

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO.202 OF 2013
WITH
CRIMINAL APPLICATION NO.1033 OF 2018
IN
CRIMINAL APPEAL NO.202 OF 2013**

**DHIREN GHANSHYAM MEHTA @ VIKAS)
Aged 49 years, Residing at 302, Punaji)
Niwas, Plot A-13, Sector 19, Koparkhairane)
Navi Mumbai. Currently lodged in Kolhapur)
Central Prison, Kalamba – 416007.)...APPELLANT**

V/s.

**1) UNION OF INDIA)
Through Narcotics Control Bureau,)
Mumbai)
)
2) STATE OF MAHARASHTRA)...RESPONDENT**

Mr.Anand Sachwani a/w. Mr.R.R.Shah, Advocate for the Appellant.

Ms.Yasmin N. Katpitia a/w. Ms.Ankeeta Appanna, Advocate for Respondent No.1/Union of India.

Mr.S.V.Gavand, APP for the Respondent/State.

CORAM : A. M. BADAR, J.

DATE : 8th AUGUST 2018

JUDGMENT :

1 By this appeal, the appellant/accused is challenging the judgment and order dated 6th January 2012 passed by the learned Special Judge for Narcotics Drugs and Psychotropic Substances Act (hereinafter referred to as NDPS Act for the sake of brevity), Sessions Court, Greater Mumbai, in NDPS Special Case No.144 OF 2007, thereby convicting the appellant/accused of offences punishable under Sections 20(b)(c) read with Section 8(c) of the NDPS Act and under Section 28 read with 23(c), 8(c), 20(b)(c) of the NDPS Act as well as under Section 29 read with 8(c), 20(b)(c) and 23(c) of the NDPS Act. On each count, the appellant/accused is sentenced to suffer rigorous imprisonment for 10 years apart from payment of fine of Rs.1 lakh, and in default thereof, to suffer rigorous imprisonment for a period of 1 year. By the impugned judgment and order, the learned trial court had directed that the substantive sentences imposed on the appellant/accused shall run concurrently.

2 Facts leading to the prosecution of the appellant/accused, in nutshell, are thus :

- (a) According to the prosecution case, the appellant/accused contravened the provisions of the NDPS Act and he was found to be possessing hashish/charas weighing 2.690 kilograms on 11th February 2007, at about 12.10 hours. He was attempting to export the same to the United Kingdom in furtherance of the conspiracy which he hatched with known and unknown accused persons.
- (b) On 11th February 2007, Intelligence Officer C.I.Kedari of the Narcotics Control Bureau received specific intelligence indicating that a person named Dhiren @ Vikas Mehta (appellant/accused) will be visiting the office of the DHL located at Shop Nos.1 and 2 at Plot No.21, Sector 24 of Turbhe, Sanpada, Navi Mumbai, around 12 noon of that day with a parcel containing substantial quantity of hashish /charas concealed in the jewelery boxes for dispatching that parcel to the United Kingdom. Said Intelligence Officer

C.I.Kedari then reduced that information into writing and placed it before his immediate superior PW4 Ajit Pandurang Patil, Superintendent of the Narcotics Control Bureau. PW4 Ajit Patil then verified that information and made endorsement thereon. He directed PW2 Anil Kodnani, Intelligence Officer of the Narcotics Control Bureau to organize a team and rush to the spot for taking necessary action under the NDPS Act.

- (c) In pursuant to the directions of the Superintendent of the Narcotics Control Bureau, PW2 Anil Kodnani took field testing kit and other articles for effecting raid. Accompanied by PW4 Ajit Patil, Superintendent of Narcotics Control Bureau, by official vehicle they left for the office of the DHL located at Sector 20, Turbhe. On the way, PW3 Sanjay Sinha, Intelligence Officer as well as K.S.Hate and S.B.Kadam joined them. Two panch witnesses including PW10 Nitin Mane were arranged at the spot.

