

State Vs. Fatima

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Court : Delhi

Decided On : Mar-07-2014

Judge : Indermeet Kaur

Appellant : State

Respondent : Fatima

Judgement :

\$~R-37 * IN THE HIGH COURT OF DELHI AT NEW DELHI % + Judgment Reserved on:04.03.2014 Judgment Delivered on :07.3.2014 CRL.A. 134/2006 STATE Through Appellant Mr.Navin K. Jha, APP. versus FATIMA Through Respondent Mr.Jetendra Sethi and Mr. Hemendra Jailiya, Advocates. CORAM: HON'BLE MS. JUSTICE INDERMEET KAUR INDERMEET KAUR, J.

1 This appeal has been filed by the State. Vide the impugned judgment and order of sentence dated 21.9.2005 the appellant Fatima had been convicted under Section 21(a) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act) and had been sentenced to undergo the period already suffered by her noting the fact that she had been in custody for 3 years and more than 1 month. 2 The State is aggrieved by the aforementioned judgment. 3 Admittedly in this case 500 grams heroin was recovered from the appellant. The drug had been sent to the FSL for examination. The report of the FSL is dated 05.2.2004. It disclosed that the contraband recovered from the accused contained 0.32% of diacetylmorphine; it would translate to 1.60 grams.

The court had noted that this is a small quantity; the actual weight of the content/contraband being taken into account in view of the judgment of the a Bench of this Court reported in Dule Hassain Vs. State decided on 02.9.2005. Accordingly, since the possession of the appellant was of a small quantity his conviction followed under Section 21(a) of the said Act. The sentence was also ordered accordingly. 4 On behalf of the appellant, it has been pointed out that the appellant had admitted his guilt; he had admitted that he was in possession of 500 grams heroin; and the same was recovered from her possession. It is pointed out that percentage of the diacetylmorphine as detected by the FSL of 0.32% was only for the purpose of purity and to determine the potential of the contraband; the percentage of the diacetylmorphine would be of no consequence as the whole of the recovered drug has to be treated as diacetylmorphine and for this proposition attention has been drawn to the definition of opium derivative as contained in Section 2(xvi) of the said Act. Attention has also been drawn to the definition of preparation as contained in Section 2(xx); submission being that any mixture of a drug with or without any neutral substance would amount to a preparation. It is contended that the case of the petitioner clearly falls under Section 21(c) of the said Act and not 21(a). Learned counsel for the appellant has while distinguishing the judgment of Dule Hasan (supra) placed reliance upon an earlier judgment of a Single Judge of this Court reported in 111(2004) DLT759Yogesh Tyagi Vs. State; reliance has also been placed upon 2005 Cri L.J.4521 Amarsingh Ramjibhai Barot Vs. State of Gujarat. Submission being that in this case where there was a recovery of 920 grams of opium containing 2.8% of anhydride morphine, the conviction of the appellant in that case was sustained under Section 21(c) of the said Act holding it to be a commercial quantity. It is pointed out that the impugned judgment is clearly liable to be set aside and the appellant having been found to be in possession of 500 grams heroin; her conviction under Section 21(c) of the said Act should have followed. 5 Arguments have been heard. Record has been perused. 6 The Sessions Judge has convicted the appellant under Section 21(a) of the said Act. He has relied upon the judgment of a Bench of this Court reported in Dule Hassan (supra) which had been passed on a bail application preferred by the said petitioner. The court had noted that the actual weight of the content/contraband has to be taken into account to determine as to under which

head of quantity the contraband falls i.e. whether under a small quantity or commercial quantity. This position was reiterated in the case reported as 123(2005) DLT563Ansar Ahmed & Ors. Vs. State wherein also it had been held that 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 while considering whether a small quantity or a commercial quantity of the narcotic drug or psychotropic is recovered but the only actual content by weight of the narcotic drugs or psychotropic substance (as the case may be) is relevant for determining whether it constitutes a small quantity or a commercial quantity. 7 The ratio of this judgment was also relied upon by the Apex Court in the case reported as (2008) 2 SCC (Cri) 558 E.Michel Raj Vs. Intelligence Officer, Narcotic Control Bureau . In this case the total quantity of the contraband article seized was 4.07 k.g. and the purity of the heroin was 1.4 % and 1.6% respectively in the two samples and therefore the quantity of Heroin in his possession was 60 grams; the Apex Court had noted that the total quantity of heroin seized was below 250 grams i.e. below the commercial quantity noting that it was not the total weight of the substance allegedly recovered that was material but the percentage of the content of Heroin translated into weight that was relevant. The ratio of this judgment was followed by the Apex Court again in 2009 (1) ACR990(SC) State of NCT of Delhi Vs. Ashif Khan @ Kalu. In this case, the challenge was by the State against the conviction of the respondent under Section 21(a) and (b) of the NDPS Act. The quantity of substance recovered from the accused was 310 grams; this was detected to be Heroin; two samples of 5 grams were taken and sent to the Forensic Science Laboratory for testing. The FSL gave its report reporting the sample to contain 0.95% of diacetylmorphine; the percentage contained the weight of heroin of 2.945 grams; the High Court had noted that in a mixture of a narcotic drug or a psychotropic substance with one or more neutral substance the quantity of the neutral substance or substances is not to be taken while considering whether small quantity or a commercial quantity of the narcotic drugs or psychotropic substance is recovered but only the actual content by weight of the narcotic drug or psychotropic substance as the case may be would be relevant for determining whether it would constitute a small quantity or a commercial quantity and therefore the conviction under Section 21(a) was sustained; the appeal of the

State had accordingly been dismissed. 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. 02.10.2001) which rationalized the punishment structure under the NDPS Act by providing graded sentences linked to the quantity of narcotic drugs or psychotropic substances carried. It appears from the statement of object and reasons of thus Amending Act that the intention of the Legislature to rationalize the sentence structure was so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with a deterrent sentence, the addict and those who commit less serious offences are sentenced to a less severe punishment. Under the rationalized sentence structure, the punishment would vary depending upon the quantity of offending material. 9 Thus by the amending Act the sentence structure has changed drastically. Small quantity and commercial quantity are defined under Section 2(xxiii a) and Section 2(vii a) respectively. Section 21 also provides for proportionate sentence for possessing small, intermediate and commercial quantities of the contraband. 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 grams and commercial quantity has been mentioned as 250 grams. The Supreme Court in Ashif Khan (supra) has reiterated that the total weight of the substance is relevant and has clarified that the percentage of Heroin content translated into weight would be the deciding factor for ascertaining the quantity recovered from the accused. In fact an earlier judgment of the Supreme Court reported as (2004) 4 SCC446 Ouseph Vs. State of Kerala was also relied upon. 10 From the ratio of the aforementioned judgments, it is clear that it is the actual content translated into the weight of the offending drug which has to be taken into account to determine the quantity recovered from the accused. 11 The Supreme Court as early as in the case of E.Micheal Raj had clarified this and had reiterated this legal position as under:

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.

12 In this view of the matter the impugned judgment convicting the appellant under Section 21(a) of the NDPC Act holding her to be in possession of contraband falling in small quantity which has been arrived at keeping in view the actual content translated into weight of the aforementioned heroin, suffers from no infirmity. 13 State appeal is dismissed. INDERMEET KAUR, J MARCH07 2014 ndn

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