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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 2ND DAY OF AUGUST, 2022

BEFORE

THE HON'BLE MR.JUSTICE K.SOMASHEKAR

CRIMINAL REVISION PETITION NO.775 OF 2018

BETWEEN

The State of Karnataka
By Drug Inspector
Hassan Circle, Hassan
Rep. by State Public Prosecutor
High Court Building
Bengaluru – 01.

... Petitioner

(By Smt. Rashmi Jadhav - HCGP)

AND

S.B. Shivashankar

... Respondent

(By Smt. Madhu R – Advocate for
Sri. K. Prasanna Shetty - Advocate)

This Criminal Revision Petition is filed under Section 397 r/w 401 of the Code of Criminal Procedure, praying to set aside the order dated 01.04.2015 passed by the II-Addl. Civil Judge, JMFC, Hassan in C.C.No.3659/2014, insofar it relates imposing fine of Rs.10,000/- on the respondent / accused for the offences punishable under

Section 27(d) of the Drugs and Cosmetic Act, 1940 and also the order dated 16.02.2018 in Crl.A.129/2015 passed by the 5th Addl. District and Sessions Court, Hassan dismissing the appeal filed by the Petitioner/State; impose adequate sentence on the respondent/accused for the offence punishable under Section 27(d) of the Drugs and Cosmetic Act, 1940.

This Criminal Revision Petition coming on for Admission, this day, the court made the following:

ORDER

This Criminal Revision Petition is filed challenging the order passed by the Trial Court in C.C.No.3659/2014 dated 01.04.2015 convicting the respondent / accused for offences under Section 27(d) of the Drugs and Cosmetics Act, 1940 as well as the order passed by the First Appellate Court in Crl.A.No.129/2015 dated 16.02.2018 dismissing the appeal as not maintainable under Section 374 of the Cr.P.C.

2. This petition though listed for admission, is heard finally and is disposed of by this order, with the consent of the learned counsel for both the parties.

3. The Trial Court in C.C.No.3659/2014 (Old C.C.No.797/2012) dated 1.4.2015 held the respondent / accused S.B. Shivakumar guilty for offences under Section 27(d) of the Drugs and Cosmetics Act, 1940 and he was sentenced to undergo a day's imprisonment, till the rising of the Court. The accused also was imposed to pay a fine of Rs.10,000/-, failing which he was to undergo simple imprisonment for a period of three months. When the said order was challenged by the State by way of an appeal for inadequacy of sentence, the First Appellate Court in Crl.A.No.129/2015 dated 16.02.2015 dismissed the said appeal as not maintainable under Section 374 of the Cr.P.C. The judgment rendered by the Trial Court which has been confirmed by the Appellate Court has been challenged in this petition urging that adequate punishment be imposed on the accused for the alleged offences. The First Appellate Court has dismissed the appeal whereby challenging the impugned order passed by the Trial Court, on the ground of maintainability of the appeal under Section 374 Cr.P.C., which requires intervention.

4. In this petition, the learned HCGP for the State seeks for consideration of the grounds urged in this petition and to award adequate sentence for the offences lugged against the accused. It is contended that the accused had violated Section 18(a)(vi) of the Drugs and Cosmetics Act 1940 read with Rule 65(2) and Rule 65(3)(1) of the Drugs and Cosmetics Rules, 1945 which is punishable under Section 27(d) of the Drugs and Cosmetics Act, 1940. According to the provisions of Section 27(d) of the Drugs and Cosmetics Act, 1940, if a person contravenes the said provision, he or she shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to two years and with fine and which shall not be less than Rs.20,000/-, provided that the Court may record adequate or special reasons in the judgment in order to impose a sentence of imprisonment for a term of less than one year. But in the instant case, it is the contention of the learned HCGP that both the Courts have not assigned any reasons for imposing inadequate sentence. Hence, the said judgments of the Trial Court as well as the First Appellate

Court are not in accordance with law. If adequate sentence is not passed against the accused, it would result in a miscarriage of justice and gravamen of the complainant / State would be the sufferer. On these premise, learned HCGP for the State prays to set aside the order passed by the Trial Court in C.C.No.3659/2014 dated 1.4.2015 as well as the order of the First Appellate Court in Crl.A.No.129/2015 dated 16.02.2018 and thereby to award adequate sentence against the respondent / accused for the alleged offences.

