

(2004) 07 BOM CK 0096

In the Bombay High Court

Case No : Criminal Appeal No. 768 of 1998

Ramesh @ Kadu Dagdu Medge, Convict No. C-9812

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 06-07-2004

Acts Referred:

Constitution of India, 1950 — Article 14

Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001 — Section 41

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 22, 23, 41, 8

Citation : (2004) 4 RCR(Criminal) 729

Hon'ble Judges : D.G. Deshpande, J

Bench : Single Bench

Advocate : K.M. Sangani, for the Appellant; B.H. Mehta, APP, for the Respondent

Judgement

D.G. Deshpande, J.—Heard Advocate Mr. Sangani for the appellant/accused and learned APP Mr. Mehta for the State.

2. This is an appeal filed by the original accused No. 1 Ramesh @ Kadu Dagdu Medge challenging his conviction u/s 8(c) r/w 21 of the N.D.P.S. Act by which he was sentenced to suffer R.I. for 10 years and to pay fine of Rs. One lakh in default further R.I. for three months.

3. Mr. Sangani, appearing for the accused, raised only one point in appeal. He had not challenged the conviction of the accused in that sense of term but he contended that as per the charge framed vide Exhibit 2 the accused was found in possession of 45 gms. of heroin valued at Rs. 9000/-. Mr. Sangani, therefore, contended that the case of the accused is at the most to be found in possession of heroin which is more than small quantity but lesser than commercial quantity and, therefore, as provided by u/s 21(b) of the NDPS Act the punishment to which he is liable was as per the discretion of the Court. What is provided in Sub-section (b) is, imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees.

4. Mr. Sangani, appearing for the accused, admitted that Sections 21 to 23 of the NDPS Act were inserted by virtue of Amended Act of 9 of 2001. But even then he drew my attention to the Notification which is Appendix (1) of the NDPS (Amendment) Act, 2001. It is not notification. But it is called as Amendment Act. Section 41 is introduced in the said Act which provides that:-

"(1) Notwithstanding anything contained in Sub-section (2) of Section 1, all cases pending before the courts or under investigation at the commencement of this Act shall be disposed of in accordance with the provisions of the principal Act as amended by this Act and accordingly, any person found guilty of any offence punishable under the principal Act, as it stood immediately before such commencement, shall be liable for a punishment which is lesser than the punishment for which he is otherwise liable at the date of the commission of such offence."

5. Mr. Sanghi, therefore, contended that since the quantity found with the accused was 45 gms. which was more than small quantity but lesser than commercial quantity as per the Entry No. 56 of a table annexed to the Act, the accused is entitled for benefit of Section 21(b). There is a Proviso to Section 41 which provides that "nothing in this section shall apply to cases pending in appeal". In this regard Mr. Sangani relied upon three unreported judgments of this Court in Criminal Appeal No. 12 of 2000 dated September 7 & 8 2003 (Mr. Kasirve Alfani v. Mr. S.N. Salve and Anr.); Criminal Appeal No. 294 of 1999 dated October 06, 2003 [Saeed Ahmed @ Mamu Abdul Aziz Shaikh v. The State of Maharashtra] and Criminal Appeal No. 335 of 2001 dated 5.3.2004 [Smt. Mariyam Yusufmiyan Shaikh v. The State of Maharashtra]. In all these appeals similar question was raised and it was answered in favour of the accused. In Criminal Appeal No. 12 of 2000 this Court relied upon the judgment of Madhya Pradesh High Court wherein proviso to Section 41 was struck down by Madhya Pradesh High Court as ultra vires of the Constitution of India and the said proviso was declared as violative of Article 14 of the Constitution of India by the Punjab and Haryana High Court. These two cases viz. of the Madhya Pradesh High Court in case of Ramesh v. State of M.P. in Writ Petition No. 537 of 2003 decided on 25/4/2003 and of the Punjab and Haryana High Court in the case of Ram Singh v. State of Haryana reported in 2002 (3) RCR 728 were relied upon by this Court in Criminal Appeal No. 12 of 2000 and, since the quantity that was found with the accused was less than commercial quantity, the sentence of the accused was reduced to the period already undergone and he was directed to pay fine of Rs. 5000/- on two counts.

6. Same view was taken by this Court in Criminal Appeal No. 294 of 1999 with Criminal Appeal No. 295 of 1999 decided by common judgment dated October 06, 2003. Same two cases of the Madhya Pradesh and Punjab and Haryana High Courts were referred to and relied upon and ultimately sentence was reduced to six years and fine of Rs. 50,000/- so far accused No. 1 Saeed was concerned.

7. Similarly same view was taken by this Court in Criminal Appeal No. 335 of

2001 and sentence of ten years was reduced to five years.

8. It is, therefore, clear that even though the incident in this case, viz., recovery of heroin from the accused is of 7.3.1997 before coming into force of Section 21(b), the accused has to be given benefit of Section 41 of the NDPS (Amendment) Act, 2001 referred to above. It has to be held that proviso to Section 41 is violation of Article 14 of the Constitution of India and since the quantity was admittedly lesser than commercial quantity, the appeal is required to be allowed so far as it relates to the punishment awarded to the accused.

9. From the judgment it is clear that the accused is in custody since 7th March 1997. So by this date the accused is completing seven years four months [by tomorrow 7th July 2004]. Looking to the views taken by three judges earlier in the three matters referred to above, the sentence of five years with fine of rs. 20000/- in default R.I. for six months would be sufficient to meet the end of justice. Therefore, I pass the following order :-

ORDER

1. The Appeal is partly allowed.

2. Conviction of the accused u/s 8(c) r/w 21 of the N.D.P.S. Act is upheld. However, his sentence is reduced by virtue of Section 21(b) r/w 41 of the N.D.P.S. Act to five years R.I. and fine of Rs. 20,000/- in default R.I. for six months. It is clear that since the accused in custody for more than seven years, therefore, the accused be released forthwith if not required in any other matters.