

HIGH COURT OF MADHYA PRADESH : JABALPUR

Endt. No. C/4390...../
III-2-9/40Pt-I F.N.10/III-6-3/89

Jabalpur, dt. 17...../09/18

The copy of Judgment passed by Hon'ble Shri Justice J.K. Maheshwari & Hon'ble Shri Justice J.P. Gupta in Criminal Appeal No. 683/2006 in the case of Madhav Prasad @ Maddu Gupta Vs. State of Madhya Pradesh dated 17-08-2018 is forwarded to:-

(i) The District & Sessions Judges.....(all in the State) with a request to circulate the copy of the same to all the Judges working under your kind control for information & ready reference so that the possibility to commit mistake in the said procedure may be ruled out while dealing with the cases of previous conviction.

(ii) The District & Sessions Judge (Inspection & Vigilance), Jabalpur / Indore / Gwalior;

(iii) The Director MPSJA for information & needful ,


(iv) The Principal Registrar, Bench at Indore/Gwalior High Court of M.P., Jabalpur.

(v) P.S. to Hon'ble the Chief Justice ,High Court of Madhya Pradesh Jabalpur for placing the matter before His Lordships,

(vi) P.S. to Registrar General/ Principal Registrar(Judl)/ Principal Registrar (Inspection & Vigilance),/ Principal Registrar (Examination) / Principal Registrar (ILR) High court of Madhya Pradesh Jabalpur,

(vii) Registrar(J-I),(J-II) /(D.E.)/(A)/ (Vig.)/ (VI.)/ High Court of Madhya Pradesh, Jabalpur.

(ix) The Registrar(IT) for uploading the same on the Website of High Court of M.P.


17.09.18
(SANAT KUMAR KASHYAP)
REGISTRAR(DE)

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Dec 37
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HIGH COURT OF MADHYA PRADESH : JABALPUR
DIVISION BENCH : BEFORE JUSTICE J.K. MAHESHWARI
&
JUSTICE J.P. GUPTA

Criminal Appeal No.683/2006

Madhav Prasad alias Maddu Gupta

vs.

State of Madhya Pradesh

Shri Ankit Saxena, learned counsel appointed as *amicus curiae* to assist
the Court on behalf of the appellant.

Smt. M.P.S. Chuckal, learned P.L. for respondent/State.

JUDGMENT

(17/8/2018)

As per : J.K. Maheshwari, J.

This appeal under Section 374(2) of the Code of Criminal Procedure (in short, be called as "Cr.P.C.") has been filed arising out of the judgment dated 28.2.2006 passed by the Special Judge, NDPS Katni in Special Session Trial No.04/04 convicting the appellant for the charge under Section 8/20(b)(ii)(B) and Section 31 of the Narcotic Drugs and Psychotropic Substance Act (hereinafter referred to as "NDPS Act") and sentenced to undergo 15 years rigorous imprisonment alongwith fine of Rs.1,50,000/- and in default to suffer 2 years and 6 months rigorous imprisonment in addition.

2. As per prosecution allegation, on the date of incident i.e. 9.6.2002 at about 10:45 a.m., the Assistant Sub Inspector Police, Station Bahoriband, District Katni Mr. K.K. Tripathi has received information



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from informant that the accused residing in the house of Kallu Barman as tenant is in possession of two packets of *Cannabis Hemp* (Ganja), if immediate step is not taken the contraband may be sold by him. After lodging the Rojnamcha Sanha, he immediately proceeded alongwith the Constable Shrikant Pathak and called the independent witnesses Pappu Yadav and Ajay from the bus stand Bahoriband preparing the Panchanama to that effect. On interception, the contraband was seized and the offence was registered. In the investigation done as per the provisions of NDPS Act, the prosecution found that the accused committed the offence, however, challan was filed in a competent Court where charges under Section 8/20(b)(ii)(B) of the NDPS Act were framed against the accused who abjured the guilt and took the defence of false implication.

