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Subhan Khan. Vs. State.

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Court : Rajasthan Jaipur

Decided On : Mar-27-2010

Judge : Dr.Justice Smt. Meena V.Gomber, J.

Acts : Narcotic Drugs and Psychotropic Substances Act - Sections 8/18, 8/20, 2(15)(16)(17), (20), 2(14), 2 (7a), 2(22a), 2(16)(c); Opium Act - Section 3; Dangerous Drugs Act - Section 2; Code of Criminal Procedure (CrPC) - Sections 313.

Appeal No. : S.B.CR.APPEAL NO.231/2005.

Appellant : Subhan Khan.

Respondent : State.

Advocate for Def. : Mr.Sanjeev Kumar Mehla, Adv.

Advocate for Pet/Ap. : Mr.Sudhir Jain, Adv.

Judgement :

1. This appeal is directed against the judgment and order dated 23.2.2005 passed by Special Judge, NDPS Act Cases, Dholpur in Special Sessions Case No.126/2002 whereby the accused appellant Subhan Khan S/o Harila was convicted of offences under Sections 8/18 & 8/20 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act) and sentenced as under: (i) For the offence under Section 8/18 of the NDPS Act:

Seven years' rigorous imprisonment and a fine of Rs.75,000/- and in default thereof further one year's rigorous imprisonment.

(ii) For the offence under Section 8/20 of the NDPS Act:

Seven years' rigorous imprisonment and a fine of Rs.75,000/- in default thereof further one year's rigorous imprisonment.

Both sentences were to run concurrently.

2. The relevant facts of the case are that on 4.7.2002 at about 9.50 am, PW-13 Babulal, Station House Officer, P.S.-Kotwali, Dholpur was informed by an informant that two persons named Subhan Khan, Thekedar and his salesman Madanlal were illegally possessing and selling Charas, Opium and Ganja at Bhang theka shop situated at Station Road and that in Subhan Khan's rented house also contraband could be found. The SHO, after recording the information in Roznamcha at Rapat 176 and sending a copy thereof to the Superintendent of Police, proceeded alongwith his raid party towards the Bhang theka shop at 11.15 am and found two persons sitting at the shop. The Circle Officer Mania also reached at the spot as per the directions of the Superintendent of Police. In the presence of C.O. Mania, the persons sitting on the shop disclosed their names to be Subhan Khan and Madan Lal and copy of license in the name of his father Harilal for sale and possession of Dodapost (Bhang) was shown by Subhan Khan.

3. After informing them both about the secret information and also after giving them the notice of their legal right of search by a Gazetted Officer or Magistrate and obtaining their written consent for search of the shop and house, PW-13 Babulal,SHO gave his own search as well as search of the witnesses. During personal search of Subhan Khan, black solid substance which smelt and tasted like Charas was found in his shirt pocket for which he had no license. Said substance along with Polythene bag weighed 100 gms. Out of which two samples of 30 gms each were taken and sealed separately from the remaining which was marked as 'A' and the two samples were marked as 'A1' & 'A2'.

4. On personal search of Madanlal, no contraband was found on his person. However, on the East North side of the shop a 'takhat' was lying with a mattress on which Madanlal was sitting. A plastic bag containing black substance tasting & smelling as 'Charas' was found, which weighed 60 gms. Out of said substance also two samples of 30 gms each were taken, sealed and marked as 'B1' & 'B2'.

5. Thereafter PW-13 SHO Babulal went to the rented house of Subhan Khan. Subhan Khan entered the house by opening the latch of the main gate and unlocked the room inside with the key. He was again informed of his legal right about search in the presence of a Gazetted Officer or a Magistrate. He gave his written consent of search by PW-13 Babulal SHO. The SHO and witnesses, after giving their own search, entered the room wherein a plastic katta containing substance like Ganja was found in South East corner of the room for which Subhan Khan did not have any license. The substance weighed 2 kg 500 gms, out of which two samples of 400 gms each were taken and sealed and marked as 'C1' & 'C2' and the remaining substance was sealed as mark 'C' in the same Katta.

6. In the North East corner of the room, a plastic bag was found lying under the gunny bags which contained black solid substance smelling and tasting like Charas and weighed as 500 gms. Out of this two samples of 30 gms each were taken and sealed and marked as 'D1' & 'D2' whereas the remaining was marked as 'D'.

7. In the same room, a plastic bag having black blue substance which tasted and smelt like opium, was found lying under the rough papers, which weighed as 500 gms, out of which two samples of 30 gms each were taken and sealed as mark 'E1' & 'E2' whereas remaining was marked as 'E'.

8. After making seizure memos and affixing seal impressions, the accused Subhan Khan & Madan Lal were arrested. On return to the police station alongwith arrested accused and samples etc, PW-13 SHO Babulal registered case No.187/2002 under Sections 8/18 & 8/20 of the NDPS Act. Investigation was handed over to Sh.Vijay Pal Singh, SHO, Nihalganj, Dholpur.

