

The Superintendent of Customs Vs. Mohd. Younis Alias Ahmed

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Court : Andhra Pradesh

Decided On : Apr-29-2011

Judge : Samudrala Govindarajulu, J.

Acts : The Narcotic Drugs and Psychotropic Substances Act 1985 - Sections 21(c), 22(c), 23(c), 28, 67; The Drugs and Cosmetics Act - Section 2

Appeal No. : Criminal Appeal No.124 of 2006

Appellant : The Superintendent of Customs

Respondent : Mohd. Younis Alias Ahmed

Advocate for Def. : D.Suryanarayana, Adv.

Advocate for Pet/Ap. : Sri Mr.V.Gopala Krishna Gokhale, Adv.

Judgement :

1. This is an appeal against acquittal of the accused/respondent recorded by the Metropolitan Sessions Judge, Hyderabad in Sessions Case No.511 of 2004 by Judgment dated 23.08.2005 finding the accused/respondent not guilty of the charges under Sections 21(c), 22(c) and 23(c) / 28 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short, the Act). It is the prosecution case that on 27.06.2004, the prosecution agency viz., Customs Air Intelligence Unit intercepted the accused after he completed immigration, customs and security checks in Rajiv Gandhi International Air Port, Hyderabad while the accused was

holding his passport boarding pass and air ticket for boarding into flight No.EK 525 to go to Dubai and that officers of Customs Air Intelligence Unit detached baggage slips from boarding pass of the accused and got the baggages unloaded from the air craft and those baggages were identified as his baggages and that baggage of the accused contained Bunogesic and Buprigesic injections numbering 9,850 and 11,975 respectively in vial form in them. The officers seized the baggage etc., including the above injection vials under the cover of mediators' report in the presence of witnesses and the accused. They also arrested the accused. During seizure, they prepared 24 samples of the contraband. During investigation, statement of the accused was also recorded under Section 67 of the Act. After getting contents of the seized contraband as containing prohibited substance as per the Act, the prosecution was launched against the accused.

2. The lower Court in its judgment framed the following five points for consideration:

1. Whether the prosecution could able to establish the seizure of M.Os 1 to 4 as checked-in baggage belonging to the accused on 27.06.2004 at Rajiv Gandhi International Airport, Hyderabad?
 2. Whether the prosecution could able to establish that the contents of M.Os.1 to 4 contains psychotropic substances specified in the Schedule of the N.D.P.S.Act, 1985?
 3. Whether the prosecution could able to establish that the accused was found in possession of the said psychotropic substances without any licence to deal with the said psychotropic substances?
 4. Whether the prosecution could able to establish that the accused imported the same inter state through Gujarat and Maharashtra States?
 5. Whether the prosecution could able to establish that the accused has attempted to export the psychotropic substances from India to Iran via Dubai?
- On point No.1, the lower Court came to the conclusion that M.Os 1 to 4 baggage which were seized by the prosecution agency belonged to the

accused and that the said seizure was proved. On point No.2, the lower Court found against the prosecution case holding that the prosecution could not establish that the contraband which is being transported in M.Os 1 to 4 baggage to be psychotropic substance. Consequently the lower Court did not find favour with the prosecution on point Nos.3 and 5. On point No.4, the lower Court held that the prosecution could not establish importing of the seized substance interstate through Gujarat and Maharashtra States. Consequently the lower Court found the accused not guilty of the offences with which he was charged and recorded acquittal against the accused.

3. In this appeal the Special Public Prosecutor placing reliance on *Kanhaiyalal V. Union of India* of the Supreme Court contended that Ex.P-131 statement of the accused recorded by the investigating officer is legal evidence under Section 67 of the Act and that the said statement itself is sufficient for the lower Court to record conviction against the accused for the above charges. No doubt, the Supreme Court held that conviction can be maintained solely on the basis of a confession statement made under Section 67 of the Act. But, before recording the said conviction on the basis of statement of the accused under Section 67 of the Act, it has to be seen whether the substance seized by the investigating agency was manufactured drug or contained any psychotropic substance. The lower Court came to the conclusion basing on evidence of the experts P.Ws 16, 18 and 19 that the substances seized from M.Os 1 to 4 baggage viz., the injections do not contain any psychotropic substance in the sense that they do not contain the compound with the chemical name described as item No.92 of the schedule to the Act. The schedule to the Act gives list of psychotropic substances. Item 92 of the schedule reads as follows: S.No.

