
(2016) 03 CAL CK 0015
In the Calcutta High Court
Case No : CRA No. 014 of 2016

Saw Myow Win

APPELLANT

Vs

The State

RESPONDENT

Date of Decision : 30-03-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 229, Section 30, Section 374,
Section 375, Section 428
Foreigners Act, 1946 — Section 14(A), Section 14A
Maritime Zones of India Regulation of Fishing By Foreign Vessels Act, 1981 - Sectio

Citation : (2016) 03 CAL CK 0015

Hon'ble Judges : Soumen Sen, J.

Bench : Single Bench

Advocate : D. Ilango, for the Appellant; S.K. Mandal and S.C. Mishra, for the Respondent

Final Decision : Partly Allowed

Judgement

Soumen Sen, J.—1. The instant appeal is directed against the order of conviction dated 30th January, 2012 passed by the learned Additional Sessions Judge, A&N Islands, Port Blair in Sessions Case No. 54 of 2011.

2. Being aggrieved by and dissatisfied with the impugned order of conviction and sentence passed thereunder the appellant has preferred this appeal under the provision of section 374/375 of the Code of Criminal Procedure inter alia on the ground that on 30th January, 2012 when the case was fixed for framing of the charges the Trial Court decided to read out the charges through a Burmese interpreter and owing to non-knowing of the Burmese language, neither the Court nor the Counsel engaged by the State to defend the accused could properly understand the stand taken by the accused persons and that the order of conviction has been passed on a total non consideration of the vital fact that the accused appellant is a poor fisherman and came to the territorial limits of India by mistake and as such, the order of conviction and the fine imposed on him is excess and as such the same is liable to be modified for the reasons that

there is no sufficient evidence or material brought by the prosecution in support of the prosecution case to show that the accused appellant committed the offences as alleged and without any basis only on the basis of the pleading of guilty that too on the basis of the sole interpretation of the interpreter, and that the accused appellant is in judicial custody since his arrest i.e. on 24.11.2010 and is in jail for nearly 5 1/2 years. It is further contended on behalf of the appellant that learned Additional Sessions Judge has failed to appreciate the fact that the State has already confiscated the vessel of the appellant worth lakhs of rupees and hence the fine imposed ought not to have been imposed. It is further pointed out that the accused appellant entered into the territory of India by mistake and not with mala fide motive. Accordingly, the appellant has prayed for modification of the order of conviction.

3. This memo of appeal goes to show that the appellant had challenged the entire order of conviction.

4. The chronological event leading to instant appeal is that as many as 14 accused persons including the present appellant who are Burmese nationals had entered into India on 16.11.2010 at about 1445 hours, to 16000 hours. And at that time the Coastguard personnel while performing near the North sentinel Island detected that all the accused person were moving secretly in their dinghy and then police proceeded near the place of occurrence and chased them, when they started fleeing away and proceeding to pass away from Indian territory ignoring the warning signal to stop at once, but the police in the ship apprehend the ship of the accused person including present appellant. After capturing the accused persons, police arrested Zaw Zaw the Master of the vessel the present appellant herein and all other accused who are from Burma/Myanmar and it was found that they purposefully and illegally entered into India for committing theft of sea water creatures.

5. On being arrested they were handed over to SHO, CCS, PS and from their possession sea cucumbers and sea shells were recovered and on interrogation the accused person including the appellant confessed that they are citizens of Burma and have entered into India for illegal purpose. Accordingly, Police report was submitted against them for having committed the offence under Section 3/7/10/14/15 (C) of Maritime Zone of India (Regulation of fishing by foreign vessels) Act, 1981 and under Section 14A of the Foreigners Act as amended read with Para 3 of FRA order, 1963 and also under Section 50/51 of Wild Life (Protection) Act, 1972.

6. It appears from the order impugned against 14 accused persons including the present appellant that charges were accordingly framed which were read over and explained to all the accused persons including the Master of the vessels Zaw Zaw the present appellant and they pleaded guilty as stated by interpreter Mr. Moun Naoy in the way that after the charges were read over to them they stated that they understood the charges and pleaded guilty by stating that they are all citizen of Burma having their residence in Burma/Myanmar and they do

