



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

+ **CRL.A. 1111/2016**

Judgment reserved on : 08.08.2022

Date of decision : 17.08.2022

SHEIKH ANWAR

..... Appellant

Through: Ms. Sahila Lamba, Advocate
(DHCLSC) through video
conferencing with Appellant in
person through JC through
video conferencing.

versus

STATE

..... Respondent

Through: Mr. Shoaib Haider, APP for
State

CORAM:

HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

ANU MALHOTRA, J.

1. The applicant, Sheikh Anwar S/o Sh. Abdul Aziz, vide the present appeal Crl. A. No. 1111/2016 seeks the setting aside of the impugned judgment and order on sentence dated 14.09.2016 and 15.09.2016 of the Court of the learned ASJ-02, East, Special Judge, NDPS, KKD in Sessions Case No. 1367/16, P.S Crime Branch, FIR No.217/11, under Section 21(c) of the NDPS Act, 1985.

2. Notice of the appeal was issued to the State and the appeal was admitted vide order dated 23.11.2016. The Crl.M.B. 2084/2016 filed



by the appellant seeking suspension of sentence was at that stage vide order dated 23.11.2016 declined.

3. Vide the impugned judgment dated 14.09.2016 of the Court of the learned Special Judge, NDPS, KKD, Delhi in FIR No.217/2011, PS Crime Branch, the appellant was convicted for the commission of an offence punishable under Section 21(c) of the NDPS Act, 1985 holding to the effect that he was found in possession of 1.5 Kgs of heroin, that is a commercial quantity in terms of the Schedule to the NDPS Act, 1985.

4. Vide the impugned order on sentence dated 15.09.2016, the appellant was sentenced to ten years of rigorous imprisonment with a fine of Rs.1,00,000/- and in default of the payment of the said fine to undergo one year of rigorous imprisonment with the benefit of Section 428 of the Cr.P.C., 1973 having been given to the appellant.

5. Section 21(c) of the NDPS Act, 1985 provides to the effect:-

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

(a)

(b)

(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”.



Thus, for a contravention of the provisions of the NDPS Act, 1985 or any rule or order made thereunder and consequential *inter alia* possession of any manufactured drug or any preparations containing any manufactured drug where the contravention involves a commercial quantity, a minimum rigorous imprisonment of ten years which may extend to twenty years and a minimum fine of Rs.1 Lakh which may extend to Rs.2 Lakhs has been mandated with it having been provided however that a fine exceeding Rs.2 Lakhs may be imposed for reasons to be recorded in the judgment.

6. The appellant in the instant case as per the Nominal Roll dated 21.05.2022 received from the Superintendent of Prisons, Central Jail No.14, Mandoli, Delhi had till that date undergone ten years of the substantive sentence of rigorous imprisonment, and on that date, had also undergone eight months and twenty nine days of the incarceration for the fine sentence, and on that date, the appellant had yet to complete three months and one day of the fine sentence in the event of the fine not having been paid. The appellant has apparently not paid the fine, the period of his fine sentence too has to elapse on 21.08.2022 with it being 17.08.2022 today.

7. As regards the conviction of the appellant for having been found in possession of heroin on 19.11.2012 at about 11.30 AM near the Bus Stand, Ramesh Park, Pusta Road, near Shakarpur, though the appellant vide the instant appeal assailed the conviction and sentence imposed vide the impugned judgment dated 14.09.2016 and the



impugned order on sentence dated 15.09.2016 submitting to the effect:-

- that whereas the learned Trial Court had held the appellant guilty of an offence punishable under Section 21(c) of the NDPS Act, 1985, the appellant had been sentenced by the learned Trial Court for an offence punishable under Section 20(c) of the NDPS Act, 1985;
- that the learned Trial Court did not consider that the arrest of the appellant was illegal;
- that the learned Trial Court did not appreciate that the recovery witnesses were all Crime Branch officials interested in the success of the prosecution and there was no public witness joined in the proceedings which thus brought forth the false implication of the appellant;
- that the requisite notice under Section 50 of the NDPS Act, 1985 had not been issued to the appellant;
- that there was ten days' delay in sending the sample to the laboratory creating a doubt qua the veracity of the prosecution version and thus creating also the possibility of tampering with the alleged seized articles;
- that the FSL form was never filled up and not sent to the FSL and thus the link evidence is missing and there is possibility of the sample being tampered with, and that the appellant was thus entitled to be acquitted;



