

SUPREME COURT OF INDIA

State of NCT of Delhi

Vs.

Ashif Khan @ Kalu

CrI.A.No. 428 of 2009

(Dr. Arijit Pasayat and Asok Kumar Ganguly JJ.)

03.03.2009

JUDGMENT

Dr.Arijit Pasayat, J.

1. Leave granted.

2. Challenge in this appeal is to the judgment of a learned Single Judge of the Delhi High Court dismissing the appeal filed by the State against the judgment of the trial Court whereby the respondent had been convicted under Section 21(a) and (b) of *Narcotic Drugs and Psychotropic Substances Act, 1985* (in short the 'NDPS Act'). The quantity of substance recovered from the accused was 310 gms. which was prima facie detected to be heroin. Two samples of five grams were taken and those were sent for Forensic Science Laboratory for testing. After testing the said samples the Laboratory gave a report on 5.2.2004. The report revealed that samples were found to contain 0.95 % diacetylmorphine. In view of the percentage contained the weight of heroin came to be 2.945 gms. of heroin. It was observed by the High Court that in a mixture of a narcotic drug or a psychotropic substance with one or more neutral substance the quantity of the neutral substance or substances is not to be taken while considering whether small quantity or a commercial quantity of the narcotic drug or psychotropic substance is recovered but only the actual contents by weight of the narcotic drug or psychotropic substance as the case may be relevant for determining whether it would constitute a small quantity or commercial quantity. The High Court therefore held that the quantity seized was a small quantity and, therefore, the conviction would be under Section 21(a). The appeal was accordingly dismissed by upholding the conclusions of the trial Court.

3. The order of the High Court is challenged in this appeal.

4. In *E. Micheal Raj v. Intelligence Officer, Narcotic Control Bureau*¹, it was held as follows: (1) The provisions of the NDPS Act were amended by the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001 (Act 9 of 2001) (w.e.f. 2.10.2001), which rationalized the punishment structure under the NDPS Act by providing graded sentences linked to the quantity of narcotic drugs or psychotropic substances carried. (2) Thus, by the amending Act,

the sentence structure changed drastically. "Small quantity" and "commercial quantity" were defined under Section 2(xxiii-a) and Section 2(vii-a) respectively. New section 21 also provides for proportionate sentence for possessing small, intermediate and commercial quantities of offending material. (3) As per Entry 56 of the Notification dated 19.10.2001 issued by the Central Government which deals with heroin, small quantity has been mentioned as 5 gm and commercial quantity has been mentioned as 250 gms. (4) So the basic question for decision is whether the contravention involved in this case is small, intermediate or commercial quantity under Section 21 of the NDPS Act, and whether the total weight of the substance is relevant or percentage of heroin content translated into weight is relevant for ascertaining the quantity recovered from the accused.

5. It was held that the percentage of heroin content translated into weight is relevant. Reference was made to an earlier judgment and observed in para 16 as follows:

"16. In *Ouseph v. State of Kerala*², this Court in para 8 has held as under: (SCC p.447)

"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 sample 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.

" From the aforesaid decision, we find that the Court has taken the quantity of the narcotic drug or psychotropic substance found in the mixture, relevant for the purpose of imposition of punishment."

6. In view of what has been stated in the said case the appeal deserves to be dismissed which we direct.

¹(2008 (5) SCC 161)

²(2004 (4) SCC 446)