
(2015) 06 AHC CK 0014
In the Allahabad High Court
Case No : Criminal Appeal No. 333 of 2009

Ram Kisun and Others	Vs	APPELLANT
State of Uttar Pradesh		RESPONDENT

Date of Decision : 26-06-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 109, 110, 112, 114, 115
General Clauses Act, 1897 — Section 25
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 16, 18, 21, 21 (c), 21(c)
Penal Code, 1860 (IPC) — Section 40, 63, 64, 64, 65, 65

Citation : (2015) 3 ACR 2957 : (2015) 8 ADJ 497 : (2015) 90 ALLCC 594

Hon'ble Judges : Harsh Kumar, J

Bench : Single Bench

Advocate : R.K. Shahi, H.P. Singh and P.K. Yadav, for the Appellant

Final Decision : Partly Allowed

Judgement

Harsh Kumar, J—The appeal has been filed against judgment and order dated 4.12.2008 passed by Additional Sessions Judge/F.T.C. No. 2, Kushinagar at Padrauna deciding jointly the two Special Sessions Trial Nos. 13 of 2005 & 14 of 2005, arisen out of Case Crime Nos. 1043 of 2004 & 1044 of 2004, under sections 8/21 N.D.P.S. Act, P.S. Kotwali Padrauna, District Kushinagar, convicting the two accused Sallamuddin and Ram Kisun under sections 8/21 (c) N.D.P.S. Act and sentencing each of them with rigorous imprisonment for a period of 10 years and fine of Rs. 1,00,000/- and in case of default in payment of fine with simple imprisonment for additional period of two years. As per report of Jail Superintendent, District Jail, Siddharth Nagar as well as Jail Superintendent, District Jail, Deoria, the convict-appellant Ram Kisun has died in the year 2012 and so the appeal, jointly filed by two convicts stands abated in respect of appellant No. 1 Ram Kisun.

2. Heard learned Counsel for the surviving convict Sallamuddin, learned A.G.A. for the State and perused the record.

3. Learned Counsel for the appellant argued that appellant has been falsely implicated in this case; that no objectionable material cocaine or heroin was ever recovered from him and in fact he was implicated by the local police in order to show good work; that the appellant was arrested on the ground of carrying commercial quantity of cocaine while upon analysis the material allegedly recovered from him was found to be heroin; that the appellant was initially charged for carrying cocaine and by amendment of charge, for carrying heroin; that there are material contradictions in prosecution evidence and the prosecution has failed to prove the guilt of appellant beyond any shadow of doubt; that compliance of provisions of sections 41, 42, 43, 50, 52-A, 55 and 57 of N.D.P.S. Act was not made and so the prosecution case is liable to be dismissed; that learned Trial Court acted wrongly and illegally in relying on the untruthful and interested evidence of the prosecution as well as in disbelieving the appellant's version as well as the statements of independent defence witnesses produced as D.W.-1 & D.W.-2; that the appellant was aged about 55 years at the time of impugned order of conviction and sentence in 2008 and now he has crossed the age of 60 years; that the appellant is in custody since very beginning i.e. from 5.12.2004, the date of alleged recovery of narcotic drugs and has already undergone the entire period of imprisonment of 10 years R.I. for which he was sentenced under section 8/21(c) N.D.P.S. Act; that the appellant is still in custody for nonpayment of fine and according to the report of Jail Superintendent, the term of sentence in default of payment of fine will come to an end on 8.12.2016; that though the impugned judgment and order of conviction is liable to be set-aside on above mentioned grounds but if for any reason whatsoever the Court comes to the conclusion that the conviction is liable to be confirmed, the Court may kindly be pleased to consider the release of the appellant as he has undergone the full and entire period of substantive sentence of 10 years imprisonment; that the appellant is an old and poor person languishing in jail since last more than 10 years and is unable to make payment of huge amount of fine; that period of custody in default of payment of fine may not be considered to be a part of substantive sentence and may be reduced to the period of 6 months, already undergone in addition to above period of 10 years imprisonment of substantive sentence and may be released forthwith. In support of his arguments, learned Counsel for the appellant has paid reliance upon the judgment of Hon''ble Supreme Court in the case of Shanti Lal Vs. State of M.P., (2008) CriLJ 386 : (2007) 12 JT 1 : (2007) 10 SCR 727 in which Hon''ble the Apex Court reduced the period of imprisonment in default of payment of fine from three years to six months.