International non proprietary names

Other non-proprietary names

Chemical name

BUPRENORPHINE

21 -cyclopropyl- 7-a [(S) -1 hydroxy-1, 2,2-trimethyl propyl]-6, 14-endo, ethano-6, 7,8 14-tetrahydrooripavine.

4. Decision in this appeal totally rests on evidence of P.Ws 13, 14, 18 and 19. P.W-13 is Marketing Services Manager in Neon Laboratories Limited, Mumbai. P.W-14 is Senior Manager (Materials) in Rusan Pharma Limited, Mumbai. The companies in which P.Ws 13 and 14 were working, were the manufacturers of the seized injections in this case. Both the companies furnished necessary information sought for by the investigation agency during the course of investigation. P.W-13 in cross-examination deposed that Buprenorphine is a prescription drug as mentioned in schedule H of the Drugs and Cosmetics Act and that as per Rule 97 under the Drugs and Cosmetics Act, Schedule H has to bear the letters N Rx on left top corner of the label and that Buprenorphine will fall under the head of the psychotropic substance as per Rule 97. P.W-13 admits that Exs.P-97 to Ex.P-99 labels affixed on the seized substances do not bear the letters N Rx on left top corner of the label. He says that Exs.P-100 to P-104 certificates of analysis were given by the chemists of their laboratory in conformity with the standards prescribed under the Drugs and Cosmetics Act.

5. P.Ws 18 and 19 are working as Assistant Chemical Examiners in Central Revenue Control Laboratory, Customs House, Chennai. Ex.P-111 is the report of analysis given by the Laboratory and it contains signatures of P.Ws 18 and 19. The said report was furnished by the laboratory after qualitative analysis of the samples sent to them. P.W-16 who is Chemical Examiner in the same laboratory counter signed Ex.P-111 chemical analysis report. In Ex.P-111 it was stated that each sample tested qualitatively for the presence of Buprenorphine Hydrochloride as per methods given in I.P.1996 and that the test report is to the effect that each of the 8 samples in the form of colourless clear liquid, answers tests for the presence of Buprenorphine which is covered under the Act.

6. P.W-19 in cross-examination admitted that as per Indian Pharmacopoeia the chemical name of Buprenorphine is (6R, 7R, 14S)-17-cyclopropylmethyl-7, 8-dihydro-7-[(1S)-1-hydroxy-1, 2,2-trimethylpropyl]-6, 14-ethano-17-normorphine

hydrochloride. Therefore, it is contended by the counsel for the respondent/accused that chemical name of Buprenorphine as per Indian Pharmacopoeia is different from chemical name of Buprenorphine contained in item No.92 of the schedule to the Act and that therefore, the contraband seized from the accused in this case is not proved to be a psychotropic substance at all as per the Act. He placed reliance on Shahid Khan V. Director of Revenue Intelligence of this Court in support of his contention. The lower Court accepted the said contention of the defence counsel and recorded acquittal of the accused.

7. The Special Public Prosecutor as well as the respondent's counsel stated that appeal filed by the Department is against Shahid Khan (2 supra) is pending in the Supreme Court. Therefore, ratio in Shahid Khan (2 supra) has not become final.

