A STATE THROUGH INTELLIGENCE OFFICER NARCOTICS CONTROL BUREAU

v.

MUSHTAQ AHMAD ETC.

B (Criminal Appeal Nos. 1294-1295 of 2015)

OCTOBER 06, 2015

[DIPAK MISRA AND PRAFULLA C. PANT, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985 C *– s.20(b)(ii)(C) and s.2 (viia) – Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001 (Act No. 9 of 2001) – s.41(1) – Seized contraband article within definition of commercial quantity – Trial Court taking note of the fact that the first respondent and the second respondent* D *were in possession of 6 kg. 200 gms and 4 kgs. of charas respectively and the prosecution had been able to establish the same, treated the contraband article as commercial quantity and accordingly convicted them u/s.20(b)(ii)(C) of the NDPS Act and sentenced each of them to RI for 12 years* E *– High Court, however, held that the narcotic drug proved to have been recovered from the possession of the accused persons was of "intermediate quantity" in terms of s.2(viia) of the NDPS Act read with S.O. 1055(E) dated 19.1.2001 and the addition of "Note 3" after "Note 4 did not change the* F *complexion of the matter for the reason that the alleged recovery had been made way back on 5.4.2004 – Accordingly, the High Court altered the conviction of accused-respondents to one u/s.8 r/w s.20(b)(ii)(B) of the NDPS Act and restricted the period of custody to the period* G *already undergone – On appeal, held: s.41(1) of the Amending Act 9 of 2001 determined the application or exclusion of the amending provisions – In the case at hand, the occurrence too place in 2004 and, therefore, the Amending Act of 2001 was applicable – s.2 (viia) of the NDPS*

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Act defines commercial quantity – Trial Court took note of the fact that the notification issued on 19.10.2001 clearly shows that more than one kilogram is commercial quantity – The High Court reversed the finding pertaining to commercial quantity being guided by presence of "Tetra-hydrocannabinol" (THC) content – It found that the seized article contained more than 50 gms. Tetra hydrocannabinol in respect of both the accused persons – In the present case, the contraband article that has been seized is "charas" – The chemical name for charas and hashish is "extracts and tinctures of cannabis" – It finds mention at Entry No.23 of the Notification – Serial No. 150 of the Notification deals with "tetrahydrocannababinol" having a long list – The commercial quantity for the contraband article, namely, Tetra hydrocannabinol (THC) as stated in Entry no. 150 is 50 gms – Even assuming the said percentage is found in the seized item then also the contraband article would go beyond the "intermediate" quantity and fall under the "commercial" quantity – Judged from any score, the view expressed by the High Court is not correct – Therefore, the seized item fell under the commercial quantity and hence the conviction recorded by the trial court u/s.20 (b) (ii) (C) is absolutely impeccable – s.20(b)(ii)(C) stipulates that the minimum sentence will be ten years which may extend to twenty years – On facts, accused-respondents found guilty of offence punishable u/s.20(b)(ii)(C) of the NDPS Act and each of them sentenced to undergo RI for ten years and to pay a fine of Rs. 1 lakh.

Sentence / Sentencing – Minimum mandatory sentence – Effect – Held: When a minimum punishment is prescribed, no court can impose lesser punishment.

Narendra Champaklal Trivedi v. State of Gujarat **(2012) 7 SCC 80 : 2012 (6) SCR 165**; and *State of Madhya Pradesh v. Ayub Khan* **(2012) 8 SCC 676 : 2012 (7) SCR 427 – relied on.**

A *Amar Singh Ramaji Bhai Barot v. State of Gujarat* **(2005) 7 SCC 55**; *Samiullah v. Superintendent Narcotic Control Bureau* **AIR 2009 SC 1357 : 2008 (15) SCR 626**; *E. Micheal Raj v. Intelligence Officer Narcotic Control Bureau* **(2008) 5 SCC**
B **161 : 2008 (4) SCR 644**; *Ouseph @ Thankachan v. State of Kerala* **(2004) 4 SCC 446**; *Basheer v. State of Kerala* **(2004) 3 SCC 609 : 2004 (2) SCR 224**; *Harjit Singh v. State of Punjab* **(2011) 4 SCC 441 : 2011 (5) SCR 691 – referred to.**

C

Case Law Reference

(2005) 7 SCC 55	**referred to**	**Para 3**
2008 (15) SCR 626	**referred to**	**Para 3**
D **2008 (4) SCR 644**	**referred to**	**Para 3**
(2004) 4 SCC 446	**referred to**	**Para 4**
2004 (2) SCR 224	**referred to**	**Para 11**
E **2011 (5) SCR 691**	**referred to**	**Para 24**
2012 (6) SCR 165	**relied on**	**Para 27**
F **2012 (7) SCR 427**	**relied on**	**Para 28**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 1294-1295 of 2015.

