

(2009) 02 SC CK 0147

In the Supreme Court Of India

Case No : Criminal Appeal No. 1660 of 2007

Jitendra Panchal

APPELLANT

Vs

Intelligence Officer, NCB and Another

RESPONDENT

Date of Decision : 03-02-2009

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 2, 221, 221(1), 221(2), 300, 403
Narcotic Drugs and Psychotropic Substances Act, 1985 — Section 8, 12, 20, 23, 24, 27A, 29, 67
General Clauses Act, 1897 — Section 3
Indian Penal Code, 1860 — Section 3, 4
Constitution of India, 1950 — Article 14(7), 20, 20(2), 367, 372

Citation : AIR 2009 SC 1938 : (2009) AIRSCW 1559 : (2009) 57 BLJR 816 : (2009) 2 JT 267 : (2009) 1 RLW 853 : (2009) 2 SCALE 202 : (2009) 3 SCC 57 : (2009) 1 SCR 842 : (2009) 1 Supreme 777 : (2009) 2 UJ 562

Hon'ble Judges : Markandey Katju, J;Altamas kabir, J

Bench : Division Bench

Advocate : K.T.S. Tulsi, Shekhar Naphade, V. Hari Pillai, Rishi Malhotra, Prem Malhotra, Ayaz Khan, E.C. Agrawala, Mahesh Agrawala, Rishi Agrawala, Amit Sharma, Sanjay Kharde, Ravindra Keshavrao Adsure, Naresh Kaushik Sanjeev K. Bhardwaj and S.N. Terdal, for the Appellant;

Final Decision : Allowed

Judgement

Altamas Kabir, J.—This appeal raises an interesting legal conundrum involving the laws of the United States of America, hereinafter referred to as 'the USA', and the domestic laws as existing in India. At the heart of the controversy is the concept of double jeopardy within the meaning of Article 20 of the Constitution of India and Section 300 of the Code of Criminal Procedure, hereinafter referred to as 'the Code'.

2. In order to appreciate the questions which have been posed in this appeal, it will be necessary to briefly set out the factual background in which they arise.

3. On 17th October, 2002, officers of the US Drug Enforcement Agency, along

with officers of the Narcotics Bureau, India, seized a consignment of 1243 pounds equivalent to 565.2 Kgs. of Hashish in Newark, USA. During the investigation, it appears to have transpired that one Niranjana Shah and the appellant were engaged in trafficking Hashish out of India into the USA and Europe and that the seized contraband had been smuggled out of India by the appellant and the said Niranjana Shah along with one Kishore. The appellant was arrested in Vienna in Austria by officers of the Drug Enforcement Agency, USA on 5th December, 2002 and was extradited to the USA. Soon, thereafter, on 25th March, 2003, the Deputy Director General of the Narcotics Control Bureau, hereinafter referred to as 'the NCB', visited the USA and recorded the appellant's statement. Subsequently, on 9th April, 2003, officers of the NCB arrested Niranjana Shah, Kishore Joshi and Irfan Gazali in India and prosecution was launched against them in India. On 5th September, 2003, a complaint was filed by the NCB before the learned Special Judge, Mumbai, against Niranjana Shah, Kishore Joshi and two others under Sections 29/20/23/27A/24 read with Section 8/12 of the Narcotic Drugs and Psychotropic Substances Act, 1985, hereinafter referred to as 'the NDPS Act', in connection with the abovementioned incident. While the said Niranjana Shah and others were being proceeded with before the learned Special Judge in Mumbai, the appellant, who had been extradited to the USA, was tried before the District Court at Michigan, USA, in Case No. 04 CR 80571-1. On pleading guilty of the charge of conspiracy to possess with intention to distribute controlled substances, which is an offence u/s 846 of Title 21, United States Code (USC) Controlled Substances Act, the appellant was sentenced to imprisonment on 27th June, 2006, for a total term of 54 months. After serving out the aforesaid sentence, the appellant was deported to India on 5th April, 2007, and on his arrival at New Delhi, he was arrested by officers of the NCB and was taken to Mumbai and on 10th April, 2007, he was produced before the learned Chief Metropolitan Magistrate and was remanded to judicial custody.

4. At this juncture, it may be indicated that although the appellant could have been prosecuted for other offences under Title 21 USC, the other charges against the appellant were dropped as he had pleaded guilty to the offence of conspiring to possess controlled substances.

