(1979) 12 SIK CK 0002

Sikkim High Court

Case No: None

State of Sikkim		APPELLANT
	Vs	
Futi Sherpani		RESPONDENT

Date of Decision: Dec. 1, 1979

Acts Referred:

- Constitution of India, 1950 - Article 371F
- Criminal Procedure Code, 1973 (CrPC) - Section 242, 243, 255, 412, 423
- Evidence Act, 1872 - Section 3

Citation: (1980) CriLJ 114

Hon'ble Judges: A.M. Bhattacharjee, Acting C.J.

Bench: Single Bench

Judgement

@JUDGMENTTAG-ORDER

A.M. Bhattacharjee, Ag. C.J.

1. After examining the records of the case called for by this Court and hearing the learned Advocate-General appearing for the State, I have no doubt that the entire trial in this case was vitiated and the conviction and the sentence must, therefore, be set aside.

2. This was a prosecution under the provisions of an Order, generally known, though not expressly entitled, as the Work Permit Order, contained in the Notification being No. 848/HP, dated the 10th December, 1965, paragraph 1 whereof provides that "every foreigner, entering Sikkim or residing therein, shall be required to obtain a Work Permit from the Chief Secretary or any other officer authorised by him in this behalf before he can take up or -continue in any employment for gain within the State of Sikkim", paragraph 2 whereof provides that "any foreigner, who has obtained or continues in such employment without the grant of a Work Permit shall be liable to be deported from forthwith", and

paragraph 4 whereof provides that "any person acting in contravention of this Order... shall also be liable to a fin which may extend to Rs. 100/- (Rupees one hundred) and in default thereof to 15 days'' simple imprisonment". The case of the prosecution, to quote from the prosecution Report, was that "the abovenamed accused Futi Sherpani, Nepal, Temberkhola, Olong Chung, Nepal, 5 No. Taplayzong, found staying in without Work Permit in Sikkim" and was accordingly sent up for trial for violation of the provisions quoted above-

3. When the accused was brought before the learned District Magistrate, he proceeded to state to her the particulars of the offence of which she was accused and on her pleading guilty thereto, she was convicted and sentenced "to pay a fine of Rs. 150/- (Rupees one hundred fifty) only or to undergo S. I. for l month and deportation". The provisions of paragraphs 2 and 4 of the Order, as quoted hereinabove, make it irresistibly clear that any person found guilty thereunder "shall be liable to be deported", and "shall also be liable to a fine which may extend to Rs. 100/- (Rupees one hundred) only and in default thereof to 15 days'' simple imprisonment", and, therefore the sentence of fine of Rs. 150/- imposed by the learned District Magistrate was in excess of what was authorised by the law and must be struck down to the extent of the excess and I would have done so if I were not satisfied that the whole trial having been otherwise vitiated, the conviction, the sentence and the order of the deportation must be struck down in their entirety.

4. This is no doubt a case where the accused has been convicted on her own plea of guilty by a Magistrate of the First Class and, therefore, u/s 412 of the Criminal Procedure Code, there could be no appeal except as to the extent or legality of the sentence, A conviction on confession is, as it should be, immune from any interference by any higher Court, appellate, revisional, superintending or supervisory and should, as it does, operate as waiver of the right to challenge the same any further unless there was nothing to confess or there was rib basis for the confession, in fact or in law, or the confession was vitiated by mistake, of law or fact, or by fraud or mis-representation or the like; but the sentence following a confession can always be challenged if it is excessive or if it is not authorised or is beyond what is authorised by law.