- that there has been a violation of Section 57 of the NDPS Act, 1985 as the seizure report was not submitted within 48 hours, and that as much as, the mandatory provisions of the NDPS Act, 1985 had not been followed, the appellant is liable to be acquitted;
- that the appellant's statement under section 313 of the Cr.P.C., 1973 that he has been falsely implicated, that his signatures had been taken on blank and semi-written papers in the office of Crime Branch has not been considered by the learned Trial Court.
- **that the learned Trial Court failed to appreciate that the sample sent to the FSL was not found positive for *Diacetylmorphine* (Heroin) and that *Monoacetylmorphine* is neither a Narcotics Drug nor a Psychotropic Substance under the NDPS Act, 1985 and that the observations of the learned Trial Court that the Sr. Scientific Officer, FSL Rohini had deposed that over a period of time *Diacetylmorphine* converted into *Monoacetylmorphine*, depending upon the environmental conditions like moisture by the process of hydrolysis created a doubt that the alleged recovered product was *Diacetylmorphine*. It has further been submitted by the appellant that the delay of four months in analyzing the sample creates a doubt that the alleged sample had been tampered with, and that thus, the benefit of doubt should be given to the appellant.**



8. During the course of the submissions made on 08.08.2022 during the hearing of the appeal, the learned counsel for the appellant however submitted that apart from the contention that the appellant as per the FSL report was not found to be in possession of the 1.5 Kgs of *Diacetylc Morphine* (Heroin) in view of the FSL report dated 28.12.2011 which as per the chemical analysis, TLC, GC, GC-MS & HPTLC examination had opined that Exhibit A, the cloth parcel sealed with seals of “CRM” and “DST” sent by the SHO Crime Branch vide letter No.873/SHO/ Crime Branch dated 29.08.2011 in relation to FIR No.217/2011 dated 19.08.2011 which contained a brown colored powder with granules kept inside a polythene weighed approximately 5.48 Gms. which polythene was found to contain *paracetamol*, *caffeine* and *Monoacetylc Morphine*, and it was thus submitted on behalf of the appellant that the prosecution version that the appellant was in possession of 1.5 Kgs. of heroin i.e., *Diacetylc Morphine* was not established, and that thus, the appellant be released on the period of detention already undergone by him, in as much as, he cannot be held to have been rightly convicted for possession of a commercial quantity of heroin. In view of this submission made on behalf of the appellant, it is only this contention raised on behalf of the appellant that is being taken up for consideration.

9. The learned APP for the State refuted the submissions of the learned counsel of the appellant that the appellant was not found in possession of a commercial quantity of heroin submitting *inter alia* to the effect that the entire substance recovered from the appellant which



weighed 1.5 Kgs would have to be considered for consideration of the quantity of heroin recovered from the appellant.

10. Reliance on behalf of the appellant was placed on the verdict of the Hon'ble High Court of Gujarat in Crl. Appeal Nos.871/2010, 872/2010, 876/2010 and 1029/2010, a verdict dated 08.05.2014 in **SHARIF MOHAMMED AMIR MOHAMMED KURESHI vs. STATE OF GUJARAT** and on the verdict of the Coordinate Bench of this Court dated 08.07.2019 in **SANDEEP KUMAR vs. CENTRAL BUREAU OF NARCOTICS** CRL.A. 462/2016.

11. It is essential to observe that these above mentioned judgments relied upon on behalf of the appellant are prior to the verdict of the Hon'ble Supreme Court in **HIRA SINGH AND ANOTHER Vs. UNION OF INDIA AND ANOTHER**, a verdict dated 22.04.2020 (2020) 20 SCC 272.

