

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO. 130 OF 2017
ALONG WITH
CRIMINAL APPLICATION NO. 1657 OF 2017**

Peter Clement Arize	]	
Age 32 Yrs, Occ.Businessman,	]	
R/o. Shri Krupa Bldg., Flat No.404,	]	
Pachnand Nagar, Talaja Road,	]	
Navi Mumbai.	]	
(At present Arthur Road Jail.)	]	... Appellant

V/s.

The State of Maharashtra	]	
ANC Ghatkopar Unit,	]	
(Wide CR No.229/2014)	]	... Respondent

**ALONG WITH
CRIMINAL APPEAL NO. 299 OF 2017
ALONG WITH
CRIMINAL APPLICATION NO. 1465 OF 2017**

Lucky Agbaraizu	]	
Nigerian National, Age 33 Yrs.,	]	
R/o. Shri Krupa Bldg., Flat No.404,	]	
Plot No.49, Sector-02,	]	
Pachnand Nagar, Talaja Phase No.01,	]	
Talaja Road, Navi Mumbai.	]	
(At present undergoing sentence at	]	
Kolhapur Central Prison, Kolhapur.)	]	... Appellant

V/s.

The State of Maharashtra	]	
Anti Narcotic Cell,	]	
CR No.229/2014 dated 01/06/2014	]	... Respondent

Mr.Ayaz Khan a/w.Mr.Dilip Mishra for Appellant(s).
Mr.Amit Palkar, A.P.P. for Respondent-State.

CORAM : A.S. GADKARI, J.

RESERVED ON : 25th November 2020.

PRONOUNCED ON : 6th January 2021.

JUDGMENT :

Being dissatisfied with the Judgment and Order dated 30th January 2017 passed in NDPS Special Case No.144 of 2014 by the NDPS Special Judge, City Civil & Sessions Court, Gr. Mumbai, appellants have preferred the present appeals. By the impugned Judgment and Order dated 30th January 2017, the Trial Court has convicted appellants for the offence under Section 9-A read with 25-A of The Narcotic Drugs and Psychotropic Substances Act, 1985 (*for short, "the N.D.P.S. Act"*) and are sentenced to suffer rigorous imprisonment for 8 years each and to pay a fine of Rs.1,00,000/- each, in default of payment of fine to further suffer simple imprisonment for 6 months by each of the appellants.

2. Heard Mr.Ayaz Khan, learned counsel for the Appellants and Mr.Amit Palkar, learned A.P.P. for the Respondent-State. Perused entire record.

3. Appellant, Peter Clement Arize in Criminal Appeal No. 130 of 2017 is original Accused No.1 and Appellant, Lucky Agbaraizu in Criminal Appeal No. 299 of 2017 is original Accused No.2 in NDPS Special Case No.144 of 2014.

The record reveals that, Nitin P. Patil (PW-6), Assistant Police Inspector (API) was investigating a Crime bearing C.R. No. 41 of 2014 under Sections 420, 465, 466, 467, 471, 34 read with 120-B of the Indian Penal Code. He had already arrested two accused persons in the said crime. One accused by name Godwin, who was a Nigerian national was absconding. On 31st May 2014 he received information that, the said accused Godwin would come at Kopar Khairane, Navi Mumbai. He communicated the said information to Police Inspector Shri Gopale. P.I. Shri Gopale asked him to take permission of superior officers to go to the said spot along with staff. After taking necessary permission API Nitin Patil (PW-6) went to the said spot along with his staff. At about 3:00 pm he received information that accused Godwin would come at Vidyanagari, Kalina, Santacruz East. He therefore along with his staff went at the said place at about 5:10 pm. In the meantime P.I. Gopale sent A.P.I. Fulpagare and other staff along with necessary articles of raid for preparing panchanama. The said additional staff also reached at the said spot at about 5:10 pm. They met at the north gate of the University on Hans Bhugra Road, Kalina. All the staff was divided into two teams. At about 5:30

pm one auto-rickshaw came at the bus-stop of route No.318. Two Nigerian persons got down from it. They were waiting for somebody and chit-chatting. One of the two persons was having black coloured sack bag on his shoulder, while the other person was holding sack bag in his hand. API Nitin Patil doubted that one of them was accused Godwin. All the police personnel encircled the said two persons. A.P.I. Nitin Patil told Police Constable Shri Sawant to call for two panchas. At about 5.50 pm, two panch witnesses, namely, Mohd Sajja Abdul Sattar Shaikh (PW-3) and Omprakash Pyarelal Vaish (PW-4) came at the spot.

