

Sriskandaraja Vs State

Court: Madras High Court

Date of Decision: July 21, 2014

Citation: (2014) 2 LW(Cri) 515

Hon'ble Judges: Aruna Jagadeesan, J

Bench: Single Bench

Judgement

Aruna Jagadeesan, J.

This appeal is preferred against the judgment of conviction and order of sentence passed by the learned Special

Judge, I Additional Special Court under NDPS Act, Chennai 104 in C.C. No. 266 of 2004 dated 14.08.2012 whereby the appellant was

convicted for the offence under sections 8(c) r/w 21(c), 28 and 29 of NDPS Act 1998 as amended by Act 9/01 and sentenced to undergo 10

years rigorous imprisonment for each offence and to pay a fine of Rs. 1,00,000/- for each offence, in default, to undergo 6 months rigorous

imprisonment for each offence. The appellant is also convicted for the offence under section 31 of NDPS Act, 1985 as amended Act 9/01 for the

previous punishment in C.C. No. 236/1993 and sentenced him to undergo 10 years rigorous imprisonment and to pay a fine of Rs. 1,00,000/- in

default to undergo 6 months rigorous imprisonment. Totally, there are three accused in this case. The case of the prosecution in brief is that on

30.05.2004, the officer of NCB, P.W. 2 Mr. S. Karthikeyan received information that a Srilankan namely Suresh @ Khalifa @ Sriskandaraja, an

absconding convict in drug case is indulging in drug trafficking in Mumbai between Madhya Pradesh, Mumbai, Chennai and Sri Lanka with the

assistance of the associate Kandipan(A3), a Srilankan residing at Kottivakkam and the said Kalifa (A1) has procured about 3 kgs of heroin from

Madhya Pradesh and come down to Chennai and was making arrangements to deliver about 3 kgs of heroin to one Ranganathan Prabhakaran

(A2), a Srilankan and that the said Khalifa (A1) has sent his associate Kandipan(A3) with 3 kgs of heroin to deliver to Ranganathan

Prabhakaran(A2) who has to illegally traffick to Sri Lanka through Rameshwaram in an Ambassador car bearing registration No. TN-09-J-7817

on 31.05.2004. On receiving the information, the NCB Officer, Chennai rushed to Tambaram Municipal Bus stop with two independent witnesses

and mounted surveillance. The officer noticed a white colour Ambassador car coming from Chennai to Tindivanam direction. The officer

surrounded the car with the help of two independent witnesses. The driver of the car disclosed his name as Koilraj and he is the owner cum driver

of the above Ambassador car. The officer enquired the person who was seated in the car and seized 3 packets and on weighment, it was found to

be 1.030 kgs, 1,030 kgs and 1.040 kgs, totally weighing 3.100 kgs. A seizure mahazar was drawn on the same day and the officer issued

summons under section 67 of NDPS Act to those persons A2 and A3 on the same day and asked to appear before them and obtained a

statement from them and thereafter, arrested them under section 8(c) r/w section 21(c), 28 and 29 of NDPS Act. They were produced before the

Remanding Magistrate, Saidapet, Chennai.

2. It is the further case of the prosecution that on 01.06.2004, based on a specific information that a Srilankan Sriskandaraja, an absconding

convict is involved in this case and he has come from Mumbai to Chennai on 28.05.2004 and staying in Mogappair area and that he would come

to Ambathur O.T. Bus stand, the officer rushed to the bus stand and with the help of photograph, they identified the said Sriskandaraja and

brought him to the office after summoning him under section 67 of the NDPS Act and obtained a statement from him. He was produced before IX

Metropolitan Court, Saidapet, Chennai. After following the procedure contemplated under the NDPS Act, the samples were sent to chemical

analysis and the presence of Di-Acetyl Morphine was confirmed.

3. In order to prove its case, the prosecution examined 8 witnesses and marked 44 exhibits and produced 15 material objects. The trial Court,

after analysing the evidence, convicted the appellants and sentenced them as state above.

