

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ Crl.App. No. 436/2007 & Crl.M.A.No.8392/2008

% Reserved on : 06.01.2009
Date of decision : 16.01.2009

RAJENDER KUMAR ... Appellant
Through: Mr. Anish Dhingra, adv.

Versus

STATE ...Respondent
Through: Mr. Navin Sharma, APP

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

MOOL CHAND GARG, J.

1. This order shall dispose of a Criminal Miscellaneous Application filed in the aforesaid criminal appeal against the judgment dated 25.05.2007 convicting the appellant under Section 18(b) of the 'The Narcotic Drugs and Psychotropic Substances Act, 1985' (hereinafter referred to as the NDPS Act) and sentencing him to undergo R.I. for 10 years and to pay fine of Rs. 1,00,000/- in terms of the order dated 28.05.2007 passed by a Session Judge, Delhi in S.C.No.65/N/2003 on account of being found in possession of 6.550 kg of opium. The appellant is in JC since 22.08.2003 and has assailed the order of conviction and

sentence in his appeal on number of grounds mentioned therein but vide his application dated 07.07.2008 (Crl.M.A.No.8392/2008), the petitioner has confined his relief made in the appeal to only reduction of sentence to the period already undergone and for waiving of the payment of Rs. 1,00,000/- as fine.

2. It is his case that out of 6.550kg of the manufactured drugs allegedly seized from his possession, the actual quantity of morphine was only 91.7 gms which is below commercial quantity. It has been submitted that in view of the amended NDPS Act, 2001, different punishments have been provided for different quantities recovered from the accused persons. Thus, the appellant become entitled to the benefit of the aforesaid amendment as the total quantity of morphine which has been discovered from the mixture seized from him is only 91.7 gms which cannot be termed as the commercial quantity attracting a minimum sentence of 10 years as provided for under Section 21 (C) of the NDPS Act and would fall in intermediary quantity i.e. more than small quantity and commercial quantity. He, therefore, prays that the benefit of a lesser sentence, and waiver of fine or the punishment in lieu thereof as has been done in the case of Manohar Lal Yadav Vs. State reported as **2008 (2) JCC (Narcotics) 65**.

4. The appellant has also relied upon a judgment delivered by

the Apex Court in the case of E.Micheal Raj V. Intelligence Officer, Narcotics Control Bureau **2008 V AD (SC) 22** wherein it was held that only the actual content by weight of the narcotic drugs is relevant for the purpose of determining whether it is small quantity or commercial quantity. If the quantity recovered from the appellant would be less than commercial quantity and the accused/applicant becomes entitled to reduction in sentence.

5. The prayers made by the appellant has been opposed by the learned counsel for the State who has relied upon a judgment delivered by this Court in the case of Mohd. Irfan Vs. State (NCT of Delhi) Crl.App.No.460/2005 decided on 14.12.2005 where also the effect of the amended Act has been taken into consideration and it has been held that despite percentage of morphine was 4% in the sample taken out of the substance seized from the accused, the total quantity has to be considered as the quantity recovered for the purpose of imposing sentence, this is where a different view was taken by this Court. In the aforesaid judgment the learned Single Judge of this Court while taking note of the amendment of the NDPS Act and the provisions contained under Section 21 of the same observed:

28. Lastly, counsel for the appellant has tried to urge that the presence of morphine in the substance to the extent of 4% goes show that the substance seized was, in fact, morphine and that the entire approach adopted by the prosecution in charging the appellant with unlawful possession of opium under the NDPS Act is wrong headed. He then sought to build his further by saying that since the quantity of morphine was 4%, therefore, the quantity of the offending substance seized from him ought to have been determined by

extrapolation of this percentage upon the entire quantity of the substance seized i.e. 4 kgs. I do not find any force in this argument which is merely a rope of sand for the reason that morphine is always present in opium and in fact Section 2(xv) defines opium as:

“(a) The coagulated juice of the opium poppy; and
(b) any mixture, with or without any neutral material, of the coagulated juice of the opium poppy,
But does not include any preparation containing not more than 0.2 per cent of morphine.

29. A reading of this definition shows clearly that for a substance to be opium as defined under the Act, it must contain more than 0.2% of morphine. In fact, in Lyon's Medical Jurisprudence for India (10th Edition) at page 694, it has been stated that opium:

“contains meconic acid and a number of alkaloids, those present in largest quantity being narcotine and morphine.”

