

Neutral Citation No. - 2024:AHC-LKO:10806

Reserved on 19.01.2024

Delivered on 06.02.2024

A.F.R.

Court No. - 16

Case :- CRIMINAL APPEAL No. - 1593 of 2019

Appellant :- Anita Gajraj

Respondent :- State of U.P.

Counsel for Appellant :- Bal Krishna Shukla, Manoj Kumar Singh

Counsel for Respondent :- G.A.

Hon'ble Shamim Ahmed, J.

1. List has been revised.
2. Heard learned Counsel for the appellant, Shri Awadhesh Kumar Pandey, learned A.G.A. for the State-respondents and perused the material placed on record.
3. This appeal has been filed against the judgment and order dated 28.02.2019 passed by learned Additional Session Judge VIIth, Bahraich in Special Session No.32/2014 Case Crime No.1139/2013, Police Station-Rupaidiha, District-Bahraich thereby convicting the appellant under Section 8/20 N.D.P.S. Act and whereby sentencing under Section 8/20 to appellant to undergo imprisonment of ten years and also pay fine of Rs.100000/- (One Lakhs) in the condition of default of fine passed under Section 8/20 of N.D.P.S. Act appellant shall further undergo six months further imprisonment and all the sentences run concurrently inter-alia on the following amongst other grounds.
4. Brief fact of the case emerges as such that on 26.12.2013 at 20.00 hours, the informer informed to the police that one Nepali woman wearing green color dress carrying illegal drug will arrive India via Nepalganj

Rupaidiha main highway from Nepal. On receiving this information, Ravi Shankar Kumar, Assistant Commander made Special Checking Squad comprising of Sub-Inspector, Munni Bai, Head Constable, Vallabh Joshi, Constable Hari Om Yadav and other personnel. The special checking squad along with the informant reached the check post which was situated at Nepalganj Rupaidiha highway and started waiting for accused-appellant. At 18:30 hours a woman carrying a baby alongwith her luggage de-boarded a bus and on pointing out of informer, the suspected accused was intercepted for checking. Even as the accused opened the bag, she started fleeing from the spot. But the special checking squad immediately nabbed her and on asking her name and address and the reason for fleeing, she told that there is charas in her bag and further told her name Anita Gajraj, W/o Heera Singh, R/o Village-Rukaza, P.O-Khadi, Police Station-Musikat, District-Rukum, Nation-Nepal, aged 30 years. The special team informed the accused about her right as per the provisions of N.D.P.S. Act, that she can let her search be conducted before the Magistrate or a gazetted officer, on which she replied that I am carrying *charas* then I do need to create more witnesses in my case and she insisted the squad team to search her, thereafter a consent letter was drafted and the woman was searched thoroughly and contraband article was tested by Drug Testing Kit and prima facie, the recovered contraband article was found to be charas, therefore, the accused-appellant was immediately arrested. It was found that a box containing charas, Indian Rs. 1500/- and a Micromax Mobile. Then, the information regarding arrest of the accused-appellant was given by the police authority to her relatives. On weighing by the scale available there, the recovered charas was 5kg and 238gms. Out of which, 25-25 gms charas was separately sealed for sample and the remaining charas was sealed in another packet. The accused was brought to the police station-Rupaidiha, where the case under section 8/20 of NDPS Act was registered as case crime no. 1139 of 2013. On asking the reason for bringing or taking the alleged charas, the accused told that she is habitual seller of charas which costs around Rs. 15,000/- per Kilogram and she works in a Hotel and doing this business for seven to eight years.

5. After investigation, charge-sheet was submitted against the accused-appellant before concerned court, Bahraich. This case was transferred to the VIIth Additional Sessions Judge, Bahraich, where the charge was framed. The accused-appellant pleaded not guilty of the charges leveled against her and she contended that she was falsely implicated in this case and claimed to be tried.

6. In order to prove its case, the prosecution examined PW 1 Ravi Shankar Kumar; PW 2 Munni Bai, PW 3 Ram Kumar Gautam and PW4 Ram Daras Yadav.

7. The trial court on the basis of evidence adduced by the prosecution held that the prosecution succeeded to prove the charges against the appellant. It was also held that all the procedural technicalities were complied with. Thus, the trial court convicted the appellant for possessing the contraband article Charas from her possession and sentenced the appellant as aforesaid.

