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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL.A. 790/2017**

STATE OF NCT OF DELHI

..... Appellant

Through: Mr Amit Gupta, APP for State.
Inspector Rajesh Sharma, and SI
Harpal Singh, PS Jama Masjid.

versus

PARVEEN

..... Respondent

Through: Mr Preet Singh Oberoi,
Advocate.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

06.02.2020

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VIBHU BAKHRU, J

1. The State has filed the present appeal under Section 377 of the Cr.P.C. impugning an order of sentence dated 24.03.2017 passed by the learned ASJ.

2. It is the appellant's case that the sentence awarded to the respondent is not in conformity with the provisions of Section 31 of the Narcotics, Drugs and Psychotropic Substances Act, 1985 (hereafter 'the Act').

3. The respondent was apprehended on 29.03.2015 at about 10:45 am and was found to be in possession of smack weighing 9.92 grams.

Thereafter, FIR bearing no. 43/2015 under Sections 21/61/85 of the Act, was registered with PS Jama Masjid. She was tried for an offence punishable under Section 21(b) of the Act and was convicted by a judgment dated 22.03.2017.

4. Concededly, prior to this trial, the respondent was tried for a similar offence (in Sessions Case No. 17/2014) pursuant to FIR No. 230/2014, registered with PS Jama Masjid, as she was found to be in possession of 10.23 grams of smack. She was convicted for the said offence and was sentenced to rigorous imprisonment for a period of three months and a fine of ₹5,000/-.

5. Thus, admittedly, the respondent's conviction in FIR No. 43/2015 was her second conviction for a similar offence and Section 31 of the Act – which contains a provision for awarding a higher sentence for subsequent offences – is applicable. The Trial Court considered the import of Section 31 of the Act and concluded that the words “shall extend to”, as used in the Section 31(1) of the Act, placed enough discretion with the Trial Court to determine the sentence. And, it merely enhanced the maximum sentence and maximum fine that could be awarded or imposed.

6. Keeping in view the mitigating circumstances, including the fact that the respondent had a three and a half year old child who is totally dependent on her, the Trial Court sentenced the respondent to rigorous imprisonment for a period of one year with a fine of ₹5,000/- and in default of payment of fine, to undergo simple imprisonment for a further

period of two months. It was also directed that the respondent would have the benefit under Section 428 of the Cr.P.C.

7. Mr Gupta, learned APP submits that the Trial Court had erred in interpreting Section 31(1) of the Act. He submits that the clear wording of the said provision makes it mandatory that the person convicted for a second time be sentenced to the maximum term as provided for the offence under the Act. Thus, in the case of an offence under Section 21(b) of the Act, the punishment imposed would be one and a half times the terms of ten years and one and a half times the fine of ₹1,00,000/-. He also contended that since the maximum sentence for an offence of being in possession of a small quantity, as provided in Section 21(a) of the Act, is one year and therefore in any event, the punishment for committing an offence under Section 21(b) of the Act should extend beyond the said period.

8. Mr Oberoi, the learned counsel appearing for the respondent countered the aforesaid contentions. He submitted that the plain language of Sub-section (1) of Section 31 of the Act clearly indicates that the import of the said Sub-section is to enhance the maximum sentence and fine that could be awarded. He also referred to Sub-section (2) of Section 31 of the Act and submitted that Sub-section (2) of Section 31 of the Act also provides for a similar enhancement in the minimum sentence that is required to be awarded to a person, referred to in Sub-section (1) of Section 31 of the Act.

9. I have heard the learned counsel appearing for the parties.

10. Before proceeding further, it would be relevant to refer to Section 21 of the Act, which reads as under:-

“21. Punishment for contravention in relation to psychotropic substances. — Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any psychotropic substance shall be punishable, —

- (a) where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to one year, or with fine which may extend to ten thousand rupees, or with both;
- (b) where the contravention 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) where the contravention 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.”

11. It is clear from the plain language of Clause (b) of Section 21 of the Act that where the contravention involves a quantity, lesser than

commercial quantity but greater than small quantity, as is in the present case; the person convicted may be sentenced to rigorous imprisonment for a term which may extend to ten years and with a fine which may extend to ₹1,00,000/-. Unlike Clause (c) of Section 21 of the Act, Clause (b) does not prescribe any minimum sentence for the offence punishable under that clause (Section 29(b) of the Act).

12. It is also relevant to refer to Section 31 of the Act, which reads as under:

“31. Enhanced punishment for offences after previous conviction. — (1) If any person who has been convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit, any of the offences punishable under this Act is subsequently convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit, an offence punishable under this Act with the same amount of punishment shall be punished for the second and every subsequent offence with rigorous imprisonment for a term which may extend to one and one-half times of the maximum term of imprisonment, and also be liable to fine which shall extend to one and one-half times of the maximum amount of fine.

(2) Where the person referred to in sub-section (1) is liable to be punished with a minimum term of imprisonment and to a minimum amount of fine, the minimum punishment for such person shall be one and one-half times of the minimum term] of imprisonment and one and one-half times of the minimum amount] of fine:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding the fine for which a person is liable.

(3) Where any person is convicted by a competent court of criminal jurisdiction outside India under any corresponding law, such person, in respect of such conviction, shall be dealt with for the purposes of sub-sections (1) and (2) as if he had been convicted by a court in India.”

