A AMAR SINGH RAMJIBHAI BAROT

v.

STATE OF GUJARAT

SEPTEMBER 19, 2005

B [H.K. SEMA AND B.N. SRIKRISHNA, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985:

Section 29—Criminal conspiracy—Abetment of—Contraband substances
C *recovered from accused persons—They were found together but individually carried the substances recovered—High Court concluded that there was criminal conspiracy between them—Correctness of—Held: There was no evidence to suggest that there was any such abetment and/or criminal conspiracy—Hence, it was not possible for the High Court to take the view*
D *that Section 29 was attracted.*

Sections 21, 2(xi) and (xvi)(e)—Applicability of—Contraband substance recovered from accused was "opium derivative" which was a "manufactured drug" under S. 2(xi)—Held: Such an offence fell within S. 21 for illicit possession of "manufactured drug".

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Section 21(c)—Applicability of—920 gms. of "opium derivative" recovered from accused—Whether such a quantity was "small quantity" or "commercial quantity"—Held: In respect of "opium derivatives" the Central Govt. Notification specified 5 gms. as "small quantity" and 250 gms. as "commercial quantity"—Hence, the offence fell under S. 21(c) and not under
F *S. 21(a) or (b)—Notification S.O. 1055 (E) dt. 19.10.2001.*

Evidence Act, 1872:

Section 45—Expert opinion—Forensic Science Laboratory (FSL) opined that the contraband substances recovered from accused was "opium"—Binding
G *nature of—Held: when no acceptable evidence that the substance found was coagulated juice of opium poppy—Opinion of FSL not binding on the Court.*

Words & Phrases:

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"Manufactured drug"—Meaning of—In the context of S. 2(xi)(a) of the Narcotic Drugs and Psychotropic Substances Act, 1985. A

The appellant and the deceased-accused were found to be in possession of contraband substances weighing 920 gms. and 4.250 gms. respectively. Two sets of samples were drawn from the substances recovered and were forwarded to Forensic Science Laboratory (FSL) B which opined that the substances were "opium" as described in the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS).

The trial Court held that both the accused persons were guilty of individually and jointly possessing 920 gms. of opium and 4.250 gms. of C opium and convicted them under Sections 17 and 18 of the NDPS Act. However, the High Court held that the appellant was liable to be convicted under Section 21(c) read with Section 29 of the NDPS Act for individually being in possession of 920 gms. and for being jointly, in conspiracy with the deceased-accused, in possession of 4.250 gms. of opium. Hence the appeal. D

Dismissing the appeal, the Court

HELD: 1. There was no warrant for the conclusion of the High Court that there was a criminal conspiracy between the appellant and the deceased-accused. There is no evidence to suggest that there was any such E abetment and/or criminal conspiracy within the meaning of Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS). The appellant and the deceased-accused were found together, but individually carrying the recovered substances. Hence, it was not possible for the High Court to take the view that Section 29 was attracted. [277-G-H] F

2. There does not appear to be any acceptable evidence that the black substance found with the appellant was "coagulated juice of the opium poppy" and any mixture, with or without any neutral material, of the coagulated juice of the opium poppy". The Forensic Science Laboratory (FSL) has given its opinion that it is 'opium as described in the NDPS Act'. G That is not binding on the court. [279-C-D]

3.1. The evidence does not indicate that the substance recovered from the appellant would fall within the meaning of sub-clauses (a), (b), (c) or (d) of Section 2(xvi). The residuary clause (e) would take into its sweep all preparations containing more than 0.2 per cent of morphine. The FSL H

A report proves that the substance recovered from the appellant had 2.8 per cent anhydride morphine. Consequently, it would amount to "opium derivative" within the meaning of Section 2(xvi)(e). [279-D-E-F]

3.2. All "opium derivatives" fall within the expression "manufactured drug" as defined in Section 2(xi) of the NDPS Act. Thus, the conclusion is B that what was recovered from the appellant was "manufactured drug" within the meaning of Section 2(xi) of the NDPS Act. The material on record, therefore, indicates that the offence proved against the appellant fell clearly within Section 21 of the NDPS Act for illicit possession of "manufactured drug". [279-G-H]

