

(2006) 07 GAU CK 0051
In the Gauhati High Court
Case No : Criminal Appeal (J) No. 1 of 2002

Amzad Ali

APPELLANT

Vs

Ksh. Nobin Chandra Singh

RESPONDENT

Date of Decision : 19-07-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 235(2), 360
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 35, 53A, 54, 55
Penal Code, 1860 (IPC) — Section 302

Citation : (2006) 3 GLT 800

Hon'ble Judges : M.B.K. Singh, J

Bench : Single Bench

Advocate : Kh. Mani, for the Appellant; N. Brojendra Singh, for the Respondent

Judgement

M.B.K. Singh, J.—This appeal is directed against the judgment and order passed by the judge, Special Court (NDPS), Manipur in Special Trial No. 10 of 2000 convicting the Appellant on 30.1.02 for commission of the offence u/s 20(b)(i) of the Narcotic Drugs & Psychotropic Substances Act (hereinafter refers as the ND & PS Act) and sentencing him on 31.1.2002 to 3 years R.I. and a fine of Rs. 2,000/- with a direction that in default of the payment of the fine, he was to undergo rigorous imprisonment for two months.

2. I have already heard Mr. Kh. Mani, learned Counsel for the Appellant and Mr. N. Brojendro, learned Counsel appearing on behalf of the Respondents. The materials before the Court are also perused.

3. The said special trial No. 10 of 2000 was registered on the basis of a complaint filed by one Intelligence Officer of Narcotic Control Bureau (in short N.C.B.), Regional Unit, Imphal. In the case, the Appellant was charged with the commission of the offence u/s 20(b)(i) of N.D. & P.S. Act alleging that on 18.1.2000 in the morning, he was found having illegal possession of 165 Kgs. of contraband Ganja by concealing in the hidden chamber of the Tata truck bearing

registration No. AS-25/5097 of which he was the Driver at the relevant time. The Appellant is found to have pleaded not guilty. 7 PWs were examined on behalf of the prosecution/claimant during the trial, 2 DWs were examined on behalf of the defence.

4. Ksh. Nobin, (PW1) is the Intelligence Officer of the N.C.B., Regional Unit, Imphal, who filed the Complaint Case leading to Reg-istration of Special Trial No. 10 of 2000 against the Appellant. According to him, on 16.1.2000 at about 6 P.M., he got secret information to the effect that one Tata Truck bearing No. AS-25/5097 would be coming from Keibi to Imphal carrying V* Monds of contraband Ganja in the early morning on 18.1.2000 and after recording the information, he reported about it to the Superintendent of N.C.B. Further, according to PW1, on 18.1.2000 in the early morning, while he and some personnel of his Unit lead by the SP/N.C.B. were checking trucks plying along Imphal-Ukhrul Road, they found the said Tata truck bearing Regn. No. AS-25/5097 coming from Keibi towards Imphal along the above said road and they stopped the said truck at Khurai Konsam Leikai. As per testimony of P W 1, though on superficial look, he and his companions did not find any contraband Ganja in the truck at the time of checking on the road-side, they made the Driver to drive it up to Revenue Complex, Lamphelpat and they followed it in their official Gypsy. According to PW 1, when the said truck was checked thoroughly on the same day in presence of two local witnesses, namely, Surjit Singh and Dhiren Singh, it was found having a lengthened Oil tank concealing therein 6 (six) bags containing 165 Kgs. of contraband Ganja in all. As per testimony of PW 1, all the necessary precautionary measures were taken for safe keeping of the seized Ganja as well as of the samples collected. PW 1 testified about the seizure of the said contraband Ganja, weighing of the seized Ganja and taking of samples in presence of the witnesses. During the trial, all the relevant seizure lists and memos were also proved. Moreover, according to PW1, on that day, after taking consent of the accused Driver (Appellant) as to whether he wanted to be searched before a Magistrate or Gazetted Officer, his body was searched before the Superintendent, NCB and seized his Driving Licence along with the R.C. Book of the said truck. PW 1 was cross-examined, but his testimony was not shaken in material parts.

