

# THE HIGH COURT OF SIKKIM: GANGTOK

(Criminal Appellate Jurisdiction)

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**S.B: THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE**  
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## CRL. A. No. 25 of 2018

1. Rabin Baraily  
aged about 19 years,  
S/o Harka Bahadur Baraily,  
R/o 6<sup>th</sup> Mile Malbasey,  
Gyalshing, West Sikkim.
2. Puran Bhujel  
aged about 25 years,  
S/o Dhan Bahadur Bhujel,  
R/o Lower Pelling,  
Gyalshing, West Sikkim.

..... **Appellants**

### Versus

State of Sikkim

..... **Respondent**

### **Appeal under section 374(2) of the Code of Criminal Procedure, 1973.**

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**Appearance:**

Ms Gita Bista, Advocate for the Appellants.

Mr. Yadev Sharma, Additional Public Prosecutor for the State  
respondent.

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**Date of hearing : 05.08.2021**

**Date of judgment: 21.08.2021**

## **JUDGMENT**

### **Bhaskar Raj Pradhan, J.**

1. This appeal under section 374(2) of the Code of Criminal Procedure, 1973 (Cr.P.C.) is directed against the judgment and order on sentence dated 30.06.2018 passed by the learned Special Judge (SADA 2006), West Sikkim at Gyalshing in

Sessions Trial (SADA) Case No. 03 of 2018 (*State of Sikkim vs Rabin Baraily and another*).

**2.** The learned Special Judge found the appellants guilty under sections 9(1)(b) and 9(b) of the Sikkim Anti Drugs Act, 2006 (SADA, 2006). The learned Special Judge sentenced the appellants to rigorous imprisonment of seven years and to pay a fine of Rs.50,000/- under section 9(1)(b) of SADA, 2006. In default, the appellants were to undergo simple imprisonment for six months. The appellants were also sentenced to pay a fine of Rs.5000/- under section 9(b) of SADA, 2006. In default, the appellants were to undergo simple imprisonment for one month. The period of imprisonment already undergone by the appellants were set off. The learned Special Judge also directed that during their term of imprisonment, the appellants were to undergo compulsory detoxification and rehabilitation available in the State Prison at Rongyek, if necessary.

**3.** Heard Ms Gita Bista, learned counsel for the appellants and Mr. Yadev Sharma, learned Additional Public Prosecutor for the State of Sikkim.

**4.** The learned counsel for the appellants raised her first challenge about the seizures in the present case. It was her contention that there was no evidence that the seized Puma bag was found in the possession of the appellant no.1. The learned

counsel submitted that the Sub-Divisional Magistrate, Tushar Nikhare (PW-1) (SDM) accompanied the police for the search in the house of the appellant no.2 and therefore, was not independent of the police. The learned counsel also submitted that the prosecution has not been able to prove the collection of urine samples of the appellants. The learned counsel relied upon the judgment of this court in **Sushil Sharma vs State of Sikkim**<sup>1</sup>.

**5.** The learned Additional Public Prosecutor on the other hand submitted that the evidence laid before the court would conclusively establish that the seizures were in fact made and the urine samples properly collected from the appellants which on forensic examination gave positive indication for controlled substances.

**6.** The FIR was lodged by Police Inspector Mahindra Pradhan (PW-10) on 28.01.2018 stating that on that day, he along with a police team, namely, Sub Inspector (SI) Upashna Sharma, Constable Gyan Bahadur Rai and others were conducting vehicle checking at Tikjuk near Police Station when he received credible source information that appellant no.1 was coming towards Gyalshing in a taxi bearing registration no. SK 02 T/0576 from Pelling and that he was suspected to be in possession of contraband substances in his black carry bag. The

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<sup>1</sup> SLR (2018) Sik 1499

FIR further reported that as soon as he received the information, the vehicle arrived, and the appellant no.1 was intercepted along with the vehicle in the presence of two witnesses, viz. Sonam Bhutia (PW-7) and Bishnu Chettri (PW-3). The SDM was called over mobile phone and upon his arrival the appellant no.1 was given an option to have himself, and his bag searched under section 24 of SADA, 2006. Appellant no.1 agreed to be searched in the presence of the SDM. As such, the police team conducted search on his body and his bag in the presence of the SDM and the two independent witnesses. Five files (24 x 5 = 120 capsules), 1 loose file containing 6 number of Spasmo Proxyvon capsules were found in the black bag. Two numbers of loose Spasmo Proxyvon capsules were also recovered and seized from the right pocket of his jeans trousers along with one stick cigarette (Sahara) and one brown leather wallet containing Rs.120/-. It was reported that during this process of search and seizure, Bikash Kr. Singh, Assistant Commandant 36<sup>th</sup> Bn, SSB, Gyalshing (PW-6), was also present as he was called by him to assist and witness the search and seizure. The recovered items were photographed, seized, packed, and sealed in the presence of the witnesses and the SDM. From the seized items, one file (24 x 1 = 24 capsules), one loose file containing six numbers and two loose capsules of Spasmo Proxyvon were separately packed, sealed and labelled in the presence of the SDM and two witnesses, to send it to RFSL for forensic analysis. After the

