

IBRAHIM

v

STATE OF RAJASTHAN

[M. HIDAYATULLAH AND N. RAJAGOPALA AYYANGAR, JJ.]

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Foreigners Act, 1946 (31 of 1946), ss. 2(a) 3.9 and 14—Whether a person is a foreigner has to be decided in relation to the time of the offence—The fact that he was not a foreigner before the time of offence not material—Onus of proof on the accused—Citizenship Act, 1955 (LVII of 1955). s. 9(2).

The appellant, a Pakistani National originally came over to India on a Pakistani Passport and on the strength of visa. He was found to be overstaying in India and he was deported on April 21, 1957. Subsequently on finding him again in India he was charged with an offence of having entered India without a passport in contravention of s. (2)(a) of the Foreigners Act, 1946. His defence was that he had been in India from his birth and that the person who was said to have been deported in 1957 was some other and not himself. The trial court accepted this defence and acquitted him. The State appealed to the High Court and the High Court reversed the finding of the lower court and held him guilty of the offence charged. The present appeal was filed on a special leave granted by this Court.

The first contention of the appellant was that the High Court was wrong in reversing the finding of the trial court on the issue of the identity of the appellant. Secondly it was submitted that under s. 2(2) of the Foreigners Act as it stood before the Amendment which came into force on January 19, 1957 the appellant though a Pakistani citizen was not a "foreigner" and hence his entry into India before that date would not constitute an offence. It was contended further that the courts had no jurisdiction to determine whether the appellant was or was not a foreigner by reason of the provision of s. 9(2) of the Indian Citizenship act 1955.

Held: The appellant was the person who was deported on April 21, 1957 and the finding of the High Court on the question of his identity was correct.

(ii) If on the date when the offence is committed a person is "a foreigner" as defined by the Act, it would be no excuse for him to say that on an earlier date he was not foreigner. Since the appellant was deported in April 1957 and he came back to India subsequently without a passport he was a foreigner under the amendment provision which came into force on January 19, 1957 had committed an offence under s. 3 of the Foreigners Act.

(iii) Under s. 9 of the Foreigners Act the onus is upon the person who is accused under the Act to prove that he is not a foreigner. It is only where there is proof that a person is, to start with a citizen of India and it is alleged that he has lost his Indian Citizenship by reason of acquiring the nationality of the foreign State that any question of invoking the provisions of s. 9(2) of the Citizenship Act arises. In the present case the appellant a Pakistani national came to India originally with a Pakistani Passport and after his deportation in April 1957 came back to India without a passport and hence he cannot invoke s. 9(2) of the Citizenship Act and he had committed an offence under s. 3(2)(a) of the Foreigners Act.

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CRIMINAL APPELLATE JURISDICTION: Criminal Appeals No. 14 of 1963. Appeal by special leave from the judgment and order dated November 9, 1962 of the Rajasthan High Court in D.B. Criminal Appeal No. 502 of 1961.

S. Shaukat Hussain, for the appellant.

H. R. Khanna and *S. P. Nayyar*, for the respondent.

March 24, 1964. The Judgment of the Court was delivered by

Ayyangar, J.

AYYANGAR, J.—This appeal, by special leave, against the judgment of the High Court of Jodhpur raises for consideration the legality of the conviction of the appellant for a contravention of s. 3 of the Foreigners Act (Act XXXI of 1946) which is an offence under s. 14 of that Act. The relevant portion of s. 3 enacts:—

- “3. (1) The Central Government may by order make provision, either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigners, for prohibiting regulating or restricting the entry of foreigners into India or other departure therefrom or their presence or continued presence therein.
- (2) In particular and without prejudice to the generality of the foregoing power, orders made under this section may provide that the foreigner:—
- (a) shall not enter India or shall enter India only at such times and by such route and at such port or place and subject to the observance of such conditions on arrival as may be prescribed;
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Section 14 reads:

- “14. If any person contravenes the provisions of this Act or of any order made thereunder, or any direction given in pursuance of this Act or such order, he shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine; and if such person has entered into a bond in pursuance of clause (f) of subsection (2) of section 3, his bond shall be forfeited, and any person bound thereby shall pay the penalty thereof, or show cause to the satisfaction of the convicting Court why such penalty should not be paid.”

