

SUPREME COURT OF INDIA

Rafiq Qureshi

Vs.

Narcotic Control Bureau Eastern Zonal Unit

Crl.A.No.567 of 2019

(Ashok Bhushan and K.M.Joseph,JJ.,)

07.05.2019

JUDGMENT

Ashok Bhushan,J.,

SLP(Crl.)No.10246 of 2018

1. This appeal has been filed against the judgment dated 17.04.2018 of High Court of Calcutta, partly allowing the appeal filed by the appellant challenging his conviction and sentence under Section 21 (C) of the Narcotic Drugs and Psychotropic Substances Act, 1985. The Additional District & Sessions Judge had convicted the appellant and sentenced him under Section 21(c) to suffer rigorous imprisonment for a term of eighteen years and to pay fine of Rs.2 lakh, and in default to suffer imprisonment for twelve months. High Court while maintaining the conviction has reduced the sentence to sixteen years rigorous imprisonment with fine of Rs. 2 lakh and in default of payment of such fine, appellant was to undergo simple imprisonment for six months. Aggrieved against the judgment of the High Court this appeal has been filed. This Court issued notice on 26.11.2018 limited to the quantum of the sentence.

2. We have heard counsel for the appellant as well as learned counsel appearing for the State of West Bengal for the respondent.

3. Learned counsel for the appellant submits that appellant could not have been awarded sentence of more than ten years which is the minimum sentence provided for offence under Section 21(c), since the Court below did not advert to Section 32B of the Narcotic Drugs and Psychotropic Substances Act, 1985 and has not returned any finding that any of the factors for imposing the punishment higher than the minimum term of imprisonment as enumerated in clauses (a) to (f) are present in the facts of the present case. He submits that punishment higher than the minimum term of imprisonment can be awarded as per Section 32B only when any of the factors enumerated in 32B from (a) to (f) are present. There being no aggravating factors as enumerated in clauses (a) to (f) present in the facts of the present case, appellant could have been awarded only sentence of ten years, which is a minimum sentence for punishment under Section 21(c).

4. Learned counsel for the appellant has relied on judgment of Allahabad High Court where the Allahabad High Court has taken the view that without adverting to factors as mentioned in Section 32B, the Trial Court could not impose higher than the minimum punishment. He has relied on judgment of the Allahabad High Court reported in *Raj Kumar Vajpayee versus State of U.P. reported in*'.

5. Learned counsel for the respondent refuting the submissions, has relied on another judgment of Allahabad High Court in Ram Asre Vs. State of U.P. in Jail Appeal No. 894 of 2015 decided on 14.12.2017 where another single Judge of the Allahabad High Court has taken the view that there is no compulsion for the court to take into the consideration the factors which are enumerated in clauses (a) to (f) of Section 32B while awarding the punishment higher to the minimum which was prescribed.

6. We have considered submissions of the learned counsel for the parties and perused the record.

7. The main issues which have arisen in the present appeal pertain to interpretation of Section 32B of the Narcotic Drugs and Psychotropic Substances Act, 1985. The issues are as to: -

i) whether in absence of any of the factors enumerated in Section 32B from clauses (a) to (f) whether the trial court could have awarded punishment higher than the minimum term of imprisonment.

ii) Whether the trial court could not take any other factor into consideration apart from factors mentioned in clauses (a) to (f) while imposing punishment higher than the minimum term of imprisonment? Both the issues being related, we proceed to consider the issues together.

