

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.03.2016

CORAM

THE HON 'BLE DR.JUSTICE S.VIMALA

Criminal Appeal Nos.161 of 2014 & 281 of 2014
and M.P.No.1 of 2014

S.Edmand ... Appellant in CrI.A.161 of 14/ Accused-1
M.Sithi ... Appellant in CrI.A.281 of 14/ Accused-2

Vs

State by:

Intelligence Officer,
Narcotics Control Bureau,
South Zonal Unit, Chennai

(NCB F.No.48/1/08/2006-NCBMDS) ... Respondent / complainant
in both the Appeals

Criminal Appeal No.161 of 2014 filed under Section 374 (2) of the Criminal Procedure Code read with Section 36-B of the NDPS Act, 1985, against the judgment of the learned Principal Special Judge, Principal Special Court under EC & NDPS Act, Chennai, dated 21.11.2013 made in C.C.No.52 of 2006, convicting the appellant to undergo Rigorous Imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/- and in default, to undergo Rigorous Imprisonment for six months for the offence under Section 8 (c) read with 21 (c) of NDPS Act, and was acquitted under Section 235 (1) Cr.P.C., for the charges under Section 8 (c) read with Sections 28 and 29 of the NDPS Act and the period already undergone by the appellant shall be set-off under Section 428 Cr.P.C.,

Criminal Appeal No.281 of 2014 filed under Section 374 (2) of the Criminal Procedure Code read with Section 36-B of the NDPS Act, 1985, against the judgment of the learned Principal Special Judge, Principal Special Court under EC & NDPS Act, Chennai, dated 21.11.2013, made in C.C.No.52 of 2006, convicting the appellant for the alleged offence under Section 8 (c) read with Section 21 (c) of the NDPS Act, 1985, as amended by Act 9/01 to undergo Rigorous Imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/- and in default to undergo Rigorous Imprisonment for six months.

For Appellant in both the Appeals : Mr. K.S.Suresh
For Respondent in both the Appeals : Mr. N.P.Kamal,
Spl.P.P., for NCB Cases

C O M M O N J U D G M E N T

"Whenever a separation is made between liberty and justice, neither, in my opinion, is safe." Edmund Burke.

2. When the mandatory minimum amount of the fine as specified in Section 18 of the NDPS Act, 1985, cannot be reduced in view of the legislative mandate, whether the award of imprisonment in default of payment of fine can be reduced on account of inability of the accused to pay fine, [despite a decadal substantive term of imprisonment having been suffered,] is the issue raised in these two appeals.

3. As there is common question of law is involved, common judgment is pronounced in these two Criminal Appeals.

4. Both the appellants are the accused in respect of the offence under Sections 8 (c) read with 21 (c) of the NDPS Act, 1985, of which, they were put on trial before the learned Principal Special Judge, NDPS Act, in C.C.No.52 of 2006.

5. After trial, the court came to the conclusion that charges under Section 8 (c) read with 21 (c) of the NDPS Act, as amended by Act 9/2001 has been proved as against each of the appellants and they are liable to be punished for the same. Each of the appellants were convicted and sentenced to undergo ten years Rigorous Imprisonment and to pay a fine of Rs.1,00,000/- in default to undergo further period of six months Rigorous Imprisonment. Challenging the same, each of the appellants (S.Edmand and Ms.Sithi) have filed appeals in C.A.Nos.181 of 2014 and 281 of 2014, respectively.

6. Even at the outset, the learned counsel appearing for the appellants submitted that the appellants are not challenging the merits of the judgment on the conviction and sentence, but they are challenging only the default sentence, because of the change in circumstances.

7. The learned counsel for the appellants contended that the passion for liberty is natural for every human being, especially for the appellants who suffered incarceration for nearly a decade. This passion will be at its height and in turn, it reflects its inability to pay the fine and therefore, it is a fit case for reducing the imprisonment ordered in default of payment of fine and in support of this proposition, the decision reported in (2007) 11 Supreme Court cases 243 (Shantilal v. State of M.P.) where-under, under similar circumstances, the Hon'ble Supreme Court reduced the Rigorous Imprisonment of three years to Rigorous Imprisonment of six months. The relevant observation of the Hon 'ble Supreme, in the case, cited supra, reads thus:-