5. Learned counsel for the respondent Smt. Madhu R has taken this Court through the concept of Section 27(d) of the Drugs & Cosmetics Act, 1940 whereby the complainant / State had initiated criminal prosecution against the accused who is arraigned as the respondent herein as urged. Subsequently, an application under Section 265-B of Cr.P.C. seeking for 'plea bargaining' was made by the accused / respondent. On 30.03.2015, plea bargaining was conducted as per the order-sheet maintained in C.C.No.3659/2014.

6. Learned Assistant Public Prosecutor in that matter who represented the complainant / State and the accused as well, was present along with his counsel. Learned Assistant Public Prosecutor submitted that if accused pleads guilty, then plea-bargaining can be done and the said benefit could be extended between the complainant and the accused and suitable sentence could be passed. Consequent upon consideration of the application made by the accused under section 265B of the Cr.P.C. relating plea-bargaining, and in view of the fact that the respondent / accused pleaded guilty and the offence as well being committed by the accused for the first time, the Trial Court in C.C.No.3659/2014 imposed minimum imprisonment and also sentenced to pay a fine, which is incorporated in the operative portion of the order. Therefore, in this petition, there are no justifiable grounds for seeking intervention as sought for by the learned HCGP for the State who is representing the State. On all these premise, the learned counsel for the respondent / accused seeks for dismissal of this petition as being devoid of merits.

7. In the context of the contentions made by the learned HCGP for the State and so also the counter made by the learned counsel for the respondent / accused, it is deemed appropriate to refer that criminal law was set into motion on receipt of a complaint by the State represented by the Drug Inspector, Hassan Circle, Hassan under Section 200 of the Cr.P.C. against the accused. It was registered on credible information that drugs were being sold by the accused without prescription. On the basis of the complaint, criminal law was set into motion and thereafter the Investigating Agency filed a charge-sheet against the accused before the Court having jurisdiction. As per the complaint made by the complainant, the accused is alleged to have sold the schedule drugs as specified hereunder, in the absence of a registered Pharmacist:

a) OMNIFLOX – 500 mg Tablet, Batch No.OM5-163, D/M 02-10, D/E 01/13 Mfd. By M/s. Embiotic Laboratories (P) Ltd., Magadi Road, Bangalore-560 091.

b) DOLIDE Plus Tablet, Batch No.DOPO 9018 D/M:12/09, D/E 11/12, Mfd. By: Tirupati Medicare Ltd., Paonta Sahib, District: Sirmour (H.P.-173205.

In view of having sold the said drugs in the absence of a registered Pharmacist, it was held that the accused had violated Section 18(a)(vi) of the Drugs & Cosmetics Act, 1940 read with Rule 65(2) of the said Rules which is punishable under Section 27(d) of the said Act. The accused also had not issued any sale bill for the sale of drugs effected by him and hence, had violated Section 18(a)(vi) read with Rule 3(1) of the said Act, also punishable under Section 27(d) of the Drugs & Cosmetics Act, 1940.

8. During the pendency of the case in C.C.No.3659/2014, the respondent herein arraigned as accused, had hired the services of a counsel and through the said counsel, had filed an application under Section 265-B of the Cr.P.C. seeking for plea-bargaining on 30.03.2015. Accordingly, the benefit of plea-bargaining was facilitated and was mutually extended in between the

complainant who is the gravamen of the incident and the accused who is the gravamen of the accusation made in the charge-sheet against the accused. Learned Asst. Public Prosecutor who was present submitted that if accused pleads guilty, plea-bargaining can be done and punishment can be awarded. Accordingly, minimum punishment along with fine was agreed to be imposed. Thereby, the accused was convicted to undergo imprisonment for one day, till the rising of the Court and to pay a fine of Rs.10,000/- and in default of payment of fine, to undergo simple imprisonment for three months. The aforesaid judgment of conviction rendered by the Trial Court was challenged by the State by filing an appeal in Crl.A.No.129/2015 under Section 374 Cr.P.C. urging various grounds. But the said appeal came to be dismissed as not maintainable, by order dated 16.02.2018.