5. Section 412, which circumscribed the right of appeal only to a challenge to the extent or legality of the sentence where the accused has been convicted on his own plea of guilty, refers to appeals only and there is no corresponding provision in the Criminal Procedure Code relating to criminal revisions. Section 439, which lays down the extent of the power of revision, confers on the High Court all "the powers conferred on Court of Appeal by Sections 423, 426, 427 and 428" and does not expressly refer to the limitations imposed by Section 412. If the powers conferred on a revisional Court were stated to be the powers of the Court of Appeal simpliciter, it could have been urged with a good deal of force that such powers included and were circumscribed by all the limitations imposed by Section 412 on the Court of

Appeal. But powers conferred on the revisional Court are those powers of the Court of Appeal which have been conferred by Section 423 and other specified Sections, which do not contain'' any limitations analogous to those contained in Section 412 and it would, therefore, be reasonable to conclude that the powers of the revisional Courts are not controlled by the aforesaid limitations and the revisional Court can entertain any challenge to the correctness or legality of the conviction itself, even though it was on a plea of guilty. This is also the view of many of the High Courts though some High Courts have taken a contrary view. I have, however, no doubt that our laws of procedure should be construed, wherever that is reasonably possible, in favour of fuller and more comprehensive hearing of the party, whose life, liberty and property are likely to be affected by the provisions of the relevant laws and if a particular provision of law can be interpreted in two ways, one permitting fuller and more comprehensive hearing and the other confining such hearing to narrower limits, we must adopt the former and reject the latter. And I would add that this should be more so in respect of criminal laws and procedure, which put in peril the fundamental right of a person to his personal liberty. This also, in my view, necessarily and logically follows from the classical observations of Vivian Bose, J., though in some other context, in Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya, and if I am reminded of the observations of Lord Halsbury in Quinn v. Leathern 1901 AC 495 , quoted with approval by Hegde, J., in the The State of Orissa Vs. Sudhansu Sekhar Misra and Others, that a decision is an authority for what is actually decides and is not an authority for what logically follows from the observation made therein, I should only say that nothing prevents me from choosing to be bound by such logical conclusions, whether they are binding authorities or not. I am, therefore, of opinion that the revisional jurisdiction of the High Court is not controlled by the principles contained in the provisions of Section 412 and that such jurisdiction may be invoked, whether suo motu or on application, in order to examine the legality of the conviction also, even when such a conviction is based on a plea of guilty.

6. But even assuming that the principles of Section 412 should apply to revisions also, it is by now well-settled that though ordinarily in the case of conviction on a plea of guilty, there is a bar u/s 412 for an appeal except as to the extent or legality of the sentence, still if the facts alleged or disclosed or admitted by the accused do not amount to the offence for which he has been convicted, even though on his own plea, such a plea of guilty is no bar to an appeal on merits and to any challenge to the conviction itself and will not stand in the way of the accused being acquitted. Reference, if at all necessary, may be made to the Division Bench decision of this Court in Puspa Kumar Rai Vs. State of Sikkim, where the decision of the Madras High Court in Re : In Re: U.R. Ramaswami, and of the Madhya Pradesh High Court in the State of M.P. Vs. Mustaq Hussain Azad and Others, were relied on. Reference in this connection may also be made to the later decisions of this Court in Raj Kumar Rai Vs. State, and also in Sonam Tshering Vs. State of Sikkim,

7. The relevant statements in the Prosecution Report have already been quoted hereinbefore, wherein it was only alleged that the accused Futi Sherpani was "found staying in without Work Permit in Sikkim". As already noted, under paragraph 1 of the Notification, "every foreigner entering Sikkim or residing therein shall be required to obtain a Work Permit" before he can take up or continue in any employment for gain within the State of Sikkim" and any contravention of this provision is punishable under paragraph 4 of the Notification. It is, therefore, obvious that at foreigner by merely entering Sikkim or by merely residing therein, without a Work Permit, does not contravene the provisions of paragraph 1 and does no) render himself punishable under paragraph 4, unless he takes up or continues in any employment for gain in Sikkim There is absolutely no allegation in the prosecution Report that the accused has taken up or is continuing in any employment in Sikkim, whether for gain or otherwise and that being so, there is no escape from the conclusion that the facts alleged by the prosecution in its report do not make out any offence and, therefore, on the authority of the decisions referred to hereinbefore, it must be held that the prosecution must fail, the alleged plea of guilty of the accused notwithstanding.

