Narendra Kumar Vs. Asstt. Collector, C. Ex. and Customs

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Court : Rajasthan

Decided On : Jul-06-1989

Reported in : 1990(47)ELT332(Raj)

Judge : Milap Chandra, J.

Acts : Probation of Offenders Act, 1958 - Sections 4 and 6; Customs Act, 1962 - Sections 135 and 140A; Customs, Gold Control and Central Excises (Amendment) Act, 1973; Code of Criminal Procedure (CrPC) , 1968 - Sections 562; Prevention of Food Adulteration Act - Sections 20AA; Code of Criminal Procedure (CrPC) , 1973 - Sections 248(2), 313 and 360; Defence of India Rules, 1962 - Rule 126P(2)

Appeal No. : S.B. Criminal Revision Petition No. 2/81

Appellant : Narendra Kumar

Respondent : Asstt. Collector, C. Ex. and Customs

Advocate for Def. : J.P. Joshi, Addl. Adv. General

Advocate for Pet/Ap. : N.N. Mathur, Adv.

Disposition : Petition dismissed

Judgement :
ORDER

Milap Chandra, J.

1. This revision petition has been filed against the order of the Additional Sessions Judge, Udaipur dated November 26, 1980 by which he allowed the revision petition and set aside the order of the Additional Chief Judicial Magistrate, Udaipur dated May 2, 1977, giving the accused-petitioner benefit under Section 4, Probation of Offenders Act, after convicting him under Section 135, Customs Act and Rule 126P(2) (ii) and (iv), Defence of India Rules, 1962. The facts of the case giving rise to this revision petition may be summarised thus.

2. The Assistant Collector, Central Customs & Excise, Ajmer filed a complaint against the accused-petitioner under Section 135, Customs Act, 1962 (hereinafter to be called 'the Act') and Rule 126P (2) (ii) & (iv), Defence of India Rules, 1962 (In short, 'Rules') with the allegations, in short, that the accused-petitioner was found carrying six gold biscuits bearing foreign marking '19990 - The Sheffield Smelting Company Ltd.' on October 30,1966 while he was travelling in a bus coming from Ahmedabad to Udaipur. The gold biscuits were seized and penalty of Rs. 2,00,000/- was imposed by him vide his order dated August 7, 1967. After framing charges and recording the evidence of the parties, the learned Magistrate convicted the accused-petitioner and gave him the benefit of Probation of Offenders Act, as said above. An appeal was filed by the complainant. The learned Additional District Judge treated it as a revision petition and allowed it. He set aside the order of the learned Magistrate giving the benefit of Probation of Offenders Act and remanded the case to the trial court for passing appropriate sentence after hearing the accused-petitioner under Section 248(2), Cr.P.C., 1973.

3. It has been contended by the learned counsel for the accused-petitioner that the learned Additional Sessions Judge has seriously erred to hold that the crucial date for the determination of age of an accused for giving the benefit under Section 6 of the Probation of Offenders Act is the date of the judgment and not the date of the commission of the offence. He relied upon Darshan Kumar v. Jabalpur Municipality, A.I.R. 1973 S.C. 906. He also contended that the charges against the accused-petitioner are not proved and the Additional Sessions Judge seriously erred in not examining the evidence on record on this crucial point.

4. In reply, it has been contended by the learned Additional Advocate General that Section 140A has been inserted in the Customs Act, 1962 by Customs, Gold Control & Central Excises & Salt (Amendment) Act, 1973, providing that nothing contained in Section 562 of the Code of Criminal Procedure, 1968 or in the Probation of Offenders Act, 1958 shall apply to a person convicted of an offence under this Act unless that person is under 18 years of age and the accused-petitioner was not admittedly under 18 years of age on the date of the commission of the offence. He further contended that the provisions of this Section would apply in the present case even if the offence was committed prior to the insertion of Section 140A, Customs Act, 1962 and relied upon State of Punjab v. Meethu Singh, 1988 (3) S.C.C. 607. He lastly contended that no appeal was filed by the accused-petitioner against his said conviction and as such he cannot now challenge his conviction.