4. Learned A.G.A. has defended the impugned order stating it to be well discussed on facts and law and contended that section 8/21 N.D.P.S. Act provides for imprisonment for a minimum period of 10 years R.I. with a minimum fine of Rs. 1,00,000/- which may extend to a period of R.I. for 20 years with fine upto Rs. 2,00,000/-; that the appellant has been sentenced with minimum period of imprisonment and minimum amount of fine and since he has not made payment

of fine he has to undergo simple imprisonment for additional period of 2 years.

5. The brief facts of present case as per First Information Report, are that, "upon information received from Superintendent of Police, Kushinagar, the first informant being Incharge of S.O.G., P.S. Kotwali, District Kushinagar, alongwith Constables as well as Sub-Inspector Upendra Nath was during patrolling on 8.12.2004 at about 12:30 p.m., found two persons coming from opposite side; that seeing the police party they tried to flee away and on catching both them told their names as Sallamuddin and Ram Kisun and also that since they are in possession of heroin and cocaine they were trying to flee away; that upon being informed that their search is to be taken before some magistrate or gazetted officer, they told search may be taken by the first informant, S.O.G. Incharge; that Superintendent of Police, Kushinagar was informed who arrived at the spot; that in presence of S.P. Kushinagar upon search of each other, the search of accused-appellants was made on which a packet was found in the bag in right hand of Sallamuddin having a label of cocaine made in Afghanistan net weight 1 Kg. retail price Rs. 6 crores and another packet from the bag in right hand of Ram Kisun with a label of "heroin made in Afghanistan net weight 1 Kg. retail price Rs. 6 crores" were recovered; that the appellants admitted their offence and were taken into custody after informing them about the offence; that though several persons assembled there but none of them was ready for becoming a witness; that after preparing the recovery memo and taking the appellants into custody, the F.I.R. was lodged P.S. Kotwali Padrauna, District Kushinagar at 2:30 p.m.

6. The prosecution has produced as many as seven witnesses P.W.-1 to P.W.-7, including first informant, investigating officer and other witnesses of facts as well as formal witnesses, who have proved the F.I.R. and other documentary and material evidence marked exhibits and material exhibits; that after completion of prosecution evidence, the statements of accused persons were recorded under section 313 Cr.P.C. and they produced two witnesses Uttam and Tapesar as defence witnesses No. 1 & 2.

7. Perusal of record shows that first informant of this case has been produced as P.W.-1, who has proved the written report and the other exhibits & material exhibits, the packets of recovered quantity etc. It is pertinent to mention that as per report of Forensic Lab, Mahanagar, Lucknow where the samples of recovered material were sent for analysis, reported that upon chemical analysis the material recovered from appellant Sallamuddin as cocaine, was found to be heroin. It is also pertinent to mention that initially the charge was framed against appellant Sallamuddin on 19.12.2005 under sections 8/16/18/22/23 of N.D.P.S. Act for recovery of 1 Kg. cocaine, but subsequently upon hearing him afresh charge under section 8/21 N.D.P.S. Act was framed against him on 5.6.2008 for recovery of heroin in view of the Forensic Lab report.

8. In view of the above facts, the argument of learned Counsel for the appellant regarding contradictions in respect of recovered material being cocaine or heroin,

has no force because at the time of search the packet recovered from the bag of appellant Sallamuddin was bearing a label of cocaine and upon chemical analysis as per report of Forensic Lab, Lucknow the recovered material was found to be not cocaine but heroin. Moreover, since upon hearing the accused-appellant charge was amended and a fresh charge under section 8/21 N.D.P.S. Act was framed regarding recovery of heroin from him so there is no illegality or irregularity in this respect.

9. As far as the arguments of noncompliance of provisions of section 41, 42, 43, 50, 52-A, 55 & 57 of N.D.P.S. Act is concerned, learned counsel has failed to show the alleged non-compliance on facts and law and has not paid reliance on any case law in order to support his arguments of non-compliance of any of above provisions in view of the facts of the case.

10. However, in reference to facts of this case, following case laws are relevant to be mentioned:--

11. In the case of Bahadur Singh Vs. State of Haryana, (2010) 3 JT 566 : (2010) 4 SCC 445 : (2010) 4 SCR 402 : (2010) 4 UJ 1777 , the Hon"ble Apex Court has held that "substantial compliance is enough unless accused can show that he was prejudiced thereby--Held, with advancement of technology and availability of high-speed exchange of information, some of the provisions of NDPS Act, including section 42, have to be read in the changed context--Delay caused in complying with provisions of section 42 could result in escape of offender or even removal of the contraband--Hence, substantial compliance is sufficient, if the information received were subsequently sent to the superior officer".