C

4.1. The appellant's contention that even if the appellant was guilty of an offence under Section 21 of the NDPS Act, the punishment could only fall within Section 21(a) as the "manufactured drug" involved was of "small quantity" is untenable. The Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001 (Act 9 of 2001) introduced the concept D of "small quantity" and "commercial quantity" for the purpose of imposing punishment. The punishment thereunder is graded according to whether the contravention involved "small quantity", "commercial quantity" or a quantity in between the two. By reason of Section 41(1) of the Amending Act of 2001, the amended provisions apply to pending cases. E Simultaneously, with the Act of 2001 coming into force, by a notification S.O. 1055 (E) dated 19.10.2001, the Central Government specified what would amount to "small quantity" and "commercial quantity" respectively, of different substances. [280-A-D]

4.2. In respect of opium derivatives (at Sr. no. 93) in the said F notification 5 gms. is specified as "small quantity" and 250 gms. as "commercial quantity". The High Court was, therefore, right in finding that the appellant was guilty of unlawful possession of "commercial quantity" of a manufactured drug. Consequently, his case would be covered by clause (c) and not clause (a) or (b) of Section 21 of the NDPS G Act. [280-D-E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1218 of 2005.

From the Judgment and Order dated 29.4.2004 of the Gujarat High H Court in Crl.A. No. 431 of 2002.

Sushil Kumar Jain, Ms. Pratibha Jain, Ram Niwas and Sarad Singhania for the Appellant. A

Mrs. Hemantika Wahi and V. Madhukar for the Respondent.

The Judgment of the Court was delivered by

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SRIKRISHNA, J. Leave granted.

This appeal by a special leave petition under Article 136 impugns the judgment of the Division Bench of the High Court of Gujarat upholding the conviction of the appellant under the provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the NDPS Act"). C

H.K. Chauhan, Police Inspector, C.I.D., Crimes, Narcotics Cell, Ahmedabad received information that on 29.9.1999 a person named Amarsingh and another named Danabhai, having particular physical descriptions, were likely to come from village Dhima to Deesa town through Tharad Cross Roads carrying opium. Chauhan made the necessary entry in the register and gathered a posse of police officers with necessary equipment for interception of the possible carriers of drugs. The raiding party arrived near Tharad Cross Roads, parked their vehicle near Gokul Hotel and maintained a watch. After some time, a jeep coming from village Dhima was sighted. The jeep halted near Tharad Cross Roads. Two persons alighted from the said jeep and were found to have the physical descriptions matching those given by the informant. While the two persons were going towards Gokul Hotel, they were intercepte by the Police. On interrogation, their names were disclosed as (i) Amarsingh Ramji Barot (the appellant), and (ii) Danabhai Virabhai Rabari, the other accused who died during the pendency of his appeal before the High Court. The Police Officer-Incharge of the raiding party, Police Inspector Chauhan, gave an offer to the appellant and deceased Danabhai of being searched in the presence of a Gazetted Officer or a Magistrate. This offer was declined, upon which they were searched. The appellant was found to be carrying a plastic bag. When the plastic bag was opened, it contained a black coloured liquid substance. The black coloured liquid substance was *prima facie* found to have the smell of opium. The Police Officer weighed the said substance recovered from the appellant and the weight was found to be 920 grams. 4.250 kgs. of a grey coloured substance, suspected to be a drug, was recovered from deceased Danabhai. Out of the 920 grams opium recovered from the appellant, two samples of 10 grams each were drawn, placed in plastic jars, D E F G H

A wrapped with paper bearing signatures of panch witnesses and sealed. Similar samples were drawn from the substance recovered from deceased Danabhai. The samples were forwarded to the Forensic Science Laboratory (FSL). The FSL opined that the substance which had been sent as sample A/1, (recovered from the present appellant) was opium as described in the NDPS Act containing 2.8% anhydride morphine, and also pieces of poppy flowers (posedoda). The B sample recovered from deceased Danabhai was found to be 'opium' as described in NDPS Act having 1.2% anhydride morphine, also containing pieces of poppy flower (posedoda).

