THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Revisional Jurisdiction)

DATED : 3rd August, 2022

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

Crl.Rev.P. No.02 of 2020

Petitioner : Union of India

versus

Respondent : Dasang Bhutia

Application under Sections 397 and 401 of the Code of Criminal Procedure, 1973.

Appearance

Mr. Dilip Kumar Agarwal, Junior Standing Counsel for the Petitioner.

Mr. Zangpo Sherpa, Advocate for the Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1. The Court of the Learned Chief Judicial Magistrate (hereinafter, "CJM"), East and North Sikkim, at Gangtok, vide its impugned Order dated 09-10-2019, in Prosecution Report Case No.01/2017, discharged the Respondent/Accused, Dasang Bhutia, (hereinafter, "Respondent") of the offences under Section 135(1) (a) and (b) of the Customs Act, 1962 (for short, "Customs Act") on consideration of the facts, provisions of law and the evidence brought forth, concluding that no case was made out against the Respondent to warrant his conviction for the offences under the aforementioned provisions of the Customs Act. Aggrieved thereof, the Petitioner/Complainant (hereinafter "Petitioner") is before this Court urging that the Learned Trial Court erred in its conclusion and erroneously discharged the Respondent.

2(i). To appreciate the matter in its correct perspective it is essential to briefly lay down the facts of the case. The Petitioner lodged a Complaint before the Court of Learned CJM in Prosecution Report Case No.01/2017 under Section 135(1) (a) and (b) and Section 137(1) of the Customs Act, stating that the Petitioner, (Superintendent of Customs, Sherathang Land Customs Station, Gangtok under Siliguri Commissionerate), on receipt of information from the Sikkim Police on 17-11-2015, accompanied by Customs Officers of Gangtok Customs and two witnesses went to the Sadar Police Station, Gangtok at about 14.00 hours. At the Police Station (P.S.) they learned that as per GD Entry No.34, dated 16-11-2015, the team of Police Personnel posted at Sherathang P.S. with the assistance of the Indo Tibetan Border Police (ITBP) stationed at Nathula, acting on a tip off, conducted a body search of traders and a search of vehicles inbound from Rinchenghang, Tibetan Autonomous Region (TAR), China to India at Nathula Gate. On a search of the "Toyota Fortuner", vehicle bearing registration No.SK-01-PA-6314 and its owner-cum-driver, the Respondent, one piece of yellow metal believed to be gold, weighing approximately one kilogram in weight was found concealed in the inner pocket of the right side of his trousers and duly recovered. The Respondent failed to furnish any valid documents to establish legitimate possession of the article which appeared to be smuggled from TAR, China and was later found to be valued at ₹51,00,000/- (Rupees fifty one lakhs) only. At about 17.00 hours on 16-11-2015, the Station House Officer (SHO), Sherathang P.S., Police Inspector (PI) Novin Rai seized the said gold bar bearing the marking AS30361 "VALCAMBI SUISSE 1 KILO FINE GOLD, 999.9" and the vehicle of

the Respondent vide seizure memo dated 16-11-2015, under Section 102 of the Cr.P.C, in the presence of witnesses Sub Inspector (SI) Roshan Gurung of the Special Branch and Woman Constable (WCT) Bindhya Rai, Sikkim Police. The Respondent was then detained and brought to the Sadar P.S., Gangtok. On the same day in a related incident a truck driven by one Ms. Nim Lhamu Sherpa was intercepted and five pieces of gold bar weighing five kilograms were found concealed under the driver's seat. As both the cases involved illegal import of gold, the SHO, Sherathang P.S. informed the Customs Officials and made over to them the Respondent, all the gold bars recovered and the seized Toyota Fortuner by preparing a "Handing-Taking" Memo dated 17-11-2015 at 14.40 hours, at the Sadar P.S., in the presence of the Sub-Divisional Magistrate, Gangtok and Police Officers. The gold seized from the Respondent was tested by two independent licensed jewelers of Gangtok who concluded that the yellow metal bar was a 24 carat Gold bar. The Respondent on preliminary enquiry admitted that he had brought the gold from Rinchenghang, TAR, which was accordingly seized and sealed by the SHO, Sherathang P.S. As the gold was clandestinely smuggled into India it was thus liable for confiscation under Section 111 of the Customs Act and accordingly seized under Section 110(1) of the Customs Act on 17-11-2015, in the presence of the Respondent, the Sub-Divisional Magistrate, Gangtok and other Officials. A proper "Panchnama" was prepared thereafter. Due to paucity of time the statement of the Respondent could not be recorded but he was arrested under Section 104 of the Customs Act at 5.00 p.m. on 17-11-2015 and

produced before the Court of Learned CJM, from where he was enlarged on bail on the same date.

