
(2014) 09 SHI CK 0145
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 438 of 2009

Bhim Bahadur

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 01-09-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 29, 30
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20
Penal Code, 1860 (IPC) — Section 498A

Citation : (2014) CriLJ 4926 : (2015) 3 Crimes 157

Hon'ble Judges : Sanjay Karol, J;Piar Singh Rana, J

Bench : Division Bench

Advocate : Ravinder Thakur, Advocate for the Appellant; Ashok Chaudhary, Addl. Advocate General, Vikram Thakur, Deputy Advocate General and J.S. Guleria, Advocate for the Respondent

Judgement

Sanjay Karol, J.—Appellant-convict Bhim Bahadur, hereinafter referred to as the accused, has assailed the judgment dated 15.10.2009, passed by Special Judge, Bilaspur, Himachal Pradesh, in Sessions Trial No. 8 of 2009, titled as State of Himachal Pradesh v. Bhim Bahadur, whereby he stands convicted for having committed an offence punishable under the provisions of Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act), and sentenced to undergo rigorous imprisonment for a period of ten years and pay fine of Rs. 1,00,000/- and in default thereof to further undergo rigorous imprisonment for a period of one year. The judgment stands assailed by the convict by taking several grounds in the appeal.

2. However, at the time of hearing Mr. Ravinder Thakur, learned counsel for the appellant, confined the challenge only on the question of period of imprisonment, which the convict has to undergo, in the event of default of payment of fine by him. According to the learned counsel, convict is a poor man and cannot deposit fine of Rs. 1,00,000/-. As such, he wants the Court to reduce the period of imprisonment from one year. In support of his contention, learned counsel has

referred to and relied upon Shahejadjkhan Mahebubkhan Pathan Vs. State of Gujarat, ; and Shanti Lal Vs. State of M.P., .

3. Despite limited submission, we ourselves, in order to ascertain as to whether judgment of conviction is within the settled parameters of law or not, minutely examined the record.

4. Having perused the testimony of witnesses of recovery of contraband substance from the conscious possession of the convict, we do not find any illegality, infirmity or error in the findings returned by the trial Court. On 25.2.2009, convict was found to be in possession of contraband substance i.e. charas in the shape of sticks and rolls, weighing 1 kg and 150 grams. It was kept by the accused in a green envelope. Recovery was effected by SI/SHO Gurdial Singh (PW-10), when he along with other police officials was present near College Chowk, Bilaspur, in connection with a case under the provisions of Section 498-A of the Indian Penal Code. The convict was informed of his statutory rights. The contraband substance was weighed; samples drawn; sealed and seized by the police officials and thereafter deposited with the MHC who sent the samples for chemical analysis to the Forensic Science Laboratory. All papers of search, seizure and recovery were prepared in accordance with the settled principles of law. Report of the chemical analysis confirmed the recovered contraband substance to be charas.

5. We find factum of recovery also to have been brought to the notice of superior officer in accordance with law. FIR No. 58, dated 25.2.2009 (Ex. PW-10/C) was also registered promptly at Police Station, Sadar (Bilaspur), on the basis of Rukka (Ex. PW-10/B). Seized sample and the remaining stuff were sealed and not tampered with at all. The sealed samples were opened only in the Laboratory at the time of conducting chemical analysis.

6. As such, prosecution has been able to establish recovery of charas, from the conscious possession of the convict, beyond reasonable doubt, by leading clear, cogent, consistent and convincing piece of evidence.

7. Coming back to the sole submission made by learned counsel, we are of the considered view that the Act itself provides minimum sentence of imprisonment and fine. We cannot find any infirmity with that part of the sentence, whereby convict is sentenced to undergo rigorous imprisonment for a period of ten years and pay fine of Rs. 1,00,000/-, for having committed an offence punishable under Section 20 of the Act. But however, finding favour with the submission of the learned counsel that convict, a poor person, perhaps may not be in a position to pay a sum of Rs. 1,00,000/-, we reduce the sentence of imprisonment, which the convict is required to undergo in the event of default of payment of fine.

