

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **Crl.A.No.573/2001**

Judgment reserved on : 24th October, 2017
Date of decision : 18th December, 2017

SMT.BULBUL Appellant
Through: Mr. Sunil Tiwari, Advocate
versus

STATE Respondent
Through: Mr. Panna Lal Sharma, APP
for State with SI Prakash
Chand, PS Kotwali.

CORAM:
HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

ANU MALHOTRA, J.

1. The present appeal was filed by the appellant Smt.Bulbul W/o Sh. Raju against the impugned judgment dated 29.5.2001 of the then learned Additional Sessions Judge, Special Court under the NDPS Act, Delhi in Sessions case No.5/2000 in relation to FIR no.628/99, Police Station Kotwali under Section 21 of the NDPS Act, 1985 whereby she was convicted for the proved commission of the offence of possession of 10 grams of Heroin and was thus convicted under Section 21 of the NDPS Act, 1985.

2. The appellant has assailed the impugned order on sentence dated 31.5.2001 in the said case whereby she was sentenced to undergo rigorous imprisonment of 10 years and to pay a fine of

Rs.1,00,000/- and in default of the payment of the said fine she was further directed to undergo rigorous imprisonment for one year.

3. Written synopsis on behalf of either side were submitted. However, during the course of the submissions made on 24.10.2017 it was submitted by the learned counsel for the appellant that the appellant no more challenges the finding vide the impugned judgment whereby she was convicted for the commission of an offence punishable under Section 21 of the NDPS Act having been held to have been found in possession of 10 gms of Heroin. It was thus submitted on behalf of the appellant that the appellant now challenges the sentence for a period of 10 years imposed upon her vide order on sentence dated 31.5.2001 submitting to the effect that there has been an amendment in the NDPS Act, 1985, whereby there has been a rationalization of the punishment structure under the NDPS Act, 1985, by providing graded sentences limited to the quantity of the narcotic drugs or psychotropic substance carried.

4. Vide order dated 24.10.2017, the nominal roll of the convict was called for from the Jail which has since been received. The nominal roll dated 27.10.2017 received from the Superintendent, Central Jail No.6 Tihar, New Delhi indicates that the appellant has undergone a period of 3 years 9 months and 5 days on the date 27.10.2017 and has thus now as on 18.12.2017, the appellant has undergone 3 years 11 months and 21 days of rigorous imprisonment. The fine imposed of Rs.1,00,000/- has not yet been deposited by the

convict. The nominal roll indicates that the overall jail conduct of the appellant is satisfactory as per the jail record and that the appellant is on bail in FIR No.628/94, Police Station Kotwali under Section 61 for an offence punishable under the Punjab Excise Act, 1914.

5. In view of the submissions that have been made on behalf of the appellant and the State, it is essential to observe that the date of commission of the offence in the instant case when the appellant/convict was found in possession of 10 gms of Heroin was 27.10.1999. As on the said date Section 21 of the NDPS Act, 1985 read to the effect:

“Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (original)

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 use any manufactured drug or any preparation containing any manufactured drug shall be punishable 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.”

6. With effect from 2.10.2001 in view of the NDPS(Amendment) Act, Section 9 of 2001 Sections 21 as it stands w.e.f. 2.12.2001 is as under under:

“Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (amended)

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.

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

“Narcotic Drugs and Psychotropic Substance Act, 1985 provides deterrent punishment for various offences relating to the illicit trafficking in narcotic drugs and psychotropic substances. Most of the offences invite uniform punishment of minimum ten years; rigorous imprisonment which may extend upto 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.””

7. As observed by the Hon'ble High Court in *E Micheal Raj v. Intelligence Officer, Narcotic Control Bureau*; 2008 AIR(SC) 1720 the amending Act which rationalizes the punishment structure under the NDPS Act provided graded sentences linked to the quantity of the narcotic drugs or psychotropic substances carried and changed the sentence structure drastically whereby Section 2(xxiii a) defined 'small quantity' and Section 2(vii a) defined 'commercial quantity' as follows:

"Section (viia) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (amended)
(viia) "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;"

And Section 2(xxiii a) of the NDPS Act, 1985 (Amended) w.e.f. 2.10.2001 reads as follows:

"Small quantity", in relation to narcotic drugs and psychotropic substances, mean any quantity lesser than the quantity specified by the Central Government by notification in the Official Gazette."

8. As per Entry 56 of the Notification issued vide S.O(E) dated 19.10.2001 issued by the Central Government which deals with Heroin, small quantity thereof has been mentioned as 5 gms and commercial quantity thereof has been mentioned as 250 gms.