- (d) On 11th February 2007 itself, as a result of the specific information received by Intelligence Officer C.I.Kedari, the appellant/accused came to be intercepted in presence of panch witness PW10 Nitin Mane and the co-panch in the office of DHL Express India Private Limited located at Sanpada, Navi Mumbai. At that time, the appellant/accused was in the process of booking a parcel for dispatching it to Manchester in United Kingdom. Upon examination of that parcel it was found to be consisting a carton containing 12 small boxes of incense sticks of brand “Pradhan's Royal Life Spiritual Fragrance” as well as 12 bathing soaps of brand “Jiva”, That carton was also found containing two locked wooden jewelery boxes. By taking key from the appellant/accused, those boxes were opened by the officers of the Narcotics Control Bureau. In the false bottom of those jewelery boxes, one scotch taped pocket each was found. Upon examination of that, those pockets were found to be containing hashish/charas weighing 1.440 and 1.250 kilograms each. Thus, the appellant/accused was found to

be in conscious possession of hashish/charas weighing 2.690 kilograms. Officers of the Narcotics Control Bureau confirmed the substance to be hashish/charas by testing the same with the help of the field testing kit. Both pockets were then marked as "J1" and "J2". From each box, two samples each, weighing 24 gms each, were drawn. Those samples were kept in different polythene sachets which were heat sealed and then those samples were kept in different paper envelopes. The remaining contraband found in jewelery boxes "J1" and "J2" respectively was kept in two separate polythene bags which were heat sealed. Those polythene bags were then kept in a carton which was scotch taped and labeled. All articles were then sealed and seized by preparing panchnama.

- (e) Personal search of the appellant/accused was then taken by complying with the provisions of Section 50 of the NDPS Act. Sundry articles were found in his possession which were also seized under panchnama.

- (f) The appellant/accused was taken to Hotel Dera situated in Sector 28, Vashi, Navi Mumbai, and those premises were searched in presence of panch witnesses and few documents were seized under panchnama.
- (g) PW2 Anil Kodnani, Intelligence Officer, then apprised the appellant/accused about provisions of Section 67 of the NDPS Act. The appellant/accused then showed his readiness to make the statement. Accordingly, questions were put to the appellant/accused in English. He answered those questions by himself typing the answers on computer in English language. The appellant/accused himself recorded his detail statement with his name, family background, residence and his dealings in contraband. In this way, the appellant/accused made confessional statement by admitting his guilt by asserting that he had obtained the contraband in the wooden boxes at the instance of his friend named Dax – a British national. Those wooden boxes were sent to the appellant/accused

through a person named Avi – an Israeli national, who arrived at Mumbai on 7th February 2007 by Rajdhani Express. The appellant/accused confessed that he received the boxes at Mumbai Central Railway Station as per instructions of his friend Dax. Then those boxes were taken to the Guest House and got fumigated. The appellant/accused further asserted that he obtained Phythosanitary Certificate. Those jewelery boxes in which hashish/charas was concealed, as per say of the appellant/accused, were to be couriered to the United Kingdom and the appellant/accused was to get an amount of Rs.20,000/- for doing this job from his friend Dax. The appellant/accused explained that the amount of Rs.12,000/- found on his person was for the purpose of payment of courier charges to the DHL and he was to receive the consideration of Rs.20,000/- after successful dispatch of the consignment. The appellant/accused further stated that his friend Dax has given instructions to him about dispatching the consignment through “Jumbo

Box” of DHL. The address of the consignee and instructions to fill up the vacant spaces inside the box using ayurvedic soap and incense sticks were also given to him. The appellant/accused disclosed name of the agency which carried out fumigation. The appellant/accused further disclosed that on two previous occasions, he had exported hashish/charas to foreign countries at the instance of his friend Dax. He further stated that he used to buy hashish/charas from many foreigners as well as from Manali and a village called Diallo. On subsequent occasions, statement of the appellant/accused came to be recorded under Section 67 of the NDPS Act.

- (h) The appellant/accused came to be arrested in the subject crime. Samples seized from him were sent for chemical analysis to the Deputy Chief Chemist, New Custom House, Mumbai, as well as to Central Forensic Science Laboratory, Hyderabad. Those were found to be of narcotic drug hashis.

