

(2014) 09 MAD CK 0387

In the Madras High Court

Case No : HCP. No. 574/2013 and M.P. No. 1/2013

Kanchana

APPELLANT

Vs

The State

RESPONDENT

Date of Decision : 08-09-2014

Acts Referred:

Constitution of India, 1950 — Article 309
Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 190, 210
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20(b)
Penal Code, 1860 (IPC) — Section 147, 148, 149, 152, 186
Prisons Act, 1894 — Section 42, 45, 46, 52, 59

Citation : (2014) 09 MAD CK 0387

Hon'ble Judges : S. Rajeswaran, J; P.N. Prakash, J

Bench : Division Bench

Judgement

P.N. Prakash, J.

1. The petitioner in this HCP is one Kanchana, whose son Vijayan is a life convict, CT No. 1547, and who is serving sentence of life imprisonment in the Central Prison, Puzhal-I.

2. It is the case of the petitioner that, the jail authorities foisted a case on her son as if he was in possession of Ganja, and without any enquiry imposed punishment of denial of interview for three months. She sent a representation dated 28.03.2013 to jail authorities, in which she has sought for an enquiry into the allegation. As there was no response to her representation, she has come up with this Habeas Corpus Petition, praying for a direction to the authorities to hold an enquiry under the Prison Rules and pass appropriate orders.

3. On notice to the respondents, a counter affidavit has been filed by Thiru S.Parameswaran, the Superintendent of Prisons, Central Prison, Puzhal, Chennai. In his counter affidavit he has stated as follows:

"3. I humbly submit that the content made by the petitioner is false. The Life Convict Prisoner-1547, Viji @ Vijayan was involved in illegal activities in Central

Prison - 1, Puzhal based on information on 04.03.2013 at 22.00 P.M. in Associate Block - I, 15th dorm entry cell the search was conducted by the special searching team prison wardens. In that search the contraband Item Ganja measure about 100 gm was seized from a bag own by the petitioners son/Life Convict Prisoner.

4. I humbly submit that the same was recorded in the Jailor Report book No. 16 Page 299 by then Jailor and enquiry was conducted by the Superintendent and the extract of the Jailor report book as follows:-

5. I humbly submit that based on the Jailor report book a complaint was given at M3 Puzhal Police Station as per Rule and the same was registered in Cr.No. 421/13, u/s 20(b) of NDPS Act read with 42 of Prison Act. Now this case was pending before the Hon"ble JM-Tiruvottiyur Court, Chennai and the convict Prisoner got bail on this case on 25.05.2013."

We also summoned the records from the prison and found the entries in the Jailor Report Book No. 16, which has been extracted in the affidavit.

4. Mr.R.Sankarasubbu, the learned counsel for the petitioner placed reliance upon the following two Judgments in support of his prayer:

(i) State of Haryana Vs. Ghaseeta Ram,

(ii) S. Nalini Vs. State and The Superintendent of Police,

5. To appreciate the contentions of Mr.R.Sankarasubbu, it may be relevant to extract certain provisions of law touching upon this subject. Section 59 of the Prisons Act, 1894 empowers the State Government to frame Rules consistent with the Act touching upon several subjects and we are now concerned with only 4 aspects in this case.

[a] "59. Power to make rules.-[The State Government may] make rules consistent with this Act-

(1) defining the act which shall constitute prison-offences;

(2) determining the classification of prison-offences into serious and minor offences;

(3) fixing the punishments admissible under this Act which shall be awardable for commission of prison-offences or classes thereof;

(4) declaring the circumstances in which acts constituting both a prison-offence and an offence under the Indian Penal Code (Act 45 of 1860) may or may not be dealt with as a prison-offence;

[b] The relevant portion of Section 45 of the Prisons Act is as under:

"45. Prison-offences.- The following acts are declared to be prison-offences when committed by a prisoner:-

(1) such wilful disobedience to any regulation of the prison as shall have been

declared by rules made under section 59 to be a prison-offence;

(2) any assault or use of criminal force;

(3) the use of insulting or threatening language;

(4)

(5)

(6)

(7)

(8)

(9)

(10)

(11)

(12) receiving, possessing or transferring any prohibited article;"

[c] In exercise of powers conferred by Section 59 of the Prisons Act, the Government of Tamil Nadu has framed the Tamil Nadu Prison Rules, 1983 and by virtue of Rule 297, 62 conducts have been declared as prison offences within the meaning of Section 45 of the Prisons Act. Here, in this case, we are extracting only two of those Prison offences.

