Devu Vs. the Excise Circle Inspector and anr.

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Court : Kerala

Decided On : Jan-24-1986

Reported in : 1986CriLJ1478

Judge : K. Sreedharan, J.

Appellant : Devu

Respondent : The Excise Circle Inspector and anr.

Judgement :
ORDER

K. Sreedharan, J.

1. Accused in C.C. 161/79 on the file of the Judicial First Class Magistrate's Court, Tirur is the petitioner in this revision petition. She was charged with offence punishable under Section 55(a) of the Abkari Act. The learned Magistrate after trial found her guilty of the said offence and convicted her thereunder. Thereupon she was sentenced to undergo simple imprisonment for 6 months and to pay a fine of Rs. 1000/-. In default of payment of fine she was directed to undergo simple imprisonment for three months. The said conviction and sentence were challenged in Crl. Appeal No. 46/80 before the Sessions Court, Manjeri. The learned Sessions Judge by judgment dt. 15-3-1982 confirmed the conviction, but altered the sentence to one of fine. The accused was directed to pay a fine of Rs. 2500/- and in default of payment of fine to suffer simple imprisonment for a period of three

months. Hence this revision petition.

2. The learned Counsel appearing for the revision petitioner raised two points before me. They are:

(1). The accused cannot be convicted for offence under Section 55(a). Even if the entire prosecution case is taken as proved the offence committed by the petitioner will only be one coming under Section 58 of the Abkari Act.

(2). The Appellate Court by imposing a fine of Rs. 2500/- has enhanced the sentence which is prohibited by Section 386 of the Cr. P.C. and hence this Court has to interfere with the same.

I shall proceed to deal with these points one by one.

Point No. 1 : The prosecution case in a nutshell is as follows: At about 4 p.m. on 19-12-1978 the accused was found in possession of about 5 litres of illicit arrack in one cannas by the side of the road situated in front of Uniyal Mosque in Niramaruthur amsom. She was intercepted by the Excise Circle Inspector and party. The arrack was seized as per Ext. PI mahazar attested to by P.W. 3. P.Ws. 1 and 2 are officials of the Excise Department. They swear to the fact that the accused was found by the side of the road carrying the cannas. The scene mahazar Ext. PI goes to prove this fact. The independent witness examined to prove Ext. PI has turned hostile. According to him he had not seen the accused carrying the cannas or the Excise Officials seizing the same. Anyhow this witness admits his signature in Ext. PI mahazar. Thus the denial stated by P.W. 3 can only be taken as a false one. The Court below have rightly held so.

3. When a person is charged with an offence punishable under Section 55, as per the provision contained in Section 64 the Court has to presume that the accused person has committed the offence charged against him until the contrary is proved. In other words the accused has to disprove the fact that he has not committed an offence punishable under Section 55 of the Act. No such evidence is let in by the accused in this case. Relying on the evidence of P.Ws. 1 to 3 and on account of the presumption under Section 64 of the Abkari Act, the Court has only

to find that the accused has committed the offence punishable under Section 55 of the Act. Thus the conviction entered by the Courts below has only to be confirmed and I do so. Point No. 1 is thus found against the revision petitioner.

Point No. 2: The relevant provision of the Cr. P.C. dealing with this point is Sub-clause (iii) of Clause (b) of Section 386, it reads as follows:

After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under Section 377 or Section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may--

(b) in an appeal from conviction--

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same:

4. The Appellate Court after confirming the conviction can alter the nature of the sentence, the extent of the sentence or nature and extent of the sentence so as not to enhance the same. A sentence may consist of imprisonment, imprisonment and fine or fine alone. According to the learned Counsel, imprisonment or fine is to be taken as the nature of the sentence. If imprisonment is the only sentence imposed and it is altered to one of fine the learned Counsel would argue that there is a change in the nature of the sentence. In the case before me the sentence consists of both imprisonment and fine namely, 6 months imprisonment and fine of Rs. 1000/-. The learned Sessions Judge altered the imprisonment portion of the sentence and imposed a total fine of Rs. 2500/-. He did not enhance the period of imprisonment to be undergone in default of payment of fine. Even then according to counsel the nature has completely been changed as far as the imprisonment is concerned and since the fine has been changed from Rs. 1000/- to Rs. 2500/- there is enhancement of sentence which is tabooed by the abovequoted provision.

