

Md. Azimul @ Md. Ajim Vs. State

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Court : Kolkata

Decided On : Feb-10-2005

Reported in : 2005(3)CHN70

Judge : Alok Kumar Basu and ;Pranab Kumar Deb, JJ.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 21; ;
[Indian Penal Code \(IPC\), 1860](#) - Sections 65 and 66

Appeal No. : C.R.A. No. 335 of 1997

Appellant : Md. Azimul @ Md. Ajim

Respondent : State

Advocate for Def. : Minoti Gomes, Adv.

Advocate for Pet/Ap. : Ashim Roy, Adv.

Disposition : Appeal dismissed

Judgement :

Alok Kumar Basu, J.

1. We have heard both Mr. Roy on behalf of the convict-appellant and Miss Minoti Gomes on behalf of the State-respondent.

2. The present appeal was preferred by the convict-appellant from jail challenging his order of conviction and sentence recorded by the learned Special Judge, 6th Bench, Sessions Court at Calcutta under Section 21 of the NDPS Act in connection with NDPS Case No. 42 of 1994 of that Court.

3. According to the prosecution case, huge quantity of brown-sugar was recovered from the custody and possession of the convict-appellant who was found to be a Bangladeshi national and staying for a temporary period in a Calcutta hotel.

4. According to the prosecution complying with all the formalities as provided in the Act seizure was made in respect of the contraband articles from the possession of the convict-appellant and thereafter he faced trial before the learned Special Judge, under Section 21 of the NDPS Act.

5. During trial the prosecution examined as many as six witnesses and also produced chemical examiner's report regarding the seized article. The learned Special Judge having regard to the fact and evidence on record and specially after taking into consideration, the report of the chemical examiner and after taking into account the submissions made both by prosecution and the defence finally held the appellant guilty for the offence under Section 21 of the NDPS Act and as per provision of that section the appellant was sentenced to suffer 10 years rigorous imprisonment and also to pay the minimum fine of Rs. 1,00,000/- (one lac), in default R.I. for two years.

6. Appearing for the appellant-convict Mr. Roy is frank enough to concede that so far the prosecution evidence on record is concerned he does not have sufficient ground to challenge the order of conviction. We really appreciate the submission of Mr. Roy which he has made with reference to fact and evidence on record.

7. Having regard to the submission of Mr. Roy on behalf of the convict-appellant regarding the question of conviction, we are inclined to hold that there is no ground for us to make any interference with the order of conviction and hence the order of conviction stands confirmed.

8. Mr. Roy, however, strenuously argued before us that in this particular case it would appear from record that the convict-appellant was detained as back in the month of August, 1994 and since then he has been serving the jail term and taking the period of his first arrest, it is crystal clear that till today he has already served the substantive sentence of 10 years rigorous imprisonment. Mr. Roy contends that when the convict-appellant has already served the substantive sentence imposed against him, it is now left to the judicial discretion of this Court to consider whether the default clause of rigorous imprisonment of two years imposed against him for non-payment of fine of Rs. 1,00,000/- (one lac) may be reduced so that the convict-appellant may see the light of the day and have the breathing of free air as a free man.

9. Mr. Roy submits that having regard to the provisions contained in Section 21 of the NDPS Act and reading the provision of Sections 65 and 66 of the Indian Penal Code, this Court is always empowered to reduce the default clause of imprisonment and in this case considering the plight of the convict-appellant the Court would do better in the interest of justice to exercise the discretion in favour of the convict-appellant. Mr. Roy in support of his contention is fortified with one decision of the Apex Court, in the case of *Obie Kwe Emeanu v. State of Maharashtra*, reported in 2003 (11) SCC 317 and also a Bench decision of this High Court in the case of *Sahida Banu v. State of W.B.*, where in the first case the Apex Court reduced the sentence in default of fine in the case of a Nijerian citizen and in the second case this High Court in the case of a woman accused reduced such sentence in the interest of justice.

10. Miss Gomes appearing on behalf of the State-respondent has strongly opposed the contention of Mr. Roy in the matter of exercising discretion by this Bench in reducing the sentence, in default of fine on the ground that huge amount of contraband article was recovered from the possession of the convict-appellant and in the case of convict-appellant there is nothing before this Court to hold conclusively that he would leave the country for ever. Miss Gomes further submits that this Court must not forget the intrinsic intention of the legislature behind the NDPS Act, 1985 which is now really an instrument in the hand of executive to deter the trafficking of narcotic drugs so as to save the society from the abuse of

drug menace.

11. We have considered the submissions of both the sides and we really record our appreciation for the submission made on behalf of the convict-appellant by Mr. Roy, since Mr. Roy was engaged at State expense to represent the convict-appellant as the convict-appellant could not engage his own advocate.

12. Having regard to the legal position, we accept the contention of Mr. Roy that it is purely within the discretion of this Court to consider the question of reduction of sentence in default of fine. On examination of the judgment of the Apex Court as well as the judgment of the Division Bench of this High Court, we find that in two separate situation both the Apex Court and the Division Bench of this Court exercised their discretion and it is well-accepted position in law that judicial discretion cannot be defined through any strait-jacket formula and this Court while exercising such discretion must take into account the factual matrix of each case and only thereafter draw a conclusion of its own.

13. In the case of the Nijerian citizen the Apex Court was satisfied that the said appellant would leave the country for ever and in the case of Sahida Banu, this High Court considered the case only because the appellant was a woman.

14. So far the case before us is concerned, we find that the quantity of the contraband article was indeed too high. It is also available from record that the appellant was a citizen of Bangladesh and in that background we apprehend that our exercise of discretion may be total misuse having regard to the facts and circumstance of this particular case and with this end in view we although accept the contention of Mr. Roy on principle but we are not inclined to accept the same so far the present appellant is concerned. Accordingly, the appeal has no merit behind it and stands dismissed and both the order of conviction and sentence passed against the convict-appellant is hereby confirmed. Let copy of judgment and order be sent to the Trial Court along with the LCR immediately and let a copy be delivered to Mr. Roy free of cost as expeditiously as possible.

Pranab Kumar Deb, J.

I agree.

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