4. Mr. A. Ganesh, learned counsel for the appellant though filed the appeal challenging the conviction and sentence passed by the trial Court for

the offence under sections 8(c) r/w 21(c), 28 and 29 of NDPS Act 1985 as amended by Act 9/01 and under section 31 of NDPS Act, 1985 as

amended Act 9/01, during the course of arguments, he confines his argument only to the conviction for the offence under section 31 of NDPS Act,

1985 as amended Act 9/01 and sentencing him to undergo 10 years rigorous imprisonment and to pay a fine of Rs. 1,00,000/-, in default, to

undergo 6 months rigorous imprisonment. The sentence imposed upon the appellant for the offences under sections 8(c) r/w 21(c), 28 and 29 of

NDPS Act 1988 as amended by Act 9/01 were ordered to run concurrently. However, for the offence under section 31 of NDPS Act, 1985 as

amended Act 9/01, the appellant was directed to undergo sentence for a further period of 10 years rigorous imprisonment. Learned counsel for the

appellant contended that there is no specific charge framed for the offence under section 31 of NDPS Act and without framing the charge under

section 31 of NDPS Act, 1985 as amended Act 9/01, the trial Court cannot enhance the punishment, thus violated Section 211(7) of Cr.P.C.

Learned counsel further contended that the prosecution has not let in any evidence in respect of the alleged previous conviction and no document

was marked more particularly, the judgment of the Court which passed the conviction on which the enhancement of punishment is awarded has not

been marked before the Court as per Section 298 of Cr.P.C. in this regard, learned counsel for the appellant relied upon the judgment of M.S.

Dhananjayan v. State by Provident Fund Inspector, Madras reported in 1989 L.W.(Cri.) 210.

5. Learned counsel further contended that the previous conviction of the accused has not been proved in accordance with law inasmuch as there is

no evidence to prove that the appellant/accused was convicted for the similar offence. Learned counsel also pointed out that the prosecution having

failed to prove the identity of the accused in this case whose name is Srisankararaja @ Suresh. By merely giving the C.C. number the accused

cannot be convicted under section 31 of NDPS Act awarding with enhancement of sentence. He also pointed out that when the accused was

examined under section 313 Cr.P.C., no question was put to him regarding the previous conviction.

6. When the learned counsel for the appellant addressed the Court challenging the conviction made under section 31 of the NDPS Act on the

above grounds, learned Special Public Prosecutor took time and later filed an application in M.P. No. 1 of 2014 under Section 391 of Cr.P.C.

seeking leave of the Court to receive the judgment in C.C. No. 236 of 1995 and to give evidence in the above criminal appeal. Learned Special

Public Prosecutor would submit that the judgment in C.C. No. 236 of 2005 is an important document to punish the respondent under Section 31

of the NDPS Act which inadvertently not marked before the trial Court. Therefore, he prayed that the said document may be received as

additional document and he should be permitted to let in additional evidence if the Court deem fit. The said application has been opposed by the

learned counsel for the appellant who contended that the prosecution cannot fill up the lacunae by filing this application and placed reliance on the

judgment reported in 1965 Cri.L.J. 554 (Kashmira Singh v. State).

7. Heard learned counsel appearing for the appellant as well as the learned Special Public Prosecutor. Perused the materials placed on record.

8. In order to render enhanced punishment under section 31 of NDPS Act any one of the following conditions must be present.

i) The accused must have been convicted of the commission of, or admit to commit or abetment of, or criminal conspiracy to commit the offence

under the Act.

ii) The said accused must have been a previous convict of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to

commit, any of the offences punishable under the Act.

iii) Where such accused has been convicted by a competent court of criminal jurisdiction outside India under any law corresponding, such person,

in respect of such conviction, shall be dealt with as a previous convict under this section as if he had been convicted by a court in India.

