IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. Appeal No.325 of 2023
Reserved on: 24.11.2023
Date of Decision: 20th December, 2023

State of H.P.

....Appelant

Versus

Shaul Borov

....Respondent

Coram
Hon'ble Mr Justice Rakesh Kainthla, Judge.
Whether approved for reporting? Yes

For the Appellant : Mr. Jitender Sharma, Additional Advocate General.

Rakesh Kainthla,Judge

The present appeal has been filed under Section 377 of Cr.P.C. against the order of conviction and sentence dated 31.03.2023 passed by learned Special Judge-II, Kullu, District Kullu, H.P. in Case No.100 of 2020 (Sessions Trial No.150 of 2020).

2. It has been asserted that the accused was found in possession of 2.500 kgs of charas, which is a commercial quantity. He was liable to imprisonment for not less than 10 years and payment of fine of not less than ₹ 1,00,000/-. However, the accused was sentenced to undergo rigorous imprisonment for six months and

Whether reporters of the local papers may be allowed to see the judgment? Yes

payment of fine of ₹1,000/-. The sentence imposed by the learned Trial Court is inadequate and liable to be enhanced. Hence, the appeal.

3. A doubt was entertained regarding the maintainability of the appeal because as per the judgment and order passed by the learned Special Judge-II, Kullu, District Kullu, H.P., the respondent-accused was held guilty of possessing 50 grams of charas, which is a small quantity. He had undergone the sentence which is more than the maximum sentence that can be awarded for possessing a small quantity of charas. Hence, the matter was listed for consideration whether the Court could enhance the sentence above the maximum prescribed.

4. I have heard Mr. Jitender Sharma, learned Additional Advocate General for the appellant/State, who submitted that the State is aggrieved by the fact that the learned Trial Court had sentenced the accused for the possession of the small quantity of the charas, whereas he was found in possession of the commercial quantity. The sentence imposed by the learned Trial Court is inadequate and is required to be enhanced.

5. I have given considerable thought to his submissions and have gone through the records carefully.

6. Volume-III Chapter 25E Rule 5 of the High Court Rules and Order deals with the appeal for the enhancement of the sentence and states that when a person tried for an offence punishable under Section 302 of IPC is convicted under Section 304 of IPC, the order of the Sessions Judge amounts to an acquittal and the Court has no jurisdiction to alterthe conviction from Section 304 to Section302 of IPC and thereafter enhance the sentence. It has been observed:

> "5. In this connection, it should be noted that the Privy Council has held that when a person is tried for an offence under section 302, Indian Penal Code, but is convicted under section 304, Indian Penal Code, and sentenced to a term of imprisonment, the Sessions Judge's order amounts to an acquittal under section 302. On application to a High Court for revision of sentence, the High Court has no jurisdiction in view of the provisions contained in clause (4) of section 439, Criminal Procedure Code, to alter the conviction to one under section 302 and sentence the accused to death. In such cases, an appeal under section 417 of the Code is required to give the High Court jurisdiction, if it is desired to, alter the conviction. (Indian Law Reports, Allahabad, Volume 50, page 722)"

7. In ***Kishan Singh v. Emperor*, *1928 SCC OnLine PC 62: (1927-28) 55 IA 390*** Kishan Singh was charged with the commission of an offence punishable under Section 302 of IPC but he was convicted under Section 304 of IPC. The Privy Council held that the conviction

under Section 304 would amount to acquittal under Section 302 of IPC. It was observed:

