

CASE NO.:
Appeal (crl.) 905 of 2006

PETITIONER:
Khalek Shaikh

RESPONDENT:
State of West Bengal

DATE OF JUDGMENT: 31/08/2006

BENCH:
ARIJIT PASAYAT & LOKESHWAR SINGH PANTA

JUDGMENT:
J U D G M E N T
(Arising out of SLP (Crl.) No. 2282 of 2006)

ARIJIT PASAYAT, J.

Leave granted.

Appellant was convicted for alleged commission of offence punishable under Section 46A(a)(ii) of the Bengal Excise Act, 1909 (in short the 'Act'). According to the prosecution he was in unlawful possession of 40 litres of illicit distilled liquor.

The trial found him guilty and convicted him in terms of Section 46A(a)(ii) and sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs.500/- with default stipulation.

The said order of the learned Judicial Magistrate, 1st Court at Diamond Harbour, 24 Parganas (South) was maintained by learned Additional Sessions Judge, 6th Court, Alipore, 24 Parganas (South). The High Court also did not find any substance in the revision filed before it and dismissed the same.

The background facts leading to prosecution and culminating in conviction essentially are as follows:

On 17.01.1996 at about 10.30 A.M the present appellant was apprehended on Falta Road near Fatehpur market for unlawful possession of 40 litres of illicit distilled liquor in a polythene jar. He was arrested and the article was seized after observing formalities followed by taking sample in a separate bottle which was forwarded to the chemical examiner. The analysis report is in the positive with the finding that the liquid contained 61.22 alcohol which is of illicit origin. The Government suffered a loss of Rs.1400/- toward revenue.

Four witnesses on behalf of the prosecution while five witnesses on behalf of the defence were examined, and after considering the facts, circumstances and materials on record, the trial Court found the appellant guilty under Section 46A (a)(ii) of the Act, convicted him there under and sentenced him to suffer Rigorous Imprisonment for three years and to pay fine of Rs.500/- in default to R.I. for one month which was affirmed as stated supra by the First Appellate Court and in

revision petition before the High Court was dismissed.

Learned counsel for the appellant submitted that no independent witness was examined and, therefore, the conviction is per se unsustainable. It is also submitted that the conviction in terms of Section 46A(a)(ii) is uncalled for and at the most the same could be in terms of Section 46A(a)(i) of the Act. It is also submitted that the sentence imposed is high, beyond the limit prescribed by the statute and, therefore, are unsustainable.

Learned counsel for the State, supported the order.

The first issue relates to non-examination of independent witnesses. The courts below analysed in detail the factual position and came to hold as to why it was not possible for the prosecution to examine any independent witness. There is no prohibition on a conviction being recorded on the basis of the testimony of official witnesses if they are found to be trustworthy.

Coming to the question about the applicable provision, the provision itself needs to be noted. The same reads as follows:

"46A. Penalty for unlawful manufacture of spirit or transport etc., of intoxicating drug, cultivation of hemp, use and possession of materials for manufacture of spirit and intoxicating drug. - Whoever in contravention of this Act or of any rule, notification or order made, issued or given, or a license, permit or pass granted under this Act, -

(a) manufactures any spirit or intoxicating drug other than bakhar or cultivates hemp plant (*Cannabis sativa* L.) or; (from which an intoxicating drug can be manufactured for produced), or

(b) uses, keeps or has in his possession any material, still, utensils, implements or apparatus whatsoever for the purpose mentioned in clause (a), or

(c) imports, exports, transports, possesses or sells spirit or intoxicating drug other than bakhar, or;

(cc) bottles spirit for the purpose of sale, or;

(d) works any distillery or brewery, or

(e) establishes any distillery or brewery, or warehouse,

(f) collects or sells any portion of hemp plant (*Cannabis sativa* L.) from which an intoxicating drug may be manufactured or produced.
[shall be punishable, -

(i) In the case of an offence under clause (c) or clause (f), when the value of the spirit, intoxicating drug or hemp plant (*Connabis sativa* L.) from which an intoxicating drug can

be manufactured or produced is less than two thousand rupees, with imprisonment for a term which may extend to two years and with fine:

Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court, such imprisonment shall not be:-

(1) for the first offence, for less than one month and

(2) for the second and for every subsequent offence, for less than three months;

(ii) in any other case, with imprisonment for a term which may extend to five years (but shall not be for less than six months) and with fine:

Provided that for special and adequate reasons to be recorded in the judgment of the court, such imprisonment may be for less than six months but shall not be for less than three months.]"

A bare reading of the provision makes it clear that separate punishments are provided. First part relates to offences under Clause (c) or Clause (f) as the case may be, when the value of the spirit, intoxicating drug or hemp plant is less than Rs.2,000/-, and for these cases the maximum imprisonment is two years with fine. Second part is in the nature of a residuary provision and relates to cases not covered by clauses (c) or (f) within the value of Rs.2,000/-. If the value of the contraband article is more than Rs.2,000/- the second part will be applicable, even if the case is covered by clause (c) or (f). This is clear from the expression used "in any other case".

The proviso permits the court to reduce the sentence below the prescribed minimum but it shall be only for special and adequate reasons to be recorded in the judgment. In the instant case though no special or adequate reason has been indicated to reduce the sentence, the courts below proceeded on the basis as if it is covered by alleged offence is covered by Section 46A(a)(ii).

There is no dispute and in fact the courts below have proceeded as if the offence committed by the accused related to "possession". Clause (a) relates to "manufacture". Allegations in this case do not relate to "manufacture". That being so Section 46A(a)(ii) had no application and on the other hand the applicable provision is Section 46A(a)(i) of the Act. The conviction is accordingly altered. The sentence which can be imposed for the said offence is maximum two years with fine. Considering the quantum of illicit distillery liquor seized, in our considered view five months rigorous imprisonment would meet the ends of justice.

The appeal is allowed to the aforesaid extent.