9. Under the Indian Penal Code, the provision for enhanced punishment is contained under section 75 of the Code but there the attempt to commit

the offence is not liable to enhanced punishment. However, under section 31 of the NDPS Act, 1985 not only the commission of offence but the

attempt to commit the offence and the abetment or criminal conspiracy to commit the offence specified in the section makes the accused liable to

enhanced punishment.

10. In order to determine proper sentence, it is necessary to know the previous conviction of the accused. Even if there is no doubt that the

accused was previously convicted, it could be unfair to take prior conviction into account when they were neither proved nor mentioned in the

charge. The previous conviction means the conviction of the accused for the specified offence earlier. Section 211 (7) of the Code of Criminal

Procedure 1973 lays down that the specific charge of previous conviction has to be framed and put to the accused if the accused by reason of

such previous conviction is liable to enhanced punishment, which is reproduced below for the sake of convenience.

211. Contents of charge(1) Every charge under this Code shall state the offence with which the accused is charged.

.....

.....

(7) If the accused, having been previously convicted of any offence, is liable, by reason of such previous conviction, to enhanced punishment, or to

punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of effecting the

punishment which the Court may think fit to award for the subsequent offence, the fact date and place of the previous conviction shall be stated in

the charge; and if such statement has been omitted, the Court may add it at any time before sentence is passed.

11. Therefore, the charge qua of the previous conviction under section 211(7) of the Code of Criminal Procedure, 1973 can be framed at any time

before the sentence is passed after convicting the accused and before hearing the parties on the quantum of sentence. After framing of charge of

previous conviction under section 211 (7) of the Code, the Special Judge has to follow the procedure laid down in Section 236 of the Code of

Criminal Procedure which provides as under.

Previous conviction:- In a case where a previous conviction is charged under the provisions of sub-section(7) of section 211, and the accused

does not admit that he has been previously convicted as alleged in the charge, the Judge may, after he has convicted the said accused under section

229 or section 235, take evidence in respect of the alleged previous conviction, and shall record a finding thereon:

Provided that no such charge shall be read out by the Judge nor shall the accused be asked to lead thereto nor shall the previous conviction be

referred to by the prosecution or in any evidence adduced by it, unless and until the accused has been convicted under section 229 or section

235.

12. Therefore, the charge of previous conviction has to be put to the accused only after he has been convicted of the subsequent offence and if the

accused pleads not guilty of the said charge of previous offence evidence has to be adduced on the same. Therefore, it is clear that no evidence of

previous conviction can be adduced at the time of trial before conviction of the accused and if some evidence is led qua previous conviction before

the accused is convicted for subsequent offence, the same cannot be used against the accused. However, the prosecution in such case is entitled to

lead a fresh evidence to prove the previous conviction after framing of the charge of previous conviction, if the accused pleads not guilty of the

same.

13. The previous conviction can be proved by the prosecution as per the provision of section 298 of the Criminal Procedure Code. It is

reproduced as under.

Previous conviction or acquittal how proved. - In any inquiry, trial or other proceeding under this Code, a previous conviction or acquittal may be

proved, in addition to any other mode provided by any law for the time being in force,-

(a) by an extract certified under the hand of the officer having the custody of the records of the court in which such conviction or acquittal was

held, to be a copy of the sentence or order, or

(b) in case of conviction, either by a certificate signed by the officer in charge of the jail in which the punishment or any part thereof as undergone,

or by production of the warrant of commitment under which the punishment was suffered, together with, in each of such cases, evidence as to the

identity of the accused person with the person so convicted or acquitted.

14. The other mode to prove the previous conviction can be by producing the certified copy of the judgment by which the person was previously

convicted by virtue of Section 91 of the Indian Evidence Act 1872 which lays down as under:

When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases

in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract,

grant or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which

secondary evidence is admissible under the provisions here-in-before contained.

