
(2009) 08 RAJ CK 0022
In the Rajasthan High Court
Case No : Criminal Appeal No. 25 of 2009

Ram Lal

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 21-08-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 374(2), 482, 91
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 17, 18, 2, 21, 8

Citation : (2010) 1 Crimes 57

Hon'ble Judges : C.M. Totla, J

Bench : Single Bench

Judgement

C.M. Totla, J.—This appeal u/s 374(2) Cr.P.C challenges appellant's conviction for the offence punishable u/s 21(c) of the NDPS Act (hereinafter referred to as the "Act") and sentence awarded of 14 years rigorous imprisonment and fine of Rs. 1 lac.

2. Heard learned Counsel for the appellant and learned Public Prosecutor.

3. In course of arguments, on behalf of appellant thrustly argued is that conviction is for possessing (and/or transporting) commercial quantity of heroin alleged to be 450 gms and appellant's application of 14.11.2008 requesting (i) re-examination of sample for determining quantity of diacetyl morphine and then consequent (ii) calling of the expert examining sample is rejected by trial Court vide order of same day and, since determination of quantity was and is necessary, so the application ought to have been allowed and ordering accordingly, the appeal should be decided.

4. Learned Counsel while mentioning little points on merits, argued that the above application for determining quantity, may be deemed one u/s 91 Cr.P.C. and in interest of justice deserves to be allowed even at this stage.

5. Submitted that in appeal also similar is appellant's I.A. No. 56/09 requesting

for direction to forward the sample of recovered contraband to FSL for determination of percentage of di-acetyl morphine.

6. Learned Public Prosecutor submitted that application very belatedly presented is rightly rejected by learned Judge and FSL report (Ex.P/27) is straight clear about the substance having diacetylmorphine.

7. Considered rival arguments and perused the record.

8. Contemplated by this order is to address above argument for further scientific chemical examination of same and then other points, if need be.

9. At the outset it is mentioned that consideration of above point is without in any touching the merits of the case and if any alleged fact is described, it is only in context of and for deciding above.

10. In very short, allegedly as per prosecution in June 2006, when SHO PW/12 searched a moped (two wheeler) driven by appellant, on it in a bag were black pair rexine shoes - concealed in sole of shoes is found this substance stated to be 440 gms. Two samples collected from this substance and one forwarded to FSL.

11. Appellant charged, and trial resulted in conviction of and sentence to appellant.

12. Per FSL report, Ex.P/27 bearing date 31.07.07, sample was deposited on 07.06.06 and on microchemical examination, "the sample contained in the packet marked A gave positive tests for the presence of di-acetyl morphine (Heroin)."

13. Learned Counsel for the appellant submitted that the report does not show how much was percentage of diacetyl morphine and the report submitted before the trial Court in August, 2007 therefore, the application presented on behalf of appellant cannot be said to be delayed one and as the appellant was in custody so, rejection of application by learned trial Judge on the basis of stated delay is erroneous. Submitted that determination of percentage of diacetylmorphine is essential for just decision.

14. On behalf of appellant also submitted is that appellant, in relation to his application dismissal order of 14.11.2008, moved a petition u/s 482 Cr.P.C being No. 1569/08 but since the case was already decided by that time, the petition was dismissed observing that points raised may be agitated before the appropriate forum. Presented copy of order dt. 28.01.2009 for perusal.

15. In support of contentions, learned Counsel relied on decisions (i) 2008(2) SCC (CrL.) 558 E. Michael v. Intelligence Officer, Narcotics Control Bureau and (ii) 2009 (4) Raj. 296 Sujan Ram v. State of Rajasthan.

16. Learned Public Prosecutor opposing submitted that application presented only on 14.11.2008 when the case at the stage of and posted for final arguments after completion of evidence.

17. Learned trial Judge rejecting the application, per order dt. 14.11.2008, observed that report received on 14.08.07, since then was in knowledge of Advocate representing the appellant, still only after one year and when the case posted for final hearing, the application is presented, so it seems for to delay decision.

18. Considered contentions and questions involved.

19. If for reasons the applications presented by appellant are held to be worth acceptance, then may arise contingency of remand i.e. order of re-trial. Re-trial is to be sparingly ordered only on reasonably strong reasons and when necessarily essential for arriving at right and just decision.

20. Considering above eventuality, proper may be to examine in little detail if just necessity exists for further analysis of sample. Since the report reached trial Court in August, 2007 and application presented before trial Court while appellant in judicial custody and as minimum is sentence of ten years imprisonment and more so, when appellant then prisoner-under trial, the questions of delay and ancillary thereto hardly arise here.

21. Still it is explicitly recorded that question of delay or its effect including thereto of sample or part being rendered non-suitable for examination or analysis, reasons of delay, effect and impact of delayed examination and all related matters (including also for the case at hand) are here and now neither in issue nor are being touched and commented upon.

22. Appellant is charged for possession of 440 gm of smack. "Smack" means and is a synonym for "heroin". (so is taken). Entry No. 56 of S.O 1015 (E) dt 19.10.2001 mentions chemical name of heroin as diacetyl morphine and per report Ex.P/27, the substance contained diacetyl morphine-so no reluctance can be to take that by smack is meant heroin (diacetyl morphine). Opium derivative appearing at Section 2(xvi) includes heroin which is defined as under:

2 (xvi) "opium derivative" means -(a) medical opium

(b) prepared opium

(c) phenanthrene alkaloids...