5. The learned counsel for the accused-petitioner further submitted that the provisions of the newly added Section 140A of the Customs Act would not apply in this case as it was inserted long after the commission of the alleged offence and he relied upon Municipal Corporation v. Manmohanlal, A.I.R. 1983 S.C. 506. He also contended that a lenient view should be taken in favour of the accused-petitioner as the occurrence took place in the year 1966 and the complaint was filed after about 10 years thereof.

6. There is no force in the contention of the learned counsel for the accused-petitioner that the said offences are not proved from the evidence on record. The accused-petitioner admits in his statement recorded under Section 313, Cr. P.C., 1973 that the disputed gold biscuits were found in his possession at the time of his search and he had concealed them in his shoes. He further disclosed that these biscuits were not of foreign origin but they were got prepared and foreign marking were got engrossed on them at Bombay. The question for consideration is whether the gold biscuits seized were of foreign origin and were smuggled to India. The Customs Authority recorded the statement Ex. P6 of the accused-petitioner on October 30, 1966. In this statement, this defence was not at all disclosed. On the contrary, he clearly admitted that it was contraband gold. The Customs Authority also recorded the statement Ex. P.9 of Shri Ramesh Chand, Advocate on 18-7-

1987. The accused-petitioner admits in his statement recorded under Section 313, Cr. P.C. that the statement of his counsel Shri Ramesh Chand, Advocate was duly recorded by the Customs Authorities and he also put his signature on it. This statement Ex. P.9 bears the signatures of the accused-petitioner and also of his counsel Shri Ramesh Chand, Advocate. It would be best to quote it extenso. It runs as under :-

'The Advocate contended that for one reason or the other his client has been changing his statements. He was working as a Munim with M/s. Tara Chand Inder Mal at Rs. 30/P.M. Then he started working with M/s. Chandhamal Isher Mal at Rs. 50/- P.M. Two years back, he married the daughter of Shri Lachman Singh. Shri Lachman Singh is staying at 373 Bhupalpura, Udaipur. Shri Lachman Singh is working as a gold ornament dealer and also exchanges old currency notes. It is on his advice that Shri Narinder Kumar started bringing gold on behalf of his father-in-law. The Advocate further contended that his client did bring gold on 30th October, 1966 and he admitted that it was his client who was found with 8 bars of foreign mark gold weighing 80 Tolas at Rikhabdev. The gold was concealed in his shoes. The advocate stated that he is a mere carrier and is a poor man and should be treated leniently. The Advocate further stated that under the circumstances the guilt has been admitted and he does not want to cross examine the witnesses who have been summoned.'

The said defence does not at all find mention in this statement also.

7. The said offences are also well proved from the statements of the prosecution witnesses namely the then Deputy Collector, Customs & Excise, Rajasthan, Jaipur, Maharat Singh Punshi P.W. 4, Senior Superintendent, Central Excise & Customs, Balwant Singh P.W. 3 and Inspector, Central Excise, Udaipur B.N. Sharma P.W. 2. The attesting witness Prithvi Raj P.W. 1 has supported them. Nothing damaging could be elicited out in their lengthy cross-examination. It cannot, therefore, be said that the said offences are not proved against the accused-petitioner.

8. The next question for consideration is whether the accused-petitioner is entitled to get the benefits under the probation of Offenders Act. Section 140A was added

in the Customs Act w.e.f. 28-8-1972. This section is similar to Section 20AA, Prevention of Food Adulteration Act which was similarly added in the Prevention of Food Adulteration Act w.e.f. April 1, 1976. In Delhi Municipality v. Man Mohan Lal, A.I.R. 1983 S.C. 506 para 3, it has been observed as follows :-

