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**(2009) 03 CAL CK 0078**

**Calcutta High Court**

**Case No:** Criminal Appeal No. 378 of 1998

Nirapada Saha

APPELLANT

Vs

State of West Bengal

RESPONDENT

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**Date of Decision:** March 4, 2009

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 29, 30, 313
- General Clauses Act, 1897 - Section 25
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 21, 21(c), 29
- Penal Code, 1860 (IPC) - Section 40, 41, 42, 63, 64

**Citation:** (2011) 6 RCR(Criminal) 1835

**Hon'ble Judges:** Kishore Kumar Prasad, J; Girish Chandra Gupta, J

**Bench:** Division Bench

**Advocate:** P.S. Bhattacharya, for the Appellant; Tapan Dutta Gupta, for the State, for the Respondent

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**Judgement**

Kishore Kumar Prasad, J.

This appeal is directed against the judgment and order of conviction dated 20.11.1998 passed by the learned Judge, Special Court under NDPS Act, Murshidabad in NDPS Case No.23/97 by which the appellant was convicted for the offence punishable u/s 21 of the NDPS Act. By an order dated 21.11.1998 the appellant was sentenced to suffer rigorous imprisonment for a period of ten years and also to pay fine of Rs. 1,00,000, in default of payment of fine to suffer further rigorous imprisonment for two years.

2. Being aggrieved by the orders of conviction and sentence passed by the learned trial Court, the appellant has preferred the present appeal.

3. Prosecution version in a nutshell was that in pursuance of source information recorded in G.D.Entry No.758 dated 20.11.1997 at 21.05 hours and after sending R.T.

message to C.I. of Polite, Berhampur, a Gazetted Officer, the O.C., Lalgola Police Station PW7 along with other Police Officers and force left for Village Dakshin Sudarshanganj to work out the information. After arrival at Village Dakshin Sudarshanganj, the Police Officer knocked at the door of the appellant who opened the door. Police Officer informed the appellant that it was suspected that he kept heroin in his house. On interrogation in presence of public witness and CI of Police, Lalgola, the appellant confessed his guilt and brought out a small deep green coloured cloth bag containing two polythene packets of heroin weighing 125 grams each that is 250 grams in total which was kept concealed on the first floor of the staircase of the house of the appellant. Thereafter, in presence of CI of Police PW8 and two witnesses viz. P W3 and PW4, contraband articles along with cloth bags and packets were seized and sample of 3 grams from each of the two packets were drawn for chemical examination. The appellant was arrested on the allegation that he was possessing unlawfully heroin. He was taken to Lalgola Police Station where a crime was registered.

4. Investigating Authority took up investigation. In course of investigation, the samples of contraband articles were sent for chemical examination. On chemical examination, the samples were found to be heroin. After completion of investigation, charge-sheet under Sections 21/29 of the NDPS Act was submitted against the appellant by PW6 SI, T.K.Dutta.

5. In the trial Court, charge u/s 21 of the NDPS Act was framed against the appellant. The appellant pleaded not guilty to the charge framed against him and claimed to be tried.

6. In the trial Court as many as 8 witnesses were examined on behalf of the prosecution. Apart from leading oral evidence, the prosecution also tendered and proved large number of exhibits which were marked as Exs. 1 -2.

7. Though the appellant was examined u/s 313 of the Cr.P.C. yet there was no adduction of evidence by the appellant. From the trend of cross-examination of PWs and suggestion thrown to the witnesses; the defence version was that the appellant had been falsely Implicated and the alleged recovery of contraband article was not made from the staircase of his house.

8. The learned trial Judge disbelieved the defence version. The learned trial Judge after considering the oral and documentary evidence and hearing the Learned Counsel for the parties passed orders of conviction and sentences against the appellant as indicated above.

9. No argument was advanced by the Learned Counsel for the appellant before this Court challenging the judgment and order of conviction passed by the learned trial Court. Learned Counsel appearing for the appellant at the hearing of the appeal before this Court confined his argument only towards the quantum of sentence, in default of payment of fine awarded by the learned trial Court.