"39. We are mindful and conscious that the present case is under the NDPS Act. Section 18 quoted above provides penalty for certain offences in relation to opium poppy and opium. Minimum fine contemplated by the said provision is rupees one lakh [fine which shall not be less than one lakh rupees]. It is also true that the appellant has been ordered to undergo substantive sentence of rigorous imprisonment for ten years which is minimum. It is equally true that maximum sentence imposable on the appellant is twenty years. The learned counsel for the State again is right in submitting that clause (b) of sub-section (1) of Section 30, CrPC 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. But considering the circumstances placed before us on behalf of the appellant-accused that he is very poor; he is merely a carrier; he has to maintain his family; it was his first offence; because of his poverty, he could not pay the heavy amount of fine (rupees one lakh) and if he is ordered to remain in jail even after the period of substantive sentence is over only because of his inability to pay fine, serious prejudice will be caused not only to him, but also to his family members who are innocent. We are, therefore, of the view that though an amount of payment of fine of rupees one lakh which is minimum as specified in Section 18 of the Act cannot be reduced in view of the legislative mandate, ends of justice would be met if we retain that part of the direction, but order that in default of payment of fine of rupees one lakh, the appellant shall undergo rigorous imprisonment for six months instead of three years as ordered by the trial court and confirmed by the High Court."

8. Following the decision of the Hon'ble Supreme Court, cited supra, this Court, by the Judgment, dated 24.07.2013, in Criminal Appeal Nos.561 of 2010 and 57 of 2012, had reduced the default sentence of one year Rigorous Imprisonment to fifteen days of Rigorous Imprisonment.

9. It would be necessary to consider the facts and circumstances of these cases to find out, whether the same rationale can be applied in these cases also.

10. Each of the Appellants have suffered the substantive term of imprisonment of ten years. During these ten years, each of the appellants were not able to pay the fine of Rs.1,00,000/- each. Such a requirement could not be met by the accused

herein, since they had been suffering incarceration for almost a decade during which, their near and dear were not only grief-stricken, their immediate family would have suffered near indigence, in the absence of its breadwinner. Had it been possible for him to comply with the directions imposing fine of such a huge amount, they would have paid it even before the start of their sentence. But, it would have been better to safely assume that it is their poor economic status that had made them to fail to comply with the direction for payment of fine amount and to suffer the prospects of being behind the bar for another six months of imprisonment, following the decadal incarceration.

10.1. Further, the prospects of earning such a huge amount has also been curtailed by the sentence. It would be a cross imprudence to expect him to be ready with a sum of Rupees One Lakh immediately on their coming to see the open air from out of the high walls of prison. Their family, in the absence of the accused, could have suffered loss of moral support as well as financial strength. If they could secure the release of the accused without undergoing the further sentence of six months, they had to manage the money by stretching their earning capacity too wider.

11. The life of personal liberty is common to every man, irrespective of his nationality and cultural climate. The instinct of liberty pervades every faculty of the soul and this liberty cannot be curtailed for impossibility of performance.

12. As said by Mr. Edmund Burke, there cannot be a separation between liberty and justice and it is essential that both must be safe. Therefore, in the interest of liberty and justice, this Court feels it appropriate to reduce the default sentence from six months to fifteen days, considering the circumstances in which the each of the appellants is placed for the past ten years.

In the result, these Criminal Appeals are partly-allowed. The conviction recorded and the sentenced imposed on each of the the appellants to undergo Rigorous Imprisonment for ten years is confirmed. An order for payment of fine of Rs.1,00,000/- each is also upheld. But, the order that in default of payment of fine, the appellants shall undergo Rigorous Imprisonment for six months is reduced to Rigorous Imprisonment for a period of 15

days. To that extent, the appeals filed by each of the appellants are allowed. Consequently, the connected MP is closed.

srk

s/d-

Assistant Registrar(CS-III)

True Copy

Sub-Assistant Registrar

To

1. The Intelligence Officer, Narcotics Control Bureau, South Zonal Unit, Chennai
 2. The Principal Special Judge, Principal Special Court under EC & NDPS Act, Chennai
 3. The Public Prosecutor, High Court, Madras.
 4. The Superintendent, Central Prison, Puzhal, Chennai.
 5. The Superintendent, Special Prison for Women, Puzhal, Chennai.
- 2 ccs to Mr.K.S.Suresh, Advocate SR 14318 & 14317.
 - + 1 cc to Mr.K.S.Suresh, Advocate SR 14888 (14/6/16)

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and M.P.No.1 of 2014

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