3. The trial Court after recording the evidence of the witnesses said the charges framed have been proved beyond reasonable doubt, therefore, convicted the appellant by the impugned judgment. The Session Court while sentencing the accused observed that the appellant is the second time convict, therefore, as per Section 31 of the NDPS Act punished him further to the extent one half period of the maximum term of sentence, adding sentence of 5 years in the maximum sentence and awarded the sentence of 15 years along with an amount of fine of Rs.1,50,000/- and in default 2 years and 6 months rigorous imprisonment.

4. Learned counsel appearing on behalf of the appellant submits that accused is in custody from the date of incident i.e. 9.6.2004 and he has served the actual sentence of more than 14 years. In such circumstances, the appellant do not wish to challenge the findings of conviction on merit and on the point of sentence enhanced being previous convict with the aid of Section 31 of the NDPS Act, without framing charge in view of the provisions as contained under Section 211(7) of the Cr.P.C., and without following the procedure prescribed in the M.P. Rules and Orders (Criminal) to prove previous conviction, sentence awarded to appellant is unsustainable. Thus, without framing the charge of Section 31 of the NDPS Act and following the procedure, the sentence as directed adding one half time of the maximum term of the sentence is contrary to law. Otherwise, the appellant has already served the sentence of 14 years in total, which include sentence served due to non-payment of fine, therefore, considering the aforesaid, the sentence to such extent may be set aside and the appeal may be allowed in part, releasing him from the jail.

5. On the other hand, learned P.L. though opposed the prayer but looking to the provisions of Section 31 of the NDPS Act and Section 211(7) of the Cr.P.C. and also the procedure as contemplated under M.P. Rules and Orders (Criminal), it is urged that this Court may consider the provisions of law and pass appropriate order, which may be circulated to all the Subordinate Courts of M.P. thereby the procedure in the cases of previous convict may be followed in the judgments.



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6. After hearing learned counsel appearing on behalf of both the parties, and perusal of the record we are of the view that the finding of conviction for the charge under Section 8/20(b)(ii) is based on legal evidence and in accordance to law. At this stage, learned counsel for the appellant has not pressed this appeal on merit, therefore, this appeal challenging the findings of conviction under Section 8/20(b)(ii)(B) of the NDPS Act is dismissed and those findings are affirmed.

7. Now to advert the argument that the trial Court while passing the sentence with the aid of Section 31 of the NDPS Act for 15 years without following the procedure, the record of trial is perused, by which it reveals, the Court relied upon the document Ex.P/32, the crime register of Police Station, Sihora, in which it is mentioned that previous also similar offence was registered against accused in which he was convicted. The copy of the judgment of the said case is not brought on record to afford an opportunity to the accused. The crime register Ex.P/32 do not disclose that any appeal against the said judgment was filed by the appellant and what was its fate. Mainly on the basis of the entry of the crime register in the name of the accused, it cannot be accepted that the appellant and the accused of the said case is the same. To decide all the factual contention, it was incumbent on the Court to frame the charge under Section 31 of the NDPS Act, showing all details of the previous conviction, and afford an opportunity to the accused to defend himself and decide whether he is previously convicted for the similar offence. After such finding of previous conviction, different

sentence, for a subsequent offence may be passed. In this regard, Section 211 of the Cr.P.C. is relevant, however, it would be fruitful to reproduce Section 211(7) of the Cr.P.C, which reads as thus :-

“211(7) - If the accused, having been previously convicted of any offence, is liable, by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence, the fact, date and place of the previous conviction shall be stated in the charge; and if such statement has been omitted, the Court may add it at any time before sentence is passed.”



On perusal of the aforesaid, if the sentence of the accused is required to be enhanced due to his previous conviction or to give him punishment of different kind for subsequent offence and to prove previous conviction which may affect the punishment, the charge shall be framed stating the date and place of previous offence and the detail of conviction, though such charge may be added at any time before sentence is passed.

