

(2009) 09 DEL CK 0062
In the Delhi High Court
Case No : Criminal A. 303 of 2004

Mohd. Akbar Butt

APPELLANT

Vs

State (NCT of Delhi)

RESPONDENT

Date of Decision : 18-09-2009

Acts Referred:

Constitution of India, 1950 — Article 134A, 20(1), 21
Criminal Procedure (Amendment) Act, 1955 — Section 117
Criminal Procedure Code, 1973 (CrPC) — Section 30, 362, 482
Explosive Substances Act, 1908 — Section 4, 5, 6
Explosives Substance (Amendment) Act, 2001 — Section 1(2), 3
General Clauses Act, 1897 — Section 25
Penal Code, 1860 (IPC) — Section 53, 53(2), 53(3), 53A, 53A(3)

Citation : (2009) 165 DLT 1213 : (2010) 6 RCR(Criminal) 2491

Hon'ble Judges : P.K. Bhasin, J; Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : Kamini Jaiswal, Shomila Bakshi and Rani Mishra, for the Appellant;
Pawan Sharma and Rajat Katyal, for the Respondent

Judgement

Badar Durrez Ahmed, J.—The appellant (Mohd. Akbar Butt) had been accused with two others, for having committed offences under the Explosive Substances Act, 1908 (hereinafter referred to as "the said Act."). They were tried together in Sessions Case No.82/2000. The Additional Sessions Judge, by a judgment dated 03.06.2003, found the appellant to be guilty of having committed the offences under Sections 4, 5 and 6 of the said Act. The two co-accused were also found guilty, but only for the offence u/s 6 of the said Act. By an order of sentence dated 07.07.2003, the appellant and the co-accused were sentenced to undergo 10 years rigorous imprisonment alongwith a fine of Rs. 20,000/- and two years rigorous imprisonment in default thereof, for the offence u/s 6 of the said Act. Additionally, the appellant was also sentenced to undergo life imprisonment and to pay a fine of Rs. 25,000/- and three years rigorous imprisonment in default thereof, in respect of the offences under Sections 4 and 5 of the said Act. The three convicts filed two appeals. One appeal was filed by the present appellant

(CRL.A. 303/2004). The other appeal was filed by the co-convicts being CRLA 552/2003. By a common judgment dated 05.09.2006, a Division Bench of this Court allowed CRL.A. No.552/2003 filed by the co-convicts and they were acquitted of the charge u/s 6 of the said Act and were directed to be released from jail forthwith. Insofar as the present appellant is concerned, his appeal (CRL.A. 303/2004) was partly allowed inasmuch as the conviction and sentence u/s 6 of the said Act was set aside. However, the conviction and punishment imposed on him u/s 4 read with Section 5 of the said Act were confirmed. In other words, the appellant (Mohd Akbar Butt) was sentenced to undergo imprisonment for life as well as to pay a fine of Rs. 25,000/- and, in default thereof, to undergo three years rigorous imprisonment for his conviction u/s 4 read with Section 5 of the said Act.

2. After the said judgment dated 05.09.2006 was delivered, the appellant filed an application (CRL. M. No. 2026/2007) u/s 482 of the Code of Criminal Procedure, 1973 read with Articles 20(1) and 21 of the Constitution of India and Sections 4 and 5 of the said Act for recall of the judgment dated 05.09.2006. It was contended on behalf of the appellant (applicant) that, at the time when the offence was committed, the sentence provided under the provisions of Section 4 of the said Act was "transportation for a term which may extend to twenty years, to which fine may be added, or with imprisonment for a term which may extend to seven years, to which fine may be added". The sentence provided u/s 5 was "transportation for a term which may extend to 14 years, to which fine may be added, or with imprisonment for a term which may extend to five years, to which fine may be added". It was contended on behalf of the appellant that by virtue of the amendment to the Indian Penal Code in 1956 and by introduction of Section 53-A therein, wherever the expression "transportation for a term" was used, the same was deemed to be omitted. Consequently, it was contended that the only punishment u/s 4 of the said Act could be imprisonment for a term which may extend to seven years, to which fine may be added. Similarly, in respect of Section 5, it was contended that the maximum punishment would be imprisonment for a term which may extend to five years, to which fine may be added. It was, therefore, contended that the sentence of life imprisonment for the offence under Sections 4 and 5 of the said Act were clearly beyond the powers of the court. It is on this basis that the said application (CRL.M. No. 2026/2007) u/s 482 of the Code of Criminal Procedure, 1973 had been filed seeking recall of the judgment dated 05.09.2006. The Division Bench, hearing the said application, felt constrained in exercising powers u/s 482, CrPC and observed:

We find that the Supreme Court, while squarely dealing with this aspect, has held that the High Court cannot unshackle the bar u/s 362 of the Code of Criminal Procedure by resort to Section 482 of Code of Criminal Procedure. Although, it appears to us prima facie that there is substance in what learned Counsel for the appellant has argued and that the same may require serious consideration, yet we find ourselves not armed with the power to undo what we have already done.

