

HARJIT SINGH
v.
STATE OF PUNJAB
(Criminal Appeal No. 816 of 2011)

MARCH 30, 2011

[P. SATHASIVAM AND DR. B.S. CHAUHAN, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985 – ss. 2, 8 and 18 – Distinction between Opium and Morphine – Recovery of contraband – Conviction of accused-appellant – Whether when the entire substance recovered is opium and not any kind of mixture, the question of determining the quantity or percentage of morphine in the substance is relevant – Held: Morphine is one of the derivatives of the Opium – The requirement under the law is first to identify and classify the recovered substance and then to find out under what entry it is required to be dealt with – If it is Opium as defined in clause (a) of s.2(xv) then the percentage of Morphine contents would be totally irrelevant – It is only if the offending substance is found in the form of a mixture as specified in clause (b) of s.2(xv), that the quantity of morphine contents becomes relevant – The instant case did not relate to a mixture of narcotic drugs or psychotropic substances with one or more substances – The material so recovered from the appellant was opium in terms of s.2(xv) – In such a fact-situation, determination of the contents of morphine in the opium became totally irrelevant for the purpose of deciding whether the substance would be a small or commercial quantity – The entire substance had to be considered to be opium as the material recovered was not a mixture – Percentage of morphine was not a decisive factor for determination of quantum of punishment, as opium is to be dealt with under a distinct and separate entry from that of morphine.

A On 4-7-2003, a police party on patrol duty, being suspicious of the appellant, apprehended him. The appellant was carrying a plastic bag which was found to contain opium. He was convicted by the trial Court under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) and sentenced to undergo RI for 10 years. The High Court affirmed the judgment passed by the trial court.

C In the instant appeal, the appellant contended that as the opium recovered from him weighing 7.10 kgs. contained 0.8% morphine, i.e. 56.96 gms., the morphine content was below the commercial quantity, though more than the minimum quantity prescribed under the Notification issued in this respect, and thus the maximum sentence of 10 years as awarded by the court was unwarranted.

E Per contra, the State Government submitted that as the entire substance recovered from the appellant was opium and not any kind of mixture, the question of determining the quantity or percentage of morphine in the substance could not arise.

Dismissing the appeal, the Court

F HELD:1. Notification dated 18.11.2009 (as issued under the provisions of Section 2 of the Narcotic Drugs and Psychotropic Substances Act, 1985) has replaced the part of the Notification dated 19.10.2001. It is evident that under the aforesaid Notification, the whole quantity of material recovered in the form of mixture is to be considered for the purpose of imposition of punishment. However, this amendment, in fact, provides for a procedure which may enhance the sentence. It is a settled legal proposition that a penal provision providing for enhancing the sentence does not operate

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retrospectively. Its' application would be violative of restrictions imposed by Article 20 of the Constitution of India. The said Notification dated 18.11.2009 cannot be applied retrospectively and therefore, has no application so far as the instant case is concerned. [Para 13] [700-C-H]

2. 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. 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. An analysis, however, 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). [Paras 14,15] [701-A-D]

Baidyanath Mishra & Anr. v. State of Orissa 1968 (34) CLT 1 (SC); State of Andhra Pradesh v. Madiga Boosenna & Ors. AIR 1967 SC 1550 = 1967 SCR 871 – relied on.

3. Chemical analysis of the contraband material is essential to prove a case against the accused under the NDPS Act. The NDPS Act defines 'opium' under Section 2(xv) as under: 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, but does not include any preparation containing not more

A than 0.2 per cent of morphine. Coagulated means
 solidified, clotted, curdled – something which has
 commenced in curdled/solid form. In case the offending
 material falls in clause (a) then the proviso to Section 2(xv)
 would not apply. The proviso would apply only in case
 B the contraband recovered is in the form of a mixture
 which falls in clause (b) thereof. [Paras 16 to 18] [701-E-
 H; 702-A-B]

4. In the instant case, the material recovered from the
 appellant was opium. It was of a commercial quantity and
 C 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
 D 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
 E 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. Thus, as the case falls
 F 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
 G required. Entry No.92 is exclusively applicable for
 ascertaining whether the quantity of opium falls within the
 category of small quantity or commercial quantity. [Para
 21] [702-E-H; 703-A-B]

