

Sanjay Jaiswal Vs. State

Sanjay Jaiswal Vs. State

SooperKanoon Citation : sooperkanoon.com/1100751

Court : Delhi

Decided On : Nov-28-2013

Judge : Hima Kohli

Appellant : Sanjay Jaiswal

Respondent : State

Advocate for Def. : Mr. Naveen Sharma

Advocate for Pet/Ap. : Mr. Krishan Kumar, Ms. Sunita Arora

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI + CRL.A.24/2007 Decided on 28.11.2013 IN THE MATTER OF : SANJAY JAISWAL Appellant Through: Mr. Krishan Kumar and Ms. Sunita Arora, Advocates with appellant in person. versus STATERespondent Through: Mr. Naveen Sharma, APP for State CORAM HON'BLE MS.JUSTICE HIMA KOHLI HIMA KOHLI, J.

(Oral) 1. The present appeal has been filed against the judgment dated 7.10.2004 passed by the learned ASJ in case arising out of FIR No.42/2002 registered under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short the Act), wherein the appellant was held guilty for committing an offence under Section 21(c) of the Act for being found in possession of commercial quantity of heroin. Under the order on sentence dated 11.10.2004, the appellant was sentenced to undergo rigorous imprisonment for a period of ten years with fine of

Rs.1.00 lac, in default of payment of fine, simple imprisonment for a period of one year.

2. Before considering the submissions made by learned counsel for the appellant and the learned APP, it is deemed appropriate to briefly recapitulate the facts of the case. The incident in question, subject matter of the present FIR, had occurred on 14.6.2002 when, as per the prosecution case, at about 10.15 A.M., a secret informer had informed the police that the appellant herein (a resident of Lucknow), was bringing heroin from Barabanki and supplying the same in Delhi. On the basis of the said secret information, a raiding party was constituted and the appellant was apprehended at 11.00 A.M. at Baba Kharak Singh Marg and he was served with a notice under Section 50 of the Act. On his search, a green rexine bag, which was found on his right shoulder, was opened, wherein apart from his apparel, two transparent polythene bags were found. On conducting a test with a field testing kit, it was discovered that the brown coloured powder in the two transparent polythene bags was heroin. Upon weighing the contents of the aforesaid bags, the weight was found to be 2.5 kgs. After completing all formalities, the appellant was arrested and the samples were collected and sent to the FSL for chemical examination.

3. After the charge-sheet came to be filed, vide order dated 25.10.2002, charges were framed against the appellant under Section 21(c) of the Act, to which he had pleaded not guilty and claimed trial.

4. In support of its case, the prosecution had examined eight witnesses, including, Dr. Madhulika Sharma, Chemical Examiner (PW-3), SI Prem Chand, the first IO (PW-4), HC Mahinder Singh (PW-5), SI Kuldeep Singh, the second IO (PW-7). The appellants statement was recorded under Section 313 Cr.P.C. and he had produced one witness, namely, Vinod Kumar (DW-1).

5. After conclusion of the evidence and upon considering the submissions advanced by both the sides, the trial court observed that the most material witnesses in the present case were PW-2 & PW-4, who were the recovery witnesses and there was hardly any contradiction found in their statements on major aspects inasmuch as both of them had proved the receipt of secret

information and deposed about the service of a notice under Section 50 of the Act on the appellant. After being satisfied that recovery of contraband from the possession of the appellant had been duly established from the testimony of the aforesaid two witnesses, the trial court had referred to the documentary evidence, including the Recovery Memo (Ex.PW-2/C), entries in the Malkhana register (Ex.PW-8/A) and the report under Section 57 of the Act (Ex.PW5/A), and concluded that the recovery of 2.5 kgs. of contraband from the possession of the appellant stood established beyond reasonable doubt.

6. Coming next to the deposition of Dr. Madhulika Sharma, Chemical Examiner (PW-3), the impugned judgment refers to the fact that the said witness had proved her report (Ex-PW3/A) stating inter alia that both the samples collected by the prosecution had been examined by her and they had tested positive for the presence of diacetylmorphine. Though the trial court had observed that both the reports had not given the purity percentage, it had turned down the submission made by the counsel for the appellant that the purity percentage was required to be reported by the expert, by relying on the judgment dated 26.05.2004 of the High Court in Bail Application No.360/2004 entitled Yogesh Tyagi vs. State. The trial court had proceeded to satisfy itself as to whether the prosecution had established the link evidence and concluded that having regard to the deposition of PWs-3, 4, 6 and 8, there was sufficient evidence to establish beyond reasonable doubt that compliance of Sections 55 and 57 of the Act had been made by Insp. S.P. Kaushik (PW-2) and HC Mahinder Singh (PW5), respectively.