In order to ensure that injustice is not perpetuated, we feel it would be proper and in the interest of justice if while rejecting the application of the appellant, we grant him leave to appeal under Article 134-A of the Constitution of India since the question raised herein may have wider ramification as also the rights of the appellant may be infringed by our judgment. Leave to appeal is granted accordingly.

With the above observations, the application is dismissed.

3. Thereafter, the matter travelled to the Supreme Court in CRL. A. No.815/2007. The said appeal was disposed of by the Supreme Court by its order dated 19.05.2009. The Supreme Court observed as under:

It is an admitted position before us that the date of offence in the present case was 30.08.1999. After trial in the said case, the trial court convicted the appellant herein on 03.05.2003 and the High Court affirmed the order of conviction and sentenced him by order dated 05.09.2006. It is not disputed that when the appeal was heard before the High Court the aforesaid issue which is sought to be raised herein was not raised and the same was subsequently raised before the High Court by filing an application u/s 482 of the Code of Criminal Procedure, 1973. The High Court, however, declined to go into the issue on the ground that the High Court does not possess any power to review a judgment passed on the criminal side. Therefore, the said issue which is sought to be raised before us was not argued before the High Court. The issue raised is undoubtedly a vital and important legal issue and goes to the root of the matter which is connected with the power of sentencing of the court in respect of the offences under the Act.

Learned Counsel for the respondent-State, on the other hand, has submitted that the contention of the counsel for the appellant, which is sought to be raised now, is without merit once the provisions of Sections 53-A and 57, IPC are looked into and considered.

Be that as it may, the issue in our opinion is an important and vital one and is also connected with the power of sentencing. Therefore, we consider it appropriate that the High Court should consider the submissions of the rival parties in respect of the aforesaid issue and pass a judgment afresh only on this issue in accordance with law.

Therefore, while maintaining the order of conviction, we set aside the order of sentence passed by the High Court and remit the matter back to the High Court to pass a fresh order of sentence after hearing the counsel for the parties as expeditiously as possible preferably within a period of four months from the date of receipt of this order. At this stage, counsel for the appellant states that the appellant may be given the liberty to move the High Court for releasing the appellant on bail. We, however, express no opinion on the matter leaving it open to the High Court to deal with the matter in accordance with law.

Accordingly, the appeal is disposed of.

4. We have heard the counsel for the parties on the question of sentence as directed by the Supreme Court.

5. The learned Counsel for the appellant relied on the following decisions:

1) Javed Ahmed Munshi Vs. The State,

2) Abdul Gafoor v. State of Delhi and Anr. 2007 (III) AD (Delhi) 305; and

3) Latif Mohammad Butt @ Bilal Ashraf Vs. State (NCT of Delhi),

6. The learned Counsel for the respondent/State contended that Section 53-A IPC did not altogether abolish the sentences for transportation for shorter term but merely converted them to imprisonment instead of transportation.

7. As noted in the Supreme Court's order dated 19.05.2009, the date on which the offence was committed in the present case was 30.08.1999. This means that the unamended provisions of the Explosive Substances Act, 1908, as applicable on 30.08.1999, would be relevant. The Explosive Substances (Amendment) Act, 2001 came into operation on 01.02.2002. This is apparent from Section 1(2) of the Explosive Substances (Amendment) Act, 2001 read with the Ministry of Home Affairs' Notification No.S.O.131 (E), dated 31.01.2002 published in the Gazette of India, Extraordinary, Part II, Section 3(ii) dated 31.01.2002. By virtue of the said notification, the Central Government appointed the 1st day of February, 2002 as the date on which the Explosive Substances (Amendment) Act, 2001 came into force. It is only under the Explosive Substances Act, 1908, as amended by the Explosive Substances (Amendment) Act, 2001 that the punishment for the offence u/s 4 thereof has been stipulated as, inter alia, imprisonment for life. In the present case, we have already mentioned that the appellant, after having been found guilty of having committed the offences under Sections 4 and 5 of the said Act was sentenced to imprisonment for life along with a fine of Rs. 25,000/- and three years rigorous imprisonment in default thereof. Since the 2001 amendment was to operate prospectively and, more particularly in view of the provisions of Article 20(1) of the Constitution of India, whereunder it is stipulated that no person shall 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 as also held in State Through CBI, Delhi Vs. Gian Singh, it is clear that the sentence of imprisonment for life could not have been given to the appellant. This is so because Sections 4 and 5 of the said Act prior to its amendment in 2001 did not provide for any sentence of imprisonment for life. The provisions of Sections 4 and 5, as applicable on the date of commission of the offence, i.e., on 30.08.1999 read as under:

