

(2010) 07 SHI CK 0005

In the High Court Of Himachal Pradesh

Case No : Criminal Revision No. 122 of 2010

Dheeraj Kanwar

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 08-07-2010

Acts Referred:

Constitution of India, 1950 — Article 1, 13(1), 20, 20(1), 20(2)
Criminal Procedure Code, 1973 (CrPC) — Section 356, 360, 468
Himachal Pradesh Panchayati Raj Act, 1968 — Section 196(1), 197, 199, 20, 239
Penal Code, 1860 (IPC) — Section 323, 34, 341, 506, 75

Citation : (2011) 3 ShimLC 283

Hon'ble Judges : Dev Darshan Sood, J

Bench : Single Bench

Judgement

Dev Darshan Sud, J.—The petitioner has approached this Court against the order passed by the learned Judicial Magistrate, 1st Class, Court No. 1, Shimla, condoning the delay in taking cognizance of the case and further charging the petitioner herein for offences under Sections 341, 323 and 506 read with Section 34 of the Indian Penal Code. This case has a chequered history with its genesis being in the year 1993. First Information Report was lodged on 12.6.1993 under Sections 341, 323 and 506 read with Section 34 of the Indian Penal Code at Police Station, Chotta Shimla (East) against the petitioner and two others, namely, Subhash Mishra and Sunil Mishra. At the relevant point of view, the jurisdiction to try this case was that of the Gram Panchayat, Pujarli (Beolia). By a notification dated 17th January, 1997, the area which was the area where the offence was committed was transferred to the Municipal Corporation, Shimla and the territorial jurisdiction to try the offence became vested in the Judicial Magistrate, Shimla.

2. The petitioner has raised two major points for consideration of this Court (i) that the learned trial Court was wrong in taking cognizance of the case as it was barred u/s 468 of the Code of Criminal Procedure and there was no specific application on record to show as to how and why delay occurred in the case

being tried by Judicial Magistrate, Shimla The second important issue raised by the learned Counsel appearing for the petitioner is the bar under Article 20 of the Constitution of India which is attracted to the facts of the case.

3. Dealing with the second aspect first, it is undisputed before me that at the time when the offence was committed the jurisdiction to try the offences was with that of Gram Panchayat, Pujarli (Beolia). Section 196(1) of the Himachal Pradesh Panchayati Raj Act, 1968 (hereinafter referred to as the "Act") provided for cognizance of offences to be taken by the Gram Panchayat. Sub-section (1) of Section 196 refers to Schedule II of the Act which brings within its ambit Sections 323, 341 and 506 I.P.C. The relevant portion of the provisions read:

196. Offences" Cognizable by Gram Panchayat-

(1) Offences mentioned in Schedule-II or declared by the State Government to be cognizable by a Gram Panchayat, if committed within the jurisdiction of a Gram Panchayat and abetment of and attempts to commit such offences shall be cognizable by such Gram Panchayat.

Schedule-II.

OFFENCES COGNIZABLE BY A GRAM PANCHAYAT

(See Section 196)

No.

Name of Act/Code

Offence

Section

18.

Indian Penal Code

Voluntarily causing hurt

323

20.

Indian Penal Code

Wrongfully restraining any person.

341

33.

Indian Penal Code

Punishment for criminal intimidation etc.

4. According to Section 197, the Gram Panchayat could only impose fine not exceeding Rs. 100/- but no sentence of imprisonment could be awarded. The Section provides:

197. Penalties: A Gram Panchayat may impose a fine not exceeding one hundred rupees but shall not inflict a sentence of imprisonment, either substantive or in default of payment of fine.

5. The other provisions which require to be considered are Sections 199 and 239 which provide:

199. Transfer of criminal proceedings to the Gram Panchayat in certain cases. If, at any stage of the proceedings in a criminal case pending before a magistrate, it appears that the case is triable by a Gram Panchayat, he shall at once transfer the case to that Gram Panchayat which shall try the case de novo.

239. Conviction by Gram Panchayat not to be a previous conviction.-- No conviction by a Gram Panchayat shall be deemed to be previous conviction for the purposes of Section 75 of the Indian Penal Code, 1860 (45 of 1860) or Section 356 or 360 of Code of Criminal Procedure, 1973. (2 of 1974)

6. This Act was repealed by the Himachal Pradesh Panchayati Raj Act, 1994 where the corresponding provisions are Sections 32, 33, 35 and 76 and Schedule III which are a verbatim copy of the corresponding provisions of the Act of 1968. It is, thus, clear that under both the Acts of 1968 and 1994 the exclusive jurisdiction to try the offence was that of the Panchayat and the case had to be transferred to them Gram Panchayat.

