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Court : Patna

Decided On : Oct-07-1994

Judge : Dharampal Sinha and A.N. Chaturvedi, JJ.

Appeal No. : Criminal Appeal No. 107 of 1992

Appellant : Jagdeo Das

Respondent : State of Bihar

Prior history : Dharampal Sinha, J. 1. In this case a somewhat unusual question has arisen for consideration in the following background: One Jagdeo Das was tried by the Sessions Judge, Darbhanga in Sessions trial No. 40 of 1989 on three heads of charge, one relating to offence punishable under Section 20(b)(i), second punishable under Section 23 and third punishable under Section 25 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act for short) and he was found guilty of all the three offen

Judgement :

Dharampal Sinha, J.

1. In this case a somewhat unusual question has arisen for consideration in the following background:

One Jagdeo Das was tried by the Sessions Judge, Darbhanga in Sessions trial No. 40 of 1989 on three heads of charge, one relating to offence punishable under Section 20(b)(i), second punishable under Section 23 and third punishable under Section 25 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act for short) and he was found guilty of all the three offences. He was also charged of the offence punishable under Section 47(a) of the Excise Act but that the learned Sessions Judge had held that there is no necessity for convicting him of that offence and we are not concerned with that offence. Learned Sessions Judge passed sentence of rigorous imprisonment for 5 years for the offence punishable under Section 20(b)(i) of the NDPS Act, 10 years for the offence punishable under Section 23 and for the same period (of 10 years) for the offence punishable under Section 25 of the NDPS Act, with a direction that all the sentence shall run concurrently.

2. Jagdeo Das, the convict, preferred the appeal (Criminal Appeal No. 107 of 1992), which was disposed of by an order, dated 20th September, 1993, by a Single' Bench of this Court. The operative part of the order passed in this appeal are contained in Paragraphs 9 and 10 of the judgment, which read as follows:

9. For the reasons above this appeal is partly allowed. Conviction and sentence of the appellant under Section 25 of the Act are set aside, and while sustaining his conviction under Section 20(b)(i) of the Act, his sentence is reduced to the period already undergone by him.

10. The appellant was caught red handed while committing the crime in December, 1985. He is still in jail. His sentence under Section 20(b)(i) of the Act having been ordered to be reduced to the period already undergone by him, he is ordered to be set at liberty forthwith, if not required to be detained in connection with any other case.

3. A perusal of the appellate Court judgment clearly shows that so far the conviction and sentence, which had been passed by the trial Court for the offence punishable under Section 25 of the NDPS Act was set aside, while conviction for the offence punishable under Section 20(b)(i) of the NDPS Act was upheld, but the sentence passed by the trial court for this offence (5 years rigorous imprisonment)

was reduced 'to the period already undergone' by the appellant. So far the offence punishable under Section 23 of the NDPS Act is concerned, it appears from a perusal of the appellate Court judgment that it completely escaped from its notice, although the trial court, as already indicated above, had held the appellant guilt of that offence also and had sentenced him to rigorous imprisonment for 10 years. When the judgment of the appellate Court was sent to the trial Court, the District and Sessions Judge, Darbhanga sent a letter No. 1497 (S), dated the 4th day of June, 1994. In this letter he made the following observation:

In this connection, I have to submit that from the record of Session case, it appears that the appellant Jagdeo Das was also held guilty under Section 23 of the N.D.P.S. Act and sentenced to undergo Rule 1. for ten years. It does not appear from the Hon'ble Court's order, dated 20-9-1993 passed in Cr. Appeal No. 107/92 that the sentence passed under Section 23 of the NDPS Act by the then Sessions Judge has also been set aside'. The Sessions Judge requested that 'the matter may kindly be placed before the Hon'ble Court in the Judicial side so that necessary direction of the Hon'ble Court in this regard may kindly be communicated to me at the earliest.

