

M.Veludurai Vs. the State

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Court : Chennai

Decided On : Dec-23-2011

Judge : M.Jaichandren; S.Nagamuthu, Jj.

Acts : Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 29, 8(c), 21

Appeal No. : CRIMINAL APPEAL (MD).No.256 of 2009 and CRL.O.P.(MD).Nos.9668 of 2011 and 11953 of 2011

Appellant : M.Veludurai

Respondent : The State

Advocate for Def. : Mr.C.Arul Vadivel, Adv.

Advocate for Pet/Ap. : Mrs.V.Jeyarani, Adv.

Judgement :

“Whether in the absence of exact quantity/percentage of narcotic drug/psychotropic substance found in the seized contraband, the punishment for contravention in relation to manufactured drug and preparations, is to be imposed under Section 21(a) or under Section 21(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985?”. This is the question referred to this Division Bench to answer. The said question came to be referred to by a learned Single Judge in the following circumstances.

2. The appellant in C.A.(MD).No.256 of 2009 was found guilty by the Trial Court for having found in possession of 1.370 Kilograms of heroin. The occurrence was on 07.01.2001. The Trial Court convicted him for the offences under Sections 8(c) r/w Section 29 and Section 8(c) r/w Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985, [hereinafter referred to as "the NDPS Act"] and sentenced him to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/- in default to undergo simple imprisonment for three months. Challenging the said conviction and sentence, the appellant has filed the above Appeal.

3. When the said Criminal Appeal came up for hearing before Hon'ble Mr.Justice M.SATHYANARAYANAN, an argument was advanced before him that even assuming that the prosecution had proved the charge that the accused was found in possession of 1.370 kg of contraband containing heroin, even then, the accused could be convicted only under Section 21(a) of the NDPS Act and not either under Section 21(b) or under Section 21(c) of the said Act. This argument was based on the fact that out of the total quantity of the powder allegedly seized from the accused, it was not found out as to what was the exact quantity of heroin [Narcotic Drug] in the mixture. It was, therefore, contended that it should be held that the quantity of Narcotic Drug found in the mixture was only a small quantity, as defined in Section 2[xxiii] and not a commercial quantity, as defined in Section 2(vii) of the NDPS Act.

4. In order to substantiate the said contention, the learned counsel appearing for the appellant had relied on two Judgments of the Hon'ble Supreme Court. The first one was E.Micheal Raj vs. Narcotic Control Bureau reported in 2008 (5) SCC 161. That was a case, where the accused therein was found in possession of a total quantity of contraband weighing 4.07 Kilograms. A chemical analysis [hereinafter referred to as "the Purity Test"] was conducted and it was found that 1.4% and 1.6% respectively in two samples were found to be heroin. Based on the said percentage, the total quantity of heroin found in the contraband was calculated at 61.05 grams. On the said conclusion, the Hon'ble Supreme Court has held that the possession of 61.05 grams of heroin would fall below the commercial quantity, as defined in Section 2(vii) of the NDPS Act, as notified by the Central Government.

The Hon'ble Supreme Court has also concluded that obviously, 61.05 grams of heroin cannot be stated to be a small quantity in view of the notification, [as per the notification issued by the Central Government dated 19.10.2001 in S.O.No.1055(E), up to 5 grams, heroin is a small quantity and more than 250 grams is commercial quantity]. Accordingly, the Hon'ble Supreme Court held that the accused was found in possession of heroin, which was neither a small quantity nor a commercial quantity and it was an intermediate quantity. Accordingly, the Hon'ble Supreme Court convicted the accused under Section 21(b) of the NDPS Act. For the purpose of easy understanding, in this order, the quantity of Narcotic Drug or Psychotropic Substance, which is neither a commercial quantity nor a small quantity, is referred to either as "intermediate quantity" or as an "in between quantity".