15. The onus is upon the prosecution to prove the previous conviction of the accused for enhanced punishment in either of the two forms. It is also

for the prosecution to prove the person previously convicted is the same person who has now convicted by the Court in the subsequent evidence.

16. In *M.S. Dhananjayan v. State by Provident Fund Inspector Madras* 1989 L.W.(Crl.) 210 this Court while dealing with section 298 of Cr.P.C.

has held as follows:

...The main argument advanced by the learned counsel for the petitioner is that the previous conviction of the accused has not been proved in

accordance with law. Under section 298 of the Cr.P.C., the previous conviction has to be proved by producing an extract certified under the hand

of officer having custody of the records of the court in which such conviction or acquittal may be proved or in case of a conviction either by a

certificate signed by the officer in charge of the jail in which the punishment or any part thereof was undergone, or by production of the warrant of

commitment under which the punishment was suffered. No such extract has been produced. The learned magistrate has stated that when

questioned, the accused admitted the previous conviction and on this basis he has proceeded to convict him under Sec. 14 (AA) of the Act. In

Yasin v. King Emperor (ILR XVIII Calcutta 689), a Bench of that Court has held that:

In order to support a charge of a previous conviction, there should be on the record a copy of some judgment or extract from a judgment or sum

other documentary evidence of the act of such previous conviction, as is required by Sec. 91 of the Evidence Act or Se. 511 of the Cr.P.C., the

examination by a magistrate of the accused in respect of such previous conviction is without legal warrant or justification.

I therefore hold that the Magistrate, without the extract of the judgment in the previous case, ought not to have questioned the accused and his

reliance on the admission of the accused for holding that he has been previously convicted is unsound. It must therefore be taken that the previous

conviction of the revision petitioner has not been satisfactorily established.

17. In the present case, no specific charge is framed under section 31 of the Narcotic Drugs and Psychotropic Substances Act, 1985 except

stating that he was convicted in C.C. No. 236/1993 and sentenced to undergo 10 years rigorous imprisonment and to pay a fine of Rs. 1 lakh. In

the charge, there is no mention to the section under which he is charged for enhanced sentence. Admittedly, the certified copy of the judgment was

not produced before the Court. None of the modes provided under section 298 of the Code of Criminal Procedure has been followed. The

accused has pleaded not guilty including the charge for enhanced sentence. In spite of the same, no evidence was led by the prosecution to prove

that the person who was convicted in C.C. No. 236 of 1993 is the same person who has now convicted by the trial Court in C.C. No. 266 of

2004. There is no question put to the accused with regard to award of enhanced sentence on the ground that he was previously convicted for the

similar offence. The questioning of accused under Section 313 Cr.P.C is not an empty formality, the essence of accusation has to be brought to the

notice of the accused while examining him under section 313 Cr.P.C. The omission to put questions with regard to the charge under section 31 of

the Narcotic Drugs and Psychotropic Substances Act, 1985 to the accused under section 313 Cr.P.C. definitely caused prejudice to the

accused.

18. Learned Special Public Prosecutor contended that Section 391 Cr.P.C. empowers the Court to admit evidence at the appellate state if it

considers that such additional evidence is necessary to enable it to do justice to the case. He would submit that the additional evidence is necessary

in this case, in order to enable the Court to give correct and proper finding and no prejudice would be caused to the accused. It is trite that power

of the appellate Court under section 391 Cr.P.C. has to be exercised sparingly and only in suitable cases. It must not, however be received as a

disguise for retrial or to change the nature of the case against the accused. In the present case, there is no specific charge under section 31 of

NDPS Act. The previous conviction must be separately charged and the accused should be called upon to plead to the separate charge for

previous conviction. Such charge shall be read out to the accused and asked to plead only after he has been convicted of the subsequent offences.

