

(2009) 07 KAR CK 0117
In the Karnataka High Court
Case No : Criminal Appeal No. 1719 of 2008

K.K. Rejji, Mathew and John Thundattil	APPELLANT
Vs	
State of Karnataka	RESPONDENT

Date of Decision : 20-07-2009

Acts Referred:

Narcotics Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20 (b) (i)
Penal Code, 1860 (IPC) — Section 144, 149, 427, 447

Citation : (2011) 1 Crimes 508 : (2010) 5 KarLJ 279

Hon'ble Judges : Jawad Rahim, J

Bench : Single Bench

Advocate : K.M. Shiralli, for the Appellant; P.H. Gotkhindi, HCGP, for the Respondent

Final Decision : Allowed

Judgement

Jawad Rahim, J.—Convicted accused is in appeal against the judgment dated 6.11.2003 in Spl. Case No. 8/1998, on the file of learned District & Sessions Judge, Uttara Kannada, Karwar, convicting the Appellants for offence punishable under the provisions of Section 20 (b) (i) of the Narcotic Drugs and Psychotropic Substances Act NDPS Act and u/s 25 of Indian Arms Act as also u/s 147, 447, 427 r/w Section 149 of IPC.

2. Heard both sides.

3. The factual matrix of the prosecution case on the basis of which the Appellants were tried and ultimately found guilty are:

On 4.3.1997 at 1600 hours, the Forest officials inspected the land in Sy. No. 75 of Uttarakoppa village, Bhatkal taluk and found the accused 1 to 7 forming an unlawful assembly to trespass upon the said land for removal of 7 forest trees. They had in furtherance of their common object, cut and removed 7 trees from two plots of land measuring 15 guntas and 20 guntas respectively, without permission or sanction from the competent authority. The forest officials found

the Appellants had thereby committed theft of the forest produce and natural wealth of the State. When the officials further inspected the place they also detected cultivation of Ganja on the said land. When they tried to apprehend the Appellants, they tried to make good their escape but on further investigation, they found from the residence of the accused harvested Ganja weighing 10 Kgs in two bags. A mahazar was drawn seizing the said contraband and further investigation was taken up.

4. To initiate prosecution A.C.F., Bhatkal and RFO, Manki with their staff conducted raid at the place of offence and report was lodged at the jurisdictional police station. In the report, it was alleged that though there were 7 persons only Petitioners 1, 2 and 3 could be apprehended. The cut trees were seized and the Ganja plants cultivated on the land were destroyed. The complainant also recorded that on search he has found 800 ganja plants on two plots, which were removed and destroyed. As the seizure was also effected during the said raid, it was registered at the jurisdictional police and FIR in Crime No. 23/97 and on further investigation they seized from possession of the accused a S.B.P.L. Gun and that was also recorded in the mahazar.

Later RTC extracts were collected to ascertain ownership of the land. Being armed with the F.S.L. report that the forest produce seized from the possession of the accused was in fact Ganja, charge was laid for offence punishable u/s 20 (a) (b) of NDPS Act. The accused put up a defence of denial simplicitor but did not lead evidence in their defence.

5. To sustain the charge, prosecution examined 11 witnesses and relied upon 10 documents and produced 10 material objects.

6. The learned trial Judge considering the ocular testimony of Nagappa Chennayya Nail, Ganesh Shantaram Naik, Nagappa Ganapayya Gonda, John Pedru Fernandes and Manohar Nagu Netrekar, examined P Ws. 1 to 5, held that the charge was proved and convicted them. Against the said order, they are in this appeal.

7. The learned Counsel for Appellants seriously disputes seizure of alleged 10 Kgs of Ganja from the possession of Appellants. He also disputes that accused had grown ganja in the land bearing No. 75 or had cut forest produce. He submits that prosecution itself is vitiated as the provisions of NDPS Act are violated.

