

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 02.07.2010

+ **CRL.A. 64/2008**

RAVINDER KUMAR Appellant

versus

NCT OF DELHI (STATE) Respondent

Advocates who appeared in this case:

For the Appellant : Mr Abhishek Singh with Mr Amit Nehra
For the Respondent : Ms Mukta Gupta with Mr Amit Sharma

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE AJIT BHARIHOKE

1. Whether Reporters of local papers may be allowed to see the judgment ? Yes
2. To be referred to the Reporter or not ? Yes
3. Whether the judgment should be reported in Digest ? Yes

BADAR DURREZ AHMED, J

1. A learned single Judge of this court by an order dated 28.05.2009, referred the following question for a decision by the Division Bench:-

“Whether the percentage of morphine in a sample of opium can by itself be determinative of the purity of the sample and whether such test is relevant or necessary for the purpose of considering the grant of bail or of awarding of sentence in terms of Section 18 read with Section 37 of the NDPS?”

2. The appellant was convicted for the offence punishable under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as ‘NDPS Act’) for possession of 5 kgs of opium and

was sentenced to undergo imprisonment for 10 years. In appeal, the appellant raised a plea before the learned single Judge that as the morphine content of the contraband said to have been recovered from the appellant was only 0.24%, which translated to 12 gms, the sentence awarded to him was, therefore, not in consonance with the provisions of the said Act. The plea of the appellant was that if the weight of opium is to be determined on the basis of the morphine content of 0.24%, the same would amount to only 12 gms which would be a small quantity for which, the maximum sentence was only six months imprisonment. It was contended on behalf of the appellant that the extent of opium allegedly recovered from the possession of the appellant ought to have been taken as 12 gms and not the entire 5 kgs and consequently, he should have been treated as having been in possession of a small quantity and not a commercial quantity of opium.

3. The learned single Judge, who passed the reference order on 28.05.2009, noted in the said order itself that there was divergence of the opinion between two single bench decisions of this court with regard to the relevance of percentage of morphine in recoveries of opium. On the one hand, a learned single Judge of this court in *Mohd Irfan v. State* [Crl. A.460/2005] had taken the view that the definition of opium in Section 2(xv) of the NDPS Act left no manner of doubt that morphine is always present in opium and so long as the recovered sample contains more than 0.2% morphine, the entire sample would be regarded as opium. A different view had been taken by another learned single Judge of this court in *Rajender Kumar v. State* [Crl. A.436/2007] by holding that the percentage

of morphine contained in opium had relevance in considering the question as to whether the recovered substance fell within the category of small quantity or commercial quantity.

4. In the said order, a reference was also made to a decision of a single Judge of this court in the case of **Ansar Ahmed v. State: 2005 (123) DLT 563** as also to the decision of the Supreme Court in **E. Micheal Raj v. NCB: 2008 (5) SCC 161**. In those decisions, the percentage of diacetylmorphine present in the sample was considered to be determinative of the actual content of heroin for the purposes of classifying the recovered substance to be a small, intermediate, or commercial quantity. However, as rightly pointed out by the learned single Judge making the reference order dated 28.05.2009, those were decisions in the context of heroin, which, unlike opium, was a manufactured drug. The case of heroin, we may say at the outset, is entirely different from the case of opium and, therefore, the decisions in *Ansar Ahmed (supra)* and *E. Micheal Raj (supra)* inapplicable to the opium.

5. In the order of reference dated 28.05.2009, a mention was also made of another case titled **Dilip v. State** being Bail Appn. No.2330/2008, in which a similar question arose with regard to the percentage content of tetrahydrocannabinol (THC) in *charas*. In that case, another learned single Judge of this court, had made a reference to the Division Bench in terms similar to the reference made in this case. In fact, both the references, the present one and *Dilip v. State* were heard at the same time. The reference in

Dilip v. State has been decided by us today itself, wherein we have held that the percentage of THC in a sample of *charas* cannot by itself be determinative of the purity of the same. We have also held that the percentage of THC in *charas* is not at all relevant for the purposes of considering the grant of bail or of awarding a sentence in terms of Section 20 read with Section 37 of the NDPS Act. We have to consider almost similar concepts in the present case which relates to the issue of percentage content of morphine in a sample of opium.