The facts giving rise to the appeal are briefly these: The case of the prosecution was that the appellant—Ibrahim, s/o Miru—a resident of Rajgarh in Bikaner Division—was a Pakistani national who had originally come over to India on a Pakistani passport issued to him in 1954 and on the strength of a visa granted in December, 1956. He was then found to be overstaying in India since February 18, 1957 and an order was thereupon passed in March, 1957 for his deportation. This order was given effect to and on April 21, 1957 he was taken across the Pakistan border at the Check Post Munabao by the Indian police officials and deported. Then followed the events which have given rise to the present proceedings. Subsequent to his deportation to Pakistan and on a date as regards which the prosecution had no information, the appellant had, unknown to the Indian authorities, managed to come over to India clandestinely and he was found again in Rajgarh. On seeing him there the Sub-Inspector of Churu made a report to the Station House Officer of Rajgarh by which he drew the latter's attention to the fact that the appellant who had been deported had managed to cross the border on the side of Ganganagar and had re-entered India and he brought this to his notice for the purpose of action being taken. The accused was thereupon apprehended and was charged with an offence of having entered India without a passport in contravention of s. 3(2)(a) of the Foreigners Act.

The defence of the appellant was simple. He said he had been in India all the time since birth, had never gone to Pakistan and so had never come here in 1957 with a Pakistani passport, was never deported therefrom and therefore there was no question of his having entered India without a passport. In other words, his defence was that he was not the person who had come over in 1957 and had been deported to Pakistan in April 1957.

In support of their case the prosecution proved the order of Government by which Ibrahim, son of Meeru of Rajgarh had been directed to be deported in which is found a reference to his having come over to India with a passport and having overstayed the time permitted by the visa, the general diary of the Emigration Check Post, Munabao dated April 21, 1957 which recited that on April 21, 1957 the deportee— Ibrahim—had come with a Head Constable and that the deportation order had been given effect to, and an entry in the deportation register of the Check Post which recited the date and number of the Pakistani passport and the authority by which the order of deportation had been passed and the carrying out of the actual deportation. In order to establish the identity of the appellant with Ibrahim mentioned in these documents the prosecution examined two witnesses— Shiv Rattan who was the Police Inspector in-charge of the

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Munabao Check Post at the relevant date (P.W. 2) and Govind Singh who was a peon who was posted at the police lines at Churu and who accompanied Dube Singh, Head Constable when Ibrahim was taken from Rajgarh to the Check Post at Munabao for being deported. These two witnesses identified the appellant who was present in Court Ibrahim whom they had seen off at the border Check Post in execution of the order to deport. The learned Magistrate, however, was not satisfied with this proof of identity, because he was of the view that the two prosecution witnesses—P.Ws 2 and 3—could not, after the lapse of 4 years, be believed when they said that they remembered that the appellant was Ibrahim whom they had seen deported at the Check Post. The learned Magistrate also held that there was some discrepancy in the father's name of Ibrahim in one of the documents produced by the prosecution which, according to him, did not tally with the name of the appellant's father. On these grounds the learned Magistrate acquitted the accused.

The respondent-State filed an appeal to the High Court against this order of acquittal and the learned Judges holding that there could be no doubt about the identification by P.W.s 2 and 3 of the appellant as the Ibrahim whom they had deported, reversed the order of acquittal and held the appellant guilty of the offence charged and sentenced him to a term of imprisonment. It is from this judgment of the High Court that the present appeal has been filed pursuant to leave granted by this Court.

The first point urged by learned counsel for the appellant was as regards the identity of the appellant with Ibrahim. On this we are quite satisfied that the learned Judges were correct in their appreciation of the evidence in the case. Both the witnesses—P.W.s 2 and 3—are public servants and there is no reason why they should depose falsely against the appellant. The documents produced as regards which there is no challenge give the name of the person deported as Ibrahim, his father as Miru and besides, they specify his age as 27 which, it is conceded, tallies with the description of the appellant. The only point that was suggested by learned Counsel was that in Ex. P-I—the deporting register at the Check Post—the name of Ibrahim's father was stated to have been entered as Murra and not Miru. When, however, it was pointed out to learned Counsel during the course of the arguments that there was a possibility of these words written in Urdu being wrongly transliterated in the English learned Counsel did not persist in the point. If then Ibrahim s/o Miru, aged 27 was deported and there is evidence adduced which has been accepted by the High Court that it was the appellant that was deported on the former occasion, we find no substance in the argument as regards this question of identity.

