

SL. NO. 111 dt. 29/9/14

IN THE COURT OF LD. 3 RD JUDICIAL MAGISTRATE AT SILIGURI.

C.R. Case No: 405/2013
(T.R. No 212/2013)

Present : Bhaskar Majumder
Judicial Magistrate, 3 rd Court,
Siliguri.

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Clerk-in-Charge
A.C. Court

29 SEP 2014

State (West Bengal Forest Department)

=VS=

1. Joe Rangang
2. Amit Kr. Rana @ Amrit Kunwar Rana
3. M. Udhyia Kumar
4. Bhagchand Dhabj
5. Ganesh Ghimirey
6. Dakchaya Bir Bahadur @ Bir Bhadra Rai
.....accused persons.


(Offences under Section 51(1) of the Wild Life Protection Act 1972)


Judgment delivered on 29th September, 2014.

1) The case of the prosecution, in brief, is that on 31.07.2013 at about 10 A.M, one secret information came to the Forest Range Officer Sarugarah Range, Baikunthapur Division, Darjeeling that huge number of wild life articles would be transacted at Krishna Nagar Debdanga. On the basis of such secret information, the Range Officer, Swapan Kumar Majhi, after informing the matter to the Divisional Forest Officer, Baikunthapur Division and having direction therefrom, went to Krishnanagar Devdanga on raid with some forest personnels and found there that some persons (aforesaid accused persons) were discussing in front of an abandoned house having five bags containing some articles kept near their feet. Seeing them, one of such persons tried to flee away but the raid team apprehended him. After opening the bags scales of Pangolin were found inside. On demand the accused persons failed to produce any valid document in respect of possession of such articles. The Range Officer arrested the six accused persons, seized labelled the scales of Pangolin, weighted the same (found 70 Kgs) also seized 6 mobile phones and took them back to the Range Office. There the Assistant Divisional Forest Officer / Sri Dibyajyoti Bera (WBFS) interrogated them and recorded their statement u/s 50 (8) of Wild Life (Protection) Act, 1972 where they confessed their guilt.

2. Thereafter out of the six accused persons three accused persons namely accused no 3,4,6 were taken into remand for further recovery. Accordingly, on 06/08/2013 the said Range Officer Swapan Kr. Majhi took those three accused

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Judicial Magistrate
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Siliguri

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persons, with some forest office personnels, and as per showing of three accused persons they went to a rental house of accused no 6 at Patharghata, Khaprai More. Accused no 6 entered into the said house after opening the number lock and came out therefrom with four gunny bags containing dry sea horse. They failed to produce any valid document / licence in respect of possession of dry sea horse. Thereafter the dry sea horses were seized, labelled and weighted (found 6 kgs) and they were taken back to the Range Office. On that day Driving licence, PAN card, Voter Identity card were also seized from that house as produced by Accused no 6. There after, the said ADFO/Sri Dibyajyoti Bera again interrogated those three accused and recorded their statements u/s 50(8) of Wild Life (Protection) Act 1972. They confessed their guilt. It is the further case of the prosecution that during the seizure on 21/07/13 and 06/08/13, the local people gathered at the place of occurrence but they refused to be witnesses of such seizure in spite of repeated requests by the raid party, for which, finding no other alternative the Range Officer made the Forest Office personnel witness in the seizure etc.

3) The sample of Seized Pangolin scales, dry sea horses were sent to Zoological Survey Of India, Kolkata for scientific examination. Such reports, were obtained. The first seized articles were reported as scales of Chinese Pangolin [(Manis Penta Dactyla) Animal of Schedule I, part I, item 5A]] and the second seized articles were reported as genuine dry sea horses (Species Animals of Schedule I, Part II, A Item no 3).

4) During investigation it was learnt that these accused stored those contraband Wild Life articles at different places of Siliguri for despatching them to China enroute Nepal, Maynamar. So as per the case of the prosecution, these 6 accused persons were guilty of offence punishable u/s 51 (1) of Wild Life (Protection) Act 1972.

5) The prosecution submitted Offence Report (Enquiry report) Vide no 26/SG of 2013-2014 against all six accused persons wherein cited witnesses were 1) Ranjit Kr Kar (Dr. FR), 2) Subrata Roy (F.G), 3) Sonam Gyatso Bhutia (DR/FR), 4) Swapan Kr. Majhi (FR), 5) Jaharul Md. Ali (E.G) 6) Dibyajyoti Bera (ADFO), 7) Basudev Tripathi (Officer in Charge Z. S.I. Kolkata) 8) Subhrendu Shekhar Misra (Scientist -B, Z.SI Kolkata). The above referred witnesses were examined before charge in the order of :

PW-1... Subrata Roy (O.R.W-2)/Witness of Seizure dtd. 31.7/13 and 6/8/13.

PW-2... Swapan Kr. Majhi (ORW4)/Enquiry Officer.

PW-3... Sonam Gyatso Bhutia (ORW3)/Member of Raid Team dt. 31.7.13

PW-4... Jaharul Md. Ali (ORW5)/witness of seizure dtd. 31.7.13

PW-5... Dibyajyoti Bera (ORW 6)/ADFO/ Statement Recording Officer.

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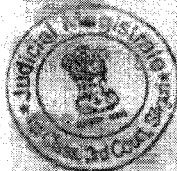
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29/9/14
Judicial Magistrate
1st Class, 3rd Court
Siliguri

Judicial Magistrate, 3rd Court, S.I.G
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Judicial Magistrate
1st Class, 3rd Court
Siliguri

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A.C.J. Court

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- PW-6.....Ranjit Kr. Kar (ORW 1)/Witness of seizure dt. 31.7.13.
 PW-7....Basudeb Tripathi (ORW -7)/Scientific report regarding scales of Pangolin.
 PW-8.....Subhrendu Sekhar Mishra (ORW 8) / Scientific report regarding dried Sea horse.

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6) Thereafter upon hearing both sides, charge was framed against all six accused persons for offence punishable u/s 51(1) of Wild Life (Protection) Act, 1972. The particular of such charge was read over and explained to each of the accused persons, to which each of them pleaded not guilty and claimed trial.

7) After framing of such charge the above referred witnesses i.e PW 1 to PW 8 were cross examined (cross after charge) on behalf of the accused persons.

8) During the examination of witnesses (PW 1 to PW-8), the prosecution produced several documents, materials etc and exhibited the same. Now for the sake of brevity and convenience, those exhibited documents, materials are mentioned below in respect of two days i.e 31.07.2013 and 06.08.2013, incidents.

DOCUMENTS & MATERIALS

(i) Exhibited document in respect of incident dtd. 31.07.2013.

A.

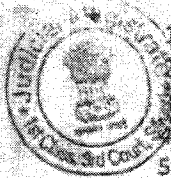
1. The seizure list dated 31.7.2013.....Exbt. 1/1 .
2. The signature of PW-1 on this seizure list dt. 31.7.13 Exbt. 1.
3. The signature of PW 2 on this seizure listExbt 1 /2.
4. The signatures of accused no 1,2,3,5,6 on the Seizure listExbt 1/3 Series.
5. The LTI of accused No 4 on the seizure listExbt. 1 /4.
6. The signatures of witness Asoke Banerjee on the Seizure list ...Exbt. 1/5.
7. Reverse page of Seizure list dt. 31.7.13.....Exbt. 1/6.
8. Signature of PW2 on Reverse page of seizure list dt. 31.7.13....Exbt. 1/7.
9. Signatures of accused no 1,2, 3, 5, 6 on the reverse page of seizure list dt. 31.7.13.....exbt. 1 /8. (series).
10. LTI of Accused no 4 on the reverse page of seizure list dt. 31.7.13...Exbt. 1/9.
11. Signature of PW 4 on seizure list dt. 31.7.13.....Exbt. 1/10.
12. Signature of PW 6 on seizure list dt. 31.7.13....Exbt. 1/11.
13. Signature of one witness Nibaran Ch. Basak on seizure list dt. 31.7.13.....Exbt. 1/12.