investigation by Sub Inspector (SI) Naresh Chettri (PW-9), the report under section 173 of the Cr.P.C. was filed alleging the commission of offences under section 9/14 of SADA, 2006 read with section 13(c) of the Drugs and Cosmetics Act, 1940.

7. On 04.04.2018, charges were framed against the appellants under section 9(1)(b) of SADA, 2006 as amended vide Notification No. 21/LD/17 dated 19.09.2017 and section 9(b) of SADA, 2006. The appellants pleaded not guilty, and the case proceeded for trial. The prosecution examined ten witnesses including the Investigating Officer Naresh Chettri (PW-9). Tushar Nikhare (PW-1) is the SDM involved in the search and seizure of the controlled substances from both the appellants. Sonam Zangmoo Bhutia (PW-2) is the Junior Scientific Officer in the Chemistry Division of RFSL, Saramsa, who examined the seized substances as well as the urine samples of the appellants. Bishnu Chettri (PW-3) and Sonam Bhutia (PW-7) are the seizure witnesses to the seizure made in front of the Tikjuk Police Station on 28.01.2018 vide seizure memo (Exhibit-2). Mani Kumar Rai (PW-4) - the landlord of appellant no.2 and P. Tshering Bhutia (PW-8), were the seizure witnesses from the room of the appellant no.2. Dr. Pratik Rasaily (PW-5) examined both the appellants and prepared their medical reports, Exhibit-9 and Exhibit-10. The appellants were, thereafter, examined under section 313 Cr.P.C.

Both feigned ignorance and said that the allegations were not true.

**8.** Mahindra Pradhan (PW-10) was the one who conducted the vehicle search and intercepted the appellant no.1 on 28.01.2018 at Tikjuk near the Police Station. He deposed that the appellant no.1 was given option to have his person and his bag searched under the provisions of section 24 of SADA, 2006. Appellant no.1 agreed to be searched in the presence of the SDM and two independent witnesses. According to him, in the notice under section 24(1) of SADA 2006 (Exhibit-1), the appellant no. 1 acknowledged “*Mero body search SDM Gayzing ko pargenc (sic ‘presence’) ma garnu sakcha*” [Exhibit-1(e)]. Mahindra Pradhan (PW-10) identified the handwriting and signature of the appellant no.1. Mahindra Pradhan (PW-10) was cross-examined by the defence. There was not even a denial of the endorsement made by the appellant no.1 in the notice (Exhibit-1).

**9.** Bishnu Chettri (PW-3) stated that during the checking the seized items were recovered from the black Puma bag of the appellant no.1. He also stated that two loose capsules were recovered from the right jeans pocket of the appellant no.1. During cross-examination, Bishnu Chettri admitted that when he reached the place of occurrence the search was already on. The appellant no.1 was sitting inside the vehicle. The Driver of the vehicle was not searched and checked by the police. He did not

hear the police asking the appellant no.1 anything before conducting the search although he was present there. He also admitted that when he reached the place of occurrence the alleged bag was already in the possession of the police.

**10.** Sonam Bhutia (PW-7) stated that the contraband drugs were recovered from the appellant no.1. He also stated that some contraband drugs in the black bag were seized by the police. During cross-examination, he admitted that Bishnu Chettri (PW-3) was conducting search of the bag.

**11.** The facts reveal that the appellant no.1 was intercepted in a vehicle and searched in the presence of the SDM after he was given an option by Mahindra Pradhan (PW-10) under section 24 of the SADA, 2006. Although Mahindra Pradhan (PW-10) deposed this fact, no question was asked to him by the defence which would indicate that the search was not conducted legally. He made a categorical statement that the appellant no.1 had given his option to have himself and his bag searched in the presence of the SDM. Neither in the cross-examination of Mahindra Pradhan (PW-10) nor in the cross-examination of the two seizure witnesses did the defence raise the plea that the black Puma bag did not belong to the appellant no.1. Even during his examination under section 313 Cr.P.C., he did not take such a plea. The statement of Bishnu Chettri (PW-3) during his cross-examination that the accused was inside the

vehicle and the bag was already in the possession of the police would not be of much consequence in view of the categorical deposition of Mahindra Pradhan (PW-10).