From the Judgment and Order dated 03.06.2011 of the
G High Court of Jammu and Kashmir at Jammu in Crl. Appeals Nos. 35 and 36 of 2009.

Ms. Sushma Manchanda, M. Khairati, B. Krishna Prasad, Yoshak Adhyaru, Advs. for the Appellant.

Ms. Nidhi, Adv. for the Respondents.

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The Judgment of the Court was delivered by A

DIPAK MISRA, J. 1. In this appeal, by special leave, the State of Jammu and Kashmir has called in question the legal propriety of the judgment and order passed in Criminal Appeal Nos. 35 and 36 of 2009 whereby the High Court has converted B the conviction recorded by the learned trial Judge holding the accused respondents guilty of the offence punishable under Section 20 (b) (ii) (C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for brevity, "the NDPS Act") and sentencing each of them to suffer rigorous imprisonment for a C period of 12 years and further to pay a fine of Rs.2 lakhs each and in case of default of payment of fine to undergo rigorous imprisonment for period of one year to one under Section 8 read with Section 20 (b) (ii) (B) of the NDPS Act and restricted the period of custody to the period already undergone, that is, D slightly more than seven years and to pay a fine of Rs.25,000/- each with a modified default clause.

2. The facts which are necessary to be stated are that the accused-respondents were chargesheeted under Section 8 read with Section 20 of the NDPS Act and accordingly, they E were sent up for trial. Accused persons denied the accusations and claimed trial. The prosecution to substantiate its stand examined number of witnesses and brought in series of documents in evidence. The learned trial Judge taking note of the fact that Mushtaq Ahmad, the first respondent and Gulzar F Ahmad, the second respondent were in possession of 6 kg. 200 gms and 4 kgs. of charas respectively and the prosecution had been able to establish the same, treated the contraband article as commercial quantity and accordingly found them guilty for the offence punishable under Section 20(b) (ii) (C) of G the NDPS Act and eventually considering the gravity of the offence and the proliferating and devastating menace the drugs have been able to create in the society and keeping in view

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A the need for eradication, sentenced each of them as has been mentioned hereinabove.

3. The aforesaid judgment of conviction and order of sentence constrained the respondents-accused to prefer Criminal Appeal Nos. 35 and 36 of 2009 and the Division
B Bench of the High Court of Jammu and Kashmir at Jammu heard both the appeals together. The Division Bench addressed to various aspects and taking into consideration the law laid down in ***Amar Singh Ramaji Bhai Barot v. State of Gujarat***[1] and ***Samiullah v. Superintendent Narcotic***
C ***Control Bureau***[2], and ***E. Micheal Raj v. Intelligence Officer Narcotic Control Bureau***[3] came to hold that the narcotic drug proved to have been recovered from the possession of the accused persons was of "intermediate quantity" in terms of Section 2(viia) of the NDPS Act read with S.O. 1055(E) dated
D 19.1.2001 and the addition of "Note 3" after "Note 4 did not change the complexion of the matter for the reason that the alleged recovery had been made way back on 5.4.2004, that is, more than five years prior to the amendment had come in force and further there was no allegation that there were more
E than one narcotic drugs or isomers, esters, ethers and salts of the narcotic drug detected in the recovered substance. Being of this view, the High Court opined that the accused could only be convicted for the offence punishable under Section 8 read with Section 20(b) (ii) (B) of the NDPS Act. The High Court,
F accordingly, held thus:-

> "38. The appellants against the above backdrop were to be convicted of offence punishable under section 8 read with section 20 (b) (ii) (B) of the Act
G and sentenced to the punishment prescribed under section 20 (b) (ii) (B) of the Act and not to the punishment prescribed for the offence involving

[1] (2005) 7 SCC 55
[2] AIR 2009 SC 1357
H [3] (2008) 5 SCC 161

possession of "commercial quantity" of narcotic drug under section 20 (b) (ii) (c) of the Act. However, the appellants arrested on 5.4.2004 and are in custody for last more than seven years.