“.....The percentage of morphine in different samples of opium varies from about 2.5 to 15 or even 20%. Indian opium often contains under 5 and seldom over 9% of morphine.”

30. In this case, the substance has been found to contain 4% of morphine. It satisfies that definition of opium in Section 2(xv) of the NDPS Act, therefore, the substance recovered is clearly opium. Under item 92 of the Notification dated 19th October, 2001, issued under Section 2 of the NDPS Act, specifying small quantity and commercial quantity, commercial quantity has been stipulated to be 2.5 kgs. And above. The quantity recovered from the appellant is stated to be 4 kgs. by weight. It is clearly a commercial quantity. Under Section 18(b) of the NDPS Act, the minimum punishment for possessing commercial quantity of opium is fixed at 10 years and fine which must not be less than Rs.1.00 lac. It is, therefore, clear that by sentencing the appellant to rigorous imprisonment for 10 years and a fine of Rs.1.00 lac and in case of default in payment thereof, to undergo further simple imprisonment for one year, the learned Trial Court has awarded the appellant the minimum punishment attracted to his case

Learned counsel appearing for the petitioner/applicant however submits that in view of the judgment delivered in the case of Manohar Lal Yadav & E. Micheal Raj (Supra), the judgment of the learned Single Judge in Mohd. Irfan's Case (Supra) does not hold field as it is now per inquirium to the views taken by the Apex Court in E. Micheal Raj's Case and the views expressed in Manohar Lal Yadav's Case (Supra)

6. No reply has been filed to the application filed by the appellant by the State. As such the facts as mentioned by the appellant in para 2 of his application about the percentage of morphine found in the sample being 91.7gms out of total recovery of 6.550kg cannot be disputed. The appellant in this case is in jail since 02.08.2003 and, therefore, has already suffered more than 5 years of imprisonment, moreover he has also not paid the fine.

7. The only question which, thus, arises for determination is as to whether the appellant/applicant is entitled to the benefit of the amended Act by holding that the substance recovered from his possession can be taken to be containing a lesser quantity of morphine so as to take it out of the commercial quantity.

8. The Apex Court in E. Micheal's case (supra) has made following observations after taking note of the provisions of the amended Act and the contents of the notification No. S.O. 1055(E) dated 19.10.2001:

"2. that on 5.3.2001, the Intelligence Officer was informed by an informant that two persons with certain drugs would be arriving by a Tamil Nadu Transport Corporation Bus at Thiruvananthapuram Bus Stand. The Officer along with other persons and the informant went to the bus stand and waited for the bus. At about 9.00 a.m., the two accused alighted from the Tamil Nadu Transport Corporation bus. They were identified by the informant. They were intercepted by the officials. The officials disclosed their identity and the accused were searched. When asked about possession of narcotic drugs, it was admitted by the accused that they were carrying 4 kgs. of heroin and they handed over the bag to the Officer. The bag contained two packets wrapped in Tamil newspapers secured with brown adhesive tape in which light grey powder was found. Two samples of 5 gms. each from both the drug packets were packed, sealed and sent for testing to the Laboratory. The accused were arrested, but the second accused escaped while on the way to produce them before the Magistrate. On 26.3.2001, the Customs House Laboratory, Cochin sent a report confirming the samples as answering to the test of crude heroin, a narcotic drug covered under the NDPS Act. The report further said that the Laboratory was not equipped to conduct a quantitative

test. Thus, the samples were sent for quantitative test. On 22.2.2002, a quantitative test was done in the Customs Laboratory, Chennai where the purity was tested and the quantitative test report indicated as follows:

S. No.	Marking on the cover	Lab No.	Wt of the sample received with plastic cover	Wt of the remnant received with plastic cover	Purity
1.	S1	235	5.6g	5.0 g	1.4%
2.	S3	236	4.9g	4.6g	1.6%”

3. On the basis of the aforesaid recovery the appellant was convicted by the Sessions Judge under Section 21(c) of the NDPS Act by holding that the quantity which was recovered from the appellant in that case containing more than 2.0% of morphine, the whole of it will have to be taken as the manufactured drug and, thus, the appellant was awarded the minimum sentence of 10 years along with fine of Rs. 1,00,000/. On an appeal the High Court also upheld the sentence by holding that “Section 21 of the NDPS Act when read with Section 2(xi) which defines ‘manufactured drug’, makes it evident that the packet seized from the appellant is a manufactured drug. The offence can be in respect of the manufactured drug as well as preparation of manufactured drug. “Preparation” has been defined in Section 2(xx). Again, any mixture of narcotic drug with other substances will also come within the purview of Section 21 of the NDPS Act, so the rate of purity becomes irrelevant. The purity test does not advance the case of the accused”. As per the High Court, it is the whole quantity of mixture which has to be taken into consideration for imposing the punishment under Section 21 of the NDPS Act. The High Court maintained the conviction and sentence awarded by the Special Judge.