API Patil informed the said pancha witnesses that, he is investigating C.R. No.41 of 2014 and was intending to take search of the said two persons. He therefore gave introduction to both the Nigerian persons and told them, the purpose of his arrival. In the presence of said panch witnesses he enquired with the said two persons. One of the person disclosed his name as Peter Clement Arize and the other person as Lucky Agbaraizu, both residing at Taloja Road, Navi Mumbai. API Patil took search of the sack bags which were in possession of the said two persons and noticed that, both of the said bags were having powder in the shape of white crystals kept in plastic bags therein. He got suspicious about the fact that, it may be a narcotic drug and therefore, he kept the said articles in the bags again and closed its chains. He enquired with both the said persons about the said substance. They gave

unsatisfactory answers. API Patil informed the said incident to PI. Gopale on phone. PI. Gopale informed Mr.Patil that, he will communicate the said fact to his superior officers and directed API Patil to wait at the said spot with panchas and accused.

At about 7.30 pm a Police Jeep bearing No.MH-01/4232 arrived at the spot. A police team headed by Police Inspector Vijay Belge (PW-5), then incharge of Anti Narcotic Cell (A.N.C.), Ghatkopar Unit, along with PSI Baban Sanap (PW-7) of A.N.C. and other police personnel alighted from it. PI. Vijay Belge (PW-5) introduced himself. PI. Belge thereafter took-over the further investigation of the case. Under the directions of PI. Belge, PSI Sanap (PW-7) took search of those two panch witnesses, namely, Mohd Sajja Abdul Sattar Shaikh (PW-3) and Omprakash Pyarelal Vaish (PW-4).

PI. Belge thereafter directed PSI Sanap to take search of the said two panch witnesses and vice-versa. No objectionable things were found on the person of the panch witnesses. PI. Belge enquired with those two Nigerian persons about their name and addresses to which they answered accordingly. PI. Belge showed his identity card to the appellants and told them that, he intends to take their search. He thereafter in presence of panch witnesses orally as well as by issuing letters in writing, bearing Exhibit Nos.33 and 34 respectively, apprised appellants about their right of search to be taken before the nearest Gazetted Officer or nearest Magistrate as contemplated under

Section 50 of the NDPS Act. The appellants wrote on the said letters as 'not required'. As per the instructions of P.I. Belge, API Nitin Patil (PW-6) took search of appellants and found 2 k.g. and 1.900 k.g. of white colour crystal like powder in the back sacks of appellants respectively. The appellants told the Investigating Officer that, the said powder was Ephedrine. Small quantity of the said powder was tested with the help of Field Testing Kit and it was transpired that, it was 'Ephedrine'. P.I. Belge thereafter by following due procedure, drew samples of the said powder, namely, Exhibit A-1 and B-1 respectively. After completion of all the legal formalities, the appellants came to be arrested by the Investigating Agency.

The samples i.e. Exhibit A-1 and B-1 respectively were thereafter carried to the Office of Chemical Analyzer, Forensic Science Laboratory (F.S.L.), Kalina by Rajendra Shirke (PW-1), Police Naik then attached to A.N.C. Gharkopar Unit on 2nd June 2014. Miss Ramanpreet Kaur Kuldeep Singh Oberoi, Assistant Chemical Analyzer, then attached to F.S.L. Kalina, Mumbai, examined those samples for its analysis. After analysis, she found that, the samples were 'Pseudoephedrine'. She accordingly issued Chemical Analysis Report (Exhibit-23). On the basis of the aforesaid evidence available on record, the Trial Court has convicted and sentenced the appellants as noted in para No.1 here-in-above.

4. The aforestated facts have been deciphered from the testimonies of the witnesses of the present case. The possession of contraband, namely, Ephedrine / Pseudoephedrine by the appellants has been proved by the prosecution beyond reasonable doubt.