(ii) On 18-11-2015, the Respondent got himself admitted to the Central Referral Hospital, Manipal, Gangtok, Sikkim and on summons issued under Section 108 of the Customs Act agreed to give his statement after much persuasion but insisted that his son scribe his statement. He retracted his earlier statement of 17-11-2015 to the Customs Authority, where he had admitted that he had brought the gold from Rinchenghang, TAR, China and instead categorically denied its ownership. He stated that on his return from TAR after conducting business the Police Officers of Sherathang P.S. intercepted his vehicle at Nathula Gate and checked it from where they allegedly recovered the said gold bar, of which he was unaware and alleged that it had been planted in his vehicle and that he was falsely implicated.

(iii) A Show-cause Notice was issued to the Respondent dated 09-05-2016 and the competent Authority passed the Adjudication Order on 19-10-2016, ordering confiscation of the 'Toyota Fortuner' with the option to the owner to redeem his vehicle on payment of redemption fine of ₹9,25,000/- (Rupees nine lakhs twenty five thousand) only. Penalty of ₹5,00,000/- (Rupees five lakhs) only, was imposed on the Respondent for committing offences under the provisions of Section 112(a) and b(i) of the Customs Act.

(iv) According to the Petitioner, Section 123 of the Customs Act casts a reverse burden on the Respondent to prove that the gold bar was not smuggled goods. That, in terms of the policies of the Government of India and Notifications issued from time to time

only twenty items are permitted to be imported from the TAR through Nathula of which the value of a single consignment cannot exceed Rs.2,00,000/- (Rupees two lakhs) only. That, as Gold is not in the list of items allowed to be imported through the Sherathang Land Customs Station it is a prohibited item. As per the Reserve Bank of India, Circular dated 18-02-2015, only nominated banks are permitted to import gold on consignment basis. Hence, the Respondent was in gross violation of the provisions of law. It was prayed that the Court take cognizance of the offence under Section 137(1) of the Customs Act and Order for Prosecution of the Respondent under Section 135(1) (a) and (b) of the Customs Act.

3(i). Walking this Court briefly through the facts of the case as stated *supra*, Learned Counsel for the Petitioner advancing his arguments reiterated that the prime witnesses *viz.* Constable Ranjeet Patel, ITBP, SI Roshan Gurung, and WCT Bindhya Rai, who were present at the spot proved recovery of the gold bar from the Respondent when their statements under Section 108 of the Customs Act were recorded. It was urged that the Learned Trial Court however, failed to appreciate that the cross-examination of the witnesses failed to decimate the evidence of the seizure of the gold bar. That, there was an error in interpreting the provisions of Section 102 of the Customs Act which specifically empowers a "Proper Officer" to search the specific person against whom information regarding illegal possession of articles is received. It does not involve a random search of any person, by any Customs Official who not is empowered to conduct such a search. The Learned Trial Court also failed to appreciate that the seizure was conducted by Police Personnel and hence the question of invocation

of the provisions of Section 102 of the Customs Act did not arise. The Learned Trial Court also failed to consider that there was a *prima facie* case in terms of the evidence furnished by the Petitioner to frame charges against the Respondent. The Learned Trial Court erroneously concluded that Customs Officials were present at the spot who failed to take steps as envisaged by Section 102 of the Customs Act. That, the Learned Trial Court doubted the Prosecution case on grounds that the Petitioner himself was not present at the spot when the alleged search and seizure took place. It was further argued that although SI Roshan Gurung, Petitioner's Witness turned hostile but under cross-examination he admitted that the number inscribed in the gold bar, M.O.I, matched the details recorded in the Seizure Memo Exhibit 2.

(ii) It was next contended that the Respondent paid the penalty during the Adjudication Proceedings as ordered and did not assail the Adjudication Order which is revelatory of his guilt. Consequently, the Learned Trial Court despite the *prima facie* case against the Respondent perversely arrived at a wrong finding and discharged the Respondent. To buttress his submissions, reliance was placed on ***Mohamed Iqbal S/o of Chand Mohamed Qureshi*** vs. ***K. R. Sehgal, Superintendent of Customs and Another***[1], ***Basudev Das*** vs. ***Union of India***[2] and ***State of Maharashtra*** vs. ***Natwarlal Damodardas Soni***[3]. Hence, the impugned Order be set aside and the trial be resumed.

