

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.271 OF 2010

UGUDU OGABONNA

)...APPELLANT

V/s.

STATE OF MAHARASHTRA

)...RESPONDENT

Ms.Rohini Dandekar, Advocate for the Appellant.

Mr.S.V.Gavand, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 4th JANUARY 2018

ORAL JUDGMENT :

1 The appellant/accused by this appeal is challenging the judgment and order dated 23rd February 2010 passed by the learned Special Judge under Narcotic Drugs and Psychotropic Substances Act (NDPS Act), Greater Bombay, Mumbai, in NDPS Special Case No.101 of 2008, so far as it relates to convicting him of offences punishable under Sections 3(1)(2)(c)(e)(iii) read with Section 14 of Foreigners Act, 1946, as well as under Section 3(1)

(2)(a)(3)(4) of the Passport (Entry into India) Act, 1920, read with Rules 3 and 6 of the Passport (Entry into India) Rules, 1950. On these two counts, he has been sentenced to suffer simple imprisonment for 3 years apart from payment of fine of Rs.1,000/-, in default, to undergo further simple imprisonment for 3 months, and simple imprisonment for 3 months apart from direction to pay fine of Rs.500/-, in default, to undergo simple imprisonment for 1 month, respectively. He was, however, acquitted of offences punishable under Sections 21 read with 8(c) and 29 read with 8(c) of NDPS Act.

2 Heard Ms.Rohini Dandekar, the learned advocate appearing for the appellant/accused. She vehemently argued that even if the prosecution case is accepted as it is, then also, it is seen from the evidence on record that there is no iota of evidence for connecting the appellant/accused with the crime in question. She further argued that the cause of action in the case in hand is seizure of narcotic drug and entire evidence adduced by the prosecution is in respect of the alleged possession of narcotic drug

by the appellant/accused. There is no evidence regarding violation of the provisions of Foreigners Act, 1946, the Passport (Entry into India) Act, 1920, as well as Rules framed thereunder. Therefore, in submission of the learned advocate appearing for the appellant/accused, for want of evidence, the learned trial court ought not to have convicted the appellant/accused.

3 The learned APP drew my attention to the evidence of PW3 Ganesh Harpude, Police Sub-Inspector, Versova Police Station, PW4 Mohd.Yusuf Usman Khapatwala – panch witness, and that of PW5 Hemant Gosavi, Assistant Police Inspector, Versova Police Station, who had investigated the crime in question and argued that evidence of these three witnesses consistently shows that the appellant/accused had entered into India without any passport and visa and stayed in India in violation of express provisions of law. Despite being asked for the passport and visa, though the appellant/accused time and again insisted before the trial court that he is going to produce valid passport, nothing was placed on record by the appellant/accused. The learned APP

further argued that in terms of provisions of Section 106 of the Evidence Act, it was incumbent on the part of the appellant/accused to produce valid passport and visa and as he has failed to comply with the same, the learned trial court has rightly convicted him of the alleged offence.

4 I have carefully considered the rival submissions and also perused the record and proceedings including deposition of witnesses as well as documentary evidence adduced by the prosecution.

5 According to the prosecution case, the appellant/accused is a Nigerian citizen. A secret information was received by PW3 Ganesh Harpude, Police Sub-Inspector, Versova Police Station, on 26th June 2008 to the effect that the appellant/accused, who is a Nigerian citizen, is coming to Bon Bon Junction for selling cocaine. The information was then recorded in the Station Diary and was transmitted to immediate superior official by PW3 Ganesh Harpude, Police Sub-Inspector,

Versova Police Station. After following necessary formalities, according to the prosecution case, panch witnesses were summoned and trap teams were formed. Along with panchas, the trap teams then went to Bon Bon Junction. At about 2.45 p.m. of 26th June 2008, the appellant/accused came from the Model Town area towards Bon Bon Shoe Shop. After waiting for some time, as his movements were found suspicious, he came to be apprehended by the Police team.

6 It is case of the prosecution that after following necessary provisions of law, the personal search of the appellant/accused was taken and he was found to be in possession of cocaine weighing 3 gms. The Police Officials made inquiry regarding passport and other documents from the appellant/accused apart from his name and address. The appellant/accused informed his name and further informed that he is a resident of Nigeria and presently staying on the footpath in front of Andheri Railway Station.

7 The appellant/accused was taken in custody. The First Information Report (FIR) came to be lodged. Necessary investigation came to be followed and on completion of investigation, the appellant/accused came to be charge-sheeted.

