
(2013) 08 DEL CK 0154

In the Delhi High Court

Case No : Criminal Appeal No. 1103 of 2010

Unice Ada Jemor

APPELLANT

Vs

Customs

RESPONDENT

Date of Decision : 21-08-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 30, 313, 332
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21(c), 23(c), 28
Penal Code, 1860 (IPC) — Section 63, 64, 65, 66, 67

Citation : (2013) 08 DEL CK 0154

Hon'ble Judges : Sunita Gupta, J

Bench : Single Bench

Advocate : Dinesh Malik, for the Appellant; Pramod Bahuguna, for the Respondent

Final Decision : Disposed Off

Judgement

Sunita Gupta, J.—The appellant has preferred the present appeal against the judgment dated 27th March, 2010 and order on sentence dated 31st March, 2010 of Additional Sessions Judge, Delhi by which she was convicted for committing offence punishable u/s 21(c) and Section 28 r/w Section 23(c) of NDPS Act and sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 1 lac each, in default of payment of fine to undergo SI for six months. The appellant was apprehended from the Departure Hall at IGI Airport on 24th August, 2003 and was alleged to be in possession of Heroine weighing 1.690 kg by the Custom Authorities. In order to substantiate its case, prosecution examined 14 witnesses besides one court witness. Statement of the accused was recorded u/s 313 Cr. P.C. No defence evidence was led. After considering the facts on record and appreciating the arguments of the concerned parties, vide impugned order, the appellant was held guilty of being found in possession of Heroine weighing 1.690 kg which she was attempting to export out of India as she was bound to fly to Amsterdam by KLM Flight No. 872 dated 25th

August, 2003. As such, she was convicted for the offence punishable u/s 21(c) and Section 28 r/w Section 23(c) NDPS Act. Being aggrieved, the appellant has preferred the present appeal.

2. During the course of arguments, learned counsel for the appellant, on instructions from the appellant, submitted that he does not challenge the conviction of the appellant for the offence punishable u/s 21(c) and Section 28 r/w Section 23(c) of NDPS Act. He, however, prays for modification of the order on sentence as the appellant has already undergone 9 years 11 months and 21 days as per the nominal roll. The appellant is very poor and is unable to deposit the amount of fine. Further, she is a chronic patient of various deceases due to HIV+.

3. Reliance was placed on Shahejadjkhan Mahebubkhan Pathan Vs. State of Gujarat, and Raj Kumar Vs. State, Crl. Appeal No. 63/2006.

4. I have considered the submissions of the parties and have examined the trial court record.

5. Since the appellant has not opted to challenge the findings of the learned Trial Court on conviction u/s 21(c) and Section 28 r/w Section 23(c) of NDPS Act, the order of conviction of the Trial Court stands confirmed.

6. As regards the quantum of sentence, the appellant was sentenced to undergo rigorous imprisonment for 10 years each and both the substantive sentences were ordered to run concurrently. As per the nominal roll dated 17th August, 2013, the appellant has almost served the substantial sentence inasmuch as she remained in custody for a period of 9 years 11 months and 21 days.

7. As per the report, she was convicted in FIR 218/06 u/s 332, PS Hari Nagar and the sentence has already expired. However, her overall conduct has been reported to be satisfactory. She is also suffering from HIV+. As such, considering all these facts and circumstances of the case and in the interest of justice, the order of substantive sentence under both the sections is maintained as it is the minimum sentence, i.e., RI for 10 years.

8. In the case of Shahejadjkhan (supra) relied upon by the learned counsel for the appellant, Hon"ble Supreme Court reduced the sentence from 15 years to 10 years as the appellant therein had already served nearly 12 years in jail. The order on payment of fine of Rs. 1,50,000/- was upheld but default sentence was reduced from RI for 3 years to RI for 6 months. It was observed that:-

The term of imprisonment in default of payment of fine is not a sentence. To put it clear, it is a penalty which a person incurs on account of non-payment of fine. On the other hand, if sentence is imposed, undoubtedly, an offender must undergo unless it is modified or varied in part or whole in the judicial proceedings. However, the imprisonment ordered in default of payment of fine stands on a different footing. When such default sentence is imposed, a person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. Accordingly, he can always avoid to

undergo imprisonment in default of payment of fine by paying such an amount. In such circumstances, we are of the view that it is the duty of the Court to keep in view the nature of offence, the circumstances in which it was committed, the position of the offender and other relevant considerations such as pecuniary circumstances of the accused person as to character and magnitude of offence before ordering the offender to suffer imprisonment in default of payment of fine. The provisions of Sections 63-70 of IPC make it clear that an amount of fine should not be harsh or excessive. We also reiterate that where substantial term of imprisonment is inflicted excessive fine should not be imposed except in exceptional cases.

9. This judgment was followed in Raj Kumar (Supra) by this Court. While maintaining the substantive sentence, the default sentence was reduced from 6 months to 3 months.

10. Taking into consideration Section 30 of Cr. P.C. and judgment of Hon''ble Supreme Court followed by this Court, the default sentence of 1 year each is reduced to 3 months each. It is ordered that the appellant shall pay a fine of Rs. 1 lac and in default of payment of fine, she shall undergo SI for a period of 3 months each on both counts.

11. The appeal filed by the appellant is disposed of in the above terms. Pending applications also stand disposed of.

12. A copy of the order be sent to Superintendent, Tihar Jail, who shall send a copy of same to the appellant also. Copy of the order along with trial court record be sent back to the Trial Court.