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[Signature]
 Judicial Magistrate
 1st Class, 3rd Court
 Siliguri

Judicial Magistrate, 3rd Court, SLG

[Signature]
 29/9/14
 Judicial Magistrate
 1st Class, 3rd Court
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B.

1. Rough sketch map of place of occurrence dtd. 31.7.13.....Exbt. 12.
2. Signature of PW 2 on the rough sketch mapExbt. 12 /1.

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[Signature]
Magistrate in Charge
3rd Court

29 SEP 2014

C.

1. Statement of accused no 1 recorded by PW-5 dt. 31.7.13.....Exbt. 5.
2. Signatures of accused no 1 on this statementExbt. 5/1, 5/2.
3. Signatures of PW-5 on this statement.....Exbt. 5/3, 5/4.

D.

1. Statement of accused no 2 recorded by PW dtd. 31.7.13Exbt. 6.
2. Signatures of accused no 2 on this statementExbt. 6/1, 6/2,
3. Signatures of PW 5 on this statementExbt. 6/3, 6/4.

E.

1. Signature of accused no 5 recorded by PW 5 dt. 31.7.13.....Exbt. 7.
2. Signatures of accused no 5 on this statementExbt. 7/1, 7/2.
3. Signatures of PW 5 on this statementExbt. 7/3, 7/4.

F.

1. Statement of Accused no 6 recorded by PW 5 dt. 31.7.13.....Exbt. 8.
2. Signatures of accused no 6 on this statementExbt. 8/1, 8/2.
3. Signatures of PW 5 on the statementExbt. 8/3, 8/4.

G.

1. Statement of accused no 3 recorded by PW 5 dt. 31.7.13.....Exbt. 9.
2. Signatures of accused no 3 on this statementExbt. 9/1,9/2.
3. Signatures of PW 5 on this statementExbt. 9/3, 9/4.

H.

1. Signature of accused no 4 recorded by PW 5 dt. 31.7.13.....Exbt. 10.
2. LTIs of accused no 4 on the statementExbt. 10/1,10/2.
3. Signature of PW -5 on this statementExbt. 10/3, 10/4.

I.

1. Expert report (scientific) in connection with Pangolin ScalesExbt. 16.
2. Signature of PW 7 on this reportExbt. 16/1.

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[Signature]
JUDICIAL Magistrate
1st Class, 3rd Court
Siliguri

Judicial Magistrate, 3rd Court, S.L.C.

[Signature]
29/9/14

Judicial Magistrate
1st Class, 3rd Court
Siliguri

II. Exhibited document in report of incident dtd. 06/08/2013.

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[Signature]
Charge
Sheet

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A.

1. Seizure list dt. 6/8/13 (including reverse page)Exbt. 2/1.
2. Signature of PW 1 on this seizure list.....Exbt. 2.
3. Signature of PW 2 on this seizure listExbt. 2/2.
4. Signature of PW 2 on the reverse page of this seizure listExbt. 2/3.
5. Signatures of accused no 3, 6 on this seizure listExbt. 2/4. (series).
6. LTI of accused no 4 on this seizure listExbt. 2/5.
7. Signatures of accused no 3,6 on the reverse page of this seizure listExbt. 2/6(series).
8. LTI of accused no 4 on the reverse page of this seizure listExbt. 2/7.
9. Signature of PW-1 on the reverse page of this seizure list....Exbt. 2/8.
10. Signature of PW -6 on this seizure listExbt. 2/9.

B.

1. Rough sketch map of place of occurrence dt. 6/8/13.....Exbt. 3.
2. Signature of PW -2 on this rough sketch mapExbt. 3/1.

C.

1. Statement of accused no 6 recorded by PW -5 dt. 6/8/13...Exbt. 13
2. Signatures of accused no 6 on this statementExbt. 13/1, 13/2.
3. Signature of PW -5 on this statementExbt. 13/3, 13/4.

D.

1. Statement of accused no 3 recorded by PW- 5 dt. 6/8/13...Exbt. 14.
2. Signatures of accused no 3 on this statementExbt. 14/1, 14/2.
3. Signature of PW- 5 on this statementExbt. 14/3, 14/4.

E.

1. Statement of accused no 4 recorded by PW- 5 dt. 6/8/13....Exbt. 15.
2. LTIs of accused no 4 on this statementExbt. 15/1, 15/2.
3. Signature of PW- 5 on this statement.....Exbt. 15/3, 15/4.

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[Signature]

Judicial Magistrate
1st Class, 3rd Court
Siliguri

Judicial Magistrate, 3rd Court, SLG

[Signature]
29/9/14

Judicial Magistrate
1st Class, 3rd Court
Siliguri



F.

1. Expert report (Scientific) In respect of dried seahorseExbt. 17.
2. Signature of PW -B on this reportExbt. 17/1.

III. MISCELLANEOUS

A.

1. Offence report no 26/SG of 2013-14.....Exbt. 4 with forwarding.
2. Signature of PW- 2 on offence reportExbt. 4/1.

B.

Signature of PW- 1 on label of yellow envelope seized on 31.7.13.Exbt. 11.

IV. Exhibited materials In respect of seizure etc dated 31.07.2013.

A. Gunny bags + labels etc dtd. 31.7.13

1. Mat Exbt. I,II, III, IV, V.....5 gunny bags containing Pangolin scales.
2. Mat Exbt. I/1, II/1, III/1, IV/1, V/1.....Signature of PW 1 on the labels of 5 bags.
3. Mat Exbt. I/2, II/2, III/2, IV/2, V/2- 5 labels of 5 gunny bags.
4. Mat Exbt. I/3, II/3, III/3, IV/3, V/3- Signature of PW 2 on the 5 labels.
5. Mat Exbt. I/4, II/4, III/4, IV/4, V/4- signature of forest staff Asoke Banerjee.
6. Mat Exbt. I/5, II/5, III/5, IV/5, V/5- LTIs of accused no 4 on the five labels.
7. Mat Exbt. I/6, II/6, III/6, IV/6, V/6- Signatures of Accused 1,2,3,5,6, collectively on 5 labels.
8. Mat Exbt. I/7, II/7, III/7, IV/7, V/7- Signature of PW 4 on five labels.
9. Mat Exbt. I/8, II/8, III/8, IV/8, V/8- Signature of PW6 on five labels.
10. Mat Exbt. I/9, II/9, III/9, IV/9, V/9- Signature of Forest Staff Nibarani Ch. Basak on 5 labels.

B. 6 Mobile Phones kept in Yellow Envelope dtd. 31/7/13

1. Mat Exbt. VI- --6 Mobile Phones collectively kept in the yellow envelope.
2. Mat Exbt. VI/1 --Signature of PW 1 on the label of yellow envelope.
3. Mat Exbt. VI/2 ---label of yellow envelope.
4. Mat Exbt. VI/3 ---- signature of PW 2 on this label.
5. Mat Exbt. VI/4 ---Signature of Asoke Banerjee / forest office staff on this label.
6. Mat Exbt. VI/5 ---LTI of accuse no 4 on this label.
7. Mat Exbt. VI/6---- 5 signatures of five accused i.e accused no 1,2,3,5,6 (collectively) on this label.

Dictated & corrected by me,

R. 29/9/13

Judicial Magistrate
1st Class, 3rd Court
Siliguri

Judicial Magistrate, 3rd Court, SLG

Shamshir 29/9/13

Judicial Magistrate
1st Class, 3rd Court
Siliguri

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Clerk-in-Charge
Court

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- 8. Mat Exbt. VI/7—Signature of PW -4 on this label.
- 9. Mat Exbt. VI/8—Signature of PW -6 on this label.
- 10. Mat Exbt. VI/9— Signature of Nibaran Ch. Basak / Forest Office staff on this label.