5. The other Judgment relied on by the learned counsel for the appellant was State of NCT of Delhi v. Ashif Khan @ Kalu reported in 2009 (3) Scale 429 : AIR 2009 SC 1977. In the said Judgment, the Hon'ble Supreme Court had an occasion to refer to E.Micheal Raj's case and yet another Judgment of Ouseph v. State of Kerala reported in 2004 (4) SCC 446. In Ouseph's case, the Hon'ble Supreme Court in Paragraph No.8 has held as follows:- "8. The question to be considered by us is whether the psychotropic substance was in a small quantity and if so, whether it was intended for personal consumption. The words "small quantity" have been specified by the Central Government by the notification dated 23-7-1996. Learned counsel for the State has brought to our notice that as per the said notification small quantity has been specified as 1 gram. If so, the quantity recovered from the appellant is far below the limit of small quantity specified in the notification issued by the Central Government. It is admitted that each ampoule contained only 2 ml and each ml contains only .3 mg. This means the total quantity found in the possession of the appellant was only 66 mg. This is less than 1/10th of the limit of small quantity specified under the notification."

In Ashif Khan @ Kalu's case, the Hon'ble Supreme Court followed the dictum laid down in E.Micheal Raj's case and Ouseph's case, cited supra.

6. Relying on these Judgments of the Hon'ble Supreme Court, it was contended before the learned Single Judge that it is absolutely necessary that Purity Test should be conducted to find out the exact quantity of Narcotic Drug [heroin] in the total quantity of contraband seized, which is a mixture of Narcotic Drug and a neutral substance and since the same was not done, it should be construed that the quantity of heroin contained in the contraband was only a small quantity, and therefore, the accused should be convicted under Section 21(a) of the Act.

7. But, the learned Special Public Prosecutor relied on four Judgments of this Court rendered by four different Hon'ble Judges, wherein, in cases where there were no Purity Tests conducted, the learned Judges confirmed the conviction of the respective accused under Section 21(b) of the Act, treating the quantity of Narcotic Drug found in the total quantity of contraband as intermediate quantity. The first Judgment relied on was in *Rekha Parameswari v. Assistant Collector of Customs* reported in 2009 (1) T.N.L.R. 353 (Mad). The second Judgment was in *Mohammed Nizar Thasaleen and others vs. The Superintendent of Customs, Customs Preventing Division*, reported in CDJ 2009 MHC 2490. The third Judgment was dated 30.03.2010 made in Crl.A.(MD)Nos.1895 of 2003 and 200 of 2004. The last Judgment was in *Mohammed Umar @ Mohammed Salim and Others v. Intelligence Officer, Narcotics Control Bureau, South Zonal Unit, Chennai* reported in (2010) 3 MLJ (Crl) 603. The Hon'ble Mr. Justice M.SATHYANARAYANAN, after analyzing the Judgments of the Hon'ble Supreme Court in *E.Micheal Raj's* and *Ashif Khan @ Kalu's* cases, as well as the above cited four Judgments of the learned Single Judges of this Court, found that he was unable to agree with the views taken by the learned Single Judges of this Court in the above four Judgments. He took the view that in the absence of Purity Test, the exact quantity of Narcotic Drug/Psychotropic Substance contained in the contraband cannot be ascertained, and therefore, by giving benefit of doubt, it should be held that it is only a small quantity. In Paragraph Nos.64 and 67 of the Referral Order, the learned Judge has held as follows:-

64. In the absence of quantity/exact percentage of narcotic drug in Ex.P.17, Chemical Analysis report, in the considered opinion of this Court, it cannot be taken as "in between quantity".

67. Therefore, this Court is of the view that in the absence of exact quantity/percentage of Diacetyl Morphine (Heroin) in the seized contraband, it should be taken as small quantity and punishment is to be imposed under Section 8(c) read with Section 21(a) of the N.D.P.S.Act. Since the above cited four decisions rendered by this Court took the view that even in the absence of exact percentage/quantity of narcotic drug/psychotropic substance, it should be taken as “in between quantity” and the punishment is to be imposed under Section 21(b) of the N.D.P.S.Act, this Court is of the opinion that the said issue is to be decided by a Larger Bench of this Court.

