

Court No. - 13

Case :- JAIL APPEAL No. - 492 of 2021

Appellant :- Dinesh Thapa

Respondent :- State of U.P.

Counsel for Appellant :- Jail Appeal, Piyush Kumar Singh, Shivam Tiwari

Counsel for Respondent :- G.A.

Hon'ble Karunesh Singh Pawar, J.

Heard Shri Piyush Kumar Singh, learned counsel for the appellant as well as learned AGA for the State and perused the record.

The instant appeal under section 374(2) of the Cr.P.C. has been preferred by the appellant-Dinesh Thapa against the judgment and order dated 15.12.2018, passed by Additional Sessions Judge / Fast Track Court-II, Bahraich in the Special Sessions Trial No. 38/2013, State of U.P. Vs. Dinesh Thapa, arising out of Case Crime No. 231/2013, under Section 8/20 N.D.P.S. Act, Police Station Rupaideeha, District Bahraich, whereby the appellant has been convicted for the offence under Section 20 N.D.P.S. Act and has been sentenced to undergo rigorous imprisonment of 15 years with a fine of Rs.1,50,000/- and in default of non-payment of fine it is also directed that the appellant shall further undergo the imprisonment for three years.

Learned counsel for the appellant at the outset submits that he does not want to press the instant appeal on merit and his only prayer is with regard to the punishment awarded by the trial court under Section 20 of the N.D.P.S. Act and having regard to all the facts and circumstances of the case the same may kindly be reduced as admittedly the appellant was neither a previous convict nor he is having any criminal history and

it has been more than 10 years he has been in prison in this case.

It is further submitted that when it was established before the trial court that the appellant is not having any criminal history a sympathetic view should have been taken by the trial court at the time of sentencing and minimum punishment, as provided under Section 20 of NDPS Act should have been awarded, and imprisonment of 15 years and fine of Rs. 1,50,000/- and three years further imprisonment in default of payment of fine is on the higher side and thus the same be reduced to the period already undergone by the appellant in prison.

It is further submitted that the appellant is a poor labourer at the most he could be termed as the carrier and could not be the owner of the contraband allegedly recovered from him and co-accused.

Learned AGA on the other hand submits that the appellant has been apprehended by the S.S.B while possessing 13.336 Kgs. of charas and Indian currency worth Rs. 3,400/- and Nepal Currency of Rs. 900/- and 11 Kgs charas in his trunk and 2.336 Kg. charas in his briefcase was recovered and the prosecution has been able to prove its case beyond reasonable doubt and also that under Section 20 of the N.D.P.S. Act the commercial quantity of charas is punishable with rigorous imprisonment in terms of not less than 10 years which may extend to 20 years and with fine which shall not be less than Rs. 1,00,000/- to which may extend upto Rs. 2,00,000/-, therefore the appellant has already been shown leniency by the trial court so far as awarding of sentence is

concerned.

Having heard learned counsel for the parties and having perused the record, it is transpired that though learned counsel for the appellant has not made any submission with regard to the conviction part of the judgment of the trial court but since the appeal had been admitted, in order to satisfy its judicial conscience this Court has perused the judgment of the trial court in the background of the evidence placed on record by the prosecution before the trial court.

Perusal of the record would reveal that an FIR was lodged on 15.4.2013 at 22.30 hours on the basis of the seizure memo prepared by the Abhinav Kashyap, Assistant Sena Naik of S.S.B. Cheque Post Rupaideeha of date 5.4.2013 pertaining to the apprehension of the appellant and co-accused Jog Bahadur Pun and recovery of 13.336 Kgs. and 11 kgs 'charas' respectively from the appellant and co-accused Jog Bahadur Pun.

It is further stated in the seizure memo that prior to the search of appellant and co-accused Jog Bahadur Pun they were informed of their right to be searched before a Gazetted Officer and after obtaining their written consent the informant who himself is a Gazetted Officer proceeded to search the appellant and co-accused as well as their luggage where from the contraband mentioned herein before was recovered. The sample from the recovered charas was also taken on the spot and the contraband as well as samples were sealed on the spot. After investigation of the First Information Report and keeping in view the report of the FSL Mahanagar, Lucknow wherein recovered contraband was found charas, charge

sheet was submitted against the instant appellant and co-accused.

