

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

Judgment delivered on: December 06, 2010

+ **CRIMINAL APPEAL NO.305/2005**

VED PARKASH

....APPELLANT

Through: Ms.Rakhi Dubey, Amicus Curiae.

Versus

STATE OF DELHI

.....RESPONDENT

Through: Ms.Fizani Husain, APP.

CORAM:

HON'BLE MR. JUSTICE AJIT BHARIHOKE

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

AJIT BHARIHOKE, J.(ORAL)

1. This appeal is directed against the impugned judgment dated 26.2.2005 in Sessions case No.72/2004 FIR No.97/2002 P.S. Narcotics Branch and the consequent order on sentence dated 11th March 2005 whereby the appellant Ved Prakash was convicted for the offence under Section 21(c) read with Section 29 of The Narcotic Drugs and Psychotropic Substances Act (for short `NDPS Act') and sentenced to undergo R.I. for the period of 10 years and also to pay a fine of ₹1,00,000/-; in default of payment of fine to undergo S.I. for a further period of one year.

2. Briefly stated, case of the prosecution against the appellant Ved Parkash is that he, on 10th December 2002 at around 7.10 p.m., supplied a polythene packet containing 640 gms of heroin to his co-accused Kharak Singh, which heroin was recovered from the personal search of Kharak Singh after completing the formalities under the NDPS Act.

3. The appellant was charged under Section 21(c) read with Section 29 of the NDPS Act to which he pleaded not guilty and claimed to be tried.

4. In order to bring home the guilt of the appellant, prosecution examined 10 witnesses, including the raid officials in whose presence the transaction took place and heroin was recovered from the possession of Kharak Singh.

5. The appellant, in his statement under Section 313 Cr.P.C., denied the prosecution story and claimed to be innocent. No witness in defence was examined.

6. Ms.Rakhi Dubey, learned Amicus Curiae appearing on behalf of the appellant, at the outset submitted that she has instructions from the appellant not to press the appeal on merits as the appellant admits that he actually delivered the packet of heroin to his co-accused Kharak Singh. The appellant, however, has confined his submissions to the limited issue related to his sentence under Section 21(c) of the NDPS Act with the aid of Section 29 of the NDPS Act. As per learned Amicus Curiae, the conviction and sentence of the appellant for the offence under Section 21(c) of the NDPS Act is contrary to law because total quantity of contraband seized from the co-accused Kharak Singh was 640 gms and the purity of said heroin, as per report submitted by FSL, Delhi, during the pendency of appeal, was 0.073

per cent. Therefore, the quantity of pure heroin in possession of the appellant was only 0.467 gms, which recovery falls within the definition of 'small quantity'. As such, the conviction of the appellant under Section 21(c) of the NDPS Act, which deals with the recovery of 'large quantity', is unwarranted. Learned counsel submitted that since only a small quantity was delivered by the appellant to his co-accused Kharak Singh, his offence falls within the purview of Section 21(a) of the NDPS Act for which the maximum punishment is upto six months.

7. Learned APP, on the contrary has contended that for the purpose of determining if the contraband recovered constitutes a small quantity or commercial quantity, the weight of the recovered contraband alone, irrespective of purity of the substance, shall be taken as the relevant factor.

8. I have considered the rival submissions. The legal issue raised by learned counsel for the appellant came up for consideration before the Supreme Court in the matter of **E. Micheal Raj v. Intelligence Officer, Narcotic Control Bureau**, (2008) 5 SCC 161 wherein the Supreme Court, after taking into consideration the amendment in the provisions of the NDPS Act brought by Narcotic Drugs and Psychotropic Amendment Act 2001, which rationalised the punishment structure under the NDPS Act by providing Grade 'A' sentence linked to the quantity of narcotic drugs and psychotropic substances recovered, as also the definitions of commercial quantity and small quantity inserted by the amendment Act of 2001, concluded that for the purpose of determining whether or not the contraband recovered was

within the purview of small quantity or commercial quantity, the purity of the substance would be a relevant factor and inter alia, observed thus:-

"15. It appears from the Statement of Objects and Reasons of the amending Act of 2001 that the intention of the legislature was to rationalise 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 gm 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 gm of heroin is recovered from an accused, it would amount to a small quantity, but when the same 4 gm is mixed with 50 kg of 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 appears 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."

9. From the above enunciation of law, it is clear that for determining whether the recovered substance shall constitute small quantity or commercial quantity, purity of the material shall be the relevant factor to calculate the exact amount of the contraband of 100% purity actually recovered from the accused.

10. During the pendency of this appeal, a sample from the case property was directed to be sent for chemical analysis to FSL, Delhi. As per the report of FSL dated 31st March 2008, the sample of case property gave positive test for diacetylmorphine and Phenobarbital and the content of diacetylmorphine in the sample was found to be 0.073%. As per the case of prosecution, the quantity of narcotic substance recovered from the possession of co-accused Kharak Singh was 640 gms. Therefore, the quantity of diacetylmorphine in the recovered substance by weight amounts to $640 \times 0.073/100$ i.e. 0.467 gms, which obviously is a small quantity being less than 5 gms of heroin. Thus, the offence committed by the appellant in delivering that narcotic substance to his co-accused Kharak Singh falls within the purview of Section 21(a) of NDPS and not under Section 21(c) of the Act.

11. Section 21 of the NDPS Act reads thus:-

"21. Punishment for contravention in relation to manufactured drugs and preparations

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.”

12. On bare reading of Section 21(c), it is clear that this provision provides for a punishment for contravention involving commercial quantity. Since the recovery effected from the co-accused Kharak Singh was of small quantity, Section 21(c) is obviously not attracted and the act committed by the appellant falls under Section 21(a) of the NDPS Act, which provides maximum sentence of R.I. upto 6 months or fine which may extend to ₹10,000/- or both.

13. In view of the discussion above, I find it difficult to sustain the conviction of the appellant under Section 21(c) read with Section 29 of the NDPS Act and consequent sentence awarded to him. The case of the appellant falls within the purview of Section 21(a) of the NDPS Act. Therefore, the order of conviction is modified to the extent that the appellant is convicted for the offence punishable under Section 21(a) read with Section 29 of the NDPS Act and sentence is reduced to 6 months R.I. with fine of ₹10,000/-, in default of payment of fine to undergo R.I. for a further period of 3 months.

14. Appellant, as per his nominal roll, has undergone imprisonment for a period of 2 years, 7 months and 19 days as on 1.8.2005, which covers the sentence of imprisonment awarded to the appellant as well as sentence in default of payment of fine. Therefore, appellant be released forthwith, if he is not required in any other case.

15. The appeal is partially accepted and disposed of with above modification.

16. Copy of the judgment be sent to Jail Superintendent for compliance.

(AJIT BHARIHOKE)
JUDGE

December 06, 2010

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