8. On the basis of the above conclusion, the learned Judge thought it fit to refer the question to a Division Bench to answer. As per the direction of the Hon'ble The Chief Justice, the said question has been referred to this Bench, and accordingly, we proceed to answer the same.

9. Before coming into force of amending Act 09/01, the quantum of Narcotic Drug/Psychotropic Substance was immaterial for the purpose of deciding the quantum of punishment. The provisions of NDPS Act were amended by amending the Act 09/01 with effect from 02.10.2011, which rationalized the punishment structure under the NDPS Act by providing graded sentences linked to the quantity of Narcotic Drugs or Psychotropic Substances carried. Sections 2[via] and 2[xviii] of the NDPS Act were introduced defining the expressions “commercial quantity” and “small quantity”, which read as follows:- ““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 Gazettee.” ““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”.

Sections 15, 17, 18, 20, 21, 22, 23 and 25 of the NDPS Act were also amended suitably providing graded sentences depending upon the quantity of the Narcotic Drug/Psychotropic Substance involved in the crime. For the purpose of brevity, let us now refer to the amended Section 21 alone, which reads as follows:-

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, purchase, 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 term which may extend to ten years and with fine which may extend to one lakh rupees; (c) where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to twenty years and shall also be liable to fine which shall be less than one lakh rupees but which may extend to two lakh rupees.”

10. In exercise of the power conferred by the clauses 2[viia] and 2[xxiia] of the NDPS Act, the Central Government has issued a notification dated 19.10.2001 in S.O.No.1055(E), thereby specifying the quantity mentioned in column Nos.5&6 of the Table in the notification in relation to the Narcotic Drug and Psychotropic Substance mentioned in the corresponding entry in column Nos.2 to 4 of the said Table as the small quantity and commercial quantity respectively for the purposes of the said clauses of that Section. Entry 56 in the said Table, relates to heroin and Entry 239 relates to mixture or preparation, which state as follows:-

Serial No.(1)

Name of drug and psychotropic substance

(2)

Other non-propriety name

(3)

Chemical name

(4)

Small quantity [in gm]

(5)

Commercial quantity [in gm/kg]

(6)

56

Heroin

Diacetyl morphine

5

250 gm

239

Any mixture or preparation that of with or without a neutral material, of any of the above drugs.

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* Lesser of the Small quantity between the quantities given against the respective narcotic drugs or psychotropic substances mentioned above forming part of the mixture.

** Lesser of the commercial quantity between the quantities given against the respective narcotic drugs or psychotropic substances mentioned above forming part of the mixture.

11. While deciding the relevant clause of Section 21, under which the accused should be punished, in terms of the above definitions, and in the light of the above notification issued by the Central Government, in E.Micheal Raj's case, the Hon'ble Supreme Court held that it is absolutely necessary for the prosecution to prove as to what exactly was the quantity of heroin contained in the contraband [powder] seized from the possession of the accused. As we have already stated, in E.Micheal Raj's case, a test, known as "Purity Test" was conducted, by which the percentage of the heroin found in the samples was found out, from which the total quantity of heroin in the contraband was calculated, based on which it was easily concluded that the accused was found in possession of heroin, which was an "intermediate quantity". The Hon'ble Supreme Court, ultimately, in Paragraph No.4, held as follows:-

4. The accused-appellant was charged with the offence committed under Section 8(c) read with Sections 21 and 29 of the NDPS Act by the Intelligence Officer, Narcotic Control Bureau. The Special Judge for Trial of Cases under the NDPS Act found that the substance found in possession of the accused was an opium derivative which has been defined under Section 2(xvi), and under Section 2(xvi)(e) a preparation, containing more than 0.2% of morphine or diacetylmorphine, is an opium derivative; and that since this contraband article contained 1.4% and 1.6% heroin it is an opium derivative, and punishable under Section 21 of the NDPS Act. Since the manufactured drug being carried weighed 4.07 kg., it would come under Section 21(c) being a commercial quantity, but since the accused is only a carrier and is not the beneficiary of the transaction, he would not be awarded the maximum sentence and would be awarded the minimum sentence of 10 years rigorous imprisonment and a fine of rupees one lakh, in

default of payment of fine rigorous imprisonment for one more year.