The charges against the appellant and co-accused were framed under Section 8/20 N.D.P.S. Act, to which the appellant denied and claimed trial.

The prosecution in order to prove its case before the trial court had presented P.W.1 head constable, Jitendra Kumar Rai, P.W.2- Abhinav Kashyap, P.W.3- Lallan Singh, P.W.4- Constable- Vinod Kumar Yadav. The prosecution has also relied on the following documentary evidence:-

I. Seizure memo Ext. Ka-1.

II. Arrest Memo Ext. Ka-2.

III. Search Memo pertaining to appellant Ka-3.

IV. Written consent of appellant Ext. Ka-4,

V. Finger Prints of appellant Ext. Ka-5,

VI. Memo pertaining to the weight of the contraband as well as of the sample Ka-6.

VII. Site plant Ka-7.

VIII. Charge sheet Ka-8.

IX. Chick FIR Ka-9.

X. Charge sheet of co-accused Dinesh Thapa Ka-9.

XI. Copy of G.D. of FIR Ka-10.

XII. Arrest memo of co-accused Dinesh Thapa Ka-7.

XIII. Search memo of co-accused Diensh Thapa

Ka-8.

XIV. Written consent of co-accused Dinesh Thapa Ka-9.

XV. Finger Prints of co-accused Dinesh Thapa Ka-10.

XVI. Weight of contraband as well as sample Ka-11.

XVII. Report of FSL Ka-12.

XVIII. Briefcase along with recovered contraband material Ext. 1 trunk with contraband recovery from the appellant material Ext. 2, Trunk and material recovered from the co-accused Ext. 3.

After conclusion of the prosecution evidence the statement of the appellant and co-accused Jog Bahadur Pun were recorded, wherein they claimed innocence and denied the charges on the basis that they have been falsely implicated in this case. However, they did not claim to produce any witness or to tender any documentary evidence in support of their defence.

The trial court after appreciating the evidence available on record came to a conclusion that the prosecution has proved its case beyond reasonable doubt and thus convicted the appellant and co-accused for the offence under Section 8/20 N.D.P.S. Act.

The record of the trial court would also reveal that the prosecution witness no.1 Head Constable Jeetendra Kumar Rai and prosecution witness no.2- Sena Naik Abhinav Kashyap as well as Investigating Officer of the case, namely, P.W.3-

Lallan Singh had given reliable and trustworthy evidence before the trial court and despite lengthy cross examination core of the prosecution case was intact and the accused persons had failed to create any reasonable doubt in their testimony. It was also proved before the trial court that the appellant and co-accused person were given option to be searched by the Gazetted Officer and when they by their written consent asked the informant Abhinav Kashyap who was himself a Gazetted Officer, to search them the compliance of Section 50 N.D.P.S. Act in the considered opinion of this Court appears to have been made. Thus for the reasons aforesaid, I do not find any illegality so far as the appreciation of the evidence done by the trial court and also in conviction of appellant. Therefore keeping in view of the facts and circumstances of the case the judgment and order of the trial court so far as the same is concerned with conviction of the appellant is hereby affirmed.

Coming to the sentencing part of judgment with regard to which submissions have been made by learned counsel for the appellant to the tune that no previous conviction or criminal history of the appellant was proved before the trial court and thus the trial court in absence of any such evidence should have sentenced the appellant for a minimum sentence of 10 years and also minimum fine of Rs. 1,00,000/-.

Having regard to the submissions made by learned counsel for the appellant it is to be recalled that the appellant has been convicted by the trial court for possessing commercial quantity of charas which is unshakable under Section 20 of the N.D.P.S. Act. Section 20 of the N.D.P.S.

Act is reproduced as under:-

"Section 20 of the N.D.P.S. reads as under:-

20. Punishment for contravention in relation to cannabis plant and cannabis.?Whoever, in contravention of any provisions of this Act or any rule or order made or condition of licence granted thereunder,

(a) cultivates any cannabis plant; or

(b) produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable 1[(i) where such contravention relates to clause (a) with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine which may extend to one lakh rupees; and (ii) where such contravention relates to sub-clause (b),

(A) and 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) and 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) and 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.