9. In the instant case, the appellant has been found in possession of 10 gms of Heroin, i.e., 'diacetylmorphine' if grouped in terms of Entry 56 of the notification dated 19.10.2001 issued by the Central Government. In terms of Section 21 Sub-Clause (b) of the NDPS Act, 1985 as it now stands w.e.f. 2.10.2001 where the contravention involves quantity lesser than the commercial quantity but greater than the small quantity, the offence of possession of any manufactured drug or any preparation containing any manufactured drug is punishable with rigorous imprisonment for a term which may extend to 10 years and with a fine which may extend to one lakh rupees.

10. The NDPS Act, 1985 as it stood prior to 2.10.2001 provided punishment for the offence of illicit trafficking in narcotic drug or psychotropic substances whereby most of the offences invited uniform punishment of minimum 10 years of rigorous imprisonment which could extend upto twenty years.

11. Heroin is a manufactured drug and is an opium derivative as per Section 2(xvi) (e) of the NDPS Act, 1985 which says that all preparations containing more than 0.2. per cent 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. The possession of the opium derivative which in the instant case is a manufactured drug is prohibited under Section 8 of the NDPS Act, 1985, and thus

punishable under Section 21 thereof as observed vide para 11 of the verdict of the Supreme Court in ***E. Micheal Raj*** (supra):

“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 observed by the Supreme Court, the intention of the Legislature for introduction of the Amendment to the NDPS Act, 1985 was to punish the people who committed less serious offences with less serious punishment and those who committed trafficking with more severe punishment. In the case of E.Micheal Raj (supra), the appellant therein as per the analyst report was found in possession of 60 gms that is more than the small quantity but less than 250 gms i.e., the commercial quantity and thus vide paragraph 17 and 18 of the verdict of the Supreme Court, it was observed as under:

“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.”,

thus upholding the appellant to be punishable under Section 21(b) of the NDPS Act, 1985 i.e., for the intermediate quantity and in the facts and circumstances of that case, the sentence of the appellant therein which was of 10 years of rigorous imprisonment plus a fine of Rs.1,00,000/- was reduced to a sentence of six years of rigorous imprisonment with a fine of Rs.20,000/- and in default of the payment of the fine to rigorous imprisonment for a period of six months.

13. It is essential to observe that the commission of the offence under Section 21 of the NDPS Act, 1985, in the instant case was on the date 27.10.1999, i.e., prior to the date 2.10.2001 when the amendment was introduced to the NDPS Act, 1985 defining commercial quantity and small quantity of the narcotic drug or psychotropic substance and creating punishments therefor.

14. As a consequence, qua the retrospective application of the amendment so made whereby graded punishment has been provided for commission of the offence punishable under the Section 21 of the said enactment, it was submitted on behalf of the appellant and conceded on behalf of the State that in view of the verdict in *E Micheal Raj* (supra), the Amendment Act No.9 of 2001 though in operation w.e.f. 2.10.2001 was in substance retrospectively applicable

in view of the verdict of the Supreme Court in *E.Micheal Raj* (supra) wherein the accused therein was found in possession of the narcotic drugs on the dated 5.3.2001 i.e. prior to the date 2.10.2001.

15. Thus, as it is apparent that the verdict of the Supreme Court in E. Micheal Raj (supra) relates to the commission of an offence on the date 2.3.2001 on which date the amendment Act had yet to take effect.

16. Notification NO.SO-1055(E) dated 19.10.01 issued by the Central Government is as follows:

**NOTIFICATION SPECIFYING
SMALL QUANTITY AND COMMERCIAL QUANTITY**

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 or 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 clause of that section.

17. TABLE

18. [See sub-clause vii(a) and xxiia(a) of section 2 of the Act]

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.
1.	2	3	4	5	6
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56.	Heroin		Diacetylmorphine	5	250 gm.
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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.	

19. As per Clause (vii a) and clause (xxiii a) of Section 2 of the NDPS Act, 1985, Heroin, a narcotic drug was held to be in a small quantity upto 5 gms and to be a commercial quantity if it exceeded 250 gms.

20. Thus in the instant case also, where the appellant was found in possession of 10 gms of Heroin which is a much lesser then 250 gms of Heroin, it is considered appropriate to allow the prayer made by the

appellant seeking reduction of the period of sentence and thus the appellant who has been sentenced to 10 years of rigorous imprisonment and a fine of Rs.1,00,000/- and has been in custody now for 3 years 11 months and 21 days with satisfactory jail record is allowed to be released on the period of detention already undergone by her and to a fine of Rs.10,000/- and in default of payment of the fine to rigorous imprisonment for a period of two months.

21. A copy of this judgment be sent to the Superintendent, Jail, Delhi and be supplied to the appellant through Superintendent Jail, Delhi.

ANU MALHOTRA, J.

DECEMBER 18, 2017/SV