5. The Trial Court imposed a sentence of 6 months imprisonment and a fine of Rs. 1000, which is the minimum prescribed under Section 55. At the time when the

Sessions Court was to dispose of the appeal the accused was having a suckling child. To avoid the contingency of sending the child also to prison the learned Sessions Judge, instead of imposing a sentence of imprisonment directed the accused to pay a further sum of Rs. 1500/- as fine without any default clause. This, according to counsel will amount to enhancement of the sentence,

6. The argument of learned Counsel is that the Appellate Court can alter the nature of the sentence. It can also alter the nature and extent of the sentence. If there is a sentence of imprisonment for a substantive period and say fine for Rs. 1000/- the learned Counsel would urge that the term of imprisonment cannot be effaced and the fine enhanced. According to counsel, if the imprisonment is effaced it will be altering the nature of the sentence. The enhancement of the fine will be, having the effect of enhancing the other 'nature of the sentence' namely fine. It is further submitted that if the imprisonment is not completely effaced; but is limited to at least a day's imprisonment and then instead of the remaining part of the period of sentence a fine is imposed and in default of the payment of that fine, a lesser period of sentence, is imposed that will not be objectionable, because the substantive sentence directed to be undergone and the imprisonment to be undergone on default of payment of fine will not exceed the original term of imprisonment fixed earlier. Thus, it is submitted that when the substantive period of sentence is completely effaced and an additional fine of Rs. 1500/- is imposed, it will result in the enhancement of the sentence.

7. I do not find any merit in this contention. If this argument is accepted no substantive sentence of imprisonment can be completely altered into a fine. Any amount directed to be paid as fine in that case will go to enhance the sentence. According to me, the mental agony one has to undergo by being imprisoned cannot be valued in money. So, any imposition of fine instead of imprisonment can only be considered as a lesser sentence. Of course, it may be having adverse effect on the purse of the accused. The fine imposed, if not paid will subject the accused to undergo the period of sentence fixed in default. Even after undergoing imprisonment for that period the liability to pay the fine will still be subsisting. But that is no reason to say that imposition to fine instead of imprisonment will be having the effect of enhancing the sentence.

8. The learned Counsel placed before me a decision reported in Rupan Konwar v. State AIR 1952 Assam 23. There the accused was sentenced to undergo rigorous imprisonment for 6 months by the Magistrate. On appeal the Sessions Judge altered the sentence to imprisonment for 5 months and fine of Rs. 500/- in default of payment of fine to undergo sentence for a period of one month. Without any reasoning the Division Bench held:

It is obvious that the learned Sessions Judge had no power to enhance the sentence when hearing the appeal. In enhancing the sentence he, exceeded his jurisdiction and his order to this extent cannot be sustained.

Reliance was also placed on S. N. Sarma v. State of Assam AIR 1967 Assam 111 : 1967 Cri LJ 1597. In that case the Magistrate sentenced the two accused to undergo rigorous imprisonment for three months each under Sections 447 and 325 and also to pay a fine of Rs. 100/-. He directed that the sentence will run concurrently, without specifying what he was referring to was the sentence of imprisonment. On appeal the Sessions Judge removed the sentence of imprisonment altogether and imposed separate sentence of fine of Rs. 50/-on each count. A learned Single Judge of the Assam High Court held:

The learned Sessions Judge removed the sentence of imprisonment altogether on each count and imposed separate sentence of fine of Rs. 50/- on each count. Although, the total fine payable by the accused persons is only Rs. 100/- each and has not been enhanced by the learned Sessions Judge, the conversion of a concurrent sentence of fine to a consecutive sentence of fine is in the nature of an enhancement, irrespective of the amount of fine involved. That jurisdiction the learned Sessions Judge has not got.

With great respect I do not find my way to agree with this decision. Each of the accused was., sentenced to undergo rigorous imprisonment for 3 months and to pay a fine of Rs. 100/-. The Sessions Judge changed that sentence and imposed a fine of Rs. 100/- only. By no stretch of imagination can this direction given by the Sessions Judge be considered as an enhancement of the sentence imposed by the trial Court.

9. Another decision that was brought to my notice is the one is Narayan Singh v. State . There the trial court imposed a sentence of 6 months rigorous imprisonment. On appeal Sessions Court altered the sentence to one month's rigorous imprisonment and a fine of Rs. 200/-and in default of payment of fine to undergo imprisonment for two months. The Rajasthan High Court, after considering a catena of decisions on the point came to the conclusion that there is no enhancement of the sentence. In that decision reference was made to Full Bench decision of the Madras High Court in Bhakthavatsalu Naidu v. Emperor 1907 ILR 30 Mad 103 : 5 Cri LJ 36. The Madras High Court took the view that where the aggregate period of imprisonment awarded on appeal is to any extent less than the period of the original sentence, of imprisonment the fact that a fine is imposed by the Appellate Court is not an enhancement of the sentence within, the meaning of Section 423 of the Cr. P.C. (old Code).

10. As stated earlier, the Sessions Judge has effaced the sentence of imprisonment. The mental agony to which the accused might have been subjected to while undergoing imprisonment cannot be valued in money. So, any amount of fine in substitution of the period of imprisonment cannot be taken as an enhancement of the sentence. Viewed in this manner, I do not find any error, illegality or impropriety in the judgment passed by the learned Sessions Judge.

11. It therefore follows that the revision petition is devoid of any substance. It is dismissed.