8. In Shahid Khan (2 supra), the contraband seized was Methaqualone; and this Court came to the conclusion that since chemical composition of the sample tested by the scientific officers C.F.S.L was different from chemical composition of Methaqualone given in schedule to the Act, the prosecution must fail. I propose to quote the relevant observations therein for useful reference, as under:

35. As stated earlier, it was contended that whatever seized by the Officers of the Revenue Intelligence is not a Psychotropic substance within the meaning of Section 2(xxiii) of the Act. The Act has given a list in the Schedule showing as to what is Psychotropic substance. Unless the substance, which is seized, tallies with the Schedule given to the Act, only in that event, it has to be called as a psychotropic substance and not otherwise, as this Act is very much technical. Methaqualone appears to be a commercial name which has the following chemical composition:

2-Methy-3-o-tolyl-4 (3H)-quinazolinone

36. Now I have to see the evidence regarding the chemical composition as given in the evidence. P.W.19, who happened to be the Senior Scientific Officer, CFSL, Agra, was examined by the prosecution as an Expert witness. While answering to the cross questions, he has given the chemical composition of Methaqualone as under:

Methyl - 3 (2methyl phenyl) - 4 (3H) Quinalinozil"

37. By looking to the evidence of the aforesaid witness that the chemical composition given by the said witness does not tally with the chemical composition given in the Schedule. The word "tolyl" is totally absent in the formula given by P.W.19.

38. While giving the explanation to the above discrepancy, the learned Special Public Prosecutor has produced a Xerox copy of the Merck Index and Encyclopedia of Chemicals, Drugs and Biologicals, 12th Edition. My attention was drawn to page 6028 which has given the chemical composition of Methaqualone as under: "2-methyl-3-o-tolyl-4(3H)-quinazolinone"

39. The Merck Index, which was shown to this Court, also does not tally with the chemical formula, which is given by the witness in the evidence. Therefore, this Court is not able to hold that whatever the substance was analysed by the Scientific Officer is a Methaqualone. Therefore, on this ground alone the prosecution must fail."

The Act gives list of psychotropic substances in the schedule, in continuation of Section 2(xxiii) of the Act thereof. Shahid Khan proceeded on the ground that chemical name of the seized substance should tally with chemical name given in the schedule of the Act, in order to find the said substance as psychotropic substance for the purpose of the Act. In order to understand what is a psychotropic substance for the purpose of the Act, it is most essential to refer definition thereof contained in Section 2(xxiii) of the Act reads as follows:

Section 2(xxiii) of the Act "psychotropic substances" means any substance natural synthetic or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the Schedule;" As per the above definition, psychotropic substance may be of any of the following, varieties:

(a) Natural synthetic, or

(b) Natural material, or

(c) (i) Salt, or (ii) Preparation of such substance; or (d) Material included in the list of psychotropic substances specified in the schedule.

Therefore, contention of the respondent's counsel that in order to find the substance seized to be a psychotropic substance, it should tally with the chemical name given in the list of psychotropic substances mentioned in the schedule to the Act, is not wholly correct. List of psychotropic substances given in the schedule to the Act is not the whole of description or definition of a psychotropic substances. It is not exhaustive but illustrative. It only contains illustrations of psychotropic substances which are also included within the definition of psychotropic substances under the Act. It would be a misnomer to contend that there can be no psychotropic substance outside the list of psychotropic substances specified in the schedule. As pointed out earlier, there are 4 or 5 varieties of psychotropic substances as per Section 2(xxiii) of the Act; and list of psychotropic substances specified in the schedule is only one of the varieties. Having regard to the language employed in Section 2(xxiii) of the Act while defining psychotropic substances, it may not be correct and it would be contrary to the definition contained in Section 2(xxiii) of the Act in case it is held that unless the substance tallies with chemical name given in the schedule to the Act, then only it has to be called a psychotropic substance and not otherwise. Observation to that effect in *Shahid Khan* (2 *supra*), with due respect, is contrary to various limbs in the definition of psychotropic substances contained in Section 2(xxiii) of the Act.

9. In Ex.P-111 chemical analysis report, finding of P.Ws 18 and 19 is as follows:

Each of the eight samples is in the form of colourless clear liquid. Each answers tests for the presence of Buprenorphine Hydrochloride, which is covered under NDPS Act, 1985."

It shows that the samples representing the contraband seized was a salt or preparation of Buprinorphine. Buprinorphine Hydrochloride is nothing but a salt of Buprinorphine or preparation of Buprinorphine and therefore ultimately the seized contraband is nothing but a psychotropic substance within the meaning of Section 2(xxiii) of the Act.

