

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 1367 OF 2012

Jude Okonkwo Chukwuemeka.

Nigerian National, Christian aged 42 years.

R/o SW 7/60 B, Fagbohun Road,

O/CE/Kapdi, Oyo Oyo State,

Nigeria.

(At present in Thane Central Prison.)

..Appellant.

V/s.

1. Union of India

(Through NCB, Mumbai)

3rd floor Exchange Building,

Ballard Pier, Mumbai.

2. The State of Maharashtra.

..Respondents.

Ms. Shradha Sawant, advocate appointed for appellant.

Ms. Ankeeta Appanna I/b. Ms. Yasmin N. Katpitia, advocate for respondent No. 1.

Mr. S.S. Pednekar, APP for State.

CORAM : SMT. SADHANA S. JADHAV,J.

DATE : DECEMBER 19, 2018.

JUDGMENT :

1 The appellant herein is convicted for an offence punishable under section 8(C) read with Section 21(C) of N.D.P.S. Act and is sentenced to suffer R.I. for the period of 11 years and to pay fine of Rs.

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One Lakh I.d. to suffer S.I. for one year. Hence, this appeal.

2 Such of the facts necessary for the decision of this Appeal are as follows :

(i) The complainant in this Case is Narcotic Control Bureau (hereinafter referred to as N.C.B.) Mumbai. It is the case of the N.C.B. that on 2nd September, 2007 in the vicinity of Khaniwade Tollnaka National Highway No. 8, Virar, appellant in conspiracy with other accused was found in possession of 2 kg. of heroin.

(ii) It is the case of N.C.B. that on 1/11/2007 Canute Menezes P.W. 1 was attached to N.C.B.. He had received secret information at about 5.30 p.m. to the effect that one African national namely, Jude aged about 42 to 45 years is travelling in luxury bus No. RJ-27/PA-937 of Eagle Travels from Udaypur to Mumbai and he is carrying substantial quantity of heroin in his shoulder bag.

(iii) There was also information that the bus would reach Virar tollnaka at about 6.30 a.m.. The officers i.e. P.W. 1 and Ashish Mangaonkar reduced the information into writing and the same was placed before Shri Mahar, Zonal Director. They decided to intercept the said luxury bus.

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(iv) They had followed initial procedure. They apprehended the bus. They had taken panchas alongwith them. They had recovered contraband from the appellant. The accused had disclosed his name as Jude Okonkwo Chukwuemeka. He was carrying grey colour shoulder bag. The said shoulder bag was seized. The said contraband was tested with field testing kit. The test was positive for the presence of heroin. They had sealed the same.

(v) He was taken to the police station and after following due procedure of law, the FIR was filed on behalf of the State. The report of arrest is at Exh. 43. At the trial, the prosecution examined as many as 8 witnesses to bring home the guilt of the accused.

3 P.W.1 Canute Menezes was attached to N.C.B. Mumbai as an Intelligence Officer. He has deposed before the Court in respect of receiving the secret information, reducing it into writing and informing it to the Zonal Director Shri Mahar, as contemplated under section 42 of the N.D.P. S. Act.

4 P.W.2 Shri Shrinivasrao is the carrier of the contraband to the office of C.FSI, Hyderabad.

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5 P.W. 3 Kishore Hate was working as an intelligence Officer with the N.C.B. He had received direction from Zonal Director Shri Mahar to carry out the investigation. He has deposed before the Court that he has complied with the rules of the investigation as contemplated under the provisions of N.D.P.S. Act. In the cross-examination, he has admitted that he has not filed any document to show that he was in the office on the earlier night and he has not disclosed any reason for remaining in the office late at night. He has denied the suggestion that an African national was present in the office of N.C.B. on 1.9.2007 and he did not recollect as to whether 2 kg. Of heroin was seized from him on 1/9/2007. The office does not maintain any register of visitors. No entry is made for bringing the accused in N.C.B. office. There is no record to indicate as to who had brought the accused in the office of N.C.B. and at what time. It is admitted that except document at Exh. P-10, there is no document to show that Mr. Canute and Mr. Mangaonkar were present in the office on 1/9/2007. No information was received by them in his presence. It is admitted that they had not disclosed as to whether the secret information was a telephonic information, whether it was received on landline or cell phone or any other mode and manner. It is also admitted that since this could be an important factor, there is always an entry in the register as to whether the information is received

telephonically or not. P.W. 3 has filed a complaint. There is no document to show that N.C.B. -I form was sent to the Head Quarter. It is also admitted that the registration number of the bus given in the information note differs from bus number in bus ticket at Exh. 37. According to him, he has prepared the complaint after collecting all necessary documents from various officers connected with the case. The ticket was issued by sub-agent of Rajdhani travels. On the basis of the list of passengers submitted by the traveller of Eagle Travels, it is seen that Jude was travelling in the said bus. However, the said chart was neither seized or produced on record. It is also admitted that there is no enquiry by P.W. 3 with the driver and cleaner in respect of bus number. From the tenure of the cross-examination and the admissions given by the witness, it appears that there was non-compliance of keeping the documentary evidence in place i.e. of maintaining N.C.B. Form II and N.C.B. Form No. III. It is admitted that the bag was opened for the first time in the official vehicle. The statement of the accused was not recorded under section 67 of N.D.P.S. Act before writing the memorandum of panchanama. It is also admitted that P.W. 3 had not even conducted a preliminary enquiry as to whether a gazetted officer or Magistrate would be available in the vicinity of the spot. It was not aware as to whether the accused would accept offer under section 50 of the N.D.P.S. Act. The statement of the co-passengers were not recorded. At

this stage, the learned Counsel for the appellant submits that there is non-compliance of the provisions under section 50 of the N.D.P.S. Act. It is also admitted that the documents at Exh. 41 does not reflect that there was compliance of section 50 of the N.D.P.S. Act. It is admitted that there was no enquiry about the bag which was handed over to P.W. 3 by the accused and the officer did not feel necessity of obtaining the signature of co-passengers. There was no enquiry with the driver and the conductor about the time/place when the accused boarded the bus. The investigating officer did not feel necessity of recording statement of the accused under section 67 of the N.D.P.S. Act. In short, the Investigating Officer has admitted that he had not taken certain requisite steps mandated in the course of investigation. In fact, Exh. 41 is the statement of accused/appellant recorded under section 67 of the N.D.P.S. Act.