The appellant and deceased Danabhai Virabhai Rabari were charged C with offences punishable under Sections 15, 17 and 18 read with section 29 of the NDPS Act and put up for trial. The trial court held that the prosecution had proved that both the accused were guilty of individually and jointly possessing 920 grams of opium and 4.250 kgs. of opium without any pass or permit and, were, therefore, liable to be convicted for offences punishable under Sections 17 and 18 read with Section 29 of the NDPS Act. Each of the D accused, i.e. the appellant and the deceased Danabhai, was awarded with punishment of 5 years rigorous imprisonment together with a fine of Rs. 35000 with a default sentence. With regard to jointly possessing 4.250 kgs. opium without any pass or permit, both the accused i.e. the appellant and Danabhai Virabhai Rabari were awarded with punishment of rigorous E imprisonment for 10 years with a fine of Rs. 1,00,000 each, together with a default sentence. Both the punishments were directed to run concurrently.

The appellant and the said Danabhai Virabhai Rabari filed separate appeals challenging their convictions. CRA No. 431/02 was filed by Amarsingh Ramjibhai Barot, and CRA No. 553/02 by Danabhai Virabhai Rabari. During F the pendency of his appeal, Danabhai Virabhai Rabari expired on 22.3.2004, therefore, his appeal CRA No. 553/02 was disposed of as having abated by an order made on 28.4.2004.

A number of contentions were urged in the High Court by the appellant in support of his appeal. It was contended that the conviction was liable to G be set aside as there was non-compliance with the provisions of section 42(2), 50, 52 and 57 of the NDPS Act. There is no substance in this contention. The High Court, however, was of the view that the conviction of the appellant under section 17 and 18 read with section 29 of the NDPC Act was not correct. On the other hand, the High Court came to the conclusion that the H appellant was liable to be convicted under Section 21(c) and also under

Section 21(c) read with Section 29 of the Act, for individually being in possession of 920 grams and for being jointly, in conspiracy with the deceased, in possession of 4.250 kgs. of the prohibited substance recovered. In the view of the High Court, the total amount of prohibited substance recovered (personally from the appellant and also from the joint possession of the two accused) being more than "commercial quantity" as defined under the applicable notification, the appellant was liable to be visited with the minimum punishment of 10 years rigorous imprisonment plus fine of Rs. 1 lakh. The High Court was also of the view that, even if the quantity of 920 grams recovered from the appellant alone were to be considered, it would warrant conviction under Section 21(c) and the minimum sentence of 10 years rigorous imprisonment plus fine of Rs. 1 lakh. Being aggrieved thereby, the appellant is before this Court.

The learned counsel appearing for the appellant urged only one contention in support of the present appeal. He contended that the High Court fell into an error in taking the total quantity of the offending substances recovered form the two accused jointly and holding that the said quantity was more than the commercial quantity, warranting punishment under Section 21(c) of the NDPS Act. He contended that as far as the appellant is concerned, the High Court erred by assuming that there was criminal conspiracy within the meaning of Section 29 of the NDPS Act, and erroneously proceeded under the said section. The High Court fell into a further error of assuming that because Section 29 was applicable, the total quantity of opium recovered was 920 grams plus 4.250 kgs. The counsel urged that because of this error the High Court took the wrong view that the total recovered opium was of "commercial quantity" and, therefore, attracted Section 21(c) of the NDPS Act.

Although, at first blush, the argument of the learned counsel appeared attractive, on careful appreciation of the facts on record we are satisfied that the High Court judgment is fully justified and needs to be upheld. It is true that the High Court proceeded on the footing that there was a criminal conspiracy between the appellant and the deceased, Danabhai Virabhai Rabari. In our view, however, there was no warrant for this conclusion at all as there is no evidence to suggest that there was any such abetment and/or criminal conspiracy within the meaning of Section 29 of the NDPS Act. The appellant and Danabhai Virabhai Rabari were found together, but individually carrying the recovered substances. Hence, it was not possible for the High Court to take the view that Section 29 was attracted.

A The High Court was justified in its conclusion that the appellant could not have been punished under Sections 17 and 18 of the NDPS Act.

The High Court has not merely rested its conclusion on Section 29 and the fact of adding together the recoveries made from the appellant and the other accused, deceased Danabhai Virabhai Rabari, for the purposes of arriving B at a quantity of recovery of opium more than the 'commercial quantity'. The High Court has carefully analysed the facts before it and arrived at the right conclusions as we shall see presently.

The appellant was found in possession of 920 grams of black liquid which *prima facie* smelt of opium. The FSL report indicates that the substance C recovered from the appellant was 'opium as described in the NDPS Act' containing 2.8% anhydride morphine, apart from pieces of poppy (posedoda) flower found in the sample.