4(i). Repudiating the arguments of the Learned Counsel for the Petitioner, Learned Counsel for the Respondent urged that Sections 244 and 245 of the Code of Criminal Procedure, 1973

[1] 2002 SCC Online Guj 551
[2] 2010 SCC Online Gau 674
[3] (1980) 4 SCC 669

(hereinafter, the "Cr.P.C") have been discussed at length by the Learned Trial Court and Section 245 of the Cr.P.C specifically lays down that charge is to be framed only if the Prosecution case would succeed if unrebutted. That, the evidence on record indicates that the seizure of the alleged smuggled article was made at "Nathula Gate" which is a Customs Area where Customs Officials are present, in such a circumstance, the provisions of Sections 100 101 and 102 of the Customs Act ought to have been invoked but this was not done by the Customs Officials present at the spot. That, the Customs Officials were well aware of the information pertaining to the smuggling of the article as evident from the deposition of SI Roshan Gurung. That, in fact, the Petitioner's Witnesses Dr. Y. Siva Prasad, Commandant, 1st IRBN, Delhi, SI Roshan Gurung, and PI Novin Rai proved that prior information had been received by the Customs Officials with regard to the alleged smuggling of the article who failed to take steps in terms of the statutory provisions. That, besides their failure to act as per the mandate of law the Property Seizure Memo, Exhibit 2 at Serial No.8 requires the seizing Authority to give details of the "*action taken/recommended*" for keeping of valuable property which were however not inserted. Exhibit 3, the "Handing and Taking Memo" reveals that the article was seized and sealed in the presence of witnesses at the spot under Section 102 Cr.P.C but no such seal is seen in Exhibit 2 the Seizure Memo. The evidence of CW7, PI Novin Rai reveals that he had made no entries of the seized article in the required documents, the seizure witnesses were only Police Personnel but no other independent witnesses were present at the time of seizure.

(ii) It was next contended that even if the rigours of Section 102 of the Cr.P.C are not fulfilled, the Learned Trial Court has carefully considered the provisions of Sections 244 and 245 of the Cr.P.C and correctly concluded that no materials exist *prima facie* to frame charges against the Respondent and hence the Petition be dismissed.

5(i). Having heard Learned Counsel for the parties at length and considered all materials furnished before this Court, in the first instance it may relevantly be noticed that the matter is under Section 397 of the Cr.P.C *viz;* Criminal Revision. The said Section is extracted below for convenient reference;

> "**397. Calling for records to exercise powers of revision.-**(1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record."

It is now well settled by a plethora of Judgments of the Hon'ble Supreme Court that the Court exercising revisional powers under Section 397 of the Cr.P.C is to confine the examination of the records for the purpose of satisfying itself as to the *correctness, legality* or *propriety* of any finding, sentence or order, recorded or passed by the concerned Magistrate. The Revisional Court cannot examine the case on merits and substitute its own decision in place of the findings of the Magistrate. In other words, all that the Revisional Court is to examine is whether any

perversity emerges in the findings of the Learned Trial Court, while either discharging or framing charge against the accused.

That having been said, the question that falls for consideration before this Court is whether the Learned Trial Court correctly discharged the accused of the offences under Section 135(1) (a) and (b) of the Customs Act.

(ii) In ***Ajoy Kumar Ghose*** vs. ***State of Jharkhand and Another***[4], the essential difference of procedure in the trial of Warrant case on the basis of a Police report and that instituted otherwise than on the Police report, in Sections 238 and 239 of the Cr.P.C on the one hand and Sections 244 and 245 of the Cr.P.C on the other, were distinguished. That, on a Police report when the accused appears or is brought before the Magistrate, the Magistrate has to satisfy himself that he has been supplied the necessary documents like the Police report, FIR, statements recorded under sub-section (3) of Section 161 of the Cr.P.C of all the witnesses proposed to be examined by the Prosecution, as also the confessions and statements recorded under Section 164 of the Cr.P.C and any other documents which have been forwarded by the Prosecuting Agency to the Court.