4. Punishment for attempt to cause explosion, or for making or keeping explosive with intent to endanger life or property.-Any person who unlawfully and maliciously-

(a) does any act with intent to cause by an explosive substance, or conspires to cause by an explosive substance, an explosion in India of a nature likely to endanger life or to cause serious injury to property; or

(b) makes or has in his possession or under his control any explosive substance with intent by means thereof to endanger life, or cause serious injury to property in India, or to enable any other person by means thereof to endanger life or cause serious injury to property in India;

shall, whether any explosion does or does not take place and whether any injury to person or property has been actually caused or not, be punished with transportation for a term which may extend to twenty years, to which fine may be added, or with imprisonment for a term which may extend to seven years, to which fine may be added.

5. Punishment for making or possessing explosives under suspicious circumstances. - Any person who makes or knowingly has in his possession or under his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object, shall, unless he can show that he made it or had it in his possession or under his control for a lawful object, be punishable with transportation for a term which may extend to fourteen years, to which fine may be added, or with imprisonment for a term which may extend to five years, to which fine may be added.

8. The question that has to be determined is what punishment could have been given to the appellant under the unamended provisions of Sections 4 and 5 of the said Act. Section 4 of the said Act, as applicable on the date of commission of the offence, provided for two kinds of punishments. The first was that a person convicted u/s 4 could be punished with "transportation for a term" which may extend to twenty years and the second was where such person could be sentenced to "imprisonment for a term" which may extend to seven years. Of course, a fine could be added to either of the sentences. Similarly, u/s 5, a person convicted thereunder could be punished with "transportation for a term" which may extend to fourteen years or with "imprisonment for a term" which may extend to five years. Again, fine could be added to either of the two sentences. Thus, under both the provisions, there are two alternative punishments apart from the question of fine. The first alternative is "transportation for a term" and the second alternative is "imprisonment for a term".

9. By virtue of the Code of Criminal Procedure (Amendment) Act, 1955, certain amendments were carried out in the Indian Penal Code. The same were carried out in terms of Section 117 of the Code of Criminal Procedure (Amendment) Act, 1955 read with the Schedule thereto. The relevant provisions read as under:

117. Amendment of Act XLV of 1860. Act X of 1873 and Act IX of 1908.- The Indian Penal Code (Act XLV of 1860), the Indian Oaths Act, 1873 (X of 1873) and

the Indian Limitation Act, 1908 (IX of 1908) shall be amended in the manner specified in the Schedule.

THE SCHEDULE

(See Section 117)

A. Amendments to the Indian Penal Code (Act XLV of 1860)

1. xxxxx xxxxx xxxxx xxxxx xxxxx

2. After Section 53, the following section shall be inserted, namely:

53A. Construction of reference to transportation:

(1) Subject to the provisions of Sub-section (2) and Sub-section (3), any reference to "transportation for life" in any other law for the time being in force or in any instrument or order having effect by virtue of any such law or any enactment repealed shall be construed as a reference to "imprisonment for life".

(2) In every case in which a sentence of transportation for a term has been passed before the commencement of the Code of Criminal Procedure (Amendment) Act, 1954, the offender shall be dealt with in the same manner as if sentenced to rigorous imprisonment for the same term.

(3) Any reference to transportation for a term or to transportation for any shorter term (by whatever name called in any other law for the time being in force) shall be deemed to have been omitted.