9. Section 374 of the Cr.P.C. inclusive of Section 375 of the Cr.P.C., reads thus:

“374. Appeals from convictions.

(1) Any person convicted on a trial held by a High Court in its extraordinary original criminal jurisdiction may appeal to the Supreme Court.

(2) Any person convicted on a trial held by a Sessions Judge or an Additional Sessions Judge or on a trial held by any other Court in which a sentence of imprisonment for more than seven years has been passed against him or against any other person convicted at the same trial, may appeal to the High Court.

(3) Save as otherwise provided in sub-section (2), any person,-

(a) convicted on a trial held by a Metropolitan Magistrate or Assistant Sessions Judge or Magistrate of the first class, or of the second class, or

(b) sentenced under section 325, or

(c) in respect of whom an order has been made or a sentence has been passed under section 360 by any Magistrate, may appeal to the Court of Session.

(4) When an appeal has been filed against a sentence passed under Section 376, Section 376A, Section 376AB, Section

376B, Section 376C, Section 376D, Section 376DA, Section 376DB or Section 376E of the Indian Penal Code, the appeal shall be disposed of within a period of six months from the date of filing of such appeal."

"375. No Appeal in certain cases when accused pleads guilty. Notwithstanding anything contained in section 374, where an accused person has pleaded guilty and has been convicted on such plea, there shall be no appeal,-

(a) if the conviction is by a High Court; or

(b) if the conviction is by a Court of Session, Metropolitan Magistrate or Magistrate of the first or second class, except as to the extent or legality of the sentence."

10. The State had also filed application under Section 5 of the Limitation Act seeking to condone the delay of 49 days in preferring the appeal in Crl.A.No.129/2015. It was contended that the said delay was due to the fact that the appellant / State had to obtain necessary permission from the concerned

Department to initiate the appeal. The application came to be allowed and delay was condoned.

11. It is deemed appropriate to refer to Section 265B of the Cr.P.C. relating to 'plea bargaining', which reads thus:

> "**265 B. Application for plea bargaining –**
>
> (1) A person accused of an offence may file application for plea bargaining in the Court in which such offence is pending for trial.
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> (2) The application under sub-section (1) shall contain a brief description of the case relating to which the application is filed including the offence to which the case relates and shall be accompanied by an affidavit sworn by the accused stating therein that he has voluntarily preferred, after understanding the nature and extent of punishment provided under the law for the offence, the plea bargaining in his case and that he has not previously been convicted by a Court in a case in which he had been charged with the same offence.

(3) After receiving the application under sub-section (1), the Court shall issue notice to the Public Prosecutor or the complainant of the case, as the case may be, and to the accused to appear on the date fixed for the case.

(4) When the Public Prosecutor or the complainant of the case, as the case may be, and the accused appear on the date fixed under sub-section (3), the Court shall examine the accused in camera, where the other party in the case shall not be present, to satisfy itself that the accused has filed the application voluntarily and where

(a) the Court is satisfied that the application has been filed by the accused voluntarily, it shall provide time to the Public Prosecutor or the complainant of the case, as the case may be, and the accused to work out a mutually satisfactory disposition of the case which may include giving to the victim by the accused the compensation and other expenses during the case and thereafter fix the date for further hearing of the case;

(b) the Court finds that the application has been filed involuntarily by the accused

> or he has previously been convicted by a Court in a case in which he had been charged with the same offence, it shall proceed further in accordance with the provisions of this Code from the stage such application has been filed under sub-section (1)."