That, thereafter comes the stage of discharge as provided in Section 239 of the Cr.P.C where the Magistrate has to consider the Police report and the documents sent with it under Section 173 of the Cr.P.C and if necessary, to examine the accused and hear the prosecution of the accused. If on such examination and hearing, the Magistrate considers the charge to be groundless, he would discharge the accused and record his reasons for doing so. The

[4] (2009) 14 SCC 115

prosecution at this stage is not required to lead evidence. Charge is framed under Section 240 of the Cr.P.C on examination of the aforementioned documents and on the Magistrate arriving at a conclusion that a *prima facie* case exists for proceeding with the trial.

However, in a Warrant trial instituted otherwise than on a Police report, when the accused appears, or is brought before the Magistrate under Section 244(1) of the Cr.P.C, the Magistrate has to hear the prosecution and take all such evidence as may be produced in support of the prosecution. In this, the Magistrate may issue summons to the witnesses under Section 244(2) of the Cr.P.C on the application by prosecution. All this evidence is evidence before charge. It is after all this evidence is taken, then the Magistrate has to consider under Section 245(1) of the Cr.P.C whether any case against the accused is made out, which, if unrebutted, would warrant his conviction. If the Magistrate concludes that there is no such case made out against the accused, the Magistrate proceeds to discharge him. On the other hand, if he is satisfied about the *prima facie* case against the accused the Magistrate would frame a charge under Section 246(1) of the Cr.P.C. That, the Complainant then gets a second opportunity to lead evidence in support of the charge unlike in a Warrant trial on Police report, where there is only one opportunity.

It has been elucidated in the Ratio *supra* that in a Warrant trial instituted otherwise than on a Police report, the Complainant gets two opportunities to lead evidence, firstly, before the charge is framed and secondly, after framing of the charge. Under Section 245(2) of the Cr.P.C, a Magistrate can discharge the accused at

any previous stage of the case, if he finds the charge to be groundless. If there is no discernible incriminating material in the evidence, then the Magistrate proceeds to discharge the accused under Section 245(1) of the Cr.P.C.

It thus concludes that in a warrant trial instituted on a Complaint, the Court is to exercise it judicial mind to determine, whether a case for trial has been made out or not. In such proceedings, the Court is not to hold a mini trial by marshalling the evidence.

6(i). In ***R.S. Nayak*** vs. ***A. R. Antulay and Another***[5], the Hon'ble Supreme Court while considering the provisions of Section 245(1) and Section 246 of Cr.P.C propounded *inter alia* that the Code contemplates discharge of the accused by the Court of Sessions under Section 227 in a case triable by it; cases instituted upon a police report are covered by Section 239 and cases otherwise than on police report are dealt with in Section 245. The three sections contain somewhat different provisions in regard to the discharge of the accused. Under Section 227, the Trial Judge is required to discharge the accused if he "*considers that there is not sufficient ground for proceeding against the accused*". Obligation to discharge the accused under Section 239 arises when "*the magistrate considers the charge against the accused to be groundless*". The power to discharge is exercisable under Section 245(1) when "*the magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction*". It is a fact that Sections 227 and 239 provide for discharge being ordered before the

[5] (1986) 2 SCC 716

recording of evidence and the consideration as to whether charge has to be framed or not is required to be made on the basis of the record of the case, including documents and oral hearing of the accused and the prosecution or the police report, the documents sent along with it and examination of the accused and after affording an opportunity to the two parties to be heard. The stage for discharge under Section 245, on the other hand, is reached only after the evidence referred to in Section 244 has been taken. It was however clarified in the Ratio *supra* that; **Notwithstanding this difference in the position there is no scope for doubt that the stage at which the Magistrate is required to consider the question of framing of charge under Section 245(1) is a preliminary one and the test of "prima facie" case has to be applied. In spite of the difference in the language of the three sections, the legal position is that if the Trial Court is satisfied that a prima facie case is made out, charge has to be framed.**

(ii) Bearing the above pronouncement in mind, it is essential to consider what the Hon'ble Supreme Court observed in ***Mauvin Godinho*** vs. ***State of Goa***[6], as to what a *prima facie* case is. It was *inter alia* held that although the application of this standard depends on the facts and circumstances in each case, a *prima facie* case against the accused is said to be made out when the probative value of evidence on all the essential elements in the charge taken as a whole is such that, it is sufficient to induce the Court to believe in the existence of the facts pertaining to such essential elements or to consider its existence so probable, that a prudent man ought to act upon the supposition that those facts existed or did happen. At this stage there cannot be a roving

[6] (2018) 3 SCC 358

enquiry into the pros and cons of the matter and the evidence weighed as if the trial was being conducted.