39. We therefore, alter the conviction of the appellants to section 20 (b) (ii) (B) of the NDPS Act and sentence the appellants to the imprisonment already undergone and a fine of Rs.25000/- each. In default of payment of fine the appellants shall suffer rigorous imprisonment for a further period of six months. The Criminal Appeal No. 35/2009 titled Mushtaq Ahmad v/s State and Cr. Appeal No. 36/2009 titled Gulzar Ahmad v/s State are disposed of accordingly."

4. It is submitted by Ms. Sushma Manchanda, learned counsel appearing for the State that the High Court has fallen into error by converting the conviction from Section 20(b)(ii) (C) to Section 20(b)(ii) (B) of the NDPS Act relying on the decisions in ***Amar Singh Ramaji Bhai Barot*** (supra), ***Ouseph @ Thankachan v. State of Kerala***[4] and ***E. Micheal Raj*** (supra) without taking into consideration the definition of "charas" under the dictionary clause of the NDPS Act and fallaciously dwelt upon the other substance which has no applicability. She has seriously criticized the finding recorded by the Division Bench of the High Court on the ground that neither the definition nor the stipulations in the relevant notification lend support to such a finding and, therefore, the conclusion arrived at by the High Court is vulnerable in law.

5. Ms. Nidhi, learned counsel for the respondent, per contra, submitted that the High Court has rightly converted the offence from Section 20(b)(ii) (C) to Section 8 read with Section 20(b)(ii) (B) of the NDPS Act regard being had to the percentage in the seized contraband article and the sentence

[4] (2004) 4 SCC 446

A imposed being in the upper limit of the sentence prescribed in the provision, the same does not warrant any interference by this Court. It is her further submission that the reliance on the authorities placed by the High Court cannot be found fault with. Additionally, it is contended by him that the discretion exercised
B by the High Court cannot be regarded as injudicious warranting interference by this Court.

6. We shall deal with the first aspect first, for our finding on that score shall foreclose other submissions as there would be no warrant for the same. There is no dispute over the fact
C that the contraband articles were seized on 5.4.2004. Section 8 of the NDPS Act at that time read as follows:-

> "**8. *Prohibition of certain operations*.**—No person shall—
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> D (*a*) cultivate any coca plant or gather any portion of coca plant; or
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> (*b*) cultivate the opium poppy or any cannabis plant; or
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> E (*c*) produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or tranship any narcotic drug or psychotropic substance,
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> F 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 and in a case where any such provision, imposes any requirement by way of licence, permit or
> G authorisation also in accordance with the terms and conditions of such licence, permit or authorisation:
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> Provided that, and subject to the other provisions of this Act and the Rules made thereunder, the

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prohibition against the cultivation of the cannabis plant for the production of ganja or the production, possession, use, consumption, purchase, sale, transport, warehousing, import inter-State and export inter-State of ganja for any purpose other than medical and scientific purpose shall take effect only from the date which the Central Government may, by notification in the Official Gazette, specify in this behalf:

Provided further that nothing in this section shall apply to the export of poppy straw for decorative purposes."

7. Section 20 of the NDPS Act at the relevant time after certain amendments read thus:-

"20. *Punishment for contravention in relation to cannabis plant and cannabis.*—Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder,—

(a) cultivates any cannabis plant; or

(b) produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable –

(i) where such contravention relates to clause (a) with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine which may extend to one lakh rupees; and

(ii) where such contravention relates to sub-clause (b),—

(A) and involves small quantity, with rigorous imprisonment for a term which may extend to one year, or with fine, which may extend to ten thousand rupees, or with both;

A (B) and involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees;

B (C) and involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two C lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

D 8. Prior to the amendment, Section 20 of the NDPS Act read as follows:-

"20. *Punishment for contravention in relation to cannabis plant and cannabis.*—Whoever, in contravention of any provision of this Act or any rule E or order made or condition of licence granted thereunder,—