> "On the 18th June 1927 the appellant, Kishan Singh, was charged by a Magistrate of the First Class as follows:
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> > "That you on or about the 20th day of March 1927 at Bharthwa did commit murder by intentionally causing the death of Kuber Singh and Shoran Singh and thereby committed an offence punishable under Sect. 302, Indian Penal Code, and within the cognizance of the Court of Session.
> >
> > And I hereby direct that you be tried by the said Court on the said charge."
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> He was tried on the said charge by the Additional Sessions Judge of Aligarh, with the aid of four assessors, and on the 31st July, 1927 the learned Judge delivered his judgment. He recited the finding of the assessors as follows:
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> > "All the assessors are unanimously of the opinion that the accused was guilty under Sect. 304 Indian Penal Code and in their opinion the story about the rath was a false one and the accused had shot down Kuber Singh as he had seen him cohabiting with his own wife. They were also of the opinion that both Shoran Singh and Kuber Singh were shot by Kishan Singh with his gun and the gandasa story was a got-up one and the gandasa was never used by the accused in order to kill Shoran Singh. They were also of the opinion that in the struggle which ensued between Kishan Singh and Shoran Singh the gun went off and shot Shoran Singh."
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> The learned Judge concluded his judgment by saying:
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> > "Agreeing with all the assessors I find the accused guilty under Sect. 304, Indian Penal Code, for committing both the said murders. I sentence him to three years rigorous imprisonment for the murder of Kuber Singh under Sect. 304, Indian Penal Code, and I sentence him to five years

> rigorous imprisonment for the murder of Shoran Singh with his gun under Sect. 304, Indian Penal Code, both the sentences to run concurrently."

Although the learned Judge in the above-mentioned part of his judgment spoke of the "murder of Kuber Singh" and "the murder of Shoran Singh" it is clear that the sentence was passed under Sect. 304, Indian Penal Code. That section deals with culpable homicide not amounting to murder, and it must, therefore, be taken for the purposes of this appeal that the offence of which the appellant was found guilty by the learned Judge was culpable homicide not amounting to murder.

The charge, as already stated, was that the appellant had committed an offence punishable under Sect. 302, Indian Penal Code, viz., murder.

It is, however, provided by Sect. 238 (2), Criminal Procedure Code, that when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

It was, therefore, legitimate for the learned Judge to convict the appellant of the offence punishable under Sect. 304, Indian Penal Code, viz., culpable homicide not amounting to murder, although there was no charge in respect of that offence framed against the appellant.

The learned Judge did not record an express finding of acquittal in respect of the charge of murder, but their Lordships are of the opinion that the conclusion at which the learned Judge arrived amounted to an acquittal in respect of that charge.

The only charge framed against the appellant was one of murder; he certainly was not convicted of murder. On the contrary, he was found guilty of culpable homicide not amounting to murder.

The appeal, therefore, must be decided upon the assumption that the appellant was acquitted of the charge of murder and

> that he was convicted of the offence punishable under Sect. 304, Indian Penal Code."

8. It was ultimately held that it is not permissible to convert the finding of acquittal on the charge of murder into the conviction and sentence him to death. It was observed:

> "They are of the opinion that the learned Judges of the High Court, in converting the finding of acquittal of the appellant on the charge of murder into one of conviction, and in sentencing him to death on the application for revision, were acting without jurisdiction, and in such circumstances, it is impossible to hold that no injustice was done. Their Lordships are of the opinion that this case comes within the exception to the rule stated in the judgment of Lord Watson in ***In re Abraham Mallory Dillet [(1887) 12 A.C. 459: 36 W.R.***"

9. In ***Eknath Shankarrao Mukkawar v. State of Maharashtra*, *(1977) 3 SCC 25: 1977 SCC (Cri) 410***, the accused was acquitted of the commission of an offence punishable under Section 16(1)(a)(i) read with Section 2(i)(c) and appeal for enhancement was filed contending that he should have been convicted under Section 2(i)(1). The Hon'ble Supreme Court held that in an appeal against the inadequacy of the sentence, it is not permissible to alter the conviction to an aggravated category of offence for which the accused was not convicted. It was observed:-

> "21. Mr Khanna submits that we should alter the finding of conviction to one for violation of Section 2(i)(c) from Section 2(i)(1), since, according to him, that will be the proper