6 P.W. 4 Shrikant Phansekar was posted as Investigating Officer in NCB, Mumbai. On 1st September, 2007 at around 6.15 p.m. Mr. Hate had informed them that he has been directed to take steps in respect of the secret information received by him and hence, all of them had set out to work on the secret information. Upon entering the bus, they had found an African national with a military green colour shoulder bag on his lap. Upon enquiry, he had disclosed that he was carrying 2 kg.

Heroin. Mr. Hate had informed the said person about this right under section 50 of the N.D.P.S. Act. They had carried out the investigation as per the Manual. It is admitted by P.W. 4 in the cross-examination that there is no reference to the steps taken by him in the course of investigation. It is admitted that Manohar Bhoir had voluntarily attended the office of NCB. Needless to reiterate that Manohar Bhoir has acted as panch in the present case.

7 P.W. 5 Shri Sanjay Poojari was posted as an Enforcement Officer in Enforcement Department. He was a member of the investigating team. He has also admitted before the Court that they have all followed the due procedure of law in conducting the investigation. He was the custodian of the NCB godown and had given seal No. 03 to Investigating Officer Hate. It is admitted that he had not tried to tally the name of the accused with the name in the photo copy of the passport. That the document at D-2 is not the passport of the appellant. He has denied the suggestion that the accused was apprehended from his residence at Mira Road. It is also admitted that on Exh. 39, there is no reference to sealing the samples with NCB seal No. 03 in the forwarding letter.

8 According to P.W. 6 Seema Shrivastav who was attached to

C.FSL, Hyderabad, Head of Department, Chemistry, the sample contains granule substance and not granule powder. Upon examination, the substance was found to be the contraband, which showed the presence of caffeine, dizapan and heroin.

9 P.W. 7 Manohar Bhoir has acted as a panch. He was working at Khanewade Toll Naka as supervisor. The other panch Suraj was also working at Khanewade Toll Naka. The witness has resiled from his earlier statement and therefore, was cross-examined by the Special P.P. and was declared hostile.

10 P.W.8 Velji Patel was the driver on the bus of Neeta Travels in which the accused was apprehended alongwith contraband. It is admitted in the cross-examination that the ticket at Exh. 37 does not show that the said ticket is issued for the passenger of Egle travels. That Egle travels has one or two buses plying between Udaypur and Mumbai. It is not his job to see ticket but to see driver's slip. The signature on the driver's slip at Exh. 57 collectively are inherently inconsistent with each other. However, the witness has admitted his signature on both the documents. It appears from the tenore of the cross-examination that the accused has challenged the fact that Velji Patel was the driver of the bus in which the accused was allegedly travelling and was apprehended

alongwith heroin.

11 The learned Counsel has submitted that upon perusal of the admissions given by the officers of the NCB in the cross-examination, it is more than clear that a false case has been foisted upon the accused and that he was falsely implicated in the present case. It is submitted that there has been non-compliance of section 15 of the N.D.P.S. Act. The said contention will not hold good ground. In view of the judgment of the Hon'ble Apex Court in the case of Himachal Pradesh v/s. Pawan Kumar reported in 2005 Cr. L.J. 2208, wherein the Court has held as follows :

A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in [Section 50](#) of the Act.

12 The learned Special Court has also held that there is proper compliance of section 57 of the N.D.P.S. Act. It is also held that the statement of the accused was recorded under section 67 of the N.D.P.S. Act and that he has admitted his guilt and the said document is admissible in evidence. Although it is argued that the confession was subsequently retracted, there is nothing on record to even remotely suggest that the said statement was retracted. In fact, it appears from

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the record that the statement was shown to have been retracted only by way of cross-examination.

13 The learned Counsel for the appellant has placed reliance upon the Judgment of the Apex Court in the case of **Shantilal vs. State of M.P. reported in (2014) Insc 1014.**

“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.”

14 In view of the above discussion, the findings recorded by the Special Judge call for no interference. The appellant is in custody since 2/9/2007. He has undergone substantive sentence of 11 years. In view of this, the substantive sentence is upheld.

15 Hence, following order is passed :

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ORDER

- (I) The appeal is partly allowed.
- (II) The conviction of the appellant i.e. 11 years rigorous imprisonment for the offence punishable under sections 8(C) read with Section 21(C) of the Narcotic Drugs and Psychotropic Substances Act (N.D.P.S. Act) imposed by the learned Special Judge, N.D.P.S., Thane vide Judgment and Order dated 30th October, 2012 is hereby confirmed.
- (III) The sentence of fine of Rs. 1,00,000/- imposed upon the appellant is maintained. However, the default sentence that is for non-payment of fine amount is reduced to three months, instead of one year.
- (IV) Writ be issued expeditiously.
- (V) The professional fees to be paid to the Advocate appointed Ms. Shraddha Sawant as per rule.
- 16 The appeal is disposed of accordingly.

[SMT. SADHANA S. JADHAV, J.]