V. Exhibited materials in respect of seizure etc dtd. 06/08/13

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 Charge
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A. Gunny bags and labels etc dtd. 6/8/13

- 1. Mat Exbt. VII, VIII, IX, X – Four Gunny bags containing dried Sea horse.
- 2. Mat Exbt. VII/1, VIII/1, IX/1, X/1—Signatures of PW 1 on the labels of four gunny bags.
- 3. Mat Exbt. VII/2, VIII/2, IX/2, X/2- Four labels of four gunny bags
- 4. Mat Exbt. VII/3, VIII/3, IX/3, X/3- Signature of PW 2 on four labels.
- 5. Mat Exbt. VII/4, VIII/4, IX/4, X/4- LTIs of Accused no -4 on four labels.
- 6. Mat Exbt. VII/5, VIII/5, IX/5, X/5 --Set of signature of Accused No 3,6 on the four labels.
- 7. Mat Exbt. VII/6, VIII/6, IX/6, X/6- Signature of PW -6 on the four labels.

B. Seizure of PAN Cards, D/L, ATM cards etc dtd. 6/8/13 kept in Yellow Envelope.

- 1. Mat Exbt. XI- Articles kept in yellow envelope collectively.
- 2. Exbt. 11/1, 11/2- The label and signature of PW -2 on this label respectively.
- 3. Exbt. 11/3- LTI of Accused No 4 on this label.
- 4. Exbt. 11/4- Set of signatures of Accused no 3,6 on this label (collectively).



Apart from above referred exhibited documents, materials exhibits, during the cross examination before charge and after charge of PW-2, one address verification report of accused no 3, the copy of notification no 1269- for 4 A-1/72 dt. 15/2/77, one e. mail text of police verification report of accused no 1 were marked as Exbt. A, B, C (as documents on confrontation).

10) After closure of evidence from the side of the prosecution all above named six accused persons were examined u/s 313 of Cr.P.C to such examination each of them pleaded not guilty and innocence stating inter alia that 1) nothing was seized from them 2) they did not give any confessional statement during the inquiry or investigation, 3) their signatures and LTIs were obtained in prosecution document by threat, force, assault and undue influence, 4) they were not present at the place of occurrence, at the relevant point of time. They also individually declined to adduce any evidence in support of their defence. The recorded examinations u/s 313 Cr.P.C of six accused persons were kept in the record.

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[Signature]
 Judicial Magistrate
 1st Class, 3rd Court
 Siliguri

Judicial Magistrate, 3rd Court, SLG
[Signature]
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11) Thereafter heard argument from Ld. APP for prosecution and Ld. Advocates for accused no 1, Ld. Advocate for accused no 3, 4, 5, 6 Ld. Advocate for the rest accused no 2 adopted the argument of Ld. Advocate of other five accused persons. The Ld. Advocate for accused no 3,4,5,6 filed a written argument which is kept in the record. Copy served to Ld. APP.

POINT TO BE DECIDED

12) Whether the prosecution has been able to prove the charge of offence punishable u/s 51(1) of Wild Life (Protection Act) of 1972 against the above referred all six accused persons beyond all reasonable doubts?

DECISION WITH REASONS

13) The prosecution examined as good as eight witnesses (mentioned above) and exhibited documents and materials (mentioned above). The offence for which the accused persons faced the trial is the offence punishable u/s 51(1) of Wild Life (Protection) act of 1972.

14) Briefly stated the offence runs thus -- "Any person who contravenes any provision of this act (except Chapter V A and section 38J) or any rule or made there under or who commits a breach of any of the condition of any licence or permit granted under this act, shall be guilty of offence against this act, and shall on conviction be punishable with Imprisonment for a term which may extend to three years or with fine which may extend to 25,000/- or with both:

provided that where the offence committed is in relation to any animal specified in Schedule I or part II of Schedule II or Meat of any such animal or animal article, trophy, uncured trophy derived from such animal or where the offence relates to hunting in a sanctuary or in a National park or boundary of a sanctuary or a National park , such offence shall be punishable with an imprisonment for a term which shall not be less than 3 years but may extend to seven years and also with fine which shall not be less than Rs. 10,000/-.

Provided further that in the case of a second or subsequent offence of nature mentioned in this subsection the term of imprisonment shall not be less than three years but may extend to seven years and also with fine which shall not be less than Rs. 25,000/-."

15) The above referred sub section of the offence prescribes three fold of punishments. Firstly under first part of the said subsection, secondly under second part (1 st proviso) of the same, and thirdly under third (2nd proviso) of the same.

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B. 29/9/14
Judicial Magistrate
1st Class, 3rd Court
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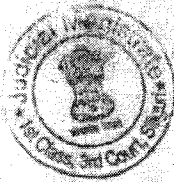
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29/9/14
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16) It is the bounden duty of the prosecution to prove the charge of the above referred offence against the accused persons beyond all reasonable doubts. In this regard, the provision under section 57 of Wild Life (Protection) Act, 1972 is a very important provision of law. This section deals with presumption as to certain cases. As per this section - "Where in any prosecution for an offence against this act, it is established that a person is in possession, custody or control of any captive animal, animal article, meat, trophy, uncured trophy, Specified plant or part or derivative thereof it shall be presumed until the contrary is proved, the burden of proving which shall lie on the accused, that such person is in unlawful possession, custody or control of such captive animal, animal article, meat, trophy uncured trophy specified plant or part or derivative thereof." To sum up this section the presumption of offence against this act shall be made against the accused when it is established i) That the accused was in possession custody or control of articles in question, ii) That such article in question were of any captive animal, animal article, meat, trophy, uncured trophy, specified plant or part or derivative thereof - until the contrary is proved by the accused person. The burden of proving the contrary against such presumption lies upon the accused persons.

Now the consideration of the facts of the case and the evidences on record in respect of Search, Seizure etc dt. 31/07/2013.

17) The PW-1, PW3, PW 4 and PW -6, two forest staffs namely Nibaran Ch. Basak and Asoke Banerjee were the member of raid party dt. 31.7.13 under the leadership of PW-2 (enquiry officer) /Forest Range Officer, and except PW-3, the rest PWs and Nibaran Ch. Basak and Asoke Banerjee were made witnesses in the seizure list label etc dt. 31/7/13. Though the said Nibaran Ch. Basak and Asoke Banerjee were made witnesses in seizure list and label but they were not cited as witnesses in offence report and accordingly, they were not examined by the prosecution.

18) PW -1, PW 3, PW 4, PW -6 in their examination in chief stated that on 31.7.13 the PW -2 Swapan Kumar Majhi at about 10.00 -10.30 AM told them to be ready for a raid. Accordingly, they under the leadership of PW -2 left their office at Sarugara Range at about 12.00 hours to 12.15 PM and went to Devidanga Krishnagar Area. On reaching there, they found that five to six persons were talking to each other in front of an abandoned house with five gunny bags keeping near their feet. As per instruction of Swapan Kumar Majhi they apprehended them. One of them tried to flee but PW -1 caught him. Then PW-2 asked them to open those bags but those persons refused to open. Then as per the instruction of PW -2 the members of the raid team opened those bags and scales like articles were found inside. On being asked those persons disclosed that those were scales of Pangolin. PW-2 demanded valid paper/ licence of such Pangolin scales but they failed to produce any such document. They disclosed their names (above mentioned accused persons) as per asking of PW-2. Then the weight of the scales of Pangolin was taken

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[Signature]
29/9/13

Judicial Magistrate
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Siliguri

Judicial Magistrate, 3rd Court, S.I.G.

[Signature]
29/9/13

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there with the help of digital weigh machine and it was found 70 Kgs. PW-2 seized those Pangolin scales and also six mobile sets from them, prepared the seizure list labels etc, signed by the witnesses, PW-1, PW-4, PW -6 Nibaran Chandra Basak and Asoke Banerjee, and by accused No 1,2,3,5,6. The accused no 4 put his LTI there on. The PW -2 thereafter arrested them. PW-1, 3,4,6, further stated that during search and seizure at that place of occurrence some local village people gathered there. PW-2 requested them to sign on the seizure list, label etc as witness but they refused to sign it as witness of such seizure and labels etc. Then finding no other alternative PW -2 / the Enquiring Officer asked PW -1 , PW-4, PW -6, Nibaran Ch. Basak and Asoke Banerjee to put their signatures there on as witness and accordingly they signed those documents and labels.

