(2013) 04 DEL CK 0042

In the Delhi High Court

Case No : Criminal A. 926 of 2010

Mohd. Issa @ Raj — APPELLANT

Vs

State — RESPONDENT

Date of Decision : 09-04-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 100(4)
Explosive Substances Act, 1908 — Section 4, 5
Foreigners Act, 1946 — Section 14
Penal Code, 1860 (IPC) — Section 120B, 121, 121A, 122, 123

Citation : (2013) 4 AD 608

Hon'ble Judges : Mukta Gupta, J

Bench : Single Bench

Advocate : Ajay Verma, Mr. Shiv Kumar Dwivedi and Mr. Y. Bhattacharya, for the Appellant; Manoj Ohri, APP and SI Satish Rana, PS Spl. Cell, Lodhi Colony, for the Respondent

Judgement

Mukta Gupta, J.—The present appeal is directed against judgment dated 22nd October, 2009 convicting the Appellant for offences u/s 5 of the Explosive Substance Act, 1908 (in short the ES Act) read with Section 18 and 23 of the Unlawful Activities Prevention Act, 1957 (in short the UAP Act) besides Section 120B IPC. The Appellant has also challenged the order on sentence dated 26th October, 2009 whereby the following sentences have been awarded to the Appellant. (i) Rigorous imprisonment for a period of 5 years and to pay a fine of Rs. 10,000/- and in default to undergo rigorous imprisonment for a further period of 1 year u/s 5 ES Act. (ii) Rigorous Imprisonment for a period of 7 years u/s 18 of UAP Act and to pay a fine of Rs. 50,000/- and in default to undergo rigorous imprisonment for a period of 1 year. (iii) Rigorous imprisonment for a period of 7 years and to pay a fine of Rs. 50,000/- each and in default to undergo rigorous imprisonment for a further period of 1 year u/s 27 of the UAP Act. (iv) Rigorous imprisonment for a period of 4 years u/s 120B IPC. Early hearing of this appeal was allowed on 31st October, 2011. However, in view of the adjournments sought the matter could not be heard. Finally on 15th January, 2013 the production of the Appellant was directed and when he was produced it was revealed that he had undergone the substantive sentence on all the counts on 16th November, 2012 and thereafter he is undergoing sentence in lieu of fine which is 3 years R.I. on the three counts put together. On 21st February, 2013 learned counsel for the Appellant on instructions from the Appellant sought time to address arguments on the point that even in a case of enhanced penalty the quantum of fine and the sentence in default of payment of fine awarded by the learned Trial Court was on the higher side, unwarranted and liable to be set aside.

2. Learned counsel for the Appellant submits that the quantum of fine has not been defined in the special enactments i.e. ES Act and the UAP Act, however Section 63 IPC provides that the fine should not be excessive and as per Section 64 IPC the sentence in default of payment of fine should not exceed one-fourth of the maximum sentence that can be awarded. There is no previous involvement. The Appellant should not be prejudiced due to his poverty and for not being able to deposit the fine amount. Thus, the fine amount and the sentence in default of payment of fine be reduced.

3. Learned APP on the other hand contends that Section 23 of the UAP Act provides for enhanced penalty. It provides that if any person with intent to aid terrorist or a terrorist organization is in unauthorized possession of any bomb, dynamite or hazardous explosive substance etc., he shall notwithstanding anything under the rules made there-under, be punished with imprisonment for a term which shall not be less than 5 years but which may extend to imprisonment for life and shall also be liable to fine. In the present case the Appellant has been awarded 7 years rigorous imprisonment for being in possession of RDX and live detonators. In view thereof, no case for reduction of sentence much less any fine or sentence in default of fine is made out.

4. I have heard learned counsel for the parties. Before adverting to the fine and the sentence imposed in default of payment of fine, this Court is required to look into the evidence on record so as to assess whether a case of conviction is made out or not as the present is a first appeal against the judgment of conviction and order on sentence. Brief exposition of facts is that on 10th August, 2006 on the basis of a secret information that the Appellant along with his associate had boarded Sarvodaya Express train from Jammu and would arrive at New Delhi Railway Station with a huge consignment of explosives, raiding parties were constituted which reached the New Delhi Railway Station at about 8.45 PM. At around 9.45 PM the train arrived and two persons alighted from boggy No. S-8 who were identified by the secret informer. While the Appellant and his co-accused approached the TSR stand near Ajmeri Gate and were about to board a TSR at about 10 PM they were apprehended. From the Appellant one black colour briefcase with one red colour printed cardboard which was packed with the help of brown colour tap was recovered. On opening the box underneath the husk two electronic detonators were found concealed in white cotton wool. Further a black

