

Bhola Vs. State

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Court : Delhi

Decided On : Mar-08-1991

Reported in : 44(1991)DLT151

Judge : S.C. Jain, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 30

Appeal No. : Criminal Appeal No. 145 of 1988

Appellant : Bhola

Respondent : State

Advocate for Pet/Ap. : Meera Bhatia and; S.K. Bhatia, Advs

Judgement :

S.C. Jain, J.

(1) The facts giving rise to this appeal are that Bhola, herein after called the appellant, was found in possession of 80 grams of Charas wrapped in a piece of newspaper on 23.2.1987, at 9 a.m. on the northern side of platforms 8 and 9 near the latrine of New Delhi Rly Station. He was tried for the offence punishable under Section 20 of Ndps Act and the learned Addl Sessions Judge by his judgment dated 4.9.88, found the appellant guilty of the said offence and convicted him accordingly. After giving an opportunity of hearing on the point of sentence, the

learned Addl Sessions Judge on 16.9.88 sentenced him to undergo RI for ten years and also to pay a fine of Rs. 1 lakh under Section 20 of Ndps Act.

(2) Aggrieved, this appeal has been filed by the appellant through jail. Mrs. Meera Bhatia was appointed amicus curiae to argue the matter on behalf of the appellant as the appellant showed his inability to engage any Counsel of his choice.

(3) The first question raised by the Counsel for the appellant is that the appellant was below the age of 18 years at the time of the alleged recovery of charas and in view of the provisions of Section 33 of Ndps Act, he was to be considered for giving the benefit of probation under the probation of offenders Act, or under Section 360 Cr.P.C. keeping in view of his young age. In this regard, learned Counsel put reliance on a decision of the Supreme Court in the case of *Raisul v. State of U.P.*, : 1977 CriLJ1555 . in support of her contention that in the absence of any evidence to the contrary, the statement of the accused recorded under Section 313 Cr.P.C. about his age should be accepted as correct unless rebutted. She submitted that the age of the accused at the time of commission of the offence is to be taken into consideration for this purpose and not at the time of holding him guilty i.e., at the time of pronouncement of judgment. According to her, there is no rebuttal on this aspect and the age given by the appellant in his statement under Section 31 Cr.P.C. is 19 years and therefore, he should have been given the benefit of probation in this case.'

(4) The next contention raised by the Counsel for the appellant is that the appellant was not properly defended at the trial stage. The alleged recovery of 80 grams of charas has not been proved beyond reasonable doubt, inasmuch as, the trial court has wrongly relied upon the statement of Shri Ved Parkash, Pw 7, who is alleged to be a public witness. According to the learned Counsel he is a stock witness of the police and trial Court should not have relied upon his statement for conviction of the accused for the offence which is of very serious nature. According to her, the prosecution has to stand on its own legs and that the prosecution cannot take any benefit out of the lacuna in the defense put forward by the accused/appellant.

(5) Mr. S.K. Bhatia, learned Counsel for the state, countered the argument of Mrs. Bhatia and drew my attention towards the order passed by Duggal, J. on 24th October, 1989, wherein, after appreciating various contentions of both the parties and going through various decisions on this point, the Hon'ble Judge came to the conclusion that for the purpose of considering benefit of probation the Court has to see the age at the time of conviction because that is the time when the Court is dealing with the point of sentence. This point which stands finally decided cannot be reopened now at this stage, at the time of final arguments. Even otherwise, Mr. Bhatia submitted that the law on this point is clear, as laid down by the Supreme Court in *Ramji Misar v. State of Bihar* : AIR 1963 SC1088 ; *Daulat Ram v. State of Haryana* Air 1972 S, 2434 *Ram Parkash v. State of Himachal Pradesh*, : 1973 CriLJ593 , that for the purpose of considering benefit of probation the Court has to see the age at the time of conviction because that is the time when the Court is dealing with the point of sentence. The learned App further submitted that besides this fact, the appellant who is involved in a serious offence under Ndps Act is not entitled to the benefit of probation either under Section 360 Cr.P.C. or under the provision of Probation of Offenders Act.

(6) On merits, learned App submitted that the trial Court has appreciated the evidence on record in detail and reliance has been placed on the testimony of the witnesses rightly, as their version could not be shattered in their cross-examination. No question was put to Ved Parkash, a witness from the public indicating that he is a stock witness of the police. No particular of any case has been given to show that he had appeared as a prosecution witness in some other case. He defended the judgment of the Addl Sessions Judge being based on facts and correct appreciation of law.