The effect of Section 211(7) and Section 236 Cr.P.C. is that the accused has to be charged with the previous conviction at the same time when he

is charged with the subsequent offence. In *Rambhau v. State* AIR 2001 SC 2120 it has been held that additional evidence cannot and ought not be

received in such a way so as to cause any prejudice to the accused. In yet another decision reported in AIR 1978 SC 59 (*Bir Singh and others v.*

State of Uttar Pradesh) the Honourable Apex Court has held that though the appellate Court has power to take additional evidence in a suitable

case yet the discretion should not be exercised to fill up the gap or lacunae in the prosecution case.

19. In *Kashmira Singh v. State* reported in 1965 Cri.L.J. 554, the High Court declining to accede to the prayer made by the Advocate General to

permit him to lead additional evidence has observed as follows:

4. The Advocate General realizing the difficulty tried to persuade me to order a re-trial or to summon the complainant in the case as a witness

under the provisions of Section 438 or 540 Cr.P.C. I am afraid to accede to such a prayer would be allowing the prosecution to fill up gaps which

it deliberately left in the case when it was pending before the trial magistrate. The powers of the court either for ordering re-trial or for taking

additional evidence are not meant to be exercised in order to enable the prosecution to fill up lacunae to the case. The result of accepting such a

prayer would tie to punish the accused for a fault which was not committed by him but by the prosecution. Once the accused is put on trial his

liberty is put in jeopardy and the prosecution is at liberty to produce any evidence that it likes against the accused. If it fails to adduce the necessary

evidence, it cannot ask the appellate court to order a retrial for giving a chance to the prosecution to fill up a lacuna in the case and thereby putting

the liberty of the accused again into Jeopardy. For these reasons, therefore, I am unable to accede to the prayer made by the Advocate General.

20. In the present case, the prosecution had a fair opportunity before the trial Court but has not availed of it for the reasons best known to them. It

is pertinent to point out that even the identity of the accused has been disputed by the accused in the case where he was allegedly convicted

previously. In such circumstances, the application for bringing the certified copy of the judgment in C.C. No. 236/1993 and to adduce evidence is

not just and reasonable and the same is liable to be rejected. In view of the reasons stated above, the conviction and sentence passed by the trial

Court under section 31 of NDPS act cannot be sustained and liable to be set aside.

21. Learned counsel for the appellant would submit that the appellant was arrested on 01.06.2004 and the accused was in prison from the date of

arrest and he has completed the substantive sentence of imprisonment of 10 years and the appellant is not in a position to pay the fine amount.

Learned counsel would further submit that the appellant is a very poor person and he has a big family to support and he has not involved in any

other offence of similar nature. Learned counsel appearing for the appellant would further submit that the default sentence imposed upon the

appellant is 6 months rigorous imprisonment for each offence. He would further submit that considering the fact that the appellant has completed

substantive sentence and his inability to pay the fine which is a huge sum, the default sentence may be reduced.

22. On the other hand Mr. N.P. Kumar, learned Special Public Prosecutor appearing for NDPS Act cases would submit that the appellant was in

possession of 3.100 kgs of heroin and the quantum of contraband exceeded the commercial quantity and it is a serious offence under NDPS Act

and therefore, he vehemently objected to the modification the default sentence.

23. This Court heard the arguments of the learned counsel for the appellant as well as the learned Special Public Prosecutor appearing for the

NDPS Act cases.

24. As the learned counsel appearing for the appellant confined his arguments only with regard to award of default sentence in regard to his

conviction under section 8(c) r/w 21(c) and 29 of the NDPS Act, I am not inclined to go into the merits of the case though the appeal was filed

challenging the judgment of conviction and sentence of imprisonment. Therefore, the conviction under sections 8(c) r/w 21(c), 28 and 29 of NDPS

Act, 1985 and the sentence of 10 years rigorous imprisonment for each offence and Rs. 1 lakh for each offence as against the appellant, are

confirmed.

25. In view of the above submission made by the learned counsel for the appellant, the default sentence of imprisonment for non-payment of fine

has to be considered at this juncture.

