

Ouseph @ Thankachan

v.

State of Kerala

(Supreme Court Of India)

HON'BLE MR. JUSTICE K.T. THOMAS HON'BLE MR. JUSTICE S.N.
PHUKAN

Crl.A. No. 1256 of 2001 & Special Leave to Appeal (Crl.) No. 1389 of 2001 |
06-12-2001

1. Leave granted

2. The appellant has been convicted by a Sessions Court for the offence under Section 22 of the Narcotics Drugs & Psychotropic Substances Act, 1985 (NDPS Act for short). He was sentenced to R.I. for 10 years and to pay a fine of Rs. 1 lakh (in default of payment of fine, he was directed to undergo simple imprisonment for a further period of two years).

3. He filed an appeal challenging the said order of conviction and sentence but the same was dismissed by the High Court of Kerala. He filed special leave petition through jail. We appointed Mr. Jayant Bhushan, Advocate, as amicus curiae to argue for him. We heard him and also the learned Counsel for the State of Kerala.

4. The case against the appellant is that he was found in possession of 110 ampules of Buprenorphine. (Its trade name is Tidigesic). It is too late in the day for reappreciating the evidence for ascertaining whether as a matter of fact the appellant was not in possession of the aforesaid article.

5. Though the investigating agency thought that the article recovered from the appellant was narcotic substance, it is in fact a psychotropic substance. This is clearly discernible from Item No.92 of Schedule 2 of the NDPS Act. If it is a psychotropic substance, possession of it would become an offence only if it was in contravention of the Rules prescribed. Under Rule 66 of the Narcotic Drugs

& Psychotropic Substances Rules, 1985 any person may possess a reasonable quantity of psychotropic substance “as may be necessary for their genuine scientific requirements or genuine medical requirements”. This is subject to the limitation contained in the proviso that he is in possession of the said substance for his personal medical use, the quantity thereof shall not exceed one hundred dosage units at a time.

6. Some arguments have been advanced before us to show that in the absence of any quantification of a dosage 110 ampules recovered from the appellant cannot be held to be in excess of the aforesaid limit indicated in Rule 66. We would have certainly considered the said arguments seriously if the appellant had thought it fit to adopt such a line of defence in the Trial Court or before the High Court. Unfortunately it has not been done.

7. In any case we are inclined to consider another argument advanced before us by the learned Counsel for the appellant based on Section 27 of the NDPS Act. It says that whoever, in contravention of any provision of this Act, possess any psychotropic substance, “which is proved to have been intended for his personal consumption and not for sale or distribution” shall be punishable for a term which may extend to 6 months or with fine or with both (unless the substance is not one falling under Clause (a) of Section 27).

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 word “small quantity” has been specified by the Central Government by Notification dated 23rd July, 1996. Learned Counsel for the State has brought to our notice that as per the said Notification the 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 ampule 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.

9. Then the next question is whether this substance was possessed by him for personal consumption. As the accused had adopted a defence of repudiating the

allegation against him, it may look that he cannot rely upon the alternative contention that it was possessed by him for personal consumption. It is too harsh to deny the accused/appellant a right to resort to the alternative contention. Merely because on legal advice, he has chosen one line of defence he cannot be precluded from reaching other defence available to him, particularly since the consequences visiting him are very serious. If the fact situation is sufficient for the Court to satisfy that the small quantity in his possession was for personal consumption, he should not be denied of the benefit of Section 27 of the NDPS Act.

10. In the aforesaid context we notice a significant factual aspect that along with the small quantity of psychotropic substance recovered, two syringes were also recovered from him by the police. That aspect reflects that he only wanted to use Buprenorphine (Tidigesic) for his personal consumption and not for trading purposes. The burden on the accused in this respect need not be discharged in the manner and prosecution is to prove the case beyond a reasonable doubt. It is enough that he satisfies the judicial mind by a preponderance of probability.

11. On account of the aforesaid fact situation, we are inclined to believe that the small quantity of Buprenorphine (Tidigesic) was in the possession of the appellant for his personal consumption and, therefore, the offence committed by him would fall under Section 27 of the NDPS Act.

12. We, therefore, alter the conviction of the appellant to Section 27 of the Act. We sentence him to the maximum provided under Section 27(b) of the NDPS Act, which is imprisonment for 6 months. He is already in jail for nearly 6 years by now. It is not necessary for us to say that he has been in jail far beyond the sentence imposed by us. We, therefore, direct the jail authorities to release him from jail forthwith unless required in any other case.

13. The appeal is disposed of in the abovesaid terms.