H *E. Micheal Raj v. Intelligence Officer, Narcotic Control*

Bureau (2008) 5 SCC 161: 2008 (4) SCR 644 and Amarsingh Ramjibhai Barot v. State of Gujarat (2005) 7 SCC 550: 2005 (3) Suppl. SCR 272 – distinguished. A

5. The Notification applicable herein specifies small and commercial quantities of various narcotic drugs and psychotropic substances for each contraband material. Entry 56 deals with Heroin, Entry 77 deals with Morphine, Entry 92 deals with Opium, Entry 93 deals with Opium Derivatives and so on and so forth. Therefore, the Notification also makes a distinction not only between Opium and Morphine but also between Opium and Opium Derivatives. Undoubtedly, Morphine is one of the derivatives of the Opium. Thus, the requirement under the law is first to identify and classify the recovered substance and then to find out under what entry it is required to be dealt with. If it is Opium as defined in clause (a) of Section 2(xv) then the percentage of Morphine contents would be totally irrelevant. It is only if the offending substance is found in the form of a mixture as specified in clause (b) of Section 2(xv) of NDPS Act, that the quantity of morphine contents become relevant. [Para 24] [703-F-H; 704-A-B] B C D E

6. The instant case does not relate to a mixture of narcotic drugs or psychotropic substances with one or more substances. The material so recovered from the appellant is opium in terms of Section 2(xv) of the NDPS Act. In such a fact-situation, determination of the contents of morphine in the opium becomes totally irrelevant for the purpose of deciding whether the substance would be a small or commercial quantity. The entire substance has to be considered to be opium as the material recovered was not a mixture and the case falls squarely under Entry 92. Undoubtedly, the FSL Report provided for potency of the opium giving particulars of morphine contents. It goes without saying that opium would contain some morphine F G H

A which should be not less than the prescribed quantity, however, the percentage of morphine is not a decisive factor for determination of quantum of punishment, as the opium is to be dealt with under a distinct and separate entry from that of morphine. [Para 25] [703-C-F]

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Case Law Reference:

2008 (4) SCR 644	distinguished	Paras 9, 10, 22, 25
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1968 (34) CLT 1 (SC)	relied on	Para 15
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1967 SCR 871	relied on	Para 15
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2005 (3) Suppl. SCR 272	distinguished	Para 23
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CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 816 of 2011.

From the Judgment & Order dated 19.5.2010 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 1711-SB of 2005.

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R.S. Suri, V. Mukherjee, Suruchi Suri, Chanchal Kumar Ganguli for the Appellant.

Jayant K. Sud, AAG, Aman Raj G., Kuldip for the Respondent.

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The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. Leave granted.

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2. This criminal appeal has been preferred against the judgment and order dated 19.5.2010 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 1711-SB/2005, by which the High Court has affirmed the judgment and order dated 2.9.2005 passed by learned Special Judge, Fatehgarh Sahib, in Sessions Case No. 72T/5.9.03/

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7.10.04, by which the appellant stood convicted for the offence

punishable under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called as NDPS Act) and was sentenced to undergo RI for 10 years and to pay a fine of Rs.1,00,000/- in default whereof, to undergo further RI for 6 months. A

3. Facts and circumstances giving rise to this appeal are that on 4.7.2003, a police party was proceeding from Focal Point, Mandi Gobindgarh to G.T. Road on patrol duty in a government vehicle. When the police party reached near the culvert of minor in the area of village Ambe Majra, the police party spotted the appellant who was coming on foot, from the side of Ambe Majra carrying a plastic bag in his right hand. On seeing the police, the appellant turned to the left side of the road. The police party apprehended the appellant, being suspicious of him. In the meantime, Ashok Kumar, an independent witness also came to the spot and joined the police party. The appellant was apprised of his right of being searched in the presence of a Gazetted Officer and in that respect his statement was recorded. Shri Dinesh Partap Singh, Assistant Superintendent of Police, was summoned to the spot by the Investigating Officer and in his presence, Amarjit Singh, Inspector (P.W.3) searched the plastic bag of the appellant and the substance contained therein was found to be opium. Two samples of 10 gms. each of the opium were taken. The remaining opium was found to be 7.10 Kgs. The samples and the remaining opium were sealed and taken into possession by the police party. B
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4. A formal FIR was registered against the appellant; on personal search, an amount of Rs. 510/- was found with the appellant; the arrest memo of the accused was prepared and he was formally arrested. After completion of investigation and on receipt of the report from the Forensic Science Laboratory, confirming the contents of the sample to be of opium, a charge-sheet was filed against him for the offence punishable under Section 18 of the NDPS Act. He did not plead guilty to the G
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A charges and claimed trial.

