

E. Micheal Raj vs Intelligence Officer, Narcotic ... on 11 March, 2008

Equivalent citations: AIR 2008 SUPREME COURT 1720, 2008 AIR SCW 2365, (2008) ILR(KER) 2 SC 153, 2008 (5) SRJ 83, (2008) 65 ALLINDCAS 112 (SC), 2008 (65) ALLINDCAS 112, (2008) 3 MH LJ (CRI) 499, (2008) 1 CRILR(RAJ) 401, (2008) 2 JCC 78 (SC), 2008 CRILR(SC&MP) 401, 2008 (4) CRI RJ 172, 2008 (2) JCC 78, 2008 (5) SCC 161, 2008 (2) SCC(CRI) 558, 2008 ALL MR(CRI) 1318, 2008 CRILR(SC MAH GUJ) 401, 2008 (4) SCALE 592, (2008) 2 EFR 277, (2008) 2 KER LT 36, (2008) 2 ALLCRIR 2204, (2008) 2 CHANDCRIC 206, (2008) 2 ALLCRILR 793, 2007 ALLMR(CRI) 3010, (2008) 1 MH LJ (CRI) 303, (2008) 2 MAD LJ(CRI) 1144, (2008) 40 OCR 832, (2008) 4 RAJ LW 3549, (2008) 2 RECCRIR 597, (2008) 4 SCALE 592, (2008) 61 ALLCRIC 660, (2008) 2 CURCRIR 235, 2008 (2) ANDHLT(CRI) 110 SC

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Bench: P.P. Naolekar, Lokeshwar Singh Panta

CASE NO.:

Appeal (crl.) 1250 of 2005

PETITIONER:

E. Micheal Raj

RESPONDENT:

Intelligence Officer, Narcotic Control Bureau

DATE OF JUDGMENT: 11/03/2008

BENCH:

P.P. NAOLEKAR & LOKESHWAR SINGH PANTA

JUDGMENT:

J U D G M E N T P.P. NAOLEKAR, J.:

1. This appeal by special leave is directed against the judgment and order dated 25.8.2004 of the Kerala High Court in Criminal Appeal No. 185 of 2004 whereby the conviction and sentence of the accused-appellant under Section 21(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act) was confirmed.

2. The relevant facts of the case are 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 5.6g 5.0 g 1.4%

2. S3 4.9 g 4.6g 1.6%

3. The accused-appellant was charged with the offence committed under Section 8(c) read with Sections 21 and 29 of the NDPS Act by the Intelligence Officer, Narcotic Control Bureau. The Special Judge for Trial of Cases under the NDPS Act found that the substance found in possession of the accused was an opium derivative which has been defined under Section 2(xvi), and under Section 2(xvi)(e) a preparation, containing more than 0.2% of morphine or diacetylmorphine, is an opium derivative; and that since this contraband article contained 1.4% and 1.6% heroin it is an opium derivative, and punishable under Section 21 of the NDPS Act. Since the manufactured drug being carried weighed 4.07 kg., it would come under Section 21(c) being a commercial quantity, but since the accused is only a carrier and is not the beneficiary of the transaction, he would not be awarded the maximum sentence and would be awarded the minimum sentence of 10 years rigorous imprisonment and a fine of rupees one lakh, in default of payment of fine rigorous imprisonment for one more year. On an appeal being preferred, the High Court found the accused guilty. The High Court said 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 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 (viia) (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 (viiia) and (xxiiia) 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.

Sl.

No Name of Narcotic Drug and Psychotropic Substance ..

Other non-

propriety name Chemical Name Small Quantity (in gm) Commercial Quantity (in gm./kg.) Heroin Diacetylmorphine 250 gm.

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)(e) 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 (viiia) 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 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.

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.