5. On 25th April, 2007, on the appellant's application that the proceedings against the appellant in India would amount to double jeopardy, the learned Special Judge, Mumbai, rejected the appellant's contention upon holding that the charges which had been dropped against the appellant in the proceedings in the USA had not been dealt with while imposing sentence against him in the District Court of Michigan, USA. The Special Judge extended the judicial custody of the appellant and subsequently rejected his prayer for bail on 17th May, 2007.

6. The appellant then approached the Bombay High Court on 11th June, 2007, praying for quashing of the proceedings initiated by the NCB and also praying for interim bail on the ground of double jeopardy. On 13th September, 2007, a

complaint was filed by the NCB against the appellant in the Court of Special Judge, Mumbai, against which the appellant filed Criminal Writ Petition No. 1038 of 2007, inter alia, praying for quashing of the said complaint. The Bombay High Court dismissed the writ petition upon holding that the ingredients of the offences with which the appellant had been charged in India were totally different from the offences with which he had been charged and punished in the USA. The High Court also held that the acquisition and possession of Hashish in India and importation of the same into India from Nepal and the export of the contraband out of India, as well as sale thereof in the USA, could not be said to be the subject matter of an offence u/s 846 read with Section 841 of Title 21 USC Controlled Substances Act, nor was the appellant subjected to prosecution in respect of any of such offences in the USA. Consequently, conspiracy for all those acts in India was not the subject matter of prosecution in the District Court, New York, USA. Similarly, the Special Judge, Mumbai, was not competent to deal with the offence' u/s 846 read with Section 841 of Title 21 USC Controlled Substances Act, nor was the District Court in New York competent to take cognizance of any of the offences alleged to have been committed under the NDPS Act, 1985. The High Court came to the conclusion that merely because the same set of facts gives rise to different offences in India under the NDPS Act and in the USA under its drug laws, the different circumstances and the law applicable would not debar the Special Judge, Mumbai, from dealing with matters which attracted the provisions of the local laws and hence the application of the principle of double jeopardy was not available in the facts of the present case.

7. It is against the rejection of such plea of double jeopardy by the High Court that the present appeal has been filed.

8. Appearing in support of the appeal, Mr. K.T.S. Tulsi, learned Senior Advocate, firstly submitted that the appeal of the appellant in India is barred under Article 20 of the Constitution of India and also u/s 300 of the Code on the ground that the appellant has already been tried and convicted by a Court of competent jurisdiction for the same offence arising out of the same set of facts. For the sake of reference Article 20 of the Constitution is set out hereunder:

Article 20. Protection in respect of conviction for offences:

(1) ...

(2) No person shall be prosecuted and punished for the same offence more than once;

(3) ...

Similarly, Section 300 of the Code also prohibits a second trial if the person has either been convicted or acquitted and is also reproduced hereinbelow:

300. Person once convicted or acquitted not to be tried for same offence. - (1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or

acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Sub-section (1) of Section 221, or for which he might have been convicted under Sub-section (2) thereof.

9. Mr. Tulsi urged that the judgment of the United States District Court has already been filed in the proceedings and is part of the records of this appeal. He submitted that there is also no dispute that the appellant is being sought to be tried on the same set of facts for which he has already been convicted by a competent Court of the USA and has undergone the sentence imposed on him. It was submitted that the offences for which the appellant was now being charged in India, are not only identical but in respect of which a charge u/s 221 Cr.P.C. could have been made had the trial taken place in India.

Mr. Tulsi submitted that this Court had in the case of *Maqbool Hussain Vs. The State of Bombay*, observed that the provisions of Article 20 of the Constitution should be liberally interpreted to cover situations which were not specifically enumerated therein. He also urged that the term "offence" is not defined in the Constitution and, therefore, while relying on the definition as indicated in Section 3 of the General Clauses Act, it must be understood to mean any act or offence which has been made punishable in law.

