Bisahulal Vs State of M.P.

Court: Madhya Pradesh High Court

Date of Decision: Sept. 29, 1966

Acts Referred: Opium Act, 1878 â€" Section 9

Citation: (1969) JLJ 823

Hon'ble Judges: Shivdayal, J

Bench: Single Bench

Advocate: R.K. Pandey, for the Appellant; M.V. Tamasker, Dy. Government Advocate for State, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Shivdayal, J.
The Petitioner has been convicted for possession of opium, punishable u/s 9 (a) of the Opium Act, and has been sentenced

to three months rigorous imprisonment.

2. It has been found by both the Courts below that when the house of the Petitioner was searched, a Dabba (small box), containing raw opium,

was recovered from behind the idol of Shri Hanumanji. In fact, this was admitted by the accused. His plea was that his school going son found it

lying on the road some-where and it was he who put it behind the idol. The learned trial Magistrate as also the appellate Court have disbelieved the

defence; in my opinion, rightly. It is unnecessary to repeat the reasons stated by the appellate Court in detail.

3. Learned Counsel for the Petitioner contends that the prosecution did not prove the quantity of opium, which was in the Dabba and further that it

was the duty of the prosecution to prove that the quantity therein exceeded the quantity of opium, which a person is permitted to possess, that is,

1/4 Tola in weight. In my opinion, the first point is correct but the second point is irrelevant.

4. The seizure memo (Ex. P-1; clearly shows that the weight of the opium, including the Dabba, was 80 grams and this is also clear from the

statement of C.G. Jaiswal, Excise Inspector (P.W.1). He admitted in cross-examination that the weight 80 grams, included that of the Dabba. This

appears to have escaped notice of the Courts below. The charge mentions 81 grams of opium; the judgment of the Magistrate mentions 80 grams

of opium; ""JO APHIM BARAMAD HUI HAI WAH 80 GRAM KE LAGBHAG HAI JO KAPHI MATRA HAI"": and the judgment of the

Additional Sessions Judge also mentions, "" a Dabba containing 80 grams of raw opium"". Since the weight of the Dabba is not known, it is difficult

to say whether the weight of the opium was 79 grams or 1 gram.

5. But the weight of opium does not matter. In this State, it is not permissible to be in possession of any quantity of opium without a license. Shri

R.K. Pandey relies on Sub-rule (1) of Rule 8, Part VI, of the C.P. Rules made under the Opium Act, as amended by Notification No. 47, dated

10 January 1948. The sub-rule was substituted by these words:

(1)(a). Except in areas in which the C.P. and Berar Prohibition Act, 1938, (VII of 1938) is in force, no person shall at any one time possess opium

exceeding 1/4 Tola in weight, provided that and Indian soldier may....

Learned Counsel produces before me a book containing those rules and the amendment. But those rules are not in force as they were repealed

under Rule 25 of the M.P. Opium Rules, 1959, which came into force on 1 April 1959 (published in M.P. Gazette Extraordinary, dated 1 April

1959).

6. Shri Pande then appealed for reduction of sentence. Shri Tamasker, learned Deputy Government Advocate, contends that three months

imprisonment is the minimum sentence so that reduction is out of the question. Learned Counsel for the Petitioner urges that there is no minimum

sentence prescribed for an offence u/s 9 (a) of the Opium Act. Alternatively, he relies or. the principle of State of M.P. v. Sarman 1964 JLJ 402:

ILR 1963 MP 529: 1964 MPLJ 367.

7. Section 9 of the Opium Act, 1878, as printed in the M.P. Criminal Manual by D.P. Tiwari, at page 242-243 reads thus:

9. Any person who, in contravention of this Act, or of rules made and notified u/s 5 or Section 8.-

(a) possesses opium, or

(b) transports opium, or

(c) imports or exports opium, or

(d) sells opium, or

(e) omits to warehouse opium or removes or does any act in respect of ware-housed opium, and any person who otherwise contravenes any such

rule,

shall, on conviction before a Magistrate, be punishable for each such offence with imprisonment which may extend to three years, with or without

fine, and, where a fine is imposed, the convicting Magistrate shall direct the offender to be imprisoned in default of payment of the fine for a term

which may extend to six months, and such imprisonment shall be in excess of any other imprisonment to which he may have been sentenced.