26. The Honourable Supreme Court in *Shanthilal v. State of M.P.* Reported in (2007) 11 SCC 243 considered the imprisonment in default of

payment of fine with reference to various provisions of IPC and the Code of Criminal Procedure, 1973. This Court in *Crl. A. No. 356 of 2012* on

16.04.2013 has also taken the same view modifying the default sentence to 15 days R.I. on failure of payment of fine for each offence.

27. In a recent decision of the Hon"ble Supreme Court in *Shahajadkhan Mahebubkhan Pathn v. State of Gujarat* reported in 2013 (2) LW Crl.

254, it has been held that it is the duty of the Court to keep in view the nature of offence, circumstances in which it was committed, the position of

the offender and other relevant considerations such as pecuniary circumstances of the accused person as to character and magnitude of the offence

before ordering the offender to suffer imprisonment in default of payment of fine. Further held that the provisions of Sections 63 to 70 of IPC make

it clear that an amount of fine should not be harsh or excessive and where a substantial term of imprisonment is inflicted, an excessive fine should

not be imposed except in exceptional cases.

28. In *Shantilal v. State of M.P.* cited supra, it has been held by the Hon"ble Supreme Court as below:

The term of imprisonment in default of payment of fine is not sentence. It is a penalty which a person incurs on account of non-payment of fine.

The sentence is something which an offender must undergo unless it is set aside or remitted in part or in whole, either in appeal or in revision or in

other appropriate judicial proceedings or otherwise. A term of imprisonment ordered in default of payment of fine stands on a different footing a

person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount.

29. Section 30(1)(b) of Code of Criminal Procedure authorizes the Court to award imprisonment in default of payment of fine upto one fourth term

of imprisonment which the Court is competent to inflict as punishment for the offence. The maximum sentence imposable on accused under NDPS

Act is 20 years. But in this case, the appellant has been ordered to undergo substantive sentence of 10 years rigorous imprisonment which is a

minimum sentence. However on facts, considering the circumstances of the appellant/accused that he is very poor and has to maintain his family

and that he could not pay the huge amount of fine of Rs. 1 lakh for each offence 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 would be caused not only to him but also to his family

members. Therefore, I am of the view that though the amount of payment of fine of Rs. 1 lakh for each count (for 3 counts Rs. 3 lakhs) which is

minimum as specified in Section 18 of NDPS Act cannot be reduced, in view of the legislative mandate, ends of justice would be met, if the

appellant is ordered to undergo rigorous imprisonment of 15 days instead of six months for each offence, in default of payment of the fine amount.

In the result,

i) The judgment of conviction under sections 8(c) r/w 21(c), 28 and 29 of NDPS Act, 1985 and the sentence of 10 years rigorous imprisonment

for each offence and Rs. 1 lakh for each offence passed by the learned Special Judge, I Additional Special Court under NDPS Act, Chennai 104

in C.C. No. 266 of 2004 dated 14.08.2012 as against the appellant, are confirmed. The learned Special Judge has ordered to run the above said

substantive sentences concurrently which also stand confirmed. However, the appellant is ordered to undergo rigorous imprisonment of 15 days

instead of six months for each offence, in default of payment of the said fine amount.

ii) The sentence of imprisonment of 10 years and a fine of Rs. 1,00,000/- imposed upon the appellant for the offence under Section 31 of NDPS

Act 1985 as amended Act 9/01 for the previous punishment in C.C. No. 236/1993, are set aside.

ii) It is reported that the appellant is in custody till date and has completed the substantive sentence of imprisonment on 01.06.2014 and he has

completed the default sentences also. In case, the appellant has completed the default sentences also, he shall be released forthwith unless his

presence is required in connection with any other case.

iii) The Superintendent of Central Prison, Puzhal-I, Chennai, is directed to act accordingly.

iv) Accordingly, the criminal appeal is disposed of.