12. It is further essential to observe that Note No.4 has been added to the table to Section 2 Sub-Clause (viia) and (xxiia) of the NDPS Act, 1985 vide notification No.S.0.2941(E) dated 18.11.2009 which Note No.4 reads to the effect:-

“The quantities shown in column 5 and 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 substance of the particular drug in dosage form or isomers, esters, ethers and salts or these drugs, including salts or esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content.”



It is essential to observe further that the date of the commission of the offence in the instant case is 19.11.2012 when the appellant was found in possession of 1.5 Kgs of heroin as per the prosecution version. The notification referred to hereinabove incorporating Note No.4 to the table under the NDPS Act, 1985 as detailed hereinabove is dated 18.11.2009 that is prior to the commission of the offence in the instant case and is wholly applicable to the facts of the instant case.

13. The verdicts relied upon on behalf of the appellant in **SANDEEP KUMAR and SHARIF MOHAMMED AMIR MOHAMMED KURESHI (Supra)** are all *inter alia* on the basis of the verdict of the Hon'ble Supreme Court in **E. Micheal Raj Vs. Intelligence Officer, Narcotic Control Bureau** 2008 (5) SCC 161, which has been overruled vide the verdict of the Hon'ble Supreme Court in **HIRA SINGH (Supra)**. The observations of the Hon'ble Full Bench of the Supreme Court in **HIRA SINGH (Supra)** in paragraphs 10.2 to 12.4 are as under:-

“10.2. Therefore, considering the Statement of Objects and Reasons and the Preamble of the NDPS Act and the relevant provisions of the NDPS Act, it seems that it was never the intention of the legislature to exclude the quantity of neutral substance and to consider only the actual content by weight of offending drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity. Right from clauses (vii-a) and (xxiii-a) of Section 2 of the NDPS Act, emphasis is on narcotic drug or psychotropic substance (Sections 21, 22, 23, 24, 27 and 43). Even in the Table attached to the Notification dated 19-10-2001, Column 2 is with respect to name of narcotic drug and psychotropic substance and Columns 5 and 6 are with respect to “small quantity and commercial quantity”. Note



2 of the Notification dated 19-10-2001 specifically provides that quantity shown against the respective drugs listed in the Table also apply to the preparations of the drug and the preparations of substances of Note 1. As per Note 1, the small quantity and commercial quantity given against the respective drugs listed in the Table apply to isomers ..., whenever existence of such substance is possible. Therefore, for the determination of “small quantity or the commercial quantity” with respect to narcotic drugs and psychotropic substance mentioned in Column 2 the quantity mentioned in Clauses 5 and 6 are required to be taken into consideration. However, in the case of mixture of the narcotic drugs/psychotropic drugs mentioned in Column 2 and any mixture or preparation that of with or without the neutral material of any of the drugs mentioned in Table, lesser of the small quantity between the quantities given against the respective narcotic drugs or psychotropic substances forming part of mixture and lesser of commercial quantity between the quantities given against the respective narcotic drugs or psychotropic substance forming part of the mixture is to be taken into consideration. As per example, mixture of 100 gm is seized and the mixture is consisting of two different narcotic drugs and psychotropic substance with neutral material, one drug is heroin and another is methadone, lesser of commercial quantity between the quantities given against the aforesaid two respective narcotic drugs and psychotropic substance is required to be considered. For the purpose of determination of the “small quantity or commercial quantity”, in case of Entry 239 the entire weight of the mixture/drug by whatever named called weight of neutral material is also required to be considered subject to what is stated hereinabove. If the view taken by this Court in **E. Micheal Raj [E. Micheal Raj v. Narcotics Control Bureau, (2008) 5 SCC 161 : (2008) 2 SCC (Cri) 558]** is accepted, in that case, it would be adding something to the relevant provisions of the statute which is not there and/or it was never intended by the legislature.



