IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH, JAIPUR

JUDGMENT

S.B. CRIMINAL APPEAL NO. 77/2008

GYAN CHAND
VS.
STATE OF RAJASTHAN

DATE OF JUDGMENT : 10.04.2012

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HON'BLE MR. JUSTICE NARENDRA KUMAR JAIN-I

Mr. J.K. Singhi, Senior Counsel assisted by Mr. Ramit Pareek, for the appellant.

Mr. G.S. Fauzdar, Public Prosecutor, for the State.

BY THE COURT:

Heard learned counsel for the parties.

2. This appeal is directed against impugned judgment and order dated 27.11.2007 passed by Special Judge, N.D.P.S. Cases, Baran in Sessions Case No. 132/2005, whereby the appellant has been convicted and sentenced under Section 8/18 of The Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act') to 10 years rigorous imprisonment and a fine of Rs. 1,00,000/- and in default of payment of fine to further undergo one year additional rigorous imprisonment.

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3. Mr. J.K. Singhi, learned Senior Counsel appearing on behalf of the appellant submitted that the incident in the present case took place on 01.08.2005 and since then the appellant is in judicial custody, therefore, he has already remained in jail for more than 6 years and 8 months and since the contraband recovered in the present case is not greater than the commercial quantity specified by the Central Government by notification in the Official Gazette, therefore, it will be just and proper in the interest of justice to reduce the sentence of imprisonment and fine of the appellant awarded by the trial court to a period of imprisonment already undergone by him.

4. He submitted that contraband recovered in the present case is 2.5 Kg. opium. The commercial quantity notified in the notification issued by the Central Government is 2.5 Kg., but in view of definition of “commercial quantity”, as defined under Section 2(viia) of the NDPS Act, the same cannot be treated as “commercial quantity”, as it should be greater than the quantity specified in the notification issued by the Central Government.

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5. Learned counsel for the appellant submitted that Larger Bench of Himachal Pradesh High Court in **Ratto Vs. State of H.P., 2003 (3) Crimes 323** interpreted the definition of "commercial quantity" and held that quantity, to be determined as commercial quantity, should be higher than the quantity notified in the notification.

6. He further submitted that the judgment of Larger Bench of Himachal Pradesh High Court was followed by this Court in **Chanda Soni @ Pushpa(Smt.) Vs. State of Rajasthan, 2009 (1) Cr.L.R.(Raj.) 706**, which was a case of opium itself, wherein this Court took a view that contraband so recovered is not of commercial quantity. He, therefore, submitted that the trial court committed an illegality in treating the quantity of 2.5 Kg. opium as 'commercial quantity' and in awarding minimum sentence of 10 years rigorous imprisonment.

7. Learned Public Prosecutor defended the impugned judgment and order passed by the trial court, but so far as interpretation of definition of "commercial quantity", taken by Larger Bench of Himachal Pradesh High Court in **Ratto Vs. State of H.P.(supra) case**, which has been followed by this Court also in **Chanda Soni @ Pushpa(Smt.) Vs. State of**

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Rajasthan(supra) case is concerned, he fairly and frankly submitted that 2.5 Kg. opium cannot be said to be commercial quantity, therefore, minimum sentence of 10 years rigorous imprisonment in the present case is not attracted.

8. I have considered the submissions of learned counsel for the parties and examined the impugned judgment and order passed by the trial court.

9. The facts of the case are that on 01.08.2005, SHO PS Sadar, Baran, Hari Mohan Sharma with Udai Raj, ASI; Ummed Singh, Islam Khan, Uttam Singh, constables and driver Abdul Arif were on patrolling duty and at that time, near Mauja Miyada, they saw one person coming with a bag. On seeing the patrolling party, he started running, therefore, he was stopped and during interrogation, he did not give satisfactory reply. Thereafter, his bag was searched in accordance with the provisions of law. He was informed about provisions of law, as to whether he wants a search to be made by Gazette Officer or the Magistrate. The contraband, i.e. opium with bag was found, which was weighed as 2 Kg. and 520 Grams. After excluding the weight of the bag, i.e. 20 Grams, net weight of contraband came as

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2.5 Kg. Two samples of 50-50 Grams opium were prepared and sent for chemical examination. After completion of investigation, a charge sheet was submitted. Charge was framed against the appellant under Section 8/18 of the NDPS Act and after completion of trial, he was convicted and sentenced, as mentioned above.