polythene was also recovered containing four small cardboard boxes which has oil based explosive in the form of sticks. The oil based explosives in the form of sticks weighed about 900 grams from which a sample of 10 grams was drawn. The name of the co-convict of the Appellant was revealed as Asif Ali @ Anas @ Rizwan who was a Pakistani national who could not produce any travel document authorizing his presence in India. The co-convict was also carrying a black colour bag which also contained a red colour printed cardboard box packed with the help of brown tape. On opening the box, 3 electronic detonators were found beneath the white cotton wool and from a black polythene bag 5 small cardboard boxes containing sticks of oil based explosives were found which weighed 1100 grams. A sample of the oil based explosive was taken and the case properties and samples were seized and sealed. The Appellant and his co-convict were charged for offences under Sections 121/ 121A/ 122/ 123 IPC besides Section 4/ 5 of ES Act read with Section 120B IPC and 18/ 20/ 23 of the UAP Act. The co-convict of the Appellant was also charged for offence u/s 14 of the Foreigners Act also.

5. The main ground of attack in the appeal is on the presence of PW 4, the public witness. It is stated that the public witness was only joined at the time of alleged recovery and not before Appellants alighted from the train. This contention cannot be given much credence as Section 100(4) of the Cr.P.C. directs that independent witnesses are required to be associated during search. The moment the Appellants were apprehended and before taking search an independent witness present at the railway station, who runs water trolley was associated. PW 4 has also withstood the cross-examination.

6. The other plea taken is of false implication i.e. the Appellant was abducted and unlawfully detained with effect from 5th February, 2006 from outside New Delhi Railway Station. The Appellant was required to prove this plea by preponderance of probabilities. He has neither led any defence evidence nor has been able to elicit anything from the cross-examination of the prosecution witnesses that he was kept in illegal custody and a false case was foisted on him.

7. The testimony of PW 8 Shri N.B. Bardhan, Principal Scientific Officer, CFSL Lodhi Road, New Delhi with regard to his opinion confirming the presence of RDX based high explosive has remained unchallenged in cross-examination. Further this witness has also stated that the seals on the parcels were found intact and tallied with the specimen seal. Thus, the prosecution has been able to prove the link evidence as well.

8. Considering the evidence on record the learned Trial Court rightly acquitted the Appellant and his co-convict for offences u/s 121/ 121A/ 122/ 123/ 120B IPC as there was no evidence led by the prosecution to prove that the Appellant with co-convict was engaging in any act of waging war against the Government of India. Since the Appellant was found in possession of live detonators and oil based explosive which was RDX, the learned Trial Court rightly convicted the Appellant for offences under Sections 18 and 23 of the UAP Act and Section 5 of

the ES Act besides Section 120B IPC.

9. This brings me to the question of excessive fine amount and sentence in default of payment of fine. The Hon''ble Supreme Court while dealing with the default sentence in Shahejadkhan Mahebubkhan Pathan Vs. State of Gujarat, held:

10. Coming to the next claim of the appellants i.e. default sentence, the trial Judge, taking note of various aspects including the fact that the appellants were carrying commercial quantity of brown sugar from the State of Madhya Pradesh to the State of Gujarat for doing business, imposed a fine of Rs. 1.5 lakh each, in default, ordered to undergo RI for 3 years.

11. According to the learned counsel for the appellants, the default sentence i.e. 3 years is very harsh and the Additional Sessions Judge ought not to have imposed such sentence for non-payment of fine amount. In view of the same, he relied on a decision of this Court in Shanti Lal Vs. State of M.P., wherein this Court considered the imprisonment in default of payment of fine with reference to various provisions of IPC and the Code of Criminal Procedure, 1973 (in short "the Code") and held as under: (SCC pp. 255-60, paras 31-38)

31. ... The term of imprisonment in default of payment of fine is not a sentence. It is a penalty which a person incurs on account of non-payment of fine. The sentence is something which an offender must undergo unless it is set aside or remitted in part or in whole either in appeal or in revision or in other appropriate judicial proceedings or ''otherwise''. A term of imprisonment ordered in default of payment of fine stands on a different footing. A person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. He, therefore, can always avoid to undergo imprisonment in default of payment of fine by paying such amount. It is, therefore, not only the power, but the duty of the court to keep in view the nature of offence, circumstances under which it was committed, the position of the offender and other relevant considerations before ordering the offender to suffer imprisonment in default of payment of fine.