8. There is another way of looking into the matter. The particulars of the offence stated by the learned Magistrate and the alleged plea of the accused thereto were recorded as hereunder -

Q. You are charged u/s 848/HP. of 10-12-1965 for entering and staying in Sikkim without valid permit, being national of a foreign country. What have you to say?

Ans. Plead guilty.

R.T.I.
Sd/- Futi Sherpani of Wallangcheng
(Signature or mark of the accused)
Sd/- J.P. Tsherine
16-9-1979
(Signature of Magistrate)

9. Therefore, in the particulars stated to the accused also it was only stated that the accused was "charged .... for entering and staying in Sikkim without valid permit" without alleging that she took up or continued in any employment for gain in Sikkim, which alone could make her liable for any offence under the Notification. If the particulars of the offence stated to the accused u/s 242, Criminal Procedure Code did not make out any offence, any plea of guilty to any such accusation or charge, u/s 243, Criminal Procedure Code cannot sustain a conviction and cannot amount to such a plea within the meaning of Section 412 to bar an appeal or a revision against the conviction, even assuming that the principles of the section should apply to revisions.

10. There is yet another way of looking into the matter. An admission of guilt of the accused u/s 243 is, under the mandate of that Section, to "be recorded as nearly as possible in the words used by him" and the provisions of this Section cannot be said to have been complied with if the Magistrate instead of recording the admission of the accused in his own words merely records his own conclusion therefrom that the accused has or has not pleaded guilty. As already pointed out, an admission or plea of guilt goes a very long way to deprive the accused of his right to challenge the conviction in higher Courts and, therefore, the higher Courts must examine the admission themselves to determine as to whether the accused really pleaded guilty and was, therefore, deprived of his right to challenge the conviction and that is why Section 243 commands that not only the admission is to be recorded but that the same should be recorded, as nearly as possible, in the words used by the accused. There should not have been any doubt that these provisions are mandatory and non-compliance thereof shall vitiate the trial; but even if there was any doubt, the same has now been dispelled by the Supreme Court in Mahant Kaushalya Das Vs. State of Madras, where (at 23-24) it has been observed as hereunder:

It is manifest from the record that the admission of the appellant has not been recorded ''as nearly as possible in the words used by him'' as required by Section 243 of the Criminal Procedure Code, It is true that in the judgment dated March 22, 1963, the Magistrate has said that the appellant pleads guilty but the record contains no indication whatsoever as to what exactly the appellant admitted before the Magistrate. in our opinion, requirements of Section 243 of the Criminal Procedure Code are mandatory in character and violation of these provisions vitiates the trial and renders the conviction legally invalid. The requirement of the section is not a mere empty formality but is a matter of substance intended to secure proper administration of justice. It is important that the terms of the section are strictly complied with because a right of appeal of the accused depends upon the circumstances whether he pleaded guilty or not and it is for this reason that the legislature requires that the exact words used by the accused in his plea of guilty should, as nearly as possible, be recorded in his own language in order to prevent any mistake or misapprehension.

(Underlining is mine)

11. I have quoted rather extensively from the Supreme Court decision in order to impress upon the trying Magistrates the great care that must be exercised by them when proceeding to convict an accused on his plea of guilty and that the law as laid down by legislation as well as by judicial decisions requires that before proceeding to do so they must record not merely the factum of the accused pleading guilty but the contents of the plea itself. We have pointed out in Puspa Kumar Rai''s case (1979 Cri LJ 1379 (Sikkim)) that "a conviction on a plea of guilty is an exception to the general rule that the prosecution has to prove its case by legal, reliable and unimpeachable evidence" because "the plea of guilty of an accused person is not

evidence in the ordinary sense of the term as defined in Section 3 of the Indian Evidence Act, 1872", and that "the Court, therefore, must exercise very great care before making such a plea the foundation of a conviction". We pointed out further that since such an extraordinary course has been sanctioned by the procedure established by law (e.g., Section 243, Section 255, etc. of the Criminal Procedure Code), it is not for the Courts to consider its propriety, but "the course being itself extraordinary, the caution to be exercised by the Courts before resorting to such extraordinary course should also be extraordinary".