8. Per contra learned Government Pleader has supported the impugned judgment.

9. Keeping in mind what is urged by both sides, I have examined the LCR. But before we advert to the evidence to find out whether it inculcates Appellants for the charge leveled against them, certain legal aspects need to be noticed are:

- i. Which court had jurisdiction to try the offence charged?
- ii. What was the actual produce seized and what was its quantity?

iii. What constitutes Ganja ?

10. In the first instance, we have to go on the premise that prosecution charge against the accused is based on alleged seizure of ganja. Ganja is defined under the provision of NDPS Act as follows:

2 (iii) (b). ganja, that is, the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever name they may be known or designated."

From this definition it is clear that "Ganja" would mean only the flowering or fruiting tops excluding the leaves as also seeds.

In the instant case, the prosecution has produced seizure panchanama-Ex.P.5, to show what was seized. It reads as follows:

1)

2)

From the extracted portion it is seen what the officers have seized are cannabis plants. The description of seized product shows it had stems, leaves, branches and perhaps even the fruiting parts. But the question is can the stem, leaves, branches be termed as "Ganja" in view of definition referred to above. The answer is obviously in the negative, because the Act itself defines what is Ganja. Not only the raiding party but the Investigation Officer has not separated fruiting tops or flowering from the ganja plants before weighing. What has been done is they have weighed the entire plants to record the weight as 10 Kgs. Since the leaves, stem and branches were also part of the weight, (mass) there was no definite weight of actual flowering or fruiting part of the plant (defined as Ganja). Hence, the evidence produced before the prosecution to sustain the charge is totally vague. If the whole plant is seized, then it will only be a cannabis plant and not ganja.

11. Initially, the charge against the Appellant/accused was for the offence punishable u/s 20 (a) (b) of NDPS Act, but the trial Court found them guilty only for the offence punishable u/s 20 (b) (i) of the Act. There is no conviction for the offence u/s 20 (a) of the Act. Hence, it was incumbent upon the prosecution to establish it was Ganja as defined and its weight.

12. This makes difference because the punishment prescribed by Section 20 (b) of the Act depends on the quantity of the contraband seized. The Act prescribes three quantities- small quantity, lesser than commercial quantity but greater than small quantity and commercial quantity.

13. Under the Act, Central Government is empowered to notify what will be the small quantity, commercial quantity and what will be small quantity, lesser than commercial quantity but greater than small quantity and commercial quantity. The Central Government, in exercise of that power has issued notification by virtue of Section 2 of NDPS Act 1985 vide notification dated 16.7.1996. As per

the said Notification, Ganja is found at Sl. No. 55. It defines small quantity as 1000 Grams i.e. 1 Kg. And commercial quantity as 20 Kgs. In the instant case, whole plant was weighing 10 Kgs in the two gunny bags. If flowering or the fruiting part was to be removed, which is actually defined under the Act, the quantity would have been much less than the total weight of the product seized. Had the Investigation Officer done so, it would have been possible to decide whether it was a small quantity or commercial quantity or less than commercial quantity or more than small quantity. That has not been done.

Consequently, the very jurisdiction of the court is affected. This is because, if the offence relates to small quantity then it will become punishable with rigorous imprisonment upto period of six months as provided u/s 20 (b) (ii) (A) of the NDPS Act. If the quantity is more than small quantity but less than the commercial quantity it would be punishable with imprisonment for a term which may extend to ten years u/s 20 (b) (ii) (B) of the Act. Thus the quantum of punishment also varies. Section 20 reads thus:

Section 20 - Punishment for contravention in relation to cannabis plant and cannabis.- Whoever, in contravention of any provision of this Act or any rule of order made or condition of licence granted thereunder,-

(a) cultivates any cannabis plant; or

(b) produces, manufactures, possesses, sells, purchases, transports, imports shall be punishable,-

(i) where such contravention relates to Clause (a) with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine which may extend to one lakh rupees; and

(ii) where such contravention relates to Clause (b),-

(A) and involves small quantity, with rigorous imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both;

(B) and involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years, and with fine which may extend to one lakh rupees;

(C) and involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.]