B 5. The prosecution examined Manjinder Singh, Constable (P.W.1), Jagdish Singh, Head Constable (P.W.2), Amarjit Singh, Inspector (P.W.3), Dinesh Partap Singh, Assistant Superintendent of Police (P.W.4) and Dalip Singh, Sub Inspector (P.W.5). Ashok Kumar, an independent witness was not examined by the prosecution, as he had been won over by the appellant.

C 6. In his statement under Section 313 of the Code of Criminal Procedure, 1973, the appellant stated that the prosecution case was false; he had been taken by the police from his house and Rs.6,000/- had been snatched from him; he was not physically fit even to walk as he had met with an accident in 1999. The appellant also examined 6 witnesses in
D his defence.

E 7. The Trial Court after scrutinising the evidence held that the appellant was guilty of the offences charged with and was awarded the sentences as mentioned hereinabove. Being aggrieved, he preferred an appeal before the High Court which has been dismissed by the impugned judgment and order dated 19.5.2010. Hence, this appeal.

F 8. Shri R.S. Suri, learned senior counsel appearing for the appellant at an initial stage raised a large number of factual and legal issues. However, ultimately considering that there had been concurrent findings of fact against the appellant by the two courts, he primarily submitted that as the opium recovered from the appellant weighing 7.10 kgs. contained 0.8% morphine, i.e. 56.96 gms., the quantity was below the commercial quantity,
G however, more than the minimum quantity prescribed under the Notification issued in this respect, the maximum sentence awarded by the court was unwarranted.

H 9. Shri Suri has placed reliance upon the judgment of this Court in *E. Micheal Raj v. Intelligence Officer, Narcotic Control*

Bureau, (2008) 5 SCC 161, wherein the Court dealt with the case of recovery of heroin from a carrier, and held that when any narcotic drug or psychotropic substance is found mixed with one or more neutral substance (s), for the purpose of imposition of punishment it is the content of the narcotic drug or psychotropic substance which shall be taken into consideration. Therefore, it will depend upon the morphine content and if this is less than the commercial quantity of morphine, the maximum sentence can not be awarded.

10. On the contrary, Shri Jayant K. Sud, learned Addl. Advocate General, appearing for the State of Haryana has submitted that as the entire substance recovered from the appellant was opium and not any kind of mixture, the question of determining the quantity or percentage of morphine in the substance could not arise. The opium itself is an offending material under the NDPS Act. Therefore, the court has to proceed in view of Entry No.92 in the Notification in this regard which deals with opium and any preparation containing opium and specifies that a small quantity is only 25 gms., whilst a commercial quantity is 2.5 kgs. In the instant case as it was 7.10 kgs, i.e. the appellant was carrying about three times the minimum amount required for a commercial quantity. The judgment of this Court in *E. Micheal Raj* (supra) has no application in this case as that was a case of heroin and not of opium. More so, the accused was merely a carrier and not a dealer.

11. It is further contended by Shri Sud that the Notification applicable in this case provides separate Entry No. 77 for morphine, wherein the minimum quantity is 0.5 gms. and commercial quantity is 250 gms. Entry No. 92 separately deals with opium. Entry No. 93 for opium derivatives provides that a minimum quantity is 5 gms. and a commercial quantity is 250 gms. The present case is to be dealt with under Entry No.92 and not Entry No.77 or any other Entry. More so, in view of the Notification dated 18.11.2009 under the provisions of Section

A 2 of NDPS Act, no consideration is required in respect of the material recovered from the appellant. Thus, the question of interference with the impugned judgment and order does not arise. The appeal is liable to be dismissed.