"297. Acts declared to be prison offence under section 45 of the Prisons Act, 1894 (Central Act IX of 1894).- The following acts are forbidden and every prisoner who wilfully commits any of the following acts shall be deemed to have wilfully disobeyed the regulations of the prison, and to have committed a prison offence within the meaning of section 45 of the Prisons Act, 1894 (Central Act IX of 1894), namely :

(1)

(2)

(3) Secreting any article whatever;

(4)

(5)

(6) Answering untruthfully any question put by prison official or a visitor."

[d] Rule 298(c) of the Tamil Nadu Prison Rules reads as under:

298. Prohibited articles.-- The following shall be deemed to be prohibited articles within the meaning of Section 42 and clause (12) of Section 45 of the Prisons Act, 1894 (Central Act IX of 1894) namely.-

(a)

(b)

(c) Bhang, ganja, opium and other hemp drugs and intoxicants."

[e] The next relevant provision would be Rule 304.

"304. Enquiry before punishment.- (1) Prisoners are liable to be punished for prison offences as per rules irrespective of the class in which they are placed-

(2)

(3) Whenever prisoners are produced before the Superintendent for punishment, the Superintendent shall conduct a thorough enquiry in a fair manner. It shall not become a mechanical process for the mere awarding of punishments. Enquiry shall be conducted as promptly as possible. During enquiry, the accused shall be present. Witnesses shall be brought in one at a time."

[f] The power to impose punishments is vested on the Superintendent of Prisons by Rule 302, which classifies the punishments into minor and major punishments. In this case, we are only concerned with Rule 302(4) which reads as under.

302. Classification of punishments.- The punishments enumerated in section 46 of the Prisons Act, 1894 (Central Act IX of 1894), shall be classified into minor and major punishment

(a) Minor.- The following punishment shall be considered as minor punishments, namely:-

(1)

(2)

(3)

(4) Forfeiture of class, grade or prison privileges for a period of not exceeding three months."

6. From the facts and circumstances and from the records produced we find that, based on secret information, a special team of Jailors searched Room 15 in AB-I Block at 10.00 p.m. on 04.03.2013 and seized from the bag of the detenu 100 gm of Ganja. This act of his falls under Rule 297 (1) of the Prison Rules [extracted above] because Ganja has been declared as a prohibited article under Rule 298(c) [extracted above]. The Superintendent has conducted an enquiry based on the report given by the Jailer. In the enquiry the detenu was asked to explain how the contraband came into his possession, for which he refused to give any explanation. That has been recorded in the Jailer Report Book by the Superintendent himself. Thereafter, after giving due opportunity to the detenu, the Superintendent has imposed a minor penalty of denying him interview for

three months under Rule 302(4) of the Prison Rules which is extracted above. Therefore, we find no infirmity in the order passed by the Superintendent in a case of this nature.

7. Mr.R.Sankarasubbu, the learned counsel for the petitioner submitted that the Superintendent cannot impose penalty and also initiate criminal prosecution against a prisoner, as that would amount to double jeopardy. In support of this argument, he relied upon the two judgments referred to above. To appreciate this contention, the following provisions of law require to be analysed.

[a] Section 52 of the Prisons Act.

"52. Procedure on committal of heinous offence.- If any prisoner is guilty of any offence against prison-discipline which, by reason of his having frequently committed such offences or otherwise, in the opinion of the Superintendent, is not adequately punishable by the infliction of any punishment which he has power under this Act to award, the Superintendent may forward such prisoner to the Court of the District Magistrate or of any Magistrate of the first class [or Presidency Magistrate] having jurisdiction, together with a statement of the circumstances, and such Magistrate shall thereupon inquire into and try the charge so brought against the prisoner, and, upon conviction may sentence him to imprisonment which may extend to one year, such term to be in addition to any term for which such prisoner was undergoing imprisonment when he committed such offence, or may sentence him to any of the punishments enumerated in section 46:

[Provided that any such case may be transferred for inquiry and trial by the District Magistrate to any Magistrate of the first class and by a Chief Presidency Magistrate to any other Presidency Magistrate : and]

Provided also that no person shall be punished twice for the same offence."