There is no mention in this book of local amendment made by the Madhya Pradesh Legislature. But the following position is to be considered:

(i) u/s 9 of the Indian Opium Act, 1878, as it stood prior to 21 December 1957, the provision for. punishment was in these words:

...shall, on conviction before a Magistrate, be punished for each such offence with imprisonment for a term which may extend to one year or with

fine which may extend to one thousand rupees, or with both.

(ii) By the Opium (Madhya Bharat Amendment) Act, 1955, (No. 15 of 1955), which came into force on 17 June 1955, for the words ""one year

or with fine which may extend to one thousand rupees or with both"", the following words were substituted:"" two years or with fine which may

extend to two thousand rupees or with both; provided that, in the absence of special reasons to the contrary mentioned in the judgment of the

Court, such imprisonment shall not be less than three months and fine shall not be less than Rs. 500"". The Madhya Bharat Amendment Act

received the assent of the President under Article 254 of the Constitution on 5 June 1955.

(iii) By virtue of the M.P. Extension of Laws Act, 1958 (No. 23 of 1958), which came into force on 12 September 1958, the above Madhya

Bharat amendment was extended to and brought into force in all other regions of the new Madhya Pradesh State as well. The M.P. Extension of

Laws Act received the assent of the President under Article 254 of the Constitution on 27 August 1958.

(iv) Let it be mentioned here that the Parliament, by the Opium Laws (Amendment) Act, 1957 (No. 52 of 1957), which came into force on 21

December 1957, had amended Section 9 of the Opium Act, 1878, by substituting the following words:

....shall, on conviction before a Magistrate, be punishable for each such offence with imprisonment which may extend to three years, with or

without fine.

(v) It may be presumed that both the amendments were before the State Legislature, when the Extension of Laws Act was passed. But, since

under the M. B. Amendment Act the maximum sentence of two years imprisonment was prescribed; whereas under the Principal Act, the

maximum sentence had been raised to three years, it seems to me that the Parliament Act No. 52 of 1957 was lost sight of at the time of enacting

the extension of Laws Act, 1958.

(vi) The language of the proviso which prescribes the minimum sentence, does not make it obligatory that the sentence of imprisonment and the

sentence of fines shall both be awarded, in the substantive part of the section it is left to the discretion of the Court whether to award sentence of

imprisonment or sentence of fine, or both the sentences. The Court may not award sentence of imprisonment, but, if the sentence of imprisonment

is in fact awarded, the minimum would be three months. Likewise the Court may not award sentence of fine at all, but, if the sentence of fine is

awarded, then the minimum fine must be Rs. 500/-.

8. From the above provisions it is clear that with effect from 12 September 1958, when the M. P. Extension of Laws Act, 1958, came into force:

(a) Under the State law the maximum punishment of imprisonment is two years and the maximum punishment of fine in Rs. 2,000/-, but under the

Union Law, the maximum sentence of imprisonment is 3 years and no limit of fine is prescribed;

(b) Under the State law the minimum sentence of imprisonment, if imprisonment is awarded is three months, and, the sentence of fine, if sentence of

tine is awarded, is Rs. 500/-. Under the Union Law no minimum sentence is prescribed.

9. The validity of the aforesaid two provisions of the State Law must now be tested by the provisions of Article 254 of the Constitution, which

embodies the following rules:

(a) Under Clause (1) of that Article, the general rule laid down is that in case of repugnancy of a State Law with a Union Law relating to the same

matter in the Concurrent List, the Union Law prevails irrespective of whether it is prior or subsequent to the State Law.

(b) Clause (2) engrafts an exception to the above general rule. When the State law has been reserved for the President''s consideration and

receives his assent, it will prevail notwithstanding its repugnancy to an earlier law of the Union.

