
(2007) 11 DEL CK 0068

In the Delhi High Court

Case No : Criminal Appeal No. 426 of 2005

Veer Pal @ Veeru @ Rahisuddin

APPELLANT

Vs

State (NCT of Delhi)

RESPONDENT

Date of Decision : 30-11-2007

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 2(via), 21, 21(b), 21(c)

Citation : (2008) 2 ILR Delhi 31

Hon'ble Judges : Sudershan Kumar Misra, J

Bench : Single Bench

Advocate : R.P. Khatana, Mr. Gaurav Khatana and Mr. Satendra Kumar, for the Appellant; Amit Sharma, for the Respondent

Judgement

Sudershan Kumar Misra, J.—This is an appeal preferred by Veer Pal @ Veeru @ Rahisuddin against his conviction and sentence by the Special Judge, Delhi u/s 21(c) of the NDPS Act to rigorous imprisonment for 12 years and a fine of Rs. 1,20,000/- and in default of payment of fine, to further undergo simple imprisonment for 1 year two months. In the memorandum of appeal presented before this Court, the appellant has assailed his conviction on a number of grounds. However, Mr. Khatana, learned counsel for the appellant has confined his appeal to one ground alone. He says that the sentence awarded to the appellant by the impugned judgment is based on the conclusion reached by the Learned Trial Court that the quantity of the diacetylmorphine (heroin) seized from his client constituted a "commercial quantity" which in turn entailed a minimum sentence of rigorous imprisonment for a term not less than 10 years along with fine not less than 1.00 lac of rupees in terms of Section 21(c) of the NDPS Act. He submits that the Trial Court was in error in concluding that merely because the entire quantity of the substance seized from his client weighed 1 kg., therefore the requirement of Item 56 of the relevant notification of the Central Government, which specifies the commercial quantity of diacetylmorphine (heroin) to be 250 grams, was satisfied. He submits that, in

fact, keeping in view the ratio of the judgment of this Court in the case of Ansar Ahmed Vs. State (Govt. of NCT of Delhi), , the Learned Trial Court ought to have rested its decision on the point of sentencing on the actual quantity by weight of diacetylmorphine (heroin) that was determined to be present within the substance seized after analysis by the CFSL. He submits that had this been done, the actual quantity of diacetylmorphine (heroin) in the substance seized from his client would have actually amounted to 24 grams, which is much less than the quantity designated as a, "commercial quantity", as notified u/s 2(vii-a) of the NDPS Act. In Ansar Ahmed's case (supra), Badar Durrez Ahmed, J. of this Court has taken the view that while applying the provisions of Section 21 of the NDPS Act for awarding punishment, what must be seen is the extent of the substance, in this case diacetylmorphine (heroin), by weight in the mixture. The judgment, inter alia, states as follows:

It does appear to me that what has to be seen is the content of heroin by weight in the mixture and not the weight of the mixture as such. Otherwise, anomalous consequences would follow. While a recovery of 4 grams of heroin would amount to a small quantity, the same 4 grams mixed up with say 250 grams of powdered sugar would be quantified as a "commercial quantity"! And, where would this absurdity stop ? Suppose one were to throw a pinch of heroin (say 0.5 gram) into a polythene bag containing small steel ball bearings having a total weight of 1 kg.; would the steel ball bearings be also weighed in and it be declared that a commercial quantity (1000.5 grams) of heroin was recovered ! Surely, it is only the content of heroin (0.5 gram) in the "mixture" of heroin and steel ball bearings that is relevant? Clearly, then, it would qualify as a small quantity. Therefore, in a mixture of a narcotic drug or a psychotropic substance with one or more neutral substances, the quantity of the neutral substance or substances is not to be taken in considering whether a small quantity or a commercial quantity of the narcotic drug or psychotropic substance is recovered. Only the actual content by weight of the narcotic drug or the psychotropic substance (as the case may be) is relevant for determining whether it would constitute a "small quantity" or a "commercial quantity"

2. That judgment also goes on to examine other cases including the case of Mohd. Sayed Vs. Customs, where a similar question had arisen with regard to the psychotropic substance "buprenorphine" which was to be found in ampoules of "temgesic injections" and it was held that;

it could only be the actual quantity/value of buprenorphine as found present in each ampoule..... and not the total quantity..... that may be taken for the purposes of framing of charge against the petitioner.....