- (i) After completion of investigation, PW2 Anil Kodnani, Intelligence Officer of the Narcotics Control Bureau, lodged complaint before the Special court on 27th July 2007.
- (j) The learned Special Judge framed Charge for the offence punishable under Sections 20(b)(c) read with Section 8(c), under Section 28 read with 23(c), 8(c), 20(b)(c) and under Section 29 read with 8(c), 20(b)(c) and 23(c) of the NDPS Act. In order to bring home the guilt to the appellant/accused, the prosecuting agency has examined in all 11 witnesses and also relied on documentary evidence.
- (k) Defence of the appellant/accused was that of total denial. In his statement under Section 313 of the Code of Criminal Procedure, the appellant/accused has disclosed that he was forced to sign blank as well as written papers. He had not made any voluntary statement. His statement was recorded under duress, force, coercion and threat of dire consequences. He had retracted that statement when he

was produced for the first time before the Special court. He never visited the office of the DHL or Dera Hotel.

- (1) After hearing the parties, the learned trial court by the impugned judgment and order dated 6th January 2012 was pleased to convict the appellant/accused and to sentence him as indicated in the opening paragraph of this judgment.

3 I have heard Shri Sachwani, the learned counsel appearing for the appellant/accused. He submitted that considering the material placed on record by the prosecution as well as the evidence adduced by the prosecution in support of the Charge, he is not pressing the challenge to the conviction of the appellant/accused of the alleged offences. The learned counsel further submitted that even otherwise, with passage of time, substantive sentences imposed on the appellant/accused is already over. The learned counsel further argued that considering the age of the appellant/accused as well as the health condition, the default sentence awarded by the learned Special Judge cannot be

justified. The same, according to the learned counsel, is against the settled law as found in the judgment of the Honourable Apex Court in the matter of **Shahejadh Khan Mahebub Khan Pathan vs. State of Gujarat**¹. The learned counsel argued that the appellant/accused is behind bars right from the date of his arrest i.e. on 11th February 2007, and his health condition has been deteriorating day by day in the prison. At present, the appellant/accused is undergoing default sentence, which needs to be modified in terms of the judgment of the Honourable Apex Court in the matter of **Shahejadh Khan Mahebub Khan Pathan (supra)**. The appellant/accused, in submission of the learned counsel, is a first time offender and his statement under Section 67 of the NDPS Act, which is a product of duress and harassment, cannot be construed as a material to indicate that in past he has indulged in export of the narcotic substance.

4 I have also heard the learned counsel appearing for the respondent/ Narcotics Control Bureau. She vehemently argued that statement of the appellant/accused recorded under Section

1 (2013) 1 Supreme Court Cases 570

67 of the NDPS Act shows that he had couriered the parcels containing narcotic drugs on three occasions, at the instance of his friend named Dax. On the third occasion, he came to be apprehended by the officers of the Narcotics Control Bureau. Therefore, even the default sentence cannot be reduced.

5 I have considered the rival submissions and also perused the record and proceedings including deposition of witnesses examined by the prosecution as well as the documentary evidence adduced in support of the Charge. Evidence of PW1 Chandrashekhar Ishwar Kedari, Intelligence Officer, coupled with that of PW4 Ajit Patil, Superintendent of Narcotics Control Bureau, goes to show that on receipt of the intelligence, a note to that effect came to be prepared by PW1 C.I.Kedari and it was submitted before PW4 Ajit Patil, Superintendent of Narcotics Control Bureau. It is not under challenge that PW4 Ajit Patil, Superintendent of Narcotics Control Bureau is the immediate official superior of PW1 C.I.Kedari, Intelligence Officer. That intelligence note was also sent to the

Deputy Director General of Narcotics Control Bureau by fax, as deposed by PW2 Anil Kodnani, the complainant, and PW4 Ajit Patil, Superintendent of the Narcotics Control Bureau. Evidence of PW4 Ajit Patil, Superintendent of Narcotics Control Bureau, shows that he had directed PW2 Anil Kodnani, Intelligence Officer, to take necessary steps in the matter by arranging the trap.