19) PW-2 /Enquiry Officer in his examination in chief also stated the same facts as stated by PW -1, PW-3, PW-4, PW-6 in their respective examination in chief. Reliable and reasonable corroboration was there. All these witnesses including PW-2 identified the five bags containing the scales of Pangolin in the Court at the time of evidence. They also, in Court exhibited their respective signatures and that of Nibaran Ch. Basak and Ashoke Banerjee in seizure list, labels and also exhibited the bags containing the scales of Pangolin and six mobile sets kept in yellow envelope as material exhibits.

20) Now let me consider the cross examination of PW -1, PW -2, PW-3, PW -4 and PW -6 as regards raid dated 31/07/2013. Perused the same carefully and on such perusal it appears to me that the defence case raised the points in dispute like :-

- I. The ownership of abandoned house was not ascertained.
- II. No paper or document is produced regarding on duty of Pws on 31/7/13.
- III. No Digital Weight Machine was produced.
- IV. Dispute as to who opened the gunny bags .
- V. Discrepancy in number of houses near the abandoned house.
- VI. Plea that accused no 1 was picked up on the road while ^{the} team was returning from the spot.
- VII. Sitting arrangement of PW s in the vehicle and the manner ^{of} coming out from the vehicle at the spot.
- VIII. Contradiction regarding number of local people present there.
- IX. No independent witnesses were cited in seizure list and label inspite of the presence of local people.
- X. The gunny bags were not held by the accused in their hands.
- XI. The signatures of accused were obtained in the seizure list and labels under threat, assault and undue influence.

Dictated & corrected by me,

B. 29/9/14

Judicial Magistrate
1st Class, 3rd Court
Siliguri

Judicial Magistrate, 3rd Court, SLG

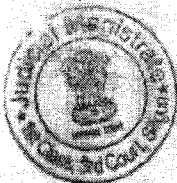
Shankar Das

Judicial Magistrate
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Point No 1.

It was urged on behalf of the accused that ownership of the abandoned house was not ascertained. The evidence of PW-1, PW-3, PW-4 and PW -6 show that such ownership was not ascertained. But PW-2 in his cross examination stated that it was learnt that one Suraj Chettri was the owner of that abandoned house but his further particular could not be traced out. So at least name of one person in respect of said house was obtained by PW-2. More so whether the ownership of that house was actually ascertained or not, it will hardly affect the seizure etc on that day. For argument sake if there is any failure to ascertain the ownership of that house, does it washout the fact of the seizure. Answer is - Obviously not. Further more all the witnesses stated that gunny bags were found out side of that abandoned house. So the absence of such ownership does not hamper seizure.

POINT NO -2.

The above referred all PW s were cross examined on the point whether they were on duty on 31.7.13 or not. It is pertinent to mention here that all Pws are government employees and Section 114 of Evidence Act gives a presumptive privilege to their official works. As per Section 114(e) the Court may presume that judicial and official work have been regular performed. Such MAY PRESUMTION is rebuttable at the instance of person who challenges such official act. In the instant case there is no rebutted materials or evidence on the part of the accused to hold that the PW s were not on duty on 31.7.13. In such situation the PW s must enjoy the benefit of such presumption u/s 114(e) of Evidence Act. So this contention as highlighted by the Ld. Defence Counsel is not acceptable.

POINT NO -3

It was also contended that the Digital Weight Machine which was used for weighing the contraband articles was not produced. The production of digital weight machine in the Court could hardly show the more or less of the weight of Pangolin scales. The PW s in the Court identified the huge amount of Pangolin scales which were produced as alamat. Therefore, discrepancies if would be at all would not raise any doubt in respect of the existence of handful of alamat. So the non production of digital weight machine did not destroy the veracity of seizure.

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29 SEP 2014



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R 29/9/14
Judicial Magistrate
1st Class, 3rd Court
Siliguri

Judicial Magistrate, 3rd Court, S.G.

Bhaskar Chandra
29/9/14
Judicial Magistrate
1st Class, 3rd Court
Siliguri

POINT NO 4, 5, 7 and 8.

On close perusal of above referred evidences of PW s (a) it is found that some of them stated therein that the gunny bags were opened by them individually or with the help of other witnesses or with the help of accused or opened by the accused themselves - these are the discrepancies. (b) It is further found from their evidences that they failed to state the exact same number of houses in the near distance of abandoned house. © It is also found that PW s stated different numbers of people like 10-15 persons 8-10 persons etc gathered. I find that the above referred three circumstances have contradictions but negligible in manner. Such minor discrepancies are required to be ignored so far the entire evidences of the prosecution are concerned. It can also be said that such minor discrepancies shall not prejudice the accused in any manner and / or touch the veracity of other substantive part of the evidences. The question of vitiating trial on this ground would not arise at all. In this regard I like to rely upon the decision reported in 2001 SCC(Cri) 1416, 212 (3) Crimes 15(SC). The Honourable Court s have been pleased to observe that in case of minor discrepancies not touching the core of the case shall be ignored.

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Silliguri
20 SEP 2014

Ld. Defence Counsel further highlighted that PW-4, stated that PW-1 sat at the right side of the driver in the front side of Tata Sumo Car. Had it be the case the vehicle Tata Sumo would be considered as left hand driving car but it is not. I find that the evidences of PW-1 i.e the person in respect of whom said fact was asserted is to be considered. PW-1 in his cross examination specifically stated that after reaching the spot by a vehicle he came out of his vehicle (Tata Sumo) from its left side. This means he did not sit on the right side of the driver. More so it can be taken into judicial notice that a Tata Sumo vehicle is always a right hand driving car. So the evidences of PW-4 as regards sitting of PW-1 was mere a bonafide human error.



POINT NO -6

The accused no 1 i.e the accused Joe Rangang took a plea in his cross examination as well as in the examination u/s 313 of Cr.P.C that he was picked up on the road on 31/07/13 while the prosecution was returning from the spot. This is a plea of alibi on behalf of the accused no -1. In fact this is a specific defence case of this accused. It is not the duty of the prosecution to prove his alibi when the specific case of the prosecution was that the accused was arrested on the spot. It is the burden on the accused no -1 to prove that he was picked up on the road while prosecution was returning from the spot. On record no such evidence or reliable materials are there in respect of such plea of accused no 1. So such plea is not reliable and hence not accepted.

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Judicial Magistrate
1st Class, 3rd Court
Silliguri

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1st Class, 3rd Court
Silliguri

POINT NO -9

It was urged by the Ld. Defence counsel that at the time of seizure no independent witness were cited in the seizure list, label, envelope inspite of presence of local village people at the place of occurrence. The presence of such independent witness is a mandatory requirement of provision of section 100(4) of Cr.P.C. The Ld. APP for the prosecution submitted that this a case under special law Wild Life (Protection) Act 1972. Forest Officers do not come under the general provision of Cr.P.C. He is not the police officer. His power of search, arrest and detention had been governed by section 50 of Wild Life (Protection) Act 1972. The Ld. APP, however, made further submission that there were several decisions of Honourable Courts wherein Their Lordships were pleased to view that if the reason for not getting the signatures of local witness in the seizure list etc were properly explained, and prosecution had to take signatures of only official witness there on, it would not be wise to throw out such seizure only on the ground of absence of local witness, disbelieving the evidence of official witness. Ld. APP relied upon the decision reported in 1981 C.C. Cases 261 (P and H), AIR (1996) SC 2943. The Ld. Defence Counsel submitted that Section 100(4) Cr.P.C was the mandatory provision to follow in case of seizure. The prosecution purposefully did not do that. They relied upon the decision reported in Cr.A. 557/2003 (H.P) dt. 13/07/2010, AIR 2000 Cal 104, WP 1299/09 Cal dt. 21/01/11. Before dealing with the decision let me see the provision of Section 100 Cr. P.C. As per this section the relevant search would be held in closed house. In our case in hand the search, seizure dt. 31.07.2013 was made in front of an abandoned house. All the PW s stated the said aspect. So in the instant case of seizure dt. 31.07.2013 section 100 of Cr.P.C is not applicable. However, on perusal of cited decision on behalf of both sides it is found that the Hon'ble Court have been pleased to view that section 100(4) of Cr. P. C should be complied with but subject to satisfactory explanation or effort to get the signatures of local witness. If non availability of signatures of such witnesses is there and reason is sufficiently explained, then Court is to consider the entirety of the evidences of official witnesses. In the present case, however, the non availability of signatures of local witnesses was explained and corroborated by the PW s. They all stated in their evidences that inspite of repeated requests to the local people they did not sign. I find that ground is reliable. It is a common human nature of public at large whether rural or urban, that they generally avoid their acquittance, of any sort, in respect of investigation or enquiry of any crime. In this case the circumstances of not getting any signatures of local witness were in favour of prosecution and thus non compliance of prov. u/s 100 Cr.P.C was not fatal.