32. A general principle of law reflected in Sections 63 to 70 IPC is that an amount of fine should not be harsh or excessive. The makers of IPC were conscious of this problem. The authors of the Code, therefore, observed:

Death, imprisonment, transportation, banishment, solitude, compelled labour, are not, indeed, equally disagreeable to all men. But they are so disagreeable to all men that the legislature, in assigning these punishments to offences, may safely neglect the differences produced by temper and situation. With fine, the case is different. In imposing a fine, it is always necessary to have as much regard to the pecuniary circumstances of the offender as to the character and magnitude of the offence.'' (Ratanlal & Dhirajlal''s Law of Crimes, 26th Edn., 2007, p.221)

The authors further stated: (Ratanlal & Dhirajlal at pp. 226-27)

... When a fine has been imposed, what measures shall be adopted in default of payment? And here two modes of proceeding, with both of which we were familiar, naturally occurred to us. The offender may be imprisoned till the fine is paid, or he may be imprisoned for a certain term, such imprisonment being considered as standing in place of the fine. In the former case, the imprisonment is used in order to compel him to part with his money; in the latter case, the imprisonment is a punishment substituted for another punishment. Both modes of proceeding appear to us to be open to strong objections. To keep an offender in imprisonment till his fine is paid is, if the fine be beyond his means, to keep him in imprisonment all his life; and it is impossible for the best Judge to be certain that he may not sometimes impose a fine which shall be beyond the means of an offender. ... On the other hand, to sentence an offender to fine and to a certain fixed term of imprisonment in default of payment, and then to leave it to himself to determine whether he will part with his money or lie in gaol, appears to us to be a very objectionable course. ....

... We propose that, at the time of imposing a fine, the court shall also fix a certain term of imprisonment which the offender shall undergo in default of payment. In fixing this term, the court will in no case be suffered to exceed a certain maximum, which will vary according to the nature of the offence. If the offence be one which is punishable with imprisonment as well as fine, the term of imprisonment in default of payment will not exceed one-fourth of the longest term of imprisonment fixed by the Code for the offence. If the offence be one which by the Code is punishable only with fine, the term of imprisonment for default of payment will in no case exceed seven days.

33. The issue also came up for consideration in some cases. In Emperor Vs. Mendi Ali,], M was charged with an offence of murder of his wife. The Sessions Court, however, convicted him for an offence punishable u/s 304 Part I IPC since M had committed the offence of killing his wife in grave and sudden provocation as he saw her (his wife) ''with his own eyes committing adultery with N''. M was thus altogether deprived of the power of self-control. But the Sessions Judge not only imposed the maximum imprisonment of ten years u/s 304 Part I but he also imposed a fine of Rs. 100 or to undergo rigorous imprisonment for one year.

34. In a suo motu revision, the High Court observed that the Sessions Judge had awarded maximum term of sentence on M for the offence for which he was found guilty ''and added to it a fine (which there could surely have been little prospect of his paying). The result was that he was, in effect, sentenced to eleven years'' rigorous imprisonment.

35. Considering the facts, Braund, J. stated: Emperor Vs. Mendi Ali,

So far as the fine is concerned, I cannot think it is proper, in the case of a poor peasant, to add to a very long term of substantive imprisonment a fine which there is no reasonable prospect of the accused man paying and for default in paying which he will have to undergo a yet further term of imprisonment. And, in my judgment, without venturing to say whether it is a course which is strictly in accordance with the law or not, I cannot help thinking that it becomes all the more undesirable to impose such a fine where the term of imprisonment to be undergone in default will bring the aggregate sentence of imprisonment to more than the maximum term of imprisonment sanctioned by the particular section under which he is convicted. I venture to think that Judges should exercise a careful discretion in the matter of superimposing fines upon long substantive terms of imprisonment.

(emphasis supplied)

36. We may as well refer to a decision of this Court in Palaniappa Gounder Vs. State of Tamil Nadu and Others, In that case, P was convicted by the Principal Sessions Judge, Salem and was sentenced to death. The High Court of Madras upheld the conviction but reduced the sentence from death to imprisonment for life. But while reducing the sentence, the Court imposed a fine of Rs. 20,000 on P. Leave was granted by this Court limited to the question of the propriety of fine.

37. The Court considered the provisions of IPC as also Cr PC and observed that courts have power to impose a sentence of fine and if fine is imposed on an offender, it cannot be challenged as contrary to law.

38. Speaking for the Court, Chandrachud, J. (as His Lordship then was) said: Palaniappa Gounder Vs. State of Tamil Nadu and Others, SCC pp. 638-39, para 9)