6 As regards to the actual incident of laying down the trap and apprehending the appellant/accused, evidence of PW2 Anil Kodnani, the complainant, is material. His version is in tune with the case of the prosecution and the same is corroborated by panch witness PW10 Nitin Mane as well as by evidence of PW3 Sanjay Sinha - Intelligence Officer, PW5 Jitu Pande - House Keeper of the Dera Guest House and PW6 Vikram Vijan – owner of the Dear Guest House. Evidence of PW2 Anil Kodnani, PW4 Ajit Patil, PW3 Sanjay Sinha coupled with that of PW10 Nitin Mane shows that at about 12.10 hours of 11th February 2007 one person carrying parcel approached the booking counter of the DHL. He

was attempting to send that parcel to Manchester in United Kingdom. The members of the raiding team approached him and directed him to open the parcel, which was being carried by him. It is seen from evidence of these witnesses that then the appellant/accused opened the parcel, which along with other items was also found to be containing two jewellery boxes. By using the keys supplied by the appellant/accused, those jewellery boxes were opened. In the false bottom of those boxes, contraband hashish/charas kept in packet was found. Evidence of the prosecution witnesses is also disclosing that one packet was weighing 1.440 kilogram and it was marked as "J1" whereas the another packet weighing 1.250 kilogram was marked as "J2". The contents of each box were tested by using the field testing kit and found to be hashish/charas. It is seen from evidence of these witnesses that then from both packets, two, two samples each, weighing 24 gms were drawn. Those samples were packed, sealed and seized. The rest of the bulk quantity was kept in different polythene bags and those packets were also packed, sealed and labeled.

7 It is seen from the evidence of the complainant that sealed samples were sent to Central Forensic Science Laboratory, Hyderabad, as well as to the Deputy Chief Chemist, New Custom House, Mumbai. Those were found to be of hashish/charas, as per the report of the Central Forensic Science Laboratory, Hyderabad. In this view of the matter, no infirmity can be found in the impugned judgment and order convicting the appellant/accused of offences alleged against him. It was established from evidence of the prosecution that the appellant/accused was in conscious possession of 2.690 kilogram of hashish/charas and was attempting to export it to Manchester in United Kingdom.

8 Now let us examine whether the sentence imposed on the appellant/accused is in consonance with the provisions of the NDPS Act and proportionate with offences held to be proved against him. The learned trial court has directed all substantive sentences to run concurrently. On all three counts, the appellant/accused is awarded substantive sentence of 10 years of

rigorous imprisonment. Considering the offences held to be proved against the appellant/accused, it cannot be said that substantive sentences imposed on him in respect of the duly proved offences are disproportionate. Ultimately, he was found to be in possession of 2.690 kilograms of hashish/charas when the commercial quantity of this narcotic drug is 1 kilogram. The learned trial court has rightly imposed the substantive sentence on the appellant/accused on all three counts.

9 In addition to substantive sentence of rigorous imprisonment for 10 years, the appellant/accused is directed to pay fine of Rs.1 lakh on each count, and in default, to suffer rigorous imprisonment for 1 year on each count. At this juncture, it is apposite to note that the appellant/accused had retracted his statement under Section 67 of the NDPS Act on his first appearance before the learned Special Judge under the NDPS Act. The learned trial court in paragraph 84 of the impugned judgment and order, after considering all facts and circumstances of the case, came to the conclusion that the complainant has succeeded

in proving the offences alleged against the appellant/accused beyond reasonable doubt without assistance of the retracted statement of the appellant/accused. Except this retracted confessional statement of the appellant/accused at Exhibit 33 made by him under Section 67 of the NDPS Act before PW2 Anil Kodnani, the complainant, there is no material on record to indicate that the appellant/accused has indulged in commission of similar offences in past. The appellant/accused has undergone atleast 11½ years of sentence by now. He must be undergoing the sentence in default of payment of fine.

10 The learned advocate appearing for the appellant/accused seriously challenged the default sentence imposed on the appellant/accused. In default of payment of fine of Rs.1 lakh on each count, the learned trial court had directed him to undergo rigorous imprisonment for 1 year on each default. This, according to the learned advocate appearing for the appellant/accused, is very harsh sentence, and in his submission, the learned trial court ought to have kept due regard to the

pecuniary position of the appellant/accused to pay fine. In addition, it is further argued that the appellant/accused is first time offender having no criminal antecedent and he has already undergone the substantive sentence imposed upon him and in addition he has also undergone default sentence of about 18 months, as he is unable to pay fine imposed upon him.