8. Section 298 of the Cr.P.C. prescribe a procedure to prove the previous conviction or acquittal. The said provision is also relevant, however, reproduced as thus :-

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“298. Previous conviction or acquittal how proved – In any inquiry, trial or other proceeding under this Code, a previous conviction or acquittal may be proved, in addition to any other mode provided by any law for the time being in force -

(a) by an extract certified under the hand of the officer having the custody of the records of the Court in which such conviction or acquittal was held, to be a copy of the sentence or order, or

(b) In case of a conviction, either by a certificate signed by the officer in charge of the jail in which the punishment or any part thereof was undergone, or by production of the warrant of commitment under which the punishment was suffered,

together with, in each of such cases evidence as to the identity of the accused person with the person so convicted or acquitted.”

Bare perusal of the aforesaid, in addition to any other mode provided by any law for the time being in force in any inquiry, trial or other proceeding, a previous conviction or acquittal may be proved by way of extract certified under the hand of the officer having the custody of the records of the Court in which such conviction or acquittal was held on producing a copy thereof or otherwise either by certificate signed by the officer in charge of the jail in which the punishment or any part thereof or by production of the warrant of commitment under which the punishment was suffered. In each of the said cases evidence as to the

identity of the accused person with the person so convicted or acquitted must be brought on record. It is relevant to point out here that akin to the provisions contained under Section 31 of the NDPS Act, Section 75 of the IPC also prescribe altogether *pari materia* provision in case the accused committed an offence punishable under Chapter XII or Chapter XVII of the IPC.

9. In the said context, certain provisions of M.P. Rules and Orders (Criminal) are also relevant which prescribe a procedure governing the Courts vested with criminal jurisdiction in the State of Madhya Pradesh. In this regard, Rule 175 to 179 are relevant which are reproduced as under :-

“Rule 175 – Sub-section (7) of section 221 of the Code directs that, if the accused having been previously convicted of any offence is liable, by reason of such previous conviction, to enhanced punishment or to punishment of a different kind for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence, the fact, date and place of the previous conviction shall be stated in the charge. An admission by an accused person of a previous conviction, or the mere recording of the fact that previous convictions have been proved against the accused will not suffice. To render the accused liable to a sentence which cannot be passed except on proof of a previous conviction, the fact, date and



place of the previous conviction must be set forth in the charge before sentence is passed.

Note 1. - A previous conviction for the purpose of affecting the punishment which a court is competent to award is a conviction the penalty following which had been undergone by the accused (in whole or in part) at the time when he committed the offence for which he is being tried. Not all convictions on record at the date of the charge are, however, always to be reckoned as previous convictions for the purposes of section 75 of the Indian Penal Code.

Note 2. - When a person has been convicted at or about the same of more offence than one and after undergoing the accumulated penalties for those offences commits another offence and is again convicted, each of the previous convictions is a separate conviction in relation to the present conviction.

Rule 176. - It is not necessary to state previous convictions in the charge unless -

(a) the accused is liable to a sentence which cannot be passed except on proof of a previous conviction, and

(b) it is intended to proved the previous convictions for the purpose of affecting the punishment which the court may think fit to award. It will thus appear that where section 75 of the Indian Penal Code or any other similar provision of the law is applicable the details of previous convictions must be stated in the charge whether the court thinks fit to award the enhanced punishment prescribed by that provision

or not. But where it is not applicable, these details need not be stated in the charge, even if the court thinks fit to award a sentence which though within maximum provided by law for a first offence, is still higher than it would have awarded if the trial were for a first offence.

Rule 177. - A previous conviction may be proved, in addition to any other mode provided by any law for the time being in force -

(a) by an extract duly certified to be a copy of the sentence or order;

(b) by a certificate signed by the superintendent of the jail in which the sentence was executed;

(c) By the production of the warrant under which the punishment was suffered;

together with in each of these cases evidence as to the identity of the accused person with the person so convicted.

Note. An extract from a register of previous convictions is not an extract of the kind contemplated by clause (a) of section 511 of the Code (section 298 of the Code of Criminal Procedure, 1973).

Rule 178. - If the name, father's name and caste of the person sentenced which are given in the copy, certificate or warrant, tally with those claimed by the accused under trial, the agreement may be treated as a circumstance appearing in the evidence against him which he should be called upon under section



342 of the Code to explain (section 313 of the Code of Criminal Procedure, 1973). If on examination he denies his identity with the person described in the document, it will be necessary to call a witness or witnesses having personal knowledge that the accused has been previously convicted.

