

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Order delivered on: 24th February, 2015

+

CRL.A. 1311/2014 & CrI.M.A. No.14713/2014

NARCOTICS CONTROL BUREAU

Through

..... Appellant

Mr.Mohit Arora, Adv. with

Mr.B.S. Arora, Adv.

versus

NTHADISENG JOSEPHINA BULAYA & ANR. Respondents

Through

Mr.Gaurav Chandhok, Adv.

CORAM:

HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The facts as per record and recorded by the trial court are :
 - (a) On 20th July, 2013 Sh. Rajesh Kumar, IO received information from Inspector Tulsi Ram, CISF that two foreign nationals namely Nthadiseng Josephina and Grace Bongiwe who were to depart from IGI Airport for Gaborone via Nairobi by Kenya Airways flight 221 were suspected to be carrying huge quantity of narcotic drugs in their baggage.
 - (b) The information was reduced into writing and put up before Sh. R.K. Singh, Superintendent, NCB and on his instructions a raiding team consisting of Intelligence Officers of NCB namely, C.S.K. Singh, Rajesh Kumar, Vishwanath Tiwari, Vasudev Bhardwaj and Malkeet Singh proceeded for the airport from

NCB office and reached the terminal 3 of IGI airport at about 2310 hours. On reaching the airport Sh. C.S.K. Singh, IO met Sh. Tulsi Ram, Inspector CISF and Tulsi Ram then led the team to the X-BIS system where suspected passengers were sitting. On the request of IO, Sh. Sandeep Prabhakar, CISF staff official and Sh. Sandeep Kumar, Porter, agreed to witness the proceedings that were to be conducted by the NCB team. On inquiry the suspects revealed their names as Ms. Nthabiseng Josephina Bulayi and Ms. Grace Bongiwe Mkhaliwe.

- (c) Both the aforementioned ladies were then served with notices under Section 50 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as the “Act”) and were made to understand that they have a legal right to be searched before a Magistrate or a Gazetted Officer but both the accused persons refused to exercise the said right and informed that any NCB officer/lady officer could conduct their search. Thereafter, IO C.S.K. Singh conducted the search of one black colour ‘blue star’ marked bag and one white colour ladies hand bag of the accused Nthabiseng Josephina Bulayi but nothing incriminating was found.
- (d) Investigation Officer conducted the search of luggage of the accused Nthabiseng Josephina Bulayi consisting of one purple coloured “American Tourister” suitcase and one olive green colour bag having mark “X-Racing”. The purple coloured “American Tourister” suitcase was found containing 37 gift

items wrapped in cellophane plastics and olive green coloured bag was found containing 20 gift items wrapped in cellophane plastics. After opening the cellophane packets, each packet was found containing four separate gift items wrapped in different colour gift papers and two artificial ladies choti. On opening the gift paper of each gift item, it was found containing rectangular wooden boxes containing a cylindrical concealment wrapped in khaki colour plastic tapes and on cutting open the khaki tapes of concealments white crystalline powder was recovered from therein. The white substance on being tested with the help of Field Testing Kit gave positive result for pseudoephedrine (a controlled substance). All the substance from the wooden box recovered from the purple coloured suitcase was collected in five transparent polythenes and mixed properly and on weighing its weight came out to be 18.300 kg. Two samples of 25 grams each were drawn out from the recovered substance and were put in zip lock pouches and were then placed inside separate paper envelopes. The samples were marked as A1 and A2 and the remaining substance was converted into a parcel and kept in a plastic sack and was marked as A. The other packing material was kept in the same purple coloured American tourister suitcase and was marked as A3. Thereafter all the substance from the wooden box recovered from the olive green colour suitcase was collected separately and mixed properly and on weighing its weight came out to be 10.450 kg. Two samples of 25 grams

each were drawn out from the recovered substance and were put in separate zip lock pouches and were then placed inside separate paper envelopes. The samples were marked as B1 and B2 and the remaining substance was kept in a plastic sack and marked as B. The other packing material was kept inside the same Olive green colour mark “X-Racing” carry bag and the bag was further kept inside a plastic sack and was marked as B3. The remaining black colour “Blue Star” marked hand bag was marked as C.

- (e) Thereafter, IO conducted the search of the luggage of the accused Grace Bongiwe Mkhaliwe consisting of one black and light purple coloured handbag marked “Reflex” and one black coloured small bag marked “Sports” but nothing incriminating was recovered from them. Thereafter, IO conducted the search of remaining luggages i.e. two black coloured bags marked “Diesel”. Both bags were found containing 21 sarees each wrapped on corrugated cylindrical sheets. On opening the said corrugated sheets, it was found that each corrugated sheet was containing a concealment wrapped in khaki plastic tape. On opening all the 21 concealments, each of them was found containing white coloured crystalline substance, which on being tested with the help of Field Testing Kit gave positive result for pseudoephedrine. All the substance recovered from the one black coloured bag was collected separately and mixed properly and on weighing its weight came out to be 10.450 kg. Two

samples of 25 grams each were drawn out from the recovered substance and were put in separate zip lock pouches and were then placed inside separate paper envelopes. The samples were marked as D1 and D2 and the remaining substance was kept in a plastic sack and marked as D. The packing material was kept inside the same black colour mark “Diesel” bag and was marked as D3. Thereafter all the substance from the second black coloured bag was collected separately and mixed properly and on weighing its weight came out to be 10.450 kg. Two samples of 25 grams each were drawn out from the recovered substance and were put in separate zip locked pouches and were then placed inside separate paper envelopes. The samples were marked as E1 and E2 and the remaining substance was kept in the plastic sack and marked as E. The packing material was kept inside the same black colour mark “Diesel” bag and was marked as F.

