(1994) 07 BOM CK 0073

In the Bombay High Court

Case No : Criminal Appeal No. 304 of 1991

State of Maharashtra APPELLANT

Vs

Sawarmal Agrawal and Others RESPONDENT

Date of Decision : 27-07-1994

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 63(2)
Criminal Procedure Code, 1973 (CrPC) — Section 211, 212, 386

Citation : (1996) 1 BomCR 559

Hon'ble Judges : V.S. Sirpurkar, J

Bench : Single Bench

Advocate : G.C. Mishra, app, for the Appellant; V.C. Daga, for the Respondent

Judgement

V.S. Sirpurkar, J.—Present appeal is directed by the State of Maharashtra against the quantum of sentence awarded by the Judicial Magistrate, First Class, Mehkar, against the original accused Nos. 1, 2 and 3, for offence u/s 63(2) of the Bombay Sales Tax Act, 1959. By this order, the trial Court has sentenced each of the accused to pay fine of Rs. 500/- and in default to suffer simple imprisonment for one month each.

2. Short spectrum of the facts is as under :

A charge-sheet came to be filed for the offence u/s 63(2) of the Bombay Sales Tax Act against the four accused persons. However, one of the accused persons. S.H. Agrawal, has expired on 15-1-1987 and, therefore, in the present matter, we are concerned only with the three accused persons, who are respondent Nos. 1 to 3 herein. In the said charge-sheet, the prosecution case appears to be that there was a grain-shop run by the partnership firm wherein all these accused persons were the partners, in Mehkar town, and that they were the registered dealers. It is stated in the charge-sheet that though these persons knew the provisions of the Sales Tax Act, yet they, instead of paying the tax as per the rules, filed incorrect returns for the period 8-11-1980 to 27-10-1981 and did not pay proper tax. This appears to be the prosecution case on the basis of the charge-sheet.

3. The charge-sheet seems to have been formulated on the basis of a report by the Sales Tax Officer, dated 18-12-1986. There is an order in the said charge-sheet recommending a prosecution. This order seems to have been passed u/s 67(1) of the Bombay Sales Tax Act, 1959, whereby the Deputy Commissioner of Sales Tax, Nagpur Division, Nagpur, had recommended the prosecution of the four accused persons. This order seems to have been passed after an opportunity was given to the accused persons to explain and after a show-cause letter was sent to them. The report for prosecution, which is accompanied with by this order, suggests that there has been a loss of revenue to the extent of Rs. 2,33,373.00. This report is signed by Shri K.K. Ambulkar, Sales Tax Officer, Khamgaon. On this basis, the police investigated and filed a final report u/s 173 of the Code of Criminal Procedure in the Court of the Judicial Magistrate, First Class, Mehkar. It seems that the criminal case was registered on 16-5-1987. Thereafter, it seems that this case was treated as a summary case and the particulars of the offences were explained to the accused on 3-5-1991. For that purpose, there appears to be an application signed by the accused persons and counter-signed by their lawyer. In this application, the permission is sought to admit the offence. It is also mentioned in this application that against the orders passed by the Sales Tax Officer inflicting the fines, there is already an appeal pending before the appellate authorities.

4. The particulars of offence are in the following terms :

"That you accused being partners of Firm by name M/s. Sawarmal Shankarlal Agrawal, of Mehkar submitted incorrect Sales Tax returns for the period of 8-11-1980 to 27-10-1981, and thereby committed an offence punishable u/s 63(2) of the Bombay Sales Tax Act within my cognizance."

The accused persons admitted this and the learned trial Court seems to have passed the impugned order. In its order, the trial Court has mentioned that the accused confessed the guilt in the open Court and submitted that the Firm had stopped the business since 1987. Finding that they were not habitual offenders and had regularly paid sales-tax to the Government and further finding that accused Sawarmal and Dattatray were old persons, the trial Court awarded them the sentence of fine of Rs. 500/- each. It is this order which is challenged by way of the present appeal u/s 377 of the Criminal Procedure Code, by the State.