3. Similarly in the case of Masoom Ali @ Ashu v. State (Crl. Rev. Petition 195/2004) decided on 07.04.2004, R.S. Sodhi, J. of this Court, while disagreeing with the reasoning to the contrary of the Court below, held that;

..... where in a large quantity of powder recovered the percentage of the

narcotic substance is very small then proportionate reduction in the recovery would have to be made in order to ascertain whether the offence falls within the categories mentioned in the NDPS Act.

4. The Supreme Court of India in Ouseph alias Thankachan Vs. State of Kerala , while deciding whether the substance in question amounted to a "small quantity" also took into consideration only the actual extent of the psychotropic substance present within the substance seized. My attention has also been drawn to two other decisions of this Court on the same point being Sagar Singh Vs. The State (Govt. of NCT), and Rashid Mohd. v. State (2006) 2 JCC 101.

5. Ansar Ahmed's case (supra) also takes note of the decision of the Supreme Court in the case of Basheer @ N.P. Basheer Vs. State of Kerala, which has gone into the question of the genesis of the classification of narcotic drugs and psychotropic substances into "small" and "commercial" quantities and the reasons and objects for the same, which was rationalisation of the sentencing structure wherein it was also held that its object was, "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."

6. I find that judgment on Ansar Ahmed also takes note of a decision to the contrary by another Learned Single Judge of this Court in the case of Yogesh Tyagi Vs. State, which decision was clearly rendered in ignorance of previous decisions not only of other single benches of this Court as also of the Supreme Court of India and concluded that being per incuriam, it does not constitute a binding precedent and deserves to be ignored. I am in respectful agreement with the line of reasoning adopted by Badar Durrez Ahmed, J. in the case of Ansar Ahmed (supra), to conclude that it is by now settled law that what is to be considered is the actual quantity by weight of the offending substance that has been recovered, and not the entire quantity of any material or substance seized, of which the offending substance may be a part.

7. In this case, I find that Exhibit PW-9/B, which is a report of the Forensic Science Laboratory of Government of NCT of Delhi, clearly states that "on chemical and gas chromatography examination, Exhibit-A was found to contain diacetylmorphine 2.4%". As per this report, 2.58 grams of the substance seized from the accused on examination has been found to contain 2.4% of the offending substance diacetylmorphine (heroin). By extrapolating this percentage to the entire quantity of the substance (i.e. 1 kg.) seized from the accused, the actual quantity of diacetylmorphine (heroin) seized comes to about 24 grams. It follows therefore that the quantity seized, while being more than, "small quantity", as indicated under the NDPS Act, is certainly less than the, "commercial quantity", indicated therein.

8. The fact that out of the entire substance weighing 1 kg. seized from him, the actual quantity of diacetylmorphine (heroin) seized works out to be 24 grams

only is not disputed by the learned counsel for the State. He also does, not dispute the proposition canvassed for by the appellant's counsel that on the application of the ratio of the decision cited in the bar, this case is one falling u/s 21(b) of the NDPS Act and that Section 21(c) of the said Act is not attracted. In this view of the matter, it is obvious that the accused would be punishable u/s 21(b) of the NDPS Act and not Section 21(c) thereof, as held by the Learned Trial Court. It follows therefore that the offence committed by the appellant is punishable with rigorous imprisonment for a term which may extend to 10 years and with a fine which may extent to 1.00 lac of rupees. As per nominal roll dated 22nd November, 2007, the appellant has already undergone 5 years, 8 months and 29 days" imprisonment.

9. In view of the conclusion reached by me to the effect that the appellant was found to be in possession of 24 grams of heroin (diacetylmorphine) which quantity happens to be more than 5 grams (i.e. small quantity) and less than 250 grams which has been defined as a "commercial quantity" under the NDPS Act, and looking to the fact that the accused has already undergone actual incarceration for more than five and a half years, I am of the view that the imprisonment undergone by him along with a fine of Rs. 15,000/- is sufficient to meet the ends of justice. Therefore, while his conviction is maintained, the appellant is sentenced u/s 21(b) of the NDPS Act to a period of imprisonment already undergone by him and to pay a fine of Rs. 15,000/- failing which he shall undergo further simple imprisonment for a period of one month. The conviction and sentence, as awarded by the Learned Trial Court, is modified to the extent stated above. This appeal is disposed of in the above terms.