7. Coming to the testimony of the defence witness, the learned ASJ observed that the testimony of Vinod Kumar (DW-1) contradicted the contents of the letter written by the appellant (Ex.PW-2/D-1) as to the manner in which the appellant had been apprehended on 14.6.2002 and therefore, it refused to place any reliance upon his deposition. CRL.A. 24/2007 the trial court concluded that the prosecution was successful in establishing its case beyond reasonable doubt and therefore pronounced the appellant guilty of being in possession of commercial quantity of heroin and convicted him under Section 21(c) of the Act.

8. As for the order on sentence, the trial court had examined the circumstances of the appellant and observed that as the appellant was a young man, the minimum sentence provided under the Statute would serve the ends of justice. Accordingly, the appellant was sentenced to undergo rigorous imprisonment for a period of ten years with fine of Rs.1.00 lac, in default of payment of fine, undergo simple imprisonment for a period of one year.

9. At the outset, learned counsel for the appellant states that he proposes to confine the scope of the present appeal to assailing the impugned order on sentence dated 11.10.2004, while refraining from contesting the impugned judgment of conviction on merits.

10. The solitary ground taken by the counsel for the appellant to assail the impugned order on sentence is that while passing the said order, the trial court had erred in imposing the sentence on the appellant under subSection (c) Section 21 of the Act, without first ascertaining the purity of the heroin that was found to be in his possession, which was of material consideration.

11. Learned counsel for the appellant expands his argument and submits that the aforesaid conviction order requires interference inasmuch as the trial court was required to return a finding as to whether the heroin that had been recovered from the possession of the appellant was of small quantity, or of intermediate quantity or of commercial quantity before passing an order on the point of conviction. He submits that evidence was first required to be led by the prosecution on this aspect for the trial court to have assessed as to whether the appellant ought to have been sentenced under sub-section (a) or sub-section (b) or sub- section (c) of Section 21 of the Act as each of the said sub- sections prescribes a different set of punishment for the contravention. In support of the aforesaid submission, learned counsel relies on the decision of the Supreme Court in the case of E. Michael Raj vs. Intelligence Officer, Narcotics Control Bureau, reported as 2008 (2) JCC (Narcotics) 78, and submits that the aforesaid judgment holds the field insofar as the imposition of punishment for possession of narcotic manufactured drug or any preparation of such drug is concerned.

12. Learned counsel for the appellant explains that heroin not being a natural drug and falling under the category of a manufactured drug, the Notification dated 16.07.1996 issued by the Ministry of Finance (Department of Revenue) describes diacetylmorphine CRL.A. 24/2007 and heroin under as having column 5, the commercial small quantity name has of mentioned as 5 gram and commercial quantity has been mentioned as 250 grams and the punishment to be imposed on the accused would be dependent on the quantity of the substance which had not been established before the court below.

13. It is a matter of record that the Chemical Examination report (Ex-PW- 3/A) did not mention the exact quantity of diacetylmorphine in the samples that had been forwarded for analysis. In response, Mr. Naveen Sharma, learned APP for the State submits that Dr. Madhulika Sharma (PW-3), who had undertaken the chemical examination of the samples had testified that the said samples had given a positive test for the presence of diacetylmorphine. He states that the aforesaid witness had volunteered that she would be in a position to submit another report with regard to the exact quantity of the aforesaid drug, if so asked. However, he explains that at the relevant point in time, the purity of the heroin was not required to be mentioned in a report by the Chemical Examiner for the reason that Section 21 of the Act did not prescribe that the extent of purity be specified. It is pointed out that the question of purity came to be considered by a Single Judge of this Court in a batch of matters, lead matter being Ansar Ahmed vs. State (Govt. of NCT of Delhi), reported as 2005 (3) JCC (Narcotics) 193, when the expression small quantity was examined in the context of Entry No.56 and Entry No.239 of the Act.

14. Before examining the submission made by learned counsels for the parties, it is necessary to refer to the relevant provisions of law. Chapter III of the Act deals with prohibition, control and regulation in cultivation, production, manufacture, possession, sale, purchase, etc. of any narcotic drug or psychotropic substance, and Chapter IV of the Act deals with offences and penalties for contravention of any provision of the Act. The relevant provisions that arise for consideration in the present case, are Section 2(xi) and Section 21 of the Act. manufactured drug and Section 21 Section 2(xi) defines the term prescribes the punishment for

contravention in relation to manufactured drugs and preparations. The aforesaid provisions are reproduced herein below for ready reference :

Section 2 (xi) manufactured drug means (a) all coca derivations, 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. xxx CRL.A. 24/2007 xxx 21. Punishment for contravention in relation to manufactured drugs and preparations - 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 terms which may extend to ten years and with fine which may extend to one lakh rupees; (c) Where the contravention involves commercial quantity, rigorous imprisonment for a term which shall not be less ten years but which may extend to twenty years and also be liable to fine which shall not be less than one rupees but which may extend to two lakh rupees: with than shall lakh Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.