10. We have heard the Learned Counsel for the parties on the quantum of sentence, in default of payment of fine.

11. Learned Counsel for the appellant contended that the appellant has been in judicial custody for ten years four months and during the course of proceedings up to this Court, the appellant had suffered mental agony. Learned Counsel further contended that the appellant is a day labourer and has got no adverse criminal antecedent; that he is now aged about 60 years and besides him, his family consists of two unmarried daughters and wife and there is none to look after them. It was argued further that the sentence in default of fine to suffer rigorous imprisonment for two years is too harsh and it is necessary to be lowered down for the ends of justice.

12. Learned Counsel appearing on behalf of the respondents left the question of sentence in default of payment of fine to be imposed on the appellant to the discretion of this Court.

13. The entire perusal of the record including the impugned judgment shows that the learned trial Court appreciated the evidence on record and considered the sworn testimony of the material prosecution witnesses, believed them and recorded a finding of guilt against the appellant. It was also observed by the learned trial Court that the procedural requirements had been complied with and the prosecution was successful in proving the guilt of the appellant.

14. As regards illegal possession of 250 grams contraband substance that is heroin by the appellant, there was adequate evidence coming through the material witnesses, examined in this case on behalf of the prosecution. We do not think it necessary to deal with that aspect in more details as no argument was advanced before us on that aspect. It is true that the material witnesses of the prosecution happen to be the official witnesses but that by itself cannot be the ground to impeach their evidence with any distrust. We do not find any material to disbelieve the official witnesses touching possession of contraband substance (heroin) weighing 250 grams by the appellant. They have detailed the occurrence and identified the appellant as the participant in the crime. Besides, some minor wear and tear in their evidence, nothing could be elicited from them in cross-examination which may render their evidence doubtful. That apart there is nothing on record to show that the official witnesses had any hostility towards the appellant. Apart from the aforesaid considerations the facts of having possession of contraband substance (heroin) weighing 250 grams by the appellant, its seizure on the spot after taking two samples each containing 3 grams and also sending of samples to chemical examiner stand corroborated by the seizure list (Ex. 2) and also by the report of the chemical examiner (Ex. 1).

15. In these circumstances, the conviction entered against the appellant for contravention involving commercial quantity (250 grams as per table 6) punishable

u/s 21(c) of the NDPS Act deserved to be confirmed and we do so.

16. As regards the sentence, the appellant was found to possess heroin weighing 250 grams and his case was covered u/s 21(c) of the NDPS Act. Maximum sentence prescribed thereunder is rigorous imprisonment for twenty years and minimum sentence prescribed thereunder is rigorous imprisonment for 10 years which had been imposed by the learned trial Court which is clearly in consonance with law. Hence, that part of the order suffers no infirmity and must be up held.

17. It cannot be overlooked that the appellant was also ordered to pay maximum fine to Rs. 1,00,000 as required Section 21(c) of the NDPS Act and in default, he was ordered to undergo further rigorous imprisonment for two years.

18. Thus, an important question which arises for our consideration is whether a Court of law can order a convict to remain in jail in default of payment of fine? It is true that Section 21 of the NDPS Act does not expressly say so. It merely provides for imposition of sentence as also payment of fine. The said section, as it stood reads thus:

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 six months, 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 terms 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:

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

19. In our opinion, however, even in absence of specific provision in the Act empowering a Court to order imprisonment in default of payment of fine, such power is implicit and is possessed by a Court administering criminal justice. In this regard, it may be appropriate to consider the relevant provisions of the Indian Penal Code [IPC] and the Code of Criminal Procedure, 1973 [Cr.P.C.]. Section 40, IPC

defines "offence". Sections 41 and 42 explain "special law" and "local law" respectively. Chapter III, I.P.C. prescribes various punishments. Few sections are relevant which deal with imposition of fine and imprisonment in default of payment of fine. They are Sections 63 to 70 and reads thus:

#### 63. Amount of fine

Where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive.