12. In the instant case as soon as the appellant disclosed of having possession of manufactured narcotic drugs, the Superintendent of Police was telephonically informed, who did arrive at the spot before search of bags in hands of accused-appellants.

13. It was also held by Hon"ble the Apex Court that the compliance of provisions of section 57 of N.D.P.S. Act is not mandatory.

14. In the case of State of Himachal Pradesh Vs. Pawan Kumar, AIR 2005 SC 2265 : (2005) CriLJ 2208 : (2005) 99 ECC 737 : (2005) 4 JT 373 : (2005) 4 SCC 350 : (2005) 1 SCR 417 : (2005) AIRSCW 2154 : (2005) 3 Supreme 321 , the three Judges Bench of Hon"ble the Apex Court has held that "Person" would mean a human being with appropriate coverings, clothing and footwear-Articles as bag, briefcase etc. being carried by accused, can't be treated as body of human being and provisions of Sec. 50 N.D.P.S. Act would not apply in such a case."

15. In another case of Sajan Abraham Vs. State of Kerala, AIR 2001 SC 3190 : (2001) CriLJ 4002 : (2001) 3 Crimes 377 : (2001) 77 ECC 469 : (2002) 139 ELT 241 : (2001) 6 JT 178 : (2001) 5 SCALE 91 : (2001) 6 SCC 692 : (2001) 2 UJ 1502 : (2001) AIRSCW 2970 : (2001) 5 Supreme 789 , the three Judges Bench

relying on the earlier Constitution Bench has held that "compliance of section 21, 42, 50 & 57 is mandatory for prosecution-However, if in a case following of mandate strictly results in delaying in trapping an accused and leads the accused to escape-Then prosecution case should not be thrown out and No INFERENCE CAN BE drawn of violation of section 42, if copies of F.I.R. with other records regarding arrest and seizure of contraband articles were sent to his superior officer immediately after registering the case-This constitutes substantial compliance-Section 57 thus not mandatory in nature.

Accused informed by oral communication, of his right as provided under section 50 of the Act. We do not agree with argument that communicating orally to accused is not a compliance of section 50. The aforesaid Constitution Bench (In State of Punjab v. Baldeo Singh 1999 (39) ACC 349 (SC),) upheld oral communication to be valid under section 50 of the Act.

16. In the case of State of Punjab v. Balwir Singh 1994 ACC 351 (SC) the Apex Court has held that "provisions of section 52 & 57 which deals with the steps to be taken by the officers after making arrest on seizure under sections 41 to 44, are by themselves not mandatory."

17. In view of above facts and case laws discussed, I find that argument advanced on behalf of appellant regarding non-compliance of provisions of sections 41, 42, 43, 50, 52-A, 55 and 57 of N.D.P.S. Act has no force and since at the time of recovery Superintendent of Police himself had reached and I am in agreement with the finding of Court below that substantial and due compliance of all the provisions was done.

18. The appellant has also challenged the order of conviction on the ground that quantity of 1 Kg. heroin was not recovered from the appellant and the same was falsely planted on him. In his statement under section 313 Cr.P.C. the appellant has stated that he was going, out from the village on his bicycle when the Police Inspector came by Jeep and told him to sit in the Jeep. The same statement has been given by the deceased-appellant Ram Kisun. The appellant also produced two witnesses Uttam and Tapesar in defence evidence in order to support their version and to belie the prosecution case. The D.W.-1 Uttam has stated that he runs a tea stall and on the day of alleged incident, the Sallamuddin came to his tea stall at 10:00 a.m. in the month of winter where Ram Kisun was already taking tea at his stall. D.W.-2 has also stated likewise. The above statements of defence witnesses are in contradiction to the statements of appellants under section 313 Cr.P.C. and learned Lower Court has rightly disbelieved the defence version. At the same time learned lower Court is also correct in holding that such a huge commercial quantity of 1 Kg. heroin worth Rs. 6 crores may not be falsely planted by the police in order to show alleged good work, for which a small quantity of narcotic drug would have been sufficient.

19. In view of the discussions made above, learned Counsel for the appellant has failed to show any illegality, irregularity or incorrectness in the impugned order

recording conviction of appellants under section 8/21 N.D.P.S. Act.