12. An accused also, like any other person, has a fundamental right to personal liberty and must be allowed to have the same enforced by challenging his conviction in the higher Courts under the law of procedure and when such law purports to deprive him of his right to challenge his conviction in the higher Courts where such conviction is based on his plea of guilty, the higher Courts have both the right and the duty to be satisfied and must be satisfied that there was such a plea before debarring him from challenging his conviction and the higher Courts cannot be so satisfied unless the actual plea is available in the record for their examination. It appears from the record that the accused is an old Nepali woman aged about 60 years and is also illiterate and could put her Right Thumb Impression only at the foot of the record of her alleged statement. It is, therefore, obvious that she could not and did not "plead guilty" in English, as recorded and it is now anybody''s guess as to what the accused actually said to the Magistrate and it is not surely for the Court to make any guesswork. The accused can be convicted only on his own plea of guilty and not on what the trying Magistrate concluded from his statement and if the contents of the alleged plea are not duly recorded, the higher Courts will have to proceed on the basis that there was no such plea, notwithstanding the record of the Magistrate to the effect that the accused pleaded guilty.

13. I must, therefore, in this case proceed on the basis that the accused did not plead guilty, firstly, because the particulars of the accusation put to her, in respect of which she has been alleged to have pleaded guilty, did not amount to any offence and secondly, because, the contents of the alleged plea have not been recorded by the trying Magistrate as required by law. And that being so, I would have set aside the conviction and the sentence and sent the case back for fresh trial according to law from the stage of examination of the accused u/s 242, Criminal Procedure Code, But, as already noted, since I am satisfied that the facts alleged by the prosecution in the prosecution Report or anywhere else, do not make out any offence it" will be a sheer abuse of the process of law to send the case back for retrial, even though there was no trial on merits.

14. Another question arose in this case which, however, may not be decided here. The Notification in question is after all a law relating to foreigners providing that a foreigner entering or residing in Sikkim must obtain a Work Permit before he can take up or continue in any employment for gain within the territory of Sikkim. The

Central Foreigners Act, 1946 has been extended to Sikkim on 16-5-1975 by a Notification under the provisions of Article 371F(n) of the Constitution of India and has been enforced on 1-2-1976 and the question arose as to whether as a result of such extension and enforcement of the Central Act, all corresponding Sikkim Laws, including this Notification, stood impliedly repealed. I have already held in Raj Kumar Rai Vs. State, and also in Sonam Tshering Vs. State of Sikkim, that with the extension and the enforcement of any enactment to and in Sikkim under the provisions of Article 371F(n) of the Constitution of India, the corresponding Sikkim Law stands over-borne, over-thrown and impliedly repealed. The Foreigners Order, 1948, made under the provisions of the Foreigners Act, 1946, makes some provisions relating to foreigners taking up certain types of employment in India and, therefore, it may be urged that this Notification is a corresponding Sikkim Law vis-a-vis Foreigners Act, 1946, and the Foreigners Order, 1948 and as such the former has stood impliedly repealed with the extension and enforcement of the latter and, therefore, the entire prosecution was incompetent. I, however, feel that I need not decide this question in this case which can very well be fully disposed of on the ground mentioned hereinbefore. It is well settled that the. Court should not decide as to the legality, validity or the vires of any law made by the Legislature and strike it down unless it is absolutely necessary for the disposal of the case before it and the case cannot be disposed without deciding that question. The power of the Courts to strike down any illegal or invalid or ultra vires law is not disputed; but what is disputed is the propriety of doing so without compelling necessity. It may be good to have a giant''s power, but it would not always be good to use it as a giant and I take it to be the settled law that the Court should not strike down a law, made by a competent Legislature, merely for the pleasure of legal research.

15. In the circumstances, this revision succeeds and the conviction and the sentence imposed on and the order of deportation passed against the accused are set aside and the accused is acquitted. Fine paid by the accused shall be refunded.