8. Being aggrieved and dissatisfied with the aforesaid order, the appellant preferred this appeal before this Court.

9. I have heard learned counsel for the parties and perused the record.

10. Submission of the counsel for the appellant is that the finding given by the trial court is perverse and bad in the eye of law. There are major contradictions in the statement of the witness. He has also submitted that there is no independent witness examined by the prosecution. All the witnesses shown in the recovery memo is false and concocted and there was non-compliance of the mandatory provision of NDPS Act at the time of search and seizure. It was not told to the appellant that he has right to be searched before the Gazetted officer or magistrate. Thus, there was also non-compliance of Sections 50, 56 and 57 of NDPS Act.

11. The counsel for the appellant further argued that the appellant was neither in possession of any narcotics nor any incriminating article recovered from his possession.

12. Lastly, learned counsel for the appellant submits that the appellant has no previous criminal history and she is languishing in jail since 27.12.2013. The appellant has already undergone the sentence of 10 years as awarded by the trial court. Since she is not able to pay the fine of Rs. 1 lakh as aforesaid. So, in default of the same, the appellant shall undergo for six months' additional imprisonment as awarded by the trial court. Therefore, the counsel submits that liberal view may be taken against the appellant and the appellant be released forthwith as she has already remained in incarceration about 10 years.

13. Learned A.G.A. opposed the contents advanced by learned Counsel for the appellant and submitted that all the procedure literally complied by the arresting officer at the time of search. He further contended that provision of CrPC makes it clear that the court of law can award imprisonment in default of payment of fine, one fourth of the term of the imprisonment which the court is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine. Thus, in this case, in default of payment of fine, the court is competent to award 2 years and 6 months in addition to substantive sentence. However, the trial court already taking liberal view awarded six months' additional simple imprisonment in default of payment of fine, which could not be said to be unlawful or otherwise illegal. Thus, the appeal deserves to be dismissed.

14. I have considered the arguments advanced by learned Counsel for the appellant as well as learned A.G.A. and perused the material placed on record.

15. Insofar as conviction recorded by the trial court is concerned, there is no illegality, irregularity or perversity in the impugned order passed by the trial court. The appellant has already undergone substantial part of sentence of 10 years rigorous imprisonment and in default of payment of fine, she has already spent more than 40 days in jail and she has already undergone substantial period of detention.

16. The Apex Court in ***Shanti Lal vs. State of M.P.*** decided on 8.10.2007 was pleased to observe paragraph No.36 and 37 as under:-

"36. We are mindful and conscious that the present case is under the NDPS Act Section 18 quoted above provides penalty for certain offences in relation to opium poppy and opium. Minimum fine contemplated by the said provision is rupees one lakh [fine which shall not be less than one lakh rupees]. It is also true that the appellant has been ordered to undergo substantive sentence of rigorous imprisonment for ten years which is minimum. It is equally true that maximum sentence imposable on the appellant is twenty years. The learned counsel for the State again is right in submitting that clause (b) of sub-section (1) of Section 30, CrPC authorizes the Court to award imprisonment in default of payment of fine up to one-fourth term of imprisonment which the Court is competent to inflict as punishment for the offence. But considering the circumstances placed before us on behalf of the appellant-accused that he is very poor; he is merely a carrier; he has to maintain his family; it was his first offence; because of his poverty, he could not pay the heavy amount of fine (rupees one lakh) and if he is ordered to remain in jail even after the period of substantive sentence is over only because of his inability to pay fine, serious prejudice will be caused not only to him, but also to his family members who are innocent. We are, therefore, of the view that though an amount of payment of fine of rupees one lakh which is minimum as specified in Section 18 of the Act cannot be reduced in view of the legislative mandate, ends of justice would be met if we retain that part of the direction, but order that in default of payment of fine of rupees one lakh, the appellant shall undergo rigorous imprisonment for six months instead of three years as ordered by the trial court and confirmed by the High Court.

37. For the reasons aforesaid, the appeal is partly allowed, conviction recorded and sentence imposed on the appellant to undergo rigorous imprisonment for ten years is confirmed. An order of payment of fine of rupees one lakh is also upheld. But an order that in default of payment of fine, the appellant shall undergo rigorous imprisonment for three years is reduced to rigorous imprisonment for six months. To that extent, the appeal filed by the appellant is allowed. If the appellant has undergone substantive sentence of rigorous imprisonment for ten years as also rigorous imprisonment for six months as modified by us in default of payment of fine, the appellant 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 after the period indicated hereinabove is over. The appeal is accordingly disposed of."

17. Further in *Alister Anthony Pareira v. State of Maharashtra*, (2012) 2 SCC 648, Hon'ble Supreme Court was pleased to observe as under:

"One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: the twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances."

18. The Apex court has held in various decisions that the theory of proportionality, deterrence, seriousness and rehabilitation should be taken into account while exercising discretion in sentencing.