6. The learned counsel for the appellant contended that in the present case, the alleged recovery of 5 kgs of opium ought to be taken as only a recovery of 12 gms of opium on account of the fact that the morphine content is only 0.24%. Therefore, the recovery ought to be considered as a small quantity inasmuch as any quantity less than 25 gms is regarded as a small quantity in terms of the notification issued under Section 2(viia) and Section 2(xxiiiia) of the NDPS Act. The learned counsel for the appellant also contended that as per the report of the Forensic Science Laboratory, Rohini, Delhi, the sample of the recovered substance was described as “dark brown coloured sticky solid substance stated to be opium”. The result of the examination conducted by the said Forensic Science Laboratory was as under:-

“RESULTS OF EXAMINATION

- (i) In chemical examination exhibit ‘A’ gave positive tests for the presence of meconic acid, morphine, thebaine, codeine, narcotine and papavarine which are main constituents of Opium.
- (ii) In HPTLC examination Exhibit ‘A’ was also found to contain morphine 0.24 percent.”

On the strength of the above FSL report, the learned counsel for the appellant contended that the morphine content was only 0.24% and, therefore, the weight of opium would have to be taken as 12 gms and not 5 kgs.

7. On the other hand, the learned counsel for the State submitted that as long as the recovered substance was identified as opium within the meaning of Section 2(xv) of the NDPS Act and it was found to contain more than 0.2% morphine, the entire weight would have to be regarded for the purposes of classifying the recovery as being of a small quantity or a commercial quantity. The percentage of morphine contained in such cases would not at all be determinative of the weight of opium. Once the substance has been identified as opium, the entire weight of 5 kgs would have to be regarded for the purposes of determining as to whether the recovery was of a small quantity or of a commercial quantity. Consequently, she submitted that the entire recovery of 5 kgs has correctly been taken as the amount of opium recovered from the possession of the appellant and that he has been rightly charged and convicted for possession of a commercial quantity.

8. The learned counsel for the State also submitted that the Narcotic Drugs and Psychotropic Substances Rules, 1985 (hereinafter referred to as 'the NDPS Rules') make provision, under Chapter III, for opium poppy cultivation and production of opium and poppy straw. The said Chapter III

comprises of rules 5 to 30. Several of the rules provide for weighing of the opium. She also referred to Form 1 (under Rule 7 of the NDPS Rules) in which several columns require the weight of the opium to be given in kgs. There is no mention of the percentage content of morphine in any of the rules contained in the said Chapter III of the NDPS Rules concerning the manner or procedure of weighing opium. She contended that the legislative intent is clear that the weight of the entire substance regarded as opium has to be taken to be the weight of the opium and that the percentage content of morphine would never be determinative of the weight of opium.

9. The learned counsel for the State also submitted that both opium and morphine have been separately mentioned in the notification specifying small and commercial quantities. Morphine has been mentioned at S.No.77 and opium has been mentioned at No.92. She submitted that the present case was one of possession of opium and not one of possession of morphine. Therefore, according to her, the percentage content of morphine in the recovery of opium was not a relevant circumstance either for the grant of bail or for the purposes of conviction and sentence under the NDPS Act.

10. The NDPS Act defines “opium” “opium derivative”, “opium poppy” and “preparation” as under:-

“2. Definitions. – In this Act, unless the context otherwise requires, –

XXXX XXXX XXXX XXXX

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

XXXX XXXX XXXX XXXX

“(xvi) opium derivative” means –

- (a) the medicinal opium, that is, opium which has undergone the process 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 form or granulated or otherwise or mixed with neutral materials;
- (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.”

XXXX XXXX XXXX XXXX

(xvii) “opium poppy” means –

- (a) the plant of the species *Papaver somniferum* L. ; and
- (b) the plant of any other species of *Papaver* from which opium or any phenanthrene alkaloid can be extracted and which the Central Government may, by notification in the Official Gazette, declare to be opium poppy for the purposes of this Act.”

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.”

11. The definition of ‘narcotic drug’ as given in Section 2(xiv), *inter alia*, includes opium and poppy straw. The said definition of narcotic drug is as under:-

“2. **Definitions.** – In this Act, unless the context otherwise requires,–

xxxx xxxx xxxx xxxx;
(xiv) "narcotic drug" means coca leaf, cannabis (hemp), opium, poppy straw and includes all manufactured goods.”