8 After filing of the charge-sheet, the prosecuting agency filed an application Exhibit 4 before the learned Special Judge, Mumbai, seeking permission to add necessary sections of the Passport (Entry into India) Act, 1920, the Foreigners Act, 1946, as well as relevant Rules. The same came to be allowed.

9 After hearing the parties, the learned Special Judge had framed Charge for offences punishable under Sections 29 read with 8(c) of the NDPS Act Act, 1985, under Section 8(c) read with 21 of the NDPS Act, 1985, as well as for offences punishable under Section 3(1)(2)(c)(e)(iii) read with Section 14(a) of the Foreigners Act, 1946, and Section 3(1)(2)(a)(3)(4) of the Passport (Entry into India) Act, 1920, as well as under Rules 3 and 6 of the

Passport (Entry into India) Rules, 1950. The appellant/accused abjured guilt and claimed trial.

10 In order to bring home the guilt to the appellant/accused, the prosecution has examined in all five witnesses. PW1 Sanjay Prabhavale is Assistant Chemical Analyser. PW2 Mahesh Sagade is a Police Constable, who carried muddemal for chemical analysis. First Informant Ganesh Harpude, Police Sub-Inspector, Versova Police Station, is examined as PW3. Panch witness Mohd.Yusuf Usman Khapatwala is examined as PW4. Investigating Officer Hemant Gosavi, Assistant Police Inspector, Versova Police Station, is examined as PW5.

11 After hearing the parties, the learned Special Judge came to the conclusion that the prosecution has failed to prove that the appellant/accused was in possession of 3 gms of cocaine for the purpose of selling it to the customer and that he was holding possession of the said narcotic drug under conspiracy with an unknown person. However, the learned Special Judge came to

the conclusion that the appellant/accused was found to be in India without a valid passport and visa and thereby he has contravened provisions of Section 3(1)(2)(c)(e)(iii) read with Section 14 of the Foreigners Act, 1946, as well as provisions of Section 3(1)(2)(a)(3)(4) of Passport (Entry into India) Act, 1920, read with Rules 3 and 6 of the Passport (Entry into India) Rules, 1950. Accordingly, he is convicted and sentenced as indicated in the opening paragraph of this judgment.

12 Section 3 of the Foreigners Act, 1946, empowers the Central Government to frame orders for prohibiting, regulating or restricting the entry of foreigners into India or their departure therefrom or their presence or continued presence in the Indian territory. Such an order can prescribe that the foreigner shall not remain in India or in any prescribed area therein and such a foreigner shall comply with such condition as may be prescribed or specified including the condition requiring him to furnish such proof of his identity and to report such particulars to such authority in such manner and at such time and place as may be

prescribed or specified. In exercise of powers conferred by Section 3 of the Foreigners Act, 1946, the Central Government is pleased to make the Foreigners Order 1948. Order 3 of the Foreigners Order 1948 specifically provides that no foreigner shall enter into Indian territory otherwise than at such port or other place of entry on the borders of India as a Registration Officer having jurisdiction at that port or place appointed in this behalf either for foreigners generally or for any specified class or description of foreigners or without the leave of the civil authority having jurisdiction at such port or place. Thus, entry of foreigners into India is regulated and such entry cannot be made otherwise than the provisions of Order 3 of the Foreigners Order 1948. Order 7 deals with restriction of sojourn in India and it provides that the foreigner entering into Indian territory shall obtain from the Registration Officer having jurisdiction, a permit indicating the period during which he is authorized to remain in India and also indicating the place or places for stay in India, if any, specified in the visa. In granting such permission, the Registration Officer may restrict the stay of the foreigner to any of the places specified

in the visa. Contravention of the provisions of Foreigners Act, 1946, as well as Foreigners Order 1948, is made punishable under Section 14 of the Foreigners Act, 1946. Contravention of the provisions of the said Act and the Order made thereunder is punishable with imprisonment which may extend to 5 years apart from imposition of fine.

13 Section 3 of the Passport (Entry into India) Act, 1920, deals with powers to make rules by the Central Government. It provides that the Central Government may make rules requiring that person entering India shall be in possession of passports, and for all matters ancillary or incidental to that purpose. Such rules may contain provisions regarding prohibiting the entry into India or any part thereof of any person, who has not in his possession a passport issued to him. The rules can also provide that any contravention thereof is punishable with imprisonment for a term which may extend to 5 years or with fine. In exercise of powers under Section 3 of the Passport (Entry into India) Act, 1920, the Central Government has framed the Passport (Entry into India)

Rules, 1950. Rule 3 of these Rules provides that no person proceeding from any place outside India shall enter, or attempt to enter, India by water, land or air, unless he is in possession of a valid passport conforming to the conditions prescribed in Rule 5.

