Shahejadkhan Mahebubkhan Pathan vs State Of Gujarat on 5 October, 2012

Equivalent citations: 2012 AIR SCW 5875, (2012) 119 ALLINDCAS 61 (SC), AIR 2013 SC (CRIMINAL) 61, (2012) 4 CRIMES 309, (2013) 1 EFR 10, (2013) 2 GUJ LR 921, 2013 (1) SCC 570, (2012) 4 DLT(CRL) 789, (2013) 2 MH LJ (CRI) 372, (2013) 2 MADLW(CRI) 254, (2012) 4 CRILR(RAJ) 973, (2012) 4 RECCRIR 684, (2012) 10 SCALE 21, (2012) 3 UC 2383, (2012) 53 OCR 1131, (2012) 3 ALLCRIR 3349, (2013) 1 ALD(CRL) 35, (2012) 79 ALLCRIC 718, (2013) 1 CHANDCRIC 92, 2013 (1) SCC (CRI) 558

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Bench: P. Sathasivam, Ranjan Gogoi

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

1 CRIMINAL APPEAL NO. 1592 OF 2012

(Arising out of S.L.P. (Crl.) No. 276 of 2011)

Shahejadkhan Mahebubkhan Pathan .... Appellant(s)

Versus

State of Gujarat .... Respondent(s)

WITH

2 CRIMINAL APPEAL NO. 1593 OF 2012

(Arising out of S.L.P. (Crl.) No. 277 of 2011)

J U D G M E N T

P.Sathasivam,J.

1) Delay condoned.
2) Leave granted.
3) These appeals are directed against the final judgment and order dated 08.07.2002 passed by the High Court of Gujarat at Ahmedabad in Criminal Appeal Nos. 11 and 75 of 2002 whereby the Division Bench of the High Court dismissed the appeals filed by the appellants herein and affirmed the judgment dated 10.12.2001 passed by the Additional Sessions Judge, Ahmedabad City in Sessions Case No. 381 of 2000.

4) Brief facts:

(a) On 04.09.2000, on a tip-off, the Narcotic Cell, Police Bhavan, Gandhinagar, Gujarat arrested two persons, viz., Shahejadkhan Mahebubkhan Pathan and Narendrasinh Chandrashekhar Rai (the appellants herein) carrying 500 grams brown sugar (narcotic substance) at Kalupur Railway Station, Ahmedabad while they were traveling in Sarvodaya Express from Delhi to Ahmedabad through Ratlam.

(b) After following the procedure regarding search and seizure and after registering the case under the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'the NDPS Act'), the samples were sent to the Forensic Science Laboratory (FSL) for examination.

(c) On 19.12.2000, after filing of the charge sheet, the case was committed to the Court of Session and numbered as Sessions Case No. 381 of 2000.

(d) The Additional Sessions Judge, Ahmedabad City, after considering the notification of the Government being No. SO.1055 (E) dated 19.10.2001 and the provisions of the NDPS Act held that the quantity of the narcotic substance (brown sugar) falls under the head "Commercial Quantity" and found the appellants guilty for the offence punishable under Sections 8(c), 21 and 29 of the NDPS Act and sentenced them to suffer rigorous imprisonment (RI) for 15 years. The Additional Sessions Judge, after taking note of the fact that the appellants belong to the State of Madhya Pradesh and were carrying such commercial quantity of brown sugar to the State of Gujarat for doing business, also imposed a fine of Rs. 1.5 lakhs each, in default, to further undergo RI for 3 years.

(e) Being aggrieved, the appellants herein filed Criminal Appeal Nos. 11 and 75 of 2002 before the High Court of Gujarat. The Division Bench of the High Court, by impugned order dated 08.07.2002, dismissed the said appeals. Questioning the same, the appellants herein have filed separate appeals by way of special leave before this Court.

5) Heard Dr. Sushil Balwada, learned counsel for the appellants-accused and Ms. K. Enatoli Sema, learned counsel for the respondent-State.

6) Learned counsel appearing for both the appellants before the High Court as well as before this Court, considering the materials placed by the prosecution, has not seriously canvassed the conviction, however, taking note of various aspects including the age and poorness, prayed for reduction of sentence. In addition to the same, learned counsel also prayed for modification of default sentence awarded by the Additional Sessions Judge, Ahmedabad City and confirmed by the High Court.