> conviction on the facts of the case. We are unable to entertain this plea for altering the conviction in such a manner for the purpose of enhancing the sentence under Section 377 CrPC. The State did not appeal against the acquittal of the appellant under Section 16(1)(a)(i) read with Section 2(i)(c) and proceeded on the basis that the article was adulterated within the meaning of Section 2(i)(1) as held by the trial court. This is clear also from the judgment of the High Court. In an appeal against inadequacy of sentence, it is not permissible to alter the conviction to an aggravated category of offence for which the accused was not convicted. While the accused in such an appeal under Section 377 CrPC can show that he is innocent of the offence, the prosecution is not entitled to show that he is guilty of a graver offence and on that basis, the sentence should be enhanced. The prosecution will only be able to urge that the sentence is inadequate on the charge as found or even on an altered less grave charge. The submission of Mr Khanna is clearly untenable."

10. In ***Deepak Kumar versus State of Karnataka,2003 SCC OnLineKar 197: 2004 Cri LJ 1316***, the accused was charged with the commission of offences punishable under Sections 394 and 397 of IPC; however, he was convicted for the commission of an offence punishable under Section 326 of IPC. Karnataka High Court held that conviction under Section 326 of IPC cannot be altered to Sections 394 and 397 of IPC. It was observed:

> "7. Be it as it may, although the appellant was liable for a conviction for a higher offence under Sections 394 and 397 of the IPC which carries a statutory minimum sentence of 7 years, but the offences under Section 394 and 396 of the IPC imbibe within them the offence of causing grievous injury which is distinctly made punishable under Section 326 of the IPC. The offence under Section 397 of the IPC is a combination

of the offence of committing an offence of theft and in the course of commission of theft, causes grievous hurt to the victim. While considering the ingredients of Section 397 of the IPC, the Trial Court upholds the prosecution case of causing grievous hurt punishable under Section 326 of the IPC but exculpates the accused in respect of other ingredients of robbery. In other words, the offence of causing grievous hurt which forms part of an offence under Section 397 of the IPC is held to be proved and other requisites of offence or robbery are held not proved. The said conviction under Section 326 of the IPC although erroneous but the ingredients of causing grievous hurt under Section 326 of the IPC is held to be proved and the said conviction may be improper from the standpoint of the prosecution but is to the advantage of the accused in getting a lenient punishment. Therefore, the conviction under Section 326 of the IPC cannot be held to be bad in law in view of the evidence of P.Ws. 1 and 2 and the medical evidence.

8. I do not find any ground to interfere with the order.

9. The contention of the State. Public Prosecutor that the accused could be convicted under Section 397 of the IPC in appeal by the exercise of powers under Section 396 of the IPC is untenable against the acquittal of accused 2 and partial acquittal of accused 1 from the charge under Sections 394 and 397 of the IPC. There is no appeal preferred by the State. Therefore, the order of acquittal becomes conclusive and binding even though it is erroneous. In a case where there is a charge of commission of a higher offence by the accused and conviction is rendered for a lesser offence and a higher offence accused is acquitted in an appeal by an accused against the conviction, the State cannot argue for reversal or modification of the order of acquittal granted in respect of such of the offence without a specific appeal in that behalf. So also on the sentence without an appeal by the State against the sentence the Appellate Court cannot alter the nature and extent of the sentence so as to enhance the same."

11. Thus, it is apparent from the judgments of the Privy Council, Supreme Court and the Karnataka High Court that when a person is charged with a graver offence but is convicted of the lesser offences, the same amounts to the acquittal of the serious offence and it is not permissible for the High Court to convert the lesser offence into serious offence in an appeal for enhancement of sentence. The High Court can only enhance the sentence provided for the lesser offence of which the person was found guilty.

12. In the present case, the offence of possession of a small quantity is punishable with rigorous imprisonment which may extend to one year or with a fine which may extend to ₹ 10,000/-. The accused has already undergone imprisonment for a period more than the maximum sentence provided under the Act, therefore, it is not permissible to enhance the sentence more than the maximum and the appeal is dismissed as not maintainable.

(Rakesh Kainthla)
Judge

20th December,2023
(Saurav Pathania)