

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

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Judgment reserved on: 28.01.2014

Date of Decision: 31.01.2014

+ CRL.A. 34/2010

SUNIL @ BHURE @ MAHANAND

..... Appellant

Through: Mr. Mukesh Kalia, Adv.

versus

STATE GOVT. OF NCT OF DELHI

..... Respondent

Through: Ms. Ritu Gauba, APP for State

CORAM:

HON'BLE MR. JUSTICE V.K.JAIN

JUDGMENT

V.K.JAIN, J.

This appeal is directed against the judgment dated 29.10.2009 and Order on Sentence dated 30.10.2009, whereby though the appellant was convicted under Section 21(b) of NDPS Act, he was sentenced to undergo imprisonment for the period already spend by him in the custody on the ground that the substance recovered from him contained only 1.1 gm of diacetylmorphine.

2. The case of the prosecution was that on 14.12.2007, the appellant was found to be in possession of mud coloured powder which, on field testing, was found to be heroin, weighed 25 gms and had been kept in five packets. The learned Trial Judge noted that as per the report of FSL, the substance recovered from the appellant contained 4.4% diacetylmorphine. In para 58 of

the judgment, the learned Trial Judge noted that the quantity of diacetylmorphine in the substance found in the possession of the appellant was 1.1 gm. Though the quantity up to 5 gms is small quantity, he wrongly recorded the quantity of diacetylmorphine found in possession of the appellant to be intermediate quantity in the aforesaid paragraph. However, this mistake was noted by the learned Trial Judge in para 2 of his Order on Sentence. He, however, was of the view that the aforesaid error could not be rectified by him. He also felt that the error was inconsequential since the quantum of sentence had to be proportionate to the quantity recovered and Section 21(b) does not lay down a minimum punishment.

3. The learned counsel for the appellant submits that considering the overwhelming evidence produced by the prosecution, as discussed in the impugned judgment, the appellant is not disputing his conviction or the sentence awarded to him and his only contention is since the quantity of diacetylmorphine in the substance recovered from the appellant was small quantity, he was liable to be convicted under Section 21(a) and not under Section 21(b) of the Act.

4. The learned Additional PP Ritu Gauba opposes the prayer made by the learned counsel for the appellant and submits that the quantity of the entire substance recovered from the appellant and not the quantity of diacetylmorphine found present in the said substance is to be considered for

the purpose of deciding whether it was a small quantity, intermediate quantity or commercial quantity.

5. The issue involved in this case came up for consideration of the Hon'ble Supreme Court in **E.Micheal Raj vs. Intelligence Officer, Narcotic Control Bureau** (2008) 5 SCC 161. In the aforesaid case, the appellant before the Apex Court was alleged to be found in possession of heroin weighing 4 kg. The samples drawn from the substance recovered from the appellant when examined in the laboratory were found to have purity of 1.4% in one sample and 1.6% in the other sample. The appellant was convicted under Section 21(c) of the Act on the ground that he was found in possession of heroin in commercial quantity. The High Court, while dismissing the appeal filed by the appellant, had held that it would be evident from Section 21 of the Act read with 2 (xi) thereof, which defines 'manufactured drug', that the substance seized from the appellant was a manufactured drug and since the offence can be in respect of manufactured drug as well as its preparation, defined in Section 2(xx) of the Act, any mixture of narcotics drugs with other substance will also come within Section 21 of the Act and, therefore, the rate of purity becomes irrelevant. Thus, the view taken by the High Court that the whole quantity of the mixture had to be taken into consideration, while imposing punishment under Section 21 of the Act.

It was contended on behalf of the appellant that the conviction was contrary to law since the total quantity of contraband seized from him was 4.0

kg and calculated on the basis of purity percentage the quantity came to only 60 gms which was much below the commercial quantity of heroin. It was also submitted that it was not the total weight, but the percentage contained of heroin translated into weight, which was relevant. It was contended on behalf of the State that once the substance tested positive for heroin, its percentage contained in the substance was irrelevant and, therefore, 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.

Allowing the appeal, the Apex Court *inter alia* held as under:

“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.

16..... X X X.... We are of the view that when any narcotic drug or psychotropic substance is found mixed with one or more neutral substance/s, for the purpose of imposition of punishment it is the content of the narcotic drug or psychotropic substance which shall be taken into consideration.

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."

5. The aforesaid judgment was followed by the Apex Court in *Nikku Khan @ Mohammadeen vs. State of Haryana* AIR 2011 SC 3113 and in *State of NCT of Delhi vs. Ashif Khan @ Kalu* (2009) 4 SCC 42.

6. A Notification dated 18.11.2009 replaced a part of the earlier notification dated 19.10.2001 by inserting the following note in the Table at the end after Note 3:

"(4) the quantities shown in column 5 and column 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form of isomers, esters, ethers and salts of these drugs, including

salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content.”

Thus, under above-referred notification, the whole quantity of material recovered in the form of mixtures came to be considered for the purpose of imposition of punishment.

The question whether the aforesaid amendment can be applied to a case where the offence was committed before amendment of the notification came up for consideration before the Hon’ble Supreme Court in **Harjit Singh vs. State of Punjab** (2011) 4 SCC 441 and the following view was taken:-

“It is a settled legal proposition that a penal provision providing for enhancing the sentence does not operate retrospectively. This amendment, in fact, provides for a procedure which may enhance the sentence. Thus, its application would be violative of restrictions imposed by Article 20 of the Constitution of India. We are of the view that the said Notification dated 18.11.2009 cannot be applied retrospectively and, therefore, has no application so far as the instant case is concerned.”

7. The substance alleged to have been recovered from the appellant before this Court was heroin and not the coagulated juice of the opium poppy referred to in Section 2(xv) of the Act. A perusal of the FSL report would show that the substance recovered from the appellant was a mixture of more than one substances and the quantity of

diacetylmorphine in the substance recovered from the appellant was only 04.4%. Therefore, the learned Trial Judge rightly held that the appellant was in possession of heroin weighing 1.1 gm. Admittedly, 1.1 gm of heroin (diacetylmorphine) would be small quantity and not intermediate quantity. It was only by mistake that the learned Trial Judge referred to the aforesaid quantity as intermediate quantity in the judgment. The mistake, however, was realized by him, while passing Order on Sentence. Therefore, the appellant was liable to be convicted under Section 21(a), not under Section 21(b) of the Act.

8. It was submitted by the learned Additional PP that the appellant was a dealer and not merely a carrier as would be evident from recovery of a balance and weights from his premises. In my view, the question whether the appellant was a carrier or a dealer would be irrelevant for the purpose of deciding whether he is to be convicted under clause (a) or clause (b) or clause (c) of Section 21 of the Act, though it may have a bearing on the quantum of sentence. This would be evident from a bare perusal of Section 21 which inter alia provides that whosoever, in contravention of the provisions of the Act or any rules or orders made 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 liable to be punished. Therefore, the maximums punishment for

possessing as well as for selling a manufactured drug or any preparation containing a manufactured drug is same.

9. For the reasons stated hereinabove, the impugned judgment is modified to the extent that the appellant is held guilty of offence punishable under Section 21(a) of NDPS Act. As regards sentence, since no appeal has been preferred by the State against the sentence awarded to him, I need not go into the question as to whether in the facts and circumstances of the case, the sentence was adequate or not.

The appeal stands disposed of accordingly.

LCR be sent back along with a copy of this judgment.

JANUARY 31, 2014
BG

V.K. JAIN, J.