

Yogesh Tyagi Vs. State

Yogesh Tyagi Vs. State

SooperKanoon Citation : sooperkanoon.com/693101

Court : Delhi

Decided On : May-26-2004

Reported in : 2004CriLJ3907; 111(2004)DLT759; 2004(75)DRJ31; 2004(95)ECC444

Judge : O.P. Dwivedi, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 2, 21, 25, 29 and 37(1); Narcotic Drugs and Psychotropic Substances Rules - Rules 37 and 66(2); Opium Act - Sections 9

Appeal No. : Bail Applications 116-222-360-419-452-460-494-515-646-656-679-837-829-334-505-763/2004 CRLMM 3458-

Appellant : Yogesh Tyagi

Respondent : State

Advocate for Def. : Sunil Sharma, ; Pawan Sharma and ; M.N. Dudeja, Advs.

Advocate for Pet/Ap. : R.S. Kundu,; Rajesh Mahajan,; S.S. Das,;

Judgement :

O.P. Dwivedi, J.

1. The short point involved for consideration in this batch of bail matters is whether percentage of diacetylmorphine as pointed out in the FSL reports in these cases is at all relevant for ascertaining whether quantity of drug or psychotropic substance recovered is small, commercial or in between.

2. Facts of some of these cases should be noticed in order to appreciate the point of law raised in these matters. In bail application No. 360/2004- Yogesh Tyagi v. State 1 Kg of smack was recovered from the three persons, 200 gram from Jitender Tyagi, 200 gram Yogesh Tyagi and 600 gram from Vireshwar Tyagi. Separate samples were taken out from these lots and analyst FSL reported that samples contained diacetylmorphine 1.12 %, 1.2% and 1.24 %. All three were challaned Under Section 21, 25, 29 of the NDPS Act (for short the 'Act'). In bail application No. 665/2004- Jagjit Singh v. State 1 Kg & 220 gram of heroin was recovered. As per FSL report that the sample contained 5.9 % of diacetylmorphine. In bail application No. 845/2004- Mohd. Yaseen v. State 1 Kg. Heroin was recovered which on analysis was found to contain diacetylmorphine 0.3 % . In bail application No. 573/2004-Sudhir Kumar v. State 1 Kg heroin was recovered. On analysis it was found to contain diacetylmorphine 5.7%. In bail application No. 153/2004- Smt. Afroz v. State 1 Kg. Heroin was recovered. On analysis it was found to contain 1.6% diacetylmorphine. Likewise in other connected matters different quantities of smack/ heroin have allegedly been recovered from the accused persons in those cases and diacetylmorphine with varying percentages has been noticed in the samples.

3. The contention raised by learned counsel appearing for the petitioners in all these cases is that the percentage pointed out in the FSL reports in all these cases represents the percentage of the weight of the diacetylmorphine in the samples and calculated on that basis, the total weight of diacetylmorphine from the entire lot recovered would come to less than the commercial quantity i.e less than 250 gram and thereforee the rigours of section 37(1)(b) of the Act will not apply to such cases. Since I had some doubt about the correctness of the view, I thought it proper to hear arguments in these matters at length. Having given my thoughtful consideration to the arguments advanced by learned counsel for the petitioners and the learned counsel for State, I am of the view that the entire quantity

recovered in each of these cases falls within the definition of Narcotic drug or psychotropic substance and the percentage mentioned in the CFSL reports whether by weight or potency is irrelevant for determining whether the quantity of drug recovered in each case is small quantity or commercial quantity. The reasons for my view are as under:-

At the outset some definitions given in section 2 (V), (VI), (XIV), (XV), (XVI), (XX), (XXIII) may be taken note of.

(v)' coca derivative' means-

(a) Crude cocaine, that is , any extract of coca leaf which can be used, directly or indirectly, of the manufacture of cocaine;

(b) recognize and all the derivatives of recognize from which it can be recovered;

(c) cocaine, that is, methylester of benzyl recognize and its salts and

(vi)' coca leaf' means-

(a) the leaf of the coca plant except a leaf from which all recognize, cocaine and any other recognize alkaloids have been removed;

(b) any mixture thereof with or without any neutral material, but does not include any preparation containing not more than 0.1 percent of cocaine;

(xiv)' narcotic drug' means coca leaf, cannabis (hemp), opium posy straw and includes all manufactured drugs;

(xv)' opium' means-

(a) the coagulated juice of the opium poppy; and

(b) any mixture, with or without any neutral material, of the coagulated juice of the opium poppy, but does not include any preparation containing not more than 0.2 percent of morphine.