10. I have examined the statements of prosecution witnesses and other documentary evidence including, Exhibit P-1, Seizure Memo and I find that recovery of contraband and Seizure Memo, Exhibit P-1 were found to be proved by the trial court and the finding recorded by the trial court has not been challenged by learned counsel for the appellant. I also examined the statements of prosecution witnesses and I find that finding recorded by the trial court is based on proper appreciation of evidence. The recovery of contraband from the appellant is proved from statements of P.W. 1, Udai Raj Singh; P.W. 2, Ummed Singh; P.W. 3, Islam Khan; P.W. 4, Uttam Singh; P.W. 12, Laxman Singh and P.W. 13, Hari Mohan Sharma, therefore, in my view, learned trial court was fully justified in convicting the accused-appellant under Section 8/18 of the NDPS Act.

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11. So far as reduction of sentence is concerned, it has been argued that recovery of 2.5 Kg. opium cannot be treated as commercial quantity, therefore, the sole question arises for consideration is as to, "whether 2.5 Kg. opium will be commercial quantity, in view of definition of commercial quantity, as defined under Section 2(viia) of the NDPS Act."

12. For ready reference, definition of "commercial quantity", as defined under Section 2(viia) of the NDPS Act, is reproduced as under:

> **"2.Definitions.**-(viia) "Commercial quantity", in relation to narcotic drugs and psychotropic substances, means any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette;"

13. The aforesaid question/point was considered by three Judges Bench of Himachal Pradesh High Court in **Ratto Vs. State of H.P. (supra)**. The question before Himachal Pradesh High Court was, "whether 01 Kg. Cannabis(Charas) will be commercial quantity in the face of Section 2(vii-a) of the NDPS Act" and it was held that while determining the quantity under this Sub-section, it has to be greater than one Kg. There is hardly

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any doubt regarding either the words one kg. or the "commercial quantity" which has to be "greater than", which would always mean any quantity more than/bigger than/larger than one Kg. Para No. 29 to 33 of the judgment are reproduced as under:

> "29. We feel that there is no ambiguity in the language of Section 2(viia), supra. As such, simple and literal meaning has to be given to the words "quantity greater than", so as to hold what would be the commercial quality.
>
> 30. As already noted there is hardly any ambiguity, muchless conflict between Section 2(viia) and the notification as extracted here-in-above for determination of what would be the commercial quantity. By virtue of powers conferred under sub-section (viia) of Section 2, Central Government is authorised to notify as to what would be the commercial quantity. Because the Commercial Quantity" on a plain reading of its definition amongst other things has to be ".....greater than the quantity specified by the Central Government by notification.....". Under 2001 Act notification supra was issued specifying the quantity for the purpose of Section 2 (viia) of the Act. A perusal of this notification indicates that quantity specified is one kilogram. Various columns of the notification extracted hereinabove have to be read in conjunction with the substantive provision of Section 2(viia) of the Act. This also puts a harmoneous construction on both, notification as well as Section 2(viia). While determining the quantity under this Sub-section, it has to be greater than one

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Kg. There is hardly any doubt regarding either the words one kg. or the "commercial quantity" which has to be "greater than", which in our considered view would always mean any quantity more than/bigger than/larger than one Kg. We are further of the view that this provision, and for that matter, notification admits of no other interpretation on its reading. Thus, it cannot be said that one Kg. would be the commercial quantity for the purpose of Section 2(viia), as added by 2001 Act.

31. Another reason to take this view is, that substantive and main provision of the Act is Section 2(viia) which is subject matter of the discussion in this judgment. It is also well known and accepted rule of interpretation of statutes that rules, regulations as well as notifications issued thereunder are meant to sub-serve the purpose of main provision of law and not other way round. Notification in the instant case, as extracted hereinabove, is a delegated legislation. Therefore, it can in no case byepass or over-ride the substantive provision of law and in case of conflict, delegated legislation has to give way to the main provision of law.