8. The Narcotic Drugs and Psychotropic Substances Act, 1985 enumerates different offences and provides for punishment. In the present case, conviction has been recorded under Section 21(c). Section 21 which is relevant for the case is as follows: -

"21. Punishment for contravention in relation to manufactured drugs and preparations.-Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any manufactured drug or any preparation containing any manufactured drug shall be punishable,

(a) where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to one year, or with fine which may extend to ten thousand rupees, or with both;

(b) where the contravention involves quantity, lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may

extend to ten years and with fine which may extend to one lakh rupees;

(c) where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

9. Section 32 with which we are concerned in the Present case was inserted by Act 9 of 2001 in the Narcotic Drugs and Psychotropic Substances Act, 1985 w.e.f 02.10.2001, which is to the following effect:-

"32B. Factors to be taken into account for imposing higher than the minimum punishment.- Where a minimum term of imprisonment or amount of fine is prescribed for any offence committed under this Act, the court may, in addition to such factors as it may deem fit, take into account the following factors for imposing a punishment higher than the minimum term of imprisonment or amount of fine, namely: -

(a) the use or threat of use of violence or arms by the offender;

(b) the fact that the offender holds a public office and that he has taken advantage of that office in committing the offence;

(c) the fact that the minors are affected by the offence or the minors are used for the commission of an offence;

(d) the fact that the offence is committed in an educational institution or social service facility or in the immediate vicinity of such institution or faculty or in other place to which school children and students resort for educational, sports and social activities.;

(e) the fact that the offender belongs to organised international or any other criminal group which is involved in the commission of the offences; and

(f) the fact that the offender is involved in other illegal activities facilitated by commission of the offence."

10. A perusal of different provisions of Act, 1985 indicates that various sections provide for different punishments. In Section 21(c) noticed above the provision provides that rigorous imprisonment shall not be "less than ten years but which may extend to twenty years and shall also be liable to fine". In various other sections the punishments are like Section 15(a) which may extend to one year or with fine as in Section 16 which may extend to ten years or with fine. Thus, there are few provisions in which minimum punishment and maximum punishment have been provided for. The different provisions,

however, do not indicate any legislative policy regarding sentencing especially when there is minimum and maximum punishment is prescribed, how to peg the punishment. By Act 9 of 2001, Section 31 was substituted which provides that any person who has been convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit, any of the offences punishable under this Act is subsequently convicted of the offence shall be punished for the second and every subsequent offence with rigorous imprisonment for a term which may extend to one and one-half times of the maximum term of imprisonment.

11. Section 32B is also inserted by Act 9 of 2001. It is useful to refer to Statement of Objects and Reasons of Amendment Act 9 of 2001 which is to the following effect:

"STATEMENT OF OBJECTS AND REASONS :- Amendment Act 9 of 2001:- The Narcotic Drugs and Psychotropic Substances Act, 1985 provides deterrent punishment for various offences relating to illicit trafficking in narcotic drugs and psychotropic substances. Most of the offences invite uniform punishment of minimum ten years' rigorous imprisonment which may extend up to twenty years. While the Act envisages severe punishments for drug traffickers, it envisages reformatory approach towards addicts. In view of the general delay in trial it has been found that the addicts prefer not to invoke the provisions of the Act. The strict bail provisions under the Act add to their misery. Therefore, it is proposed to rationalise the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentences, the addicts and those who commit less serious offences are sentenced to less severe punishment. This requires rationalisation of the sentence structure provided under the Act. It is also proposed to restrict the application of strict bail provisions to those offenders who indulge in serious offences."

12. The Statement of Objects and Reasons reveals that the Amendment Act has inserted provisions for rationalisation of the sentencing structure. Section 32B is a provision which is brought in the statute to rationalise the sentencing structure. Section 32B from clauses (a) to (f) enumerates various factors for imposing a punishment higher than the minimum term of imprisonment.

13. The submission made by the counsel for the appellant is that unless in the facts of a case, any of the factors mentioned in clauses (a) to (f) are not present, the Court cannot impose punishment higher than the minimum term of the imprisonment. It is submitted that the factors have been brought in the statute for the purpose of imposing the punishment higher than the minimum, hence, in absence of any such factor only minimum punishment should be awarded.

14. We have to first see the actual words used in the statute to find out object and purpose of inserting Section 32B. The Court after conviction of an accused hears the accused and take into consideration different circumstances of the accused and offence for awarding the appropriate sentence. Section 32B uses the phrase "the court may, in addition to such factors as it may deem fit, take into account the following factors for imposing a

punishment higher than the minimum term of imprisonment". The above statutory scheme clearly indicates the following:

- (a) the court may where minimum term of punishment is prescribed take into consideration "such factors as it may deem fit" for imposing a punishment higher than the minimum term of imprisonment or fine;
- (b) in addition, take into account the factors for imposing a punishment higher than the minimum as enumerated in clause (a) to (f).