4. The only submission made by Shri K.V. Viswanathan, learned Counsel for the appellant is confined to the limited issue relating to sentence of the appellant under Section 21 of the NDPS Act. As per the learned Counsel, the conviction and sentence of the appellant is contrary to law because the total quantity of contraband seized from him was 4.07 kgs. Since the purity of heroin is 1.4% and 1.6% respectively in two samples, therefore the quantity of heroin in possession is only 60 gms. $[(1.4+1.6)/2 = 1.5\% \text{ of } 4.07 \text{ kgs.} = 60 \text{ gms.}]$. Thus, the total quantity of heroin seized is below 250 gms., i.e. below the commercial quantity. It is submitted that it is not the total weight of the substance allegedly recovered that is material, but the percentage content of heroin translated into weight that is relevant.

5. On the other hand, Shri Vikas Sharma, learned Counsel appearing for the respondent urged that it is only the weight of the substance found in possession of the appellant and recovered from him ought to be seen, and once the substance tested positive for heroin, its percentage content in the substance was irrelevant, the entire substance would be viewed as a narcotic drug and consequently the total weight of the substance ought to be taken into consideration for determining whether it was a ‘small quantity or a ‘commercial quantity.

6. The provisions of the NDPS Act were amended by the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001 (Act 9 of 2001) (w.e.f 2.10.2001), which rationalized the punishment structure under the NDPS Act by providing graded sentences linked to the quantity of narcotic drugs or psychotropic substances carried. Thus, by the Amending Act, the sentence structure changed drastically. ‘Small quantity and ‘commercial quantity were defined under Section 2(xxiii a) and Section 2(viia) respectively. New Section 21 also provides for proportionate sentence for possessing small, intermediate and commercial quantities of offending material. As per Entry 56 of the Notification dated 19.10.2001 issued by the Central Government which deals with heroin, small quantity has been mentioned as 5 gms. and commercial quantity has been mentioned as 250 gms. So, the basic question for decision is whether the contravention involved in this case is small, intermediate or commercial quantity under Section 21 of the

NDPS Act, and whether the total weight of the substance is relevant or percentage of heroin content translated into weight is relevant for ascertaining the quantity recovered from the accused.

7. To appreciate the arguments of the parties, the relevant Sections of the NDPS Act have to be looked into, which are as under:

Section 2(via) (inserted by Amending Act 9 of 2001 w.e.f 2.10.2001)

'Commercial quantity', in relation to narcotic drugs and psychotropic substances, means any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette;

Section 2(xxiii) (inserted by Amending Act 9 of 2001 w.e.f 2.10.2001) 'Small quantity', in relation to narcotic drugs and psychotropic substances, means any quantity lesser than the quantity specified by the Central Government by notification in the Official Gazette;

Section 2(xvi)

'Opium derivative' means-

(a) Medicinal opium, that is, opium which has undergone the processes necessary to adapt it for medicinal use in accordance with the requirements of the Indian Pharmacopoeia or any other Pharmacopoeia notified in this behalf by the Central Government, whether in powder form or granulated or otherwise or mixed with neutral materials;

(b) Prepared opium, that is, any product of opium by any series of operations designed to transform opium into an extract suitable for smoking and the dross or other residue remaining after opium is smoked;

(c) Phenanthrene alkaloids, namely, morphine, codeine, thebaine and their salts;

(d) Diacetylmorphine, that is, the alkaloid also known as diamorphine or heroin and its salts; and

(e) All preparations containing more than 0.2 percent of morphine or containing any diacetylmorphine;

Section 2(xi) 'Manufactured drug' means -

(a) All coca derivatives, medicinal cannabis, opium derivatives and poppy straw concentrate;

(b) Any other narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare to be a manufactured drug;

but does not include any narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare not to be a manufactured drug.