- (f) The contraband substance along with other items were seized and sealed. The test memo was also prepared in triplicate. Panchnama was prepared.
- (g) Accused persons were served with summons under Section 67 of the Act and directed to appear in the NCB office on 21st July, 2013 to tender their statements and in pursuance of the same they tendered their voluntary statements in the office of the NCB. The statements of various witnesses under Section 67 of the Act were also later on recorded during investigation.

- (h) As they have committed offences punishable under Section 25A & 29 of the Act, they were arrested on 21st July, 2013 and were thereafter got medically examined.
 - (i) Reports of arrest and seizure under Section 57 of the Act were submitted by the seizing and arresting officers Sh. C.S.K. Singh, Sh. Rupesh Kumar and Sh. Pradeep Singh to Superintendent and the intimation of the arrest of the accused persons were also conveyed to the Ministry of External Affairs.
 - (j) The case property along with samples and test memo was deposited with the Malkhana Incharge and on 22nd July, 2013 the samples along with test memos were sent to the CRCL, New Delhi for testing and after receiving the report from CRCL all the samples gave positive test for pseudoephedrine hydrochloride. Thereafter the complaint was filed.
2. On the basis of the material on record vide order dated 21st November, 2013 charges were framed against both the accused persons for having made an attempt to export pseudoephedrine hydrochloride outside India and thus for having committed an offence punishable under Section 25A of the Act. Both the accused persons pleaded not guilty to the charges framed against them and claimed trial.
3. The prosecution in order to prove its case had examined 5 witnesses. Further the CRCL report has been tendered in evidence under Section 293 Cr.P.C. by the SPP and as per the said report the samples drawn out from the substance recovered from the accused

have tested positive for pseudoephedrine hydrochloride. The defence counsel had stated that he is not disputing the said CRCL report. The statement of the accused persons under Section 313 Cr.P.C was recorded.

4. No doubt, the accused knew that they were transporting some substance outside India illegally for consideration shows their state of mind and therefore it can be inferred that they had an intention of exporting some substance outside India illegally. The report of the expert is not challenged. Thus the trial court has rightly observed in the impugned judgment that the accused persons have been unable to rebut the presumption raised against them by virtue of Section 54 of the Act.

5. The trial court after considering the evidence and material placed on record, came to the conclusion that the prosecution has been able to prove beyond reasonable doubt that both the accused persons had made an attempt to export outside India, pseudoephedrine hydrochloride, a controlled substance, in contravention of the orders issued by the Central Govt. under Section 9A of the Act. Thus both the accused are hereby held guilty of the offence punishable under Section 25A of the Act.

6. The trial court after taking into consideration the nature of offence, social and economic status of both the convicts and the reasons for which they appear to have committed the offence imposed a sentence of one year of rigorous imprisonment and a fine of Rs.75, 000/- on both the convicts for having committed the offence punishable under Section 25A of the Act. In default of payment of fine, the convicts will

have to undergo further simple imprisonment for a period of 2 months. Both the convicts are to be granted the benefit of Section 428 of Cr.P.C. It is made clear that case property stands confiscated to the NCB and that they will be at liberty to dispose of the same as per the prescribed rules after the expiry of period of appeal/revision.

7. The petitioner has filed the above said appeal under Section 377 Cr.P.C. against the impugned judgment dated 4th June, 2014 passed by Special Judge, NDPS, Patiala House Courts, New Delhi for enhancement of sentence.

8. The main grounds taken in the appeal are that the trial court failed to appreciate that imposition of sentence without considering its effect on the social order may be unreally a futile exercise. Any liberal attitude by imposing meagre sentence of taking too sympathetic view merely on account of lapse of time or personal inconveniences in respect of such offence will be result wise counterproductive in the long run and against social interest which needs to be cared for and strengthened by a string of difference inbuilt in the sentencing system. The object should be to protect the avowed object of law by imposing appropriate sentence. It is expected that the courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern. The trial court failed to appreciate that heavy recovery of pseudoephedrine hydrochloride about 28.750 kg and 20.900 kg were recovered from the possession of the accused/respondents and they are foreigners and inadequate sentence will give a wrong signal and

more and more person will involve themselves in committing such an offence.