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The second submission of learned counsel was based on the fact that under s. 2(a) of the Foreigners Act, 1946, as originally enacted, a citizen of Pakistan which was a member of the British Commonwealth was not "a foreigner" within that Act and that citizens of Pakistan became "foreigners" only by virtue of the amendment effected by Central Act XI of 1957 which came into force on January 19, 1957. The argument based on this feature was as follows: A person who can be held guilty of a contravention of s. 3 of the Foreigners Act is only a "foreigner". Even according to the case of the prosecution the appellant had come over to India on the strength of a Pakistani passport issued in 1954 and under a visa of December, 1956. It must, therefore, be taken that he had crossed over to India before the 19th January, 1957. On that date he was not a foreigner, though a Pakistani, as he was a citizen of a Commonwealth country. He could not, in law, become a "foreigner" subsequently and no action could be taken against him on the footing that he had become a "foreigner". We see no merit in this submission. A prima facie reading of the Foreigners Act would show that if on the date when the offence is committed a person is a "foreigner", as defined by the Act, it would be no excuse for him to say that on an earlier date he was not a foreigner. But it is, however, unnecessary to consider this point further because, firstly, there is no proof on the record before us that the appellant entered India before January 19, 1957. But even if he had it would only mean that the earlier order of deportation which was passed in March/April 1957 was a wrong order and that certainly is not a matter with which we are concerned, because it is common ground, if the identity of the appellant is held to be established, that the appellant was deported to Pakistan in April, 1957. He could come over to India only subsequent to April, 1957 and if he did come over it is also common ground that he came over without a passport. As the date upon which he could have come over was certainly after April, 1957 by which date s. 2(a) of the Foreigners Act containing the definition of "Foreigner" had been amended, the appellant was a foreigner when he came into India without a valid passport and visa in contravention of the provisions of s. 3 of the Foreigners Act, and that is the offence with which he is now being charged. We find therefore that there is no substance in this point.

Lastly, it was submitted that the Courts could have no jurisdiction to determine whether the appellant was a "foreigner" and that their jurisdiction in that regard was barred by the provisions of s. 9(2) of the Citizenship Act, 1955. This argument proceeds upon a misapprehension of the legal position. In the first place, under s. 9 of the Foreigners Act the onus is upon the person who is accused under that Act to

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prove that he is not a foreigner. In the present case once the plea regarding the absence of identity of the appellant with the deportee of April, 1957 was rejected it could not be suggested that the appellant was ever an Indian citizen. It is only where there is proof that a person is to start with, a citizen of India and it is alleged that he has lost his Indian citizenship by reason of acquiring the nationality of a foreign State that the question of invoking the provisions of s. 9(2) of the Citizenship Act arises. That is not the case here. The case of the prosecution was that the appellant was a Pakistani national who had come over to India on a valid Pakistani passport in 1957 and had been legally deported out of India in April, 1957. On those facts there is no question of s. 9(2) of the Citizenship Act being invoked or coming into play. The offence charged was that having been deported once out of India, he again entered India without proper travel documents in violation of the provisions of s. 3(2)(a) of the Foreigners Act.

There was one further point that was mentioned by learned Counsel but which we did not permit him to argue. Learned Counsel said that the order now passed was one by the State Government and that there was no proof that the Central Government had delegated this power to the State Government. Apart from the point being without substance in view of the terms of s. 3(2)(a) we have extracted earlier, and which was the offence with which the appellant was charged, this point about delegation was never urged in the Courts below and consequently no evidence was led to establish delegation under s. 12 of the Act if that was necessary for sustaining the prosecution in the present case. As this point was not raised in the Courts below we declined to permit learned Counsel to raise it before us.

We consider that the learned Judges were right in holding that the prosecution had established the offence charged against the accused.

There are no merits in the appeal which fails and is dismissed.

Appeal dismissed..