7. Learned Counsel for the petitioner urges that this being the undisputed position in law, petitioner now can not be tried by a Court or be inflicted punishment greater than that what was provided for on the date when the offence was committed as it would violate the constitutional protection granted under Article 20(1) of the Constitution.

8. Turning to the legal aspect, it is undisputed that on the date when the offence was committed, the maximum punishment which could be imposed upon the petitioner was in accordance with the provisions of the Act as noticed above. It is well settled by a long line of decisions of the Supreme Court that a greater punishment than that which could be inflicted on the date when the offence was committed cannot be imposed upon a person at a later point of time.

9. In Ravinder Singh Vs. State of Himachal Pradesh, considering the provisions of the Punjab Excise Act as applied to the State of Himachal Pradesh, the Supreme Court holds:

7. It is trite law that the sentence imposable on the date of commission of the offence has to determine the sentence imposable on completion of trial. This position is clear even on a bare reading of Article 20(1) of the Constitution of

India. The said provision reads as under:

20. Protection in respect of conviction for offences.--(1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

10. In Superintendent, The Superintendent, Narcotic Control Bureau Vs. Parash Singh, the Court rules:

5. It is manifest from Article 20(1) that it prohibits (1) making an Act for the first time and then making that law retrospective. In other words it is not permissible to create an offence retrospectively (2) the infraction of the penalty may not be higher than what is prescribed in law which was in force at the time of the commission of the offence. It needs to be noted that the validity of Amendment Act was challenged before this Court in Basheer @ N.P. Basheer Vs. State of Kerala, . The validity of the Act was upheld. This. Court held that (a) all cases pending before the Court on 2.10.2001; (b) all cases under investigation as on that date shall be disposed of in accordance with the provisions of the Act as amended by the Amending Act. In State Through CBI, Delhi Vs. Gian Singh, it was held with reference to Article 20(1) of the Constitution that it is a fundamental right of every person that he should not be subjected to greater penalty than what the law prescribes and no ex-post facto legislation is permissible for escalating the severity of the punishment. But if any subsequent legislation down grades the harshness of the sentence for the same offence, it would be statutory principle for administration of criminal justice to suggest that the said legislative benevolence can be extended to the accused who awaits judicial verdict regarding sentence. The view expressed in Gyan Singh's case (supra) finds support from the case of T. Barai Vs. Henry Ah Hoe and Another, The High Court was not justified in holding that new offence was created. Before the amendment as well as after the amendment the ingredients of Section 8 remain same and there was no amendment in this provision. Only punishment for contravention in relation to cannabis plant and cannabis i.e. Section 20 of the Act has been amended by the Amendment Act.

11. A constitutional Bench of the Supreme Court, considering the entire gamut of this guarantee, in Rao Shiv Bahadur Singh and Another Vs. The State of Vindhya Pradesh, held:

8. Article 20(1) of the Constitution is as follows:

No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

This Article, in its broad import has been enacted to prohibit convictions and

sentences under "ex post facto" laws. The principle underlying such prohibition has been very elaborately discussed and pointed out in the very learned judgment of Justice Viulles in the well known case of--"Phillips v. Eyre", (1870) 6 QB 1 at pp. 23 and 25 (D), and also by the Supreme Court of U.S.A. in-- "Colder v. Bull", (1798) 3 Dallas 386: 1 Law Ed 648 at p. 649 (E). In the English case it is explained that "ex post facto" laws are laws which voided and punished what had been lawful when done. There can be no doubt as to the paramount importance of the principle that such "ex post facto" laws, which retrospectively create offences and punish them are bad as being highly inequitable and unjust. In the English system of jurisprudence repugnance of such laws to Universal notions of fairness and justice is treated as a ground "not" for invalidating the law itself but as compelling a beneficent construction thereof where the language of the statute by any means permits it. In the American system, however, such "ex post facto" laws are themselves rendered invalid by virtue of Article 1, Sections 9 and 10 of its Constitution. It is contended by the learned Attorney-General that Article 20 of the Constitution was meant to bring about nothing more than the invalidity of such "ex post facto" laws in the post-constitution period but that the validity of the pre-constitution laws in this behalf was not intended to be affected in any way.