11 In the matter of Shahejadjkhan (supra), the Honourable Apex Court had brought down the substantive sentence of rigorous imprisonment for the period of 15 years to 10 years and default sentence of 3 years to 6 months, in identical situation with similar offences punishable under the NDPS Act. The Honourable Apex Court in the said matter has considered its earlier judgments in the matter of Shantilal vs. State of M.P.² as well as Adamji Umar Dalal vs. State of Bombay³. In the matter of Shantilal (supra) it is held thus, in paragraphs 31 and 32 by the Honourable Apex Court :

² (2007) 11 SCC 243

³ AIR 1952 SC 14

“31.....The term of imprisonment in default of payment of fine is not a sentence. It is a penalty which a person incurs on account of non-payment of fine. The sentence is something which an offender must undergo unless it is set aside or remitted in part or in whole either in appeal or in revision or in other appropriate judicial proceedings or otherwise. A term of imprisonment ordered in default of payment of fine stands on a different footing. A person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. He, therefore, can always avoid to undergo imprisonment in default of payment of fine by paying such amount. It is, therefore, not only the power, but the duty of the court to keep in view the nature of offence, circumstances under which it was committed, the position of the offender and other relevant considerations before ordering the offender to suffer imprisonment in default of payment of fine.”

32 A general principle of law reflected in [Sections 63 to 70, IPC](#) is that an amount of fine should not be harsh or excessive. The makers of [IPC](#) were conscious of this problem. The Authors of the

Code, therefore, observed;

“Death, imprisonment, transportation, banishment, solitude, compelled labour, are not, indeed, equally disagreeable to all men. But they are so disagreeable to all men that the legislature, in assigning these punishments to offences, may safely neglect the differences produced by temper and situation. With fine, the case is different. In imposing a fine, it is always necessary to have as much regard to the pecuniary circumstances of the offender as to the character and magnitude of the offence.’ (Ratanlal & Dhirajlal's Law of Crimes, 26th Edn., 2007, p. 221)

The authors further stated : (Ratanlal & Dhirajlal at pp.226-227)

‘.....when a fine has been imposed, what measures shall be adopted in default of payment? And here two modes of proceeding, with both of which we were familiar, naturally occurred to us. The offender may be imprisoned till the fine is paid, or he may be imprisoned for a certain term, such imprisonment being considered as standing in place of the fine. In the former case, the imprisonment is used in

order to compel him to part with his money; in the latter case, the imprisonment is a punishment substituted for another punishment. Both modes of proceeding appear to us to be open to strong objections. To keep an offender in imprisonment till his fine is paid is, if the fine be beyond his means, to keep him in imprisonment all his life; and it is impossible for the best Judge to be certain that he may not sometimes impose a fine which shall be beyond the means of an offender. Nothing could make such a system tolerable except the constant interference of some authority empowered to remit sentences; and such constant interference we should consider as in itself an evil. On the other hand, to sentence an offender to fine and to a certain fixed term of imprisonment in default of payment, and then to leave it to himself to determine whether he will part with his money or lie in goal, appears to us to be a very objectionable course....

.....We propose that, at the time of imposing a fine, the Court shall also fix a certain term of imprisonment which the offender shall undergo in default of payment. In fixing this term, the

Court will in no case be suffered to exceed a certain maximum, which will vary according to the nature of the offence. If the offence be one which is punishable with imprisonment as well as fine, the term of imprisonment in default of payment will not exceed one-fourth of the longest term of imprisonment fixed by [the Code](#) for the offence. If the offence be one which by [the Code](#) is punishable only with fine, the term of imprisonment for default of payment will in no case exceed seven days.”

12 In the matter of **Palaniappa Gounder vs. State of T.N.**⁴, the Honourable Apex Court has considered the issue of sentence in default of payment of fine and has held 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. It is further held that though there is power to combine a sentence of death with a sentence of fine, that power is to be sparingly exercised because the sentence of death is an extreme penalty to impose and adding to that grave penalty a

4 (1977) 2 SCC 634

sentence of fine is hardly calculated to serve any social purpose. The Honourable Apex Court also observed that, infact, the common trend of sentencing is that even a sentence of life imprisonment is seldom combined with a heavy sentence of fine. These observations were relied by the Honourable Apex Court while deciding the case of **Shahejadjkhan (supra)** in which the substantive sentence of imprisonment was brought down from 15 years to 10 years and that of default sentence from 3 years to 6 months. Relevant observations of the Honourable Apex Court in the matter of **Shahejadjkhan (supra)** can be found in paragraphs 12, 13 and 15, which read thus :

