
(2009) 02 GUJ CK 0081
In the Gujarat High Court
Case No : Criminal Appeal No. 1169 of 2003

Mohmadtaki Aga Mehndi

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 26-02-2009

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20(b), 22, 29

Citation : (2009) 02 GUJ CK 0081

Hon'ble Judges : Sharad D. Dave, J; J.R. Vora, J

Bench : Division Bench

Advocate : Hina Desai, for the Appellant; L.R. Pujari, APP, for the Respondent

Judgement

J.R. Vora, J.—The instant appeal is preferred by the appellant against the judgment and order rendered by the Special Judge (NDPS) at Nadiad on 10.2.2000 in Special Case (NDPS) No. 5 of 1998 whereby the present appellant being accused No. 1 came to be convicted by the trial Court for the offence punishable u/s 20(b) of the Narcotic Drugs and Psychotropic Substance Act, 1985 and was sentenced to undergo rigorous imprisonment of 10 years and to pay a fine of Rs. 1 lakh, in default, to undergo rigorous imprisonment of two years.

2. As per the brief facts of the prosecution case, PSI Indrasinh Mansinh Kumpavat of Khambhat City Police Station on 19.6.1998 was in patrolling and investigating other offences came to Daliba area and near the house of accused No. 1. On seeing the police, the present appellant and his wife accused No. 2 in the trial Raisabegum both tried to run away. The police party cordoned them both and from the personal search of the present appellant, one plastic bag of pink colour and one plastic bag of white colour were found from the pant pockets of the appellant. From bags, contraband substance was found and, therefore, panchas were called and the substance was weighed. The substance found from the appellant was 381 gms. Prima facie, it appears that substance was charas and it was confirmed by the Forensic Science Laboratory. The FIR came to be lodged against both the accused and in pursuance of the investigation, a

chargesheet came to be filed. The case was committed to the Special Judge who framed the charge against both the accused vide Exh.3 to which both the accused pleaded no guilty. The charge was framed under Sections 20(b), 22 and 29 of the NDPS Act, 1985 as amended by 1988 Act. The prosecution examined as many as 9 witnesses and produced on record voluminous documentary evidence. Incriminating circumstances were brought to the notice of both the accused and their defence was of total denial. After hearing the prosecution as well as defence, learned trial Judge was pleased to acquit accused No. 2 Raisabegum - wife of the appellant accused No. 1. Against that, no appeal has been preferred, while the appellant accused No. 1 preferred the present appeal.

3. Learned advocate Ms. Desai for the appellant does not press the appeal on merit and restricted her argument to the extent of reduction of sentence which is imposed by the trial Court in default of paying fine by the appellant. It is submitted that record of the appellant is clean. He is only bread winner of the family and he has already undergone substantive sentence of 10 years as imposed by the trial Court. It is submitted that, now at present, the appellant is undergoing default punishment on account of nonpayment of fine of Rs. 1 lakh and, therefore, it is requested that this appeal is restricted only to reduce the default imprisonment in lieu of fine as awarded by the trial Court to already undergone by the appellant.

4. As against that, learned APP Mr. Pujari contesting the contentions of learned advocate for the appellant stated that the appellant either should pay a fine or to undergo punishment of two years as awarded by the trial Court in lieu of nonpayment of fine. It is submitted that the case against the appellant is proved and the default punishment awarded by the trial Court is in accordance with the gravity of the offence.

5. We have heard both the parties in respect of reduction of sentence imposed upon the appellant in lieu of nonpayment of fine. What is available on record is jail remarks of the appellant. Accordingly, the appellant had already undergone imprisonment of 10 years, 8 months and 7 days. Therefore, it is clear that the appellant has already undergone substantive sentence of 10 years rigorous imprisonment as imposed by the trial Court. He is also fined for Rs. 1 lakh by the trial Court, in default, to undergo rigorous imprisonment of two years. Therefore, now at present, the appellant is undergoing default sentence of imprisonment in lieu of nonpayment of fine and he has already undergone till today 8 months and 7 days towards default punishment in lieu of nonpayment of fine. Thus, after substantive sentence is over, the appellant has already undergone imprisonment of 8 months and 7 days towards default punishment.

6. The date of conviction in this case is 10.2.2000 and this appeal came to be admitted on 31.3.2005 though was filed in 2003. Now, in view of the decision of the Apex Court in Basheer @ N.P. Basheer Vs. State of Kerala, and particularly, according to the observations made in para 23 and ratio as laid down by the Apex Court in the matter of State of Andhra Pradesh and Others Vs. Nallamilli

Rami Reddi and Others, , the appellant will be governed by punishing provisions of NDPS Act, 1985 as amended by 1988 Act and would not be covered by Amended Act of 2001. Accordingly, as per the provisions of Section 20(b)(ii) of NDPS Act, 1985 as amended in 1988, the appellant is liable for imprisonment for a term which shall not be less than 10 years, but which may extend to 20 years and shall also be liable to fine which shall not be less than Rs. 1 lakh and which may extend to Rs. 2 lakhs. Though it is also provided that the Court may for the reasons to be recorded in the judgment impose a fine exceeding Rs. 2 lakhs.

7. Now when the appellant has already undergone minimum punishment of 10 years as imposed by the trial Court and has already undergone imprisonment of 8 months and 7 days towards default sentence and imprisonment in lieu of nonpayment of fine of Rs. 1 lakh which is minimum as prescribed by the penal provision, in our humble view, what is urged in the appeal to reduce the sentence imposed by the trial Court towards the default sentence of imprisonment is required to be accepted. The trial Court imposed 2 years rigorous imprisonment in default of fine. In our opinion, when the appellant has undergone substantive sentence and also has undergone 8 months and 7 days imprisonment in lieu of nonpayment of fine, the purpose of justice would be served if the sentence in default of nonpayment of fine is reduced from two years rigorous imprisonment as imposed by the trial Court to the imprisonment of 8 months and 7 days and to this extent the appeal is partly allowed and hence, the following final order is passed.

8. The Appeal is partly allowed. We confirm the conviction of the appellant as imposed by the trial Court as well as we also confirm the sentence imposed by the trial Court to the appellant of rigorous imprisonment of 10 years and to pay a fine of Rs. 1 lakh and the appeal to that extent is dismissed. We modify and interfere with the quantum of sentence to the extent only that default sentence of rigorous imprisonment of two years imposed by the trial Court upon the appellant in lieu of nonpayment of fine of Rs. 1 lakh is reduced by us to already undergone by the appellant and that period comes to about 8 months and 7 days and the appeal is partly allowed to this extent only. In this view of the matter, it is directed that the appellant be set to liberty forthwith if he is not required to be detained in jail for any other purpose. The order of the trial Court in respect of muddamal etc. is not interfered with. Direct Service is permitted.