12. As we have already noted, the said Judgment in E.Micheal Raj's, case came to be referred to by the Hon'ble Supreme Court in a subsequent Judgment in State of NCT of Delhi v. Ashif Khan @ Kalu reported in 2009 (3) Scale 429 : AIR 2009 SC 1977, wherein the Hon'ble Supreme Court, after referring to yet another Judgment of the Hon'ble Supreme Court in Ouseph v. State of Kerala reported in 2004 (4) SCC 446, has followed the ratio laid down in E.Micheal Raj's, case. From the above Judgments of the Hon'ble Supreme Court, it is crystal clear that the law has got catalyzed that in order to punish an accused for any offence involving a Narcotic Drug or Psychotropic Substance, as the case may be, it is absolutely necessary for the prosecution to prove the exact quantity of Narcotic Drug or Psychotropic Substance in the total quantity of the contraband seized from the accused so as to punish the accused under the appropriate penal provision.

13. Very recently, in Harjit Singh vs. State of Punjab reported in 2011 (4) SCC 441, the Hon'ble Supreme Court had an occasion to consider the Judgment in E.Micheal Raj's, case. That was a case, where the accused was allegedly found in possession of 7.10 kilograms of opium. Two samples of 10 grams [each] of opium were taken. According to the Purity Test conducted, it was found that it contained 0.8% of morphine. Based on the said estimation, it was contended before the Hon'ble Supreme Court that out of the total quantity of the contraband weighing 7.5 kilograms, the morphine content was only 56.96 gms, which, according to the accused, was an intermediate quantity. Therefore, it was contended before the Hon'ble Supreme Court that as per E.Micheal Raj's, case, the accused should be convicted only under Section 21(b) of the NDPS Act for having found in possession of the intermediate quantity of opium. But, the Hon'ble Supreme Court did not agree with the said contention of the accused. The Hon'ble Supreme Court, after referring to the definition of opium, as found in Section 2(xv) of the NDPS Act and the notification issued by the Central Government, in Paragraph Nos.15, 16, 17, 21, 22 and 23 of the said Judgment, held as follows:-

“15. Opium is essentially derived from the opium poppy plant. The opium poppy gives out a juice which is opium. The secreted juice contains several alkaloid

substances like morphine, codeine, thebaine, etc. Morphine is the primary alkaloid in opium.

16. Opium is a substance which once seen and smelt can never be forgotten because opium possesses a characteristic appearance and a very strong and characteristic scent. Thus, it can be identified without subjecting it to any chemical analysis. It is only when opium is in a mixture so diluted that its essential characteristics are not easily visible or capable of being apprehended by the senses that a chemical analysis may be necessary. In case opium is not mixed up with any other material, its chemical analysis is not required at all. "Of course, an analysis will always be necessary if there is a mixture and the quantity of morphine contained in mixture has to be established for the purpose of definition (of opium under the Opium Act)." (Vide: *Baidyanath Mishra v. State of Orissa*, 1968 (34) CLT 1 (SC); and *State of Andhra Pradesh v. Madiga Boosenna*, AIR 1967 SC 1550). [Emphasis supplied].

17. However, the aforesaid cases have been decided under the Opium Act and cannot be the authority so far as deciding the cases under the NDPS Act. Thus, chemical analysis of the contraband material is essential to prove a case against the accused under the NDPS Act.