Section 21. Punishment for contravention in relation to manufactured drugs and preparations [substituted by the Amending Act 9 of 2001, w.e.f. 2.10.2001]

Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any manufactured drug or any preparation containing any manufactured drug shall be punishable, -

(a) where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both;

(b) where the contravention involves quantity, lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years, and with fine which may extend to one lakh rupees;

(c) where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.

8. The Statement of Objects and Reasons concerning the Amending Act of 2001 is as follows:

Narcotic Drugs and Psychotropic Substances Act, 1985 provides deterrent punishment for various offences relating to illicit trafficking in narcotic drugs and psychotropic substances. Most of the offences invite uniform punishment of minimum ten years' rigorous imprisonment which may extend up to twenty years. While the Act envisages severe punishments for drug traffickers, it envisages reformatory approach towards addicts. In view of the general delay in trial it has been found that the addicts prefer not to invoke the provisions of the Act. The strict bail provisions under the Act add to their misery.

Therefore, it is proposed to rationalise the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentences, the addicts and those who commit less serious offences are sentenced to less severe punishment. This requires rationalisation of the sentence structure provided under the Act. It is also proposed to restrict the application of strict bail provisions to those offenders who indulge in serious offences.

9. The entry of the Notification under which the substance found in possession of the appellant falls is Entry 56 or Entry 239. The relevant portion of the Notification dated 19.10.2001 issued by the Central Government reads as under:

S.O. 1055(E), dated 19-10-2001. - In exercise of the powers conferred by Clauses (viia) and (xxiia) of Section 2 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) and in supersession of Ministry of Finance, Department of Revenue Notification S.O. 527(E) dated 16th July, 1996, except as respects things done or omitted to be done before such supersession, the Central Government hereby specifies the quantity mentioned in columns 5 and 6 of the Table below, in relation to the narcotic drug and psychotropic substance mentioned in the corresponding entry in columns 2 to 4 of the said Table, as the small quantity and commercial quantity respectively for the purposes of the said clauses of that section.

1	2	3	4	5	6
Sl. No.	Name of Narcotic Drug and Psychotropic Substance [International non-proprietary name (INN)]	Other non-proprietary name	Chemical Name	Small quantity (in gm.)	Commercial Quantity (In gm./kg.)
56.	Heroin	Diacetylmorphine	5	5.0 gm	239

Any mixture or preparation that of with or without a neutral material, of any of the above drugs.

* Lesser of the small quantity between the quantities given against the respective narcotic drugs or psychotropic substances mentioned above forming part of the mixture.

** Lesser of the commercial quantity between the quantities given against the respective narcotic drugs or psychotropic substances mentioned above forming part of the mixture.

10. The possession of offending substance would be considered an

offence punishable under the NDPS Act, as heroin is an opium derivative as per Section 2(xvi) which says that 'all preparations containing more than 0.2 percent of morphine or containing any diacetylmorphine' is an opium derivative. Further, according to Section 2(xi), all opium derivatives fall under the category of manufactured drug. Thus, we conclude that the offending substance is an opium derivative and hence a manufactured drug, the possession of which is in contravention of the provisions of Section 8 of the NDPS Act which prohibits certain operations to the effect that no person shall produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or tranship any narcotic drug or psychotropic substance.

11. In the present case, the opium derivative which has been found in possession of the accused-appellant is prohibited under Section 8 of the NDPS Act and thus punishable under Section 21 thereof. The question is only with regard to the quantum of punishment.

12. As a consequence of the Amending Act, the sentence structure underwent a drastic change. The Amending Act for the first time introduced the concept of 'commercial quantity' in relation to narcotic drugs or psychotropic substances by adding Clause (viia) in Section 2, which defines this term as any quantity greater than a quantity specified by the Central Government by notification in the Official Gazette. Further, the term 'small quantity' is defined in Section 2, Clause (xxiia), as any quantity lesser than the quantity specified by the Central Government by notification in the Official Gazette. Under the rationalised sentence structure, the punishment would vary depending upon whether the quantity of offending material is 'small quantity', 'commercial quantity' or something in-between.