4. When the letter of the Sessions Judge was placed before a Single Bench for orders, it was referred to a Division Bench for consideration of the question as to 'whether the appeal has to be heard afresh with regard to the conviction under Section 23 of the aforesaid Act and sentence passed in regard thereto or the same has to be treated to be set aside in view of the direction to release the appellant forthwith, if not wanted in any other case'.

5. In the matter which has thus arisen for our consideration, we have heard Mrs. Kiran Bala Sahay, who had appeared for the appellant during the hearing of the appeal before the Single Bench, the counsel for the State as also Senior counsel Sri Braj Kishore Prasad and Sri Suraj Narain Prasad Singh, who have appeared amicus curiae and have rendered valuable assistance to this Court.

6. According to the submission of Sri Braj Kishore Prasad which submission has been also adopted by the other Advocates, the order which had been passed by a Single Bench in the Criminal Appeal No. 107 of 1992 on 20th of September, 1993,

has become final and it cannot be reviewed and altered in any way in view of the provisions of Section 362 and 393 of the Code of Criminal Procedure. In support of their submission in this regard they cited before us two decisions reported in 1979 (2) SCC 805-State of Orissa v. Ram Chander Agarwala and : 1979 CriLJ1416 - Slate of Rajasthan v. Gur Charan Das Chandha. As regards the first decision they pointed out that though the facts were governed by the told Criminal Procedure Code, 1898 and there was reference to the provision of Sections 369, 424, 430 and 561A of that Code, the corresponding provisions in the Code of Criminal Procedure, 1973, are the same and so the ratio decidendi of the case will apply to the instant case also. According to the learned Counsel the two aforementioned decisions of the Supreme Court definitely settled the law in this regard and in view of that settled position of law there cannot be review of the judgment, nor can there be any alteration in any way in the appellate Court's judgment and order, dated 20th of September, 1993.

7. After having carefully considered the submissions as well as the aforementioned decisions of the Supreme Court, I am, however, of the opinion that the ratio of those decisions cannot apply to the facts of the instant case. In the case the question of reviewing the judgment of the Single Bench passed on 20th September, 1993, does not arise nor is there any question of altering the judgment in any way. So far two of the offences, one punishable under Section 20(b)(i) of the NDPS Act and the other under Section 25 of the said Act are concerned, the appellate Court's finding and conclusion in the judgment remains final and it stands and will stand as it is. However, a crucial question, which arises for consideration is whether in a situation where one of the offences of which the appellant had been found guilty and sentenced to ten years rigorous imprisonment was not considered at all, presumably because at the time of hearing of the appeal by the Single Bench, no reference was made to that offence by the learned Counsel of either of the sides or due to inadvertence, can the matter be left as it is The glaring omission cannot, in my opinion, be ignored and now left as it is, in view of the instruction sought by the Sessions Judge, who has felt difficulty in giving effect to the judgment of this Court, dated 20th of September, 1993, in my considered opinion the glaring omission can be taken care of only by exercising inherent power referred in Section 482 of the Code of Criminal Procedure. Indeed,

I am definitely, of the opinion that if in a situation like this the inherent power is not exercised on the specious ground that the judgment of the Court, 20th September, 1993 has become final and it cannot review its judgment or order or that it cannot alter its judgment and order, interest of justice is bound to suffer, I may also notice that the offence, which has escaped notice and has been left unconsidered is quite serious for which minimum sentence prescribed is 10 years imprisonment (and may extend to imprisonment for life) besides fine.

