

Muktinath Sharma Vs. State

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Court : Orissa

Decided On : Oct-08-1999

Reported in : 2000(I)OLR32

Judge : L. Mohapatra, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 8, 20, 36 and 36D

Appeal No. : Criminal Revision No. 56 of 1989

Appellant : Muktinath Sharma

Respondent : State

Advocate for Def. : Addl. Standing Counsel

Advocate for Pet/Ap. : B.K. Nayak, A.K. Sahoo and S. Mukherjee

Disposition : Petition allowed

Judgement :

L. Mohapatra, J.

1. The petitioner in this revision assails the judgment and orders passed by the courts below convicting him Under Section 20(b)(i) of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) (hereinafter called as 'the N.D.P.S. Act') and

sentencing him to imprisonment for a period of six months and to pay a sum of Rs. 500/-, in default, to serve further simple imprisonment for fifteen days.

2. The case of the prosecution is that on 19.5.1988 at about 11.30 p.m., the petitioner was found carrying a leather suit case on Jharsuguda Railway station platform and on being searched by S.I. of Excise, Intelligence Branch, Jharsuguda it was found that the said leather bag carried by the petitioner contained 6,500 kgs of non-duty paid Ganja. On demand, it is further alleged that the petitioner could not produce any authority to possess the said quantity of Ganja and therefore, he was arrested and produced before the learned S.D J.M., Jharsuguda along with the prosecution report and the seized article.

3. Form the order-sheet, it appears that on 20.5.1988 the petitioner was produced before the learned S.D.J.M., Jharsuguda and since the relevant Act could not be produced before the Magistrate, the petitioner was temporarily discharged and the case was again taken up on 21.5.1988. On the said date, the petitioner was produced by the S.I., E.I.B.Excise, Jharsuguda and he submitted a confession memo before the Magistrate. The contents of the said confession memo were read over and explained to petitioner and the petitioner admitted guilt and on the basis of the same, the Magistrate convicted him Under Section 20(b)(i) of the NDPS Act and sentenced him as stated above.

4. Against the said order of conviction and sentence, the petitioner preferred Criminal Appeal No. 65/32 of 1988 in the Court of the learned Sessions Judge, Sambalpur which was heard by the learned Addl . Sessions Judge, Sambalpur and dismissed by judgment and order dated 14.12.1988. The Addl. Sessions Judge, Sambalpur has concluded that the appeal was not maintainable Under Section 375 of the Criminal Procedure Code as the petitioner had pleaded guilty.

5. Learned counsel appearing for the petitioner has raised three legal points which run as follows :

(a) On the date the petitioner was arrested and produced before the Magistrate as well as on the date the petitioner was convicted by the trial Court, the NDPS Act had not come into force and therefore, initiation of the proceeding under the

provision of the NDPS Act was bad and the entire proceeding was vitiated ;

(b) Under the provisions of the NDPS Act, the Magistrate has no jurisdiction to try the offence. As such, the order of conviction and sentence recorded by the Magistrate is without jurisdiction; and

(c) The acceptance of the confession memo filed by the petitioner was not in accordance with the provisions of Code of Criminal Procedure (hereinafter called 'the Code') and as such the trial Court could not have acted upon such confession memo.

6. While dealing with the first point raised by the counsel appearing for the petitioner, it is necessary to refer to certain provisions of the NDPS Act. Section 8 of the said Act runs as follows :

'8. Prohibition of certain operations - No person shall -

(a) cultivate any coca plant or gather any portion of coca plant ; or

(b) cultivate the opium poppy or any cannabis plant ; or

(c) produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or tranship any narcotic drugs or psychotropic substance.

except: for medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder and in the case where any provision, imposes any requirement by way of licence, permit or authorisation, also in accordance with the terms and conditions of such licence, permit or authorisation :

Provided that, and subject to the other provisions of this Act and the rules made thereunder, the prohibition against the cultivation of the cannabis plant for the production of Ganja or the production, possession, use, consumption, purchase, sale, transport, warehousing, import inter-State and export inter-State of ganja for any purpose other than medical and scientific purpose shall take effect only from the date which the Central Government may, by notification in the official Gazette,

specify in this behalf.' It is evident from the proviso to the said section that the prohibition against possession of Ganja for any purpose other than medical and scientific purpose shall take effect only from the date on which the Central Government may, by notification in the official Gazette, specify in this behalf.