7(i). In light of the above position of law while considering the impugned Order it is seen that the Learned Trial Court has discussed at great length the provisions of Sections 245 and 246 of the Cr.P.C and relied on a catena of decisions to fortify its opinion of discharge of the Respondent but despite considering that at the stage of Section 244 and Section 245 of the Cr.P.C the evidence unrebutted would warrant his conviction does not mean "proof beyond reasonable doubt", the Respondent was discharged. In Paragraphs 9 and 10 of the impugned Order it is *inter alia* observed as follows:-

> "**9.**.....Under Section 245 CrPC accused can only be discharged if the evidence of the prosecution would not make out a case warranting the conviction. In other words, a case for conviction must be warranted by the evidence to frame charge. The requirement of evidence making out a case for warranting a conviction essential under Section 245 CrPC has to be read harmoniously with the requirement of opinion presuming the commission of offence by the accused under Section 246 CrPC....."
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> "**10.** .....**It would be wrong to say that the case of the prosecution has to be proved for conviction beyond reasonable doubt before framing of charge. The term warrant a conviction in section 245 CrPC does not encompass the 'verdict of conviction' of a trial after consideration of the entire evidence tested by cross examination and defence evidence if any but merely requires convincing case short than guilt proved beyond reasonable doubt but more than probability**. Section 245 CrPC in my considered view measures *prima facie* case for conviction on evidence and not conclusive conviction on trial whereas section 246 of CrPC requires opinion of presumption that the accused has committed an offence. When compared with the phraseology for discharge under Section 227 CrPC as 'no sufficient ground' and under Section 239 CrPC as 'groundless' section 245 requires more, that is a case has to be made out warranting a conviction, otherwise accused has to be discharged." (emphasis supplied)

(ii) In Paragraph 13 of the impugned Order, reliance was placed on ***D.N. Anerao*** vs. ***Maheshkumar Kantilal Soni and Others***[7], wherein the Hon'ble High Court of Gujarat in Paragraph 3 of its Judgment observed *inter alia* as follows;

> "**3.** ..... If there is some evidence on record which, if accepted, would warrant a conviction of the accused, the accused cannot be discharged. **The question whether particular evidence should be accepted or not arises only at the end of the trial and not at the stage of considering whether the accused should be discharged.**....." (emphasis supplied)

(iii) In Paragraph 16 of the impugned Order reliance was placed on ***Radha*** vs. ***Raju***[8], wherein Hon'ble Kerala High Court in Paragraph 13, 14 and 16 of its Judgment *inter alia* observed that;

> "13. ..... In a private complaint alleging commission of a warrant offence under Section 245 Cr.P.C., after the enquiry under Section 244 Cr.P.C., a criminal court is expected under Section 245(1) only to consider whether such a case has been made out "which, if unrebutted, would warrant a conviction." **The quality of consideration of the materials available before the court at a later stage of the proceedings - at the stage of deciding whether the accused deserve to be convicted or acquitted - is totally different and more exhaustive. It is at that stage that the exercise of weighing the evidence in golden scales will, can and should be resorted to by a court.**
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> 14. **It is true that courts have loosely employed the expression "prima facie case" at the stage of Section 203/204 Cr.P.C. and Section 245/246 Cr.P.C.** .....
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> 15. .....
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> 16. ..... It is not as though the court will have to accept any and every material placed before it at the stage of Section 245/246 Cr.P.C. An application of mind to the materials available before the court must certainly be undertaken. The evidence will not be swallowed without consideration of its probative value. **Of course, the exercise of weighing the evidence in golden scales will not also be resorted to.**" (emphasis supplied)

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[7] (1985) 2 GLR 1370
[8] 2003(3) KLT 1046

(iv) Despite the Learned Trial Court having extracted Paragraphs of Judgments which caution that at the stage of Section 245 of the Cr.P.C the entire evidence is not to be marshalled like it is done at the conclusion of trial and that a *prima facie* case which could lead to conviction is to be considered, the Learned Trial Court on examining the evidence before it discharged the Respondent with reasons commencing from Paragraph 33 of the impugned Order. According to the Learned Trial Court, the Petitioner was not acquainted with the facts of the case to his own knowledge but had filed the Complaint on the basis of the documents concerning the alleged seizure. That, the evidence of the Prosecution witnesses PI Novin Rai and WCT Bindhya Rai indicate that the alleged gold bar was seized from the possession of the Respondent but SI Roshan Gurung turned hostile and declined to identify the Respondent or seizure of the smuggled article. That, the Petitioner's Witness Dr. Y. Siva Prasad deposed about the source information, regarding the alleged gold smuggling. That, PI Novin Rai deposed that once he received the information that gold was being smuggled through Nathula Gate, he informed the Customs Officials as well as ITBP Officials.