**12.** Chapter V of the SADA, 2006 deals with the procedure to be followed during investigation. Section 21 deals with power of entry, search, seizure and arrest without warrant or authorisation by any empowered officer if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any controlled substance in respect of which the offence punishable under the Act has been committed or any document or other article which furnished evidence after commission of such offence is kept or concealed in any building, conveyance or enclosed space and sealed it in the manner provided. Section 22 of SADA, 2006 deals with the power of seizure and arrest in any public place. Section 23 of SADA, 2006 empowers any officer authorized under section 21 if he has reason to suspect that any conveyance is used for the transport of controlled substances to conduct a search of the conveyance. Section 24 mandates that when the officer is about to search any person under the provision of 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.

**13.** Section 100 of the Cr.P.C. would apply only if the conditions mentioned in section 24(2) of SADA, 2006 is fulfilled, which means that only when the person cannot be searched in the presence of a gazetted officer or a Magistrate as it is not possible to take the person to be searched to them without the possibility of the suspect parting with possession of the controlled substance he could proceed to search the person as provided under section 100 of the Cr.P.C. As the appellant no.1 was searched in the presence of a Magistrate, section 24(2) would not apply. In the circumstances, the evidence of Mahindra Pradhan (PW-10) and seizure witness Sonam Bhutia (PW-7), would be sufficient to establish beyond reasonable doubt that the seizure was effected in the manner contemplated. Resultantly, this court does not find anything illegal in the seizures. It is quite evident that the black Puma bag was, in fact, seized from the possession of appellant no.1 and that the controlled substances were found inside the black Puma bag as recorded in the said seizure memo (Exhibit-2).

**14.** The established facts reveal that the search and seizure operation in the house of appellant no.2 was done immediately after the interception of appellant no.1 in the vehicle on 28.01.2018 and lodging of the FIR. The SDM was requested by Mahindra Pradhan (PW-10) on mobile phone to come to the place where the appellant no.1 and the concerned vehicle was

intercepted. It was after the appellant no.1, during interrogation, disclosed to the Investigating Officer that he had purchased the controlled substances from appellant no.2 that his house was searched after obtaining warrant from the learned Judicial Magistrate. The SDM accompanied the police to the house of the appellant no.2 where search was to be conducted. The SDM deposed that the appellant no.2 was given option by the police as to whether he intended to be searched before the Magistrate or a Gazetted Officer to which he conveyed his desire to be searched in the presence of the SDM. Pursuant thereto, the search was conducted, and the controlled substances seized. The Body Search Memo dated 28.01.2018 (Exhibit-3) and Search Memorandum dated 28.01.2018 (Exhibit-4) have been proved by the Investigating Officer; P. Tshering Bhutia (PW-8) and Mani Kumar Rai (PW-4) as well as the SDM. It is, therefore, quite evident that the SDM had accompanied the police to the house of the appellant no.2 only because he had already been requested earlier to fulfil the requirements of section 24 by Mahindra Pradhan (PW-10). In any case, although an opportunity to cross-examine the SDM was availed by the appellant there is no cross-examination on the alleged illegality of the SDM accompanying the police during the search and seizure in the house of the appellant no.2. What matters is the carrying out of search of the person suspected in the presence of the nearest Gazetted Officer or the nearest Magistrate to ensure that the search is conducted

fairly and to overrule the possibility of false accusations. That having been done, it cannot be now held that the mere fact that the SDM accompanied the police to the house of the appellant no.2 would make the search illegal. The facts in **Sushil Sharma** (supra) were different.

**15.** A feeble attempt was also made to question the forensic evidence of the forensic report prepared by Sonam Zangmoo Bhutia (PW-2) by the learned counsel for the appellants. Sonam Zangmoo Bhutia (PW-2) examined the exhibits furnished by RFSL Saramsa and prepared the report (Exhibit-6). The report (Exhibit-6) enumerates the description of the exhibits received and the result of the examination. It also records that the exhibits were examined by chemical analysis using Colour Test, Spectrophotometric and Chromatographic techniques. She deposed that the results were obtained based on those examinations. There were eight specimens, out of which, specimens at serial no. 4 and 8 tested positive for Tramadol which is a controlled substance and the rest of it tested positive for Tramadol Hydrochloride which is also a controlled substance. Sonam Zangmoo Bhutia (PW-2) deposed that she was a Junior Scientific Officer at the Chemistry Division of RFSL, Saramsa, Ranipool. She deposed about having received the exhibits in two sealed cloth cover packets. She also deposed that she examined these exhibits using Colour Test, Spectrophotometric and

Chromatographic techniques and the results obtained. The cross-examination neither questioned her expertise nor the incorrectness of the tests conducted by her. The prosecution has, therefore, sufficiently proved that the seized items tested positive for controlled substances.