15. The learned counsel for the respondent placed reliance on the decision of this Court in *Amarsingh Ramjibhai Barot v. State of Gujarat*, (2005) 7 SCC 550, in support of his contention that

the entire material found in possession irrespective of the content of the offending material has to be taken into consideration while imposing the punishment. In Amarsingh case (supra), two persons, namely, Amarsingh and Danabhai were apprehended. Amarsingh was found carrying a plastic bag which contained a black-coloured liquid substance weighing 920 gms. Similarly, 4.250 kg. of grey-coloured substance was recovered from Danabhai. Samples were sent to the Forensic Science Laboratory (FSL). The FSL report indicated that the sample from Amarsingh was opium as described in the NDPS Act containing 2.8% anhydride morphine apart from pieces of poppy flowers and the sample relating to Danabhai was reported to be opium as described in the NDPS Act having 1.2% anhydride morphine and also containing pieces of poppy flowers. Both the accused were charged and tried under Sections 15, 17 and 18 read with Section 29 of the NDPS Act. The High Court found that the conviction under Sections 17 and 18 read with Section 29 of the NDPS Act was not correct, but convicted Amarsingh under Section 21(c) and also under Section 21(c) read with Section 29 of the NDPS Act, for individually being in possession of opium and for being jointly, in conspiracy with the other accused. The High Court found the accused possessed of commercial quantity and convicted and sentenced him for 10 years rigorous imprisonment plus fine of Rs. 1 lakh. Being aggrieved, Amarsingh approached this Court. This Court has held in para 14 of the judgment as under :

There does not appear to be any acceptable evidence that the black substance found with the appellant was coagulated juice of the opium poppy and any mixture, with or without any neutral material, of the coagulated juice of the opium poppy . FSL has given its opinion that it is opium as described in the NDPS Act . That is not binding on the court. The Court further held that the evidence also does not indicate that the substance recovered from the appellant would fall within the meaning of sub-clauses (a), (b), (c) or (d) of Section 2(xvi), but residuary clause (e) would apply and consequently it would amount to opium derivative as all opium derivatives fall within the expression `manufactured drugs . Thus, the Court arrived at the conclusion that what was recovered from the appellant was manufactured drug and the offence proved against the appellant fell clearly within Section 21 of the NDPS Act for illicit possession of manufactured drug. The Court concluded and held in para 17 as under:

In respect of opium derivatives (at Sl.No.93) in the said notification, 5 grams is specified as small quantity and 250 grams as commercial quantity . The High Court was, therefore, right in finding that the appellant was guilty of unlawful possession of commercial quantity of a manufactured drug. Consequently, his case would be covered by clause (c) and not clause (a) or (b) of Section 21 of the NDPS Act. This Court has, therefore, upheld the imposition of minimum punishment under Section 21(c) of 10 years rigorous imprisonment with fine of Rs. 1 lakh.

16. On going through Amarsingh case (supra), we do not find that the Court was considering the question of mixture of a narcotic drug or psychotropic substance with one or more neutral substance/s. In fact that was not the issue before the Court. The black-coloured liquid substance was taken as an opium derivative and the FSL report to the effect that it contained 2.8% anhydride

morphine was considered only for the purposes of bringing the substance within the sweep of Section 2(xvi)(e) as 'opium derivative' which requires a minimum 0.2% morphine. The content found of 2.8% anhydride morphine was not at all considered for the purposes of deciding whether the substance recovered was a small or commercial quantity and the Court took into consideration the entire substance as an opium derivative which was not mixed with one or more neutral substance/s. Thus, Amarsingh case (supra) cannot be taken to be an authority for advancing the proposition made by the learned counsel for the respondent that the entire substance recovered and seized irrespective of the content of the narcotic drug or psychotropic substance in it would be considered for application of Section 21 of the NDPS Act for the purpose of imposition of punishment. 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.

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.

19. The accused-appellant is stated to be in jail since 6.3.2001. He has, therefore, undergone the sentence imposed on him. He shall be set at liberty forthwith if not required in any other case.

20. The appeal stands disposed of in the above terms.