

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL NO. 508 of 2011****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE N.V.ANJARIA**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?
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BHAGWAN UCCHAV PRADHAN....Appellant(s)

Versus

STATE OF GUJARAT....Opponent(s)/Respondent(s)

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Appearance:

MS SADHANA SAGAR, ADVOCATE for the Appellant(s) No. 1

MR. L.R.PUJARI, APP for the Opponent(s)/Respondent(s) No. 1

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CORAM: HONOURABLE MR.JUSTICE N.V.ANJARIA

Date : 28/02/2013

ORAL JUDGMENT

The present appeal is preferred against the judgment and order dated 21st February, 2009, passed by the learned Special Judge (under Narcotic Drugs and Psychotropic Substances Act, 1985 Act), Surat, in NDPS case No. 1 of 2003. By the said judgment and order, the appellant herein was convicted for the offences under section 8(c) read with section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act'), and sentenced to rigorous imprisonment for ten years, and to pay fine one lakh rupees, and in default of payment of fine, to undergo rigorous imprisonment for further period of one year. It was directed that the accused-appellant would be entitled to benefit of set-off etc..

2. Stated briefly, the prosecution case was that when on 16.10.2002, Shri K. K. Patel, Police Sub Inspector, DCB Police station, Surat was on duty, at that time, the PSI of Kalavad Police station came to the DCB office and requested for help. One Haroon Siddik Odia was accompanying him. It was stated by said PSI that against the said Haroon Siddik Odia, offences under the NDPS Act were registered at Kalavad Police station at Crime Register No. 55 of 2002, and that from him 1700 grams Ganja was found. Said accused had stated that he had purchased the said contraband substance from one Bhagwan Pradhan staying at Room No. 2265 in Ashoknagar slum area, Ashwinikumar area of Surat. On the basis of this report, it was decided to conduct a raid at the place of information. After undergoing necessary procedure of making entry in the station diary, recording panchanama etc. the raiding squad alongwith said Haroon Siddik went to Ashoknagar slum area at around 13:15 hrs. in a vehicle. They reached then to room No. 2265 by

walking. Near to the said room, a person was standing who was not properly understanding the Hindi language. An interpreter was called and through him, identity of the said person was inquired. The person stated that he was Bhagwan Uchchav Pradhan-appellant herein. He was then asked whether he wanted to be searched in the presence of a gazetted officer, but he replied in the negative and consented to be searched by the raiding staff. It was the case of the prosecution that thereafter, the raiding party entered the room; near the right side wall of the room, substance looking like Ganja was lying. A green coloured weighing machine and some cash were also located. There were cotton bags filled with substance appearing to be like Ganja with green leaves. A plastic bag containing Ganja was also found lying. The quantity of 40.310 kg. Ganja was seized which was stated to be in the possession of the appellant. The samples were taken and were sealed in accordance with the procedure.

2.1 A complaint under the NDPS Act was registered against the appellant by said K. K. Patel of DCB Police Station which was registered at Illrd Crime Register No. 5684 of 2002. The process of criminal law was set into motion. Upon filing of charge-sheet by the police, the case was registered as Special NDPS case No. 1 of 2003. The appellant accused was tried. The prosecution examined ten witnesses and led documentary evidence in support of its case. The trial culminated into conviction and sentence as above.

3. Soon after the incident, the appellant was arrested on 16.10.2002. The learned Special Judge delivered judgment and order convicting and

sentencing the appellant on 21.02.2009. When the present appeal has come up for hearing and is being taken up, the position obtained is that the appellant has already served more than 10 years of imprisonment. He has therefore fully undergone the period of substantive sentence. The jail record sheet called for and produced by learned Additional Public Prosecutor also showed the aforesaid aspect of the appellant accused having remained in jail for about 10 years, 4 months and 5 days as on 27.02.2013. The sentence now being suffered and required to be suffered by the appellant is payment of fine of one lakh rupees, and in the alternative, if the fine is not paid, the appellant would have to undergo rigorous imprisonment for further one year as default punishment.

4. Learned advocate for the appellant Ms. Sadhna Sagar submitted on instructions that in the facts of the case, she did not press the appeal in so far as the recording of conviction against the appellant is concerned. It was submitted that the appeal was required to be considered in the context of the remaining part of the sentence only, which is the requirement of payment of fine of one lakh rupees and the default imprisonment in the event of non-payment of fine for further one year. Learned advocate submitted that the appellant having already suffered the main part of the sentence and he being a poor person, he may be exempted from payment of amount of fine. It was also submitted that the period of default imprisonment may be reduced and the same may be modified to one already undergone. She relied on the decision of the Supreme Court in **Shantilal vs. State of MP [(2007) 11 SCC 243]**. Learned APP would submit that the amount of fine statutorily imposable

sentence and since the challenge to conviction was given by the appellant, as stated by his advocate, there can be no waiving of amount of fine. He invited attention of the Court to section 20(b)(ii)(C) to submit that the minimum term of imprisonment was ten years and the minimum amount of fine of one lakh rupees.

5. The case on hand obtains an unfortunate situation and a sorry state of affairs where the appellant underwent imprisonment as undertrial prisoner after his arrest on 16.10.2002 till he was convicted and sentenced in February 2009. The convict challenged his conviction and sentence by preferring this appeal. When this appeal has a fortune of reaching the hearing, the substantive sentence of ten years of rigorous imprisonment has already been suffered by the appellant. He has been in jail by now for the period even more than that. By the empty passage of time which is the perils of the system, the accused is deprived of his right to fight his case on merits. The period of sentence imposed on him is over without his challenge to his conviction and sentence could culminate into a final decision. The appellant has secondly lost an opportunity to challenge the adverse decision even if the present appeal was to be dismissed on merits and the conviction and sentence was to be upheld.