13. It appears from the Statement of Objects and Reasons of the Amending Act of 2001 that the intention of the legislature was to rationalize the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentence, the addicts and those who commit less serious offences are sentenced to less severe punishment. Under the rationalised sentence structure, the punishment would vary depending upon the quantity of offending material. Thus, we find it difficult to accept the argument advanced on behalf of the respondent that the rate of purity is irrelevant since any preparation which is more than the commercial quantity of 250 gms. and contains 0.2% of heroin or more would be punishable under Section [21\(c\)](#) of the NDPS Act, because the intention of the legislature as it appears to us is to levy punishment based on the content of the offending drug in the mixture and not on the weight of the mixture as such. This may be tested on the following rationale. Supposing 4 gms. of heroin is recovered from an accused, it would amount to a small quantity, but when the same 4 gms. is mixed with 50 kgs. of the powdered sugar, it would be quantified as a commercial quantity. In the mixture of a narcotic drug or a psychotropic substance with one or more neutral substance/s, the quantity of the neutral substance/s is not to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance. It is only the actual content by weight of the narcotic drug which is relevant for the purposes of determining whether it would constitute small quantity or commercial quantity. The intention of the legislature for introduction of the amendment as it appear to us is to punish the people who commit less serious offences with less severe punishment and those who commit grave crimes, such as trafficking in significant quantities, with more severe punishment.

14. In the case of ***Ouseph alias Thankachan v. State of Kerala*** (2004) 4 SCC 446, this Court in para 8 has held as under:

The question to be considered by us is whether the psychotropic substance was in a small quantity and if so, whether it was intended for personal consumption. The words 'small quantity' have been specified by the Central Government by the notification dated 23-7-1996. Learned Counsel for the State has brought to our notice that as per the said notification small quantity has been specified as 1 gram. If

so, the quantity recovered from the appellant is far below the limit of small quantity specified in the notification issued by the Central Government. It is admitted that each ampoule contained only 2 ml and each ml contains only 3 mg. This means the total quantity found in the possession of the appellant was only 66 mg. This is less than 1/10th of the limit of small quantity specified under the notification.

From the aforesaid decision, we find that the Court has taken the quantity of the narcotic drug or psychotropic substance found in the mixture, relevant for the purpose of imposition of punishment.

17. In the present case, the narcotic drug which was found in possession of the appellant as per the Analyst's report is 60 gms. which is more than 5 gms., i.e. small quantity, but less than 250 gms., i.e. commercial quantity. The quantity of 60 gms. is lesser than the commercial quantity, but greater than the small quantity and, thus, the appellant would be punishable under Section [21\(b\)](#) of the NDPS Act. Further, it is evident that the appellant is merely a carrier and is not a kingpin.

18. In these circumstances, the ends of justice would be subserved if we reduce the sentence of the accused-appellant to 6 years rigorous imprisonment with fine of Rs. 20,000/- and in default of payment of fine rigorous imprisonment for six months. We order accordingly.

9. The issue also come up for consideration before another Learned Single Judge of this Court in the case of **Ansar Ahmed Vs. State 123 (2005) DLT 563.** In the said case, while disposing of number of bail applications and taking into consideration the effect of the amendment as well as the notification issued by the Government, including an earlier judgment of the Apex Court delivered in the case of **Basheer Vs. State of Kerala (2004) 3 SCC 609.** It was observed as under:

A2. Coming back to the common issue in all these bail applications, the learned counsel appearing for the petitioners argued that it is not the total weight of the substance allegedly recovered that is material but, the percentage content of Heroin translated into weight that is relevant. On the other hand, the learned counsel who appeared for the State urged that only the weight of the substance recovered ought to be seen. They submitted that once the substance tested positive for Heroin, its percentage content in the substance was irrelevant; the entire substance would be viewed as a narcotic drug and consequently the total weight of the substance ought to be taken into consideration for determining whether it was a 'small quantity' or a 'commercial quantity'.

A3. As pointed out by the Supreme Court in **Basheer v. State of Kerala(2004) 3 SCC 609**, the NDPS Act contemplates severe and deterrent punishments as is evident from the minimum terms of imprisonment prescribed in Sections [21](#) and [22](#) thereof. It was found that a large number of cases, in which the accused were found to be in possession of a small quantity of drugs, were really cases of drug addicts and not of traffickers in narcotic drugs and psychotropic

substances. As a result of the stringent bail provisions there were hardly any cases where such persons could obtain bail. Thus, trials were pending for long periods and the accused languished in jail. Under Section 27 of the Act of 1985, there was a marginal concession in favor of drug addicts by providing a reduced quantum of punishment if the accused could prove that the narcotic drug or psychotropic substance in his possession was intended for his personal consumption and not for sale or distribution.