14 On the backdrop of these legal provisions, let us scrutinize the evidence adduced by the prosecution.

PW3 Ganesh Harpude, Police Sub-Inspector of Versova Police Station, who was the member of the raiding team has categorically deposed that after apprehending the appellant/accused, there was inquiry with him. The appellant/accused gave his name as Ugudu Ogabonna, resident of footpath at Andheri Railway Station. Upon being asked about his passport, as per version of PW3 Ganesh Harpude, the appellant/accused did not give any reply. He was only knowing English language. This evidence virtually remained unchallenged, and as such, there is no reason to disbelieve the same.

15 PW4 Mohd.Yusuf Usman Khapatwala is a panch witness who was also present on the spot when the appellant/accused came to be arrested by police. Evidence of this witness shows that Police Officers made inquiry from the appellant/accused in respect of his passport, language known to him as well as his address.

16 PW5 Hemant Gosavi, at the relevant time was working as Assistant Police Inspector of Versova Police Station. He laid the trap team which apprehended the appellant/accused. This witness has deposed that after apprehending the appellant/accused, inquiry was made from the appellant/accused. The appellant/accused informed that he is a Nigerian citizen and was residing at Andheri Railway Station on footpath. The appellant/accused informed that he knew only English language. Evidence of PW5 Hemant Gosavi, Assistant Police Inspector, Versova Police Station, shows that on 17th July 2008, this witness has sent a letter to the Deputy Commissioner of Police, Passport

Branch, to inform Nigerian Consulate that the appellant/accused was found without possessing the passport with him. This witness received a letter communicating him that the appellant/accused be also charge-sheeted for violation of the provisions of Foreigners Act, 1946, as well as Passport (Entry into India) Act, 1920, as well as Rules framed thereunder.

17 The evidence adduced by the prosecution, as such, shows that the appellant/accused, who is a Nigerian citizen, was apprehended at Bon Bon Junction by the police team and at the relevant time, he was neither in possession of visa nor the passport. Perusal of the impugned judgment and order goes to show that before the learned trial court, the appellant/accused consistently claimed that he is in possession of a valid passport. The learned trial court observed that sufficient opportunity was given to the appellant/accused to furnish valid passport, but till the date of delivery of judgment, the appellant/accused failed to produce the passport or visa.

18 The fact that whether the appellant/accused was in possession of a valid passport or visa is a fact which was exclusively within the knowledge of the appellant/accused. It is seen from the evidence of prosecution witnesses that the appellant/accused was found without having any valid passport or visa to justify his presence in India, he being a Nigerian citizen. The learned APP rightly relied on the judgment of the Hon'ble Apex Court in the matter of Habib Ibrahim vs. State of Rajasthan¹ wherein, in paragraph 7 it is held thus :

“7 Prosecution evidence clearly establishes that the appellant did not have passport to stay in India. This fact is not disputed by the appellant. The only plea to justify his presence was that he had come to visit his wife and children. As rightly noted by the courts below, the appellant had been issued a transit visa that too for Nepal for a period of six months. There was no valid document in possession of the appellant to stay in India. The only plea to justify his presence was that he had come to visit his wife and children. That does not give any right to him to stay illegally in India. As rightly noted by the courts below, the appellant had been issued a transit

1 AIR 2009 SC (Supp) 472

visa that too for Nepal for a period of six months. There was no valid document in possession of the appellant to stay in India. Therefore [Section 3](#) read with [Section 14](#) of the Act have been rightly applied. The conviction therefore cannot be faulted. So far as the sentence is concerned, considering the large number of infiltrators come to India without valid document, there is need for imposing stricter sentence. The reasons given by the appellant to justify his presence in India have hardly any substance. Appellant's feeble plea that he did not know that he is required to be in possession of valid document is without substance. Otherwise, he would not have obtained any transit visa for Nepal.”

19 The foregoing discussion makes it clear that the appellant/accused being a Nigerian citizen entered India and stayed in India without valid documents in his possession for stay in India.

20 In the result, it cannot be said that the learned trial court has committed any error in convicting the appellant/accused

for alleged offences. The appeal, as such, is devoid of merits, and therefore, the order :

ORDER

The Appeal is dismissed.

(A. M. BADAR, J.)