(a) cultivates any cannabis plant; or

(b) produces, manufactures, possesses, sells, F purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable, –

(i) where such contravention relates to ganja or the cultivation of cannabis plant, with rigorous imprisonment for a term which may extend to five G years and shall also be liable to fine which may extend to fifty thousand rupees;

(ii) where such contravention relates to cannabis other than ganja, with rigorous imprisonment for a

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term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees and which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

9. The legislature amended certain provisions of the NDPS Act which came into effect on 2.10.2001 vide amending Act 9 of 2001. Be it stated the said Act rationalized the structure of punishment under the NDPS Act by providing graded sentences linked to the quantity of narcotic product or psychotropic substance in relation to which the offence was committed. The statement of objects and reasons to the Bill declares the intention thus:-

"STATEMENT OF OBJECTS AND REASONS

Amendment Act 9 of 2001.—The Narcotic Drugs and Psychotropic Substances Act, 1985 provides deterrent punishment for various offences relating to illicit trafficking in narcotic drugs and psychotropic substances. Most of the offences invite uniform punishment of minimum ten years' rigorous imprisonment which may extend up to twenty years. While the Act envisages severe punishments for drug traffickers, it envisages reformative approach towards addicts. In view of the general delay in trial it has been found that the addicts prefer not to invoke the provisions of the Act. The strict bail provisions under the Act add to their misery. Therefore, it is proposed to rationalise the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentences, the addicts and those who commit less serious

A offences are sentenced to less severe punishment. This requires rationalisation of the sentence structure provided under the Act. It is also proposed to restrict the application of strict bail provisions to those offenders who indulge in serious offences."

B 10. Section 41 (1) of the Amending Act 9 of 2001 determined the application or exclusion of the amending provisions. The said provision read as follows:-

"41. *Application of this Act to pending cases.*—(1) C Notwithstanding anything contained in sub-section (2) of Section 1, all cases pending before the courts or under investigation at the commencement of this Act shall be disposed of in accordance with the provisions of the principal Act as amended by this D Act and accordingly, any person found guilty of any offence punishable under the principal Act, as it stood immediately before such commencement, shall be liable for a punishment which is lesser than the punishment for which he is otherwise liable at E the date of the commission of such offence:

Provided that nothing in this section shall apply to cases pending in appeal."

11. The question arose with regard to the constitutional validity of the said provision inasmuch as there was a F classification between the accused facing trial and the convicts who had already been convicted and their appeals were pending after 2.10.2001. This Court in ***Basheer v. State of Kerala***[5], after referring to certain authorities pertaining to classification came to hold as follows:-

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"In the result, we are of the view that the proviso to Section 41(1) of the amending Act 9 of 2001 is constitutional and is not hit by Article 14. Consequently, in all cases, in which the trials had

H [5] (2004) 3 SCC 609

concluded and appeals were pending on 2-10-2001, when amending Act 9 of 2001 came into force, the amendments introduced by the amending Act 9 of 2001 would not be applicable and they would have to be disposed of in accordance with the NDPS Act, 1985, as it stood before 2-10-2001." A B

12. In the case at hand, admittedly the occurrence had taken place in 2004 and, therefore, 2001 Act applies. The 'Notes' that came to be inserted by way of amendment at a later date need not be debated upon in this case, for the simon pure reason the said Notes would not be attracted regard being had to the factual score in the present case. Presently, we shall refer to certain pertinent provisions of the NDPS Act. Section 2 (viia) of the NDPS Act defines commercial quantity. It is as follows:- C

"2. (*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;" D

13. Section 2 (xxiiia) of the NDPS Act defines small quantity. It reads as follows:- E

"2. (*xxiiia*) "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;" F

14. At this juncture, it is appropriate to refer to the definition of cannabis (hemp) as contained in Section 2(iii) of the NDPS Act:- G

"(a) charas, that is, the separated resin, in whatever form, whether crude or purified, obtained from the cannabis plant and also includes concentrated preparation and resin known as hashish oil or liquid hashish; H

A (b) ganja, that is, the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever name they may be known or designated; and