15. A perusal of the impugned judgment and the order on sentence reveals that the appellant herein was held guilty and sentenced under Section 21(c) of the Act on the premise that he had contravened the provision of the Act by being in unauthorized possession of commercial quantity of a manufactured drug/a preparation containing a manufactured drug.

16. In the case of Ansar Ahmed (supra) referred to by the learned APP, it was elaborated that upon a plain reading of Entry 56, it is clear that for the content of heroin to qualify as a small quantity it should be less than 5 grams and to qualify as a commercial quantity, it should be 250 grams or in excess thereof. It was further held that Entry 239 would come into play in a situation where there is a mixture of two or more narcotic drugs or psychotropic substances or where a preparation is derived therefrom with or without the addition of a natural material. It was finally concluded that only the actual content of the psychotropic drug or psychotropic substance is relevant for determining as to whether it would constitute as a small quantity or a commercial quantity and in a mixture of a natural drug or a psychotropic substance with one or more natural substances, the quantity of the natural substance or substances is not to be taken into consideration to decide as to whether a small quantity or a commercial quantity of narcotic drug or psychotropic substance is recovered.

17. In the case of E. Micheal Raj (supra), the Supreme Court was examining the circumstances where heroin was recovered from the accused and the chemical report submitted in respect of the said narcotic drug had not only confirmed the sample in question, but a subsequent report had established its quantitative test or in other words, its purity. Taking note of the Statement of Objects and Reasons of the Amending Act of 2001, whereunder Section 21 had been amended, the Supreme Court had made the following pertinent observations:

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 appear 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.

(emphasis added) 18. After referring to its earlier decision in the case of Ouseph Alias Thankachan vs. State of Kerala, (2004) 4 SCC446 the Supreme Court had observed in the case of E. Michael Raj (supra) that the quantity of the narcotic drug or psychotropic substance found in the mixture is very relevant for the purposes of imposition of punishment and it was of the opinion that when any narcotic drug or substance is found mixed with one or more natural substances, it is the content of the narcotic drug or psychotropic substance which shall be taken into consideration for the purpose of imposition of punishment. In the facts of the said case, taking into consideration the analysts report with regard to the purity of the narcotic drug, the Supreme Court had concluded that the quantity involved was lesser than commercial quantity, but greater than small quantity, in other words, it was an intermediate quantity and therefore, the appellant therein was held punishable under sub section (b) of Section 21 of the Act.

19. In the case in hand, it is an admitted position that the report of the analyst does not throw any light on the purity of the narcotic drug except for having scientifically established the nature of the drug. In such circumstances, drawing strength from the decision in the case of E. Micheal Raj(supra), this Court is inclined to accept the submission made by learned counsel for the appellant that prior to passing an

order on the point of conviction, it was necessary to obtain a scientific report as to the quantitative test of the drug.

20. In view of the above discussion, this Court is of the opinion that the trial court had fallen into an error by imposing a punishment on the appellant under Section 21(c) of the Act without first establishing the exact quantity of the drug. Accordingly, while maintaining the order of conviction dated 7.10.2004, the order on sentence dated 11.10.2004 is set aside and the case is remanded back to the trial court for taking on record the evidence to establish the exact quantity of the narcotic drug that was found in the possession of the appellant, by sending the preserved samples in question to the concerned agency for undertaking a quantitative test to establish the purity of the narcotic drug and obtaining a fresh analysis report. After taking into consideration the said analysis report, the trial court shall hear the counsels for the parties and thereafter pass an order on the point of sentence.

21. Having regard to the submission made by the counsel for the appellant that against the quantum of sentence imposed on the appellant under the impugned order on sentence which was rigorous imprisonment for a period of ten years with fine of Rs.1.00 lac, in default of payment of fine, simple imprisonment for a period of one year, the appellant has undergone sentence for almost seven years and four months, the trial court is requested to expedite the proceedings and conclude the same as early as is possible and preferably within a period of one month from the date of receipt of the chemical analysis report. To facilitate expeditious disposal of the case, the concerned agency is also directed to undertake the analysis of the samples of the narcotic drug in question as early as is possible and preferably within a period of one month from the date of receiving the same.

22. List before the trial court on 19th December, 2013, on which date, the appellant shall remain present before the trial court along with his counsel, for holding further proceedings.

23. Trial court record shall be released forthwith and a copy of this order shall be forwarded by the Registry to the trial court for perusal and compliance.

24. The appeal is disposed of. A copy of this order be given dasti to the learned APP for the State for compliance. NOVEMBER28 2013 sk/rkb CRL.A. 24/2007 (HIMA KOHLI)

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com