21. In the instant case, the material recovered from the appellant was opium. It was of a commercial quantity and could not have been for personal consumption of the appellant. Thus, the appellant being in possession of the contraband substance had violated the provisions of Section 8 of the NDPS Act and was rightly convicted under Section 18(b) of the NDPS Act. The instant case squarely falls under clause (a) of Section 2(xv) of the NDPS Act and Clause (b) thereof is not attracted for the simple reason that the substance recovered was opium in the form of the coagulated juice of the opium poppy. It was not a mixture of opium with any other neutral substance. There was no preparation to produce any new substance from the said coagulated juice. For the purpose of imposition of punishment if the quantity of morphine in opium is taken as a decisive factor, Entry No.92 becomes totally redundant.

22. Thus, as the case falls under clause (a) of Section 2(xv), no further consideration is required on the issue. More so, opium derivatives have to be dealt with under Entry No.93, so in case of pure opium falling under clause (a) of Section 2(xv), determination of the quantity of morphine is not required. Entry No.92 is exclusively applicable for ascertaining whether the quantity of opium falls within the category of small quantity or commercial quantity.

23. The judgment in E. Micheal Raj (Supra) has dealt with heroin i.e., Diacetylmorphine which is an Opium Derivative within the meaning of the term as defined in Section 2(xvi) of the NDPS Act, and therefore, a `manufactured drug' within the meaning of Section 2(xi)(a) of the NDPS Act. As such the ratio of the said judgment is not relevant to the adjudication of the present case. Ultimately, referring to the above facts, the definitions in respect of the opium and the other relevant provisions, the Hon'ble Supreme Court distinguished the ratio in E.Micheal Raj's, case and in Paragraph No.24 of the said Judgment held as follows:-

24. In Amarsingh Ramjibhai Barot v. State of Gujarat, (2005) 7 SCC 550, this Court dealt with a case where the black-coloured liquid substance was taken as an opium derivative. The FSL report had been to the effect that it contained 2.8% anhydride morphine, apart from pieces of poppy (Posedoda) flowers. This was considered only for the purpose of bringing the substance within the sweep of Section 2(xvi)(e) as `opium derivative' which requires a minimum 0.2% morphine.

14. Thus, a close reading of the above Judgment of the Hon'ble Supreme Court in Harijit Singh's case would make it abundantly clear that if the contraband is opium falling within the definition of Section 2(xv)(a) of the NDPS Act, then, the total quantity of morphine contained in the contraband need not be estimated, per contra, it would be suffice, if it is proved that it is opium. In case it is a mixture or preparation with or without any neutral material of the juice and poppy falling within the definition of the opium as made in Section 2(xi)(b) of the NDPS Act [i.e., a manufactured drug], then, it is absolutely necessary for the prosecution, by conducting Purity Test, to find out that the morphine content was more than 0.2%. Therefore, in deciding the case involving opium, there may not be any difficulty

henceforth, in view of the Judgment of the Hon'ble Supreme Court in Harijit Singh's case. Thus, it is crystal clear that the law laid down in E.Micheal Raj's, case is not applicable to the opium cases in the event, the contraband falls within the definition of Section 2(xva) of the NDPS Act.

15. In the case of heroin, there can be no doubt that it is a manufactured drug, as defined in Section 2(xi) of the NDPS Act. As per the Notification issued by the Central Government dated 19.10.2001, heroin is found in entry 56. The chemical name of the same, [as per the said notification], is "diacetyl morphine". The notification further states that if diacetyl morphine is found to be not more than 5 grams, it is a small quantity and if it is found to be greater than 250 grams, it is a commercial quantity. Entry 239 of the notification deals with any mixture or preparation that of with or without a neutral material of any of the above drugs.

