F.R.

IN THE HIGH COURT OF SIKKIM

CRIMINAL REVISION NO.6 OF 2004

1. Birkha Bhadhur Subba,
Son of Shri Man Bhadhur Subba,
Resident of Marchak busty, East Sikkim.
A/P below District Collectorate Office,
Lower Sichey, Gangtok, East Sikkim.

2. Smt. Meena Tamang,
Wife of Buddha Tamang,
Resident of Lower Martam,
East Sikkim.

3. Smt. Shova Chettri,
Wife of late Hasta Bahadur Chettri,
Resident of Lower Martam,
East Sikkim.

4. Tilak Bahadur Chettri,
Son of Late Amber Bahadur Chettri,
Resident of Lower Martam,
East Sikkim.

5. Prem Tshering Tamang,
Son of Late Ratna Bahadur Tamang,
Resident of Lower Martam,
East Sikkim.

6. Chandra Lall Bhujel,
Son of late Harka Bahadur Bhujel,
Resident of Nimtar,
East Sikkim.

7. Buddha Tamang,
Son of Shri Dil Bahadur Tamang,
Resident of Lower Martam,
East Sikkim.

... **Revision Petitioners.**

VERSUS

State of Sikkim
Through Sikkim Vigilance Police
Station, Gangtok. ... **Respondent.**

N.B. Chhetri

For the Petitioners : Messrs. S. S. Hamal assisted by Norden Tshering Bhutia, Advocates.

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

PRESENT: THE HON'BLE SHRI JUSTICE N. SURJAMANI SINGH, JUDGE.

Date of judgment: 22nd September 2004.

JUDGMENT & ORDER

SINGH, J.

The Judgment and order dated 4th February 2004 passed by the Sessions Judge, East and North Sikkim at Gangtok in Criminal Appeal No.1 of 2004 is the subject matter under challenge in this Criminal Revision Petition filed by the present 7 accused-petitioners.

2. The facts of the case, in a short compass, are as follows:-

The petitioner No.1, namely Birkha Bahadur Subba, who is a Government employee servicing in the office of the District Collector, East at Gangtok as L.D.C. in connivance with one Under Secretary of Land Revenue Department named Shri P. B. Chettri, prepared false Sikkim Subject certificates in the names of the present petitioners along with one Tshering Sherpa by taking money from each of them. It is said that the present petitioners, who are seven in

numbers, and the said Tshering Sherpa are not bonafide Sikkimese as the names of their parents are not recorded in old Sikkim Subject Register. However, they obtained Sikkim Subject certificates illegally and during the course of investigation, those related fake certificates were seized and accordingly, a Criminal Case being No.4 of 2001 under Sections 420, 465, 468, 471 and 474 of the I.P.C. was registered against the accused-persons and the accused-persons including the present petitioners stood trial and the trial Court found them guilty and accordingly, they were convicted and sentenced each of them on different counts in the following order: -

"1.	Birkha Bahadur Subba.....	U/S.420 for one year, U/S. 465 IPC Fine Rs.500/- in default to undergo simple imprisonment for one month. U/S.468 IPC for 6 months.
2.	Meena Tamang,	
3.	Shova Tamang,	
4.	Tilak Bahadur Chettri,	
7.	Chandralal Bhujel,	
8.	Buddha Tamang,	To undergo S.I. for one month each and to fine of Rs.100/- U/S.420/466/471/474 IPC.
5.	Pem Tshering Tamang,	
6.	Tshering Sherpa	To undergo S.I. for one month each and to fine of Rs.100/- each under Sections 420/ 465/468 IPC."

3. Being dissatisfied with the said judgment and order on conviction and sentence, the petitioners along with the Tshering Sherpa preferred an appeal in the Court of the

Sessions Judge, East and North Sikkim at Gangtok under Criminal Appeal No.1 of 2004 (22/2003). Upon hearing the parties, the First Appellate Court was of the view that in order to come to a correct finding, the case needs to be send back for retrial as the trial Court has overlooked the materials on record making out a case for framing additional charges against the present accused-petitioners in the following order:-

" Name of the accused persons	Tried U/S.	Additional Charges
1. Birkha Bahadur Subba	420/465/468 IPC	177/182/197/198/202 /34 IPC.
2. Mena Tamang	420/466/471/474 IPC	182/198/202/34 IPC.
3. Shova Chettri	420/466/471/474 IPC	182/198/202/34 IPC.
4. Tilak Bahadur Chettri	420/466/471/474 IPC	182/198/202/34 IPC.
5. Pem Tshering Tamang	420/465/468 IPC	182/198/202/34 IPC.
6. Chandra Lall Bhujel	420/466/471/474 IPC	182/198/202/34 IPC.
7. Buddha Tamang	420/466/471/474 IPC	182/198/202/34 IPC."

4. Supporting the case of the accused-petitioners, Mr. S. S. Hamal, learned counsel contended that both the Courts below mis-appreciated the evidence on record and as such both the impugned judgments on conviction and order of sentence passed by the trial Court as well as the First Appellate Court deserve to be set aside and the accused-petitioners should get clean acquittal from the case. It is also argued by the learned counsel that the framing of additional charges under Sections

177 and 182 I.P.C. as against the accused-petitioners are not tenable in the eye of law in terms of the provisions of law laid down under Section 195 of the Code of the Criminal Procedure Code, 1973.

5. On the other hand, Mr. J. B. Pradhan, learned Public Prosecutor contended that there is no infirmity or illegality in the impugned judgments on conviction and the related judgment and order passed by the Courts below.