(xvi)' opium derivative' means -

(a) medicinal opium, that is, opium which has undergone the processes necessary to adapt it for medicinal use in accordance with the requirements of the Indian Pharmacopoeia or any other pharmacopoeia notified in this behalf by the Central Government, whether in powder form or granulated or otherwise or mixed with neutral materials;

(b) prepared opium, that is, any product of opium obtained by any series of operations designed to transform opium into an extract suitable for smoking and the dross or other residue remaining after opium is smoked;

(c) phenanthrene alkaloids, namely, morphine, codeine, thebaine and their salts;

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

(e) all preparations containing more than 0.2 per cent. Of morphine or containing any diacetylmorphine;

(xx) 'preparation' in relation to a narcotic drug or psychotropic substance means any one or more such drugs or substances in dosage form or any solution or mixture, in whatever physical state, containing one or more such drugs or substances;

(xiii) ' psychotropic substance' means any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substance specified in the Schedule;

5. Explanationn to section 2 reads as under:- For the purposes of clauses (v), (vi) , (xv) and (xvi) the percentages in the case of liquid preparations shall be calculated on the basis that a preparation containing one per cent. Of a substance means a preparation in which one gram of substance if solid, or one milliliter of substance, if liquid, is contained in every one hundred milliliter of the preparation and so on in proportion for any greater or less percentage:

6. Provided that the Central Government may, having regard to the developments in the field of methods of calculating percentages in liquid preparations prescribe,

by rules, any other basis which it may deem appropriate for such calculation.

7. This Explanationn prescribes the procedure for calculating percentage of cocaine referred to in section 2(VI) of the Act and Morphine referred to in section 2(XV) of the Act and section 2(XVI) of the Act. As already noticed preparation also includes any solution or mixture containing one or more of narcotic drugs and psychotropic substances. Thus if a particular preparation contains less than 0.1 percent of cocaine, it will not be covered by Section 2(v), 2(vi)(b). Likewise, a preparation, be it a mixture or solution containing less than 0.2 percent of morphine will not be opium derivative, if it does not contain other ingredients mentioned in section 2 (XV) and (XVI) of the Act. As regards diacetylmorphine no minimum percentage is prescribed under the Act. thereforee, whole lot of any mixture or solution containing diacetylmorphine of whatever purity/potency will be heroin including the foreign material used in such mixture or solution. The contents of Notification No. SO 1055 (E) dated 19.10.2001 which prescribes small quantity and commercial quantities of narcotic drugs and psychotropic substances supports this view of mine. Item No. 239 in the said notification which deals with any mixture or preparation of any narcotic drugs and psychotropic substances with or without a neutral material, lays down in Note No. 2 below that the quantities shown against the respective drugs or psychotropic substances listed above also apply to the preparations of such drugs or psychotropic substances. Item 56 in this notification prescribes small quantity and commercial quantity of heroin whose Chemical name is diacetylmorphine. The small quantity prescribed is 5 gram and the commercial quantity prescribed is 250 gram. When this is read in conjunction with item No. 239 note 2 below, the obvious inference will be that the small quantity and commercial quantity for diacetylmorphine (heroin) and for its mixtures/preparations with or without neutral material will also be the same meaning thereby that 5 gram of mixture/preparation will be small quantity and 250 gram will be commercial quantity, no matter what is the percentage of diacetylmorphine by weight or by purity/ potency. The same view has been taken by a Division Bench of High Court of Kerala in Bail Application No. 1787/2003 (c)-Shaji @ Chullikkan Shaj v. State decided on 18.11.2003. In that case there were three applicants. They were found in possession of different numbers of ampules, all containing (TIDIGESIC) which is a preparation of BUPRENORPHINE, a