(d) diacetylmorphine, that is, the alkaloid also known as dia-morphine or heroin and its salts ; and (e) all preparations...

23. Every opium derivative falls under "manufacture drug". Section 8, 9 prohibits and Section 21 provide punishment for contraventions in relation to manufacturing drug and minimum of sentence is graded w.e.f 02.10.2001 which in most cases depend upon quantity being small or commercial one and in between them. If the quantity is commercial, minimum is ten years imprisonment and fine Rs. 1 lac.

24. For Heroin according to Entry No. 56 of notification S.O 1055 (E) dt.

19.10.2001 small quantity is less than 5 gms and commercial quantity above 250 gms-in between them is, i.e. below commercial and above small are quantities generally described as intermittent. For small quantity punishment according to Section 21 is upto six months and /or fine Rs. 10,000/-, for intermittent upto ten years and fine upto Rs. 1 lac, for commercial quantity minimum is sentence ten years and fine Rs. 1 lac which may extend to 20 years and fine Rs. 2 lac.

25. For different quantities, substantially different are the sentences and for commercial higher is the extent of punishment with minimum ten years.

26. For determining the sentence of contraband material, ascertainment of quantity is very relevant and more essential may be if charge is for quantity attracting minimum sentence as is here.

27. Hon"ble the Apex Court in E. Michael Raj v. Intelligence Officer, Narcotic Control Bureau reported in (2008) 2 SCC (Cri) 558 held that quantity of diacetyl morphine in the substance (heroin) is material and relevant. Hon"ble Apex Court has held that in mixture of narcotic drug and psychotropic substance, the quantity of neutral substance is not to be taken into consideration. Actual content of the narcotic drug/substance is relevant for the purpose of determining whether it constitutes small or commercial quantity.

28. Hon"ble the Apex Court dealing with question of small quantity observed at para 8 of the judgment in (2004) 4 SCC 446 Ouseph v. State of Kerala that;

8. 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 dt. 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 ampule 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 1/10 of the limit of small quantity specified under the notification.

29. Hon"ble Apex Court in para 16 of judgment in Amarsingh Ramjibhai Barot Vs. State of Gujarat, observed like this for quantities;

16. The learned Counsel for the appellant raised a further contention that even if the appellant is guilty of an offence u/s 21 of the NDPS Act, the punishment could only fall within Clause (a) of Section 21 as the "manufactured drug" involved was of "small quantity". In our view, this contention is untenable. The amending Act of 2001 introduced the concept of "small quantity" and "commercial quantity" for the purpose of imposing punishment. The punishment thereunder is graded according to whether the contravention involved "small quantity", "commercial quantity" or a quantity between the two.

30. In above case, for substance having 1.2% anhydrous morphine was upheld the conviction u/s 21(c) instead of Section 17 & 18.

31. Similarly, Hon"ble Apex Court in State of NCT of Delhi Vs. Ashif Khan @ Kalu, observed that quantity of narcotic drug or psychotropic substance found in the mixture may be relevant.

32. Therefore, for substance having diacetylmorphine under definition of opium derivative per Section 2 (xvi), determination of actual quantity of diacetylmorphine is essential as it affects extent or minimum of sentence.

33. Appellant is charged for possessing 440 gm of substance described above and above 250 gm invites sentence of minimum of ten years. The report Ex.P/27 only describe that sample gave positive for presence of diacetylmorphine but do not mention percentage (or weight) of diacetylmorphine. Quantitative determination being essential, so in the opinion of the Court and for determining quantity, the application for forwarding the sample to laboratory should be allowed.

34. For the above reasons and as appellant's applications dt. 14.11.2008 and I.A are allowed, so, setting aside the conviction and sentence of appellant, the matter is to be remanded back i.e retrial is to be ordered.

35. Now, question arises as to re-trial from what stage. Certainly considering reasons for directing so, complete denovo trial shall be devoid of any good reason. The application was presented after examination of appellant u/s 313 Cr.P.C after completion of prosecution evidence. In the considered opinion of the Court and reasons for remanding and relevant factors, retrial but only from specific stage-that is limited re-trial - should be directed. Accordingly, specific ought to be directions as to from what stage, re-trial is to be and considering why is so, it is directed to be from the stage prior to 14.11.2008 (date of application presented and disposed of) and just after stage of completion of prosecution evidence.

36. Deciding the appeal as above, conviction and sentence of appellant arrived at by learned Special Judge is set aside and appellant is ordered to be re-tried (limited) before Special Judge from the stage mentioned as above and (i) assuming the application for further examination of sample dt. 14.11.2008 is allowed (ii) question of calling an expert examining sample to be decided by learned Special Judge, NDPS cases afresh on the basis of relevant material, law and procedure. Learned trial Judge is not precluded from exercising or invoking any other provision per law and procedure.

37. Appellant is in custody who is to be directed to be produced before the trial Court and the Special Judge further to call him for proceeding as soon as record received but not later than 15.09.2009 and also to make every possible endeavour to complete the trial within six months.