Sections 17, 18 and 21 of the NDPS Act are intended to operate in D different circumstances. Section 17 prescribes the punishment *inter alia* for possession of ''prepared opium'', Section 18 prescribes the punishment *inter alia* for possession of ''opium'' and Section 21 deals with the punishment *inter alia* for possession of ''manufactured drugs''. Each one of these terms has been defined in the NDPS Act. ''Opium'' is defined in Section 2(xv) as:

E ''(xv) ''opium'' means -

(a) the coagulated juice of the opium poppy; and

(b) any mixture, with or without any neutral material, of the coagulated juice of the opium poppy,

F but does not include any preparation containing not more than 0.2 per cent of morphine''

The term ''opium derivative'' is defined in Section 2(xvi) as follows:

''(xvi) ''opium derivative'' means -

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(a) medicinal opium, that is, opium which has undergone the processes necessary to adapt 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 from or granulated or otherwise or mixed with neutral materials;

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(b) prepared opium, that is, any product of opium 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 dia-morphine or heroin and its salts; and

(e) all preparations containing more than 0.2 per cent, of morphine or containing any diacetylmorphine''

There does not appear to be any acceptable evidence that the black substance found with the appellant was ''coagulated juice of the opium poppy'' and ''any mixture, with or without any neutral material, of the coagulated juice of the opium poppy''. The FSL has given its opinion that it is 'opium as described in the NDPS Act'. That is not binding on the court.

The evidence also does not indicate that the substance recovered form the appellant would fall within the meaning of sub-clauses (a), (b), (c) or (d) of Section 2(xvi). The residuary clause (e) would take into its sweep all preparations containing more than 0.2 per cent of morphine. The FSL report proves that the substance recovered from the appellant had 2.8 per cent anhydride morphine. Consequently, it would amount to ''opium derivative'' within the meaning of Section 2(xvi)(e). Clause (a) of Section 2(xi) defines the expression ''manufactured drug'' as:

''(xi) ''manufactured drug'' means -

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

(b) ...''

All ''opium derivatives'' fall within the expression ''manufactured drug'' as defined in Section 2(xi) of the NDPS Act. Thus, we arrive at the conclusion that what was recovered from the appellant was ''manufactured drug'' within the meaning of Section 2(xi) of the NDPS Act. The material on record, therefore, indicates that the offence proved against the appellant fell clearly within Section 21 of the NDPS Act for illicit possession of ''manufactured drug''.

A The learned counsel for the appellant raised a further contention that even if the appellant is guilty of an offence under Section 21 of the NDPS Act, the punishment could only fall within clause (a) of Section 21 as the "manufactured drug" involved was of "small quantity". In our view, this contention is untenable. The Amending Act of 2001' introduced the concept of "small quantity" and "commercial quantity" for the purpose of imposing B punishment. The punishment thereunder is graded according to whether the contravention involved "small quantity", "commercial quantity" or a quantity in between the two. By reason of Section 41(1) of the Amending Act of 2001, the amended provisions apply to pending cases. Simultaneously, with the Act of 2001 coming into force, by a notification S.O. 1055 (E) dated C 19.10.2001 issued in exercise of the powers conferred by clauses (viia) and (xxiiia) of Section 2 of the NDPS Act, the Central Government specified what would amount to "small quantity" and "commercial quantity" respectively, of different substances.

In respect of opium derivatives (at sr. no. 93) in the said notification, D 5 grams is specified as "small quantity" and 250 grams as "commercial quantity". The High Court was, therefore, right in finding that the appellant was guilty of unlawful possession of "commercial quantity" of a manufactured drug. Consequently, his case would be covered by clause (c) and not clause (a) or (b) of Section 21 of the NDPS Act.

E The impugned judgment of the High Court upholding the imposition of minimum punishment prescribed under Section 21(c) of 10 years rigorous imprisonment together with a fine of Rs. 1 lakh is unexceptionable. We find no substance in the appeal, which is liable to be dismissed.

F In the premises, the appeal is hereby dismissed.

V.S.S. Appeal dismissed.

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1. The Narcotic Drugs and Psychotropic Substances (Amendment) Act. 2001 (Act 9 of 2001).