(c) Again, the exception contained in Clause (2) is to be read subject to the proviso which empowers the Parliament, by enacting another law to

repeal or amend a State Law even though it is valid by virtue of the President''s assent.

(d) Strictly speaking, the principle of implied repeal is attracted in case of repugnancy between two laws of the same Legislature. If the subject-

matter of the later legislation is identical with that of the earlier so that they cannot stand together, this earlier legislation is repealed by the later

enactment. The principle on which this rule rests is embodied in Article 254(2) of the Constitution.

(e) But repeal is not to be implied if it is possible to construe the scope of the two enactments to be different. The inconsistency does not lie in the

mere co-existence of the two laws. No question of repugnancy arises where Parliamentary legislation and the State legislation occupy different

fields and deal with separate and distinct matters even though of a cognate and allied character. And, where the State law is supplementary to the

Union law, and both admit of simultaneously obedience, it cannot be said that the State law is impliedly repealed by the subsequent Union law.

(f) According to the doctrine of severability, if the offending provision is severable from the rest of the Act only such provision will be ultra vires

and not the entire statute. This doctrine is imported in Article 254 of the Constitution by use of the words ""to the extent of.

10. Applying these rules, the following position clearly emerges:

(a) In the territory to which the Opium (Madhya Bharat Amendment) Act, 1955, (hereinafter called the Madhya Bharat Act) applied, the

maximum sentence having been raised both in case of imprisonment and fine and the minimum sentence being also prescribed the Madhya Bharat

Act prevailed by virtue of the President''s assent [sec Rule(B) above].

(b) But, when the Opium Laws (Amendment) Act, 1957, was enacted by the Parliament and the maximum sentence of imprisonment was raised to

three years and no limit of fine was fixed, the Madhya Bharat Act, because of the inconsistency, became invalid to that extent with effect from 21

December 1957. To put it differently, the provisions relating to maximum sentence of two years and one thousand rupees fine became void. [see

Rules (A), (C) and (D) above]. It must, however, be noted that the Parliament, while enacting the Union Law, did not expressly repeal the

Madhya bharat Act. The power conferred on the Parliament under the proviso to Article 254(2) of the Constitution extends to not only adding to,

amending or varying, but also to repealing a law made by a State Legislature with the assent of the President under Clause (2). Therefore, in the

present case, what is to be seen is whether, and how far, the principle of implied repeal [see rule (D) above] is attracted.

(c) No minimum sentence was initially prescribed in Section 9 of the Opium Act, nor even under the Union Law (Amendment) Act of 1957. The

proviso added by the Madhya Bharat Act fixing minimum sentence survived at all times as it admitted of obedience simultaneously with the Union

Law. [see Rule(E) above]. And, since the provisions relating to the maximum sentence and the minimum sentence under the Madhya Bharat Act

were severable, the latter did not fall along with the former. [See Rule(F) above]. Shri Pandey strenuously relies on the observations in Zaverbhai

v. The State of Bombay (1955) 1 SCR 799, and contends that the subject-matter of the punishment cannot be split up and since the punishment

was altered in degree but not in kind, the later provision must be considered as superseding the earlier one. But, in the same ruling, their Lordships

have made it clear that the principle on which the rule of implied repeal rests is that if the subject matter of the later legislation as identical with that

of the earlier, so that they cannot both stand together, then the earlier is repealed by the later enactment. In my opinion, the word ""identical"" and the

expression ""so that they cannot both stand together"" are of the utmost significance. That constitutes repugnancy is not merely the co-existence of

the subject-matter in the two legislations, but it is their identity and the identity to the extent that they cannot both stand together and it is in that

case that the maxim ""leges posteriores contraries abrogant"" applies. Again, in Deep Chand v. State of V. P. AIR 1919 SC 648 (658), their

Lordships recapitulated the principle on the basis of which repugnancy between two statutes is to be ascertained: ""(1) Whether there is direct

conflict between the two provisions;

(2) Whether Parliament intended to lay down an exhaustive code in respect of the subject-matter replacing the Act of the State Legislature; and

(3) Whether the law made by Parliament and the law made by the State Legislature occupy the same field.