7) In view of the limited relief prayed for and considering the relevant and acceptable materials placed by the prosecution in support of their case, there is no need to traverse the finding relating to conviction, accordingly, we hereby confirm the same.

Sentence:

> 8) Coming to the question of sentence, it is not in dispute that the appellants were charged for possession of brown sugar in the quantity of 500 grams which falls under the head "commercial quantity". As per the notification of the Government being No. SO.1055(E) dated 19.10.2001, it is necessary to consider the same in terms of Section 21(c) of the NDPS Act.

The trial Judge, taking note of the fact that the appellants were carrying such commercial quantity of brown sugar to the State of Gujarat from the State of Madhya Pradesh, awarded RI for 15 years and also directed them to pay a fine of Rs.1.5 lakhs each, in default, to further undergo RI for 3 years. For offences punishable under Sections 8(c), 21 and 29 of the NDPS Act, undoubtedly, the minimum sentence prescribed is 10 years which may extend to 20 years with fine. In this regard, it is useful to refer a decision of this Court in Balwinder Singh vs. Asstt. Commr., Customs & Central Excise, (2005) 4 SCC 146. The appellant therein was convicted for offences punishable under Sections 18, 22, 23, 25, 28, 29 and 30 of the NDPS Act and Section 120-B of the Indian Penal Code, 1860 (in short 'the IPC'). This Court, having regard to the facts and circumstances and taking note of the fact that the appellant therein was convicted for the said offences for the first time (emphasis supplied), while confirming the conviction, reduced the sentence from 14 years to 10 years for the offences under the NDPS Act and the IPC.

9) It is projected before us that both the appellants are first time offenders and there is no past antecedent about their involvement in offence of like nature on earlier occasions. It is further brought to our notice, which is also not disputed by the learned counsel for the State that as on date, the appellants had served nearly 12 years in jail. In view of the same and in the light of the decision of this Court, in Balwinder Singh (supra), while confirming the conviction, we reduce the sentence to 10 years which is the minimum prescribed sentence under the relevant provisions of the NDPS Act.

Default Sentence:

> 10) Coming to the next claim of the appellants, i.e., default sentence, the trial Judge, taking note of various aspects including the fact that the appellants were carrying

commercial quantity of brown sugar from the State of Madhya Pradesh to the State of Gujarat for doing business, imposed a fine of Rs.1.5 lakh each, in default, ordered to undergo RI for 3 years.

11) According to the learned counsel for the appellants, the default sentence, i.e., 3 years, is very harsh and the Additional Sessions Judge ought not to have imposed such sentence for non-payment of fine amount. In view of the same, he relied on a decision of this Court in Shantilal vs. State of M.P. (2007) 11 SCC 243 wherein this Court considered the imprisonment in default of payment of fine with reference to various provisions of IPC and the Code of Criminal Procedure, 1973 (in short 'the Code') and held as under:

"31. .....The term of imprisonment in default of payment of fine is not a 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. He, therefore, can always avoid to undergo imprisonment in default of payment of fine by paying such amount. It is, therefore, not only the power, but the duty of the court to keep in view the nature of offence, circumstances under which it was committed, the position of the offender and other relevant considerations before ordering the offender to suffer imprisonment in default of payment of fine.

32. A general principle of law reflected in Sections 63 to 70 IPC is that an amount of fine should not be harsh or excessive. The makers of IPC were conscious of this problem. The authors of the Code, therefore, observed:

"Death, imprisonment, transportation, banishment, solitude, compelled labour, are not, indeed, equally disagreeable to all men. But they are so disagreeable to all men that the legislature, in assigning these punishments to offences, may safely neglect the differences produced by temper and situation. With fine, the case is different. In imposing a fine, it is always necessary to have as much regard to the pecuniary circumstances of the offender as to the character and magnitude of the offence....

The authors further stated: (Ratanlal & Dhirajlal at pp. 226-27) .....When a fine has been imposed, what measures shall be adopted in default of payment? And here two modes of proceeding, with both of which we were familiar, naturally occurred to us. The offender may be imprisoned till the fine is paid, or he may be imprisoned for a certain term, such imprisonment being considered as standing in place of the fine. In the former case, the imprisonment is used in order to compel him to part with his money; in the latter case, the imprisonment is a punishment substituted for another punishment. Both modes of proceeding appear to us to be open to strong objections.

