

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL.APPEAL NO.671/2010**

**&**

**Crl. M.(Bail) No. 794/2010 & Crl. M.A. No. 18994/2011**

Reserved on: 4<sup>th</sup> January, 2012

Date of Pronouncement: 30-01-2012

CHIGBATA EPHRAIN NWEKE ..... Appellant  
Through Mr. Anish Dhingra, Advocate.

versus

STATE OF NCT OF DELHI ..... Respondent  
Through Mr. Sunil Sharma, APP.

**CORAM:**  
**HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA**

**SUDERSHAN KUMAR MISRA, J.**

1. Brief facts relevant for the purpose of deciding this appeal and applications are that on 23<sup>rd</sup> October, 2001, the applicant, a Nigerian, was brought down from the Jet Airways Flight No.9W352 and his three bags were also unloaded from the aircraft, besides that he was also carrying a hand bag. The bags being carried by the applicant was searched and was found containing white colour granule powdery substance. The said substance of each packet was checked and was found to be Heroin. The contents of each of the 20 packets were weighed and found to be 150 grams each, and therefore, the total weight of Heroin was found to be 3 kilograms. The applicant was arrested and after completion of

investigation, the charge sheet was filed against the applicant/accused for his trial u/s 21/61/85 NDPS Act. The trial court found him guilty and sentenced him to 10 years rigorous imprisonment and to pay fine of Rs. 1 Lac, in default to undergo simple imprisonment for six months.

2. In Crl.M.A.No.794/2010 under Section 389 read with section 482 of Criminal Procedure Code the applicant, inter-alia, seeks suspension of his sentence and to grant him bail during the pendency of the appeal. Further in Crl.M.A. 18994/2011 under Section 482 Cr.P.C, the applicant, inter-alia, seeks directions for waiving the fine of Rs. 1 lac or alternatively the sentence in default imposed on the applicant.

3. Counsel for the applicant submits that the applicant was convicted for an offence u/s 21 (c) NDPS Act and was sentenced to ten years R.I. with a fine of Rs. 1 lac and in default to undergo further simple imprisonment for 6 months by the learned Special Judge, Dwarka Court, New Delhi. Counsel further contends that the applicant is a foreign national and has family to be looked after. He also contended that by now the applicant has undergone his substantial sentence, that is 10 years rigorous imprisonment.

4. Learned counsel for the applicant referred to a number of judgments of this Court. In my view all the referred judgments do not help the applicant in the facts and circumstances of the present case. Counsel also submits that the financial condition of the applicant does not permit him to deposit the fine, and therefore, it is prayed that the sentence imposed in default may be waived.

5. Learned APP, Sunil Sharma, contended that the applicant, who was going to Mumbai from Delhi via Jet Airways was found with 3

kgs of Heroin which is commercial quantity. Counsel further contended that in criminal law both Cr.P.C and IPC authorizes the Court to award imprisonment in default of payment of fine up to one-fourth term of imprisonment which the Court is competent to inflict as punishment for the offence. He further submits that the learned trial Court has already taken a lenient view. In default of payment of fine, the trial court could have sentenced him to 2 ½ years simple imprisonment, i.e. 1/4<sup>th</sup> of the maximum sentence awarded to the applicant, but it has sentenced the applicant for 6 months only.

6. It is to be noted that the applicant is in judicial custody since the day of his arrest, i.e. 23<sup>rd</sup> October, 2001 meaning thereby that the applicant has already undergone the major part of the sentence and now he is serving additional sentence in default of fine of Rs.1 lac. The applicant, as per his nominal roll dated 22.12.2011, has undergone imprisonment for a period of 10 years, 1 months and 29 days as on 30.12.2011, which covers the sentence of imprisonment awarded to the applicant as well as sentence in default of payment of fine.

7. Learned counsel for the applicant contended that although a number of foreigners have been released when the major portion of the sentence has been served; but no authority setting down any such law by the courts has been cited where accused becomes entitled to be released merely because he has served a major portion of his sentence.

8. Admittedly, in the present case the applicant is convicted u/s 21 NDPS Act which is a special law. It is also to be noted that the applicant has been ordered to undergo substantive sentence of rigorous

imprisonment for ten years which is minimum sentence under section 21(c) NDPS Act.

9. It would be relevant to point out that the intrinsic intention of the legislature behind the NDPS Act, 1985 is to deter the trafficking of narcotic drugs so as to save the society from the abuse of drug menace. In **Durand Didier vs. Chief Secretary, Union Territory of Goa AIR1989SC1966** the Supreme Court held that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore, the Parliament enacted the NDPS Act 1985 to control the smuggling and trafficking of drugs and other such substances.

10. In **Md. Azimul @ Md. Ajim vs. State 2005(3)CHN70** the Division Bench of Calcutta, inter alia, observed as under:

*“12. Having regard to the legal position, we accept the contention of Mr. Roy that it is purely within the discretion of this Court to consider the question of reduction of sentence in default of fine. On examination of the judgment of the Apex Court as well as the judgment of the Division Bench of this High Court, we find that in two separate situation both the Apex Court and the Division Bench of this Court exercised their discretion and it is well-accepted position in law that judicial discretion cannot be defined through any strait-jacket formula and this Court while exercising such discretion must take into account the*

*factual matrix of each case and only thereafter draw a conclusion of its own.*

*13. In the case of the Nijerian citizen the Apex Court was satisfied that the said appellant would leave the country for ever and in the case of Sahida Banu, this High Court considered the case only because the appellant was a woman.*

*14. So far the case before us is concerned, we find that the quantity of the contraband article was indeed too high. It is also available from record that the appellant was a citizen of Bangladesh and in that background we apprehend that our exercise of discretion may be total misuse having regard to the facts and circumstance of this particular case and with this end in view we although accept the contention of Mr. Roy on principle but we are not inclined to accept the same so far the present appellant is concerned. Accordingly, the appeal has no merit behind it and stands dismissed and both the order of conviction and sentence passed against the convict-appellant is hereby confirmed.....”*

11. In view of the submissions made by the learned Counsel of the applicant and in view of the fact that as much as 3 kg. of Heroin was recovered from the applicant/accused; which is clearly a commercial quantity in terms of Column 6 of the table under the notification dated 19<sup>th</sup> October 2001; I do not find any error, illegality or perversity in the judgment and order impugned.

12. For the reasons given in the preceding paragraphs, I find no merit in the application, Crl. M.A. 18994/2011, and the same is hereby dismissed. Crl.M.(Bail) No.794/2010 has become infructuous. The

judgment and order impugned dated 30<sup>th</sup> November, 2009 and 10<sup>th</sup> December, 2009 passed by the Special Judge (NDPS), Dwarka, Delhi convicting and sentencing the applicant to ten years R.I. with a fine of Rs. 1 lac and in default to undergo further simple imprisonment for 6 months for the offence under Section 21(c) of the NDPS Act is hereby affirmed and the appeal is disposed of accordingly.

**SUDERSHAN KUMAR MISRA, J.**

**January 30, 2012**