

\$-8 & 9

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

DECIDED ON : 18th MARCH, 2014

+ **CRL.A. 599/2012**

TASSAVUR Appellant

Through : Mr.Shahid Azad, Advocate.

versus

DRI Respondent

Through : Mr.Vikas Gautam, Advocate.

AND

+ **CRL.A. 767/2012 & CRL.M.A.No. 1429/2013**

MUKAIL ADEBAYO Appellant

Through : Ms.Anita Abraham, Advocate.

versus

THE STATE (NCT OF DELHI) Respondent

Through : Mr.Vikas Gautam, Advocate.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.Garg, J. (Open Court)

1. Tassavur (A-1) and Mukail Adebayo (A-2) challenge the legality and correctness of a judgment dated 03.03.2012 of learned Additional Sessions Judge / Special Judge - NDPS in Sessions Case No. 30A/06 by which they were held guilty of committing offence punishable

under Section 21(c) of NDPS Act. By an order on sentence dated 06.03.2012, they were awarded RI for ten years with fine ₹ 1 lac, each.

2. Allegations against the appellants were that on 20.11.2005 at about 11.00 A.M., an intelligence was received by PW-1 (Sh.K.S.Ratra), Intelligence Officer that one person (A-1) would bring around 3 Kg. of heroin to deliver it to Becky Samuel (since expired) and A-2 at R-22, 2nd floor, Khirki Extension, Malviya Nagar, New Delhi in between 04.00 to 07.00 P.M. The information was reduced into writing and was placed before superior officer who directed PW-1 to mount a surveillance around the said premises. Further case of the respondent / DRI is that around 05.00 P.M., the said premises were raided in the company of two independent witnesses. A-1, A-2 and Becky Samuel (since expired) were found present there. A-1 attempted to flee the spot and caught hold. It is further alleged that one leather bag of “Da Millano” brand and some Indian and Foreign currency were recovered from the said premises. On examination of the bag, it was found to contain two golden fabric pouches and four pairs of ladies sandals. These contained white powder / granules of various weights. The total recovery effected was 2.924 Kg. of heroin. Panchnama (Ex.PW-2/C) was drawn at the spot. In response to the summons dated 20.11.2005 under Section 67 of the NDPS Act, all the

three accused persons tendered their statements (Ex.PW-10/B, Ex.PW-2/F and Ex.PW-5/B). All the accused persons were arrested. Statements of the witnesses conversant with the facts were recorded. After completion of investigation, a complaint was filed in the Court on 17.05.2006. The Trial Court took cognizance of the offence on 19.05.2006; they were duly charged and brought to trial. The prosecution / DRI examined 16 witnesses to establish guilt of the accused persons. In their 313 statements, the appellants denied their complicity in the crime and pleaded false implication. Mukail Adebayo (A-2) examined himself in defence. It is relevant to note that Becky Samuel expired during trial and the proceedings against her were dropped. After considering the rival contentions of the parties and appreciating the evidence on record, the Trial Court, by the impugned judgment, held the appellants guilty for the offence mentioned previously and sentenced them accordingly. It is significant to note that both the appellants were acquitted of the charge under Section 29 read with Section 21 (c) of the Act. The prosecution / DRI did not challenge the said acquittal. Being aggrieved and dissatisfied, they have preferred the appeals.

3. During hearing of the appeals, appellants' counsel on instructions stated at Bar that they have opted not to challenge the findings

of the Trial Court on conviction. They prayed to modify the sentence order as the appellants have already undergone substantial period of substantive sentence awarded to them.

4. Since the appellants present in custody pursuant to the issuance of production warrants have accepted their conviction under Section 21 (c) of NDPS voluntarily and have given up challenge to the conviction in view of the overwhelming evidence coupled with recovery from their possession, their conviction under Section 21 (c) of NDPS Act stands affirmed. The appellants were awarded RI for Ten years with fine ₹ 1 lac, each. A-1's nominal roll dated 05.07.2012 reveals that he has suffered six years, seven months and fourteen days incarceration as on 05.07.2012. It further reveals that he is not a previous convict and is not involved in any other criminal case. His overall jail conduct is satisfactory. It is informed that he is to maintain his four minor children. His parents have expired during the pendency of the trial. His wife has left the matrimonial home due to his involvement in the case. He was also implicated in some other false case in which he has been acquitted by the Court.

5. A-2's nominal roll dated 01.06.2012 reveals that he has suffered six years, six months and ten days incarceration as on

01.06.2012. It further reveals that he is also a first offender and is not involved in any other criminal case. His overall jail conduct is satisfactory. He is a foreign national. He is aged about 60 years and is to maintain two wives and six children. It is submitted that the A-2 is suffering from various ailments.

6. Considering all these facts and circumstances of the case and in the interest of justice, keeping in mind the peculiar facts of this case, the order on substantive sentence under Section 21 (c) of NDPS Act is maintained as it is the minimum sentence i.e. RI for 10 (Ten) years.

7. In the case of '*Shahejadjkhan Mahebubkhan Pathan vs. State of Gujarat*', 2012 (10) SCALE 21, decided on 05.10.2012, the Supreme Court reduced the sentence from 15 years to 10 years as the appellant therein had already served nearly 12 years in jail. The order on payment of fine of ₹ 1,50,000/- was upheld but default sentence was reduced from RI for 3 years to RI for 6 months. The appellant therein was found in possession of 500 grams of brown sugar and was convicted for the offence punishable under Section 8 (c), 21 and 29 of NDPS Act. The Division Bench of Gujarat High Court had dismissed the Crl.A.No.11 & 75/2002 vide order dated 08.07.2002. The appellants have expressed their inability to deposit the fine amount of ₹ 1 lac due to poverty. The amount of ₹ 1 lac

imposed by the Trial Court cannot be reduced. However, taking into consideration Section 30 of Cr.P.C. and the judgment of '*Shahejadhkan Mahebubkhan Pathan vs. State of Gujarat*' (supra) where the default sentence was reduced from three years to six months, it is ordered that the appellants shall pay a fine of ₹ 1 lac, each and in default of payment of fine they shall undergo SI for a period of fifteen days.

8. The appeals filed by the appellants are disposed of in the above terms. A copy of the order be sent to Jail Superintendent, Tihar Jail for information. Trial Court record along with copy of this order be sent back to the Trial Court.

CRL.M.A.No. 1429/2013 in CRL.A. 767/2012

The application has been moved by the respondent for destruction of 2.895 Kg heroin. Since the matter has been decided and learned counsel for the appellants have no objection, the respondent is permitted to destroy the seized property i.e. 2.895Kg heroin including the representatives samples as per rules.

The application stands disposed of.

**(S.P.GARG)
JUDGE**

MARCH 18, 2014/tr

Crl.A.Nos. 599/2012 & 767/2012

Page 6 of 6