B (c) any mixture, with or without any neutral material, of any of the above forms of cannabis or any drink prepared therefrom;"

[Emphasis supplied]

15. It is pertinent to reproduce the relevant extract from C the notification dated 19th October, 2001 issued under Clause (viia) and (xxiiia) of Section 2 of the NDPS Act. The requisite part of the table is reproduced below:-

"Sl. 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)
(1)	(2)	(3)	(4)	(5)	(6)
23.	Cannabis and cannabis resin	CHARAS, HASHISH	EXTRACTS AND TINCTURES OF CANNABIS	100	1 kg.
150	Tetrahydrocannabinol		The following isomers and their stereochemical variants:- 7,8,9,10-tetrahydro-6,6,9-trimethyl-3-pentyl-6H-dibenzo [b,d] pyran-1-o1 (9R, 10aR)-8,9,10,10a-	2	50 gm

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			tetrahydro-6,6,9-trimethy1-3-pentyl-6H-dibenzo[b,d] pyranl-ol (6aR, 9R, 10aR)- 6a, 9,10,10a-tetrahydro-6,6,9-trimethyl-3-penty1 – 6H-dibenzo [b,d] pyran-1-o1 (6aR, 10aR)-6a, 7,10,10a-tetrahydro-6,6,9-trimethyl – 3-penty1-6H-dibenzo [b,d] pyran- 1-ol 6a,7,8,9-tetrahydro-6,6,9-trimethyl-3-pentyl-6H-dibenzo [b,d] pyran-l-ol (6aR, 10aR)-6a,7,8,9,10, 10a-hexahydro-6, 6-dimthyl-l-9-methylene 3-pentyl-6H-dibenzo [b,d] pyran-1-o]"		

[Emphasis supplied]

16. The learned trial Judge had treated the seized contraband article falling within the definition of commercial quantity and accordingly found the accused persons guilty and imposed the sentence. He has taken note of the fact that the notification issued on 19.10.2001 clearly shows that more than one kilogram is commercial quantity. The High Court while reversing the finding pertaining to commercial quantity has stated thus:-

> "It needs to be pointed out that the Chemical Examiner as per the prosecution case did not only analyze the samples to find out whether it comprised of or contained any Narcotic Drug but went a step further to find out "percentage by weight" of the Narcotic Drug in the sample. The Chemical Examiner as per his reports dated 25.04.2004 certified that the sample taken from one of the seven brownish stick shaped substance tested positive for Charas and the Tetra hydrocannabinol (THC) content in the sample was 5.1 percent. In case of sample lifted from one of the five sticks recovered from the appellant Mushtaq Ahmad Tetra hydrocannabinol (THC) content in the sample was 5.1 percent. In case of sample lifted from one of the five sticks recovered from the appellant Mushtaq Ahmad Tetra hydrocannabinol (THC) content in the sample was found to be 4.9 percent. In the circumstances, if the samples lifted from the substance recovered from the appellants would be 45 gms and 39 gms respectively taking each stick to have average weight of 890 (6.2 Kg-7) and 800 (4.0 Kg-5) gms respectively. However, if, working on the assumption made by learned trial Court that in view of confessional statements of the appellants, the whole substance was to be taken as Charas irrespective of restricted sampling, the Narcotic

> Drug content in the entire substance recovered from the appellants still would work out to be 316 gms and 196 gms respectively."

17. We have reproduced the aforesaid paragraph to appreciate that the High Court has been guided by presence of "Tetra-hydrocannabinol" (THC) content and on that foundation has proceeded to hold that the seized item from both the accused persons is beyond the small quantity but lesser than the commercial quantity. To arrive at the said conclusion, reliance has been placed essentially on ***Ouseph @ Thankachan*** (supra) and ***E. Micheal Raj*** (supra).

18. We think it appropriate to analyse the ratio of the said decisions. In ***Ouseph @ Thankachan*** (supra), the accused was found in possession of 110 ampoules of buprenorphine trade name of which is Tidigesic. The court addressed to the issue whether psychotropic substance was in small quantity and if so, whether it was for personal consumption. In that regard, the Court proceeded to state thus:-

> "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 ampoule 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."