12. Subsequently, the impugned order passed by the Trial Court was challenged by the State assigning various reasons that Section 265B of the amended provision of the Cr.P.C. relating to mutually extending the benefit of plea-bargaining in between the complainant and the accused if provided, one/fourth of the total punishment ought to have been inflicted on the accused when he pleaded guilty. The complainant is the gravamen of the incident and accused is the gravamen of the accusation whereby charge-sheet has been laid against the accused.

13. The respondent / accused had appeared before the Court through counsel Shri M.A. Muralidhar and vehemently contended that the order passed by the Trial

Court was just and proper and there was no error committed by the Trial Court in awarding the sentence. Further, it was contended that the appeal itself was not maintainable in view of the specific provision under Section 265-G of the Cr.P.C. wherein it has been specifically held that, 'The judgment delivered by the Court under Section 265 shall be final and no appeal (except the Special Leave Petition under Article 136 and Writ Petition under Article 226 and 227 of the Constitution of India) shall lie in any court against such judgment. Even though the case has been disposed of keeping in view the tenor of Section 265-G and so also Section 265 of the Cr.P.C., it is relevant to refer to Section 200 of the Cr.P.C. relating to filing a private complaint by the complainant against the accused by following the requisite provisions of the Cr.P.C., whereby the Trial court has to take cognizance keeping in view Sections 190(1)(a), (b) and (c) respectively. But cognizance is a judicial action and it is a process of law when once criminal law is set into motion either on submitting orally or even in writing made a complaint. In the instant case, the Drug Inspector

/ State has filed a complaint under Section 200 of the Cr.P.C. before the Court having jurisdiction and initiated criminal prosecution against the accused for offences under Section 27(d) of the Drugs and Cosmetics Act, 1940 relating to violation of certain provisions, that is Section 18(a)(vi) read with Rule 65(2) of the Drugs & Cosmetics Act, 1940. Based upon the complaint and also the mandatory provision of law, the accused was summoned to participate in the criminal proceedings initiated against him. But the accused pleaded guilty by making an application seeking to mutually extend the benefit of 'plea bargaining' and the same has been extended by the Trial Court in the presence of the Assistant Public Prosecutor and also in the presence of the defence counsel for the accused. But when once criminal law was set into motion, it is not required to keep present the complainant who is the author of the complaint. Hence complainant was represented by the Assistant Public Prosecutor.

14. The Hon'ble Apex Court in the Judgment reported in (2008) 7 SCC 550 in the case of State of

Punjab v/s Premsagar and others has discussed the development of legal principles with respect to quantum of sentence and also sentencing. In the said Judgment the Hon'ble Apex Court has held that, "Although a wide discretion has been conferred upon the court, the same must be exercised judiciously. It would depend upon the circumstances in which the crime has been committed and his mental state. Age of the accused is also relevant. What would be the effect of the sentencing on the society is a question which has been left unanswered by the legislature. The superior courts have come across a large number of cases which go to show anomalies as regards the policy of sentencing. Whereas the quantum of punishment for commission of a similar type of offence varies from minimum to maximum, even where same sentence is imposed, the principles applied are found to be different. Similar discrepancies have been noticed in regard to imposition of fine.

15. In the case of Dhananjoy Chatterjee v. State of W.B. [(1994) 2 SCC 220:1994 SCC (Cri) 358, the Court held:

> "Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime."

16. In the case of Gentela Vijayavardhan Rao v. State of A.P.[(1996) 6 SCC 241: 1996 SCC(Cri) 1290] following Dhananjoy Chatterjee [(1994) 2 SCC 220 : 1994 SCC (Cri) 358], states the principles of deterrence and retribution but the same cannot be categorized as right or wrong. So much depends upon the belief of the Judges.

17. The Appellate Court had also referred to a judgment in the case of Shailesh Jasvantbhai v. State of Gujarat [(2006) 2 SCC 359 : (2006) 1 SCC (Cri) 499] and another decision in the case of Sevaka Perumal v. State of T.N. [(1991) 3 SCC 471:1991 SCC (Cri) 724] wherein it is held that it was the duty of every court to award proper

sentence having regard to the nature of the offence and the manner in which it was executed or committed, etc.

