence unlike the normal rule of criminal jurisprudence that an accused is presumed to be innocent unless proved guilty. But that does not absolve the prosecution from establishing a prima facie case only whereafter the burden shifts to the accused. In *Noor Aga v. State of Punjab*, *(2008) 16 SCC 417* it was observed as follows :
>
> > 58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.
>
> Because there is a reverse burden of proof, the prosecution shall be put to a stricter test for compliance with statutory provisions. If at any

[3] Order dated 20-08-2019 passed in Criminal Appeal No.1206 of 2013

> stage, the accused is able to create a reasonable doubt, as a part of his defence, to rebut the presumption of his guilt, the benefit will naturally have to go to him.**"**

These observations hold good for Section 16 of the SADA, 2006, and therefore for the purposes of the instant case as well. No proof emerged to establish that the M.Os were in the possession of the Appellant or that he sought to sell the articles. None of the ingredients of Section 7 of the SADA, 2006, were proved by the Prosecution.

14. While dealing with Section 9(d) of the SADA, 2006, according to P.W.2, he detained the Bus bearing registration No.WB 73B 8496 for reasons as enumerated *supra*. He informed P.W.4 the SHO, Rangpo P.S. of his suspicion, asking him to take necessary action. The bus along with the Appellant remained at the Rangpo Check Post till arrival of the Police team including P.W.6 upon which he handed over the Appellant to them and returned to the Check Post for duty. P.W.4 substantiated the evidence of P.W.2 with regard to the information having been given to him by P.W.2 upon which he drew up the FIR, Exhibit 7, registering a case against the Appellant under Sections 7(a)/9(d)/14 of the SADA, 2006. P.W.2 was not witness to the alleged seizure. No passengers of the bus however were made witnesses to the case, either to establish search and seizure of the controlled substances from the person of the Appellant or that he was in the possession of controlled substances. No evidence could establish the allegation of the presence of the Appellant in the bus. This lacuna in the Prosecution case cannot

be wished away, more so when both P.W.3 and P.W.5 have stated that the seizures were made at the Check Post contradicting the evidence of P.W.6.

15. P.W.3 is said to have medically examined the Appellant but found no traces of intoxication which P.W.2 had suspected the Appellant of being under. Although P.W.1 the Junior Scientific Officer at RFSL, Saramsa opined that M.O.II and M.O.III tested positive for 'Nitrazepam' and 'Tramadol hydrochloride' respectively which are controlled substance in terms of the Notification No.16/HC-HS&FW, dated 06-06-2007 and Notification No.16/HC,HS&FW, dated 01-06-2015, respectively, this fails to garner support for the Prosecution in the absence of proof of search, seizure and possession. There is no proof that the Appellant was travelling in the said bus with the controlled substances nor is there proof that the alleged controlled substances were seized from him. The Prosecution also failed to furnish any proof of sale of controlled substances by the Appellant or that he had stocked it for sale or trade.

16. In view of the anomalies and shortcomings in the Prosecution case as emanate from the foregoing discussions, the impugned Judgment and Order on Sentence is liable to be and is accordingly set aside.

17. Appeal allowed.

18. The Appellant is acquitted of the offences under Section 7(1) read with Section 14 and Section 9(d) of the SADA, 2006.

19. The Appellant is on bail vide Order of this Court dated 17-09-2018 in I.A. No.01 of 2018. He is discharged from his bail bonds.

20. Copy of this Judgment be transmitted forthwith to the Learned Trial Court for information along with the records related to this case.

(Meenakshi Madan Rai)
Judge
31-08-2019

Approved for reporting : **Yes**

Internet : **Yes**

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