8. For securing the ends of justice recourse to provision of Section 482 would appear to be necessary, inter alia, for the following reasons:

The Sessions Judge has passed a judgment convicting the appellant, inter alia, of the offence punishable under Section 23 of the NDPS Act and sentenced him to 10 years rigorous imprisonment for that offence. If no appeal could have been preferred, the conviction and sentence passed with regard to that offence (as also of other offences) which has already been taken care of and stands disposed of by the Single Bench would have remained intact and operative. But if an appeal was preferred by the convict, it was appeal against the conviction and sentence with respect to all the offences of which the trial court had found him guilty and passed sentences against him. If the appellate Court has not given any consideration at all to one of the offences which is punishable under Section 23 of the NDPS Act, it will not be reasonable and proper nor will it be just to hold, either in favour of the appellant, that the appeal even with regard to that offence had been allowed and the conviction and sentence passed with regard to the same is also set aside, nor in favour of the respondent, that the appeal so far that offence is concerned stands dismissed.

9. In may notice here that in view of the direction contained in the judgment of the Single Bench to the effect that the appellant is ordered to be detained in connection with any other case, learned Counsel appearing amicus curiae submitted that this direction will necessarily imply that the appellant has to be set at liberty notwithstanding the fact that about one of the offences there is no consideration or discussion at all in the appellate Court's judgment. In my opinion this direction as would appear from Paragraph 10 of the judgment (quoted above),

has been made in the context of the offence punishable under Section 20(b)(i) of the NDPS Act and appears in the same sentence. So it will be unrealistic and a wrong interpretation of the direction regarding setting the appellant at liberty with regard to the unconsidered offence, when it is definitely in the context of reducing the sentence with regard to the offence punishable under Section 20(b)(i) of the Act.

10. Now as regards the decision cited by the learned Counsel I may mention here that in the first ease State of Orissa v. Ram Chandra Agarwala (supra) on a reference made by the Sessions Judge with regard to sentence, which had been passed by the District Magistrate in connection with the offence under the Forward Contract Regulation Act, 1952 (of which the-respondents had been found guilty) the High Court had passed sentence of imprisonment with regard to some of the respondents while disposing of the reference. Subsequently, when a miscellaneous petition had been filed by the respondents to modify the sentence of imprisonment, the High Court had reviewed the order awarding sentence of imprisonment and substituted the sentence of imprisonment with fine. In that context the Apex Court held that the High Court had no jurisdiction to review the final order, which had been passed by the High Court on reference. In the instant case, however, the appellate judgment of the Single Judge disposing of the criminal appeal is not being reviewed or altered in any way, and so the ratio of that case cannot be availed of in the instant case.

11. Similarly in the second decision : 1979 CriLJ1416 , the High Court had passed a final order in revision petition, which had been directed against an order passed by the Special Judge framing charges against the respondents, and after the disposal of the revision petition, which was dismissed by the High Court, a second revision petition had been filed against the same order of the Special Judge framing charges and the High Court in effect reviewed the earlier order. The Apex Court held in that circumstance that it was wrong on the part of the High Court and it was also beyond the jurisdiction of the High Court to pass the order in the second revision petition, which was different from the order in the first revision petition. None the less the Supreme Court did not set aside the second revisional order of the High Court on the ground that it was correct and just order, which was

in consonance with the decision of the Supreme Court and was calculated to promote the ends of justice. The ratio of this case also, in my opinion, cannot be applied to the facts of the instant case.

12. There cannot be any doubt that some propositions with regard to exercise of the wide inherent powers contemplated by Section 482 of the Code of Criminal Procedure are well settled. The inherent power cannot be invoked in the matters about which specific provisions have been made in the Code. It also cannot be exercised against express bar of any law engrafted in the provisions of the Code. But I do not think that there is any specific provision in the Code, which can take care of a situation like that which has arisen in this case. The provision of Section 482 of the Code seem to indicate that 'to secure the ends of justice', the inherent power of the High Court cannot be deemed to have been limited in any way, for the opening words of the section says that 'nothing in this Code will be deemed to limit or affect the inherent power of the High Court'. I have already indicated above that to secure the ends of justice in this case the exercise of inherent power seems to be necessary and the query made by the learned Sessions Judge has to be answered and can be answered only by exercise of inherent power contemplated by Section 482 of the Code.