5. Shri Mishra, learned Additional Public Prosecutor for the State, invited my attention to section 63(2) of the Bombay Sales Tax Act. The wording of that section is as follows :---

"63(2)---Whoever knowingly furnishes a false return shall on conviction, be punished ---

(i) in case where the amount of tax, which could have been evaded if the false return had been accepted as true, exceeds Rs. 10,000, with rigorous imprisonment for a term which shall not be less than six months but which may extend to three years and with fine;

(iii) in any other case, with rigorous imprisonment for a term, which shall not be less than three months but which may extend to one year and with fine."

On the basis of this wording, Shri Mishra argued, and in my opinion, rightly, that the sentence awarded is even less than the minimum prescribed by law. He pointed out with reference to the documents and charge-sheet that here was a case where the evasion of tax was more than Rs. 10,000/-, and as such the minimum punishment would have been six months of rigorous imprisonment. Even if it is taken that the evasion of tax was not more than Rs. 10,000/-, the sentence would have been minimum three months'' rigorous imprisonment. He pointed out that there is no power in section 63 of the Act to give any lesser punishment than the one prescribed, as the language of the provision is mandatory and suggests that the imprisonment shall not, in any case, be less than three months. The submission appears to be correct. The trial Court seems to have obviously missed this peremptory language of section 63(2) of the Bombay Sales Tax Act. The sentence is undoubtedly inadequate, nay; illegal. The question is, however, whether this Court should adopt the course of enhancing the said punishment.

6. Shri Daga, learned Counsel appearing on behalf of the respondents-accused, very forcefully submitted that, in fact, there has been a prejudice suffered by the accused persons. He very rightly pointed out the language of the particulars explained. According to him, the offence u/s 63(2) of the Bombay Sales Tax Act was ''knowingly furnishing false returns''. He pointed out that firstly the aspect of the evasion of tax for more than Rs. 10,000/- has not been explained at all. He secondly pointed out that the language of the particulars does not refer to the ''knowingly furnishing false return''. Instead, the particulars show that the Firm had submitted "incorrect Sales Tax return" and thereby committed an offence punishable u/s 63(2) of the Bombay Sales Tax Act. Shri Daga is undoubtedly right. The language of the particulars is not only incorrect but misleading also. The essential ingredient of the offence u/s 63(2) was "knowingly furnishing false return". That essential ingredient itself has not been put to the accused persons. It would not be, therefore, proper to straightway act on the plea of guilt expressed on such defective particulars. There is no guarantee that the accused persons would have admitted their guilt, if the correct charge and/or particulars of the offence were explained to them. Therefore, the plea of guilt cannot be said to be with an open and free mind as it ordinarily should be. The accused persons, in order to be held bound by the plea of guilt must understand the plea properly. The particulars explained in this case are not only incorrect but are misleading and thereby the possibility of the accused misunderstanding the plea or not understanding the plea cannot be ruled out.

7. The trial Court has proceeded to act summarily in this case. Now, if all the documents are considered properly, it would be seen that there is material in the

charge-sheet to show that the evasion of tax was more than Rs. 10,000/-. In that event, the trial Court should not have proceeded summarily, as it has done. Therefore, on that Count, the trial is defective. In that view of the matter, though the punishment is found to be inadequate, since the language of the particulars itself appears to be defective, it would be better if the accused persons are tried again under a proper charge. Such course is open u/s 386(c) of the Criminal Procedure Code, which runs as under :---

"386. After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal u/s 377 or section 378, the accused, if he appears, the appellate Court may ----

(c) in an appeal for enhancement of sentence ---

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such appellate Court or committed for trial, or

(ii) ------------------------------, or

(iii) ------------------------------.

8. In view of what is found, it would be better that the matter goes back before the trial Court for retrial. The trial Court will proceed to frame a correct charge now, in the light of the observations made in this judgment and shall proceed with the trial expeditiously. With these observations, the appeal stands disposed of.