#### 64. Sentence of imprisonment for non-payment of fine

In every case, of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment, and in every case of an offence punishable with imprisonment or fine, or with fine only, in which the offender is sentenced to a fine, it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the imprisonment shall be in excess of any other imprisonment to which the offender shall suffer imprisonment for a certain, which he may have been sentenced or to which he may be liable under a commutation of a sentence.

#### 65. Limit to imprisonment for non-payment of fine, when imprisonment and fine awardable

The term for which the Court directs the offender to be imprisoned in default of payment of a fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine.

#### 66. Description of imprisonment for nonpayment of fine

The imprisonment which the Court imposes in default of payment of a fine may be of any description to which the offender might have been sentenced for the offence.

#### 67. Imprisonment for non-payment of fine, when offence punishable with fine only

If the offence be punishable with fine only, the imprisonment which the Court imposes in default of payment of the fine shall be simple, and the term for which the Court directs the offender to be imprisoned, in default of payment of fine, shall not exceed the following scale, that is to say, for any term not exceeding two months when the amount of the fine shall not exceed fifty rupees, and for any term not exceeding four months when the amount shall not exceed one hundred rupees, and for any term not exceeding six months in any other case.

#### 68. Imprisonment to terminate on payment of fine

The imprisonment which is imposed in default of payment of a fine shall terminate whenever that fine is either paid, or levied by process of law.

69. Termination of imprisonment on payment of proportional part of fine.

If, before the expiration of the term of imprisonment fixed in default of payment, such a proportion of the fine be paid or levied that the term of imprisonment suffered in default of payment is not less than proportional to the part of the fine still unpaid, the imprisonment shall terminate.

70. Fine leviable within six years or during (sic) Death not to discharge property from liability

The fine, or any part thereof which remains unpaid, may be levied at any time within six years after the passing of the sentence, and if, under the sentence, the offender be liable to imprisonment for a longer period than six years, then at any time previous to the expiration of that period; and the death of the offender does not discharge from the liability any property which would, after his death, be legally liable for his debts.

20. Section 30, Cr.P.C. provides for "sentence of imprisonment in default of fine". It is also relevant and reads as under:

30. Sentence of imprisonment in default of fine- (1) The Court of a Magistrate may award such term of imprisonment in default of payment of fine as is authorised by law:

Provided that the term:

(a) is not in excess of the powers of the Magistrate u/s 29;

(b) shall not, where imprisonment has been awarded as part of the substantive sentence, exceed one-fourth of the term of imprisonment which the Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine.

(2) The imprisonment awarded under this section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate u/s 29.

21. We may as well refer to Section 25 of the General Clauses Act, 1897 which states:

25. Recovery of fines.- Sections 63 to 70 of the Indian Penal Code (45 of 1860) and the provisions of the Code of Criminal Procedure (5 of 1898) for the time being in force in relation to the issue and the execution of warrants for the levy of fines shall apply to all fines imposed under any Act, Regulation, rule or bye-law unless the Act, Regulation, rule or bye-law contains an express provision to the contrary.

22. From the above provisions, in our opinion, it is clear that if a person commits any offence under IPC, he can be punished and when such offence is punishable with substantive sentence and fine, or substantive sentence or fine, or fine only, in default of payment of fine, he can be ordered to undergo imprisonment. Section 30,

Cr.P.C. prescribes maximum period for which a Court may award imprisonment in default of payment of fine.

23. But more important issue is whether the above statutory provisions would apply to special laws and offences committed by a person not covered by IPC. In the present case, we are concerned with the provisions of Narcotic Drugs and Psychotropic Substances Act, 1985 which is a special law. There is no express power in a Court to order imprisonment in default of payment of fine. But to us, the law is well-settled and it has been held since more than a century that such an order can be passed by a competent Court of law having power to impose fine as one of the punishments.