[b] Rules 300 and 301 of the Tamil Nadu Prison Manual:

300. Reference to Magistrate in certain cases.- When in the opinion of the Superintendent any of the following offences are established, against any prisoner, he shall refer the case to the Magistrate exercising jurisdiction for enquiry in accordance with the Code of Criminal Procedure, 1973 (Central Act 2 of 1974) namely:-

(1) Offences punishable under Sections 147, 148 and 152 of the Indian Penal Code (Central Act XLV of 1860).

(2) Offences punishable under sections 222, 223 and 224 of the Indian Penal Code (Central Act XLV of 1860).

(3) Offences punishable under Sections 304A, 309, 325 and 326 of the Indian Penal Code (Central Act XLV of 1860),

(4) Any offence triable exclusively by the Court of Sessions.

301. Powers of Superintendent in other cases.- It shall be in the discretion of the Superintendent to determine, with respect to any other act which constitutes both a prison offence and an offence under the Indian Penal Code (Central Act XLV of 1860) whether he will use his own powers of punishment or move the Magistrate possessing jurisdiction to enquire into it in accordance with the Code of Criminal Procedure, 1973. (Central Act 2 of 1974)."

8. On a careful reading of Section 52 of the Prisons Act, the heading Procedure on committal of heinous offence is indeed very misleading. It belies the main provision of Section 52. Section 52 says that, if a person is repeatedly committing an offence against prison discipline or otherwise, then the Superintendent can refer his case to the Magistrate, who will conduct a trial and can punish the delinquent detenu upto one year imprisonment. Thus Section 52 is a punishment section for a particular offence, viz., frequent commission of a prison offence by a detenu or otherwise. The expression "otherwise" means even if he is not frequently committing, then too the Superintendent can refer his case to the Magistrate depending upon the gravity of the conduct. The Doctrine of Election is given to the Superintendent of Prisons. A Superintendent can himself inflict any of the penalties adumbrated in Rule 302 of the Tamil Nadu Prison Rules, or send him to the Magistrate for being tried and punished under Section 52 of the Prisons Act. The Superintendent does not have the power to inflict any sentence of imprisonment on any detenu and that is an exclusive prerogative of the Court. The Superintendent is in the capacity of a disciplinary authority in a Government Organisation. There, penalties are imposed by virtue of the powers conferred by the Rules framed under Article 309 of the Constitution of India, but whereas here, the Superintendent is imposing punishment by virtue of Rules framed under Section 59 of the Prisons Act. This does not give the Superintendent power to impose sentence of imprisonment on any prisoner. Therefore, if a Superintendent elects to send a case to the Magistrate, then he is denuded of imposing upon him any penalty for the same act of indiscipline, as that would amount to double jeopardy which is what the second proviso to Section 52 states.

9. The learned counsel pointed out to the Supreme Court case in State of Haryana Vs Ghaseeta Ram [cited supra] and contended that there, the Supreme Court had quashed the penalty imposed on the convict by the Superintendent on the ground that the delinquent detenu was subsequently convicted by a competent criminal Court. We are unable to apply this judgment to the facts of this case because, here there are no two punishments as of yet. The prisoner may even get acquitted in the criminal Court, if the prosecution fails to prove the case beyond doubt. On the contrary, the Superintendent like an Employer has to maintain day-to-day discipline in the prison. He cannot be expected to wait endlessly for the verdict of the criminal Court. The delinquent Prisoner may be a short term remand prisoner and may go out of the prison on getting bail. Further, even on facts of this case, the prisoner was not punished by the Superintendent for possessing Ganja, but for misleading the authorities by being untruthful,

which is by itself a Prison Offence under Rule 297(6).