**16.** Exhibits 9 and 10, both dated 29.01.2018, are the letters forwarding the appellants for medical examination with a request to the medical officer to collect their urine samples. Dr. Pratik Rasaily (PW-5), the medical officer who examined both the appellants on 28.01.2018, opined that the appellants were under the influence of psychotropic substances. The appellants pupils were dilated and sluggishly reacted to light. The appellant No.1 was conscious but restless. The appellant No.2 was conscious but drowsy. Dr. Pratik Rasaily (PW-5), thereafter, prepared the medical reports (Exhibit-9 and Exhibit-10). These reports record the collection of urine samples. He also deposed that he collected their urine samples and handed it over to the police. During cross examination, he admitted that the sluggish and dilated pupils could be caused by consumption of alcohol as well. He admitted that there was no witness when he handed over the urine sample to the police. Naresh Chettri, the Investigating officer, also corroborated that the appellants' urine samples were collected and sent for forensic analysis. The handing/taking memo (Exhibit-13) dated 28.01.2018 and the intimation dated

29.01.2018 to the Learned Chief Judicial Magistrate by Mahindra Pradhan (Exhibit-17) also records the collection of the urine samples from the appellants. The forensic report (Exhibit-6) records the receipt of exhibits including the urine samples in glass vials in sealed boxes by a special messenger on 01.02.2018. Sonam Zangmoo Bhutia (PW-2) confirmed receiving the urine samples for forensic examination and its examination by her. The urine samples also tested positive for tramadol which is a controlled substance. Consequently, there is no reason to doubt that the urine samples had in fact been collected and sent for forensic examination.

**17.** The alleged offence was committed on 28.01.2018. The last amendment to SADA, 2006 was vide Notification No. 20/LD/18 dated 24.10.2018 by which section 9(1)(b) was further amended. Therefore, section 9 as it stood on 28.01.2018 as amended by the Sikkim Anti-Drugs (Amendment) Act, 2017 would be applicable in the facts of the present case. Section 9 as it stood at the time of the commission of the offence reads thus.

**“9.** (1) Whoever, in contravention of any provision of this Act or any rule or order made thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses,-

(a) .....

(b) where the contravention involves large quantity, with rigorous imprisonment for a term which shall not be less than seven years but may extend to ten years and shall also be liable to pay fine which shall not be less than fifty thousand rupees but may extend to one lakh rupees;

- (c) .....
- (2) .....
- (3) .....
- (4) .....
- (5) ....."

**18.** The learned Special Judge has convicted the appellant under section 9(b) of SADA 2006 which did not exist at the time of the offence. Original section 9 as enacted in the year 2006 did contain section 9(b). The Sikkim Anti-Drugs (Amendment) Act, 2017 notified on 19.09.2017, however, vide section 7 thereof, substituted section 9 as it existed thereby also removing section 9(b). Section 9, which therefore existed prior, was now replaced with section 9 which contain sub-sections (1) to sub-section (5). Resultantly, the conviction of the appellant under section 9(b) is set aside. The offence punishable under section 9(1)(b) involves the contravention of any provision of the Act or any rule or order for manufacture, possession, sale, purchase, transport, imports inter-State, exports inter-State or use of large quantity of controlled substances. Under section 2(i), “large quantity” in relation to controlled substances means any quantity as specified in the Schedule to the Act. The schedule provides that anything between 101 to 1500 pieces of controlled substances would be large quantity. According to the evidence, the seizure of controlled substances from the possession of each of the appellants were more than 101 in number and less than

1500. Resultantly, the conviction of the appellants under section 9(1)(b) are upheld.

**19.** Section 9(1)(b) provides rigorous imprisonment for a term which shall not be less than seven years but may extend to ten years and shall also be liable to pay fine which shall not be less than fifty thousand rupees but may extend to one lakh rupees. The learned Special Judge has convicted the appellants to the minimum sentence and fine prescribed. Accordingly, the sentence of the appellants under section 9(1)(b) are also upheld.

**20.** The appeal is partly allowed to the above extent. The other directions issued by the learned Special Judge are maintained.

**21.** The appellants were enlarged on bail vide order of this Court dated 28.11.2018. In view of their convictions as above, they shall surrender before the Court of the learned Special Judge (SADA 2006), West Sikkim at Gyalshing on 23.08.2021 to undergo the sentences. The learned Special Judge shall take appropriate steps should the appellants fail to surrender as directed hereinabove.

**22.** No order as to costs.

**23.** Copy of the judgment be sent to the Court of the Learned Special Judge for information and compliance.

**( Bhaskar Raj Pradhan )  
Judge**

Approved for reporting: **Yes/No**  
Internet : **Yes/No**

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