

Abdul Mateen Vs. Uoi and anr

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Court : Delhi

Decided On : Nov-06-2012

Judge : Badar Durrez Ahmed

Appellant : Abdul Mateen

Respondent : Uoi and anr

Judgement :

THE HIGH COURT OF DELHI AT NEW DELHI % + Judgment delivered on:

06. 11.2012 W.P.(Crl) 1552/2010 ... Petitioner ABDUL MATEEN versus ... Respondents UOI AND ANR Advocates who appeared in this case: For the Petitioner For the Respondent : Mr T.K. Mahapatra, Mr Dinesh, Mr Sunit Sharma : Mr Sachin Datta (CGSC) with Ms Kritika Mehra CORAM:HONBLE MR JUSTICE BADAR DURREZ AHMED HONBLE MS JUSTICE VEENA BIRBAL JUDGMENT BADAR DURREZ AHMED, J.

1. This writ petition seeks the quashing of notification S.O. No. 2941 (E) dated 18.11.2009 issued by the Ministry of Finance, Department of Revenue, Government of India on the ground that it is ultra vires the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act).

2. The petitioner is a citizen of Afganistan and is facing trial in the case entitled State v. Niyamatulah & Ors. which arises out of FIR No. 212/2009 of Police Station Crime Branch registered under section 21(c) of the NDPS Act. An alleged

recovery of 500 grams of heroin was made from, inter alia, the petitioner. The Forensic Science Laboratory Report with regard to the said alleged heroin indicated that the substance allegedly recovered comprised of 44.5% diacetylmorphine (heroin). If this percentage is taken into account, then, according to the learned counsel for the petitioner the actual weight of heroin in the alleged recovery would be 222.5 grams. According to the learned counsel for the petitioner this would be less than the commercial quantity of 250 grams specified under notification S.O. 1055 (E) dated 19.10.2001. If the petitioner is right, then, the recovery would be of less than the commercial quantity prescribed for heroin and therefore the punishment could be for a term which could extend to 10 years with fine which could extend to Rs. 1 lakh. However, if the petitioners submission is not accepted then the alleged recovery would be of a commercial quantity inasmuch as the commercial quantity specified for heroin under the said notification S.O. 105.(E) dated 19.10.2001 is 250 grams and above. If that were to be the case, then, the punishment involved has to be not less than 10 years and may extend to 20 years with fine which cannot be less than Rs. 1 lakh and may extend to Rs. 2 lakh.

3. Prior to the issuance of the impugned notification S.O. 2941 (E) dated 18.11.2009, there was a controversy that had been set at rest by a decision of the Supreme Court in the case of E. Micheal Raj v. Intelligence Officer Narcotic Control Bureau:

2008. (5) SCC 161. The Supreme Court, after analyzing the provisions of the NDPS Act as also entries 56 and 239 of the notification dated 19.10.2001, observed that the offending substance in that case, which contained diacetylmorphine, was an opium derivative and hence a manufactured drug. The Supreme Court then observed as under:15. It appears from the Statement of Objects and Reasons of the amending Act of 2001 that the intention of the legislature was to rationalise the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentence, the addicts and those who commit less serious offences are sentenced to less severe punishment. Under the rationalised sentence structure, the punishment would vary depending upon the quantity of offending material.

Thus, we find it difficult to accept the argument advanced on behalf of the respondent that the rate of purity is irrelevant since any preparation which is more than the commercial quantity of 250 gm and contains 0.2% of heroin or more would be punishable under Section 21(c) of the NDPS Act, because the intention of the legislature as it appears to us is to levy punishment based on the content of the offending drug in the mixture and not on the weight of the mixture as such. This may be tested on the following rationale. Supposing 4 gm of heroin is recovered from an accused, it would amount to a small quantity, but when the same 4 gm is mixed with 50 kg of powdered sugar, it would be quantified as a commercial quantity. In the mixture of a narcotic drug or a psychotropic substance with one or more neutral substance(s), the quantity of the neutral substance(s) is not to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance. It is only the actual content by weight of the narcotic drug which is relevant for the purposes of determining whether it would constitute small quantity or commercial quantity. The intention of the legislature for introduction of the amendment as it appears to us is to punish the people who commit less serious offences with less severe punishment and those who commit grave crimes, such as trafficking in significant quantities, with more severe punishment. Finally the Supreme Court concluded that:..when any narcotic drug or psychotropic substance is found mixed with one or more neutral substances for the purpose of imposition of punishment it is the content of the narcotic drug or psychotropic substance which shall be taken into consideration.