10. Elaborating on his aforesaid submission, Mr. Tulsi submitted that the offences which the appellant is alleged to have committed were all part of one continuing transaction and could not be split up for the purposes of trial, in the USA and again separately in India. According to Mr. Tulsi, prosecution under the other provisions other than Section 846 of Title 21 USC Controlled Substances Act, were also available to the trying authority in the United States but the same were not proceeded with and it must, therefore, be accepted that the charges thereunder had been abandoned by the prosecution and no separate proceeding could lie in India for the same offence and/or offences. In this connection, Mr. Tulsi referred to the letter which had been addressed by the Assistant United States Attorney to the learned Advocate for the appellant in Mumbai on 25th April, 2007, in which it had been stated that the appellant had been prosecuted in the United States for his role in a drug transaction involving Mr. Niranjana Shah. It was also indicated that the appellant was arrested in Austria and thereafter extradited to the United States. The Assistant US Attorney thereafter went on to observe that at the time of his arrest the appellant could have been prosecuted for importation of controlled substances into the United States, attempted importation of controlled substances into the United States, aiding and abetting importation of controlled substances into the United States, conspiring to import controlled substances into the United States and conspiring to possess controlled substances with the intent to distribute them further. However, since the appellant pleaded guilty, he was charged with conspiring to possess controlled substances to which he has been convicted and sentenced and the other charges were in effect dropped. It was lastly observed that the appellant had gone on to

serve his sentence in an American prison and that he had completely paid his debt to society and could resume a productive life.

11. According to Mr. Tulsi, offences for which the appellant was being prosecuted in India are essentially the same for which he had already been tried and convicted in the USA. Mr. Tulsi urged that since India was a signatory to the International Covenant of Civil and Political Rights adopted by the United Nations on 16th December, 1966, it had to abide by Article 14 of the said Covenant which has the force of law and is required to be enforced by the Indian Courts in regard to a situation where there is no statutory provision to the contrary in the domestic law.

12. Mr. Tulsi then urged that as far as Article 20 of the Constitution of India is concerned, the same is not confined to national borders which would have the effect of restricting its, applicability within India. He submitted that neither Article 20 of the Constitution of India nor Section 300 of the Code confines the jurisdiction of the competent Court to within the national boundaries. The only requirement for invoking the protection of the aforesaid provisions is that the earlier trial would have had to be conducted by a Court of competent jurisdiction. Mr. Tulsi urged that since the Constitution itself does not prescribe that the trying Court had to be located within the country, such a constraint should not be read into Article 20 which would have the effect of defeating the very purpose of protection against double jeopardy. Reiterating his submissions with regard to the decision of this Court in Maqbool Hussain (*supra*), Mr. Tulsi urged that so long as the previous prosecution was before a Tribunal, which decides such matters judicially on evidence on oath, which it is authorized by law to administer the requirements of Clause (2) of Article 20 must be deemed to have been satisfied. Furthermore, once it is found that the foreign Court had valid territorial jurisdiction over the cause and was legally competent to award a sentence, the judgment of the foreign Court would have to be taken note of and would have to be deemed to have satisfied the provisions of Sections 41 and 42 of the Indian Evidence Act, 1872.

13. Mr. Tulsi further urged that the only condition precedent for application of the principle of double jeopardy is that the person concerned has been prosecuted and punished for the same offence. No other ingredient could be added and since the judgment of the US District Court establishes that the appellant had been prosecuted and punished for the same offence, it must be held that the situation is covered by the prohibition against double jeopardy embodied in Article 20 of the Constitution, even though such judgment may have been rendered by a foreign Court.

14. In this regard Mr. Tulsi referred to the decision of this Court in P.K. Unni Vs. Nirmala Industries and others [OVERRULED], wherein this Court has held that even if there was a defect or an omission in a Statute, the High Court could not correct such defect or supply such omission since the Court cannot add words to a Statute or read words into it which are not there, especially when the literal

reading produces an intelligible result. This Court also observed that where the language of the Statute leads to manifest contradictions with regard to the apparent purpose of the enactment, the Court can adopt a construction which will aid the obvious intention of the legislature and as stated by Lord Denning, in doing so, (sic) Judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

15. Mr. Tulsi also referred to the Constitution Bench decision of this Court in *Assistant Collector of Customs and Another Vs. L.R. Malwani and Another*, in which it was observed that the doctrine of *antefois convict* or *autrefois acquit* which was embodied in Section 403 of the Code prior to its amendment, now numbered as Section 300 of the Code along with the benefit of Article 20 of the Constitution would be available to an accused person to establish that he had been tried by a Court of competent jurisdiction for an offence and that he was convicted or acquitted of that offence and the said conviction or acquittal was in force. The Constitution Bench then went on to observe that if that much was established, it could be contended that he was not liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made. Certain other decisions on this point were also referred to by Mr. Tulsi, which reiterates the said position.

