

(2019) 02 OHC CK 0037

In the Orissa High Court

Case No : Criminal Appeal Nos. 234, 638 Of Of 2010

Madhab @ Madhaba Chandra Pradhan

APPELLANT

Vs

State Of Orissa

RESPONDENT

Date of Decision : 12-02-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 374(2)
Narcotic Drugs AND Psychotropic Substance Act, 1985 — Section 20(b), 20(b)(c),
20(ii)(c), 32A
Indian Penal Code, 1860 — Section 63, 64, 65, 66, 67, 68, 69, 70

Citation : (2019) 02 OHC CK 0037

Hon'ble Judges : Dr. A. K. Mishra, J

Bench : Single Bench

Advocate : G.Sahoo, M.K. Mallick, D.P. Pattnaik, A.Mohanty, P.K.Mohanty, P.K.Das, P.Swain, S.P. Mohanty, P.Nanda, S.N. Sahani, K. Pradhan, P.K.Mohanty, P.K.Das, J.Pradhan, P.Prusty, D.K.Pradhan

Final Decision : Partly Allowed

Judgement

Dr. A.K.Mishra, J

1. In view of the cessation of the Court work as per the resolution dated 08.02.2019 of the High Court Bar Association, neither the learned counsel for the appellant nor the learned counsel for the State is present in the Court.

Mrs. Urmila Pradhan, wife of appellant Madhab Ch. Pradhan (CRLA No.234 of 2010) is present in person.

Both appeals are taken up together for analogous hearing as per order dated 07.01.2019 passed in Criminal appeal no.234 of 2010. Judgment dated

06.05.2010 in 2(a)CC No.1 of 2008 by learned Sessions Judge-Cum-Judge, Special Court, Phulbani in convicting both the appellants under Section

20(b)(c) of Narcotic Drugs Psychotropic Substance Act (NDPS), 1985 and

sentencing each of the appellant to under to rigorous imprisonment for 10 years and to pay fine of Rs.1,00,000/- in default to undergo rigorous imprisonment for 1 year is assailed in these appeals preferred separately but heard analogously.

2. One Urmila Pradhan, wife of appellant Madhab Chandra Pradhan appears and submits that as her husband, accused Madhab Chandra Pradhan has

already undergone substantive sentence of 10 (Ten) years imprisonment and she is unable to pay the fine amount of Rs.1,00,000/- (Rupees one lakh)

due to poverty, the default sentence may be reduced. She further submits that the co-accused-appellant in CRLA No.638 of 2010, Kulamani

Mohapatra is also unable to pay the fine amount and her submission may be considered to save the starving children in disarray.

She further submits that one of her daughter at the marriageable age is not given marriage for the long incarceration of the father in the custody.

3. It appears from the record that on 03.09.2012, the argument was heard in extenso. On 07.01.2019 having heard learned counsel for both the

appellants, a report was called for from the learned Sessions Judge-cum-Judge, Special Court, Phulbani in the following manner:-

â?? Be that as it may, considering the aforesaid facts and submission made, the learned Sessions Judge-cum-Judge, special Court, Phulbai is directed to verify the matter and call for a report from the concerned Jail Authority and furnish a report in this regard to this Court and if it is found that the appellants have already

undergone the substantive sentence as well as the default sentence, they shall be released on bail forthwith without awaiting further order from this Court in this regard. Such report must reach this Court by 12th of February, 2019.

List both the matters on 12.02.2019.â??

3-(a). The report of District Judge vide letter dated 714 dated 31.01.2019 is received as follows :-

â??Convict Kulamani Mahapatra, aged about 23 years, son of Babaji Mahapatra of village Subarnapur, PS-Banki, District-Cuttack and Madhab Chandra Pradhan, aged about 38 years, son of Bhikari Pradhan of village Darudhipa, PS-Phategrah, District-Nayagarh were in jail custody since 24.12.2008 and their substantive

sentence of 10 (Ten) years have already been completed on 23.12.2008 and now they are suffering R.I. for 1 (one) year against default sentence for non-payment

of

fine of Rs.1,00,000/- (Rupees one lakh) each and the same will be completed on 23.12.2019.

I am to further submit that Superintendent, Special Jail, Bhubaneswar vide his office Memo No.602 dated 26.01.2019 and Superintendent, District jail, Puri vide his

office Memo No.359 dated 26.01. 2019 have informed that the convicts are not entitled to any remissions as per Section 32A of the NDPS Act.â??

As the matter is already heard and is only confined to the question of default sentence, I heard Mrs. Urmila Pradhan, present today in Court with copy

of Aadhaar Card and Voter Identity Card.