4. However, that view of the Supreme Court prevailed at a time when the impugned notification had not been issued. Before we proceed further it would be appropriate to set out the impugned notification. The same reads as under:THE GAZETTTE OF INDIA EXTRAORDINARY PART II Section 3 sub-section (ii) PUBLISHED BY AUTHORITY No. 18931 NEW DELHI, WEDNESDAY, NOVEMBER 18 2009 / KARTIKA 27 1931 MINISTRY OF FINANCE (Department of Revenue) NOTIFICATION New Delhi, the 18th November, 2009 S.O. 2941(E). In exercise of the powers conferred by clause (vii a) and (xxiii a) of Section 2 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (61 of 1985) the Central Government, hereby makes the following amendment in the Notification S.O.

1055(E), dated 19th October, 2001, namely :In the Table at the end after Note 3, the following Note shall be inserted, namely:- (4) The quantities shown in column 5 and column 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content. [F. No. 662/33/2008-NC-I] VIMLA BAKSHI, Under Secy 5. According to the learned counsel for the petitioner, the law as declared by the Supreme Court in E. Micheal Raj (supra) clearly entails that the alleged recovery in the present case would be only to the extent of 222.5 grams, representing the actual weight of the heroin, and that would be less than the commercial quantity of 250 grams specified in the notification dated 19.10.2001. But, by virtue of the impugned notification, the entire quantity of 500 grams is sought to be reckoned as the weight of the narcotic drug, be it regarded as heroin or as an opium derivative. If that were to be so, the alleged recovery would be of a commercial quantity in either case, that is, whether it is regarded as diacetylmorphine (heroin) or as an opium derivative. He submitted that while the legislature could have provided that the mixture of heroin and neutral substances should be considered in totality, the Central Government could not do so by issuing a notification. It was submitted that the Central Government could have done so only if the legislature had empowered the Central Government to do so. According to the learned counsel for the petitioner, the power for issuing the impugned notification is sought to be traced to the provisions of section 2 (viia) and section 2 (xxiiiia) of the NDPS Act. According to the learned counsel for the petitioner, a bare reading of the said provisions indicate that the legislature has only given the Central Government power to specify the quantity of narcotic drugs and psychotropic substances and no power had been conferred by the legislature to define as to what has to be considered as part of a narcotic drug and psychotropic substance. It was then contended by the learned counsel for the petitioner that it was never the intention of the legislature to consider a neutral substance as part of a manufactured drug like heroin. In this context it was submitted that wherever the legislature intended a mixture to be taken into account it had made it explicit, for example, in the case of cannabis,

section 2 (iii) makes it clear that cannabis, inter alia, means any mixture, with or without any neutral material, of any of the given forms of cannabis or any drink prepared therefrom. Similarly, the definition of coca leaf in section 2 (vi)(b) is also specified to mean any mixture of the substance in clause (a) with or without any neutral material. It was also contended by the learned counsel for the petitioner that the word preparation included in the definition of opium derivative in section 2 (xvi)(e) was with reference to a mixture of two drugs and not a mixture of a drug and a neutral substance. It was reiterated that wherever the legislature intended to include the total weight of a mixture of a drug and a neutral material, it had done so specifically by mentioning the same and, as such, where it has not been specifically mentioned, the total weight of the mixture of a drug with neutral material cannot be taken and it is only the weight of the drug in that mixture that could be regarded for the purposes of determining as to whether the contraband was of a small quantity or a commercial quantity or an intermediate quantity. It was submitted that the impugned notification dated 18.11.2009 issued by the Central Government went beyond the provisions of the NDPS Act in including the weight of the neutral substance for the purposes of determining whether the case fell within any one of the three categories small quantity, intermediate quantity or commercial quantity. The learned counsel for the petitioner had also placed strong reliance on the decision in *Ansar Ahmed v. State*:

123. (2005) DLT 56. and more particularly on the judgment of the Supreme Court in the case of *E. Micheal Raj* (supra).

6. On the other hand the learned counsel for the UOI submitted that the impugned notification dated 18.11.2009 has been issued in exercise of powers conferred under section 2 (viiia) and 2 (xxiiia). It was submitted that the NDPS Act itself delegates to the Central Government the power to specify the small quantity and commercial quantity of narcotic drugs and psychotropic substances. It was then contended that the expression narcotic drugs in section 2 (xiv) has been defined to include all manufactured drugs. The expression manufactured drugs itself has been defined in section 2 (xi) to, inter alia, include opium derivatives which in turn has been defined in section (xvi) to, inter alia, mean diacetylmorphine, that is, the alkaloid also known as diamorphine or heroin and its salts. The expression opium