10.3. At this stage, it is required to be noted that illicit drugs are seldom sold in a pure form. They are almost always adulterated or cut with other substance. Caffeine is mixed with heroin, it causes that heroin to vaporise at a lower rate. That could allow users to take the drug faster and get a big punch sooner. Aspirin, crushed tablets, they could have enough powder to amend reversal doses of drugs. Take the example of heroin. It is known as powerful and illegal street drug and opiate derived from morphine. This drug can easily be “cut” with a variety of different substances. This means that drug dealer will add other drugs or non-intoxicating substances to the drug so that they can sell more of it at a lesser expense to themselves. Brown sugar/smack is usually made available in powder form. The substances is only about 20% heroin. The heroin is mixed with other substances like chalk powder, zinc oxide, because of these, impurities in the drug, brown sugar is cheaper but more dangerous. These are only few examples to show and demonstrate that even mixture of narcotic drugs or psychotropic substance is more dangerous. Therefore, what is harmful or injurious is the entire mixture/tablets with neutral substance and narcotic drugs or psychotropic substances. Therefore, if it is accepted that it is only the actual content by weight of offending drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity, in that case, the object and purpose of enactment of the NDPS Act would be frustrated. There may be few punishment for “commercial quantity”. Certainly that would not have been the intention of the legislature.

10.4. Even considering the definition of “manufacture”, “manufactured drug” and the “preparation” conjointly, the total weight of such “manufactured drug” or “preparation”, including the neutral material is required to be considered while determining small quantity or commercial quantity. If it is interpreted in such a manner, then and then only, the objects and purpose of the NDPS Act



would be achieved. Any other intention to defeat the object and purpose of enactment of the NDPS Act viz. to the Act is deterrent.

10.5. The problem of drug addicts is international and the mafia is working throughout the world. It is a crime against the society and it has to be dealt with iron hands. Use of drugs by the young people in India has increased. The drugs are being used for weakening of the nation. During the British regime control was kept on the traffic of dangerous drugs by enforcing the Opium Act, 1857, the Opium Act, 1875 and the Dangerous Drugs Act, 1930. However, with the passage of time and the development in the field of illicit drug traffic and during abuse at national and international level, many deficiencies in the existing laws have come to notice. Therefore, in order to remove such deficiencies and difficulties, there was urgent need for the enactment of a comprehensive legislation on narcotic drugs and psychotropic substances, which led to enactment of the NDPS Act. As observed hereinabove, the Act is a special law and has a laudable purpose to serve and is intended to combat the menace otherwise bent upon destroying the public health and national health. The guilty must be in and the innocent ones must be out. The punishment part in drug trafficking is an important one but its preventive part is more important. Therefore, prevention of illicit traffic in the Narcotic Drugs and Psychotropic Substances Act, 1985 came to be introduced. The aim was to prevent illicit traffic rather than punish after the offence was committed. Therefore, the courts will have to safeguard the life and liberty of the innocent persons. Therefore, the provisions of the NDPS Act are required to be interpreted keeping in mind the object and purpose of the NDPS Act; impact on the society as a whole and the Act is required to be interpreted literally and not liberally which may ultimately frustrate the object, purpose and Preamble of the Act. Therefore, the interpretation of the relevant provisions of the statute canvassed on behalf of the accused and the intervener that



quantity of neutral substance(s) is not to be taken into consideration and it is only actual content of the weight of the offending drug, which is relevant for the purpose of determining whether it would constitute “small quantity or commercial quantity”, cannot be accepted.