6. The relevant notification issued by the Ministry of Finance (Department of Revenue) New Delhi, the 30th May, 1989 is quoted below :

'S.O.309(E) - In exercise of the powers conferred by the first proviso to Section 8 of the Narcotic Drugs and Psychotropic Substances Act. 1985 (61 of 1985), the Central Government hereby specifies the 13th December, 1989 as the date from which the prohibition against the production, possession, use, consumption, purchase, sale, transport, warehousing ; import inter-State and export inter-State of Ganja for any purpose other than medical and scientific purpose shall take effect.'

It is clear from the notification that the Act in relation to production, possession, use, consumption, purchase, sale, transport, warehousing etc. of Ganja for any purpose other than medical and scientific purpose took effect from 13.12.1989.

In my considered view, the Act so far as it relates to possession of Ganja is concerned came into effect from 13th December, 1989 as is evident from a reading of Section 8 along with the notification stated above. Therefore, initiation of the proceeding under the provisions of the Act for possession of Ganja on 20th May, 1988 was bad in law.

7. So far as the second contention of the learned counsel for the petitioner is concerned, the provisions contained in Sections 36 and 36D of the NDPS Act need to be looked into. Section 36 of the Act runs as follows :

'36. Constitution of Special Courts - (1) The Government may for the purpose of providing speedy trial of the offences under this Act, by notification in the official Gazette constitute as many Special Courts as may be necessary for such areas as may be specified in the notification.

(2) A Special Court shall consist of a single Judge who shall be appointed by the Government with the concurrence of the Chief Justice of the High Court.

Explanation - In this sub-section, 'High Court' means the High Court of the State in which the Sessions Judge or the Additional Sessions Judge of a Special Court was working immediately before his appointment as such Judge.

(3) A person shall not be qualified for appointment as a Judge of a Special Court unless he is, immediately before such appointment a Sessions Judge or an Additional Sessions Judge.'

8. As is evident from the aforesaid provision, the Government may for the purpose of providing speedy trial of the offences under this Act, by notification in the official Gazette, constitute as many Special Courts as may be necessary for such areas as may be specified in the notification. Since the Act had not come into force on the date of commission of the alleged offence in the present case, the question of constitution of Special Courts by Government did not arise. Counsel appearing for the State has drawn the attention of Court to Section 36D of the act which is a transitional provision. The said section provides that any offence committed under the Act on or after the commencement of the Act, until a Special Court is constituted under Section 36, shall, notwithstanding anything contained in the Code of Criminal Procedure, be tried by a Court of Session. In the present case, as stated earlier, the Act had not come into force on the date of commission of the alleged offence and there was no existence of Special Courts, as provided Under Section 36 of the Act. Therefore, Section 36D also has no application to the present case. Keeping in mind the aforesaid provisions, I am of the view that the learned S.D.J.M.,Jharsuguda had no jurisdiction to take cognizance or frame charge under the Act and convict the petitioner thereunder.

9. Having held that the initiation of the proceeding under the NDPS Act was bad in law and that the learned S.D.J.M. had no jurisdiction to either take cognizance or to convict the petitioner under the provisions of the said Act, it is not necessary on my part to deal with the 3rd contention raised by the counsel for the petitioner. Since the learned Magistrate had no jurisdiction to take cognizance or frame charge, he could not have also accepted the guilty/confession memo and acted

upon it. The entire proceeding before the trial Court is vitiated due to lack of jurisdiction.

10. In view of the discussions made above, the judgment and orders of the Courts below are set aside and the petitioner is acquitted of the charge.

The revision is accordingly allowed.

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