15. The statutory scheme indicates that the decision to impose a punishment higher than the minimum is not confined or limited to the factors enumerated in clauses (a) to (f). The Court's discretion to consider such factors as it may deem fit is not taken away or tinkered. In a case a person is found in possession of a manufactured drug whose quantity is equivalent to commercial quantity, the punishment as per Section 21(c) has to be not less than ten years which may extend to twenty years. But suppose the quantity of manufactured drug is 20 times of the commercial quantity, it may be a relevant factor to impose punishment higher than minimum. Thus, quantity of substance with which an accused is charged is a relevant factor, which can be taken into consideration while fixing quantum of the punishment. Clauses (a) to (f) as enumerated in Section 32B do not enumerate any factor regarding quantity of substance as a factor for determining the punishment. In the event the Court takes into consideration the magnitude of quantity with regard to which an accused is convicted the said factor is relevant factor and the Court cannot be said to have committed an error when taking into consideration any such factor, higher than the minimum term of punishment is awarded.

16. This Court in *Sakshi vs. Union of India and others*², held that it is a well settled principle that the intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. A construction which requires for its support addition or substitution of words has to be avoided. In paragraph 19 of the judgment following was laid down:

"19. It is well-settled principle that the intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence a construction which requires for its support addition or substitution of words or which results in rejection of words as meaningless has to be avoided. It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. Similarly it is wrong and dangerous to proceed by substituting some other words for words of the statute. It is equally well settled that a statute enacting an offence or imposing a penalty is strictly construed. The fact that an enactment is a penal provision is in itself a reason for hesitating before ascribing to phrases used in it a meaning broader than that they would ordinarily bear. (Justice G.P. Singh: Principles of Statutory Interpretation, pp. 58 and 751, 9th Edn.)"

17. The specific words used in Section 32B that Court may, in addition to such factors as

it may deem fit clearly indicates that Court's discretion to take such factor as it may deem fit is not fettered by factors which are enumerated in clauses (a) to (f) of Section 32B.

18. Learned counsel for the appellant has relied on a judgment of Allahabad High Court reported in *Raj Kumar Bajpae vs. State of U.P.*³. A Single Judge of the Allahabad High Court referring to Section 32B of the Act stated following in paragraphs 39 and 40:

"39. After going through the impugned judgment and order very carefully, I find that the trial court while imposing higher than the minimum punishment prescribed under the NDPS Act on conviction under Section 8/20 of the NDPS Act, upon the appellants has failed even to advert to the factors enumerated in Section 32(B) of the NDPS Act. In fact, no reason whatsoever is forthcoming in the impugned judgment which lead the trial court to impose higher than the minimum punishment prescribed under the Act upon the appellants.

40. After going through the evidence on record, I am satisfied that in the present case none of the factors as spelt out in Section 32 (B) of the Act exist which could have prompted the trial court to award higher than the minimum punishment prescribed under the Act. The sentence awarded to the appellants thus cannot be sustained. While maintaining the conviction of the appellants under Section 8/20, I allow this appeal in part and modify the sentence awarded to them by the trial court by the impugned judgment and order to 10 years R.I. and a fine of Rs.1 lakh and in default of payment of fine the appellants shall be liable to undergo further simple imprisonment to one month. The impugned judgment stands modified accordingly."