*11. Now, so far as the challenge to the impugned Notification No. 2942(E) dated 18-11-2009 issued by the Union of India, by which, “Note 4” has been added to Notification No. S.O. 1055(E) dated 19-10-2001 specifying small quantity and commercial quantity of the narcotic drugs and psychotropic substance covered under the NDPS Act, 1985 is concerned, as such it can be said to be clarificatory in nature and/or by way of ex abundanti cautela/abundant caution. As observed hereinabove, while determining the small or commercial quantity in relation to narcotic drugs or psychotropic substances in a mixture with one or more neutral substance(s), it includes the weight of neutral substance(s) also and not only the actual content by weight of the offending drug. Therefore, even if “Note 4” which has been added vide Notification dated 18-11-2009 is not added, in that case also, it makes no difference and/or change. It appears that after the decision of this Court in *E. Micheal Raj [E. Micheal Raj v. Narcotics Control Bureau, (2008) 5 SCC 161 : (2008) 2 SCC (Cri) 558]* by way of abundant caution, the Union of India has come out with a Notification dated 18-11-2009 adding “Note 4”. Thus, adding “Note 4” by the Notification dated 18-11-2009 to the earlier Notification dated 19-10-2001 can be said to be clarificatory and by way of abundant caution only. Even otherwise, for the reasons stated above, the impugned Notification dated 18-11-2009 adding “Note 4” to the earlier Notification dated 19-10-2001, cannot be said to be contrary to the scheme and the various provisions of the NDPS Act.*

(emphasis supplied)



11.1. At this stage, it is required to be noted that the Notification dated 19-10-2001 was issued in exercise of powers conferred by clauses (vii-a) and (xxiii-a) of Section 2 of the NDPS Act. Section 2(vii-a) defines “commercial quantity” and Section 2(xxiii-a) defines “small quantity” and it means any quantity greater or lesser than the quantity specified by the Central Government by notification in the Official Gazette, as the case may be. The Notification dated 19-10-2001 specifies the small quantity and commercial quantity with respect to respective narcotic drugs and psychotropic substances. As observed hereinabove, by abundant caution and to make it further clear, “Note 4” has been added. Therefore, it cannot be said to be ultra vires the scheme and the relevant provisions of the NDPS Act, as contended on behalf of the accused and intervenor. Therefore, challenge to the impugned Notification dated 18-11-2009 adding “Note 5” of the clause to Notification No. S.O. 1055(E) dated 19-10-2001 fails.

12. In view of the above and for the reasons stated above, reference is answered as under:

12.1. The decision of this Court in E. Micheal Raj [E. Micheal Raj v. Narcotics Control Bureau, (2008) 5 SCC 161 : (2008) 2 SCC (Cri) 558] taking the view that in the mixture of narcotic drugs or 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 and only the actual content by weight of the offending narcotic drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity, is not a good law.

12.2. In case of seizure of mixture of narcotic drugs or psychotropic substances with one or more neutral substance(s), the quantity of neutral substance(s) is not to



be excluded and to be taken into consideration along with actual content by weight of the offending drug, while determining the “small or commercial quantity” of the narcotic drugs or psychotropic substances.”

(emphasis supplied)

It is essential to observe that qua the challenge to this notification dated 18.11.2009 adding Note No.4 to the notification dated 19.10.2001, it has been held that the same is not ultra vires the scheme and the relevant provisions of the NDPS Act, 1985.

14. The verdict of the Hon’ble Supreme Court in ***HIRA SINGH (Supra)*** vide paragraph 12.1 referred to hereinabove clearly lays down that the view taken in ***E. Micheal Raj (Supra)*** that in the mixture of narcotic drugs or psychotropic substance with one or more neutral substance(s), the quantity of the neutral substance(s) is not to be taken into consideration by determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance and only the actual content by weight of the offending narcotic drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity, is not a good law.

15. The Hon’ble Supreme Court in ***HIRA SINGH (Supra)*** has further stipulated and laid down categorically vide paragraph 12.2 referred to hereinabove to the effect that in case of seizure of a mixture of narcotic drugs or psychotropic substances with one or more neutral substance(s), the quantity of neutral substance(s) is not to be excluded and is to be taken into consideration along with the actual content by weight of the offending drug by determining the “small or



commercial quantity” of the narcotic drugs or psychotropic substances.

