HUSSAIN A

v.

STATE OF KERALA

OCTOBER 27, 1999

[K.T. THOMAS AND D.P. MOHAPATRA, JJ.] B

Narcotic Drugs and Psychotropic Substances Act, 1985:

Sections 2(xi), 8,9, 20(b)(i), 21 and 27—Appellant found in possession of 6 ampoules of "Buprenorphine tidigesic"a psychotropic substance—Trial court convicted him for an offence under Section 20(b)(i) of the Act— However, the proviso to sub-rule (2) of Rule 66 falling under Chapter VII of the Rules framed under Section 9, a person was permitted to keep in his possession for his personal medical use the psychotropic substance upto one hundred dosage at a time—This point was not put forward before the trial court—Held, conviction and sentence imposed on appellant were without the sanction of law—Appellant was unlawfully deprived of his personal liberty for a long period of 5 years on account of over looking the facts and legal position—Liberty granted to the appellant to seek appropriate remedy for compensation—Constitution of India Articles 21 and 22. C D

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Appellant was found in possession of 6 ampoules of "Buprenorphine tidigesic", a psychotropic substance, each containing 2.1-ml. The appellant during the trial did not dispute that he did possess this drug but took the view that he had been using the drug under medical advice. Appellant examined DW 1, his doctor, to say that he advised him to take the aforesaid substance as a medical formulation. Trial court after completing prosecution and defence evidence had proceeded to examine the District Medical Officer as Court Witness No. 1 in order to ascertain whether the quantity of substance recovered from the appellant would fall within the limit of "small quantity" envisaged in Section 27 of the Narcotic Drugs and Psychotropic Substances Act, 1985. Having found that the quantity exceeded the limit of "small quantity", convicted the appellant under Section 20(b)(i) read with Section 8 of the Act and sentenced him to undergo rigorous imprisonment for 10 years and a fine of Rs. 1,00,000. However, trial court did not notice proviso to sub-rule (2) of Rule 66 falling under Chapter VII of the Rules framed under Section 9 of the Act wherein it was evident that a person was permitted to F G H

A keep in his possession for his personal medical use the psychotropic substance upto one hundred dosage at a time, wherein he was found to possess only 6 ampoules, which was much less than what was authorised under the Act. Hence this appeal.

Allowing the appeal, the Court

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HELD: 1. If "Buprenorphine tidigesic" was 'psychotropic substance' possession of the same would amount to an offence only if it was in contravention of Section 8 of the Narcotic Drugs and Psychotropic Substances Act, 1985. That Section shows that no person shall possess any Psychotropic C substance except for medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder. [192-H; 193-B]

2.1. Section 9 of the Act empowers the Central Government to permit, control and regulate the cultivation, production, possession etc., of psycho- D tropic substances. Rules have been formulated by the Central Government under that power. The proviso to sub-rule (2) of Rule 66 falling under Chapter VII of the Rules is very evident that a person is permitted to keep in his possession for his personal medical use the psychotropic substance upto one hundred dosage at a time. It is not disposed to think that 6 ampoules would cross the above limit and there is no attempt made either through DW-1 E (Doctor) or through Court Witness No.1 (District Medical Officer) that 100 dosage would be below the 6 ampoules recovered from him.

[193-C; 194-A, B]

2.2. It is unfortunate that the aforesaid points have not been put forward F before the trial court or the High Court. Thus the conviction and sentence imposed on the appellant were without the sanction of law. Appellant is unlawfully deprived of his personal liberty for such a long period of 5 years on account of overlooking the aforesaid facts and the legal position. The appellant is acquitted. As regards compensation the appellant is free to resort to his remedies under law. [194-C, D]

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CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 780 of 1998.

From the Judgment and Order dated 25.9.97 of the Kerala High Court H in Crl. A.No. 137 of 1995.

Bimal Roy Jad, (A.C.) for the Appellant. A

Altaf Ahmad, Additional Solicitor General, K.M.K. Nair and Vipin Nair for the Respondent.

The Judgment of the Court was delivered by

THOMAS, J. This seems to be a very unfortunate case in which the B appellant by his fatality had languished in jail already for a long period of 5 years, when as a matter of law he should have been moving about as a free citizen. Appellant in this case was charged by the Sessions Court with an offence under Section 20(b)(i) read with Section 8 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the Act'). He was sentenced C to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 1,00,000. He filed an appeal before the High Court and a learned single Judge who heard the appeal confirmed the conviction and sentence and dismissed his appeal. He filed this appeal by special leave from jail.

The misfortune hovering around him continued to persist as the counsel D appointed as amicus curiae to argue for him did not turn up and we had to remove him as A.C. We appointed another counsel (Mr. Bimal Roy Jad) as amicus curiae. On 11.8.1999 we heard him and the learned counsel for the State in detail and reserved the Judgment. Thereafter we felt that the appeal should be re-heard as certain new features have emerged while contemplating the factual position in this case. We, therefore, re-posted the matter. Today E we are assisted by Shri Altaf Ahmad, learned Additional Solicitor General who argued for the State of Kerala, though Mr. Bimal Roy Jad has not turned up to argue for the appellant, nor did he made any representation.