Thus it is evident that when a person is convicted of the commercial quantity of possessing charas he may be sentenced with regard to the rigorous imprisonment for which shall not be less than 10 years but may extend to 20 years and shall also be liable to fine which shall not be less than Rs. 1,00,000/- but may extend to Rs. 2,00,000/- provided the courts made for reasons to be recorded to impose a fine exceeding Rs. 2,00,000/-

There cannot be any other proposition than the fact that the sentence should be proportionate to the gravity of the offence committed by the convict, however, whenever there is a minimum punishment is provided the court may not impose

a lesser punishment than the prescribed, however it is the duty of the trial court to do justice not only with the prosecution but with the accused persons also.

Hon'ble Apex Court in the case of Raj Bala Vs. State of Haryana and others (2016) 1 SCC 463, the Hon'ble Supreme Court has held that:-

"A Court, while imposing sentence, has a duty to respond to the collective cry of the society. The legislature in its wisdom has conferred discretion on the Court but the duty of the court in such a situation becomes more difficult and complex. It has to exercise the discretion on reasonable and rational parameters. The discretion cannot be allowed to yield to fancy or notion. A Judge has to keep in mind the paramount concept of rule of law and the conscience of the collective and balance it with the principle of proportionality but when the discretion is exercised in a capricious manner, it tantamounts to relinquishment of duty and reckless abandonment of responsibility. One cannot remain a total alien to the demand of the socio-cultural milieu regard being had to the command of law and also brush aside the agony of the victim or the survivors of the victim. Society waits with patience to see that justice is done. There is a hope on the part of the society and when the criminal culpability is established and the discretion is irrationally exercised by the court, the said hope is shattered and the patience is wrecked. It is the duty of the court not to exercise the discretion in such a manner as a consequence of which the expectation inherent in patience, which is the "finest part of fortitude" is destroyed. A Judge should never feel that the individuals who constitute the society as a whole is imperceptible to the exercise of discretion. He should always bear in mind that erroneous and fallacious exercise of discretion is perceived by a visible collective."

Keeping in view all the facts and circumstances of this case as well as the law placed herein before, the proved facts are to the tune that the appellant had been apprehended while possessing 13.336 Kgs. of charas which is admittedly a commercial quantity and is punishable with minimum sentence of 10 years imprisonment and Rs. 1,00,000/- of fine under Section 20 N.D.P.S. Act the trial court has sentenced the appellant to undergo 15 years of rigorous imprisonment for committing offence under Section 20 N.D.P.S. Act with a fine of Rs. 1,50,000/-. It is evident that no previous conviction of the appellant nor any

criminal history of the appellant was proved by the prosecution before the trial court.

It is also evident that since the arrest of the appellant on 5.4.2013 he is detained in prison, it is vehemently submitted on behalf of the appellant that the appellant is a poor person and was only a carrier and thus minimum sentence may kindly be imposed on him.

Thus having regard to the totality of the proved facts and circumstances in the considered opinion of this Court the appellant may be sentenced with minimum sentence provided under Section 20 of the N.D.P.S. Act. The appellant has already undergone for more than 10 years in jail.

Hence the appeal is partly allowed and while conviction of the accused/ appellant for committing offence under Section 20 N.D.P.S. Act is maintained and affirmed, sentence given by the trial court is modified to the period already undergone, with fine of Rs. 1,00,000/- for committing the offence under Section 20 of the N.D.P.S. Act. The appellant in default of payment of fine of Rs. 1,00,000/- will further undergo six months simple imprisonment. The period of detention/ sentence already served by him in jail beyond ten years, if any, shall be adjusted in counting the period of sentence awarded to the appellant under this order as regards non-payment of fine.

Let a copy of this judgment along with the record of the lower court be immediately transmitted to the lower court for compliance with the direction to immediately provide a copy of this order to the Superintendent of Jail concerned wherein the appellant is currently lodged for serving out the

sentence.

Order Date :- 30.10.2023
kkb/