Sections 2 (viia) and 2(xxiii) define the expressions “commercial quantity” and “small quantity” in the following terms:

“2. **Definitions.** – In this Act, unless the context otherwise requires, –

xxxx xxxx xxxx xxxx;
(viia) "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.”

xxxx xxxx xxxx xxxx;

(xxiii) "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.”

12. Section 15 provides for the punishment for contravention in relation to poppy straw. Sections 17 and 18 prescribe the punishment for contravention in relation to “prepared opium”, “opium poppy” and “opium” respectively. Section 19 gives the punishment for embezzlement of opium

by a cultivator. We have already pointed out that Chapter III of the NDPS Rules provides for poppy cultivation and production of opium and poppy straw. The rules falling under that chapter provide for grant of licence for cultivation of opium poppy, the form of the licences, the procedure with regard to primary weighing, delivery of opium, the procedure for weighing opium, examining and classifying it etc. It is true that, as submitted by the learned counsel for the State, none of these provisions has any reference to the content of morphine as having any significance insofar as the weight of opium is concerned.

13. In terms of the notification specifying small and commercial quantities of various narcotic drugs and psychotropic substances, the small quantity of opium is specified as less than 25 gms and the commercial quantity is specified to be 2.5 kgs. and above. This finds mention at S.No.92 of the table contained in the said notification specifying small quantities and commercial quantities. The table, insofar as is relevant for our purposes, is given below:-

SI No.	Name of Narcotic Drug and Psychotropic Substance (International non-proprietary name (INN))	Other non-proprietary name	Chemical Name	Small Quantity (in gm.)	Commercial Quantity (in gm./kg.)
	xxxxx	xxxxx	xxxxx	xxxxx	xxxxx
28.	Codeine		3-0-methylmorphine	10	1kg.
56.	Heroin		Diacetylmorphine	5	250 gm.
77.	Morphine		Morphine	5	250 gm.
92.	Opium		And any preparation containing opium	25	2.5 kg.
93.	Opium Derivatives		[other than diacetyl morphine (hereoin), morphine and those listed herein.]	5	250 gm.
120.	Thebaine		3,6-Dimethoxy-4, 5-epoxy-9a-methyl morphine-6, 8-diene	2	100 gm.

From a survey of the above provisions, it is clear that opium could either mean (a) the coagulated juice of the opium poppy; or (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 than 0.2% of morphine. Thus, opium is of two kinds. The first being the coagulated juice of “opium poppy”. The second being any mixture, with or without any neutral material, of the coagulated juice of the opium poppy. The expression “but does not include any preparation containing not more than 0.2% of morphine”, actually governs the second kind of opium and not the first. We say this on the strength of the decision of the Supreme Court in the case of **Baidyanath Mishra and Another v. The State of Orissa: 1968 (XXXIV) Cuttack Law Times 1.** In that case, the Supreme Court examined the definition of opium contained in Section 3 of the Opium Act, 1878. The definition was as under:-

“3. Interpretation-clause.

In this Act, unless there be something repugnant in the subject or context, –

“opium” means –

- (i) the capsules of the poppy (*papaver somniferum L.*), whether in their original form or cut, crushed or powdered, and whether or not juice has been extracted therefrom;
- (ii) the spontaneously coagulated juice of such capsules which has not been submitted to any manipulations other than those necessary for packing and transport; and
- (iii) any mixture, with or without neutral material, of any of the above forms of opium,

but does not include any preparation containing not more than 0.2 per cent. of morphine, or a manufactured drug as defined in section 2 of the Dangerous Drugs Act, 1930.”

14. It will be immediately noticed that the expression “but does not include any preparation containing not more than 0.2% of morphine” appears in Section 2(xv) of the NDPS Act as also in Section 3 of the Opium Act, 1878. In *Baidyanath Mishra (supra)*, a contention was raised in the facts of that case that the substance seized was not opium as defined in the Opium Act, 1878. The contention was that since opium was of three kinds as referred to in the definition under section 3 of the Opium Act, 1878. It was necessary for someone to have come forward to depose as to which category the seized opium actually belonged and further whether it was opium at all according to the said definition. It had also been contended that it was necessary to subject the seized material to a chemical analysis to find out whether it contained more than 0.2% morphine as stated in the latter part of the definition. The Supreme Court repelled the latter contention in the following words:

“3. ... In our opinion this contention cannot be allowed to prevail. To begin with, the question of 0.2 per cent of morphine does not arise in connection with the 2nd clause of the definition to which this opium obviously belonged. It refers to a preparation which means a mixture with or without neutral materials containing any other two forms of opium. Since evidence shows that this was opium and not a mixture there was no need for analysis. ...”