To keep an offender in imprisonment till his fine is paid is, if the fine be beyond his means, to keep him in imprisonment all his life; and it is impossible for the best Judge to be certain that he may not sometimes impose a fine which shall be beyond the means of an offender..... .....On the other hand, to sentence an offender to fine and to a certain fixed term of imprisonment in default of payment, and then to leave it to himself to determine whether he will part with his money or lie in gaol, appears to us to be a very objectionable course.....

.....We propose that, at the time of imposing a fine, the Court shall also fix a certain term of imprisonment which the offender shall undergo in default of payment. In fixing this term, the Court will in no case be suffered to exceed a certain maximum, which will vary according to the nature of the offence. If the offence be one which is punishable with imprisonment as well as fine, the term of imprisonment in default of payment will not exceed one-fourth of the longest term of imprisonment fixed by the Code for the offence. If the offence be one which by the Code is punishable only with fine, the term of imprisonment for default of payment will in no case exceed seven days."

33. The issue also came up for consideration in some cases. In Emperor v. Mendi Ali, AIR 1941 All 310 M was charged with an offence of murder of his wife. The Sessions Court, however, convicted him for an offence punishable under Section 304 Part I IPC since M had committed the offence of killing his wife in grave and sudden provocation as he saw her (his wife) "with his own eyes committing adultery with N". M was thus altogether deprived of the power of self-control. But the Sessions Judge not only imposed the maximum imprisonment of ten years under Section 304 Part I but he also imposed a fine of Rs 100 or to undergo rigorous imprisonment for one year.

34. In a suo motu revision, the High Court observed that the Sessions Judge had awarded maximum term of sentence on M for the offence for which he was found guilty "and added to it a fine (which there could surely have been little prospect of his paying). The result was that he was, in effect, sentenced to eleven years' rigorous imprisonment."

35. Considering the facts, Braund, J. stated: (Mendi Ali case, AIR p.

311) "So far as the fine is concerned, I cannot think it is proper, in the case of a poor peasant, to add to a very long term of substantive imprisonment a fine which there is no reasonable prospect of the accused man paying and for default in paying which he will have to undergo a yet further term of imprisonment. And, in my judgment, without venturing to say whether it is a course which is strictly in accordance with the law or not, I cannot help thinking that it becomes all the more undesirable to impose such a fine where the term of imprisonment to be undergone in default will bring the aggregate sentence of imprisonment to more than the maximum term of imprisonment sanctioned by the particular section under which he is convicted. I venture to think that Judges should exercise

a careful discretion in the matter of superimposing fines upon long substantive terms of imprisonment."

36. We may as well refer to a decision of this Court in Palaniappa Gounder v. State of T.N. (1977) 2 SCC 634. In that case, P was convicted by the Principal Sessions Judge, Salem and was sentenced to death. The High Court of Madras upheld the conviction but reduced the sentence from death to imprisonment for life. But while reducing the sentence, the Court imposed a fine of Rs 20,000 on P. Leave was granted by this Court limited to the question of the propriety of fine.

37. The Court considered the provisions of IPC as also CrPC and observed that courts have power to impose a sentence of fine and if fine is imposed on an offender, it cannot be challenged as contrary to law.

38. Speaking for the Court, Chandrachud, J. (as His Lordship then was) said: (SCC pp. 638-39, para 9) "9. But legitimacy is not to be confused with propriety and the fact that the court possesses a certain power does not mean that it must always exercise it. Though, therefore, the High Court had the power to impose on the appellant a sentence of fine along with the sentence of life imprisonment the question still arises whether a sentence of fine of Rs 20,000 is justified in the circumstances of the case. Economic offences are generally visited with heavy fines because an offender who has enriched himself unconscionably or unjustifiably by violating economic laws can be assumed legitimately to possess the means to pay that fine. He must disgorge his ill-gotten wealth. But quite different considerations would, in the generality of cases, apply to matters of the present kind. Though there is power to combine a sentence of death with a sentence of fine that power is sparingly exercised because the sentence of death is an extreme penalty to impose and adding to that grave penalty a sentence of fine is hardly calculated to serve any social purpose. In fact, the common trend of sentencing is that even a sentence of life imprisonment is seldom combined with a heavy sentence of fine. We cannot, of course, go so far as to express approval of the unqualified view taken in some of the cases that a sentence of fine for an offence of murder is wholly 'inapposite' (see, for example, State v. Pandurang Tatyasaheb Shinde, AIR 1956 Bom. 711 at p. 714), but before imposing the sentence of fine, particularly a heavy fine, along with the sentence of death or life imprisonment, one must pause to consider whether the sentence of fine is at all called for and if so, what is a proper or adequate fine to impose in the circumstances of the case. As observed by this Court in Adamji Umar Dalal v. State of Bombay, AIR 1952 SC 14 determination of the right measure of punishment is often a point of great difficulty and no hard-and-fast rule can be laid down, it being a matter of discretion which is to be guided by a variety of considerations but the Court must always bear in mind the necessity of maintaining a proportion between the offence and the penalty proposed for it. Speaking for the Court, Mahajan, J. observed in that case that: (AIR p. 16, para 5) '5. ... In imposing a fine it is necessary to have as much regard to the pecuniary circumstances of the accused persons as to the character and magnitude of the offence, and where a substantial term of imprisonment is inflicted, an excessive fine should not accompany it except in exceptional cases.' Though that case related to an economic offence, this Court reduced the sentence of fine from Rs 42,300 to Rs 4000 on the ground that due regard was not paid by the lower court to the principles governing the imposition of a sentence of fine."