5. The testimony of the complaint (PW 1) to the effect that on 18.1.2000 in the morning, when the said Tata Truck bearing No. AS-25/5097 driven by the Appellant was checked thoroughly at Revenue Complex, Lamphelpat by personnel of N.C.B.; Regional Unit, Imphal, 165 Kgs. of contraband Ganja was found concealed inside a specially lengthened oil tank, is found supported by Th. Surjit (PW2) and Kh. Dhiren (PW3). Both PW 2 and PW 3 are found to have testified supporting the testimony of PW 1 about the said seizure of 165 Kgs. of contraband Ganja in their presence by observing necessary formalities. PW 2 and PW 3 were cross-examined, but their testimonies were not shaken. There is no sufficient ground as to why these two witnesses should not be believed.

6. R.K. Devendro Singh (PW5) who was working as Superintendent, NCB at the relevant time, I. Bijando Singh, PW 6, who was also an Intelligence Officer of NCB Imphal and N.R. Mon, PW 7, who was another Intelligence Officer of NCB, Imphal gave statements supporting the testimony of the complainant (PW1) substantially. They (PWs-5, 6 and 7) testified about the seizure of the said 165 Kgs. of contraband Ganja found concealing inside the lengthened oil tank of the said truck driven by the accused Driver (Appellant). These witnesses (PWs-5, 6 & 7) were cross examined, but their testimonies were not shaken in respect of the fact of search of the said Tata truck driven by the accused (Appellant) and seizure of 165 Kgs of contraband Ganja found concealed inside the lengthened portion of the oil tank of the truck. There is no sufficient ground as to why these witnesses (PWs-5, 6 and 7) should not be believed.

7. On perusal of the materials before the Court, it is also ascertained that before the trial court, there was no dispute about the facts that the accused (Appellant) had been Driver of the said truck for some years prior to the incident of finding 165 Kgs. of contraband Ganja that the said truck had been in his custody prior to the said incident as entrusted by its owner. In the facts and circumstances, there is no reasonable possibility that the said 165 Kgs. of contraband Ganja might have been concealed in the said specially constructed chamber of the oil tank by any other person without knowledge, connivance and consent of the accused Driver (Appellant).

8. Ch. Brajen Kumar, PW 5, is found to have stated to the effect that on 18.1.2000 in the morning he translated statement given by the accused, Md. Amjad Ali, (Appellant) voluntarily in presence of witnesses after seizure of the contraband Ganja. According to PW 4, the statement marked Ext. P/3 bearing signature of the said accused at Ext. P/3 (I) was the statement given by the accused, Md. Amzad Ali, (Appellant) voluntarily in presence of the witnesses who also put their signatures at Ext. P/3 (2) and Ext.P/3(3). The testimony of PW 4 was not also shaken during his cross examination. The said statement, Ext.P/3 is found to be in consonance with the case of the complainant. However, the said statement will be relevant for the purpose and in the circumstances mentioned in Section 53-A of the ND & PS Act.

9. Ext. M.O. 13 to Ext. M.O. 18 and Ext. M.O. 7 to Ext. M.O. 12 were identified as bundles of seized contraband Ganja and envelopes containing samples of seized Ganja respectively. As per evidence before the Court, samples were sent to the Expert, i.e., F.S.L. Kahilipara Guwahati on the next date, i.e. on 19.1.2000 and the result of the examination was produced as Ext. P/12 supporting the case of the complainant. As per result of the examination by the Expert (Ext.P/12), the seized samples gave positive tests for cannabis (Ganja). Further, it is ascertained that the seized samples of Ganja were kept in safe custody by taking all the necessary precaution before sending them to the Expert. The trial Court, on the basis of the materials before it, made a finding about the due compliance of the provisions of Section 55 and Section 57 of N.D. & P.S. Act. There is no sufficient

basis for interfering with the said finding.