20. The next argument advanced on behalf of appellant was that even if there is no sufficient ground for setting aside the conviction then since the appellant has already undergone the substantive sentence of 10 years imprisonment, he may be relieved from the liability to pay fine or to undergo further sentence of two years as has been imposed in case of default in payment of fine. He argued that section 21 of N.D.P.S. Act does not provide for imprisonment in default of payment of fine and so the default clause is liable to be set-aside. He further argued that otherwise also even if the default clause is not liable to be set-aside, the term of imprisonment in default of payment of fine may be reduced to below six months and since the appellant has undergone a total period of imprisonment for 10 1/2 years, he may be released forthwith. It was also contended that the appellant is an old and poor person and being in custody since last more than 10 1/2 years, is not capable of making payment of excessive amount of fine and if he is asked to undergo additional sentence of two years imprisonment for default in payment of fine, injustice will be caused to him and his family.

21. Before proceeding on this point it would be appropriate to reproduce the provisions of sections 40, 64, 65 & 69 of I.P.C., section 30 of Cr.P.C. as well as section 21 of N.D.P.S. Act, which are as under:--

"Provisions of Indian Penal Code:--

40. "Offence".--Except in the [Chapters] and sections mentioned in clauses 2 and 3 of this section, the word "offence" denotes a thing made punishable by this Code.

In Chapter IV, [Chapter VA] and in the following sections, namely, sections [64, 65, 66, [67], 71], 109, 110, 112, 114, 115, 116, 117, [118, 119, 120,] 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389 and 445, the word "offence" denotes a thing punishable under this Code, or under any special or local law as hereinafter defined.

And in sections 141, 176, 177, 201, 202, 212, 216 and 441, the word "offence" has the same meaning when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine.

64. Sentence of imprisonment for non-payment of fine.--[In every case, of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment, and in every case of an offence punishable [with imprisonment or fine; or] with fine only, in which the offender is sentenced to a fine,] it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, in which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a

sentence.

65. Limit to imprisonment for nonpayment of fine, when imprisonment and fine awardable.--The term for which the Court directs the offender to be imprisoned in default of payment of a fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine.

69. Termination of imprisonment on payment of proportional part of fine.--U, before the expiration of the term of imprisonment fixed in default of payment, such a proportion of the fine be paid or levied that the term of imprisonment suffered in default of payment is not less than proportional to the part of the fine still unpaid, the imprisonment shall terminate.

Provisions of Code of Criminal Procedure:--

30. Sentence of imprisonment in default of fine.--(1) The Court of a Magistrate may award such term of imprisonment in default of payment of fine as is authorised by law:

Provided that the term--

(a) is not in excess of the powers of the Magistrate under section 29;

(b) shall not, where imprisonment has been awarded as part of the substantive sentence, exceed one-fourth of the term of imprisonment which the Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine.

(2) The imprisonment awarded under this section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under section 29.

Provisions of N.D.P.S. Act, 1985:--

21. Punishment for contravention in relation to manufactured drugs and preparations.--Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any manufactured drug or any preparation containing any manufactured drug shall be punishable,--

(a) Where the contravention 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) Where the contravention 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) Where the contravention 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."

22. Perusal of above provisions show that section 21(c) of N.D.P.S. Act provides that whoever in contravention of provisions of this Act is involved in possession of commercial quantity of manufactured drugs, shall be punishable with a minimum sentence of 10 years rigorous imprisonment and minimum fine of Rs. 1 lakh, which imprisonment may be extended to 20 years and fine upto Rs. 2 lakh. The proviso to section 21 of N.D.P.S. Act states that for reasons to be recorded in the judgment, the Court may also impose a fine exceeding Rs. 2 lakh.

23. The above section does not specifically state of any imprisonment in a case of default in payment of fine. Undisputedly in absence of default clause i.e. in absence of order for imprisonment in case of default in payment of fine, the order of imposition of fine will become meaningless and nobody will be willing or bound to make payment of fine as for its non-payment he would not be affected adversely by detention for any further period.

24. It is also noteworthy that sections 64, 65 of I.P.C. and section 30 of Cr.P.C. provides that in case of default in payment of fine, the period of imprisonment shall not exceed 1/4 of the term of imprisonment which is maximum fixed for the offence.

25. In view of the discussions made above in the case in hand the Court was competent to impose a sentence of further imprisonment for a period from 2 1/2 years upto 5 years in case of default in payment of fine and the order of imprisonment for 2 years, in case of default in payment of fine is fully within the competence of the Court which is much below the period of 5 years imprisonment which could have been imposed by Court within its competence and the imposition of 2 years simple imprisonment, which is much below the maximum limit of 5 years may not be considered to be excessive.