13. Now coming to the question as to whether or not the conviction of the convict, Jagdeo Das, relating to the offence punishable under Section 23 of the NDPS Act can be upheld, it may be mentioned that we have gone through the facts and evidence of the case. It appears that Jagdeo Das had been caught on 23-12-1985 when he was an occupant of a truck bearing No. AMZ 7976, which was caught at about 2 a.m. on Madhubani-Jainagar Road by Custom Inspector (PW 2), Sunil Kumar Shrivastava, who along with his staff constables Alauddin (PW 1) and Shiv Bali Gaud (PW 3) were lying in wait at village Bhatni, because they had got information that some narcotic substances were likely to be carried. That truck at that time was found to be loaded with ganja. The truck did not stop on signal but proceeded ahead in speed. It was caught, however, after it covered some distance by the aid of the departmental Jeep on which the Custom personnel chased the truck. The convict Jagdeo Das in his statement under Section 313 of the Code of Criminal Procedure did not deny this fact and he said that he was Khalasi (cleaner

of the vehicle). A car bearing registration No. WME 8536 had also been caught it came behind the aforementioned truck, and a third vehicle (a truck) bearing registration No. ASU 4468 also came later (at 5.30 according to the complaint petition) (Ext. 2) and all of them were found to be loaded with ganja.

14. The question that falls for consideration is whether the aforementioned facts which seems to be established by evidence, would make out a charge of the offence punishable under Section 23 of the Act, of which inter alia the trial Court has found jagdeo Das guilty.

15. Section 23 of the NDPS Act reads as follows:

23. Punishment for illegal import into India, export from India or transhipment of Narcotic Drugs and Psyhotropic Substances.-Whoever, in contravention of any provision of this Act or any rule or order made or conditions of licence or permit granted or certificate or authorisation issued thereunder, imports into India or exports from India or tranships any Narcotic Drug or Psychotropic Substance shall be punishable 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 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.

Obviously the offence defined under this section contemplates either 'export' or 'import' or 'transhipment' of Narcotic Drugs and Psychotropic Substances in contravention of the provisions of the Act or rules framed therein.

16. From the evidence however, it is not clear as to whether the truck in question, which had been occupied by Jagdeo Das, the Khalasi, was seen close to the border between Nepal and India and whether it was coming from Nepal into India or going out of India to Nepal. According to the evidence of PW 1 in Paragraph 8 the concerned road runs from Muzaffarpur to Jainagar and the road bifurcates at a place known as Sakri and goes to Nirmali and Kusheshwar Asthan. All these places are within the territory of India. There is no evidence about distance of the

international border between the Nepal and India from the place where the truck had been seized or the place where it had been seen for the first time. So it cannot be definitely said that the ganja, which had been found on the truck was being imported or exported. To be sure it was mentioned that it was Nepali ganjai but whether it was being transported from one place to another within the territory of India or it was going out of India or coming into India from Nepal cannot be ascertained from the evidence on the record. Moreover, from the report of the Forensic Science Laboratory, it does not appear that the article was Nepali ganja, though it was established from the report that it was ganja (Canabis 'stivo' commonly known as ganja) (vide Ext. 3).

17. There is also no evidence about transhipment, which implies transferring of any article from one conveyance to another. It is not the case of the prosecution that any transhipment was involved in the transaction. So, in my opinion, the facts alleged and established against Jagdeo Das do not establish against him the offence punishable under Section 23 of the Act and the conviction and sentence passed by the trial Court for that offence cannot be upheld. Accordingly with regard to the offence punishable under Section 23 of the NDPS Act, which was unconsidered by the Single Bench of this Court at the time of disposal of the appeal, the convict Jagdeo Das has to be acquitted and the conviction and sentence passed for that has, to be, and is hereby, set aside. Learned Sessions Judge may be instructed, accordingly, in response to his letter. This matter is, accordingly, disposed of.

A.N. Chaturvedi, J.

18. I agree.

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