24. A similar question came up for consideration before the Hon"ble Apex Court before fifty years in [Bashiruddin Ashraf Vs. The State of Bihar](#), . There a mutawalli was charged for violating the provision of Section 58 of the Bihar Wakfs Act, 1947 (Bihar Act VIII of 1948) for not discharging the obligation enjoined upon him as a mutawalli. He was, therefore, convicted u/s 65(1) of the Act by the Divisional Magistrate, Patna and was ordered to pay a fine of Rs.100 and in default to undergo simple imprisonment for 15 days. Section 65( 1) read thus:

65(1) If a mutawalli fails without reasonable cause, the burden of proving which shall be upon him, to comply with any order or direction made or issued under Clauses (i), (o) or (q) of sub-section (2) of Section 27 or u/s 56, to comply with the provisions of sub-section (1) of Section 57, sub-section (1) of Section 58, Section 59 or Section. 60, or to furnish any statement, annual account, estimate, explanation or other document or information relating to the wakf of which he is mutawalli, which he is required or called upon to furnish under any of the other provisions of this Act, he shall be punishable with fine which may extend, in the case of the first, offence, to two hundred rupees and, in the case of second or any subsequent offence, to five hundred rupees.

It was contend on behalf of the mutawalli that Section 65 did not provide for imprisonment in default of payment of fine. He was, however, ordered to suffer 15 day simple imprisonment in default of payment of fine which was illegal. The Hon"ble Apex Court considered Section 33 of the Code of Criminal Procedure, 1898 (similar to Section 30 of the present Code of Criminal Procedure, 1973) and Sections 40 and 67, IPC and held that the contention had no force and it was open to the Court to order imprisonment of the accused in default of payment of fine.

25. Though Section 25 of the General Clauses Act, 1897 was not referred to in Bashiruddin Ashraf, in our opinion, bare reading of the said provision also makes it explicitly clear and leaves no room for doubt that Sections 63 to 70, IPC and the provisions of Cr.P.C. relating to award of imprisonment in default of payment of fine would apply to all cases wherein fines have been imposed on an offender unless "the Act, Regulation, Rule or Bye-law contains an express provision to the contrary".

In our judgment, in absence of a provision to the contrary/viz. that no order of imprisonment can be passed in default of payment of fine, such power is explicit and can always be exercised by a Court subject to the relevant provisions of IPC and Cr.P.C.).

26. We are mindful and conscious that the present case is under NDPS Act. Section 21(c) quoted above provides penalty for certain offences in relation to manufactured drugs and preparations. Minimum fine contemplated by the said provision is Rs. 1,00,000 "(fine which shall not be less than to 1,00,000 rupee)". 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 20 years. Therefore, Clause (b) of sub-section 1 of Section 30 of the Cr.P.C. 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 the appellant is very poor, he has to maintain his family consists of two unmarried daughters and wife, it was his first offence, because of his poverty, he could not pay the heavy amount of fine (Rs. 1,00,000) 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, therefore of the view that though an amount of payment of fine Rs. 1,00,000 which is minimum as specified in Section 21(c) 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 Rs. 1,00,000, the appellant shall undergo Rigorous imprisonment for one year instead of rigorous imprisonment for two years as ordered by the learned trial Court.

27. For the reasons aforesaid, the appeal is partly allowed, conviction recorded and sentence imposed on the appellant to undergo rigorous imprisonment for ten years is confirmed. An order of payment of fine of Rs. 1,00,000 is also upheld. But the order that in default of payment of fine, the appellant shall undergo rigorous imprisonment for two years is reduced to rigorous imprisonment for one year. To that extent, the appeal filed by the appellant is allowed. If the appellant has undergone substantive sentence of Rigorous imprisonment for ten years as also rigorous imprisonment for one year as modified by us in default of payment of fine, the appellant shall be set at liberty forthwith unless he is required in connection with any other case. If the appellant has not completed the said period, he will be released after the period indicated here-in-above is over.

28. The appeal is accordingly disposed of.