The factual matrix as revealed in the judgment of the trial court and the High Court is this: On 25.6.1994 appellant was found in possession of F 6 ampoules of "Buprenorphine tidigesic" each containing 2 m.l. He was also found in possession of 2 syringes each of 5 m.l. capacity. It is pertinent to point out that appellant, unusually, did not dispute that the aforesaid substance had been recovered from him. On the contrary he said that he was regularly using it under medical advice. He examined a Doctor as D.W.1 to say that G a prescription was administered by him to the appellant for using the aforesaid substance as a medical formulation. The trial court after completing prosecution evidence and the defence evidence has proceeded to examine the District Medical Officer as Court Witness No. 1 in order to ascertain whether the quantity of substance recovered from the appellant would fall within the limit of 'small quantity' envisaged in Section 27 of the Act. Having found that the H

A quantity recovered from the appellant has exceeded the limit of 'small quantity' the trial court proceeded to consider whether the offence charged against him was made out.

Section 20 deals with contravention in relation to cannabis plant and cannabis. As the article recovered from the appellant cannot fall within the B ambit of either cannabis plant or cannabis the court had slipped down to Section 21 which relates to contravention of the law in respect of "manufactured drugs and preparations". As the District Medical Officer opined that "Buprenorphine tidigesic" is a manufactured drug the trial court proceeded on that premise and found him guilty under Section 21 of the Act and C convicted him and sentenced him as aforesaid.

"Manufactured drug" is defined in Section 2 (xi) of the Act, which reads thus:

2.(xi) "manufactured drug" means:

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

(b) any other narcotic substance or preparation which the Central Government may, having regard to available information as to its nature or to a decision, if any, under any International E Convention, by notification in the Official Gazette, declare to be a manufactured drug, but does not include any narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare not to be a manufacturing drug.

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No attempt has been made to show that "Buprenorphine tidigesic" would fall within the 1st limb of the definition: As no notification published by the Central Government in the Official Gazette has been brought to the notice of the Court there is no question of considering whether said article would fall within the 2nd limb of the definition. So, the prosecution has totally G failed to prove that the substance was a manufactured drug falling within the aforesaid definition.

It is unnecessary for us to consider whether the said substance is a narcotic drug as defined in the Act, for, it is easily discernible from Item No. H 92 of the Schedule to the Act (which is a list of psychotropic substances)

that "Buprenorphine" is a psychotropic substance. We may point out that the aforesaid Item No. 92 had been added to the list of psychotropic substances by the Notification dated 26.10.1992. The offence in this case is alleged to have been committed on 25.6.1994. We have therefore, no doubt that the substance recovered from the appellant is a psychotropic substance.

If it was 'psychotropic substance' possession of the same would amount to an offence only if it was in contravention of Section 8 of the Act. That Section shows that no person shall possess any psychotropic substance except for medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder.

Section 9 of the Act empowers the Central Government to permit, control and regulate the cultivation, production, possession etc. of psychotropic substances. Rules have been formulated by the Central Government under that power. Rule 66 falling under Chapter VII of the Rules is important and hence the same is extracted below:

> "66. Possession, etc., of psychotropic substances:-
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> (1) No person shall possess any psychotropic substance for any of the purpose covered by the 1945 Rules, unless he is lawfully authorised to possess such substance for any of the said purposes under these Rules.
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> (2) Notwithstanding anything contained in sub-rule (1), any research institution, or a hospital or dispensary maintained or supported by Government or local body or by charity or voluntary subscription, which is not authorised to possess any psychotropic substance under the 1945 Rules, or any person who is not so authorised under the 1945 Rules, may possess a reasonable quantity of such substance as may be necessary for their genuine scientific requirements or genuine medical requirements, or both for such period as is deemed necessary by the said research institution or, as the case may be, the said hospital or dispensary or person;
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> Provided that where such psychotropic substance is in possession of any individual for his personal medical use the quantity thereof shall not exceed one hundred dosage units at a time.
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> (3). The research institution, hospital and dispensary referred to in sub-rule (2) shall maintain proper accounts and records in relation to

A the purchase and consumption of the psychotropic substance in their possession."

The proviso to sub-rule (2) is very evident that a person is permitted to keep in his possession for his personal medical use the psychotropic substance upto one hundred dosage at a time.

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We are not disposed to think that 6 ampoules would cross the above limit and there is no attempt made either through DW-1 (Doctor) or through Court Witness No. 1 (D.M.O.) that 100 dosage would be below the 6 ampoules recovered from him.

C It is unfortunate that the aforesaid points have not been putforward before the trial court or the High Court. We feel that the conviction and sentence imposed on this appellant were without the sanction of law. Appellant is unlawfully deprived of his personal liberty for such a long period of 5 years on account of over looking the aforesaid facts and the legal position.

D We, therefore, allow this appeal and quash the judgment of the High Court as well as the Sessions Court. We acquit the appellant and direct him to be set at liberty forthwith. In this case, we are not considering the question of awarding compensation to the appellant but he is free to resort to his remedies under law for that purpose.

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R.K.S. Appeal allowed.