Therefore, there is no compulsory term of imprisonment envisaged in respect of small quantity, but if offence relates to lesser than commercial quantity but

greater than small quantity punishment prescribed is rigorous imprisonment for a term which may extend to ten years and with fine which may extend to Rs. 1 lakh.

14. Depending upon the punishment that is prescribed, the jurisdiction of the court also varies. This is prescribed by provision of Section 36A of the Act, which reads thus:

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-(a) all offences under this Act which are punishable with imprisonment for a terms of more than three years shall be triable only by the Special Court constituted for the area in which the offence has been committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the Government

(emphasis supplied)

(b) where a person accused of or suspected of the commission of an offence under this Act is forwarded to a Magistrate under Sub-section (2) or Sub-section (2A) of Section 167 of the Code of Criminal Procedure, 1973, such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate:

Provided that in cases which are triable by the Special Court where such Magistrate considers-

(i) when such person is forwarded to him as aforesaid; or

(ii) upon or at any time before the expiry of the period of detention authorised by him;

that the detention of such person is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction;

(c) the Special Court may exercise, in relation to the person forwarded to it under Clause (b), the same power which a Magistrate having jurisdiction to try a case may exercise u/s 167 of the Code of Criminal Procedure, 1973, in relation to an accused person in such case who has been forwarded to him under that section;

(d) a Special Court may, upon perusal of police report of the facts constituting an offence under this Act or upon complaint made by an officer of the Central Government or a State Government authorised in his behalf, take cognizance of that offence without the accused being committed to it for trial.

(2) When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act with which the accused may, under the Code of Criminal Procedure, 1973, be charged at the same trial.

(3) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail u/s 439 of the Code of Criminal Procedure, 1973, and the High Court may exercise such powers including the power under Clause (b) of Sub-section (1) of that section as if the reference to "Magistrate" in that section included also a reference to a "Special Court" constituted u/s 36.

(4) In respect of persons accused of an offence punishable u/s 19 or Section 24 or Section 27-A or for offences involving commercial quantity the references in Sub-section (2) of Section 167 of the Code of Criminal Procedure, 1973 thereof to "ninety days", where they occur, shall be construed as reference to "one hundred and eighty days".

Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days.

(5) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the offences punishable under this Act with imprisonment for a term of not more than three years may be tried summarily.]

Thus, it is seen that a designated court gets jurisdiction to decide a case only if the punishment prescribed is more than 3 years. If the punishment prescribed is upto to six months, then the special court has no jurisdiction and the trial has to be by a Magistrate under the Code of Criminal Procedure. The non-abstante clause contained in Section 36A of the Act becomes applicable depending upon the punishment prescribed. In the instant case as the quantity itself is not specified, the designated court could not have embarked on the trial. The jurisdictional Magistrate ought to have tried the offence against the Petitioners.

15. It must be remembered that NDPS Act is a special enactment which is a self-contained constituent not only relating to investigation but preservation of contraband, its certification, its sampling and its production before the court. Provisions are mandatory in nature and non-compliance to such provisions renders conviction of the Appellant for offence punishable u/s 20 (b) (i) unsustainable.

16. As regards charge u/s 25 of the Arms Act is concerned, seizure of the said gun is effected subsequent to the raid. There is no allegation from any of the witnesses that Appellants had used such gun. Merely seizure of gun powder from their possession does not establish contravention of Section 25 of the Arms Act, unless established.

17. In the result, noticing contravention of mandatory provisions of the Act and for want of evidence about the actual quantity of ganja, conviction for offence punishable u/s 20 (b) (i) of NDPS Act also must fail.

18. I am satisfied the conviction recorded by the learned trial Judge can hardly

be sustained. Accordingly, Appellants are acquitted of all the charge levelled against them.

Criminal appeal is allowed.