16. Mr. Tulsi urged that the stand taken on behalf of the State that Article 20 of the Constitution was not attracted in the instant case in view of the fact that the appellant was tried and convicted for a separate offence in the USA and that he was being tried in India for a different case altogether, was factually incorrect and was also contrary to the prosecution case itself. According to Mr. Tulsi, a plain reading of the criminal complaints filed against Niranjana, Shah and others and the appellant herein, along with the statements of all the accused persons recorded u/s 67 of the NDPS Act, left little doubt that the appellant came into the picture or rather the appellant was brought into the picture only after the consignment had reached the USA. Even the role ascribed to the appellant by the prosecution was that co-accused Niranjana Shah had contacted the appellant to find a buyer for the consignment which was lying in a transport godown at New Jersey in the USA. He urged that in Complaint No. 173 of 2007 which had been initiated against the appellant, it was indicted that Niranjana Shah had contacted the appellant and had informed him that a consignment of pickles containing Hashish concealed in it was lying in a transport godown at New Jersey and asked the appellant to find a buyer for the same. Even in the statement made by Niranjana Shah u/s 67 of the NDPS Act on 9th April, 2003, he had indicated that he had been informed by one Irfan Gazali about the consignment and he had thereafter contacted the appellant to find a buyer for the same.

17. Mr. Tulsi concluded on the note that the facts on which the appellant had been tried and prosecuted in the USA being the same as the ones in respect of which he was now being tried in India, the constitutional safeguard under Article

20 read with Section 300 of the Code was clearly attracted to the facts of the instant case and the proceedings initiated against the appellant in India are, therefore, liable to be quashed.

18. On the other hand, appearing for the respondent authorities, learned senior counsel Mr. Shekhar Naphade submitted that the ingredients and punishment of offences under Sections 29, 8, 12, 20, 23 and 24 of the NDPS Act, 1985 were different from the offences contemplated under Sections 846 and 841 of Title 21 USC Controlled Substances Act. Mr. Naphade submitted that after serving the sentence imposed upon him by the US authorities, the appellant was deported to India on 9th April, 2007, and was arrested by the Narcotic Control Bureau on his arrival in Mumbai. Thereafter, prosecution was launched against him under the provisions of the NDPS Act, 1985.

19. Mr. Naphade submitted that the offence in respect of which the appellant was tried and convicted in the United States was different from the offence alleged to have been committed in India. While the American Courts have tried and punished the appellant for conspiracy to possess with intent to distribute a controlled substance viz. Hashish in America, the appellant not being a citizen of America, was not and could not have been tried by the American Courts for the offences allegedly committed by the appellant on Indian soil. Mr. Naphade submitted that one of the allegations against the appellant is that in conspiracy with his co-conspirators, he imported Hashish from Nepal into India, was in possession of the contraband in India and was responsible for the sale and export of the said Hashish out of India. Mr. Naphade submitted that these offences have taken place within Indian territory and American Courts could not have tried him for the same. Mr. Naphade urged that the inevitable conclusion is that the appellant was not being tried for the same offence for which he had been tried and convicted in the USA.

20. Mr. Naphade submitted that in view of the above, the doctrine of double jeopardy contained in Article 20 of the Constitution or even the bar of Section 300 of the Code could not be applied to the case of the appellant. Mr. Naphade submitted that Article 20 of the Constitution contemplates an offence committed under the municipal laws and not any offence triable under the law of a foreign country. In this regard, reference was made to a decision of the Bombay High Court in *In Re: Rambharthi Hirabharthi*, in which the Bombay High Court had come to the conclusion that Indian Courts could not take cognizance of an offence committed by the accused in a foreign country in respect of a foreign law.

21. Mr. Naphade's next contention was that the definition of the expression "offence" in Section 2 of the Code must necessarily mean an offence under the law which is in force within India as is also the case u/s 3 of the General Clauses Act. According to Mr. Naphade, since an offence under the American law is not an offence under the Indian law for the purposes of Section 3 of the General Clauses Act, the same was not contemplated by Article 20 of the Constitution. The said proposition has been subsequently endorsed in several subsequent judgments.

22. In this regard, reference was lastly made to Article 367 of the Constitution of India, Subsection (1) whereof provides as follows:

367. Interpretation - (1) Unless the context otherwise requires, the General Clauses Act, 1897, shall, subject to any adaptations and modifications that may be made therein under Article 372, apply for the interpretation of this Constitution as it applies for the interpretation of an Act or the legislature of the Dominion of India.

(2) ...

(3) ...