psychotropic substance mentioned at item No. 169 in the notification dated 19.10.2001. Each ampules contained only 0.3 mg. Of BUPRENORPHINE. The argument on behalf of the applicants was that the quantity of BUPRENORPHINE recovered from each of the applicants was less than 1 gram and therefore offence is bailable. The Division Bench took note of the definition of the psychotropic substance contained in section 2(XXIII) and preparation as defined in section 2(XX) of the Act as also notification dated 19.10.2001 and held that going by the definition of psychotropic substances independent of pure or natural ingredients, the preparation of such substance is also a psychotropic substances as found above. therefore, the substances involved in each of these cases namely a solution of BUPRENORPHINE will come to more than the small quantity of such psychotropic substances, solution being a preparation thereof. The Division Bench held that rigours of section 37 will apply to their case. There may be mistakes in arithmetical calculations but on the point of law the D.B held that for any mixture or solution containing narcotic drug or psychotropic substance the limits of small quantity and commercial quantity will be the same as those prescribed for that drug or substance itself meaning thereby that for any mixture or solution containing diacetylmorphine small quantity will be 5 gram and the commercial quantity will be 250 gram. In each of the cases of which the facts have been taken note of, quantity recovered is more than 250 gram, therefore, the rigours of section 37(1)(b) will apply to these cases irrespective of the strength or weight of diacetylmorphine contained therein.

8. Learned counsel for the petitioner referred to a decision of the apex court in the case of Sajan Ibrahim v. State of Kerala 2004 III AD (S.C.) 425. In that case the appellant was found in possession of 25 ampules of a psychotropic substance namely Buprenorphine Hydrochloride (TIDIGESIC) along with three syringes. On facts it was found that it was meant for self consumption. Taking note of rule 66 sub-rule (2) of the Rules framed under the 'Act', the apex court observed that sub-rule 2 permits a person to possess for his personal consumption the psychotropic substances up to 100 dosage units at a time and since substance recovered from appellant falls within that limit, he has committed no offence. This decision was based on an earlier decision in the case of Hussain v. State of Kerala : 2000(72)ECC14 which has been taken note of by the Division Bench of Kerala

High Court in the case Shaji @ Chullikkan Shaj v. State decided on 18.11.2003 (Supra). In Hussain's case the appellant had been convicted Under Section 21 of the 'Act' for being found in possession of 6 ampules of BUPRENORPHINE morphine (TIDIGESIC) each contain 2 ml. On facts it was found that it was meant for self consumption. Referring to rule 66 sub-rule 2 of the 'Act', the apex Court held that quantity fell within 100 dosage units at a time and was meant for self consumption. In both these cases there was no controversy regarding percentage or weight of the psychotropic substance. These decisions are, therefore, of no help to the petitioners. One more decision cited by the learned counsel for the petitioner Mr. Jitender Sethi, Advocate reported in 1924 Lahore 99- Mt. Hamiri v. the Crown must be taken note of. In that case one Mt. Hamiri was found in possession of a solution of opium in water weighing 5 tolas and the Magistrate found that this is a preparation of opium and since the same exceeds the permitted limit of 2 tolas, convicted her Under Section 9 of the Opium Act. High Court took note of Rule 37 framed under the said Act which reads as follows: 37-

'Any person may without a license at any one time have in his possession- (d) preparations or admixtures of pure opium, other than those used for smoking in any quantity not exceeding in the aggregate two tolas.'

9. It was found on facts that amount of opium used in the preparation was within the legal limits and what was recovered was not a finished product rather it was in the process of preparation. Under the circumstances Lahore High Court observed that if the opium used in the preparation is within limits it is not possible to convict the appellant just because some quantity of water has been added to it. From the reported portion of the judgment it is not clear as to whether the word 'preparation' was defined under the Opium Act and if so what was that definition. On the other hand ' The [Narcotic Drugs and Psychotropic Substances Act, 1985](#)' section 2(XX) clearly defines preparation in relation to narcotic drugs and psychotropic substances as any solution or mixture, in whatever physical state, containing one or more such drugs or substances and item No. 239 of the notification dated 19.10.2001 prescribes the small quantity and commercial quantity of any such preparation or mixture to be the same as that for the drug or psychotropic substance. therefore, in view of the clear provisions of the 'Act' the observation

made by the High Court of Lahore in the said case cannot be applied to the facts of the present case.