12) It is clear and reiterated that the term of imprisonment in default of payment of fine is not a sentence. To put it clear, it is a penalty which a person incurs on account of non-payment of fine. On the other hand, if sentence is imposed, undoubtedly, an offender must undergo unless it is modified or varied in part or whole in the judicial proceedings. However, the imprisonment ordered in default of payment of fine stands on a different footing. When such default sentence is imposed, a person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. Accordingly, he can always avoid to undergo imprisonment in default of payment of fine by paying such an amount. In such circumstance, we are of the view 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. The provisions of Sections 63 to 70 of IPC make it clear that an amount of fine should not be harsh or excessive. We also reiterate that where a substantial term of imprisonment is inflicted, an excessive fine should not be imposed except in exceptional cases.

13) While taking note of the above principles, we are conscious of the fact that the present case is under the NDPS Act and for certain offences, the Statute has provided minimum sentence as well as minimum fine amount. In the earlier part of our judgment, taking note of the fact that the appellants being the first time offenders, we imposed the minimum sentence, i.e., 10 years instead of 15 years as ordered by the trial Court. In other words, the appellants have been ordered to undergo substantive sentence of RI for 10 years which is minimum.

14) In view of the above, it is relevant to mention Section 30 of the Code which speaks about sentence of imprisonment in default of fine:

> "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 authorized by law:
>
> Provided that the term-
>
> a) is not in excess of the powers of the Magistrate under section 29;
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> 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 under Section 29." It is clear that clause (b) of sub-section (1) of Section 30 of the Code authorizes the Court to award imprisonment in default of fine up to 1/4th of the term of imprisonment which the Court is competent to inflict as punishment for the

offence. However, considering the circumstances placed before us on behalf of the appellants-accused, viz., they are very poor and have to maintain their family, it was their first offence and if they fail to pay the amount of fine as per the order of the Additional Sessions Judge, they have to remain in jail for a period of 3 years in addition to the period of substantive sentence because of their inability to pay the fine, we are of the view that serious prejudice will be caused not only to them but also to their family members who are innocent. We are, therefore, of the view that ends of justice would be met if we order that in default of payment of fine of Rs.1.5 lakhs, the appellants shall undergo RI for 6 months instead of 3 years as ordered by the Additional Sessions Judge and confirmed by the High Court.

15) For the reasons stated above, both the appeals are partly allowed.

The conviction recorded is confirmed and sentence imposed upon the appellants to undergo RI for 15 years is modified to 10 years. The order of payment of fine of Rs.1.5 lakhs each is also upheld but the order that in default of payment of fine, the appellants shall undergo RI for 3 years is reduced to RI for 6 months. Since the appellants have already served nearly 12 years in jail, we are of the view that as per the modified period of sentence in respect of default in payment of fine, there is no need for them to continue in prison. The appellants shall be set at liberty forthwith unless they are required in any other offence. It is further made clear that for any reasons, if the appellants have not completed the modified period of sentence, they will be released after the period indicated hereinabove is over.

16) The appeals are allowed to the extent mentioned above.

.....J. (P. SATHASIVAM) .....J. (RANJAN GOGOI)
NEW DELHI;

OCTOBER 5, 2012.