10. On the basis of the materials produced on the side of the complainant, there is no reasonable doubt that the Appellant was found in possession of 165 Kgs. of contraband Ganja. Nothing was produced from the side of the Appellant to show that he was having a valid licence under the relevant law for possessing or transporting the said contraband Ganja. In view of the provisions of Section 35 and 54 of the N.D. & P.S., the Appellant ought to have produced evidence to prove that he had no capable mental state or to account satisfactorily in respect of the said possession of contraband Ganja.

11. Two witnesses (DW1 and DW 2) are found to have been examined on behalf of the Appellant. On perusal of their statements, I do not find anything for having reasonable doubt in the case against the Appellant. It is found that the trial court discussed the statements of the said DWs at length. There is no sufficient basis for interfering with the view of the trial court to the effect that testimonies of DWs were not sufficient for creating reasonable doubt to the case of the complainant.

12. In the result, I am of the opinion that the charge against Md. Amzad Ali (the Appellant) for the commission of the offence u/s 20(b)(i) of the N.D. & P.S. Act was established by cogent and reliable evidence beyond reasonable doubt. Accordingly, the conviction of the Appellant by the learned Judge, Special Court (ND & PS) Manipur for commission of the offence u/s 20(b)(i) of the N.D.& P.S. is upheld.

13. Mr. Kh. Mani, learned Counsel appearing on behalf of the Appellant draws this Court's notice to the provisions of Section 235(2) of the Code of Criminal Procedure and submits that the sentence imposed by the learned Judge, Special Court (ND & PS) Manipur is liable to be set aside for failure to comply with the provisions of Section 235(2) of the Code of Criminal Procedure. According to the learned Counsel of the Appellant, after recording the finding of guilt and the order of conviction, since the accused/Appellant was not released on probation of good conduct or after admonition u/s 360 of the Code of Criminal Procedure, the learned Judge was under an obligation to hear the accused/Appellant personally on the question of sentence under the provisions of Section 235(2) of the Code of Criminal Procedure, but the said provisions were not complied with. In this connection, the learned Counsel of the Appellant refers to *Dagdu and Others Vs. State of Maharashtra*, ; *Shiv Mohan Singh v. State Delhi Administration* AIR 1977 SC 1949 *Muniappan Vs. State of Tamil Nadu*, ; *Allauddin Mian and Ors. v. State of Bihar* AIR 1989 SC 1456 and *M.A. Waheed v. State* 1996 Cri. LJ 1059.

14. There is no dispute that the provisions of Section 235(2) of Code of Criminal Procedure is mandatory. On perusal of the above said decisions stated by the learned Counsel of the Appellant, one can very well understand the importance of the provisions of Section 235(2) of the Code of Criminal Procedure and the need for complying the provisions.

15. In *Allauddin Mian* (supra) the Hon'ble Supreme Court, after referring to the provisions of Section 235(2) of the Code of Criminal Procedure at Para 10 held:

10...The sentencing Court must approach the question seriously and must endeavour to see that all the relevant facts and circumstances bearing on the question of sentence are brought on record. Only after giving due weight to the mitigating as well as the aggravating circumstances placed before it, it must pronounce the sentence. We think as a general rule the trial court should after recording the conviction adjourn the matter to a future date and call upon both the prosecution as well as the defence to place the relevant materials bearing on the question of sentence before it and thereafter pronounce the sentence to be imposed on the offender.