16. In these circumstances, the factum that Exhibit PX, the FSL result dated 28.12.2011 indicated that on examination of the Exhibit A sent to the laboratory in the instant case it was found to contain *paracetamol, caffeine and monoacetyl morphine* in view of the deposition dated 18.05.2016 of Dr. Lingaraj Sahoo, Senior Scientific Officer of the FSL to the effect:-

“Paracetamol and caffeine are additives used for increasing the quantity of substance where as monoacetyl morphine is formed during the process of acetylation of morphine to diacetyl morphine as well as during the degradation / hydrolysis of diacetyl morphine.

I cannot tell whether monoacetyl morphine is covered as a Narcotic Drug and Psychotropic substance.”,

and in view of the testimony dated 08.07.2016 of the said witness Dr. Lingaraj Sahoo, Senior Scientific Officer of the FSL in continuation to his statement dated 18.05.2016, which read to the effect:-

“As per FSL report Exbt. PX, the sample in this case was found to contain Paracetamol, Caffiene and Monoacetyl Morphine. As per literature, over a period of time, diacetyl Morphine converts into Monoacetyl Morphine and Monoacetyl Morphine converts into Morphin. Depending on the environmental conditions like moisture in the environment and in the sample, the diacetyl morphine can convert into monoacetyl morphine and morphine by the process of hydrolysis. Diacetyl Morphine and Monoacetyl Morphine are the synthesized products of Morphine.

XXXXXXXX by Sh. C.S. Tyagi, LAC for the accused.

It is correct that the chemical name of Heroin is not monoacetylene morphine.”,



which makes it apparent that over a period of time *Diacetylmorphine* converts into *Monoacetylmorphine* and *Monoacetylmorphine* converts into *Morphine*, and that, depending on the environmental conditions like moisture in the environment and in the sample, the *Diacetylmorphine* can convert into *Monoacetylmorphine* and *Morphine* by the process of hydrolysis and that *Diacetylmorphine* and *Monoacetylmorphine* are the synthesized products of *Morphine*, and thus the observations in the impugned judgment dated 14.09.2016 vide paragraph 29 thereof, to the effect:-

“29. As per FSL result Ex.PX, the samples sent for examination to FSL was found to contain paracetamol, caffeine and monoacetylmorphine. As per notification u/s 2 of NDPS Act chemical name of Heroin is Diacetylmorphine. For this reason, court took the opinion of Dr. Lingraj Sahu, Sr. Scientific Officer, FSL Rohini, Delhi. He stated that as per literature, over a period of time Diacetylmorphine converts into Monoacetylmorphine and Monoacetylmorphine converts into Diacetylmorphine. He stated that depending upon the environmental conditions like moisture in the environment and in the samples, the diacetylmorphine can convert into monoacetylmorphine by the process of hydrolysis. He further, clarified that Diacetylmorphine and Monoacetylmorphine are synthesized products of morphine. Ld. LAC did not cross examine the expert much and therefore on the basis of literature available and statement of expert, it becomes clear that due to passage of time physical and chemical changes take place in heroin and smack. The recovery was effected on 19.08.2011. The samples were sent to FSL on 29.08.2011 but test report is dated 28.12.2011. It seems that test was conducted after about four months and due to climatic changes and hydrolysis the sample gave positive test for Monoacetylmorphine by conversion from Diacetylmorphine to Monoacetylmorphine. Thus there is no room



for doubt that sample recovered from accused was that of Diacetylmorphine which is a contraband.”,-

cannot be faulted.

17. In view of the verdict of the Hon’ble Supreme Court in **HIRA SINGH (Supra)**, a sample which was found to contain *paracetamol* and *caffeine* and *Monoacetylmorphine*, as also observed in para 10.3 of the verdict of the Hon’ble Supreme Court in **HIRA SINGH (Supra)**, to the effect:-