16. From the above definition, it is crystal clear that if the contraband seized is, pure and simple, heroin [diacetyl morphine], falling within entry 56, depending upon the weight of the heroin, it shall be construed either as commercial quantity or as small quantity or intermediate quantity, and accordingly, the accused will be convicted and punished. Only in cases, where the contraband seized is a mixture or preparation, with or without a neutral material, it is necessary that as per E.Micheal Raj's case, Purity Test should be conducted to find out the exact quantity of the heroin or any other Narcotic Drug or Psychotropic Substance, as the case may be, in the mixture or preparation, to award appropriate conviction and punishment. In E.Micheal Raj's case, what was seized from the accused was a powder weighing 4.07 kilograms. As per the report of the quantitative test conducted by the Customs Laboratory, Chennai, the samples were found to contain 1.4% and 1.6% of morphine. Thus, as held by the Hon'ble Supreme Court, what was seized from the accused was only a mixture containing morphine as well as other substances. In such view of the matter, the Hon'ble Supreme Court calculated the exact quantity of morphine content, on the basis of the report and ultimately, held that it was not a commercial quantity. In Harijit Singh's case, since the opium seized from the accused was not a mixture, the Hon'ble Supreme Court has held that the dictum laid down in E.Micheal Raj's case, is not applicable.

17. From the above discussions, it is crystal clear that if the contraband seized from the accused is a mixture containing a Narcotic Drug or a Pshchotropic Substance, then, it is necessary that Purity Test should be conducted in order to ascertain the exact quantity of Narcotic Drug or Psychotropic Substance contained in the mixture. If the contraband seized from the accused is not a mixture falling within sweep of entry 239, as held in Harijit Singh's case, there is no need to insist for Purity Test. In our considered opinion too, such Purity Test is not at all required in the case of the contrabands, which do not fall within the sweep of entry No.239 of the Notification.

18. Now, turning to the Judgments of the learned Single Judges of this Court, referred to in the Referral Order by Hon'ble Mr.Justice M.SATHYANARAYANAN, let us take Rekhaparameswari's, case, cited supra at the first. That was a case, where the accused was found in possession of 500 grams of brown sugar and there was no Purity Test conducted to ascertain the exact quantity of the narcotic drug found therein. Referring to E.Micheal Raj's case, the learned Single Judge has held that the prosecution had failed to prove that it was a commercial quantity. The learned Judge has also accepted that it was a mixture. But, in Paragraph No.21 of the said Judgment, the learned Judge has held as follows:-

“21. Though originally the charge against the accused was under Sections 8(c) read with 21 of the NDPS Act, after examining all the witnesses and after completion of the prosecution evidence, the charge was amended on 25.11.2002 under Sections 8(c) read with Section 21(c) and the argument was heard after two days. While the trial Court was aware of the specific provision of Section 21(c) of the NDPS Act, and amended the charge against the accused had not taken any steps for sending the contraband for purity test. The prosecution also has not taken any steps pending trial to get a fresh report from the analyst. The prosecution has miserably failed to establish that the contravention involves the commercial quantity, the conviction under Section 21(c) of the NDPS Act is not sustainable. At the same time, this Court is not prepared to hold that the contravention involves only small quantity of 5 grams as per Entry-50 in the table. It is not possible to conclude that the total quantity of 500 grams of brown powder would contain only 5 grams or less than 5 grams of Di-Acetyl- Morphine. In the

circumstances of the case, it is safe to conclude that the contravention by the accused involves quantity less than commercial quantity, but greater than small quantity, which is punishable under Section 21(b) of the NDPS Act.”

19. A perusal of the above Judgment would go to show that having held that what was seized from the accused was a mixture and not a narcotic drug simplicitor, the learned Judge had, however, concluded that it is beyond one's comprehension that 500 grams of brown powder would not have contained five grams of Di-Acetyl-Morphine. With great respect to the Hon'ble Judge, we are constrained to say that the said conclusion arrived at by him is not based on any sound reasons. As has been rightly observed by the Hon'ble Mr.Justice M.SATHYANARAYANAN, without the assistance of Purity Test, it will not be possible to ascertain as to whether the quantity of Narcotic Drug or Psychotropic Substance in a mixture or preparation is a commercial quantity or an intermediate quantity or a small quantity. In such an event, giving benefit of doubt to the accused, it should be held that it is only a small quantity.