15. The Supreme Court held that the exclusion provided in the expression “but does not include any preparation containing not more than 0.2% of morphine” had reference only to the third clause of the definition of opium as contained in the Opium Act, 1878. Meaning thereby that it had a reference only to any mixture, with or without neutral materials, of any of

the forms of opium specified in clauses (i) and (ii) of the said definition. By analogy, we can also conclude that the expression “but does not include any preparation containing not more than 0.2% of morphine”, has reference only to the second kind of opium referred to in Section 2(xv)(b) of the NDPS Act and has no relevance insofar as the first kind of opium is concerned, i.e., the coagulated juice of the opium poppy [Section 2(xv)(a)]. We are of the view that once there is a determination and there is evidence that the substance in question is the coagulated juice of opium poppy, there is no necessity of carrying out any further chemical examination to determine its chemical composition. Of course, the chemical examination would support the evidence that the recovered substance is opium or not. In *Baidyanath Mishra (supra)*, the Supreme Court also made the following interesting observations with regard to opium:-

“4. It is true that 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. It is possible for people to identify opium without having to subject the product to a 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. Of course, an analysis will always be necessary if there is a mixture and the quantity of morphine contained in the mixture has to be established for the purpose of definition. ...”

16. As mentioned above, opium means the coagulated juice of opium poppy by itself or as a part of any mixture. Opium poppy has also been defined in Section 2(xvii) to mean the plant of the species *papaver somniferum* L. or a plant of any other species of *Papaver* from which opium

or any phenanthrene alkaloid can be extracted and which the Central Government may, by notification in the Official Gazette, declare to be opium poppy for the purposes of the NDPS Act. The said plant (*Papaver somniferum* L.) is a medicinal herb and it contains many alkaloids, such as morphine, codeine, thebaine, etc. Morphine is the most important alkaloid. Opium is derived from the opium poppy through lancing and collection of latex from the incised capsule of the opium poppy. The said capsule provides raw opium which is in the form of a milky exudate. The capsule contains about 70% of the total morphine synthesised by the plant. The lancing operation is performed by skilled workers in the afternoon, so that a crust is formed on the surface of freshly exudated latex, due to the hot sun. Starting from the top, the workers move backwards to the base, in order to escape contact with the exuding latex and to keep the incision facing the sun. While lancing the appropriate stage is identified by touch, a skill acquired by years of experience; the depth of incision is also an accomplished, precise art. By next early morning, the latex semi-solidifies, and is collected by scraping with a trowel.

17. In the present case, we are concerned with the identification of the contraband as opium and not as morphine. As we have seen, morphine is the major alkaloid present in opium. S.No.92 of the table in the Notification with regard to small /commercial quantities, refers to “opium” and “any preparation containing opium”. The small quantity has been specified as 25 gms and the commercial quantity as 2.5 kg. Thus, for determining whether the opium recovered is of a small quantity or a

commercial quantity, there is no need to examine the percentage content of morphine. It is without doubt that all opium would contain some morphine. The percentage content of morphine does not determine the weight of opium which is distinct and separate from that of morphine.

18. While opium comprises of alkaloids, including morphine, morphine by itself does not constitute opium. It is for this reason that morphine has been separately listed in the said notification at S.No.77 and the small quantity for morphine has been specified to be less than 5 gms, whereas the commercial quantity has been fixed at 250 gms and above. While going about the determination of the quantity of the seized substance, the first thing that has to be done is to determine the nature of that substance. In the context of the opium and morphine, it must first be determined as to whether the substance is opium as defined in Section 2(xv) or it is morphine which is nothing but an opium derivative defined in Section 2(xvi)(c) of the NDPS Act. It would also be relevant to note that opium derivatives have also been separately listed in the said table at S.No.93. However, the opium derivatives mentioned at S.No.93 are those excluding diacetylmorphine (heroin), morphine and other opium derivatives separately listed in the said table. The small quantity and commercial quantity for opium derivatives under S.No.93 has been given as 5 gms and 250 gms respectively. Diacetylmorphine (heroin) has also been specified at S.No.56 and 5 gms and 250 gms have been specified as the small quantity and commercial quantity. Codeine and thebaine, which are also specified opium derivatives, have been shown at S.Nos. 28 and 120 of the table.