A4. In *Basheer* (supra), the Supreme Court further pointed out that the provisions of the NDPS Act, 1985 were amended by the amending Act 9 of 2001, which rationalised the structure of punishment under the NDPS Act by providing graded sentences linked to the quantity of the narcotic drug or the psychotropic substance in relation to which the offence was committed. The application of strict bail provisions was also restricted only to those offenders who indulged in serious offences.

A6. In *Basheer* (supra), the Supreme Court observed:-

'5. As a consequence of the amending Act coming into force on 2-10-2001, the sentencing structure underwent a drastic change. The Act introduced the concept of 'commercial quantity' in relation to narcotic drugs or psychotropic substances by adding clause (vii-a) in Section 2, which defines this term as any quantity greater than a quantity specified by the Central Government by notification in the Official Gazette. Further, the expression 'small quantity' is defined in Section 2, clause (xxiii-a), as any quantity lesser than the quantity specified in the notification. Under the rationalised sentencing structure, the punishment would vary depending on whether the quantity of offending material was 'small quantity', 'commercial quantity' or something in between. This is the effect of the rationalisation of sentencing structure carried out by the amending Act 9 of 2001, in Section 27. A notification was issued on 9-10-2001, specifying in respect of 239 narcotic drugs and psychotropic substances, as to what would be 'small quantity' and 'commercial quantity'.

A7. I have heavily relied upon the Supreme Court decision in *Basheer* (supra) because it succinctly gives the genesis of the classification of narcotic drugs and psychotropic substances into 'small quantities' and 'commercial quantities' and the reasons and object for such classifications, namely, rationalisation of the sentencing structure. Let me now examine these expressions in greater detail. These expressions are defined under Sections 2(xxiii-a) and 2(vii-a) of the NDPS Act, which read as under:-

(xxiii-a) 'small quantity', in relation to narcotic drugs and psychotropic substances, means any quantity lesser than the quantity specified by the Central Government by notification in the Official Gazette.'

(vii-a) 'commercial quantity' in relation to narcotic drugs and psychotropic substances, means any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette.'

In this case also, the learned Single Judge after taking note of the observations which find mention in paragraph 9 of the judgment delivered in *E.Micheal Raj's Case* further observed:

A8. Upon a plain and uncomplicated reading of the above Entry No. 56 it is clear that the content of heroin to qualify as a 'small quantity' is less than 5 grams of it. The content of heroin in excess of 250 grams would qualify as a 'commercial quantity'. But, going back to our hypothetical case, heroin and some other substance are mixed together having a combined weight of 500 grams. As such, the learned counsel for the State submitted that Entry 239 would come into play and, as a consequence, the entire weight of the substance would have

to be taken. I am unable to agree with this reasoning. What Entry 239 deals with is a situation where two or more narcotic drugs or psychotropic substances are mixed or a preparation derived there from, with or without the addition of neutral material. It does not deal with a situation where a mixture or preparation contains only one narcotic drug or psychotropic substance Along with neutral material. To make things clear, let us suppose we have two narcotic drugs P and Q and some neutral material N. Entry 239 would apply to a situation where the mixture is of P and Q, with or without N. It would not apply where the mixture is of P and N or Q and N. In our prototype case, the mixture is of a neutral substance and heroin (a narcotic drug). Hence, Entry 239 would have no application. In fact, as rightly submitted by the learned counsel for the petitioners, even the specifications for small and commercial quantities in respect of Entry 239 favor such an interpretation. 'Small quantity' relative to Entry 239 means 'lesser of the small quantity between the quantities given against the respective narcotic drugs or psychotropic substances mentioned above forming part of the mixture'. This, in itself, contemplates a mixture of more than one narcotic drug or psychotropic substance. For example, if against a narcotic drug P, the small quantity prescribed is 5 grams and for narcotic drug Q, the small quantity specified is 1 gram, then, the small quantity for the mixture of P and Q (with or without a neutral substance) would be 1 gram being the 'lesser of the small quantity between the quantities given against the respective narcotic drugs or psychotropic substances mentioned above forming part of the mixture'. But, this Entry 239 would not come into play when the mixture is of a narcotic drug such as heroin and a neutral substance.