A 19. In ***E. Micheal Raj*** (supra), a two-Judge Bench while dealing with the determination of a small or commercial quantity in relation to narcotic drug or psychotropic substance in a mixture with one or more neutral substance opined that the quantity of neutral substance is not to be taken into B consideration and it is the only actual content by weight of the offending drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity should be considered. The question arose in ***E. Micheal Raj*** (supra) under which Entry of the notification the C substance found in possession of the appellants would fall, that is, whether Entry 56 or Entry 239. After referring to the Entries, the Court held as under:-

> "14. As a consequence of the amending Act, the sentence structure underwent a drastic change. The D amending Act for the first time introduced the concept of "commercial quantity" in relation to narcotic drugs or psychotropic substances by adding Clause (*vii-a*) in Section 2, which defines this term as any quantity greater than a quantity E specified by the Central Government by notification in the Official Gazette. Further, the term "small quantity" is defined in Section 2(*xxiii-a*), as any quantity lesser than the quantity specified by the Central Government by notification in the Official F Gazette. Under the rationalised sentence structure, the punishment would vary depending upon whether the quantity of offending material is "small quantity", "commercial quantity" or something in-between.
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> G 15. It appears from the Statement of Objects and Reasons of the amending Act of 2001 that the intention of the legislature was to rationalise the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentence, the H

addicts and those who commit less serious offences are sentenced to less severe punishment. Under the rationalised sentence structure, the punishment would vary depending upon the quantity of offending material. Thus, we find it difficult to accept the argument advanced on behalf of the respondent that the rate of purity is irrelevant since any preparation which is more than the commercial quantity of 250 gm and contains 0.2% of heroin or more would be punishable under Section 21(*c*) of the NDPS Act, because the intention of the legislature as it appears to us is to levy punishment based on the content of the offending drug in the mixture and not on the weight of the mixture as such. This may be tested on the following rationale. Supposing 4 gm of heroin is recovered from an accused, it would amount to a small quantity, but when the same 4 gm is mixed with 50 kg of powdered sugar, it would be quantified as a commercial quantity. In the mixture of a narcotic drug or a psychotropic substance with one or more neutral substance(s), the quantity of the neutral substance(s) is not to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance. It is only the actual content by weight of the narcotic drug which is relevant for the purposes of determining whether it would constitute small quantity or commercial quantity. The intention of the legislature for introduction of the amendment as it appears to us is to punish the people who commit less serious offences with less severe punishment and those who commit grave crimes, such as trafficking in significant quantities, with more severe punishment."

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A 20. In the said case, the Court accepted the submission that purity of heroin was 1.4% and 1.6% respectively and, therefore, the quantity of heroin in possession was only 60 gms and on that ground treated it as a small quantity.

B 21. In ***Amar Singh Ramaji Bhai Barot*** (supra) the appellant was found carrying a black packet which contained black colour liquid substance that smelled like opium. The police officer weighed the said substance recovered from him and found the weight to be 920 gms. 4.250 kg of a grey coloured substance suspected to be a drug, was recovered from the C other accused who had already died. Out of the 920 gms opium recovered from the appellant, samples were sent to the Forensic Science Laboratory which opined that substance which had been sent was opium containing 2.8% anhydride morphine and also pieces of poppy flowers (posedoda). Both D the accused persons faced trial and the trial court found both of them guilty for the offences punishable under Section 17 and 18 read with Section 29 of the NDPS Act and sentenced each of them to undergo rigorous imprisonment of 10 years with fine of Rs. 1 lakh each with the default clause. The appeal E preferred by the other accused abated as he expired during the pendency of the appeal and the appeal of the Amarsingh Ramjibhai Barot was dismissed. A contention was canvassed before this Court that the High Court had fallen into error by taking a total quantity of the offending substance recovered F from 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. This Court addressed in detail to the factum of possession of 920 gms of black liquid and the FSL report that indicated the substance recovered G from it was opium containing 2.8% anhydride morphine, apart from pieces of poppy (posedoda) flowers found in the sample. The Court referred to definition of opium in Section 2(xv) and 2(xvi) and proceeded to state thus:-

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"**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". FSL has given its opinion that it is "opium as described in the NDPS Act". That is not binding on the court.