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POINT NO -10

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 Siliguri

Judicial Magistrate, 3rd Court, S.E.G

B. K. Das
 29/9/14
 Judicial Magistrate
 1st Class, 3rd Court
 Siliguri

POINT NO -10

The Ld. Defence Counsel as regards Possession and control of the contraband goods, submitted that the case of the prosecution was that the alleged bags were not found in holding condition by the accused. This means they were not in possession, control or custody of those bags. Ld. APP submitted that bags were found near the feet of the accused persons i.e within the vicinity of the accuseds' physical position. He also submitted that PW's stated that at the time of said raid the accuseds were found standing encircling those bags with contents. This was clear example of conscious possession and control. As regards the meaning and explanation of possession, control the Ld. Defence Counsel relied upon the decision reported in 2013(1) Crimes 123 (P and H) whereas the Ld. APP relied upon the decision reported in (1979)4 SCC 274. I have perused both the decisions. In decision reported in 2013 (1)Crimes 123 (P and H) the Hon'ble High Court viewed that the prosecution is not only to prove that the accused were in possession of contraband, but it is the bounden duty of the prosecution to specifically prove that accused were conscious possession of contraband. In decision reported in 1979(4) SCC 274 Hon'ble Supreme Court, in discussing about "Possession", was pleased to cite the view of POLLOCK and WRIGHT regarding "Possession of things" - that - "when a person is in such a relation to a thing so far as regards the thing, he can assume, exercise or resume, the manual control of it at pleasure and so as regards other persons, the thing is under the protection of his personal presence or in or on a house or land occupied by him or in any receptacle belonging to him and under his control, he is in physical possession of that thing."

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In the case in hand the PW-1, PW-2, PW-3 PW4 and PW -6 stated in their respective examination in chief that those bags with contents were found near accused persons' feet and they were found talking to each other encircling those bags. I have carefully perused their respective cross examinations. In such cross examination those witnesses stated that those bags were not found in a holding condition by any of the accuseds. It is also evident from examination in chief of these PW's too. But nowhere in the entire evidences of the PW's it is found that those bags with contents were away from the physical position of the accuseds. Nothing cogent has come up from those evidences that those bags were not near their feet and the accuseds were not found in a position of encircling the bags near their feet. It is also not appeared in the evidences that those bags were at a such distance that the accuseds could not assume or resume the manual control of it. The manner of standing of the accuseds (encircled) suggested clearly that the bags with contents were under the protection of their personal presence. Having regard to the extent and degree of such evidences it can safely be said that the evidences of PW-1, PW -2, PW -3, PW -4, PW -6 regarding the vicinity of the bags with its

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1st Class, 3rd Court
Siliguri

contents to the accused remained unshaken. The definition of possession / control as given by POLLOCK and WRIGHT is very much applicable to the present case. The bags with contents found near their feet, undoubtedly show that they had assumable and resumable manual control over the bags. They had very much knowledge about of those bags with its contents. So it is undoubtedly established that those bags with scales were in the conscious possession and control of the accuseds. The argument as made by Ld. Defence Counsel in respect of not holding the bags with its contents in their hands means no possession or conscious possession is not accepted in the present case.

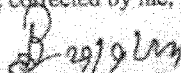
POINT NO 11.

Ld. Advocate for the accused at the time of cross examining PW-1, PW-2, PW-3, PW-4 and PW-6 gave suggestions that the signatures of accused on Seizure list, labels etc dt. 31.07.2013 were obtained by the witnesses under threat, assault, force undue influence. In accuseds' examination u/s 313 of Cr.P.C they also took the same plea. In the written argument filed by the accused, it is mentioned, that the signatures of accuseds were obtained in seizure list, labels etc under threat, force and by assault, for which one accused namely Bhagchand Dhabli sustained severe injury on his two fingers of right hand. To that effect on 14/8/13 accused filed a petition against the forest officer alleging torture inter alia, but subsequently, it was not pressed on 16/8/13 on the requests of forest Officer as alleged by the accused. It is pertinent to mention here that a "not pressed petition" has no merit to consider further. Already such petition was rejected being "not pressed" (Vide Order dt. 16/8/13). It would not be out of place to mention that mere submission of torture does not prove the allegation, it is burden upon the person who assert such allegation. In the record there is no reliable evidence or cogent material to believe that the accuseds were so tortured and forced to sign on the seizure list, labels etc dt. 31/7/13. So the submission regarding the signatures and LTI of accused obtained by torture etc is not sustainable.

Now the consideration of facts and evidences on record in respect of search arrest etc dt. 06/08/13.

21) The PW-1 and PW-6 were the members of raid party dt. 6/8/13 under the leadership of PW-2. The PW-1, PW-6 were made witnesses in seizure list labels etc dt. 6/8/13. The PW-1 and PW-6 in their examination in chief stated that on 6/8/13 PW-2 Swapan Kumar Majhi told them that they had to go for a raid on that day with three accused namely accused no 3, 4 and 6 who were under remand. Accordingly, they along with those three accused persons under the leadership of PW-2 went out for raid. On reaching at Patherghata, Khaprail Crossing the accused no 6 showed them a house. They came down. Then the accused no 6 went inside the house and come out with four gunny bags. Those gunny bags were opened and huge quantity of dry sea horse

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were found inside. PW-2 demanded document/ licence of those sea horses, but they failed to produce any such document. PW-2 then seized those bags containing dry sea horse, prepared seizure list, labels etc. The accused no -6 also produced several ATM Cards, PAN Cards, Driving Licence, Voter identity card from that house. PW-2 also seized those cards in the same seizure list. PW-2 also labelled them at the time of such seizure, some local people gathered there. The PW-1, PW-6 and PW-2 on repeated occasions requested them to sign in the seizure process but they refused to sign. Then finding no other alternative, at the request of PW-2, the witness i.e PW-1 and PW-6 signed it. The three accused persons also signed and put LTI (respectively) in the seizure list, labels etc dtd. 06/08/13 and also the envelope containing the ATM Card, PAN card etc. There after the PW-2 arrested them and they all returned back to the Sarugara Range Office.

22) The PW-2 Swapan Kumar Majhi in his examination in chief stated the same fact as told by the PW-1 and PW-6 in respect of raid dated 06/08/13. The examinations in chief of these three witnesses corroborated each other's so far the incident dtd 06/08/13 were concerned. They also exhibited their respected signatures on seizure list dated 06/08/13, the labels, the envelope, PW-2 exhibited his signatures, the seizure list, labels, the signatures of accused no 3,6 collectively on seizure list, labels, envelope and the LTI of accused no 4 on those documents. The bags containing the dry sea horses were exhibited and identified by these witnesses in the Court at the time of evidences.