A9. It is, therefore, Entry 56 which shall apply. The quantities of heroin (diacetylmorphine) specified therein are by weight. Keeping in mind that the object of introducing this classification was to rationalise the sentencing structure 'so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentences, the addicts and those who commit less serious offences are sentenced to less severe punishment', it does appear to me that what has to be seen is the content of heroin by weight in the mixture and not the weight of the mixture as such. Otherwise, anomalous consequences would follow. While a recovery of 4 grams of heroin would amount to a small quantity, the same 4 grams mixed up with say 250 grams of powdered sugar would be quantified as a 'commercial quantity'! And, where would this absurdity stop? Suppose one were to throw a pinch of heroin (say 0.5 gram) into a polythene bag containing small steel ball bearings having a total weight of 1kg: would the steel ball bearings be also weighed in and it be declared that a commercial quantity (1000.5 grams) of heroin was recovered! Surely, it is only the content of heroin (0.5 gram) in the 'mixture' of heroin and steel ball bearings that is relevant? Clearly, then, it would qualify as a small quantity. thereforee, in a mixture of a narcotic drug or a psychotropic substance with one or more neutral substances, the quantity of the neutral substance or substances is not to be taken in considering whether a small quantity or a commercial quantity of the narcotic drug or psychotropic substance is recovered. Only the actual content by weight of the narcotic drug or the psychotropic substance (as the case may be) is relevant for determining whether it would constitute a 'small quantity' or a 'commercial quantity'.

10. The relevant observations made by this Court in the case of

Manohar Lal Yadav (supra) are as under:

"2. The learned counsel for the appellant states that the appellant has already undergone six years and nine months imprisonment till date. He submits that in view of the changed position in the law as regards the distinction between the small quantity and the commercial quantity, he does not press the appeal as regards the conviction but would urge that the sentence be reduced to the period already undergone by the appellant. He points out that the report of the

Central Revenue Control Laboratory (CRCL) in this case indicates that the percentage of Morphine content was 5.6 per cent and when calculated on the basis of total seized quantity of opium, this works out to 154 gms. Referring to the schedule to the notification of the Central Government in regard to the small and commercial quantity, he points out that at Serial No. 77 the commercial quantity for Morphine is shown as 250 gms and above. He submits that inasmuch as the morphine content in the instant case is 154 gms, the Appellant cannot be sentenced to the more severe sentence of 10 years rigorous imprisonment. He placed reliance on the order passed by this court in *Mohd. Yunus v. CBI 2008 (1)JCC(Narcotic) 33*.

3. The perusal of the Ex. Px being the report of the CRCL indicates that the percentage of the morphine is indeed 5.6 per cent. It is not disputed by the learned APP appearing for the State that this works out to 154 gms of morphine which less than the commercial quantity of 250 gm as indicated in the notification of the Central Government.

4. In view of the above facts, this Court is of the view that the benefit of the lesser punishment for a quantity less than commercial quantity will be available to the appellant. This also finds support in the order of this Court in *Mohd. Yunus v. CBI* following the judgment of the Supreme Court in *State through CBI v. Gyan Singh 1999 SCC (CrI) 1512*.

5. The appellant has already undergone a sentence of six years and nine months. The sentence awarded to the appellant by the learned ASJ is also accordingly modified. The appellant is sentenced to undergo six years and nine months rigorous imprisonment, which would include the period of default imprisonment in lieu of the payment of fine."

11. In view of the aforesaid view expressed by a learned Single Judge of this Court and the Apex Court in *E. Micheal Raj's Case* (Supra) which is also in line with earlier judgments of the Apex Court delivered in the case of *Bashir Vs. State of Kerala 2004 (3) SCC 609* and the judgment delivered by another Single Judge of this Court in the case of *Ansar Ahmed* (supra), the conclusions which may be derived at, are that the quantity which may be taken into consideration for the purpose of punishment under Section 21 would be the contents of heroine which may be found out of the total quantity of opium recovered from the accused which in this case was only 91.4gms out of the total opium seized from the petitioner to the tune of 6.550 kg and thus, the appellant is also entitled to similar benefits and therefore, the judgment delivered in the case of *Mohd. Irfan* (Supra) is of no

consequence. Consequently, Cr.M.A. 8392/2008 is allowed and the sentence awarded to the appellant is reduced to the period of imprisonment already undergone and the sentence order dated 28.05.2007 is accordingly modified. The appellant is sentenced to undergo period of imprisonment already undergone which would include the period of default imprisonment in view of non-payment of fine. He shall be released forthwith if he is not required in any other case and, therefore, the appeal is also accordingly disposed of.

13. The trial Court record be sent back immediately.

14. A copy of this order be given dasti to learned counsel for the parties and a certified copy be sent to Superintendent, Tihar Jail within a week.

MOOL CHAND GARG, J.

JANUARY 16, 2009
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