16. In *Muni Appan* (supra) the Hon'ble Supreme Court, while discussing about the need to give special reason for imposing the sentence of death in connection with conviction for murder, referred to Section 235(2) of the Code of Criminal Procedure and held at the middle portion of Para 2 of the judgment;

2...The obligation to hear the case on the question of sentence which is imposed by Section 235(2) of the Criminal Procedure Code is not discharged by putting a formal question to the accused as to what he has to say on the question of sentence. The judge must make a genuine effort to elicit from the accused all information which will eventually bear on the question of sentence. All admissible evidence is before the Judge but that evidence itself often furnishes a clue to the genesis of the crime and the motivation of the criminal. It is the bounden duty of the Judge to cast aside the formalities of the Court-scene and approach the question of sentence from a broad sociological point of view. The occasion to apply the provisions of Section 235(2) arises only after the conviction is recorded. What then remains is the question of sentence in which not merely the accused but the whole society has a stake. Questions which the Judge can put to the accused u/s 235(2) and the answers which the accused makes to those questions are beyond the narrow constraints of the Evidence Act. The Court, while on the question of sentence, is in an altogether different domain in which facts and factors which operate are of an entirely different order than those which come into play on the question of conviction.

17. In *Shiv Mohan* (supra) in the context of consideration for imposing an appropriate punishment for the commission of an offence u/s 302 IPC, the Hon'ble Supreme Court at Para 23:

23...Hearing is obligatory at the sentencing stage under the New Criminal Procedure Code. The humanist principle of individualising punishment to suit the person and his circumstances is best served by hearing the culprit even on the nature and quantum of the penalty to be imposed...The heinousness of the crime is a relevant factor in the choice of the sentence. The circumstances of the crime specially social pressures which induce the crime which we may epitomize as a just sentence in an unjust society" are another consideration. The criminal, not

the crime, must figure prominently in shipping the sentence where a reform of the individual, rehabilitation into society and other measures to prevent recurrence, are weighty factors....

18. In *Dagdu and Ors.* (supra), the Hon''ble Supreme Court held at Para 78:

78...The Court, on convicting an accused, must unquestionably hear him on the question of sentence. But if, for any reason, it omits to do so and the accused makes a grievance of it in the higher court, it would be open to that Court to remedy the branch by giving a hearing to the accused on the question of sentence. That opportunity has to be real and effective, which means that the accused must be permitted to adduce before the Court all the data which he desires to adduce on the question of a sentence. The accused may exercise that right either by instructing his counsel to make oral submission to the Court or he may, or affidavit or otherwise, place in writing before the Court whatever he desires to place before it on the question of sentence. The Court may, in appropriate cases, have to adjourn the matter in order to give to the accused sufficient time to produce the necessary data and to make his contentions on the question of sentence. That perhaps, must inevitably happen where the conviction is recorded for the first time by a higher Court.

19. It is to be noted that none of the above said decisions is an authority of the submission made by the learned Counsel of the Appellant to the effect that the learned Judge, Special Court (NDPS), Manipur ought to have heard the accused (Appellant) personally on the question of sentence. No doubt, under the provisions of Section 235(2) of the Code of Criminal Procedure after recording a finding of guilt and an order of guilt, the concerned trial court is under an obligation to hear the convict on the question of sentence. But, there is no specific requirement that the hearing is to be only personal hearing of the convict and not through his counsel. In a case where a trial Court thinks that hearing of the convict personally will help the Court in passing a just sentence against the convict, the Court may hear the convict personally even if his counsel is present. In another case, a convict or his counsel may bring to the notice of the Court facts and circumstances regarding which personal hearing of the convict will be necessary. But, as stated above, there is not any requirement of law that the convict should be heard personally only and not through his counsel in all cases. Normally, hearing of the convict through his counsel will be sufficient compliance of the provisions of Section 235(2) of the Code of Criminal Procedure. When a convict is heard through his counsel before imposing a sentence as against him, it cannot be said that he is not heard on the question of sentence in compliance with provisions of Section 235(2) of the Code of Criminal Procedure.

20. Mr. Brojendro, learned Counsel appearing on behalf of the Respondent draws this Court's notice to the observation of the Hon''ble Supreme Court in *Surendra Pal Shivbalakpal v. State of Gujarat* 2004 Cril. Law Journal 4642 at Para 12 of the judgment:

12...Therefore it is incorrect to contend that the Appellant was not heard. The Counsel submitted that as regards sentence, the Appellant should have heard in person and not through the counsel appointed by him. This contention cannot be accepted. If the accused had engaged a counsel, the Court can ask the counsel as to whether he had anything to say about the sentence. The Appellant was also present in the Court and he did not make any further statement regarding sentence to be imposed on him. He also had liberty to adduce evidence regarding the sentence but he did not avail that opportunity and contention that the Appellant was not questioned before the sentence was imposed is not correct.