15. The evidence also 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 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:

> "2. (*xi*) 'manufactured drug' means—
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> (*a*) all coca derivatives, medicinal cannabis, opium derivatives and poppy straw concentrate;
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> (*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"."

22. Being of this view, this Court concurred with the decision taken by the High Court that it was a commercial quantity. The said decision has been distinguished in ***E. Micheal Raj*** (supra) by opining thus:-

> "18. Being aggrieved, Amarsingh approached this Court. This Court has held in para 14 of the judgment as under:
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> "*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'. FSL has given its opinion that it is 'opium as described in the NDPS Act'. That is not binding on the court."
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> The Court further held that the evidence also 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*), but residuary Clause (*e*) would apply and consequently it would amount to opium derivative as all opium derivatives fall within the expression "manufactured drugs". Thus, the Court arrived at the conclusion that what was recovered from the appellant was manufactured drug and the offence proved against the appellant fell clearly within Section 21 of the NDPS Act for illicit possession of manufactured drug. The Court concluded and held in para 17 as under:
>
> "*17*. In respect of opium derivatives (at Sl. No. 93) in the said notification, 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."

This Court has, therefore, upheld the imposition of minimum punishment under Section 21(*c*) of 10 years' rigorous imprisonment with fine of Rs 1 lakh.

19. On going through *Amarsingh case* we do not find that the Court was considering the question of mixture of a narcotic drug or psychotropic substance with one or more neutral substance(s). In fact that was not the issue before the Court. The black-coloured liquid substance was taken as an opium derivative and the FSL report to the effect that it contained 2.8% anhydride morphine was considered only for the purposes of bringing the substance within the sweep of Section 2(*xvi*)(*e*) as "opium derivative" which requires a minimum 0.2% morphine. The content found of 2.8% anhydride morphine was not at all considered for the purposes of deciding whether the substance recovered was a small or commercial quantity and the Court took into consideration the entire substance as an opium derivative which was not mixed with one or more neutral substance(s). Thus, *Amarsingh case* cannot be taken to be an authority for advancing the proposition made by the learned counsel for the respondent that the entire substance recovered and seized irrespective of the content of the narcotic drug or psychotropic substance in it would be considered for application of Section 21 of the NDPS Act for the purpose of imposition of punishment. We are of the view that when any

A 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."

B 23. We have referred to the said decision as the learned counsel for the State submitted that the said decision applies to the present case. In our considered opinion, the factual matrix in the said case was totally different and, in fact, it was dealing with the manufacturing and the percentage content and C hence, we need not delve into the same.

24. In the present case, the contraband article that has been seized is "charas" and the dictionary clause clearly states that it can be crude or purified obtained from the cannabis D plant and also includes concentrated preparation and resin known as hashish oil or liquid hashish. The definition also indicates that any mixture with or without any neutral material of any of the cannabis or any drink prepared therefrom. The reference in Section 2(iii)(c) refers to any mixture which has a E further reference to charas, which states crude or purified. The chemical name for charas and hashish is "extracts and tinctures of cannabis". It finds mention at Entry No. 23 of the Notification. Serial No.150 of the Notification deals with "tetrahydrocannababinol" having a long list.

F 25. Regard being had to the aforesaid factual score, reference to a two-Judge Bench decision in ***Harjit Singh v. State of Punjab***[6], would be apt. In the said case 7.10 kgs. of opium was ceased from the accused. A contention was raised before this Court that the opium recovered from the appellant G weighing 7.10 kgs. contained 0.8% morphine, that is, 56.96 gms. and hence, the quantity was below the commercial quantity. The two-Judge Bench referred to the pronouncement in ***E. Micheal Raj*** (supra) and referred to various Entries in

H [6] (2011) 4 SCC 441

the notification, namely, Entry 77 that deals with morphine, Entry 92 that deals with opium and Entry 93 that deals with opium derivatives. The Court posed the question whether the case would fall under Entry 92 or Entry 93 or any other Entry. The Court referred to the definition of opium under the NDPS Act, the chemical analysis made by the Forensic Science Laboratory, took note of the percentage of morphine, the amendment brought in 2001 and came to hold thus:-

> "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 factor, Entry 92 becomes totally redundant.
>
> 22. 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 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 92 is exclusively applicable for

A ascertaining whether the quantity of opium falls within the category of small quantity or commercial quantity."