The case in-- Keshavan Madhava Menon Vs. The State of Bombay, has been relied on to show that the fundamental rights guaranteed under the Constitution have no retrospective operation, and that the invalidity of laws brought, about by Article 13(1) of the Constitution relates only to the future operation of the pre-Constitution laws which are in violation of the fundamental rights. On this footing it was argued that even on the assumption of the convictions in this case being in respect of new offences created by Ordinance No. 48 of 1949 after the commission of the offences charged, the fundamental right guaranteed under Article 20 is not attracted thereto so as to invalidate such convictions. This contention, however, cannot be upheld. On a careful consideration of the respective Articles, one is struck by the marked difference in language used in the Indian and American Constitutions. Sections 9 (3) and 10 of Article 1 of the American Constitution merely say that "No "ex post facto" law shall be passed....." And "No State shall "pass ex post facto" law....." But in Art. 20 of the Indian Constitution the language used is in much wider terms, and what is prohibited is the conviction of a person or his subjection to a penalty under "ex post facto" laws. The prohibition under the Article is not confined to the passing or the validity of the law, but extends to the conviction or the sentence and is based on its character as an "ex post facto" law. The fullest effect must therefore be given to the actual words used in the Article. Nor does such a construction of Article 20 result in giving retrospective operation to the fundamental right thereby recognized. All that it amounts to is that one future operation of the fundamental right declared in Article 20 may also in certain cases result from acts and situations which had their commencement in the pre-Constitution period.

In--"The Queen v. St. Mary Whitechapel", (1848) 116 ER 811 at p. 814 (G), Lord

Denman C.J. pointed out that a statute which in its direct operation is prospective cannot properly be called a retrospective statute because "a part" of the requisites for its action is drawn from a time antecedent, to its passing. The general principle, therefore, the fundamental rights have no retrospective operation is not in any way affected by giving the fullest effect to the wording of Article 20. This Article must accordingly be taken to prohibit all convictions or subjections to penalty after the Constitution in respect of "ex post facto" laws whether the same was a post-Constitution law or pre-Constitution law. That such is the intendment of the wording used in Article 20(1) is confirmed by the similar wording used in Arts. 20(2) and 20(3). Under Article 20(2) for instance, it cannot be reasonably urged that the prohibition of double jeopardy applies only when "both" the occasions therefore arise after the Constitution. Similarly, under Article 20(3) it cannot be suggested that a person accused before the Constitution can be compelled to be a witness against himself, if after the Constitution the case is pending.

9. In this context it is necessary to notice that what is prohibited under Article 20 is only conviction or sentence under an "ex post facto" law and not the trial thereof. Such trial under a procedure different from what obtained at the time of the commission of the offence or by a Court different from that which had competence at the time cannot "ipso facto" be held to be unconstitutional. A person accused of the commission of an offence has no fundamental right to trial by a particular Court or by a particular procedure, except in so far as any constitutional objection by way of discrimination or the violation of any other fundamental right may be involved." (PP 398)

12. The principle has been re-affirmed in *M/s P. V. Mohammad Barmay Sons v. Director of Enforcement*, 1993 SCC (Cri) 777, holding:

10. Article 20(1) of the Constitution of India provides that no person shall be convicted of any offence except for violation of the law in force at the time of commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of commission of the offence. The Repealed Act prescribed three times the value as penalty and under the Act Section 50 provides five times penalty. So what would be imposeable as penalty is three times.....

(PP 784)

13. This Court in *State of Himachal Pradesh Vs. Gagan Singh and Others*, holds:

5. "Law in force" in Article 20(1), quoted above, postulates the factual existence of the law at the relevant time and it excludes retrospective application of any subsequent law.

The law as in force, as on the date of commission of alleged offence by the respondents, prescribed the imprisonment for a period up to six months. Even though the punishment prescribed for the offence came to be enhanced to two

years vide State Amendment Act of 1991, upon conviction the respondents could not have been sentenced for a period of more than six months in view of provisions contained in Article 20(1) of the Constitution of India....

(PP 233)

14. I need not multiply precedent any further. The submission of the learned Counsel for the petitioner that the entire trial needs to be quashed cannot be accepted at this stage. In *Tiwari Kanhaiyalal and Others Vs. The Commissioner of Income Tax, Delhi, and CIT v. M/s Shah Sadiq & Sons*, (1997) 3 SCC 516, the Supreme Court holds that where prosecution was initiated for offences under the provision of the Income Tax, 1922, its repeal by a subsequent Act could not be taken as if the entire offence had been effaced. Looking to the facts and circumstances of the case, I hold that the petitioner is entitled to the protection of Article 20(1) of the Constitution of India and if after trial it is found that the petitioner is guilty of any offence as alleged, the maximum sentence which can be imposed upon him would be in terms of Section 197 of the Act, in addition he would be entitled to protection Section 239 of the Act. As noticed, this Act though subsequently repealed by the Act of 1994 but both in terms of taking cognizance as also on the quantum of sentence, the provisions of the Amended Act are a verbatim copy of the repealed provisions. On the question of delay all that I need to say is that the case has been hanging fire for a long period of time for one reason or the others possibly not attributable to the respondent herein. This petition is accordingly disposed of. There shall be no order as to costs.