9. But legitimacy is not to be confused with propriety and the fact that the court possesses a certain power does not mean that it must always exercise it. Though, therefore, the High Court had the power to impose on the appellant a sentence of fine along with the sentence of life imprisonment the question still arises whether a sentence of fine of Rs. 20,000 is justified in the circumstances of the case. Economic offences are generally visited with heavy fines because an offender who has enriched himself unconscionably or unjustifiably by violating economic laws can be assumed legitimately to possess the means to pay that fine. He must disgorge his ill-gotten wealth. But quite different considerations would, in the generality of cases, apply to matters of the present kind. Though there is power to combine a sentence of death with a sentence of fine that power is sparingly exercised because the sentence of death is an extreme penalty to impose and adding to that grave penalty a sentence of fine is hardly calculated to serve any social purpose. In fact, the common trend of sentencing is that even a sentence of life imprisonment is seldom combined with a heavy sentence of fine. We cannot, of course, go so far as to express approval of the unqualified view taken in some of the cases that a sentence of fine for an offence of murder is wholly "inapposite" (see, for example, State Vs. Pandurang Tatyasaheb Shinde, AIR at p.714), but before imposing the sentence of fine, particularly a heavy fine, along with the sentence of death or life imprisonment, one must pause to consider whether the sentence of fine is at all called for and if so, what is a proper or adequate fine to impose in the circumstances of the case. As observed

by this Court in Adamji Umar Dalal Vs. The State of Bombay, , determination of the right measure of punishment is often a point of great difficulty and no hard-and-fast rule can be laid down, it being a matter of discretion which is to be guided by a variety of considerations but the Court must always bear in mind the necessity of maintaining a proportion between the offence and the penalty proposed for it. Speaking for the Court, Mahajan, J. observed in that case that: (AIR p.16, para 5)

5. ... In imposing a fine it is necessary to have as much regard to the pecuniary circumstances of the accused persons as to the character and magnitude of the offence, and where a substantial term of imprisonment is inflicted, an excessive fine should not accompany it except in exceptional cases.

Though that case related to an economic offence, this Court reduced the sentence of fine from Rs. 42,300 to Rs. 4000 on the ground that due regard was not paid by the lower court to the principles governing the imposition of a sentence of fine.

(emphasis in original)

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 circumstance, 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 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.

10. In Adamji Umar Dalal Vs. The State of Bombay, it was held:

8. The determination of the right measure of punishment is often a point of great difficulty and no hard and fast rule can be laid down, it being a matter of discretion which is to be guided by a variety of considerations, but the courts has always to bear in mind the necessity of proportion between an offence and the penalty. In imposing a fine it is necessary to have as much regard to the pecuniary circumstances of the accused persons to the character and magnitude of the offence, and where a substantial term of imprisonment is inflicted, an

excessive fine should not accompany it except in exceptional cases. It seems to us that due regard has not been paid to these consideration in these cases and the zeal to crush the evil of black marketing and free the common man from this plague has perturbed the judicial mind in the determination of the measure of punishment.

9. The appellant was acting in these transactions on behalf of the first accused and other principals in the capacity of a member of a commission agency firm. It was asserted before us that its commission in this deal was half per cent on sale price. There is no evidence on the record about the accused''s pecuniary condition. His learned counsel emphatically asserted at the Bar that it was impossible for him to pay even a fraction of this heavy fine. The profit made on the sale of oil in the black market would in the ordinary course of business dealings go to the principals but its extent is not known nor found on the record. The first accused who was to profit by getting kerosene oil by this device has been acquitted and is not before us. The other persons on whose behalf the oil was purchased were not brought to trial. In these circumstances there is no material on the record justifying the imposition of such heavy fines on the appellant and these seem to us to be quite disproportionate to the offences.

10. It is no doubt true that the offence of black marketing is very generally prevalent in this country at the present moment and when it is brought home against a person, no leniency in the matter of sentence should be shown and a certain amount of severity may be very appropriate and even called for. In our opinion, however, when quite a substantial sentence of imprisonment was awarded to the appellant, a person belonging to the commission agency class, imposition of unduly heavy fines which may have been justified to some extent in the case of the principals, was not called for in his case. It is not the practice of this court to interfere by special leave in the matter of punishment imposed for crimes committed, except in exceptional cases where the sentences are unduly harsh and do not really advance the ends of justice.

11. In view of the legal position laid down it is evident that the Appellant is a first time offender. Though offences involved are very serious and heinous in nature, however he cannot be penalized for not being able to deposit the fine amount in view of his pecuniary condition. The Appellant has been directed to undergo rigorous imprisonment for a period of 1 year on all three counts i.e. in default of payment of fine of Rs. 10,000/-, 50,000/- and 50,000/-, thus making it a sentence of 3 years rigorous imprisonment in default of payment of fine of Rs. 1,10,000/-. The default sentence to my mind is excessive in nature in view of the legal position summarized above and it would be thus appropriate to modify the same. It is therefore directed that for offence u/s 5 of the ES Act, the Appellant will pay a fine of Rs. 10,000/- and in default of payment of fine will undergo imprisonment for a period of three months. As regards offences u/s 18 and 23 of the UAP Act, the Appellant will undergo rigorous imprisonment for six months on each count in default of payment of Rs. 50,000/- each. The order on sentence is

accordingly modified. Appeal is disposed of.