9. Learned counsel for the appellant has referred the decision of the Supreme Court in case title as ***Union of India vs. Kuldeep Singh***, AIR 2004 SC 827 held that if there is no provision for awarding any minimum sentence for the charges even then the sentence should not be so inadequate. The relevant paras are reproduced below :

“9. Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, 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. This position was illuminatingly stated by this court in *Sevaka Perumal etc. vs. State of Tamil Nadu*, AIR 1991 SC 1463 : 1991 (2) RCR (Cr.) 427 (SC)).

13. The object should be to protect the society and to deter the criminal in achieving the avowed object to law by imposing appropriate sentence. It is expected that the Courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be.

14. Any liberal attitude by imposing meagre sentences or taking too sympathetic view merely on account of lapse of time or personal inconveniences in respect of such offences will be result-wise counterproductive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence in built in the sentencing system.”

10. As far as the finding on merit of the trial court and decision referred by the learned counsel for the appellant are concerned, this

Court agrees with the merit of judgment. However, the argument of the learned counsel for the appellant is that the trial court ought not to have shown undue sympathy to impose inadequate sentence, thus, proper sentence should have been awarded. His submission is to enhance the sentence in the present case.

11. The following reasons are given by the trial court in the order of sentence. The same reads as under :

- (a) The accused Nthabiseng Josephina Bulayi in her statement tendered under Section 313 Cr.P.C had stated that she is a native of South Africa and was working as an Event Manager before her apprehension in this case. She has further informed this Court that she is a single mother and has 3 children and her parents were also dependent upon her and that she was unable to earn sufficient money to raise her children and to look after her parents. She has further narrated before this Court that she had met one lady named Leena in South Africa through a friend and the said lady had told her that if she wishes to make quick money she can help her and that the said lady also told her that she will arrange for air tickets, visa, hotel stay for her in India and all that she will have to do is to transport some chemical from India to South Africa. One lady Leena promised her that she would be paid \$8500 for the aforementioned job and since her financial condition was not very good, she agreed to the proposal of Leena. As per the statement given by this accused the said lady had also told her that she will be given the said chemical

by some person in India and gave her the mobile number of the said person and that on reaching India she called up on the said mobile and one lady gave her the address and told her to collect the chemical from her. She has further informed this Court that that lady was an Indian lady and the said lady gave her some wooden boxes in which the chemical was told to have been concealed. This accused had stated that she had no knowledge that pseudoephedrine hydrochloride had been concealed in the bags given to her though she knew that the bags contained a powder. She did not know her co-accused Grace as she had met her only at the airport.

- (b) Accused Grace in her statement tendered under Section 313 Cr.P.C had stated before this court that she is a native of South Africa and was a vegetable vendor and selling tomatoes, cabbage etc. by putting temporary stalls before her apprehension in this case. She has 3 children and her husband used to sell vegetables along with her and that they were unable to earn sufficient money to raise their children. She has submitted that her elder brother had expired and his wife Ms. Mabis told her that if she wishes to make quick money she can help her and she will arrange for air tickets, visa for her in India and all that she will have to do is to transport some chemical from India to South Africa and also promised her that she would be paid 20,000 Rynds for the aforementioned job and in fact she agreed to the proposal of her sister in law. This accused had stated that her sister in

law also told her that that she will be given the said chemical by some person in India and gave her the mobile number of the said person. She had informed the trial court that on reaching the airport in India she called up on the said number and one person came to pick her up at the airport and took her to his house where she stayed for 21 days and that on the date of her apprehension that person took her along to some other place where two other persons met them and handed her two bags in which the chemical was stated to be concealed and then she was put in a taxi and she came to the airport. She has taken a similar stand before this Court namely that though she knew that the bags being carried by her contains a chemical, she had no idea of its nature and she did not know her co-accused Josephina before her apprehension in this case and had met her only at the airport and had casual talk with her.

12. After having gone through the entire gamut of the matter and peculiar facts and circumstances of the case, I am not inclined to allow the said prayer in the present case as this Court agrees with the findings of trial court that the sole purpose of punishing an offender is not retribution alone and that the Courts while sentencing an offender must make an attempt, within the parameters of the law, to afford an opportunity to the offender to reform himself and lead the life of a normal, useful member of the society. In the present case, the convicts have no previous criminal antecedents and it does appear from the totality of the attendant circumstances and material on record

that they are not at all hardened criminal but were forced due to their economic conditions to indulge in the illegal trafficking of controlled substance. Though poverty is not a justification for commission of crimes and imposing a harsh sentence will also not subserve the interests of justice. Both the convicts have young children to look after and it is also to be borne in mind that the convicts are women. Both the convicts had themselves admitted at the stage of recording their statement under Section 313 Cr.P.C that they were making an attempt to transport the same at the behest of some other persons.

13. The appeal filed by the appellant is hereby disposed off with the direction that both accused be deported to their country as early as possible as during the course of hearing, learned counsel appearing on their behalf has undertaken on their behalf that they would immediately go to their country and that they would not involve in any act of trafficking of controlled substance in any part of the world including India. However, the fine of Rs.75,000/- each imposed by the trial court vide impugned order dated 4th June, 2014 shall be paid by both the convicts, if already not paid.

14. No costs.

(MANMOHAN SINGH)
JUDGE

FEBRUARY 24, 2015