In that decision, Zaverbhai (supra) and Ch. Tika Ramji and Others etc. Vs. The State of Uttar Pradesh and Others, , have been referred to.

The principle of implied repeal was considered in Kutner v. Phillips (1891) 2 QB 267.

It was laid down thus:

It is admitted on the part of the applicant that there has been no express repeal of this section; but it is argued that, by reason of the legislation

which has since taken place and especially by reason of the provisions of the Country Courts Act, 1888 (51 and 52 Act. C. 43), it has been

repealed by implication. Now a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant

to the provisions of an earlier one, that the two cannot stand together.

So also in Tabernacle Permanent Building Society v. Knight 1892 AC 298, Lord Halsbury expressed himself thus:

If the two provisions may stand together I am unable to follow the argument that the one Act is inconsistent with the other, and the whole argument

depends upon the word "inconsistent" in the later statute. It is obvious to inquire, where is the inconsistency if both may stand together and both

operate without either interfering with the other ?

(Page 302).

No doubt, where a State Legislature prescribes two years imprisonment as the maximum, but in the Union Law imprisonment may extend to three

years, there is clear repugnancy. Shri Pandey, however, stretches the point further and argues that since under the Union Law a sentence of one

day imprisonment can be legally and validly awarded, but under the State Law that sentence will not be in conformity with the latter (exceptions

apart), a repugnancy is constituted. I am unable to accept this argument. It is well known that there are several statutes which prescribe both

maximum and minimum sentences. In a case where the Parliament speaks only about the former, but keeps quiet about the latter, the State

Legislature has the power to speak about the latter. Where two provisions can be reconciled and are capable of standing together, there is no

repugnancy. This has been emphatically stated in 36 Halsbury (Simonds) 465, paragraph 709, thus:

Repeal by implication is not favored by the Courts for it is to be presumed that Parliament would not intend to effect so important a matter as the

repeal of a law without expressing its intention to do so If, however, provisions are enacted which cannot be reconciled with those of an existing

statute, the only inference possible is that Parliament, unless it failed to address its mind to the question intended that the provisions of the existing

statute should cease to have effect, and an intention so evinced is as effective as one expressed in terms. The rule is, therefore, that one provision

repeals another by implication if, but only if, it is so inconsistent with or repugnant to that other that the two are incapable of standing together. If it

is reasonably possible so to construe the provisions as to give effect to both, that must be done; and their reconciliation must in particular be

attempted if the later statute provides for its construction as one with the earlier, thereby indicating that Parliament regarded them as compatible, or

if the repeals expressly effected by the later statute are so detailed that failure to include the earlier provision amongst them must be regarded as

such an indication.

(d) In the present case, as the sentence of more than two years imprisonment or more than Rs. 500 fine has not been awarded, it is not necessary

to go into the question whether the provision relating to maximum sentence, as enacted under the Madhya Bharat Act of 1955 and extended under

the M. P. Extension of Laws Act, 1958, prevails over the provision of maximum sentence under the principal Act.

11. The above discussion leads to the conclusion that so far as this State is concerned, u/s 9 of the Opium Act, the minimum prescribed sentence is

three months, in case of imprisonment, and Rs. 500 in case of fine.

12. It was argued by the learned Deputy Government Advocate that the M.P. Extension of Laws Act having received the assent of the President

under Article 254 of the Constitution, the Madhya Bharat Act must be taken as validly extended to the entire State of Madhya Pradesh by virtue

of Section 3(2) of that Act. I have given a considered thought to this argument. It is true that this is a piece of legislation by reference, but Section

3(2) itself imposes fetters. That Sub-section reads thus:

3(2) The Acts specified in Part B of the Schedule and as in force in the Madhya Bharat region immediately before the appointed day, are hereby

extended to, and shall, as from the appointed day, be in force, in all the other regions of the State.