“12 It is clear and reiterated that the term of imprisonment in default of payment of fine is not a sentence. To put it clear, it is a penalty which a person incurs on account of non-payment of fine. On the other hand, if sentence is imposed, undoubtedly, an offender must undergo unless it is modified or varied in part or whole in the judicial proceedings. However, the imprisonment ordered in default of payment of fine stands on a different footing. When such default sentence is imposed, a person is required to undergo imprisonment either because he

is unable to pay the amount of fine or refuses to pay such amount. Accordingly, he can always avoid to undergo imprisonment in default of payment of fine by paying such an amount. In such circumstance, we are of the view that it is the duty of the Court to keep in view the nature of offence, circumstances in which it was committed, the position of the offender and other relevant considerations such as pecuniary circumstances of the accused person as to character and magnitude of the offence before ordering the offender to suffer imprisonment in default of payment of fine. The provisions of Sections 63 to 70 of IPC make it clear that an amount of fine should not be harsh or excessive. We also reiterate that where a substantial term of imprisonment is inflicted, an excessive fine should not be imposed except in exceptional cases.”

“13 While taking note of the above principles, we are conscious of the fact that the present case is under the NDPS Act and for certain offences, the Statute has provided minimum sentence as well as minimum fine amount. In the earlier part of our judgment, taking note of the fact that the appellants being the first time offenders, we

imposed the minimum sentence, i.e., 10 years instead of 15 years as ordered by the trial Court. In other words, the appellants have been ordered to undergo substantive sentence of RI for 10 years which is minimum.”

“15 It is clear that clause (b) of sub-section (1) of Section 30 of the Code authorizes the Court to award imprisonment in default of fine up to 1/4th of the term of imprisonment which the Court is competent to inflict as punishment for the offence. However, considering the circumstances placed before us on behalf of the appellants-accused, viz., they are very poor and have to maintain their family, it was their first offence and if they fail to pay the amount of fine as per the order of the Additional Sessions Judge, they have to remain in jail for a period of 3 years in addition to the period of substantive sentence because of their inability to pay the fine, we are of the view that serious prejudice will be caused not only to them but also to their family members who are innocent. We are, therefore, of the view that ends of justice would be met if we order that in default of payment of fine of Rs.1.5 lakh, the appellants shall undergo RI for 6

months instead of 3 years as ordered by the Additional Sessions Judge and confirmed by the High Court.”

13 In the wake of this law laid down by the Honourable Apex Court as well as in view of the fact that the appellant/accused appears to be the first time offender having no criminal antecedents and that he has already undergone the entire substantive sentence of 10 years rigorous imprisonment, I am of the considered opinion that default sentence of simple imprisonment for 1 year on all three counts, in default of payment of fine of Rs.1 lakh on three counts, is harsh and excessive. In view of the law laid down by the Honourable Apex Court in the matter of Shahejadhkhan (supra), the same is brought down to 6 (Six) months for each default of payment of fine of Rs.1 lakh imposed for the offence punishable under Section 20(b)(c) read with Section 8(c), under Section 28 read with 23(c), 8(c), 20(b)(c) and Section 29 read with 8(c), 20(b)(c) and 23(c) of the NDPS Act. In every probability, the appellant/accused must have undergone this default sentence by now, and therefore, he shall be

set at liberty, unless he is required in any other offence. If the appellant/accused has not completed the modified period of sentence, he shall be released after the period indicated hereinabove is over.

14 Therefore, the appeal is partly allowed, by maintaining the conviction as well as sentence imposed on the appellant/accused for offences punishable under Sections 20(b) (c) read with Section 8(c), under Section 28 read with 23(c), 8(c), 20(b)(c) and Section 29 read with 8(c), 20(b)(c) and 23(c) of the NDPS Act, by modifying the default sentence, by reducing the same as indicated in the above paragraph.

15 The appeal is accordingly disposed of.

16 In view of disposal of the appeal, pending Criminal Application No.1033 of 2018 stands disposed of.

Arti Vilas
Khatate

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(A. M. BADAR, J.)