20. In Mohammed Nizar Thasaleen's case, referred to above, yet another Hon'ble Judge of this Court, Hon'ble Ms.Justice R.MALA, in Paragraph No.20 has held as follows:-

“20. So, this Court, after consideration the both sides arguments, has come to the conclusion that since there is no purity test has been conducted as per the citations referred to above, i.e, 2008 (2) Supreme Court Cases (Crl) 558, 2009 (3) Scale 429 and the Judgment dated 22.04.2009 passed in C.A.No.202 of 2003 and that the appellants were not possessed the commercial quantity and the same is in between quantity, [sic]. Hence, it is invoking Section 21(b) of NDPS Act. [sic] The prosecution has miserably failed to establish that the contravention involves the commercial quantity, the conviction under Section 21(c) of the NDPS Act is not sustainable. In the circumstances of the case, it is safe to conclude that the contravention by the accused involves quantity less than commercial quantity, but greater than small quantity, which is punishable under Section 21(b) of the NDPS Act.”

21. Here again, the Hon'ble Judge has not given any reason as to why she came to the conclusion that the quantity seized from the accused was an intermediate quantity, though there was no Purity Test conducted. Similar is the view taken in the Judgment dated 30.03.2010 made in CrI.A.(MD)Nos.1895 of 2003 and 200 of 2004.

22. In Mohammed Umar @ Mohammed Salim and another vs. the Intelligence Officer reported in 2010 (3) MLJ 603, the matter was decided by one of us [Justice S.NAGAMUTHU]. In the said case, the accused was found in possession of 5 kilograms of contraband, which was a mixture. In the said case also, there was no Purity Test conducted. Relying on E.Micheal Raj's case, it was held that in the absence of any Purity Test, the quantity of heroin found in the mixture could not be ascertained. Ultimately, the Court found the accused guilty under Section 21(b) of the Act holding that the mixture contained was intermediate quantity of heroin. In the said case, it was not at all contended by the accused that what was possessed by him was only a small quantity of heroin. Thus, there was no occasion for the Court to go into the question as to whether the quantity was a small quantity or an intermediate quantity. Since the learned counsel himself contended that it was an intermediate quantity, without going into the further details, it was held that the quantity was intermediate quantity. Therefore, the conclusion arrived at in the said Judgment cannot be taken as a precedent on this question and it is only an obiter.

23. Now, after having analyzed the Judgments of the Hon'ble Supreme Court and the Judgments of the learned Single Judges of this Court and the view taken by Hon'ble Mr.Justice M.SATHYANARAYANAN in the Referral Order, we hold as follows:-

If the contraband seized is a mixture or preparation, with or without a neutral material of any of the drugs, falling within the scope of entry No.239 of the Notification dated 19.10.2001, in the absence of the estimation of the exact quantity of Narcotic Drug/Psychotropic Substance contained in the said mixture or preparation, it shall be concluded that the quantity of Narcotic Drug/Psychotropic Substance is only a small quantity. If the contraband seized is neither a mixture nor a preparation with or without a neutral material and if it is found to be a

Narcotic Drug/Psychotropic Substance simplicitor, then, there is no need to hold any other test like, Purity Test and it would be suffice that the prosecution has proved that the contraband is a Narcotic Drug/Psychotropic Substance and not a mixture or preparation containing a Narcotic Drug/Psychotropic Substance with or without a neutral material. In such cases, the weight of the entire quantity of Narcotic Drug/Psychotropic Substance shall be taken into account to decide as to whether the said quantity is a small quantity or a commercial quantity or an intermediate quantity for the purposes of conviction and sentence.