During their cross examination, the Ld. Defence Counsel, put several questions and raised the following points in dispute, as per their case:

1. For search seizure the provision of section 100 Cr. P.C was not complied with.
2. The signatures and LTI of accused no 3,6 and 4 on the seizure list, labels, envelope were obtained by force, assault and undue influence.
3. No statements of these accuseds were recorded by the PWs/ Enquiry Officer for leading to alleged discovery of dry seahorse.
4. The possession of articles dtd. 06/08/13.

POINT NO -1

Now as regards the compliance of Section 100 of Cr.P.C it is to be noted here further (already discussed) that if the explanation was found satisfactory for not having the signatures of local witness, then the evidences of official witnesses are to be relied upon. In the present case, the PWs in their examination in chief that they requested the gathered people to sign the seizure documents but they refused. In their cross examinations, too, there were no doubt about their such attempt. Even in his cross examination PW-2 stated that even after 06/08/13 he went to said place of occurrence for local enquiry. So the process of knowing about the local people was also there.

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29 SEP 2014

Now it is already mentioned that a forest officer is not a police officer in general meaning. So the procedure which police officer adopt will not be the procedure of forest officer in a special law. As per Section 50 of Wild Life (Protection) Act 1972, the power of forest officer, was given, "Notwithstanding anything contained in other law for the time being in force" in respect of seizure, arrest and detention of the accused person.

It is further to note as regards the section 100 of Cr.P.C, this section comes under this Chapter VII of Cr.P.C. It deals with the provisions regarding the process to compel the production of things. The first step of process is summon to produce (Part A) the second step of such process is search warrants to recovery (Part B), and the general provision relating to search (Part C).

The section 91,92 come under the part A, the Section 93 to 98 come under the Part B, and section 99 to 101 come under the Part C. In case of Part A, part -B, there shall be an order of issuance of summons and issuance of search warrant by the Court. The section 100 of Cr. P.C deals with the manner and procedure of execution of such issues (by the Court) of search warrant at the place which is closed.

In our case in hand, no such issued warrant was there on the strength of which the officer went for raid in a house at Khaprail Crossing. So in the light of this aspect also, the compliance of Section 100 Cr.P.C was not a mandate upon these forest officers. The forest officer has ample independent power u/s 50(1)(b) of Wild Life (Protection) Act. 1972 to enter upon and search any premises etc. The non compliance of Section 100 of Cr. P.C would not be fatal to the case of prosecution. Apart from these, the evidences, of PW-1, PW-6, PW-2 whether examination in chief or cross examination do not show anything to cast doubt regarding reliability of the seizures, labels etc dtd 06.08.2013.

POINT NO -2

The accused no 3,4,6 again took the plea that signatures obtained in seizure list and labels etc by threat, assault, undue influence. In this respect I like to stand on the discussion made earlier on this point (Para - 20 point no 11) So the plea of torture is not accepted in case of seizure etc. dt. 06/08/13 also.

POINT NO -3.

One important aspect, raised by the Id. Defence Counsel is that PW-2 stated in his cross examination that he did not record any statement which led the recovery of dry sea horse. It is again pertinent to mention here that the

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B. 29/9/13
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A.C. Court
29 SEP 2014



forest officer is not a police officer. Recording statement of accused u/s 161 Cr.P.C like regular police officer, is not the duty of a forest officer (Enquiry Officer). It is also not his any statutory obligation to maintain any case diary like case diary maintained u/s 172 of Cr.P.C. Moreso the power of an enquiry officer (Forest Officer) is not hit by provision of Section 25,26,27 of Indian Evidence Act. The Wild Life (Protection) Act 1972 also does not confer any statutory duty upon an enquiry officer (Forest Officer) to produce any evidence (like provision u/s 27 of Evidence Act) as regards materials leading to discovery of any articles. So non production of any alleged statements of accused no 3,4,6 or part there of did not hamper the case of the prosecution for taking those accused on remand and to proceed for further recovery and subsequently leading to discovery of articles in question.

POINT NO -4

Now the vital point is whether the seized articles i.e dry sea horse were recovered from the possession of those three accused persons. The seizure list, label show that those were recovered from them. Ld. Defence at the time of argument stated that as per the case of the prosecution, the PW-6 only entered into the house at Khaprail crossing and came out with the four bags containing dry sea horses also with some ATM, Cards, PAN cards etc. So as per their argument, there was no joint possession of accused no 3,4,6 in respect of discovery of such dry sea horse.

Ld. APP submitted that the entire raid on the second day i.e 6/8/13 was conducted by the PW-2, PW-1, PW-6 on the strength of information given by these three accused and accordingly the dry sea horses were recovered in presence of accused no 3,4,6. It showed that the dry sea horses were recovered from their possession.

Considered the submission of both sides in this regard. It is evident from the evidences of PW-2, as well as materials on record, that on the strength of information given by them such raid was conducted, meaning thereby three accused had knowledge of storing of dry sea horses in the house at Khaprail crossing, Patherghata. Thereafter those were recovered on 6/8/13. These three accused put their endorsement (Accused no 3,6 put signatures and accused no 4 put LTI) on relevant documents. (Alleged torture being not sustained). This goes to establish the joint conscious possession of the accused no 3,4,6 over the dry sea horse and ATM Cards etc. So there is no doubt of establishment of accuseds' joint possession over dry sea horse and ATM cards etc.

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23) Now let me consider the evidence of another vital witness/PW-5 / Mr. Dibyojyoti Bera who recorded the statements of accused no 1 to 6 on 31/07/13 and the statements of accuseds no 3,4,6 on 06/08/13 under Section 50(8) of Wild Life (Protection) Act 1972. So far the facts of the case of prosecution is concerned, while enquiry officer PW-2 alongwith this forest personnel force returned back from 1 st day raid dtd. 31.07.13 with aboverferred 6 persons, the PW-2 requested PW-5 / Assistant Divisional Forest Officer, Baikuntrapur Division / Mr. Dibyjayoti Bera to record the statements of 6 accuseds and as per provision of Section 50 (8) Wild Life (Protection) Act PW-5 recorded 6 statements of those accuseds on 31/07/13 (Exbts 5,6,7,8,9,10). Similarly while PW-2 with his forest personnels returned back from 2 nd day raid on 06/08/13 with three accuseds namely accused no 3,4,6. PW-2 requested PW-5 to record the statements of those three accuseds and accordingly PW-5 recorded the statements of three accuseds under the above referred provision of Wile Life (Protection) Act. As per the case of the prosecution, the accuseds in respect of their respective raids dtd. 31.07.13 and 06/08/13 voluntarily confessed their guilts to PW-5.

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In respect of the confessional statement made to ADEO, Ld. APP submitted that such statements were admissible in evidence u/s 50(9) of Wild Life (Protection) Act and could be used against the accuseds who made it. It was his further submission that the general provision of Section u/s 164 o Cr.P.C and Section u/s 25 of Indian Evidence Act not applicable to ADFO. In this regard prosecution relied upon decision reported in 2001 (C.R.L.J 1897) wherein Hon'ble High Court (Odissa) in a case of state forest Act had been pleased to view that Forest Officer were not police officer but they were invested with certain powers of police officers. As such statements made before them is not hit by section 25 of Evidence Act. Ld. Defence Counsel for the accuseds urged that the accused persons did not give any statement to PW-5. Their signatures on the above nine statements were obtained by assault, threat, undue influence, force. It was further submitted that the alleged statements were not in proper form and the voluntariness of the accuseds were not duly obtained. The accuseds also retracted from those alleged statements. During argument Ld. Defence Counsel argued that a retracted extra judicial confession by the accuseds had no legal value. Conviction could not be warranted on such confession. The Ld. Defence counsel further contended that the questions put by PW-5 to the accuseds during recording of alleged confessional statement, were of leading questions. They also highlighted that recording of such alleged confessional statement took place when the accuseds were under the captivity of forest officials whether on 31/07/13 or on 06/08/13.