4. As per prosecution on 23.12.2008 at about 3:30P.M. near Sarangada Police Station a Tata Indica Car was detained by the Excise Officer. Both the

appellants were found therein and on search as per procedure the Excise Officer found 175Kg. 700Gms Ganja. Sample was collected and chemical

examination was done. After completion of investigation prosecution report was submitted against both the accused persons. In trial both of them took

a plea of denial but examined none. Prosecution examined five witnesses. P.W.3 was the Inspector of Excise, P.W.4, Rajanikanta Mallik was the

OIC, Sarangada P.S., P.W.5 was the owner of the seized car, P.W.1 was the Tahasildar-cum-Executive Magistrate, before whom the search and

seizure was made. P.W.2 was the witness to the search and seizure. Learned special court analyzing all the evidence in proper perspective held that

both the accused persons were in conscious possession of 175kg 700gms of Ganja and held them guilty of offence under section 20(b) of the NDPS

Act, 1985. The learned Lower Court sentenced both the appellants as stated above after hearing on the question of sentence where the plea of first

offender was advanced.

4-(a). From the conspectus of the facts stated and the contention urged, no infirmity is found in the order of conviction. The appeal is now confined to

the question of default sentence as both the appellants have already undergone substantive sentence of 10 years and have not paid the fine amount for

which they have already undergone default sentence 1 month 19 days till date.

5. When the appellant-accused persons have already undergone substantive period of 10 years and have not paid of Rs.1 lakh till now, it cannot be

said that their love of liberty is outweighed by love of money. Their inability to pay fine amount is glaring their incarceration. The grievance of the wife

of the appellant Madhab Chandra Pradhan about the poverty and inability to pay the fine amount tells its own tale.

6. Both the appellants, as record reveals, are not repeaters of crime and for the poverty, they are going to embrace imprisonment in lieu of taking refuge of money deposit.

6-(a). The imposition of default sentence for non-payment of fine for the offence under NDPS Act is no more res integra. The Honâ??ble Supreme

Court in the case of Shantilal vrs. State of Madhya Pradesh, (2007) 11 SCC 243 considered the imposition of imprisonment for default in making

payment of fine with response to various provisions of Indian Penal Code and Criminal Procedure Code, 1973. Relying upon the said decision, the

Honâ??ble Apex Court in the case of Shahejadjkhan Mahebubkhan Pathan vrs. State of Gujarat, reported in 2012 (10) SCALE 21, at para-12

observed as follows:-

â??12. it is clear and reiterated that the term of imprisonment in default of payment of fine is not a sentence. To put it clear, it is a penalty which a person incurs on

account of non-payment of fine. On the other hand, if sentence is imposed, undoubtedly, an offender must undergo unless it is modified or varied in part or whole in

the judicial proceedings. However, the imprisonment ordered in default of payment of fine stands on a different footing. When such default sentence is imposed, a

person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. Accordingly, he can always avoid

to undergo imprisonment in default of payment of fine by paying such an amount. In such circumstances, we are of the view that it is the duty of the Court to keep in

view the nature of offence, circumstances in which it was committed, the position of the offender and other relevant considerations such as pecuniary circumstances

of the accused person as to character and magnitude of the offence before ordering the offender to suffer imprisonment in default of payment of fine. The provisions

of Sections 63 to 70 of IPC make it clear that an amount of fine should not be harsh or excessive. We also reiterate that where a substantial term of imprisonment is

inflicted, an excessive fine should not be imposed except in exceptional cases.â??

In the decision reported in 2016 CRI. L. J. 1510 in the case of Mukesh Pradhan vrs. State of Orissa, his Lordship in the similar circumstances while

confirming the conviction, modified the sentence to the extent of default only.

7. Having carefully gone through the material on record and bestowing the thought over the submissions advanced, I do not find any reason for

interference with the finding of the learned court below. Accordingly, the convictions of both the appellant-accused persons are upheld. The sentence

is nothing but minimum prescribed by the statute under Section 20(ii)(c) of NDPS Act. The substantive sentence of 10 years and amount of fine are

hereby confirmed. But terms of default sentence i.e. rigorous imprisonment for one year is reduced to 2 (two) months.

In the result, both appeals are allowed in part.

The judgment of conviction dated 06.05.2010 in 2(a)CC No.1 of 2008 passed by learned Sessions Judge-cum-Judge, Special Court, Phulbani is

confirmed, the sentence imposed therein stands hereby modified to the extent that in default in making payment of Rs.1,00,000/-(Rupees one lakh),

the appellants shall undergo 2 (two) months rigorous imprisonment instead of 1 (one) year.

This order be communicated to the Superintendent, Special Jail, Bhubaneswar, District Jail Puri and all concerned immediately.

Send back the L.C.R.

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