(7) Section 360 Cr.P.C. lays down that when any person not under twenty one years of age is convicted of an offence punishable with fine only or with imprisonment for a term of seven years or less, or when any person under twenty one years of age or any woman is convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in

which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released, on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct and in the meantime to keep the peace and be of good behavior. Similarly, Section 4 of Probation of Offenders Act. distinguishes an offender below 21 years of age and those above that age and offenders who are guilty of having committed an offence punishable with death or imprisonment for life and those who are guilty of a lesser offence. In the case of offenders below the age of 21 years of age, a duty has been cast on the Court not to sentence them to imprisonment unless it is satisfied that having regard to the circumstances of the case including the nature of the offence and character of the offender it is not desirable to deal with them under Sections 3 and 4 of Probation of Offenders Act. Benefit that is to be given under Sections 3 or 4 of the Act is subject to the limitation laid down by these provisions. If the provisions of Section 4 are attracted then it is for the accused or his Counsel to place before the Court the circumstances and to induce the Court to give benefit of the Act.

(8) Keeping in view the above provisions of law, I find that a person convicted of an offence cannot as of right claim benefit of this Section. Exercise of power is entirely in the discretion of the Court to be exercised in view of the circumstances of each case. The Section has not been enacted with the intention of letting off every offender on his first conviction regardless of the circumstances in which the crime was committed and the age, character and antecedents of the offender. The Section itself says that regard should be had, in cases coming under sub-Section (i), to the age, character and antecedents of the offender and the circumstances in which the offence was committed. It is well settled by now that exercise of discretion under this Section needs considerable sense of responsibility. The Court should not allow themselves to be misled in applying the Section under misplaced leniency and sympathy.

(9) In this case, record shows that no question was put to the 1.0. in his cross-examination on behalf of the appellant that he (appellant) was below 21 years of

age. Even otherwise, at the time of his conviction the appellant does not claim to be below 21 years of age. It is settled law, as reflected from various decisions of the Supreme Court referred to by Duggal, J. in her order dated 24th October, 1989 that the object of the Act would make it clear that the question of age of the person is relevant not for the purpose of determining his guilt but for the purpose punishment which he should suffer for the offence of which he has been found, on the evidence, guilty. When the Court finds that the offender is not a person below 21 years of age on the date when the Court finds him guilty, benefit of Probation of Offenders Act has no application to him. No decision to the contrary has been cited at the bar by the Counsel for the appellant.

(10) Even otherwise, if it be presumed for argument's sake that the offender was below 21 years of age, even then, in the facts and circumstances of the case, he is not entitled to get the benefit of probation of good behavior. The offence committed by him is of very serious nature under Ndps Act for which minimum sentence is 10 years and a fine of Rs. 1 lakh. He has not produced any material on record which could induce the Court to give the benefit of the Act to the appellant in the present circumstances of the case.

(11) On merits, I have gone through the entire evidence, oral as well as documentary, and the statement of the accused under Section 313 Cr.P.C. Besides, the statements of police officials including SHO of New Delhi Railway Police Station, the prosecution has examined Ved Parkash, Public Witness 7, a witness from public and in whose presence charas was recovered from the possession of the accused which on weighment was found to be 80 grams. The appellant was given the option whether he would like to be searched before a magistrate and he declined the offer. A sample of 10 gms was taken out of the recovered charas. The sample as well as the remaining charas was sealed in two parcels duly sealed with the seal of SHO and of the SHO on the spot and the seal after use was given to Ved Parkash, Public Witness 7. Though these witnesses were subjected to cross-examination but nothing came out and they stood the test of touchstone of probability in their cross-examination. There is no reason to discard their testimony. Learned Addl Sessions Judge has correctly remarked that the statement of police officials should not be discarded only on the ground that

they are police officials. If their statements inspire confidence, then there is no reason to discard their statement. Regarding Ved Parkash. there is no reason on record to show and prove that he is a stock witness of the police. Mere alleging a thing without any attempt to substantiate the same cannot take the place of proof. It is in the statement of Ved Parkash that he never appeared as a prosecution witness in any of the cases and there is absolutely nothing on the record to the contrary. Even the 10 has stated that Ved Parkash was not known to him earlier. He has denied that Ved Parkash was a stock witness of the police. I find no infirmity in the findings of the learned Addl. Sessions Judge on the point of conviction as well as on the point of sentence. The learned Addl Sessions Judge has awarded the minimum sentence to the appellant prescribed for this offence under Section 20 of Ndps Act. I find no merit in this appeal and the same is hereby dismissed. A copy of the judgment be. sent to the appellant through the Supdt. Jail.

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