'3. We may refer to another decision of this Court in Devji Tandel's case (1982) 2 SCC 222 : (AIR 1982 SC 1029) where the aforesaid right has been reiterated by this Court. Counsel for the petitioner invited our attention to certain observations made by this Court in that case in paragraph 38 and has taken exception to their validity but it is unnecessary for us to deal with that aspect of the matter. The right of the detenu to be represented by a friend, who in truth and substance is not a legal practitioner, cannot be disputed and no reasons were given by the Board why it was denied to the petitioner. There is nothing to suggest that the petitioner wanted to be represented by any so-called friend who in reality was a legal practitioner. Counsel for the respondent urged that the petitioner had not furnished the name of the friend so as to enable the Board to ascertain whether the friend was a lawyer or not. But the Board could have asked that petitioner to do so either earlier or on 5th April 1982 before commencing the proceedings if it was minded to grant his request in that behalf. Counsel for the respondent further urged before us that even if this court finds that the petitioners request was wrongly rejected the matter could go back to the Advisory Board and a proper hearing could be directed to be given to the petitioner. It is not possible to accept this contention for the simple reason that the procedure followed by the Advisory Board which involved a denial of a valuable right to the petitioner, unquestionably vitiated the entire proceedings before it and therefore the continued detention of the petitioner as from 5-4-1982 would be illegal and the same will have to be quashed.'

9. In State of Punjab v. Mithu Singh, (1988) 3 S.C.C. 607 paras 4, 5 and 6, it has been observed as under:-

'4. The High Court in our view, has committed a serious error in going against the mandate of Section 20AA of the Prevention of Food Adulteration Act. Section 20AA reads :

Nothing contained in the Probation of Offenders Act, 1958 or Section 360 of the Code of Criminal Procedure, 1973 shall apply to a person convicted of an offence under this Act, unless that person is under 18 years of age.

5. It is clear from these provisions that Probation of Offenders Act, 1958 or Section 360 of the Code of Criminal Procedure shall not apply to a person convicted of an offence under the Prevention of Food Adulteration Act, unless the person is under 18 years of age. The High Court, however, extended the benefit of the said provisions to the accused since he committed the offence before the said amendment.

6. This is undoubtedly a wrong approach. The question is about the application of the provisions of the Probation of Offenders' Act or Section 360 of the Code of Criminal Procedure to a given accused. It is a benefit to be conferred or not to be conferred on the accused at a given point of time. It has nothing to do with the date of the offence committed by the accused. When Section 20AA expressly excludes the application of Probation of Offenders Act or Section 360 of the Code of Criminal Procedure to the accused convicted of an offence under the Prevention of Food Adulteration Act, the Court shall not apply those provisions to such accused after Section 20AA was brought into force.'

In the subsequent case, the attention of the Hon'ble Judges of the Supreme Court was not invited towards the earlier case. The only point involved in the subsequent judgment was about the applicability of the provisions of Section 20AA of the Prevention of Food Adulteration Act. This was not so in the earlier judgment. I am inclined to rely upon the subsequent judgment. In view of the observations made in the subsequent judgment, the accused-petitioner is not entitled to get the benefits of the Probation of Offenders Act.

10. When he is not entitled to get the benefits under the Probation of Offenders Act, there arises no question whether the crucial date for determining the age of the accused for giving the benefit under the Probation of Offenders Act is the date of the commission of the offence or the date of the judgment of conviction.

11. The accused-petitioner is not entitled for benefits under the Probation of Offenders Act for one more reason. He admits in his statement Ex. P/6 that prior to the occurrence, he similarly brought gold biscuits ten times.

12. Now the question is about quantum of sentence. The learned Additional Sessions Judge has remanded the case for the examination of the accused under Section 248(2), Cr. P.C. This was not necessary as the accused has already been examined by the learned Magistrate on the question of quantum of sentence. The minimum sentence for both the aforesaid offences is six months imprisonment. The occurrence took place in the year, 1966 and the complaint was filed in the year 1976, keeping in view all these facts and circumstances, sentence of rigorous imprisonment for six months for each offence would be quite adequate and reasonable.

13. Consequently, the revision petition is dismissed. The conviction of the accused-petitioner under Section 135, Customs Act and Rule 126P(2) (ii) and (iv) of the Defence of India Rules, 1962 is maintained. He is sentenced to undergo rigorous imprisonment for six months for each offence. The sentences will run concurrently.