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

+ CRL.A. 813/2015

Date of decision: 06.11.2015

THEOPHILUS Appellant

Through: Ms. Sushma Sharma, Adv.

versus

STATE Respondent

Through: Ms. Alpana Pandey, APP.

SI Ranjeet Singh, Special Cell.

CORAM:

HON'BLE MR. JUSTICE ASHUTOSH KUMAR

ASHUTOSH KUMAR, J. (ORAL)

1. Theophilus stood charged for the offences under Sections 21 & 29 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred as 'NDPS Act') along with Section 14(a) (wrongly stated as Section 14A) of the Foreigners Act, 1946.

2. On 24.09.2012, Inspector Devender Singh (PW.4) was informed by a secret informer that one person by the name of Gurpreet Singh would be boarding Rajdhani Express for going to Mumbai and he is in possession of huge quantity of heroine which would be delivered to somebody.

3. On receipt of such information, DD No.16 was entered and after verification of the aforesaid information, a raiding team was

constituted. The aforesaid Gurpreet could not be traced at the railway station till about 04:30 p.m. and the Rajdhani Express left the platform for its destination. After about 2 hours, Inspector Devender Singh (PW.4) received another information that Gurpreet would be arriving at Pankha Road near a half constructed flyover to receive the consignment of contraband from a Nigerian and would thereafter go to Mumbai. This information was also recorded as DD No.19. The raiding team spotted a person having a bag on his back coming from the side of Janakpuri on foot at about 08:00 p.m. The aforesaid person was identified by the informer as Gurpreet. After about sometime, a person with African looks also arrived, who was identified as the Nigerian acquaintance of Gurpreet. The Nigerian person was carrying a big bag in his hand. From the bag, he took out two packets and handed over the same to Gurpreet Singh. At this point of time, both Gurpreet and the Nigerian person were apprehended.

4. The Nigerian person so apprehended is the appellant, Theophilus.

5. Theophilus and Gurpreet Singh were apprised of their right to be searched before a Gazetted Officer or a Magistrate. However, the appellant refused to exercise such right. The bag which was being carried by Gurpreet was found to be containing two packets, one weighing 2000 grams and other 1995 grams of contraband.

6. 20 grams of the sample from each of the packets was drawn and made into a Pullanda which was marked as S1 and S2. The remaining

substance in both the packets were again packed and made into pullandas, which were marked as A & B. All the pullandas were sealed with the seal of DSN. From the bag which was being carried by appellant Theophilus, two packets were found which contained cream coloured powdery substance; one bag weighing 2005 grams whereas other 2010 grams. Two samples of 20 grams each were also drawn up, made into Pullandas and marked as S3 & S4. The remaining substance was converted into Pullandas and marked as C & D. The aforesaid pullandas were also sealed with the seal of DSN. After filling of the FSL form, the impression of the same seal was affixed on the said form whereafter the seal was handed over to SI Mohd.Mobin (PW.9).

7. The appellant pleaded not guilty to the charges under the NDPS Act and claimed to be tried but at the same time, pleaded guilty for the charge under Section 14(a) of the Foreigners Act.

8. Ten (10) prosecution witnesses were examined in all and the appellant examined one witness i.e. his wife, Ms.Zomuaepuii as DW.1.

9. The Trial Court acquitted the appellant for the offences under the NDPS Act on the ground that there was no genuine effort by the investigating agency to join independent witness in the recovery proceedings; there being alteration in the rukka and kalandras with regard to the time when the secret information was received and reduced into writing; material contradictions in the deposition of the

witnesses and the specific defence of the appellant.

10. The Trial Court, while discussing the evidence of Inspector Anand Swaroop (PW.7) has observed that in his cross examination, he had answered that he was not having any mobile phone on the date of the incident and was using a different mobile phone. The appellant has taken a specific plea that when the police officials came to his house in the evening of 04.09.2012, they could not find anything. The appellant and his wife, both, saw the police officials making calls to someone from their mobile phones. It was for the purposes of establishing the fact that the police officials had visited the house of the appellant in the evening of 24.09.2012, that mobile telephone number of the police officials were sought for so that their call record could be analysed as to who was called by them.

11. An application under Section 91 of the Cr.P.C. was moved on behalf of the appellant to procure the aforesaid details. A shaky answer was given by PW.7 and as an explanation thereof, it was stated that he got confused while giving answers to the questions of the defence counsels.

12. Considering the aforesaid circumstances, the Trial Court was of the view that the charges against the appellant under the NDPS Act could not be proved beyond reasonable doubt and thus the appellant and the co-accused were acquitted of the charges under the NDPS Act.