(4) Any reference to "transportation" in any other law for the time being in force shall, -

(a) if the expression means transportation for life, be construed as a reference to imprisonment for life;

(b) if the expression means transportation for any shorter term, be deemed to have been omitted.

xxxx xxxx xxxx xxxx xxxx

10. Section 53-A(3) IPC makes it clear that any reference to "transportation for a term" or to "transportation for any shorter term" (by whatever name called in any other law for the time being in force) shall be deemed to have been omitted. This means that in any other Act where there is a reference to a punishment entailing "transportation for a term", the same shall be deemed to have been omitted. This is further clarified in Section 53-A(4) IPC which prescribes that any reference to "transportation" in any other law for the time being in force shall, if the expression means transportation for any shorter term, be deemed to have been omitted. Of course, the expression "transportation", if it meant transportation for life, was to be construed as a reference to "imprisonment for life". The above two Sub-sections of Section 53-A IPC make it clear that it is only

transportation for life, which has to be construed as imprisonment for life and any other sentence requiring transportation for a term or any shorter term (in comparison with transportation for life) shall be deemed to have been omitted.

11. By virtue of the introduction of Section 53-A IPC, the expression "be punished with transportation for a term which may extend to twenty years" appearing in Section 4 would be deemed to have been omitted and the punishment prescribed u/s 4 would be limited to imprisonment for a term which may extend to seven years, to which fine may be added. Similarly, Section 5 would have to be read as prescribing a punishment of imprisonment for a term which may extend to five years, to which fine may be added.

12. The Supreme Court order dated 19.05.2009 records the plea of the counsel for the State that the provisions of Section 57 IPC also need to be considered. It is for this reason that we have examined the same. Section 57 IPC reads as under:

57. Fractions of terms of punishment.-In calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years.

13. Prior to its amendment by virtue of Section 117 of the Code of Criminal Procedure (Amendment) Act, 1955, read with the Schedule thereto, the terms "imprisonment for life" and "imprisonment for twenty years" read as "transportation for life" and "transportation for twenty years". Section 57 is for the purposes of working out the term of imprisonment where punishment is prescribed as a fraction of the maximum fixed for the principal offence. For example, u/s 65 IPC, the term for which the court directs the offender to be imprisoned in default of payment of a fine is stipulated not to exceed one-fourth of the term of the imprisonment, which is the maximum fixed for the offence, if the offence is punishable with imprisonment as well as fine. Thus, in the case of life imprisonment, for calculating one-fourth of the term, a fiction has been created u/s 57 IPC for treating a life term as a term of twenty years. Prior to the amendment, instead of the word "imprisonment", the word "transportation" was used. Section 57 is essentially for the purposes of working out the fraction of the maximum sentence fixed for a principal offence (see: Ashok Kumar alias Golu Vs. Union of India and others, and Gopal Vinayak Godse Vs. The State of Maharashtra and Others, It is clear that there is nothing in Section 57 IPC which would come to the aid of the learned Counsel for the State. On the other hand, we find that since the maximum punishment u/s 4 of the said Act, as applicable on the date on which the offence was committed, was only seven years imprisonment, reading Section 65 IPC and Section 4 of the said Act, the maximum in-default punishment that could be awarded to the appellant could not exceed one-fourth of the term of seven years or in other words twenty one months. In the present case, the in-default punishment is of three years rigorous imprisonment, which is also beyond the term stipulated u/s 65 IPC read with Section 4 of the said Act. We are mindful of the fact that there is no provision in

the said Act for punishment in default of payment of fine. But, this does not mean that such a punishment cannot be imposed for offences under the said Act. General principles enshrined in Section 65 IPC and Section 30 CrPC read with Section 25 of the General Clauses Act, 1897 would apply, as was done in the case of a sentence under the Narcotic Drugs and Psychotropic Substances Act, 1985 by the Supreme Court in *Shanti Lal Vs. State of M.P.*, It is for this reason that we feel that the maximum in-default punishment in respect of an offence u/s 4 of the said Act would be 21 months.

14. This being the position, the appellant could not have been sentenced to imprisonment for a period in excess of seven years for the offence u/s 4 of the said Act or with imprisonment for a term in excess of five years in respect of the offence u/s 5. Consequently, the appellant's sentence u/s 4 read with Section 5 would have to be reduced to imprisonment for a term of seven years plus fine of Rs. 25,000/- and, in default thereof, twenty one months rigorous imprisonment. We are told by the counsel for the appellant that the appellant was arrested on 30.08.1999 and has been in jail since then. If that be the case, the appellant, having served out his principal sentence of seven years as well as the duration of the in-default sentence of twenty one months, is entitled to be released forthwith. It is ordered accordingly.