13. It is apparent from the plain reading of Sub-section (1) of Section 31 of the Act that its import is to modify the terms of punishment that can be imposed in case of a person who has, on a prior occasion, been convicted of committing, or an attempt to commit, or abetment of, or criminal conspiracy to commit any offence punishable under the Act. It is material to note that a sentence in respect of such a convict is to extend to a term of one and a half times the maximum term of imprisonment and the fine is also required to extend to one and a half times the maximum amount of fine.

14. If the provisions of Section 31(1) of the Act are read in the context of Section 21(b) of the Act, the term of imprisonment for a person, who has been convicted earlier for an offence punishable under the Act, may extend to fifteen years (one and a half times of ten years) and with fine which shall extend to ₹1,50,000/- instead of ₹1,00,000/-.

15. It is material to note that the legislature in its wisdom has used the word “*shall*” in the context of the fine that can be imposed and not “*may*”, as is used in the context of the maximum sentence. Clause (b) of Section 21 of the Act expressly provides that the convict shall also be imposed a fine which *may* extend to ₹1,00,000/-. However, by virtue of Sub-section (1) to Section 31 of the Act, it is mandated that the

imposition of fine “*shall extend to*” one and a half times of the maximum fine; that is, one and a half times of ₹1,00,000/-. It is noteworthy that, insofar as the maximum sentence of imprisonment that can be awarded is concerned, Sub-section (1) to Section 31 of the Act has used the word “may” preceding the words “extend to”.

16. It is well settled that where the legislature uses two expressions in the same piece of legislation, it is presumed that the expressions are not used to mean the same.

17. In ***Mahaluxmi Rice Mills and Ors. v. State of U.P. and Ors.:*** (1998) 6 SCC 590, the Supreme Court observed as under:-

“It is significant to note that the word used for the seller to realise market fee from his purchaser is “may” while the word used as for the seller to pay the market fee to the Committee is “shall”. Employment of the said two monosyllables of great jurisprudential import in the same clause dealing with two rights regarding the same burden must have two different imports.”

18. Thus, this Court is of the view that the provisions of Sub-section (1) of Section 31 of the Act merely enhance the maximum sentence that can be awarded and the discretion of the court to award a sentence of imprisonment, is not diluted, in any manner. However, insofar as the payment of fine is concerned, the use of the word “*shall*” instead of “*may*” indicates the legislature intended that a less lenient view be taken when it comes to imposing a fine. And, the same should extend to one and a half times the amount as provided.

19. However, the discretion of the Court is not completely removed since the word “*shall*” is followed by the words “*extend to*”. Thus, if Section 21 (b) of the Act is modified in terms of Section 31 (1) of the Act, it would read as under:-

“where the contravention involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to *fifteen years*, and with fine which *shall* extend to *one and a half lakh rupees*”

Thus, in so far as imposition of fine is concerned, it would be apposite to interpret that the flexibility to reduce the said amount, is limited, but the discretion to do so is not diverted completely.

20. In case of an offence punishable under Section 21(b) of the Act, the amount of fine required to be imposed is ₹1,50,000/- (one and a half times the amount stipulated in Section 21(b) of the Act). To this extent, the courts are required to be less liberal in case of a convict who has been previously convicted for an offence under the Act.

21. The contention that Sub-section (2) to Section 31 of the Act, which enhances the minimum term of imprisonment for a convict who has been convicted earlier, also controls the operation of Section 31(1) of the Act, is unmerited. The import of Sub-section (2) of Section 31 of the Act is merely to enhance the minimum sentence that is required to be awarded to a person who has been convicted of an offence under the Act. It does not, in any manner, affect the maximum imprisonment of sentence or the fine that is required to be imposed in terms of Section

31(1) of the Act.

22. In the present case, of Sub-section (2) of Section 31 of the Act would have no application as an offence punishable under Section 21(b) of the Act does not provide for any such minimum sentence.

23. The contention that the sentence under Section 21(b) of the Act is necessarily required to be more than the maximum sentence, that can be awarded for an offence punishable under Section 21(a) of the Act, is unmerited. There is no such legislative intent that can be read into the provisions of Section 21(b) of the Act.

24. The clear language of Section 21(b) of the Act vests enough discretion on a court to impose a sentence of rigorous imprisonment which may extend to ten years. There is no stipulation of a minimum sentence that must be imposed on the offender convicted of an offence punishable under Section 21(b) of the Act.

25. In view of the above, this Court considers it apposite to modify the order on sentence impugned herein, to enhance the imposition of fine to ₹1,50,000/- (instead of ₹5,000/-) in conformity with Sub-section (1) to Section 31 of the Act. It is so directed.

26. Insofar as the prosecution's challenge to the imposition of the sentence of imprisonment is concerned, this Court does not consider it apposite to interfere with the same. The Trial Court had exercised its discretion and has awarded the sentence of one year after considering the mitigating circumstances, as obtaining in this case. This is four times

the period of sentence that was awarded to the respondent on her prior conviction.

27. In view of the above, the appeal is allowed in the aforesaid terms and the order on sentence dated 24.03.2017 is modified to the aforesaid extent.

FEBRUARY 06, 2020
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VIBHU BAKHRU, J