21. In the light of the above considerations, merely on the basis of the said submission of the learned Counsel of the Appellant that the Appellant was not heard in person before imposing the impugned sentence, one cannot reasonably conclude that there has been non compliance of the provisions of Section 235(2) of the Code of Criminal Procedure.

22. In the case before this Court, as per records, the Appellant was convicted for commission of the offence u/s 20(b)(i) of ND & PS Act on 30.1.02 and the trial court fixed 31.1.02 as the date for sentence hearing. On the date fixed for sentence hearing, the convict/Appellant was present with his counsel. As per records, the learned defence counsel submitted only for leniency. There is nothing to show that the convict/Appellant requested the trial court for giving him time for enabling to produce data/evidence which he desired to produce on the question of sentence. There is also nothing to show that there was anything in connection with the convict/Appellant regarding which the trial court should have heard the convict/Appellant in person and nor merely through his counsel. The Appellant had not brought anything to the notice of this Court for showing that he should be heard in person or that he should be questioned by the Court. In my considered opinion, there was compliance of the provisions of Section 235(2) of the Code of Criminal Procedure before passing the impugned sentence.

23. It is ascertained that the learned Judge, Special Court (NDPS), Manipur considered the circumstances of the case and also about the social menace caused by Ganja after taking into consideration of the fact that the quantity of seized Ganja was 165 Kgs and that there was no previous record against the convict/Appellant, the learned Judge, Special Court (NDPS), Manipur, sentenced the convict/Appellant to R.I. for 3 years and a fine of Rs. 2000/- with a direction that in default of payment of fine, the convict/Appellant was to undergo R.I. for 2 months. At the relevant time, the maximum punishment provided for commission of the offence u/s 20(b)(i) of ND & PS Act was R.I. for a term which might extend to 5 years with a fine which might extend to Rs. 50,000/-.

24. It is well settled that it is the duty of every court to award proper sentence having regards to the nature of the offence and the manner in which it was executed or committed. In operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. Thus, undue sympathy to impose inadequate sentence would do more harm to the justice

system. The object for imposition of an appropriate sentence should be to protect the society and to deter the criminal in achieving the evolved object of law by imposing appropriate sentence. There is an expectation that the Courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be.

25. In the present case, having regards to all the relevant considerations, including the nature of the offence for which the Appellant was convicted, the need for protection of the society from such offence, the manner in which the Appellant committed the offence presumably for his personal monetary gain, the need for deterring a potential offender from committing the mistake of committing the offence, the quantity of contraband Ganja seized, absence of previous conviction record and the age of the Appellant etc. and after balancing all other aggravating and mitigating circumstances, I am of the opinion that the learned Judge, Special Court (NDPS), Manipur imposed an appropriate punishment against the Appellant. Accordingly, the impugned sentence passed against the Appellant is not interfered with.

26. In the result, this appeal has no merit. It is hereby rejected. The impugned conviction of the Appellant for the commission of the offence u/s 20(b)(i) of the ND & PS Act and the impugned sentence passed against him in that connection are hereby upheld. The bail order passed in Appellant's favour is hereby cancelled. He is to surrender before the Judge, Special Court (NDPS), Manipur for undergoing the remaining period of imprisonment as per term of the impugned sentence dated 31.1.02 within 30 days from today. In case the convict/Appellant fails to surrender as directed within the said period, the learned Judge, Special Court (NDPS), Manipur is to take appropriate steps for compelling him to undergo the imprisonment as stated above unless this order is stayed or modified or quashed by a higher Court.

27. With this, this appeal stands disposed of.