13. On 01.10.2014, the appellant Theophilus had pleaded guilty to the charge under Section 14(a) of the Foreigners Act. He has

categorically stated that he had come to India in the year 2008 on a business visa for 6 months. The passport got misplaced in the year 2009 and thereafter he has been residing in India without any valid passport.

14. Considering the aforesaid admission of the appellant and his failure to produce any document justifying his stay in India, he was convicted for the offences under Section 14(a) of the Foreigners Act vide judgment dated 29.05.2015 passed by the Special Judge-NDPS, Patiala House Courts, New Delhi, in sessions case no.11/2013 arising out the FIR No.23/2012. By order on sentence dated 30.05.2015, the appellant was sentenced to RI for 5 years, a fine of Rs.50,000/- and in default of payment of fine, SI for 6 months.

15. Section 375 of the Cr.P.C. provides that when an accused pleads guilty and is convicted, no appeal shall lie except as to the extent or legality of the sentence.

"375. No Appeal in certain cases when accused pleads guilty. Notwithstanding anything contained in section 374, where an accused person has pleaded guilty and has been convicted on such plea, there shall be no appeal,-
(a) if the conviction is by a High Court; or
(b) if the conviction is by a Court of Session, Metropolitan Magistrate or Magistrate of the first or second class, except as to the extent or legality of the sentence."

16. Thus the present appeal preferred by the appellant is only on the question of legality and extent of the sentence imposed upon him.

17. Learned counsel appearing for the appellant has submitted that the appellant is aged about 31 years and this is his first offence. The appellant has assimilated himself in India and has a young wife aged about 26 years and 2 ½ years daughter.

18. It has also been submitted on his behalf that the wife and the child of the appellant are totally dependent upon him and hence the sentence of 5 years and fine of Rs.50,000/- is much too harsh and excessive.

19. The appellant has remained in custody for more than 2 years, which fact is evident from the nominal roll qua the appellant.

20. Section 14 of the Foreigners Act 1946 provides as follows:

14. Penalty for contravention of provisions of the Act, etc.—Whoever—

(a) remains in any area in India for a period exceeding the period for which the visa was issued to him;

(b) does any act in violation of the conditions of the valid visa issued to him for his entry and stay in India or any part thereunder;

(c) contravenes the provisions of this Act or of any order made thereunder or any direction given in pursuance of this Act or such order for which no specific punishment is provided under this Act, shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine; and if he has entered into a bond in pursuance of clause (f) of sub-section (2) of section 3, his bond shall be forfeited, and any person bound thereby shall pay the penalty thereof or show cause to the satisfaction of the convicting Court why such penalty should not be paid by him.

Explanation.—For the purposes of this section, the expression “visa” shall have the same meaning as

assigned to it under the Passport (Entry into India) Rules, 1950 made under the Passport (Entry into India) Act, 1920 (34 of 1920).

21. The nominal roll of the appellant discloses that his performance of work and his overall conduct in the jail has been satisfactory.

22. Though offences of this kind, namely a foreigner staying on Indian land without a valid passport is on the rise, nonetheless considering the conduct of the appellant in jail, and this being his first offence coupled with the fact that the appellant has a young wife and a small baby to look after, this Court is of the opinion that the sentence imposed upon the appellant is on the excessive side.

23. This Court is further of the opinion that interest of justice would be sub-served if the appellant is sentenced to the period of custody which he has already undergone.

24. So far as fine imposed upon the appellant is concerned, there is no requirement of any interference in the aforesaid quantum.

25. Thus, while maintaining the conviction of the appellant under Section 14(a) of the Foreigners Act, the sentence of the appellant is modified and is reduced from 5 years to the period which he has already undergone in custody.

26. The appellant shall be released from jail forthwith on his paying the fine which has been imposed by the Trial Court, if not wanted in any other case.

27. In case of non-payment of fine, the appellant shall undergo SI for 6 months.

28. Since the appellant is a foreign national, the Superintendent of the Tihar Jail while releasing him, would get in touch with FRRO or any other appropriate authority for his deportation or, if the authorities so decide, for grant/extension of visa on payment of penalty.

29. The appeal is partially allowed and disposed of accordingly.

CRL.M.(BAIL) 7408/2015, Crl. M.A.10021/2015

1. In view of the appeal having been partly allowed, no orders are required to be passed in the instant application.

2. Dismissed as infructuous.

Two copies of this judgment be sent to the Superintendent of the concerned jail, one to be given to the appellant and the other for record and compliance.

NOVEMBER 6, 2015

ASHUTOSH KUMAR, J

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