10. In Merck Index (an encyclopedia of Chemicals, Drugs and biologicals) (14th edition) published by Merck Research Laboratories, division of Merck & Co., Inc, U.S.A, at page 246, properties of Buprinorphine Hydrochloride are described as under:

White powder. Slightly acidic. Limited solubility in water.

Note: This is a controlled substance (narcotic) : 21 CFR, 1308.13. THERAP CAT: Analgesic (narcotic); in treatment of opioid dependence."

Buprinorphine Hydrochloride was being carried by the accused in his baggage in the form of injections. Simply because N R x is not mentioned on the contraband or on the left corner of the label thereof, it does not cease to be psychotropic substance.

11. The Special Public Prosecutor contends that the seized material also comes under the description of a manufactured drug, possession or attempt to export of which is punishable under Section 21 of the Act. Manufactured drug is defined in Section 2(xi) of the Act and it reads as follows: "2(xi) "manufactured drug" means-

(a) All coca derivatives, medicinal cannabis, opium derivatives and poppy straw concentrate;

(b) Any other narcotic substances 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 substances 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;"

This definition includes only derivatives or preparations of Narcotic substances only and this definition does not include derivatives or preparations of psychotropic substances. It is so because the definition of psychotropic

substances contained in Section 2(xxiii) of the Act is inclusive of salts or preparations of such substances. A manufactured drug as defined in Section (xi) of the Act is included in the definition of Narcotic Drug contained in Section 2(xiv) of the Act. Section 2(xiv) reads as under:

Narcotic drug & quot; means coca leaf, cannabis (hemp), opium, poppy straw and includes all manufactured drugs & quot;

Therefore, a salt or preparation of a psychotropic substance cannot be termed as a manufactured drug.

12. In view of the exhaustive definition of psychotropic substances contained in Section 2(xxiii) of the Act, cross-examination of P.Ws 18 and 19 becomes irrelevant when they stated that as per Indian Pharmacopoeia, chemical name of Buprinorphine is (6R, 7R, 14S)-17-cyclopropylmethyl-7, 8-dihydro-7\$(1S)- 1-Hydroxy-1,2,2-trimet hylprop1]-6-0-methyl1-6, 14-ehtano-17-normorphine hydrochloride. It is nothing but a salt or preparation of Buprinorphine which is a psychotropic substance. A salt or preparation of a psychotropic substance is again a psychotropic substance by itself in view of the definition in Section 2(xxiii) of the Act.

13. Since the lower Court came to the conclusion that the seized material from the accused is not a psychotropic substance whose chemical name is given in item No.92 of the schedule to the Act and on the basis of Shahid Khan (2 supra), the lower Court consequently gave findings on point Nos.2, 3 and 5 against the prosecution and in favour of the accused. In view of my conclusion noted above on the basis of definition of psychotropic substances contained in Section 2(xxiii) of the Act and in view of my above discussion of Shahid Khan (2 supra) at length, I am of the opinion that the conclusion arrived at by the lower Court is legally erroneous and is unsustainable in law.

14. Therefore, for all the above reasons, this Court finds that the accused is guilty of the offences under Sections 22(c) and 23(c) of the Act and that the accused is not guilty of the offence under Section 21(c) of the Act.

15. Both Section 22(c) as well as Section 23(c) of the Act prescribe minimum rigorous imprisonment of 10 years and minimum fine of Rs.1,00,000/- for the contraventions mentioned therein.

16. In the result, the appeal is allowed setting aside order of acquittal passed by the lower Court; and convicting the accused/respondent for the offences under Sections 22(c) and 23(c) of the Act and sentencing him to rigorous imprisonment for 10 years each and fine of Rs.1,00,000/- each on the above two counts separately. Both the sentences of imprisonment shall run concurrently. Total fine amount is Rs.2,00,000/-. In case of default in payment of fine, the accused/respondent shall undergo simple imprisonment for further period of one year on each count.

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