Mr.Ayaz Khan, learned counsel for the appellants fairly conceded to the aforestated facts and submitted that, he has no serious dispute about the facts mentioned herein above. He, on instructions, further submitted that, he is not pressing the present Appeals on merits.

5. Mr.Ayaz Khan further submitted that, the contraband, namely, Ephedrine / Pseudoephedrine is a controlled substance and therefore awarding of sentence of 8 years of rigorous imprisonment by the Trial Court to the appellants is on higher side. He submitted that, except the present conviction, there are no antecedents at the discredit of the appellants. He therefore prayed that, the sentence imposed upon the appellants may be reduced to 5 years of rigorous imprisonment and after its completion, the appellants may even be deported from India. He therefore prayed that, the present appeal may accordingly be allowed.

6. This leads me to deal with the quantum of punishment imposed upon the appellant by the Trial Court. It is the settled position of law that, the sentence awarded to the accused should be commensurate to the nature of

offence and the manner in which it was committed. The sentencing courts are necessarily to consider all relevant facts and circumstances bearing on the question of sentence, while imposing a sentence commensurate with the gravity of the offence. The sentence is necessarily to be adequate, just and proportionate with the gravity and nature of crime. The mitigating and aggravating circumstances are required to be taken into consideration while awarding sentence.

7. Serial No.4 of Schedule-A of The Narcotic Drugs and Psychotropic Substances (Regulation of Controlled Substances) Order, 2013 mentions 'Ephedrine and its salts'. Section 25-A of NDPS Act provides that, 'if any person contravenes an order made under section 9-A, he shall be punishable with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine which may extend to one lakh rupees'. It is to be noted here that, however, no minimum sentence is prescribed in the Section 25-A of NDPS Act.

It is held by this Court in a catena of decisions that, the controlled substance is neither a narcotic drug nor a psychotropic substance and therefore, no commercial quantity or otherwise is provided for the controlled substance. It is also held that, as far as controlled substance is concerned, there is no categorization of small or commercial quantity. It is further held in

the case of *Rafael Palafox Garcia Vs. The Union of India & Another (Criminal Application No. 2015 of 2008)* dated 25th September 2008, that a controlled substance is not necessary used only to make narcotic or psychotropic substance but it is a versatile substance which can be used in manufacturing of various things including innocuous medicines by the pharmaceutical industry.

8. In the present case, as per the submissions made by the learned counsel for the appellants, after conviction the appellant Peter Clemant Arize has undergone approximately 4 years and 3 months of actual imprisonment; whereas the appellant Lucky Agbaraizu has undergone approximately 6 years and 4 months of actual imprisonment.

9. In this view of the matter and considering the attending circumstances, in the opinion of this Court, the sentence of 8 years of rigorous imprisonment in the present case needs to be scaled down to rigorous imprisonment for 6 years by maintaining the fine and in default sentence imposed thereon by the Trial Court. In the result, the Appeals are partly allowed.

Hence, the following Order :-

- (i) Both the Appeals are partly allowed.
- (ii) The conviction and sentence of appellants/accused passed by the Trial Court for the offence punishable under Section

9-A read with Section 25-A of the N.D.P.S. Act is upheld.

The imposition of fine of Rs.1,00,000/- each and default sentence of simple imprisonment of 6 months is also maintained.

- (iii) However, the substantive sentence of rigorous imprisonment of 8 years each awarded by the Trial Court to the appellants is reduced to 6 years of rigorous imprisonment.
- (iv) The Respondent-Anti Narcotic Cell of Mumbai Police is hereby directed that, the appellants shall be deported to Nigeria within 10 days after completion of their sentence and release from jail by completing all the necessary formalities in that behalf.

The Investigating Agency is also directed to communicate the fact of deportation of the appellants to the Indian Embassy at Nigeria and Embassy of Nigeria in India.

10. In view of disposal of Appeals, nothing survives in the Criminal Application Nos.1657 of 2017 and 1465 of 2017 pending therein and are accordingly disposed off.

[A.S. GADKARI, J.]

Omkar S.
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