24. The learned Special Public Prosecutor would submit that in many cases, where the prosecutions were launched before E.Michael Raj's case, Purity Tests were not conducted and as a result, there is likelihood of the accused, involved in crimes involving commercial quantities of Narcotic Drug/Psychotropic Substance, to escape with minimum punishments. In our considered opinion, the said apprehension is real. But, the law is not helpless. Even after filing of the charge sheet, there is no impediment for the Prosecuting Agency or the Court to send the remaining contraband for conducting Purity Test in the case of mixtures and preparations falling within scope of entry No.239 and then, proceed with trial of the case. Having regard to the heinous nature of the offence under the Act, the Courts, which have been entrusted with the onerous task of delivering criminal justice, would do well by sending the contrabands in their custody during trial/Appeal for Purity Test, if it is found that the contraband falls within ambit of entry 239 of the notification. In pending appeals, such report can be received as additional evidence under Section 391 of the Code of Criminal Procedure. We would like to state that until the reports of Purity Tests are received, the trial may be postponed. In respect of the pending cases, including appeals, if any such request is made by any Court or Prosecuting Agency for holding Purity Test, the Laboratory concerned shall give top priority for such pending including appeals cases and submit report without any delay.

25. We are conscious of the fact that the Central Government has issued yet another notification dated 18.11.2009, wherein the Central Government has declared that in case of a mixture or preparation with or without a neutral substance, the entire quantity of mixture/preparation shall be decisive as to

whether the Narcotic Drug/Psychotropic substance is a small quantity or commercial quantity. As held in Harijit Singh's case, cited supra, the said notification is only prospective in its operation. Therefore, in view of the said notification, in respect of the offences committed on or before 18.11.2009, Purity Test need not be conducted and that the ratio laid down in Michael Raj's case is not applicable to such cases. The ratio in Michael Raj's case is applicable only to the offences committed on or before 17.11.2009.

26. In the result, we answer the question, referred to us, as follows:- i). If the contraband seized is either a mixture or a preparation with or without a neutral material, of any Narcotic Drug or Psychotropic Substance falling within the scope of entry No.239 of the notification dated 19.10.2001 issued in S.O.No.1055(E) of the Central Government, it is absolutely necessary to conduct Purity Test to ascertain the exact quantity of the Narcotic Drug/Psychotropic Substance contained in the said mixture or preparation. In the absence of Purity Test, as indicated, the contraband seized shall be construed only as a small quantity and accordingly, the accused shall be liable for punishment.

(ii). In the case of a contraband, which is neither a mixture nor a preparation falling within the sweep of entry No.239 and if the contraband is a Narcotic Drug/Psychotropic Substance simplicitor, there is no need for Purity Test and in such cases, the entire quantity of Narcotic Drug/ Psychotropic Substance shall be taken into consideration for deciding as to whether the same is a small quantity or a commercial quantity or an intermediate quantity for the purpose of conviction.

(iii). In pending cases, including appeals, relating to the substances falling within the sweep of entry No.239, the Courts/Prosecuting Agency, may do well by forwarding the samples taken from the remaining contrabands in the custody of the Courts for Purity Test to estimate the percentage of Narcotic Drug/ Psychotropic Substance in the mixture or preparation. In pending Criminal Appeals, the report of Purity Test may be received as additional evidence under Section 391 of the Code of Criminal Procedure.

(vi). If any such request is made in respect of the pending cases, the Laboratory concerned shall give top priority and submit reports without delay.

(vii). We make it clear that the ratio laid down in Michael Raj's case, regarding Purity Test and the answers given by us herein above shall be applicable to offences committed on or before 17.11.2009 alone.

27. With the above answers, we direct the Registry to list the Criminal Appeal (MD).No.256 of 2009 and CRL.O.P.(MD).Nos.9668 of 2011 and 11953 of 2011 before the learned Single Judges of this Court for appropriate orders.

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