B 12. We have considered the rival submissions made by learned counsel for the parties and perused the record.

13. Notification dated 18.11.2009 has replaced the part of the Notification dated 19.10.2001 and reads as under:-

C "In the Table at the end after Note 3, the following Note shall be inserted, namely:-

D (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."

E Thus, it is evident that under the aforesaid Notification, the whole quantity of material recovered in the form of mixture is to be considered for the purpose of imposition of punishment.

F However, the submission is not acceptable as it is a settled legal proposition that a penal provision providing for enhancing the sentence does not operate retrospectively. This amendment, in fact, provides for a procedure which may enhance the sentence. Thus, its application would be violative of restrictions imposed by Article 20 of the Constitution of India. We are of the view that the said Notification dated 18.11.2009 cannot be applied retrospectively and therefore, has no application so far as the instant case is concerned.

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14. 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.

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15. 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 & Anr. v. State of Orissa*, 1968 (34) CLT 1 (SC); and *State of Andhra Pradesh v. Madiga Boosenna & Ors.*, AIR 1967 SC 1550).

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16. 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.

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17. The NDPS Act defines 'opium' under Section 2(xv) as under:

- (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,

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

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A 18. Coagulated means solidified, clotted, curdled – something which has commenced in curdled/solid form.

B In case the offending material falls in clause (a) then the proviso to Section 2(xv) would not apply. The proviso would apply only in case the contraband recovered is in the form of a mixture which falls in clause (b) thereof.

C 19. Relevant part of the chemical analysis made by the Forensic Science Laboratory, Punjab, Chandigarh in the instant case, reads as under:

“xx xx xx xx

D On analysis of the substance kept in the bundle under reference, it is established that the substance is opium and percentage of morphine is 0.8%.” (Emphasis added)

E 20. The amendment in 2001 was made in order to rationalise the sentence structure so as to ensure that while drug traffickers who traffic in huge quantities of drugs are punished with deterrent sentences; on the other hand, the addicts and those who commit less serious offences are sentenced to lesser punishment.

F 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

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factor, Entry No.92 becomes totally redundant. 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.

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22. 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.

23. 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.

24. The Notification applicable herein specifies small and commercial quantities of various narcotic drugs and psychotropic substances for each contraband material. Entry 56 deals with Heroin, Entry 77 deals with Morphine, Entry 92 deals with Opium, Entry 93 deals with Opium Derivatives and so on and so forth. Therefore, the Notification also makes a distinction not only between Opium and Morphine but also between Opium and Opium Derivatives. Undoubtedly, Morphine is one of the derivatives of the Opium. Thus, the requirement under the law is first to identify and classify the recovered

- A substance and then to find out under what entry it is required to be dealt with. If it is Opium as defined in clause (a) of Section 2(xv) then the percentage of Morphine contents would be totally irrelevant. It is only if the offending substance is found in the form of a mixture as specified in clause (b) of Section 2(xv) of NDPS Act, that the quantify of morphine contents become relevant.

25. Thus, the aforesaid judgment in *E. Micheal Raj (Supra)* has no application in the instant case as it does not relate to a mixture of narcotic drugs or psychotropic substances with one or more substances. The material so recovered from the appellatant is opium in terms of Section 2(xv) of the NDPS Act. In such a fact-situation, determination of the contents of morphine in the opium becomes totally irrelevant for the purpose of deciding whether the substance would be a small or commercial quantity. The entire substance has to be considered to be opium as the material recovered was not a mixture and the case falls squarely under Entry 92. Undoubtedly, the FSL Report provided for potency of the opium giving particulars of morphine contents. It goes without saying that opium would contain some morphine which should be not less than the prescribed quantity, however, the percentage of morphine is not a decisive factor for determination of quantum of punishment, as the opium is to be dealt with under a distinct and separate entry from that of morphine.

26. In view of the above, we do not find any substance in the appeal. It is devoid of any merit and, accordingly, dismissed.

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Appeal dismissed.