10. In Ghaseeta Ram's case the Superintendent not only forfeited the remission of 23 months, 18 days earned by the prisoner, but also permanently removed him from the system of earning remissions in violation of Rule 633A of the Punjab Jail Manual, because under Rule 633A, such a forfeiture of remission can be ordered only after conviction by the criminal Court. Therefore, we hold that the question of double jeopardy does not arise in the facts and circumstances of this case.

11. The second submission of Mr.R.Sankarasubbu is based on the judgment of the learned single Judge in S.Nalini Vs State of Tamil Nadu [cited supra]. In that case, S.Nalini was alleged to be having a SIM card in her possession and when the jail authorities attempted to search her cell, they were obstructed and physically prevented from discharging their duties, which resulted in the Superintendent imposing a major penalty under Rule 302 of the Tamil Nadu Prison Rules and also initiating criminal prosecution by filing a complaint in the local Police Station, based on which an FIR for offences u/s 353, 186, 201 IPC r/w 42 of the Prisons Act, 1894 was registered and a Final Report was filed before the Judicial Magistrate I Vellore, in C.C.No. 70/2013.

[a] In the said judgment, the learned single Judge has quashed the very prosecution itself on the ground of double jeopardy. We are unable to agree with the conclusion arrived at by the learned single Judge for the simple reason that, Rule 301 of the Tamil Nadu Prison Rules has been framed based on the power given by Section 59(4) of the Prisons Act, which we have extracted above. The possession of cell phone and SIM card has been prohibited by Rule 298 (rr) of the Tamil Nadu Prison Rules. If a prisoner is in possession of a cell phone or SIM card inside the prison, it would definitely amount to possession of a prohibited article and will be a Prison Offence, for which the Superintendent can impose a penalty under Rule 302 of the Prison Rules, after conducting due enquiry as adumbrated in Rule 304 of the Prison Rules. Possession of SIM card or cell phone definitely is not an IPC offence. The prisoner S.Nalini was charged with offences u/s 353 IPC - Assault or criminal force to deter public servant from discharge of his duty; u/s 186 IPC - Obstructing public servant in discharge of public functions; u/s 201 IPC - Causing disappearance of evidence of offence, or giving false information to screen offender; r/w Section 42 of the Prisons Act - Penalty for introduction or removal of prohibited articles into or from prison and communication with prisoners. Thus it is clear that the Prison Offence and the IPC offences were different.

[b] Under Rule 301 of the Prison Rules, the discretion is given to the Superintendent, only where the act of the prisoner falls both as a prison offence as well as an IPC offence. The prison offence against S.Nalini, the detenu therein was, possession of SIM card and the IPC offence against her was, for preventing a public servant from discharging his duty [S. 353 IPC], Obstructing a public servant from discharging his public functions [S.186 IPC] and causing

disappearance of evidence of offence [S.201 IPC]. Section 353 IPC is a cognizable, bailable offence triable by a Magistrate as per first Schedule of the Cr.P.C. Just because it was committed inside the prison, we cannot say that the Magistrate has no power to take cognizance of the offence under Section 190 Cr.P.C and deal with the offender. Neither Section 52 nor Rule 301 can take away the power of the Magistrate under Section 190 Cr.P.C to take cognizance of an offence and deal with the accused in accordance with law. What Rule 301 says is, if a particular act constitutes both a prison offence and an offence under IPC, then a discretion is given to the Superintendent, either to inflict penalty under Rule 302 or refer the case to the Magistrate. Here also the "Doctrine of Election" comes and if he decides to elect one course, he would be precluded from adopting the other course. With due respect to the learned single Judge, we hold that the law laid down in *S.Nalini Vs State of Tamil Nadu* [cited supra] is not correct law and the prosecution could not have been quashed. Ouster of the ordinary jurisdiction of the criminal Court should not be easily inferred as held by the Supreme Court in *State of Madhya Pradesh and others Vs. Rameshwar Rathod*, .