Mr. Naphade urged that since the expression "offence" had not been defined in the Constitution but in the General Clauses Act, Article 20 of the Constitution has to be understood by reading the word "India" into the Article. Referring to Sections 3 and 4 of the Indian Penal Code, Mr. Naphade contended that under the said provisions also a person could be tried for an offence committed beyond India for which he was liable to be tried under the Indian laws.

23. Referring to the complaint which had been made by the Narcotics Control Bureau against the appellant, Mr. Naphade submitted that each of the said offences could be tried separately and trial of a part of the offence in the USA gave rise to a conflict between Legal Realism and Natural Law. It was also pointed out that the NDPS Act, 1985, extends to the whole of India and also applies to all citizens of India outside India. Hence, while the appellant may have been proceeded against in the USA in respect of a part of the offences relating to introduction of the controlled substances in the USA with the intention of distributing the same, the other portions of the transaction which originated in India could be tried separately in India as was being done in the instant case. Mr. Naphade urged that in view of the severalty of the offences relating to the contraband from its introduction into India and thereafter export to the USA, different portions thereof could be tried separately in the USA and also in India and, in any event, the Courts in the USA would have no jurisdiction over the offences allegedly committed on Indian soil and vice-versa. It was submitted that the High Court had not committed any error in rejecting the contention of the appellant in relation to Article 20 of the Constitution of India and Section 300 of the Code.

24. Mr. Ravindra Keshavrao Adsure, appearing for the State of Maharashtra, adopted Mr. Naphade's submissions and added that the offence for which the appellant was being tried in India was a distinct offence which was separate from the offence for which the appellant had been tried and convicted in the USA. Mr. Adsure submitted that since the punishment for different offences under the NDPS Act, 1985, were completely different from those contemplated under Title 21 USC Controlled Substances Act, the plea of double jeopardy was misconceived and was liable to be rejected.

25. We have carefully considered the submissions made on behalf of the respective parties and we are not inclined to interfere with the order of the High Court rejecting the appellant's prayer for quashing the proceedings initiated by the NCB and the prayer for interim bail on the ground of double jeopardy.

26. In our view, the offence for which the appellant was convicted in the USA is quite distinct and separate from the offence for which he is being tried in India. As was pointed out by Mr. Naphade, the offence for which the appellant was tried in the USA was in respect of a charge of conspiracy to possess a controlled substance with the intention of distributing the same, whereas the appellant is being tried in India for offences relating to the importation of the contraband article from Nepal into India and exporting the same for sale in the USA. While the first part of the charges would attract the provisions of Section 846 read with Section 841 of Title 21 USC Controlled Substances Act, the latter part, being offences under the NDPS Act, 1985, would be triable and punishable in India, having particular regard to the provisions of Sections 3 and 4 of the Indian Penal Code read with Section 3 of the General Clauses Act, which has been made applicable in similar cases by virtue of Article 367 of the Constitution. The offences for which the appellant was tried' and convicted in the USA and for which he is now being tried in India, are distinct and separate and do not, therefore, attract either the provisions of Section 300 of the Code or Article 20 of the Constitution.

27. We are unable to agree with Mr. Tulsi that apart from the offence for which the appellant had been tried and convicted in the USA, he could also have been tried in the U.S.A. for commission of offences which were also triable under the NDPS Act, 1985, as the contents thereof are different from the provisions of Title 21 USC Controlled Substances Act which deal with possession and distribution of controlled substances within the USA. On the other hand, in our view, the provisions of Sections 3 and 4 of the Indian Penal Code would be apt in a situation such as the present one. For the sake of reference, Sections 3 and 4 of the Indian Penal Code are extracted hereinbelow:

3. Punishment of offences committed beyond, but which by law may be tried within, India.-- Any person liable, by any Indian law, to be tried for an offence committed beyond India shall be dealt with according to the provisions of this Code for any act committed beyond India in the same manner as if such act had been committed within India.

4. Extension of Code to extra-territorial offences. -- The provisions of this Code apply also to any offence committed by--

(1) any citizen of India in any place without and beyond India;

(2) any person on any ship or aircraft registered in India wherever it may be.

28. It will be evident from the above that a person liable by any Indian law to be tried for any offence committed beyond India is to be dealt with under the

provisions of the Code, having regard to the fact that the provisions of the Code would also apply to any offence committed by any citizen of India in any place within and beyond India.

29. In that view of the matter, we see no reason to interfere with the order of the High Court impugned in this appeal. The appeal is accordingly dismissed.