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In support of their case, the Defence relied upon decision reported in 2013 Cri.LJ 3597 (Bombay), 1990 AIR 2140 (S.C), 2011 Cri. LJ 4545, (2012) 4 SCC 124, 1993 (3) SCC 449, 2007(1) Crimes 321 (S.C). On careful perusal of these decisions it is appeared that Bombay High Court and Supreme Court have been pleased to view that the extrajudicial confession of the accuseds are weak piece evidence. It is also observed by Hon'ble Court that a retracted confession is also a weak piece of evidence.


In decision reported in 2013 CRI.LJ 3597, Hon'ble Bombay High Court while discussing about the extra judicial confession has been pleased to highlight the view of Hon'ble Supreme Court (Decision reported in 2010 SCC 604) that there is no absolute rule that an extra judicial confusion can never be the basis of a conviction, although ordinarily an extra judicial confession should be corroborated by some other materials. The Hon'ble Bombay High Court has been pleased to highlight the additional view of Hon'ble Supreme Court (Decision reported in [2009] 5 SCC 740) that when an extra judicial confession is retracted by an accused, there is no inflexible rule that the Court must invariably accept the retraction. But at the same time it is unsafe for the Court to rely on the retracted confession unless the Court on a consideration of the entire evidence comes to a definite conclusion that the retracted confession is true. In our present case, PW-5 recorded the statements of all six accused persons on 31.07.2013 after recovery of Pangolin scales and recorded the statements of accused no 3,4,6 on 06.08.2013 after the recovery of dry seahorse.

From the evidences of PW -5 it is found that he was an Assistant Divisional Forest Officer / Assistant conservator of forests. He in his examination in chief stated that both the posts were of same rank. On perusal of his cross examination it is found that his evidence in r/o such status of his post was not shaken.


Now for the sake of brevity and convenience let me see the section 50(8) of Wild Life (Protection Act, 1972. It says - "Notwithstanding anything contained in any other law for the time being in force, any officer not below the rank of an Assistant Director of Wild Life Preservation or an officer not below the rank of Assistant conservation of forest -----shall have the power for purposes of making investigation into any officer against any provision of this Act....."

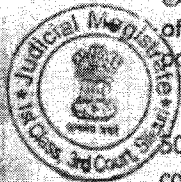
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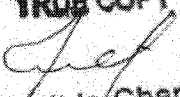
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A.C. Court
29 SEP 2014

d. to receive and record evidence. According to Sub section (9) any evidence recorded under clause (d) of subsection (8) shall be admissible in any subsequent trial before a Magistrate provided that it has been taken in the presence of the accused person.

The officer u/s 50(8) of Wild Life (Protection) Act is not a judicial officer. So recording evidence by him like recording confessional statements of accuseds are the extra judicial confessions, and according to Subsection (9) such evidence is admissible in evidence if it has been taken in presence of the accused person.

It is to be kept in mind that powers of recording statement u/s 164 of Cr.P.C. by the Judicial Magistrate and u/s 50(8) of Wild Life (Protection) Act by A.C.F etc are different. The section 164 of Cr.P.C. has categorically mentioned the do's and don'ts of recording of confessional statements. But Section 50(9) of Wild Life (Protection) Act does not prescribe any such do's and don'ts. It only says that it shall be taken in presence of accused persons.

However, Hon'ble Supreme Court has been pleased to stress upon the voluntariness of extra judicial confession. In Cross examination of PW-5 questions was put to him like the manner of questioning a Judicial Magistrate who recorded the statements of accused u/s 164 Cr.P.C. I find that manner of record statement of accused u/s 50(9) of Wild Life (Protection) Act 1972 is not exhaustively stated in ^{stated} ~~stated~~. But ascertainment of voluntariness is required as a matter of principle of justice. For that purpose let me go through the recorded statements (Exbt 5,6,7,8,9,10 and Exbt. 13,14,15) and evidence of PW-5.

I have carefully perused the questions put to each accused.

Each statements started with the caution (declaration) of PW-5 to the each accuseds that as a forest officer he would ask questions to them, to which they are to give answer cautiously because their answers could be used against them. There after PW-5 ascertained whether the accuseds understood such caution, whether anything was recovered from them on 31.07.13 and 06.08.13 respectively. In both the case they answered in affirmative and stated that recovered articles were scales of Pangolin and dry sea horse. The accuseds also told that they knew that possession of such articles was a crime.

On close perusal of questions put by PW-5 to the accuseds, those never seem like leading questions. The relevant questions did not suggest any answer that scales of Pangolin and dry sea horse were seized from them. Those questionnaire do not show any infirmity so far the ambit of extra judicial confession is concurred. The questions put to the accuseds by PW-5 at the time of recording of nine statements, bear the sanctity regarding the principle of

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B. 29/9/14

Judicial Magistrate, 3rd Court, SLG

B. 29/9/14
 Judicial Magistrate
 1st Class, 3rd Court
 Siliguri

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 A.C. Court

29 SEP 2014



of natural justice. It was argued on behalf of the accuseds that their signatures and LTI were obtained by pressure, threat, assault etc are the matter to be proved by the accuseds. No obligation is there from the side of prosecution to prove such alleged torture. The offence did not place any cogent evidence on their part to establish that they were tortured. So assertion of torture is not reliable.

At the time of argument it was submitted from the side of the Ld. Defence Counsel that the statements of accuseds were recorded while the accuseds in both days i.e 31.07.13 and 06.08.13 were under the captivity of forest officer. So there was no value of such statement. It is to be noted here again that the statements recorded u/s 50(8) of Wild Life (Protection) Act 1972 were not hit by the provision of Section 25,27 of Evidence Act. So it is immaterial that when and at what point of time such recording was made. The purview of special law overrides the General Procedure of Criminal Proceeding. It is another point to note that neither of the accuseds did not challenge their signatures and LTI on the statements as not purporting to be of them. It is not also the case of the defence that the recording of statements, whatever be, was not taken place in presence of accused persons. So the compliance of Section 50(9) of Wild Life (Protection) Act 1972 is there on behalf of PW-5. Only point in dispute as raised by defence that such recording was taken without voluntariness of the accuseds and the accuseds retracted from their confessional statements. A retracted confession connotes the denial of making confession. It is generally seen that confessions are as plentiful as retraction at the trial. Even if the confession were not obtained under undue influence, threat, oppression or promise, the desire to admit it what the maker might have stated earlier vanishes as soon as the maker appears in Court. It should be kept in the mind that a confession is not regarded as involuntary or unlawfully obtained merely because it has been retracted. In a case reported in AIR 1978 S.C. 1248, the Hon'ble Apex Court was pleased to observe that confession could be accepted after comparing the retracted with the rest of the evidence and in the light of the surrounding circumstances. There is nothing in the Evidence Act to come to the conclusion that retracted confession can not be acted upon against the confessing accused but as a matter of prudence and practice, a Court is to act upon the corroboration on material particulars (Ref: AIR 1959 S.C. 1).

On perusal of the statements of the accuseds and the evidence of PW-5 it appears to me that nothing is there to show that those statements were recorded involuntarily. Moreso as per the dictum of the Provision of Section 50 (9) of Wild Life (Protection) Act, those were taken in presence of accuseds.

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At the time of examination of the accused u/s 313 of Cr.P.C and at the stage of enquiry of this case, the accuseds pleaded retraction of confessional statement. Now how far such retraction is reliable. The confessional statements show that the scales of Pangolin and dry sea horse were recovered from them. The evidences of other witness viz PW-1, PW-2, PW-3, PW-4, PW-6 show that those articles were recovered from them. Moreover it is already discussed that the accused's possession were over the scales of Pangolin and dry sea horse. So as regards recovery of such articles from the accuseds, there are corroboration between the evidences of PW-1, PW-2, PW-3, PW-4, PW-6 and the confessional statements of the accuseds. Moreover PW-5 in his evidence stated that the accuseds confessed the recovery of such articles from them. Such corroboration can not be avoided. Having regard to this discussion I find that retractions as stated by the accuseds, are not reliable. Confessional statements stand against the accused persons. It is already mentioned that extra judicial confession is very weak piece of evidence. In the present case, the benefit of extrajudicial confession, though weak piece of evidence, must go in favour of the prosecution.