derivative as per section 2 (xvi)(e) also means all preparations containing more than 0.2% of morphine or containing any diacetylmorphine. The learned counsel for the respondent submitted that the expression preparation has also been defined in section 2 (xx) to, inter alia, mean, in relation to a narcotic drug or psychotropic substance, any solution or mixture, in whatever physical state, containing one or more such drugs and substances. It was, therefore, contended by the learned counsel for the respondent that it is evident that the expression narcotic drug includes preparation which, as defined in the NDPS Act, inter alia, means one or more drugs and substances, in the form of a solution or a mixture. In response to the submissions made by the learned counsel for the petitioner it was contended by the learned counsel for the respondent that the expression preparation cannot be limited to mean only a mixture of two drugs and not to a mixture of a narcotic drug and a neutral material. According to the learned counsel for the respondent the bare language of the definition of the word preparation used in section 2 (xx) of the NDPS Act makes it clear that the same includes any solution or mixture in whatever physical state containing one or more drugs and substances. It was, therefore, contended that there was no merit in the writ petition and the same ought to be dismissed.

7. Before we embark upon a discussion of the submissions made by the learned counsel for the parties it would be necessary to set out the relevant provisions of the NDPS Act. They are as under: 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, purchases, 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 not be less than one lakh rupees but which may extend to two lakh rupees: Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.

2. Definitions. In this Act, unless the context otherwise requires, xxxx xxxx xxxx xxxx xxxx (iii) cannabis (hemp) means (a) charas, that is, the separated resin, in whatever form, whether crude or purified, obtained from the cannabis plant and also includes concentrated preparation and resin known as hashish oil or liquid hashish: (b) ganja, that is, the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever name they may be known or designated; and (c) any mixture, with or without any neutral material, of any of the above forms of cannabis or any drink prepared therefrom; xxxx xxxx xxxx xxxx xxxx (vi) coca leaf means (a) the leaf of the coca plant except a leaf from which all ecgonine, cocaine and any other ecgonine 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 per cent of cocaine; (vii-a) 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; (xi) manufactured drug means (a) all coca derivatives, medicinal cannabis, opium derivatives and poppy straw concentrate; (b) any other narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or 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 substance or preparation which the Central Government may, having regard to the available information as to a decision, if any, under any International Convention, by notification in the Official Gazette, declare not to be a manufactured drug; xxxx xxxx xxxx xxxx xxxx (xiv) narcotic drug means coca leaf, cannabis (hemp), opium, poppy straw and includes all manufactured drugs; xxxx xxxx xxxx xxxx (xvi) opium derivative means (a) medicinal opium, that is, opium which has undergone the processes necessary to adopt 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 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 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 physical state, containing one or more such drugs or substances; xxxx xxxx xxxx xxxx xxxx (xxiii-a) 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; 8. It would also be necessary to refer to the notification S.O. 1055 (E) dated 19.10.2001. The said notification, to the extent relevant, as it stood prior to issuance of the impugned notification dated 18.11.2009, reads as under:

NOTIFICATION SPECIFYING SMALL QUANTITY AND COMMERCIAL QUANTITY In exercise of the powers conferred by clauses (vii a) and (xxiii a) of section 2 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) and in supersession of Ministry of Finance, Department of Revenue Notification S.O. 527 (E) dated 16th July, 1996, except as respects things done or omitted to be done before such supersession, the Central Government hereby specifies the quantity mentioned in columns 5 and 6 of the Table below, in relation to the narcotic drugs or psychotropic substances mentioned in the corresponding entry in columns 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.

TABLE [See sub-clause vii(a) and xxiii(a) of Section 2 of the Act]

Sl. No.	Name of Narcotic Drug and Psychotropic Substance (International nonproprietary name (INN))	Other nonproprietary name	Chemical Name	Small Quantity (in gm.)	Commercial Quantity (in gm./kg.)
(1)	(2)	(3)	(4)	(5)	(6)
-- --	-- --	-- --	-- --	-- --	-- --
-- --	Diacetylmorphin				
250.	gm.	-- --	-- --	[other than diacetyl morphine (heroin), morphine and those listed here in	

250. gm. -- -- -- * ** 56 Heroin -- 93 -- -- Opium Derivatives -- -- Any mixture or preparation that of with or without a 239 natural material, of any of the above drugs. -- * 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. Note.

1. WP(CrI) 1552/2010 The small quantity and the commercial quantity given against the respective drugs listed above apply to isomers, within specific chemical designation, the esters, ethers and salts of these drugs, including salts of esters, Page 13 of 17 ethers and isomers; whenever existence of such substance is possible.

2. The quantities shown against the respective drugs listed above also apply to the preparations of the drug and the preparations of substances of note 1 above.

3. "Small quantity" and "Commercial Quantity" with respect to cultivation of opium poppy is not specified separately as the offence in this regard is covered under clause (c) of section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985. It would be pertinent to remember that another note [Note (4)] has been added by virtue of the impugned notification dated 18.11.2009, which we have already set out in paragraph 4 above.