18. Don M. Gottfredson in his essay on "Sentencing Guidelines" in Sentencing by Hyman Gross and Andrew von Hirsch, it is opined thus:

> "It is a common claim in the literature of criminal justice and indeed in the popular press that there is considerable 'disparity' in sentencing. The word 'disparity' has become a prerogative and the concept of 'sentencing disparity' now carries with it the connotation of biased or insidious practices on the part of the judges. This is unfortunate in that much otherwise valid criticism has failed to separate justified variation from the unjustified variation referred to as disparity. The phrase 'unwarranted disparity' may be preferred; not all sentencing variation should be considered unwarranted or disparate. Much of it properly reflects varying degrees of seriousness in the offence and/or varying characteristics of the offender. Dispositional variation that is based upon permissible, rationally relevant and understandably distinctive characteristics of the offender and of the offense may be wholly justified,

beneficial and proper, so long as the variable qualities are carefully monitored for consistency and desirability over time. Moreover, since no two offenses or offenders are identical, the labeling of variation as disparity necessarily involves a value judgment, that is disparity to one person may be simply justified variation to another. It is only when such variation takes the form of differing sentences for similar offenders committing similar offences that it can be considered disparate.

(emphasis supplied)

The learned author further opines:

"In many jurisdictions, judicial discretion is nearly unlimited as to whether or not to incarcerate an individual; and bound only by statutory maxima, leaving a broad range of discretion, as to the length of sentence."

19. Further, Shri Kevin R. Reitz in Encyclopedia of Crime and Justice, 2nd Edition "Sentencing Guidelines" state:

"All guideline jurisdictions have found it necessary to create rules that identify the

> factual issues at sentencing that must be resolved under the guidelines, those that are potentially relevant to a sentencing decision, and those viewed as forbidden considerations that my not be taken into account by sentencing courts. One heated controversy, addressed differently across jurisdictions, is whether the guideline sentence should be based exclusively on crimes for which offenders have been convicted (conviction offences), or whether a guideline sentence should also reflect additional alleged criminal conduct for which formal convictions have not been obtained (non-conviction offences).

20. Keeping in view the above rulings, it is opined that the present petition which is preferred by the State challenging the impugned judgment rendered by the First Appellate Court in Crl.A.No.129/2015, ought to be dismissed. In C.C.No.3659/2014 before the Trial Court, an application was made by the respondent / accused under Section 265-B of the Cr.P.C. seeking for 'plea bargaining' on 30.03.2015. It is only on mutually extending the benefit of plea bargaining in between the

complainant and the accused. But the complainant is the gravamen of the incident narrated in the complaint either orally or in writing. But in the instant case, criminal prosecution has been initiated keeping in view Section 200 Cr.P.C. and so also Section 190 of the Cr.P.C. relating to cognizance in respect of the criminal prosecution initiated against the accused relating to offences under Section 27(d) of the Drugs and Cosmetics Act, 1940. When the parties had mutually come forward seeking 'plea bargaining' in order to close the criminal prosecution case in terms of the issues emerged in between them for violation of the provisions of the Drugs and Cosmetics Act, 1940, the Trial Court had accepted the application filed by the respondent / accused and extended plea bargaining benefit, which was also approved by the complainant / State who was represented by the Assistant Public Prosecutor in view of the fact that the accused had pleaded guilty and agreed to pay a fine of Rs.10,000/- and to undergo imprisonment for one day till the rising of the Court. Therefore, in this petition, it does not arise to call for interference the said judgments of the Trial Court as

well as the First Appellate Court since there are no warranting circumstances which arise to call for interference. In view of the aforesaid reasons, I proceed to pass the following:

ORDER

The petition filed by the State under Section 397 read with Section 401 Cr.P.C. is hereby rejected. Consequently, the order passed by the Trial Court in C.C.No.3659/2014 dated 01.04.2015 which was affirmed by the First Appellate Court in Crl.A.No.129/2015 by order dated 16.02.2018, are hereby confirmed. Ordered accordingly.

Sd/-
JUDGE

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