19. Although in the above judgment it has not been categorically held that punishment higher than the minimum cannot be awarded unless any of the factors spelt out in Section 32B are present but the Court proceeded to set aside the award of higher punishment on the above ground. There are two other judgments of learned Single Judges of Allahabad High Court which have been brought to our notice. First is judgment of Single Judge in Criminal Appeal No.4301 of 2008, Krishna Murari Pal vs. State of U.P., where learned Single Judge in paragraph 13 has considered Section 32B in the following words:

"13. The trial court has awarded the sentence of 12 years' rigorous imprisonment and fine of Rs.1 lac to the accused appellant under Section 8/20(b)(ii)(c) of the NDPS Act on the ground that huge quantity of the said contraband (Ganja) has been recovered from the possession of the accused appellant. There is nothing on record to show that the accused appellant had committed any act which may lie under any of the clauses of Section 32B of the NDPS Act hereinabove mentioned. But that does not mean that the Court cannot award the sentence more than the minimum sentence in the absence of any of the above conditions mentioned in clauses (a) to (f) because these conditions are in addition to the factors as the Court may deem fit in awarding higher punishment to the accused. In the case at hand, there is nothing on record to show that the accused appellant and previous criminal history or he is a previous convict and that the appellant is now advanced in years s and is aged about 56 years as mentioned in the supplementary affidavit filed on behalf of the accused

appellant. Undisputedly the accused appellant had licence of the retailer shop of Bhang. Thus, regard being had to all the facts and circumstances of the case I think that reduction of sentence of 12 years' rigorous imprisonment awarded to the appellant to the period of imprisonment already undergone by him and in default of payment of fine, reduction of sentence of one year imprisonment to six months' simple imprisonment would meet the ends of justice."

20. Another case which has been relied by the counsel is in Jail Appeal No.894 of 2015, Ram Asre vs. State of U.P., where a learned Single Judge of Allahabad High Court after referring to Section 32B made following observation:

"59 In opinion of this Court, if the said section be read with greater attention, it would reveal that the words used in it are "it may deem fit", therefore word 'may' would indicate that it would be discretionary for the Court to take the grounds into consideration which are mentioned in sub-section (a) to (f) of the said section, while awarding punishment higher than the minimum prescribed. Therefore there is no force found in the argument in this regard made by the learned amicus curiae that in the case at hand the punishment awarded needs to be curtailed keeping in view that the lower court did not take into consideration the above factors."

21. The views expressed by the learned Single Judges in Krishna Murari Pal and Ram Asre (supra) correctly notices the ambit and scope of Section 32B.

22. In view of the foregoing discussion, we are of the view that punishment awarded by the trial court of a sentence higher than the minimum relying on the quantity of substance cannot be faulted even though the Court had not adverted to the factors mentioned in clauses (a) to (b) as enumerated under Section 32B. However, when taking any factor into consideration other than the factors enumerated in Section 32B, (a) to (f), the Court imposes a punishment higher than the minimum sentence, it can be examined by higher Courts as to whether factor taken into consideration by the Court is a relevant factor or not. Thus in a case where Court imposes a punishment higher than minimum relying on a irrelevant factor and no other factor as enumerated in Section 32B(a to f) are present award of sentence higher than minimum can be interfered with.

23. In the present case The High Court held that although gross quantity of 8.175 Kg. of Heroin was alleged to have been recovered from the appellant but actual quantity of Heroine which was found to be in possession was only 609.6 gm. The High Court held that since the appellant was found in possession of Narcotic Drugs as per the analysis report to 609.6 gm. which is much higher than the commercial quantity, punishment higher than the minimum is justified. The High Court reduced the punishment from 18 years to 16 years. We, thus, uphold the judgment of the trial court and the High Court awarding the punishment higher than the minimum, however, looking to all the facts and circumstances of the present case including the fact that it was found by the High Court that the appellant was only a carrier, we find that the ends of justice will be sub-served in reducing the sentence from 16 years to 12 years. Thus, while maintaining the conviction of the appellant the appellant is sentenced to undergo 12 years rigorous imprisonment with fine of Rs. 2

lakh and in default of payment of such fine the appellant shall further undergo for a simple imprisonment for six months. The appeal is partly allowed to the extent as indicated above.

Judgment Referred.

¹(2016) 95 ACRC 0896

²(2004)5 SCC 0518

³(2016) 95 ACrC 0896