

(2011) 08 MAD CK 0134

In the Madras High Court

Case No : Criminal Appeal (MD) No. 130 of 2011

Balaiah @ Balu

APPELLANT

Vs

State by The Inspector of Police

RESPONDENT

Date of Decision : 11-08-2011

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 2, 21, 23, 8

Citation : (2011) 08 MAD CK 0134

Hon'ble Judges : S. Palanivelu, J

Bench : Single Bench

Advocate : T.K. Sampath, for the Appellant; P. Kandasamy, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

S. Palanivelu, J.—This Criminal Appeal has been filed to set aside the conviction of the Appellant in C.C. No. 354 of 2004, dated

05.02.2008 by the learned Additional District and Sessions Judge and Special Court for EC Act Cases, Pudukkottai, by allowing this appeal.

2. On 22.04.2004, at about 16.00 hours, along Trichy-Uraiyur Road near Uyyankondan Bridge, heroin weighing 1250 grams was seized from the

Appellant and one Kutty belonging to Bombay and they were charged under Sections 8(c) r/w. Section 21(c) of the Narcotic Drugs and

Psychotropic Substances Act, 1985, (hereinafter referred to as "the Act). On consideration of the evidence of the record, the learned Special

Judge (Essential Commodities Act Cases Court), Pudukkottai, convicted the Appellant u/s 8(c) r/w. Section 21(c) of the Act and sentenced him

to undergo Rigorous Imprisonment for 10 years and also to pay a fine of Rs. 1,00,000/-, in default, to undergo Rigorous Imprisonment for six

months. Hence, the Appellant is before this Court.

3. Mr. T.K. Sampath, the learned Counsel appearing for the Appellant would submit that he is concentrating on the sentence portion alone, leaving

apart the merits of the case. It is his contention that even though the contraband was sent for scientific examination and was found as heroine, no

purity test was conducted to ascertain the percentage of heroin content in the contraband. Hence, at no stretch of imagination, the Appellant could

be punished u/s 21(c) of the Act, but at the most, he may be found guilty u/s 21(b) of the Act, since it is to be construed that when the purity is not

ascertained by the prosecution, the contraband contains the quantity above the small quantity and below the commercial quantity.

4. Heard the learned Government Advocate (Crl. Side) appearing for the Respondent.

5. The learned Counsel appearing for the Appellant in support of his contention placed reliance upon a most celebrated judgment on this point

reported in E. Micheal Raj Vs. Intelligence Officer, Narcotic Control Bureau, , wherein Their Lordships have elaborately dealt with the subject

and rendered guidelines to be followed in the matter of imposition of lesser sentence under the Act. The operative portions of the judgment goes

thus:

8. 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 rationalised 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 u/s 2(xxiii-a) and Section 2(vii-a) 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 gm and commercial quantity has been mentioned as 250

gm. So, the basic question for decision is whether the contravention involved in this case is small, intermediate or commercial quantity u/s 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.

14. 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 (vii-a) 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(xxiii-a), 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.

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 u/s 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.

6. Their Lordships have dealt with the introduction of Sections 21 to 23 substituted by Act 9 of 2001 with effect from 02.10.2001. It is the view of the Hon"ble Apex Court that it is only the actual content by weight of the narcotic drugs which is relevant for the purpose of determining as to whether it would constitute the small quantity or commercial quantity. When the prosecution has not placed before the Court the percentage of actual content in the contraband, it is to be construed as a quantity above the small quantity and below the commercial quantity.

7. This Court has followed the above said E. Michael Raj case on so many occasions. T. Sudanthiram, J. in CrI.A. No. 438 of 2009 (Murugan v.

State rep. by The Inspector of Police, NIB CID, Chennai), dated 18.08.2009, has expressed view that though the test was conducted from the

samples for the presence of the heroin the purity test has not been conducted so as to establish the quantity of the Di-Acetyl-Morphine in the hole

mixture. Finally, the learned Judge has reached conclusion that in the circumstances of the case, it is safe to conclude that the contravention by the

accused involves quantity less than commercial quantity, but greater than small quantity, which is punishable u/s 21(b) of the Act. M. Jayapaul, J.

disposed of a CrI.A. No. 220 of 2008 (Samundeeswaran @ Samu v. State by The Inspector of Police, NIB CID, Chennai), on 07.07.2009, as

per Section 21(b) of the Act following the principles enunciated in E. Michael Raj case. C.T. Selvam, J. in a decision reported in 2010(2) Drugs

Cases (Narcotics) 150 (L. Sundhuskhan v. State), has also followed E. Michael Raj case and convicted and sentenced the accused u/s 21(b) of

the Act.

8. The learned Counsel for the Appellant also relied upon a decision of the Kerala High Court in CrI.A. 887 of 2007, dated 09.08.2009, wherein

the learned Judge has observed that the quantitative test has to be conducted to find out the exact percentage of the components which constitute

the substance for determining the offence committed by an accused, it is

necessary to get the data which would show the exact percentage of diacetylmorphine contained in the substance seized from the accused and that when it is not ascertained, then the logical corollary is that the benefit should go to the accused.

9. In view of the above said judicial pronouncements, I am of the considered view that since the purity test has not been conducted, it is to be treated as the contraband contained diacetylmorphine greater than the small quantity and less than the commercial quantity which would call for conviction and sentence u/s 21(b) of the Act.

10. In the result, the appeal is allowed in part convicting the Appellant u/s 21(b) of the Act. From 22.12.2004, the Appellant has been in custody

i.e., he has suffered sentence of Rigorous Imprisonment for 7 years and five months. As far as the sentence is concerned, this Court is of the

opinion that the sentence already undergone by the accused for the offences committed by him is sufficient. Insofar as the imposition of fine is

concerned, the fine of Rs. 1,00,000/-is reduced to Rs. 25,000/-(Rupees Twenty Five Thousand only) payable by the Appellant, in default, he has

to undergo Rigorous Imprisonment for six months.