24) Now let me consider the evidences of PW-7 and PW-8 who did the scientific examination of scales of Pangolin and dry sea horse, respectively and sent scientific reports (Exbt. 16 regarding pangolin scales, Exbt. 17 regarding dry sea horse).

The PW-7 Sri Basudev Tripathi was the scientist-C and Officer in charge of Zoological Survey of India, Kolkata and PW-8/ Sri S.S. Mishra was scientist-B and Officer in charge of Marine Fish Section of Zoological Survey of India, Kolkata at the relevant point of time.

On behalf of the accuseds it was argued that PW-7 and PW-8 were not experts. So their reports (Exbt. 16, 17) should not be considered as Expert Report. Section 45 of Evidence Act says "when a Court has to form an opinion upon a point of Foreign Law, or of Seizure or art, or as to identify the handwriting or finger impressions, the opinions upon that point of persons specifically skilled in such foreign law, science or art or in question as to identify of handwriting or finger impressions are relevant facts. Such persons are called Expert". The term "Expert" has been indirectly defined as "person specially skilled". This definition never says that the expert must hold academic degree, or belong to a particular profession. Specialised knowledge or experience will suffice.



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D. 29/9/14
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In the respective evidences of PW-7 and PW-8 they stated that they were scientist in Section of Mollascu and in section of Marine Fish respectively. Their such respective status of posts were not shaken in their respective cross examination. So it can safely be held that PW-7 and PW-8 had special knowledge and skill over their field of work. Thereafter PW-7 and PW-8 must be considered as Experts.

In their cross examination, PW-7 and PW-8, on dock stated, at the time of their evidence that seal and signatures senders were not found. But in their examination in chief they identified the plastic boxes with celotape seal made by them at the time of sending the samples examined to the Baikunthapur Division. Those seals were broken in open Court. They identified the respective samples there in as scales of Pangolin and dry sea horse. It is also needless to mention here that E.O(PW-2) made the sampling of scales and dry seahorse in plastic box as per order of Ld. Additional Chief Judicial Magistrate, Siliguri in the Court room. So presumption can be made that the sampling was duly made. In practice, seal, label are made on a wrapper when any article is sent for scientific examination. So presumption can also be made that such wrappers had due seal and label etc. Non production of such wrapper may be a lacuna but can not said to be a major one which shall put embargo to consider the scientific reports on their face value.

Ld. Advocate for accused Joe Rangang submitted that no chemical examination in respect of Pangolin scales was done. As per his submission absence of chemical examination means incomplete report (Exbt. 16).

Now let me have a look into the relevant portion of cross examination of PW-7 in respect of chemical examination. PW-7 stated that no chemical examination was done in the instant case. But it was not sufficient to conclude that for confirmation of Chinese Pangolin, the said chemical examination was a must. So the accused can not be given any benefit of such answers. There might have other scientific process. On the contrary Exbt. 16 shows that it was examined scientifically and approved as derivation of chinese Pangolin comes under item number 5-A of Part I of Schedule I of Wild Life (Protection) Act 1972. I have no doubt to rely upon the Exbt. 16.

Now as regard the veracity of report (Exbt. 17) in respect of dry sea horse nothing was submitted in the written argument.

On perusal of evidence of PW-8 and Exbt. 17 I have no doubt to rely upon the report of Exbt. 17. It shows that those were dry Sea horse and such item comes under the item number 3 (Sea horse) of Part II A of Schedule I of Wile Life (Protection) Act 1972. In respect of procedure of Exbt. 16, 17, the defence raised question of tampering the boxes, articles, but in fact on going through the evidences of PW-7, PW-8, I find no reasonable ground of such alleged tampering.

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25) Some points raised by defence as regards non production of Malkhana register, vehicle log book, the PW-2's diary by the prosecution. It is needless to mention here that it is the prerogative of the prosecution upon which material it has to rely. So production or non production any material depends upon prosecution. But at the same time it should be looked into whether any best evidence was withdrawn which damages the other evidences on record.

In the instant case, the Malkhana register was not produced. PW-1, PW-3, PW-4, PW-6 stated that after recovery of contraband articles, those were kept in office malkhana. But they stated that PW-2 knows it better than them. At the time of PW-2's cross examination, he was asked in general manner that whether his office maintained malkhana register. PW-2 replied in affirmative manner. On perusal of entire evidence of PW-2 I do not find anything as to the creation of any doubt or any adverse benefit to the accused. Nothing has come up in the cross examination that non production of such malkhana register gives rise to any doubt in the chain of evidence of seizure, production etc. It does not appear as best evidence being withheld, so far the other evidence established the possession of articles and contraband nature of articles. Ld. Defence Counsel relied upon decision reported in 2005(3) SBR 440 (S.C) wherein Hon'ble Supreme Court observed in a N.D.P.S case that malkhana register is required to be produced. In our case, in cross examination of PW-2 no doubt was created for non production of malkhana register. So I find that in our case the reported decision in respect of N.D.P.S Act does not help the defence.

Now similar is the position of non production of vehicle, log book and PW-2's diary.

There is no statutory obligation to produce E/O's diary in the Wild Life (Protection) Act 1972. For argument sake if those were not produced, had it wash out the evidences, corroboration, seizure, scientific report as already in the record and discussed. These are not such sort of material, non production of which damages the prosecution case. So in my view non production of those materials were not fatal to the prosecution.

26) At the time of argument, it was contended that PW-2, being Forest Range Officer has no power to conduct the case of Wild Life (Protection) Act 1972. Exbt. C shows that Forest Range Officer has been authorised in CW Section 55 of Wild Life (Protection) Act 1972.

27) Again on careful perusal of entire evidences I find that the possession of Pangolin Scales and dry sea horse (which come under Part I, II A of Schedule I) had been established against the six accuseds and accuseds no 3,4,6 respectively and those articles are found contraband articles as per Wild Life (Protection) Act 1972. It is to be also mentioned here that no case of hunting or killing animal is there against them.

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29 SEP 2014



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Siliguri

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Judicial Magistrate, 3rd Court, SLG
29/9/14
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Now having regard to the evidences on record and discussions made above, I have every reason to hold undoubtedly that all six accused persons contravened provision of Section 39(3) of Wild Life (Protection) Act 1972 having unlawful possession of Pangolin scales (by all six accused) and that of dry sea horse (by accused no 3,4,6) which is punishable u/s 51 (1) (1st Provision) of Wild Life (Protection) Act 1972. So the prosecution has been able to prove the charge of offence punishable u/s 51 (1) [Particularly 1st Provision] of Wild Life (Protection) Act 1972 against all six accused persons beyond all reasonable doubt. Accordingly, all six accused persons are found guilty of such offence of unlawful contraband Wild Life articles.

At this stage as per statutory provision of Section 248(2) Cr.P.C I hear the convicted persons on the point of sentence. The order regarding sentence will be passed today later on.

Dict & cordd by me,

3rd Judicial Magistrate, Siliguri

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28) I have heard the submission of all six convicted persons separately, their Ld. Advocates and also Ld. APP.

On behalf of the convict it is submitted that their financial condition is very poor, they have old ailing parents, kids, wife, family. The livelihood of their family depends upon them. Lenient view may be taken while awarding the sentence. They pray for mercy also. Ld. Defence Counsels have submitted that considering convict's submission minimum punishment be awarded. On the other hand Ld. APP has submitted that considering the seriousness of offence, maximum punishment be awarded.

29) Considered the submissions made on behalf of both sides. The nature of offence, and character of the offender are also considered. Their antecedent in the Court during the days of trial did not appear as bad. There is nothing adverse in the record so far their personal conducts are concerned. The submission of convicts as regards financial condition is also considered. On the other hand the seriousness of offence is also considered.



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