Now, the ""appointed date"" was 1, January 1959. As pointed out above, the Madhya Bharat Act. so far as it provided maximum punishment u/s 9

of the Opium Act had become void because of repugnancy with effect from 21 December 1957. Therefore, Section 3(2) of the M. P. Extension

of Laws Act, 1958, did not have the effect of extending that part of the Madhya Bharat Act. In this view of the matter, item No. 4 of Part B of the

Schedule to the M. P. Extension of Laws Act, was not, in the eye of law, extended. Apart from that, if the provision relating to the maximum

sentence under the Madhya Bharat Act became void and, therefore, became ineffective in the Madhya Bharat region, it would be anomalous to

say that the provision was extended to ""all the other regions of the State"". However, the question of maximum limit of sentence (which can be

awarded having regard to the provisions of the M. P. Extension of Laws Act, read with the Madhya Bharat Act and the Union Act, No. 52 of

1957), does not arise for consideration in the present case.

13. This brings me to Shri Pandey''s argument that inspite of the minimum sentence being prescribed, being a first offender is by itself a special

reason for awarding sentence less than the prescribed minimum. Reliance is placed on State of M.P. v. Sarman 1964 JLJ 402: ILR 1965 MP 529:

1964 MPLJ 367. That was a case u/s 34 of the M.P. Excise Act, where a minimum sentence is prescribed ""in the absence of special and adequate

reason to the contrary to be mentioned in the judgment of the Court"". It was held in that case:

Being a "first offender" is, in my opinion, both a special and adequate reason warranting the infliction of a penalty less than the minimum prescribed.

The contention that there must be something extraneous to the offence or offender to warrant the reason being "special and adequate" has no

substance. Nor can the fact that for subsequent offences higher penalties have been prescribed be any reason for saying that for first offenders the

minimum sentence prescribed in the aforesaid proviso must necessarily be inflicted.

Shri Pandey contends that the Petitioner being a first offender, the sentence to be awarded to him must be less than the prescribed minimum. On

the other hand, the learned Deputy Government Advocate contends that the decision in State of M.P. v. Sarman (supra) requires reconsideration.

His argument is that if being a first offender is by itself a special and adequate reason, in no case of a first offender can the minimum sentence be

awarded because there can be nothing to discriminate between the case of one first offender and another first offender. He further submits that this

question very often arises in cases u/s 34, M. P. Excise Act, and u/s 6, M. P. Prohibition Act, as it has now arisen u/s 9 of the Opium Act.

Therefore, in the case of every first offender, who has been found guilty of any of these offences, a sentence less than the minimum will have

necessarily to be awarded, if the decision in State of M. P. v. Sarman (supra), is to be followed.

14. Having carefully perused the decision, I am of the opinion that although the observations, as quoted above, were made in general terms, in

applying them regard must be had to the facts and circumstances of that case. There, the accused were found in possession of illicit liquor and an

apparatus for manufacturing distilled liquor. The accused, on being prosecuted, admitted their guilt and prayed to be excused. They further stated

that they did not want any investigation to be made into the allegations made against them. The plea of guilty was accepted by the trial Court. They

were convicted and each one of them was sentenced to imprisonment till the rising of the Court and a fine of Rs. 10. The matter came before this

Court in revision. After discussing theory and modern concept of punishment, it was said that note must be taken of age, sex, rank, fortune, culture,

education and many other circumstances, such as whether the accused are first offenders, or whether they are mentally abnormal or sub-normal

etc. And, in that context, it was observed thus:

In the exercise of this discretion, if the trial Judge, while taking note of the factors aforesaid, chose to contrast first offenders as against recidivists, it

cannot be said that he had acted in violation of any well recognised judicial principles.

I would, therefore, hold that the decision in State of M. P. v. Sarman (supra), does not go to the extent of holding that in every case of a first

offender u/s 34 of the Excise Act, a sentence less than the minimum must be awarded.

15. Having regard to the facts and circumstances of this case, I see no ground for reduction of the sentence.

16. The revision is dismissed.