“10.3. Take the example of heroin. It is known as powerful and illegal street drug and opiate derived from morphine. This drug can easily be “cut” with a variety of different substances. This means that drug dealer will add other drugs or non-intoxicating substances to the drug so that they can sell more of it at a lesser expense to themselves. Brown sugar/smack is usually made available in powder form. The substance is only about 20% heroin. The heroin is mixed with other substances like chalk powder, zinc oxide, because of these, impurities in the drug, brown sugar is cheaper but more dangerous. These are only few examples to show and demonstrate that even mixture of narcotic drugs or psychotropic substance is more dangerous. Therefore, what is harmful or injurious is the entire mixture/tablets with neutral substance and narcotic drugs or psychotropic substances. Therefore, if it is accepted that it is only the actual content by weight of offending drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity, in that case, the object and purpose of enactment of the NDPS Act would be frustrated. There may be few punishment for “commercial quantity”. Certainly that would not have been the intention of the legislature.”,



it is apparent that the content of *paracetamol* and *caffeine* and *Monoacetylmorphine* i.e the weight thereof has to be included into the entire content of the substance recovered from the appellant which weighed 1.5 Kgs.

18. As already observed hereinabove the factum that over a period of time *Diacetylmorphine* converts into *Monoacetylmorphine* and *Monoacetylmorphine* converts into *Morphine*, and that, depending on the environmental conditions like moisture in the environment and in the sample, the *Diacetylmorphine* can convert into *Monoacetylmorphine* and *Morphine* by the process of hydrolysis and that *Diacetylmorphine* and *Monoacetylmorphine* are synthesized products of *Morphine*, which *Morphine* is also listed at Serial No.77 of the table to Section 2 of the NDPS Act, 1985 in which the commercial quantity is stipulated as being 250 Gms., coupled with the factum that even *heroin* with its chemical name of *Diacetylmorphine*, the quantity amounting to 250 Gms. is a commercial quantity with there being chemical changes which take place in the *Diacetylmorphine* or conversion thereof into *Monoacetylmorphine* and vice versa, coupled with the factum that the prosecution version is categorical as per the Special Report under Section 57 of the NDPS Act, 1985 dated 20.08.2011 that on checking of the transparent polythene tied with rubber band and containing Matiyala coloured powder in it which had been recovered from the appellant, it was found on checking with the field testing kit to be *heroin* (i.e. *Diacetylmorphine*), with the aspect of challenge to recovery of the date of the offence from the appellant not sought to be urged during the course of



the arguments in the instant appeal, the conviction of the appellant for possession of 1.5 Kgs. of heroin, a commercial quantity, to which the provisions of Section 21(c) of the NDPS Act, 1985 apply,- has to be sustained and is sustained, even though vide the impugned order on sentence dated 15.09.2016, there appears to be a typographical error sentencing the convict under Section 20(c) of the said enactment which provision relates to possession of cannabis and not a manufactured drug and its preparations.

19. It thus becomes apparent that in terms of Section 21(c) of the NDPS Act, 1985, the possession of heroin of a commercial quantity is punishable with a minimum imprisonment of a term of ten years of rigorous imprisonment **and** to a fine which shall not be less than Rs.1 lakh. Thus, apparently, the appellant has, vide the impugned order on sentence dated 15.09.2016, rightly been sentenced to ten years of rigorous imprisonment and to a fine of Rs.1 lakh, which cannot be modified as laid down by the Hon'ble Supreme Court in **State Vs. Madhya Pradesh Vs. Vikram Das**, Crl.A.208/2019, reported in AIR 2019 SC 835, wherein, it has been observed in paragraph 7 to the effect:-

“7. In Mohd. Hashim v. State of U.P. [Mohd. Hashim v. State of U.P., (2017) 2 SCC 198 : (2017) 1 SCC (Cri) 698] , the question examined was in relation to minimum sentence provided for an offence under Section 4 of the Dowry Prohibition Act, 1961 [Act of 1961] , providing for minimum sentence of six months. It was held that benefit of the Probation Act cannot be extended where minimum sentence is provided. The Court held as under : (SCC pp. 207 & 209, paras 19 & 24)