9. We have to first of all examine whether the legislature had empowered the Central Government to bring out a notification of the kind which is impugned before us. As indicated by us earlier in this judgment, the law prior to the issuance of the notification dated 18.11.2009 had been settled by the Supreme Court by holding that when any narcotic drug or psychotropic substance is found mixed with one or more neutral substance, for the purpose of imposition of punishment, it is only the content of the narcotic drug or psychotropic substance which has to be taken into consideration. That position is sought to be altered by virtue of the impugned notification dated 18.11.2009 inasmuch as the entire mixture and not just the pure drug content has to be considered by virtue of the said notification. The question which arises is whether the Central Government had the power to

bring out such a notification. While the case of a mixture of two drugs and combination of more than one drug and psychotropic substance was specifically dealt with under Sl. No. 239 of the notification dated 19.10.2001, there was no provision for dealing with the situation where the mixture was of just one narcotic drug or psychotropic substance with neutral material. It is in the context of the notification dated 19.10.2001 prior to its amendment in 2009 that the decision in Ansar Ahmed and E. Micheal Raj (*supra*) had been rendered. Now a specific note (that is note

4) has been added by virtue of the notification dated 18.11.2009 so as to include the case of a narcotic drug or psychotropic substance mixed with a neutral material. The distinction between S.L. No. 239 and note 4 is that while S.L. No.239 required that the mixture was of one narcotic drug with another narcotic drug or psychotropic substance which may or may not also include neutral material, Note 4 widens the scope by introducing a mixture of one drug or psychotropic substance with a neutral substance. It is not at all necessary that the mixture must contain more than one drug or psychotropic substance along with neutral material for the said Note 4 to apply.

10. In order to understand as to whether the Central Government had the legislative mandate to do so, it would be necessary to examine as to what the exact limits of power of the Central Government were under section 2 (viiia) and 2 (xxiiia). Whether we consider 2 (viiia) which defines the commercial quantity or section 2 (xxiiia) which defines small quantity the language is virtually identical. The small quantity and the commercial quantity are in relation to narcotic drugs and psychotropic substances. The Central Government has been given the power to specify, by a notification in the official gazette, the quantity representing the small quantity or commercial quantity in relation to each narcotic drug and psychotropic substance. In the present case we are concerned with heroin and, therefore, we shall restrict our discussion to narcotic drugs. Narcotic drugs are defined in section 2 (xiv) to include all manufactured drugs. The latter expression has also been defined in section 2 (xi) to inter alia, mean opium derivative. And, opium derivative itself has been defined in section 2 (xvi) to, inter alia, mean diacetylmorphine and all preparations containing more than 0.2% of morphine or

containing any diacetylmorphine. In other words a preparation containing any diacetylmorphine would be regarded as an opium derivative.

11. The word preparation itself has been defined in section 2 (xx) to, inter alia, mean any solution or mixture, in whatever physical state containing one or more such narcotic drug or psychotropic substance. It is obvious that if there is only one narcotic drug and we are referring to a mixture, then the other material must be a neutral material. Therefore, the word preparation includes reference to a mixture of one narcotic drug with a neutral material. Once we understand this, it becomes clear that the Central Government has been given the power to specify the quantity of this preparation or mixture of a narcotic drug and a neutral substance. Once this is accepted then there is no escape from the conclusion that the Central Government had the power to specify the quantities shown in column 5 and 6 of the Table appended to the notification dated 19.10.2001 with reference to the entire mixture and not just its pure drug content. This is so because all preparations which contain diacetylmorphine would be opium derivatives which, in turn, would be manufactured drugs and that would lead us to the expression narcotic drugs. And, ultimately to the said expression as used in section 21 of the NDPS Act. We would tend to agree with the learned counsel for the respondent that the decision of the Supreme Court in the case of E. Micheal Raj (supra) was rendered at a point of time when this socalled loop-hole had not been plugged and therefore it is not as if we are taking a view contrary to the Supreme Court. The Central Government, at that point of time had catered to a situation which involved a mixture of one or more narcotic drugs and psychotropic substances with or without neutral material. It had not dealt with a situation which involved one narcotic drug or one psychotropic substance with some neutral material. Unless and until there was a specific provision for it, the courts could not supply the gap particularly because these were penal provisions. Now, that the gap has been filled by the amendment to the notification dated 19.10.2001 by introducing note 4 therein, the earlier decisions would really not be applicable. We make it clear that apart from the challenge to the notification as being ultra vires the provisions of the NDPS Act, there is no challenge whatsoever to the provisions of the NDPS Act.

12. In view of the foregoing discussion, we find that there is no merit in the writ petition. The same is dismissed. There shall be no orders as to costs. BADAR DURREZ AHMED, J VEENA BIRBAL, J NOVEMBER 0 , 2012 kb

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