26. As far as the fact that N.D.P.S. Act which is a special law does not provide for any imprisonment in case of default in payment of fine, it is noteworthy that as per provisions of section 25 of General Clauses Act sections 63 to 70 of I.P.C. and provisions of Cr.P.C. for the time being in force in relation to the issue, shall apply to all fines imposed under any Act, Regulation, Rule or Bye-law unless the Act, Regulation, Rule or Bye-law contains an express provision to the contrary.

27. In view of the above provision, in the case of Bashiruddin Ashraf v. State of Bihar, while dealing with section 65(1) Bihar Waqfs Act, 1947, Hon'ble the Apex Court pointed out that though section 65 does not provide for any imprisonment in default of payment of fine, the sentence of 15 days simple imprisonment in default of payment of fine of Rs. 100/- was valid.

28. Relying on above case law of the Apex Court in the case of Kishanlal Sindhi Vs. Executive Officer, Notified Area Council, (1979) 48 CLT 542 : (1980) CriLJ 365 , it was held by Orissa High Court that a conjoint reading of section 30 of Cr.P.C. and sections 40 & 67 of I.P.C. makes it clear that a sentence of imprisonment can be awarded in default of payment of fine. Even though, no such imprisonment in default of payment of fine is provided for by a local law or special statute, and section 67 of I.P.C. which deals with imprisonment in default of the payment of fine applies not merely to the offences under I.P.C. but also to offence under the special and local laws.

29. The above case laws were again relied by a Division Bench of Bombay High Court in the case of Daulat Raghunath Deralé Vs. State of Maharashtra, (1990) 3 BomCR 608 : (1991) CriLJ 817 , justifying the sentence of fine or in default for imprisonment under section 21 of N.D.P.S. Act

30. In Shanti Lal Vs. State of M.P., (2008) CriLJ 386 : (2007) 12 JT 1 : (2007) 10 SCR 727 , relied by the-appellant, where period of imprisonment in case of default in payment of fine was reduced to 6 months, it was observed that 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.

31. Though the order imposing 2 years imprisonment in case of default in payment of fine may not be incorrect as the period of imprisonment could have been upto 5 years in case of default in payment of fine but it does not mean that the above period of further imprisonment in case of default may not be lesser than 2 years.

32. Learned A.G.A. disagreeing with the above case law has stated that no principles of law has been laid down by the Apex Court in above case relied by the appellant. He submits that considering the plea as well as facts of poverty of appellant, his family background and facts of that case, as a matter of mercy, the period of imprisonment in case of default in payment of fine was reduced by Hon"ble the Apex Court from 3 years to 6 months, and so the period of sentence in case of default in this, case may not be reduced.

33. It is noteworthy that during hearing upon sentence on 4.12.2008, it was pleaded on behalf of appellant that he is an old person of 55 years languishing in jail since last 4 years and is very poor upon whose shoulders is the responsibility of his family. Considering the above arguments advanced on behalf of appellant at the time of impugned judgment and order and considering the totality of facts and circumstances as well as the fact that substantive punishment of 10 years imprisonment under section 8/21 of N.D.P.S. Act has already been undergone, I find that if the period of simple imprisonment of 2 years in case of default in payment of fine is modified to a rigorous imprisonment and reduced from the period of 2 years to a period of 10 months, it will serve the purpose of law and justice.

34. In view of the discussions made above, the impugned judgment and order of

conviction recorded by the Additional Sessions Judge as well as sentence imposing rigorous imprisonment for a period of 10 years and fine of Rs. 1 lakh is confirmed. However, the order in respect of 2 years simple imprisonment in case of default in payment of fine, is modified and reduced in the manner that in case of default in payment of fine the appellant instead of undergoing simple imprisonment for a period of 2 years, shall undergo rigorous imprisonment for a period of 10 months only. The period of imprisonment in case of default in payment of fine is accordingly modified and reduced as above.

35. If the appellant has undergone the substantive sentence of rigorous imprisonment of 10 years as also rigorous imprisonment for 10 months in default of payment of fine as modified hereinabove, he shall be set at liberty forthwith, unless he is required in any other offence. If the appellant has not completed the said period he will be released immediately after completion of the period of imprisonment as indicated hereinabove, or in case of part payment of fine earlier, in accordance with the provisions of section 69 of I.P.C.

36. The appeal filed by Sallamuddin is partly allowed accordingly. Let a copy of this order be sent to Sessions Judge, Kushinagar along with the records of sessions trial, for necessary action in accordance with law.