“19. The learned counsel would submit that the legislature has stipulated for imposition of sentence of imprisonment for a term which shall not be less than six months and the proviso only states that sentence can be reduced for a term of less than six months and, therefore, it has to be construed as minimum sentence. The said submission does not impress us in view of the authorities in Arvind Mohan Sinha [Arvind Mohan Sinha v. Amulya Kumar Biswas, (1974) 4 SCC 222 : 1974 SCC (Cri) 391] and Ratan Lal Arora [State v. Ratan Lal Arora, (2004) 4 SCC 590 : 2004 SCC (Cri) 1353] . We may further elaborate that when the legislature has prescribed minimum sentence without discretion, the same cannot be reduced by the courts. In such cases, imposition of minimum sentence, be it imprisonment or fine, is mandatory and leaves no discretion to the court. However, sometimes the legislation prescribes a minimum sentence but grants discretion and the courts, for reasons to be recorded in writing, may award a lower sentence or not award a sentence of imprisonment. Such discretion includes the discretion not to send the accused to prison. Minimum sentence means a sentence which must be imposed without leaving any discretion to the court. It means a quantum of punishment which cannot be reduced below the period fixed. If the sentence can be reduced to nil, then the statute does not prescribe a minimum sentence. A provision that gives discretion to the court not to award minimum sentence cannot be equated with a provision which prescribes minimum sentence. The two provisions, therefore, are not identical and have different implications, which should be recognised and accepted for the PO Act.

24. At this juncture, the learned counsel for the respondents would submit that no arguments on merits were advanced before the appellate court except seeking release under the PO Act. We have made it



clear that there is no minimum sentence, and hence, the provisions of the PO Act would apply. We have also opined that the court has to be guided by the provisions of the PO Act and the precedents of this Court. Regard being had to the facts and circumstances in entirety, we are also inclined to accept the submission of the learned counsel for the respondents that it will be open for them to raise all points before the appellate court on merits including seeking release under the PO Act.”,

and laid down vide paragraphs 8 and 9 to the effect:-

“8. In view of the aforesaid judgments that where minimum sentence is provided for, the court cannot impose less than the minimum sentence. It is also held that the provisions of Article 142 of the Constitution cannot be resorted to, to impose sentence less than the minimum sentence.

9. The conviction has not been disputed by the respondent before the High Court as the quantum of punishment alone was disputed. Thus, the High Court could not award sentence less than the minimum sentence contemplated by the statute in view of the judgments referred to above.”,

that where a minimum sentence is provided, the Court cannot impose less than the minimum sentence and even the provisions of Article 142 of the Constitution cannot be resorted to impose a sentence lesser than the minimum sentence. However, it is essential to observe that in Section 21(c) of the NDPS Act, 1985 though there is a minimum fine of Rs.1 Lakh imposed, there is no minimum default sentence provided for the non-payment of the fine, which sentence apparently to be imposed in default of the payment of the fine is within the discretion of the Court.



20. In view thereof, in the facts and circumstances of the instant case, where the appellant has already undergone the substantive sentence of ten years of rigorous imprisonment and also part of the default sentence till date with his fine sentence also being liable to elapse on 21.08.2022, the prayer made by the appellant seeking release on the period of detention already undergone by him is allowed.

21. Thus, whilst upholding the conviction adjudicated vide the impugned judgment dated 14.09.2016 and whilst upholding the minimum fine imposed vide the impugned judgment dated 14.09.2016 and minimum sentence imposed vide the impugned order on sentence dated 15.09.2016 inclusive of the term of rigorous imprisonment of ten years and the fine of Rs.1 Lakh, the default sentence of one year of rigorous imprisonment is reduced to the default sentence of rigorous imprisonment on non-payment of the fine imposed vide the impugned order on sentence dated 15.09.2016 in relation to FIR No.217/11, PS Crime Branch to the extent of the period of the default sentence already undergone by the appellant, and the appellant is thus directed to be released forthwith.

22. Copy of this order be sent to the Superintendent Jail, Delhi for immediate compliance. Copy of this order be also supplied to the Appellant by Superintendent Jail, Delhi.

ANU MALHOTRA, J.

AUGUST 17, 2022

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