5.1 Looking to the facts of the case, the quantity of Ganja recovered from the appellant was 40.310 kg., the same was more than the commercial quantity which is provided 20 kg. under the scheduled of the Act. Therefore, the provisions of section 20(b)(ii)(C) were attracted, whereunder the

punishment provided is of rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years, and it is further provided that the convict shall be liable to fine which shall not be less than one lakh rupees, but which may extend to two lakhs rupees. Therefore, the punishment of imprisonment and fine is imposable. The minimum imprisonment is 10 years rigorous imprisonment and the minimum fine imposable is rupees one lakh which is the sentence awarded to the present appellant.

5.2 Now that only part of sentence left is regarding payment of fine and in default imprisonment, the same deserves to be considered in the aforesaid peculiar circumstances and the other relevant factors. It was strenuously submitted by learned advocate for the appellant that the appellant cannot afford to pay the huge amount of one lakh rupees imposed as a fine. In the facts and circumstances, the prayer for reducing the default imprisonment part required to be undergone in lieu of payment of fine is quite reasonable. From the jail record, it is indicated that over and above the substantial sentence of ten years, the appellant accused has already served for further four months and more in the jail. While the appellant having given up the challenge to conviction, the merit part is not gone into, at the same time, from the prosecution story itself, it is manifested the appellant herein was sought to be roped in and the raid was arranged against him, on the basis of the statement of another accused. Whether the house which was raided and near to which the presence of the appellant was found, was of appellant's ownership or not, was a debatable issue.

6. In **Shantilal (supra)**, which was relied on by the learned advocate for the appellant, the Supreme Court had an occasion to consider the question whether a court of law can order a convict to remain in jail in default of payment of fine. The conviction of accused in the case before the Supreme Court was under NDPS Act, and section 18 of the Act was applicable for the purpose of imposition of sentence. The punishment provided therein was also similar to one in the present case which was minimum ten years imprisonment and minimum fine of one lakh rupees. The court considered the relevant provisions etc. and held that even though the NDPS Act was a special law, and even in absence of any specific provision to order imprisonment in default of payment of fine in the statutes, a Court of law has implicit power to pass order of imprisonment in default of payment of fine. In the facts of that case, the Apex Court modified the sentence by reducing the default imprisonment part of the sentence. the following observation in **Shantilal (supra)** deserves to be considered in the context of the present case.

“Section 18 quoted above provides penalty for certain offences in relation to opium poppy and opium. Minimum fine contemplated by the said provision is rupees one lakh (“fine which shall not be less than one lakh rupees”). It is also true that the appellant has been ordered to undergo substantive sentence of rigorous imprisonment for ten years which is minimum. It is equally true that maximum sentence imposable on the appellant is twenty years. The learned counsel for the State again is right in submitting that Clause (b) of sub-section (1) of Section 30 CrPC authorises the court to award imprisonment in default of payment of fine up to one-fourth term of imprisonment which the court is competent to inflict as punishment for the offence. But considering the circumstances placed before us on behalf of the appellant-accused that he is very poor; he is merely a carrier; he has to maintain his family; it was his first offence; because of his poverty, he could not pay the heavy amount of fine

(rupees one lakh) and if he is ordered to remain in jail even after the period of substantive sentence is over only because of his inability to pay fine, serious prejudice will be caused not only to him, but also to his family members who are innocent. We are, therefore, of the view that though an amount of payment of fine of rupees one lakh which is minimum as specified in Section 18 of the Act cannot be reduced in view of the legislative mandate, ends of justice would be met if we retain that part of the direction, but order that in default of payment of fine of rupees one lakh, the appellant shall undergo rigorous imprisonment for six months instead of three years as ordered by the trial court and confirmed by the High Court.”

(Para 39)

7. So far as the present case is concerned, it is seen that the appellant has remained in jail for 10 years which was the actual substantive sentence imposed. Out of these 10 years, he was in jail as an under-trial prisoner for almost 7 years. It is born out that the appellant is a farm labourer. His age is 49 years as on date. It was stated by learned advocate for the appellant that his family condition is dire and members reeling in poverty. The appellant has minor children; recently his elder son expired, adding to woes of the family. Considering the above aspects, while upholding the conviction recorded as well as the sentence including the order of payment of fine of one lakh rupees, it is proper and in the interest of justice that as far as the default imprisonment of one year is concerned, the same is modified and reduced to four months, which the applicant has already undergone as per the jail record-sheet made available by the learned APP. Therefore, in terms of the default imprisonment, the appellant shall have to undergo four months of rigorous imprisonment instead of one year's rigorous imprisonment, in the event he does not pay the amount of fine.

8. The appeal is partly allowed. The appellant accused has undisputedly

undergone the full term of substantial sentence of 10 years. The order of conviction recorded against the appellant-accused in the impugned judgment is maintained. The sentence of imposition of fine of Rs.1,00,000/- also remains unaltered. The part of the sentence requiring the applicant to further undergo one year's rigorous imprisonment as default sentence in the event of non-payment of fine of Rs.1,00,000/- is modified and reduced to four months rigorous imprisonment. The appellant accused shall be accordingly required, in the event of his non payment of fine of Rs.1,00,000/- to undergo four months rigorous imprisonment instead of one year's rigorous imprisonment. The sentence part is modified to the aforesaid extent only. Therefore, if by virtue of the aforesaid modification and reduction, in the said part of sentence, if the appellant is entitled to be set at liberty, he shall be set at liberty forthwith, if he is not required in connection with any other offence.

(N.V.ANJARIA, J.)

cmjoshi