19. Thus, the first thing that requires to be done is to identify and classify the substance as opium or opium derivative. If it is opium, as defined in Section 2(xv), then the percentage content of morphine other than for the purposes of any mixture as specified in Section 2(xv)(b) of the NDPS Act, would be irrelevant. In any event, once the seized substance has been identified as opium, the percentage content of morphine has no further relevance in determining the quantify of opium for the purposes of classifying the same as a small quantity or a commercial quantity. On the other hand, if the seized substance is determined to be morphine, then it is S.No.77 which would apply for ascertaining whether it falls in the category of small quantity or commercial quantity.

20. We would also like to refer to a decision of the Supreme Court in the case of *Amarsingh Ramjibhai Barot v. State of Gujarat*: 2005 (7) SCC 550, which was relied upon by the learned counsel for the State. From that decision, it is apparent that unless and until there is acceptable evidence that the seized substance falls within one of the two kinds of opium mentioned in Section 2(xv), the mere fact that morphine, in excess of 0.2%, is detected in the sample, would not lead to the conclusion that the substance is opium. The Supreme Court, referring to the definition of opium in Section 2(xv) of the NDPS Act, held:-

“14. 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.”

21. From the above extract, it is also clear that the courts are not bound by the opinion given by the forensic science laboratories and ultimately it is for the court to determine if the substance falls within the definition of opium as described in the NDPS Act. In *Amarsingh Ramjibhai Barot (supra)*, the Supreme Court did not accept the FSL view that the substance was opium, as noted above, but went on to hold that the substance found was an opium derivative.

22. The learned counsel for the State had also referred to a decision of a learned single Judge of this court in the case of *Satish Kumar v. State: 1989 Drugs Cases 122 = ILR 1989 Delhi 413*. She referred to the said decision with a view to persuade us to accept the view taken by the learned single Judge that once the forensic science laboratory certifies the presence of morphine to be of more than 0.2%, the contents of the sample would have to be treated as opium. She submitted that in the present case, the morphine content was 0.24% and, therefore, what was recovered from the appellant was nothing but 5 kgs of opium. We are unable to agree with the view taken by the learned single Judge in *Satish Kumar (supra)*. Such a view is clearly contrary to the view taken by the Supreme Court in *Baidyanath Mishra (supra)* and *Amarsingh Ramjibhai Barot (supra)*. While it is true that opium would contain morphine, it does not necessarily follow that any substance which contains more than 0.2% would be opium. For example, morphine by itself, unless mixed with any other substance, is 100% morphine and if one were to go by the logic employed in *Satish Kumar*

(*supra*), then morphine would be regarded as opium, because it contains more than 0.2% morphine. This is, of course, an extreme example, but it illustrates the fallacy in the reasoning adopted in *Satish Kumar (supra)*.

23. Summarising the discussion above, we hold that:-

- 1) For a substance to be regarded as opium, it must fall under either of the two categories mentioned in Section 2(xv) of the NDPS Act;
- 2) In case the substance in question falls under the first category mentioned in Section 2(xv), that is, it is the coagulated juice of opium poppy, then it would not be necessary to examine as to whether it contains more than 0.2% of morphine or not. That test is only in relation to the second category of opium, when it is in the form of a mixture, with or without any neutral material comprising of the coagulated juice of opium poppy;
- 3) Once it is determined that the seized substance is opium, then the weight of the entire substance would have to be considered for the purposes of determining whether it is a small quantity or a commercial quantity. The percentage content of morphine would have no role to play in such a determination;
- 4) Merely because a substance contains more than 0.2% morphine, does not mean that the substance is opium. It would be opium only if it falls within the definition of opium as given in Section 2(xv) of the NDPS Act.

24. In view of the foregoing discussion, we answer the question referred to us by holding that the percentage of morphine in a sample of opium, by itself, is not determinative of the purity of opium and that, in any event, the test for determining the percentage content of morphine in opium is not relevant for the purposes of considering the question of whether the seized opium is of a small quantity or of a commercial quantity and consequently, for the purposes of considering the grant of bail or for

awarding the sentence in terms of Section 18 read with Section 37 of the NDPS Act.

25. Having answered the question which was referred to us, the matter should now be placed before the appropriate Bench for further consideration.

BADAR DURREZ AHMED, J

AJIT BHARIHOKE, J

JULY 02, 2010

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