12. In *State of Haryana Vs Ghaseeta Ram* [cited supra], attempt to escape from the jail after assaulting the Jailer occurred on 16.09.1984. The Jail Superintendent imposed the punishment of forfeiture of remission and permanently removed him from the system of earning remissions on 17.09.1984. The trial Court convicted and sentenced the prisoner for the offences under Sections 307/ 149 IPC, 342/ 149 IPC, 332/ 149 IPC, 148 and 224 IPC on 22.02.1986. The Hon"ble Supreme Court did not quash the conviction and sentence on the ground of double jeopardy, but had only quashed the order of the Superintendent though it was in prior in point of time, on the basis of double jeopardy.

13. It was submitted that under Rule 300 of the Tamil Nadu Prison Rules, the Superintendent can refer cases to Magistrate for enquiry only in respect of the offences enumerated in Sub Rules 1 to 4 of Rule 300 [which we have extracted above] and not anything outside of it.

14. We are unable to give such a construction to Rule 300, for that will negate the very power of the Police to conduct an investigation under Chapter XII of the Code and also the power of the criminal Court to take cognizance of an offence under Section 190 Cr.P.C. On a careful reading of Rule 300, it imposes a statutory duty on the Superintendent of Jail to refer certain class of cases enumerated therein compulsorily to the jurisdictional Magistrate for enquiry under the Code. This is because, the Superintendent of Jail and the local Police may work in tandem and conspire to cover up cases of such nature that occurs inside the jail. If a duty is cast upon the Superintendent to inform the Magistrate, the Magistrate can either order an investigation under Section 156(3) Cr.P.C. or even take cognizance under Section 190 Cr.P.C. This does not and cannot prevent the Superintendent from informing the local police for registering a FIR and

proceeding with the investigation under Chapter XII of the Code. If the Magistrate comes to know that the case referred to him by the Superintendent is also being investigated by the local police, then he will not pass an order for investigation under Section 156(3) Cr.P.C and he would wait for the outcome of the police investigation under Section 210 Cr.P.C. This in our opinion can be the objective behind Rule 300 of the Prison Rules.

15. To say that the Superintendent does not have the power to lodge a FIR in respect of offences not enumerated in Rule 300 (1) to (4) that took place inside the prison, would lead to absurd results. For example, in the Book of "Crime in India", S.M.Edwardes Printwell Publication authored in 1924, an interesting case is reported:

"A remarkable case of false coining occurred in Nagpur. The official staff of the Central Jail suddenly became aware that one of their prisoners was gaily counterfeiting four-anna and two-anna pieces inside the jail. He was promptly prosecuted and was sentenced to a term of rigorous imprisonment; but on appeal the Sessions Judge quashed the conviction, as he found it impossible to believe that the prisoner could have counterfeited coin in the presence of so many prisoners and under the nose of the jail staff. Against the acquittal of the prisoner by the Sessions Judge the Local Government made a further appeal, which resulted in the original finding and sentence being restored. One can hardly imagine the possibility of a long-term convict in, say, Maidstone Jail calmly counterfeiting sixpenny and three penny bits, and it seems possible that jail supervision and discipline in India are sometimes of a more *dolce far niente* type than is usual in England. If the average Indian peasant and small trader were less gullible and more alert, a good deal of false coining and note-forgery would automatically cease."

If a prisoner in India counterfeits Srilankan coin, he will have to be prosecuted under Section 231 I.P.C., which is a cognizable and non bailable offence triable by Magistrate of I Class. Can the Superintendent merely impose upon him a penalty under Rule 302 of the Prison Rules and not inform the Police? If a conspiracy to commit theft is worked out by prisoners with the help of their accomplices outside the prison, can the Superintendent of Prison sweep it under the carpet by merely inflicting a nominal penalty under Rule 302 of the Prison Rules and not inform the police? Definitely not. The law is not intended to lead to absurd results. In this case, the prisoner is alleged to be in possession of Ganja which is a cognizable offence under the NDPS Act, for which the law should have to take its own course and neither Rule 301 of the Tamil Nadu Prison Rules nor Section 52 of the Prisons Act would come to the rescue of the prisoner.

In the result, the Habeas Corpus Petition is dismissed. Consequently, connected miscellaneous petition is closed.