10. Learned counsel for the petitioner has brought to my notice a decision of R.S.Sodhi J. in CRL. APPEAL NO. 163/2002- Javed Khan and another v. State decided on May 20, 2002. In that case one of the argument of the learned counsel for the petitioner was that FSL report shows that diacetylmorphine 1.4%, 3.7% and 2 % was found in the samples and calculating on that basis the total quantity of heroin (diacetylmorphine) will come to less than commercial quantity. Although, learned Judge took note of this argument and reduced the sentence of the appellant but no definite finding was given about the tenability of this argument.

11. In the case of Mohd. Sayed v. Customs- Crl. Rev. No. 120/2002 decided on 12.7.2002 by K.S.Gupta J. quantity of Buprenorphine was calculated on the basis of 0.09 ml of Buprenorphine contained per ml of the ampules quantity. It was held that the total quantity of Buprenorphine comes to about 0.578 mls. It is not clear from the judgment as to what would be the weight in terms of mg of .18 ml Buprenorphine contained in each ampule. Moreover, the question of calculating the weight of diacetylmorphine on the basis of percentage given in the FSL report was not at all raised in that case. So the said decision has no direct bearing on the facts of these cases.

12. During arguments, learned counsel for the State Mr. Sunil Sharma as well as learned counsel for the petitioner Ms. Rajni Singh, Advocate have produced before me some literature dealing with heroin, its composition, strength, laboratory testing as also harmful effects of its use. Some of the literatures has been down loaded from the Internet. At page 21 of the compilation filed by Mr. Sharma, learned counsel for the State, it has been observed as under:

Pure heroin is rarely sold on the street, although when it is it normally results in deaths due to the users being unaware of the strength (having being used to the lower grade). A bag's contents may contain only a portion of heroin. The remainder could be sugars, starch, powdered milk, or quinine. Unfortunately due to some dodgy dealers, it could also be something nasty like brick dust. Traditionally the purity of heroin in a bag has ranged from 1 to 10 percent. More

recently, heroin purity has ranged from one to ninety-eight percent, with a national average of thirty-five percent.

Another form of heroin 'black tar' has also become increasingly available in the western United States. The color and consistency of black tar, which results from the crude processing methods used to illicitly manufacture the substance in Mexico. Black tar heroin may be sticky, like roofing tar or hard like coal, and its color may vary from dark brown to black. It is often sold on the street in its tar-like state at purities ranging from twenty to eighty percent. This heroin is most frequently dissolved, diluted and injected. The main other types are 'China White' and 'Mexican Brown', the China White being the best one as it is the strongest.

13. Plain reading of the above would suggest that the percentage in relation to heroin only indicates its extent of purity/ potency. Learned counsel for the petitioner Ms. Rajni Singh produced abstract from 'Recommended methods for testing heroin' a publication of 'Division of Narcotic Drugs' Vienna which lays down various procedures for preparing heroin, different types of heroin available and their percentage purity. At page 13 onwards of her compilation various methods used for preparation of the heroin available in different parts of the world along with their percentage purity are also given. This also leads to the same conclusion that use of the percentage in relation to the heroin is only indicative of its purity/potency and not the weight. In any case, the percentage of purity of diacetylmorphine is immaterial for invoking the provisions of the 'Act' because 'Act' does not prescribe any minimum percentage purity/ potency of diacetylmorphine for its possession to be unlawful. Whatever be the strength/ potency of the diacetylmorphine its possession is unlawful and punishable under the 'Act'. Besides, small quantity and commercial quantity of the said drugs as prescribed by the notification dated 19.10.2001 will be the same for any preparation thereof be it in the form of mixture, solution in whatever physical condition it may be. therefore, calculating the weight of diacetylmorphine on the basis of percentage given in the CFSL report is a futile exercise for ascertaining whether the quantity recovered is small, commercial or in between. For the purpose of the Act, what has to be seen is the weight of the preparation itself containing diacetylmorphine, small and commercial quantity for such preparation being the same as those

prescribed for diacetylmorphine itself. Thus any preparation weighing more than 250 gram containing diacetylmorphine of whatever potency it may be, will fall within the limits of commercial quantity and the rigours of section 37(1)(b) of the 'Act' will apply to such cases.

14. Let all these matters be listed on different dates to be heard on individual merits.

15. Registry is directed to place a copy of this order in all connected matters.

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