Rule 179. - In cases of the kind referred to in the last sentence of Rule 176 the previous convictions must be formally proved if they are not admitted. In using them for his limited purpose the magistrate should be guided by the analogy of section 30 of the Code (omitted in the Code of Criminal Procedure, 1973). The judgment should be temporarily closed as soon as the conclusion that the accused is guilty has been arrived at therein. The order sheet should then show that the accused has been questioned as to certain previous convictions alleged but not up to that stage admissible in evidence, the actual questions and answers being recorded as an addition to the examination made under Section 342 of the Code (section 313 of the Code of Criminal Procedure, 1973). Whether these convictions are admitted or denied the documents constituting legal proof of them shall be filed with the record. Finally the judgment should be completed and finding and sentence recorded."

10. In view of the above provisions, it can safely be observed that if a person is previously convict for an offence under NDPS Act and has been tried for subsequent offence then the charge under Section 31 of the Act is required to be framed against him specifying the date and place of the said offence to which enhanced punishment is to be awarded in view of

Section 211(7) of the Cr.P.C. and by following the procedure prescribed in Section 298 of Cr.P.C. and Rules 175 to 179 of the M.P. Rules and Orders (Criminal), the Court has to record a finding in this regard. The fact of the previous conviction must be proved bringing the cogent evidence on record affording an opportunity of hearing to the accused.

11. On perusal of the record of the trial Court, the charge under Section 31 has not been framed against the accused to afford him an opportunity. Ex.P/32 is the crime register of the Police Station Sihora of year 2009. It is not the extract certified under the hand of the officer having the custody of the record of the Court. No certificates signed by the officer in charge of the jail in which accused has undergone the punishment or part thereof has been produced or the warrant of commitment under which the punishment was suffered. On filing those documents, an opportunity to lead evidence regarding identity of the accused and to afford him opportunity to rebut the said charge, even by recording his statement under Section 313 of Cr.P.C. ought to be given by the trial Court otherwise the enhanced sentence cannot be awarded. The trial Court passed the judgment without following the said procedure, merely because the charge under Section 8/20(b)(ii)(B) against the appellant was proved earlier, however, taking the pretext of previous conviction added the enhanced sentence which is not permissible. In view of the above discussion, the enhanced sentence awarded by the Court on the pretext of previous conviction adding one



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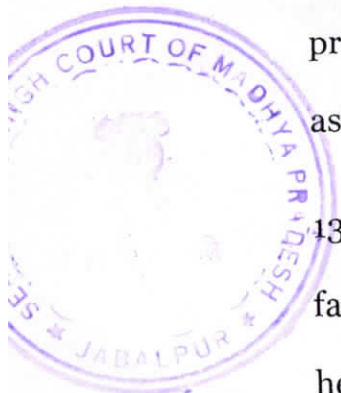
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half of the sentence without following the procedure prescribed, is not in conformity to law, therefore, it stands set aside.

12. Accordingly, this appeal is hereby allowed in part. The conviction of the appellant under Section 8/20(b)(ii)(B) of the NDPS Act and the sentence of 10 years with fine is hereby maintained. So far as the enhanced sentence by the aid of Section 31 of the NDPS Act due to previous conviction against the appellant is concerned, the same is set aside.

13. At the end, it is our duty to record the word of appreciation in favour of the *amicus curiae* who assisted the Court in disposal of this held-up appeal which was pending since last about twelve years, in which the appellant was in jail, however, his assistance is hereby acknowledged.

14. Registrar (Judicial) is directed to take steps to circulate the copy of this judgment through Registrar General to all the judges of the Subordinate Courts for information and ready reference so that the possibility to commit mistake in following the said procedure may be ruled out while dealing with the cases of previous conviction.



Copy of order forwarded to the Registrar (Judicial) High Court of M.P. Jabalpur for information and necessary action.

7-9-18
Section Officer
for Registrar

Sd/-
(J.K. Maheshwari)
Judge

Sd/-
(J.P. Gupta)
Judge

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