8. With profit, we may extract the following passages on the question of sentencing from the Book: Sentencing Law and Practice, authored by C.K. Boyle and M.J. Allen:

"A problem which frequently confronts a sentencer is that of establishing the factual basis of the offence on which to assess the appropriate sentence. As the sentence imposed should not be more severe than the offence merits, it is important that the facts of the offence are accurately established before sentence is passed. Where there has been a guilty plea, the factual basis of the offence may not be apparent, or the defendant may have pleaded guilty on the basis of his own view of the offence which may not coincide with that of the prosecution. Even in cases where there has been a full trial and a conviction, the factual basis of the offence may not be clear from the evidence and the jury verdict. For example, a verdict of guilty of manslaughter on an indictment for murder, could be arrived at in one of several ways. If the Judge is to pass the appropriate sentence, he must be able to arrive at some conclusion as to the facts of the offence (see, e.g. Wheeler [1967] 1 WLR 1531 : Hudson (1979) 1 Cr. App R (S) 130 : Campbell [1980] Crim. LR 248). Similarly, where an offender is convicted of a strict liability offence, it is important to know whether he acted intentionally, recklessly, negligently or without fault (see Lester (1976) 63 Cr. App R 144). A body of case law is gradually building up in relation to how this factual basis may be established and what evidence may be taken into consideration in establishing it."

"Each criminal offence is characterised by typically recurring factual situations of varying degrees of gravity and, accordingly, the severity of the sentence to be imposed must reflect these degrees of wickedness (See Thomas, *op. cit.*, p. 33). Ranges of sentence appropriate to each level of gravity have been developed over the years and can be identified from the decisions of the Court of Appeal. The maximum sentence available for a particular offence is reserved for the worst form of that offence (Byrne (1975) 62 Cr App R 159; Smith [1976] Crim LR 468). Using their experience and knowledge of the decisions of other Judges and of the Court of Appeal, particularly cases where the court seeks to give guidelines (See, e.g. Mohammed (1974) 60 Cr. App R 141; Taylor, Simons and Roberts [1977] 1 WLR 612; Aramah (1982) 4 Cr. App R (S) 407; Wood [1984] Crim LR 305; Clarke (1982) 4 Cr. App R (S) 197), Judges must first allocate the offence to the appropriate sentence range. There is a normal bracket of terms of years within which the sentence for an offence is to be assessed. This bracket forms the starting point for determining the appropriate sentence. From this starting point the final sentence will be calculated by taking into account any aggravating factors which lead to a sentence towards the upper end of the bracket. If appropriate, the court will also consider any mitigating factors which may lead to the imposition of a lesser sentence. In some circumstances the court may consider it inappropriate to give a discount for mitigating circumstances in order to achieve some other penal objective such as deterrence, but the sentence must be proportionate to the facts of the case, and generally must not exceed that range for that type of offence."

9. We find that accused is not a hardened criminal. It is his first offence. The apex Court in *Modi Ram and Lala Vs. The State of Madhya Pradesh*, , has laid

down certain principles on the issue of sentencing, which read as follows:

"4.The accused persons found guilty may be hardened or professional criminals having taken to the life of crime since long, or they may have taken to crime only recently or may have committed the crime under the influence of bad company or again commission of a solitary offence may be due to provocative wrongful action seriously injuring the feelings and sentiments of the accused. Human nature being what it is men are at times moved by the impulse of the moment rather than by rational, cool, calculated estimate of the future good and evil. At such moments they are ordinarily inclined to be ready to face any future evil falling short of the inevitable. Keeping in view the broad object of punishment of criminals by Courts in all progressive civilised societies true dictates of justice seem to us to demand that all the attending relevant circumstances should be taken into account for determining the proper and just sentence. The sentence should bring home to the guilty party the consciousness that the offence committed by him was against his own interest as also against the interests of the society of which he happens to be a member. In considering the adequacy of the sentence which should neither be too severe nor too lenient the Court has, therefore, to keep in mind the motive and magnitude of the offence, the circumstances in which it was committed and the age and character (including his antecedents) and station in life of the offender.....".

10. Section 30 of the Code of Criminal Procedure reads as under:

"30. Sentence of imprisonment in default of fine.--

(1) The Court of a Magistrate may award such term of imprisonment in default of payment of fine as is authorised by law:

Provided that the term--

(a) is not in excess of the powers of the Magistrate under section 29;

(b) shall not, where imprisonment has been awarded as part of the substantive sentence, exceed one-fourth of the term of imprisonment which the Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine.

(2) The imprisonment awarded under this section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under section 29."

11. We find that the Apex Court in *Shanti Lal Vs. State of M.P.*, has elaborately dealt with the scope of this Section. After taking into account various decisions rendered by various Courts of the land, the Court held that "term of imprisonment in default of payment of fine is not a sentence. It is a penalty which a person incurs on account of non-payment of fine. The sentence is something which an offender must undergo unless it is set aside or remitted in part or in whole either in appeal or in revision or in other appropriate judicial

proceedings or "otherwise". A term of imprisonment ordered in default of payment of fine stands on a different footing. A person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. He, therefore, can always avoid to undergo imprisonment in default of payment of fine by paying such amount. It is, therefore, not only the power, but the duty of the court to keep in view the nature of offence, circumstances under which it was committed, the position of the offender and other relevant considerations before ordering the offender to suffer imprisonment in default of payment of fine".