not want trial by further mentioning that they entered into India without any legal authority and at the same time wanted to capture sea animals like sea cucumber etc. for taking them away to their own country. The order impugned would reveal that the learned lawyer for the accused persons including the present appellant was present at the time of framing of the charge and consideration of the charges levelled against them and after having understood the entire contents of the charges and the plea of guilt on being accepted by the learned Judge, each of them were convicted for offence under Section 3/7/10/14/15 (C) MZI Act and all accused persons including present appellant were further convicted for the offences under Section 14A of the Foreigners Act as amended read with Para 3 of FRA order, 1963 and so also under 50/51 of Wild Life (Protection) Act as per provision under Section 229 Cr.P.C. and the same was conveyed to the convicted persons through the said interpreter who further stated that they have come to understand and they were sentenced thereunder after giving them opportunity of reflection on the question of sentence. It further reveals that the learned Judge upon hearing the convicted persons including Zaw Zaw the present appellant appeared to be professional smuggler and sentenced to suffer rigorous imprisonment for one year with a fine of Rs. Seven lakhs in Indian currency, in default to suffer rigorous imprisonment for one year for offence under section 3/10 (A) of MZI Act, and for the offence under section 7/14 MZI Act he was further sentenced to pay a fine of Rs. 2.00 lakhs in Indian currency, in default to suffer simple imprisonment for 6 months and for the offence under section 15(C) of MZI Act, he was further sentenced to suffer rigorous imprisonment for 1 year with fine of Rs. 25,000/- in default simple imprisonment for four months, and all the convicts including master of the ship were sentenced to suffer rigorous imprisonment for 3 1/2 years with a fine of Rs. 40,000/- each in default to suffer rigorous imprisonment for six months each for the offence under section 14A foreigners Act as amended read with Para 3 of FRA order, 1963 and all the convicts including master are further sentenced to suffer rigorous imprisonment for 4 1/2 years with a fine of Rs. 50,000/- in Indian currency each in default to simple imprisonment for six months for the offence under section 50/51 of Wild Life (Protection) Act, 1972 and it is stated that the above sentenced against each of the convicted persons shall run concurrently, sentence for each offence being to be consecutive and convicted persons shall have benefit under Section 428 Cr.P.C. regard set off in respect of their earlier period in custody in this case against the above awarded sentence. The order impugned further reveals that the seized alamats were confiscated to the Central Govt. as per provision of section 13(2) of MZI (Regulation of fishing by foreign vessel) Act, 1981 and that after the period of sentence is over the convicted persons without being freed in India be repatriated to their country and accordingly the Govt. of A&N Islands was directed mandatorily to hand over their personal effects to them at the time of their repatriation.

7. The learned Counsel for the appellant in view of the memo of appeal appears to have challenged the order of conviction on the ground that the appellant could

not understand as to what was interpreted to them by the interpreter and the learned Judge could not also understand the language of the appellant, which resulted in wrong order of conviction passed against the appellant. It is further submitted that appellant being foreign national having completed the period of sentence be absolved of the liability to pay fine amount so that they may be pushed back to their country. It is also pointed out that the sentence for 1 year in default of payment of fine of Rs. 7 lakhs for the charges under Section 3/10 (A) and section 7/14 of MZI Act is beyond the concept of law and so also the sentence as awarded in respect of charge under Section 15(C) of the said Act providing for suffering 6 months simple imprisonment in default to pay fine of Rs. 2 lakhs and has relied on an unreported decision of Single Bench of this Hon'ble Court passed in CRA No. 022 of 2015.

8. It would be apt to reproduce the provision of Section 65 of IPC which provides for limit of imprisonment for non payment of fine when imprisonment and fine awardable. It reads thus:

"65. The term for which the Court directs the offender to be imprisoned in default of payment of a fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine."

At the same time it would be profitable to reproduce the provision of Section 30 of Code of Criminal Procedure which is a corollary to Section 65 of Indian Penal Code, which provides thus:

"30. Sentence of imprisonment in default of fine.- (1) The Court of a Magistrate may award such term of imprisonment in default of payment of fine as is authorised by law."

9. On bare reading of the provisions it can safely be said that under Section 65 IPC, the imprisonment in default of fine cannot exceed one-fourth of maximum terms of imprisonment that can be awarded for the offence as the imprisonment in default of payment of fine is not a sentence. It is awarded only as measure to enforce payment of fine. It is a penalty which the person incurs on account of non payment of fine. But the term of imprisonment in default of payment of fine is not sentence.

10. So, the learned Magistrate had no discretion to award imprisonment in delicto of non payment of fine exceeding one-fourth of the substantive punishment awarded in respect of the offence.

11. Therefore, the sentence awarded for the charge under Section 3/10(A) and Section 7/14 of MZI Act be modified to this extent that in default to pay fine of Rs. 7 lakhs the appellant shall undergo simple imprisonment for three months and similarly for charge under Section 15(C) simple imprisonment is reduced to one month in default to pay fine of Rs. 25,000/-. However, this Court is not pleased to interfere into the punishment awarded against the appellant in so far

as charge under Section 14(A) Foreigners Act as amended read with Para 3 of FRA order, 1963 and for charge under section 50/51 Wild Life (Protection) Act are concerned.

12. Ergo the appeal is allowed in part.

13. Copy of this order be sent to the learned Additional Sessions Judge, A&N Islands, Port Blair for information and necessary action.

14. Urgent Photostat certified copy of this judgement be supplied, if applied for.