6. Upon hearing the learned counsel for both the parties and also on perusal of the available materials on record, I am of the view that the findings of the First Appellate Court, thus sending back the case to the trial Court for framing the additional charges under Sections 177 and 182 of the I.P.C. as against the accused-petitioner No.1 and Section 182 of the I.P.C. as against the other accused-petitioner Nos.2 to 7, are not tenable in the eye of law. For better appreciation in the matter, the relevant portion of the provisions of law laid down under Section 195 of the Cr.P.C. is relevant and accordingly, it is quoted below: -

> " **195. Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence.** – (1) No court shall take cognizance –
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> (a) (i) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860), or
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> (ii) of any abetment of, attempt to commit, such offence, or
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> (iii) of any criminal conspiracy to commit, such offence,

> except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate."

7. While passing the impugned judgment and order dated 4th February 2004 in the connected Criminal Appeal No.1 of 2004, the First Appellate Court gave a finding to the effect that the case needs to be sent back for retrial as the trial Court has overlooked the materials on record making out a case for framing of additional charges particularly, the charges under Sections 177, 182 of the I.P.C. and other charges under different heads of Section against the present accused-petitioners as highlighted in paragraph 4 of the judgment, thus losing the sights of the related provisions of law laid down under Section 195(1) of the Cr.P.C. which contemplates that no Court shall take cognizance of any offence punishable under Sections 172 to 188 (both inclusive) of the I.P.C. (45 of 1860), except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate. In my considered view, it is a clear case of non-application of judicial mind on the part of the First Appellate Court while passing the impugned judgment and order. It may be mentioned that such irregularity and the breaches of the related provisions in the Code cannot be cured in terms of provisions of law laid down under Section 465 of the Cr.P.C.

as the provision of law laid down under Section 195(1) of the Cr.P.C. applicable in the case in hand is mandatory and the vitiations of such provisions of law shall cause a failure of justice, thus causing prejudice to the accused-petitioners in the course of the trial of the case. It may further be noted that no competent authority or public servant concerned as required under the law made any complaint as against the present accused-petitioners for the alleged offence punishable under Sections 177 and 182 of the I.P.C. at any point of time in the case in hand.

7A. In support of the findings and observations of this Court mentioned above, I hereby recall the decisions of the **Apex Court** rendered in **Daulat Ram v. State of Punjab** reported in **AIR 1962 SC 1206**, wherein the **Apex Court** held thus –

> " It was therefore incumbent, if the prosecution was to be launched, that the complaint in writing should be made by the Tehsildar as the public servant concerned in this case. On the other hand what we find is that a complaint by the Tehsildar was not filed at all, but a charge sheet was put in by the Station House Officer. The learned counsel for the State Government tries to support the action by submitting that S. 195 had been complied with inasmuch as when the allegations had been disproved, the letter of the Superintendent of Police was forwarded to the Tehsildar and he asked for "a calender." (sic) This paper was filed along with the charge sheet and it is stated that this satisfies the requirements of s. 195. In our opinion, this is not a due compliance with the provisions of that section. What the section contemplates is that the complaint must be in writing by the public servant concerned and there is no such compliance in the present case. The cognizance of the case was therefore wrongly assumed by the court without the complaint in writing of the public servant namely the Tehsildar in this case. The trial was thus without jurisdiction ab initio and the conviction cannot be maintained."

7B. In a similarly situated case, the **Apex Court** in a case between **State of U.P. v. Mata Bhikh & ors.** reported in **(1994) 4 SCC 95** held thus –

> " Nonetheless, when the court in its discretion is disinclined to prosecute the wrongdoers, no private complainant can be allowed to initiate any criminal proceeding in his individual capacity as it would be clear from the reading of the section itself which is to the effect that no court can take cognizance of any offence punishable under Sections 172 to 188 of the IPC except on the written complaint of 'the public servant concerned' or of some other public servant to whom he (the public servant who promulgated that order) is administratively subordinate. "

8. In view of the above position, this Court has no alternative but to set aside the findings of the First Appellate Court pertaining to the framing of the additional charges under Sections 177 and 182 of the I.P.C. as against the present seven petitioners and accordingly, it is set aside. So far the other related findings made by the First Appellant Court under the impugned Judgment and Order, the same does not suffer from any infirmity or illegality. However, this Court made it clear that while the trial Court in framing the other additional charges except that of charges under Sections 177 and 182 of the I.P.C., the present accused-petitioners as well as the prosecution should be afforded a reasonable opportunity of being heard in support of their respective cases at the time of hearing on charge and, that, the trial Court shall examine and consider the matter in accordance with ~~the~~ law and the parties should be given

opportunity to adduce evidence in support of their respective cases in respect of the additional charges as highlighted above. It is also further made clear that the trial Court shall give a fresh findings on the related charges under Sections 420, 465, 466, 468, 471 and 474 of the I.P.C. as against each of the accused-petitioners on the basis of the available evidence on record and for such charges no further evidence should be laid/adduced by both the parties, i.e. the prosecution or the defence except for those additional charges, if any, for which opportunity for adducing evidence should be afforded to both the parties and apart from this, the matter is left upon the wisdom and domain of the trial Court.

9. For the reasons, observations and discussions made above, the Criminal Revision is party allowed with a direction to the trial Court to dispose of the case expeditiously in accordance with the law and also keeping in view of the observations made by this Court in the present judgment and order. The Registry is directed to send back the related case records immediately to the Courts below.

N. S. Singh

(N. S. Singh)
Judge
22-09-2004