32. In this behalf, we may also observe that legislature in its wisdom has used the words in this sub-section knowing their significance, as well as import and at the cost of repetition, it needs to be noted that when language is clear, then ordinary meaning to the words needs to be given. As such, no aids either internal or external need to be pressed into service as was urged on behalf of the respondent to give another meaning.

No other point is urged.

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33. In view of the aforesaid discussion, in our view, decisions of this Court in Mathew Andrews British National v. State of H.P., Cr.M.P.(M) No. 1492 of 2001, State v. Munshi Ram, Criminal Revision No. 140 of 2000 and Sarvjeet Singh v. State, Cr.M.P.(M) No. 1088 of 2002(so far dealing with "commercial quantity" while cancelling the bail) do not lay the correct law, therefore, these are overruled. At the same time, while answering this reference, it is held that in order to be the "commercial quantity" as defined in Section 2(viia) of the Narcotic Drugs and Psychotropic Substances Act, 1985 as amended by Central Act of 2001, it has always to be more than/greater than/bigger than one kg.

Reference answered accordingly"

14. In **Chanda Soni @ Pushpa(Smt.) Vs. State of Rajasthan(supra),** this Court considered the question whether recovery of contraband i.e. 2.5 Kg. opium is a commercial quantity or not and after considering the definition of commercial quantity and judgment rendered by the Larger Bench of Himachal Pradesh High Court, held that the contraband so recovered is not of commercial quantity. Para No. 6 of the judgment reads as under:

> "6. In the aforesaid case, the judgment of the Hon'ble Apex Court on the issue of interpretation of statues was also considered and thereafter an opinion has been recorded.

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> In the present matter, the quantity of contraband namely, "Opium" so recovered is 2.5 Kgs. and if we look at the schedule then in the head of commercial quantity also, the quantity narrated therein for "Opium" is 2.5 Kgs. and considering the definition of commercial quantity, the quantity of the contraband so recovered should be higher or greater than the quantity notified in the schedule. In the present matter, the quantity of the contraband so recovered being not greater or higher than the quantity provided under the schedule in the head of commercial quantity, thus the conclusion of the aforesaid issue is that the contraband so recovered is not of commercial quantity."

15. In both the aforesaid cases, the definition of "commercial quantity", as defined under Section 2(viia) of the NDPS Act, was considered and the reasons assigned in both the judgments for coming to a conclusion are legal and sound one, therefore, I am satisfied that in view of the aforesaid decisions, the recovery of contraband in the present case is not of commercial quantity and trial court committed an illegality in treating the recovery of contraband in the present case as of commercial quantity and in awarding the minimum sentence of 10 years rigorous imprisonment and fine.

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16. Now the next question for consideration in the appeal is as to what should be proper sentence of imprisonment for the appellant in the present case. Learned counsel for the appellant submitted that incident took place way back on 01.08.2005 and the appellant has already remained in jail for about 6 years and 8 months. He also submitted that the appellant was a young boy of 24 years of age at the time of incident and he has already suffered a lot, therefore, ends of justice would meet, in case the sentence of imprisonment awarded by the trial court is reduced to a period of imprisonment already undergone by the appellant. Learned Public Prosecutor opposed the above submission of appellant.

17. I have considered the submissions of the parties. In view of the findings recorded hereinabove about recovery of contraband, which is of less than commercial quantity, but in view of the fact that it is on higher side, I am not inclined to accept the request of learned counsel for the appellant to reduce the sentence of imprisonment of the appellant awarded by the trial court to a period of imprisonment already undergone by the appellant. In my view, ends of justice would meet, in case

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sentence of imprisonment of the appellant awarded by the trial court is reduced to a period of 8 years rigorous imprisonment and a fine of Rs. 50,000/-.

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18. Consequently, the appeal is partly allowed. Conviction of the appellant, Gyan Chand S/o. Babulal under Section 8/18 of the NDPS Act is upheld, but his sentence of imprisonment awarded by the trial court is reduced to a period of 8 years rigorous imprisonment and a fine of Rs. 50,000/- (Rupees Fifty Thousands) and in default of payment of fine to further undergo 3 months rigorous imprisonment. The judgment and order passed by the trial court is modified to the above extent.

(NARENDRA KUMAR JAIN-I),J.

Manoj.

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