9. Forensic Science Laboratory sent a report confirming the samples as answering to the test of narcotic drugs covered under 'the NDPS Act'. As per Ex.P/27 FSL report, samples contained in the packets marked A1, B1 and D1 were found to contain 'Charas' and the sample contained in packet C1 was found to contain 'Ganja' whereas the sample contained in packet E1 gave positive tests for the presence of Chief constituents of coagulated juice of opium poppy having 9.03% morphine.

10. After completion of investigation, charge-sheet was filed against the accused Subhan Khan and Madan Lal under Sections 8/18 & 8/20 of the NDPS Act.

11. At the stage of charge, accused Madanlal was discharged and accused Subhan Khan was read over the charges under Sections 8/18 & 8/20 of the NDPS Act to which he denied and claimed trial.

12. In order to prove its case, the prosecution examined as many as 15 witnesses and exhibited 24 documents.

13. After completion of prosecution evidence, the accused was examined under Section 313 Cr.P.C wherein he alleged false implication but did not lead any evidence in defence.

14. The learned Trial Court has on the basis of material before it convicted the appellant for the offences under Sections 8/18 & 8/20 of the NDPS Act and sentenced as mentioned hereinbefore.

15. Sh.Sudhir Jain, learned counsel for the appellant, relying on the decision of the Apex Court in E.Michael Raj v. NCB III-2008(5) SCC 161 and of the Coordinate Bench of this Court in the matter of Smt.Nazma v. State of Rajasthan in S.B.Cr.Appeal No.1568/2002 decided on 9.3.2009, vehemently argued that since the morphine contents found in E1 was only 9.03% and, the appellant could only have been convicted for possessing small quantity of opium.

16. I have heard the learned counsel for the appellant and also the Special Public Prosecutor and have carefully gone through the impugned judgment in the light of material placed on record.

17. Besides conviction under Section 8/20 of the NDPS Act for possessing Ganja and Charas, the appellant has also been convicted for the offence punishable under Section 8/18 of the NDPS Act for possession of 500 gms of opium and was sentenced to undergo imprisonment for 7 years.

18. Learned counsel for the appellant raised a plea that as the morphine content of the contraband stated to have been recovered from the appellant, was only 9.03%, which translated to 46.5 gms only , the sentence awarded to him was, therefore, not in consonance with the provisions of the said Act. His plea was that if the weight of opium is to be determined on the basis of morphine content of 9.03%, the same would amount to only 46.5 gms which would be slightly more than the small quantity and much less than the commercial quantity. It was contended on behalf of the appellant that the extent of opium allegedly recovered from the possession of the appellant ought to have been taken as 46.5 gms and not the entire 500 gms and consequently he should have been treated as having been in possession of an intermediate quantity and not a commercial quantity.

19. Heard the parties and perused the relevant provisions of the Act. The definition of 'Opium' in Section 2(xv) of the NDPS Act has left no manner of doubt that morphine is always present in opium and so long as the recovered sample contains more than 0.2% morphine, the entire sample would be regarded as opium.

20. Sh.Sudhir Jain, learned counsel for the appellant relied on the decision of the Hon'ble Apex Court in E.Michael Raj v. NCB II-2008(5) SCC 161, where the percentage of diacetylmorphine present in the sample was considered to be determinative of the actual content of heroin for the purpose of classifying the recovered substance to be a small intermediate, or commercial quantity.

21. However, that was a decision in the context of heroin, which unlike opium, was a manufactured drug. The case of heroin in my opinion is entirely different from the case of opium and, therefore, the decision in E.Micheal Raj's case (supra) is inapplicable to the opium.

22. The NDPS Act defines opium', opium derivative, opium poppy and preparation under Section 2(xv)(xvi)(xvii) and (xx) respectively.

2.Definition.- In this Act, unless the context otherwise requires,-

xxxx xxxx xxxx

(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 per cent of morphine. xxxx xxxx xxxx

(xvi) opium derivative means-

(a) the medicinal opium, that is, opium which has undergone the process 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 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 diamorphine or heroin and its salts; and

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

xxxx xxxx xxxx

(xvii) opium poppy means-

(a) the plant of the species Papaver Somniferum L.; and

(b) the plant of any other species of Papaver from which opium or any phenantherene alkaloid can be extracted and which the CentralGovernment may, by notification in the Official Gazetted, declare to be opium poppy for the purposes of this Act. xxx xxxx xxxx

(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 psysical state, containing one or more such drugs or substances.

23. The definition of narcotic drug as given in Section 2(xiv), inter alia, includes opium and poppy straw. The said definition of narcotic drug is as under:

2.Definitions.- In this Act, unless the context otherwise requires,-

xxxx xxxx xxxx

(xiv)narcotic drug means coca leaf, cannabis (hemp), opium, poppy straw and includes all manufactured goods. Section 2 (viia) and 2(xxiia) define the expressions commercial quantity and small quantity in the following terms:

2. Definitions.- In thisAct, unless the context otherwise requires,-

xxxx xxxxx xxxxx;

(viia) commercial quantity, in relation to narcotic drugs and psychotropic substances, means any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette. (xxiiia) small quantity, in relation to narcotic drugs and psychotropic substances, means any quantity lesser than the quantity specified by the Central Government by notification in the Official Gazette.