12. In the very same report, the Court reproduced and reiterated its earlier view taken in *Palaniappa Gounder Vs. State of Tamil Nadu and Others*, , as under:

"38. Speaking for the Court, Chandrachud, J. (as His Lordship then was) said: (SCC pp. 638-39, para 9)

"9. But legitimacy is not to be confused with propriety and the fact that the Court possesses a certain power does not mean that it must always exercise it. Though, therefore, the High Court had the power to impose on the appellant a sentence of fine along with the sentence of life imprisonment the question still arises whether a sentence of fine of Rs. 20,000/- is justified in the circumstances of the case. Economic offences are generally visited with heavy fines because an offender who has enriched himself unconscionably or unjustifiably by violating economic laws can be assumed legitimately to possess the means to pay that fine. He must disgorge his ill gotten wealth. But quite different considerations would, in the generality of cases, apply to matters of the present kind. Though there is power to combine a sentence of death with a sentence of fine that power is sparingly exercised because the sentence of death is an extreme penalty to impose and adding to that grave penalty a sentence of fine is hardly calculated to serve any social purpose. In fact, the common trend of sentencing is that even a sentence of life imprisonment is seldom combined with a heavy sentence of fine. We cannot, of course, go so far as to express approval of the unqualified view taken in some of the cases that a sentence of fine for an offence of murder is wholly "inapposite" (see, for example, *State Vs. Pandurang Tatyasaheb Shinde*, , but before imposing the sentence of fine, particularly a heavy fine, along with the sentence of death or life imprisonment, one must pause to consider whether the sentence of fine is at all called for and if so, what is a proper or adequate fine to impose in the circumstances of the case. As observed by this Court in *Adamji Umar Dalal Vs. The State of Bombay*, , determination of the right measure of punishment is often a point of great difficulty and no hard and fast rule can be laid down, it being a matter of discretion which is to be guided by a variety of considerations but the Court must always bear in mind the necessity of maintaining a proportion between the offence and the penalty proposed for it. Speaking for the Court Mahajan J. observed in that case that: (AIR p. 16, para 5)

"5.....In imposing a fine it is necessary to have as much regard to the pecuniary circumstances of the accused persons as to the character and

magnitude of the offence, and where a substantial term of imprisonment is inflicted, an excessive fine should not accompany it except in exceptional cases."

Though that case related to an economic offence, this Court reduced the sentence of fine from Rs. 42,300/- to Rs. 4,000/- on the ground that due regard was not paid by the lower Court to the principles governing the imposition of a sentence of fine."

13. Apex Court in *Gurmukh Singh Vs. State of Haryana*, , also laid down the following factors, though not exhaustive, to be kept in mind at the time of granting sentence to the accused: (i) Motive or previous enmity; (ii) whether the incident had taken place on the spur of the moment; (iii) intention/knowledge of the accused while inflicting the blow or injury; (iv) whether the death ensued instantaneously or the victim died after several days; (v) gravity, dimension and nature of injury; (vi) age and general health condition of the accused; (vii) whether the injury was caused without pre-meditation in a sudden fight; (viii) nature and size of weapon used for inflicting the injury and the force with which the blow was inflicted; (ix) criminal background and adverse history of the accused; (x) whether the injury inflicted was not sufficient in the ordinary course of nature to cause death but the death was because of shock; (xi) number of other criminal cases pending against the accused; (xii) incident occurred within the family members or close relations; and (xiii) conduct and behavior of the accused after the incident. Whether the accused had taken the injured/the deceased to the hospital immediately to ensure that he/she gets proper medical treatment?

14. Convict is a poor person. It is his first offence. He is young in age and nothing adverse has come against him with regard to his conduct, during custody. As such, we modify the impugned judgment and direct that in the event of failure of payment of fine, as directed by the trial Court, convict shall be required to suffer imprisonment, of the nature so directed by the trial Court, for a period of six months instead of one year. This is so done keeping in view the principles of law also laid down in *Shahejadkhan Mahebubkhan Pathan*, (2012 AIR SCW 5875) (supra). Except for the aforesaid, we find no reason to interfere with the judgment passed by the trial Court.

Hence, the appeal is disposed of accordingly. Pending application(s), if any, also stand disposed of.