26. In the said case, the judgment referred in ***E. Micheal Raj*** (supra) was distinguished by stating thus:-

B

"The judgment in *E. Micheal Raj* 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."

C

Eventually, in paragraph 25 the Court held thus:-

D

"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 the NDPS Act, that the quantity of morphine contents becomes relevant."

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27. Another aspect needs to be noted. The High Court in paragraph 28 has found that the seized article contained more than 50 gms. Tetra hydrocannabinol in respect of both the accused persons. The commercial quantity for the contraband article, namely, Tetra hydrocannabinol (THC) as stated in Entry no. 150 is 50 gms. Even assuming the said percentage is found in the seized item then also the contraband article would go beyond the "intermediate" quantity and fall under the "commercial" quantity. Judged from any score, we do not find the view expressed by the High Court is correct. Therefore, we conclude and hold that the seized item fell under the commercial quantity and hence the conviction recorded by the trial court under Section 20 (b) (ii) (C) is absolutely impeccable.

28. We will be failing in our duty if we do not deal with another submission put forth by the learned counsel for the respondents-accused. It is her submission that the accused persons have already spent more than seven years in custody and, therefore, they should not be incarcerated again. Section 20 (b) (ii) (C) stipulates that the minimum sentence will be ten years which may extend to twenty years and the minimum fine imposable is one lakhs rupees which may extend to two lakhs rupees. The provision also provides about the default clause which stipulates imposition of fine exceeding two lakh rupees, for the reasons to be recorded by the Court. When a minimum punishment is prescribed, no court can impose lesser punishment. In ***Narendra Champaklal Trivedi v. State of Gujarat***[7], while a submission was advanced that in exercise of power under Article 142 of the Constitution, this Court can impose a lesser punishment than the prescribed one, this Court ruled that:-

> "...where the minimum sentence is provided, we think it would not be at all appropriate to exercise jurisdiction under Article 142 of the Constitution of

[7] (2012) 7 SCC 80

A India to reduce the sentence on the ground of the so-called mitigating factors as that would tantamount to supplanting statutory mandate and further it would amount to ignoring the substantive statutory provision that prescribes minimum
B sentence for a criminal act..."

29. Yet again, in ***State of Madhya Pradesh v. Ayub Khan***[8], where the High Court had awarded the lesser punishment this Court while analyzing the position in law has opined thus:-

C "The legislature, in its wisdom, has fixed a mandatory minimum sentence for certain offences—keeping, possessing arms and ammunition is a serious offence for which sentence shall not be less than three years. The legislature,
D in its wisdom, felt that there should be a mandatory minimum sentence for such offences having felt the increased need to provide for more stringent punishment to curb unauthorised access to arms and ammunition, especially in a situation where we
E are facing with menace of terrorism and other anti-national activities. A person who is found to be in possession of country-made barrelled gun with two round bullets and 50 gm explosive without licence, must in the absence of proof to the contrary be
F presumed to be carrying it with the intention of using it when an opportunity arises which would be detrimental to the people at large. Possibly, taking into consideration all those aspects, including the national interest and safety of the fellow citizens,
G the legislature in its wisdom has prescribed *a minimum mandatory sentence*. Once the accused was found guilty for the offence committed under Section 25(1)(*a*) of the Arms Act, he has necessarily

[8] (2012) 8 SCC 676

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to undergo the minimum mandatory sentence, prescribed under the statute." A

30. In view of the aforesaid analysis, we are unable to sustain the judgment and order of the High Court and, accordingly, unsettle the same and find that the accused-respondents, Mushtaq Ahmad and Gulzar Ahmad, are guilty of offence punishable under Section 20(b)(ii)(C) of the NDPS Act and each of them is sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1 lac and, in default of payment of such fine, to suffer rigorous imprisonment for a further period of one year. B C

31. Resultantly, the appeals are allowed and the judgment and order passed by the High Court in Criminal Appeal Nos.35 and 36 of 2009, is set aside and that of the learned trial Judge, as far as the sentence is concerned, stands modified. D

Bibhuti Bhushan Bose Appeals allowed.