24. Thus the opium could either mean (a) the coagulated juice of the opium poppy; or (b) any mixture, with or without any neutral material of coagulated juice of the opium poppy, but does not include any preparation containing not more than 0.2% of morphine. Thus opium, is of two kinds. The first being the coagulated juice of opium poppy. The second being any mixture with or without any neutral material,

of the coagulated juice of the opium poppy. The expression but does not include any preparation containing not more than 0.2% of morphine used in Section 2(xv) of the NDPS Act actually governs the second kind of opium and not the first. This expression but does not include any preparation containing not more than 0.2% of morphine appears in Section 2(XV) of the NDPS Act as also in Section 3 of the Opium Act,1878 and Hon'ble Apex Court examined the definition of 'opium' contained in Section 3 of the opium Act,1878 in the case of Baidyanath Mishra and Another v. State of Orissa-1968 (XXXIV) Cuttack Law Times. Section 3(iii) of Opium Act,1878 reads as under:

3. Interpretation-clause.

(i) ....

(ii)....

(iii)any mixtyure, with or without neutral material, of any of the above forms of opium, but does not include any preparation containing not more than o.2 per cent of morphine, or a manufactured drug as defined in Section 2 of the Dangerous Drugs Act,1930.

25. While opium comprises of alkaloids, including morphine, morphine by itself does not constitute opium. It is probably for this reason that morphine has been separately listed in the notification at S.No.77 and opium at S.No.92 and the small quantity of morphine has been specified to be less than 5 gms; whereas the commercial quantity has been fixed at 250 gms and above.

26. While going about the determination of the quantity of the seized substance, the first thing that has to be done is to determine the nature of that substance. In the context of the opium and morphine, it must first be determined as to whether the substance is opium as defined in Section 2(xv) or it is morphine which is nothing but an 'opium derivative' defined in Section 2(xvi)(c) of the NDPS Act. It would also be relevant to note that opium derivatives have also been separately listed in the said table at S.No.93. However, the opium derivatives mentioned at S.No.93 are those excluding diacetylmorphine (heroin), morphine and other opium

derivatives separately listed in the said table. The small quantity and commercial quantity for opium derivatives separately listed in the said table. The small quantity and commercial quantity for opium derivatives under S.No.93 has been given as 5 gms and 250 gms respectively. Diacetylmorphine (heroin) has also been specified at S.No.56 and 5 gms and 250 gms have been specified as the small quantity and commercial quantity. Codeine and thiamine, which are also specified opium derivatives, have been shown at S.Nos.28 and 120 of the table.

27. Thus, the first thing that requires to be done is to identify and classify the substance as opium or opium derivative. If it is opium, as defined in Section 2(xv), then the percentage content of morphine other than for the purposes of any mixture as specified in Section 2(xv)(b) of the NDPS Act, would be irrelevant. In any event, once the seized substance has been identified as opium, the percentage content of morphine has no further relevance in determining the quantity of opium for the purposes of classifying the same as a small quantity or a commercial quantity. On the other hand, if the seized substance is determined to be morphine, then it is S.No.77 which would apply for ascertaining whether it falls in the category of small quantity or commercial quantity.

28. Thus I do not find any force in the said arguments of learned counsel for appellant. It can be summarised as under:

(1)Once it is determined that the seized substance is opium, then the weight of the entire substance would have to be considered for the purposes of determining whether it is a small quantity or a commercial quantity. The percentage content of morphine would have no role to play in such a determination; (2)For a substance to be regarded as opium, it must fall under either of the two categories mentioned in Section 2(xv) of the NDPS Act;

(3)In case the substance in question falls under the first category mentioned in Section 2(xv), that is, it is the coagulated juice of opium poppy, then it would not be necessary to examine as to whether it contains more than 0.2% of morphine or not. That test is only in relation to the second category of opium, when it is in the form of a mixture, with or without any neutral material comprising of the coagulated juice of opium poppy; (4)Merely because a substance contains more than 0.2%

morphine, does not mean that the substance is opium. It would be opium only if it falls within the definition of opium as given in Section 2(xv) of the NDPS Act.

29. In view of the foregoing discussion, it is held that the percentage of morphine, in a sample of opium, by itself, is not determinative of the purity of opium and that, in any event, the test for determining the percentage content of morphine in opium is not relevant for the purposes of considering the question whether seized opium is of small quantity or of a commercial.

30. In E.Micheal Raj's case (supra), the percentage of diacetyl morphine present in the sample was considered to be determinative of the actual content of heroin for the purposes of classifying the recovered substance to be a small intermediate or commercial quantity. The case of 'heroin' is entirely different from the case of opium and, therefore, the decision in E.Micheal Raj's case (supra) is inapplicable to the opium and cannabis. The case of Smt.Nazma (supra) also pertained to heroin.

31. No other arguments were made by the learned counsel for the appellant.

However, I have carefully perused the impugned judgment and I find that during investigation, all the requisite mandatory provisions of the NDPS Act have been complied with. Hence I do not find any merit in the appeal.

32. Consequently, the appeal of accused appellant Subhan Khan fails. The judgment and order of Trial Court is upheld and the appeal is dismissed.

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