19. Also In *Dhananajay Chaterjee vs State of W.B 1994 (2) SCC 220*; Apex Court has been pleased to observe that shockingly large number of criminals go unpunished thereby increasingly, encouraging the criminals and in the ultimate making justice suffer by weakening the system's creditability. The imposition of appropriate punishment is the manner in which the Court responds to the society's cry for justice against the criminal. Justice demands that Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime. The Court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment."

20. Similar view has also been expressed in **Ravji v. State of Rajasthan, [1996] 2 SCC 175**. It has been held in the said case that it is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal". If for extremely heinous crime of murder perpetrated in a very brutal manner without any provocation, most deterrent punishment is not given, the case of deterrent punishment will lose its relevance.

21. Further in *State of M.P. v. Bablu Natt, (2009) 2 SCC 272*, Hon'ble Apex Court was pleased to held that in recent years, we have noticed that crime against women are on the rise. These crimes are an affront to the human dignity of the society. Imposition of grossly inadequate sentence and

particularly against the mandate of the legislature not only is an injustice to the victim of the crime in particular and the society as a whole in general but also at times encourages a criminal. The courts have an obligation while awarding punishment to impose appropriate punishment so as to respond to the society's cry for justice against such criminals. Public abhorrence of the crime needs a reflection through the court's verdict in the measure of punishment. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of the appropriate punishment. The heinous crime of committing rape on a helpless 13/14 year old girl shakes our judicial conscience. The offence was inhumane. There are no extenuating or mitigating circumstances available on the record which may justify imposition of sentence less than the minimum prescribed by the legislature under Section 376(1) of the Act."

22. Further, the Hon'ble Apex Court in *State of Madhya Pradesh vs Mehtab*, (Cri. appeal No. 290/2015, dated 13.02.2015) has been pleased observe that;

"We find force in the submission. It is the duty of the Court to award just sentence to a convict against whom charge is proved. While every mitigating or aggravating circumstance may be given due weight, mechanical reduction of sentence to the period already undergone cannot be appreciated. Sentence has to be fair not only to the accused but also to the victim and the society."

23. Further in *Brajendra singh v. State of M.P.*, (2012) 4 SCC 289, the Hon'ble Apex Court was pleased to held that the law enunciated by this Court in its recent judgments, as already noticed, adds and elaborates the principles that were stated in *Bachan Singh* [*Bachan Singh v. State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] and thereafter, in *Machhi Singh* [*Machhi Singh v. State of Punjab*, (1983) 3 SCC 470:1983 SCC (Cri) 681]. The

aforesaid judgments, primarily dissect these principles into two different compartments one being the "aggravating circumstances" while the other being the "mitigating circumstances". The court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the court. It will be appropriate for the court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the court as contemplated under Section 354(3) CrPC.

24. In State of *M.P. v. Surendra Singh*, (2015) 1 SCC 222, based on the Theory of Proportionality, it is laid down by Hon'ble Apex Court as under:

"That undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. The court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment.

Meager sentence imposed solely on account of lapse of time without considering the degree of the offence will be counter productive in the long run and against the interest of the society. One of the prime objectives of criminal law is the imposition of adequate, just proportionate punishment which commensurate with gravity, nature of crime and the

manner in which the offence is committed. One should keep in mind the social interest and conscience of the society while considering the determinative factor of sentence with gravity of crime.

The punishment should not be so lenient that it shocks the conscience of the society. It is, therefore, solemn duty of the court to strike a proper balance while awarding the sentence as awarding lesser sentence encourages any criminal and, as a result of the same, the society suffers. Imposition of sentence must commensurate with gravity of offence."

25. In view of the discussions made above and the reasons aforesaid and laws rendered by Hon'ble Supreme Court referred 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 six months rigorous 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 rigorous imprisonment for a period of six months is reduced and shall undergo rigorous imprisonment for a period of two months' only. The period of imprisonment in case of default in payment of fine is accordingly modified and reduced as above.

26. Thus, the appeal to the above extent is ***partly allowed***.

27. If the appellant has undergone substantive sentence of rigorous imprisonment for ten years as also rigorous imprisonment for two months' as modified by this Court above in default of payment of fine, the appellant shall be set at liberty forthwith unless she is required in any other offence. If the appellant has not completed the said period, she will be released after the period indicated hereinabove is over.

28. Senior Registrar of this Court as well as office is directed to communicate this order to the court concerned, forthwith and lower court record, if any, be returned back to the court concerned.

(Shamim Ahmed, J.)

Order date:- 06.02.2024

Piyush/-