(v) Pausing here momentarily, it is evident that the Petitioner's Witnesses by their evidence have at this stage indicated the possession of the gold bar by the Respondent allegedly brought from Richenghang, TAR, through Nathula Gate on the Indian side. He did not have necessary documentary evidence to indicate legitimate possession of the article. Gold is not in the list of articles which can be imported and brought from TAR to Sikkim, in view of the various Notifications of the Ministry of

Finance, Department of Revenue, Government of India, relied on by the Petitioner. The article was tested and found to be gold of 24 carats valued at ₹51,00,000/- (Rupees fifty one lakhs) only at the time of seizure. In the teeth of such materials which made out a *prima facie* case the Learned Trial Court has proceeded to discharge the Respondent, while evidently erroneously assuming that Sherathang where the Land Customs Office is located and Officers of Gazetted Rank are said to be posted and Nathula Gate where the search and seizure took place are one and the same place. The Learned Trial Court opined that there is a Land Customs Station at Sherathang which shows that Gazetted Customs Officers would be stationed there, that in such a circumstance Section 102 of the Customs Act is mandatory. That, the Customs Officials being present with full knowledge of search of the suspect for gold in the Customs Land Station Area could not have abdicated their duty and circumvented the provisions of Section 102 of the Customs Act by claiming that they were informed by the Sikkim Police only on 17-11-2015. It is pertinent to notice that the invocation of Section 102 of the Customs Act is contingent upon the provisions of Sections 100 and 101 of the Customs Act. In such a circumstance, the provisions of Sections 100 and 101 on the Customs Act are to be fulfilled, such evidence is to be marshalled at the time of trial and not at the stage of considering whether a *prima facie* case has been made out. The Learned Trial Court also doubted the place of recovery of M.O.I and observed that the PI failed to keep any independent witnesses to the seizure. The Learned Trial Court went on to opine that *the Adjudication proceedings may be based on Section 108 statement of the Act as deposed by CW Bandhana*

Deori, however, the Sanction for Prosecution in a Court of law requires deeper probe so that the Sanctioning Authority is convinced that the Prosecution would stand the rules of evidence and the provisions of law making this one of the grounds for discharge of the Respondent.

8. Having carefully perused the evidence on record and the principles of law laid down by the Hon'ble Supreme Court in the Judgments referred to *supra,* I am of the considered opinion and reiterate here that, in terms of Section 245 of the Cr.P.C., the Learned Trial Court is indeed required to examine whether any case against the accused has been made out which if unrebutted, would warrant his conviction and in such a circumstance the Magistrate should discharge him. However, the Learned Trial Court cannot weigh the evidence furnished at this stage, on golden scales. The evidence is to be examined for the purposes of a *prima facie* case. In the instant matter it *prima facie* appears that gold had been smuggled into the country by the Respondent from Rinchenghang, TAR, seizure of which was made by the SHO, Sherathang P.S., in the presence of witnesses. That, in terms of Notification No.38/96-Customs dated 23-07-1996 as amended subsequently, Gold is not permitted to be imported from China into India by individuals.

9. In light of the evidence, a *prima facie* case has been made out by the Petitioner against the Respondent and the Order of discharge of the Respondent is thus perverse and not sustainable. The impugned Order is accordingly set aside.

10. The Learned CJM, East Sikkim, at Gangtok, shall restore the case to its original number in its File and commence trial by taking necessary steps as per law.

11. The observations made hereinabove by this Court should in no way prejudice the Learned Trial Court in arriving at its own independent findings at the completion of trial, as the observations of this Court *supra* have no bearing to the merits of the matter.

12. Crl.Rev.P No.02 of 2020 stands disposed of accordingly.

13. Copy of this Judgment be forwarded to the Learned Trial Court for information and compliance.

14. Records of the Learned Trial Court be remitted to it forthwith.

(Meenakshi Madan Rai)
Judge
03-08-2022

sdl Approved for reporting : **Yes**