Before J. S. Khehar and Sham Sunder, JJ.

ANUP GUPTA,—*Appellants*

versus

STATE OF PUNJAB,—*Respondent*

Crl. A. No. 537/DB of 2006

7th May, 2008

Narcotic Drugs and Psychotropic Substances Act, 1985—S. 21—Recovery of narcotic drug/psychotropic substance containing 25 grams heroin/diacetyl morphine—Whether such recovery constitutes small quantity or commercial quantity—Quantity of heroin less than "commericial quantity" but more than small quantity—Recovery of 25 grams heroin falling within ambit of non-commericial quantity—Accused liable to be punished as expressed in clause (b) of Section 21 of NDPS Act—Order of sentence modified.

Held, that even though the recovery made from the accused is that of an "opium derivative" but on account of the express exclusion of a mixture containing diacetyl morphine (heroin) for the drug envisaged at Serial No. 93 of the notification, referred to determine "small quantity" or "commericial quantity" in the present case cannot be made at serial No. 93. Having recorded the aforesaid conclusion the only other entry under which the recovery made from the accused can be taken into consideration, is the entry at Serial No. 56. We, therefore, record our conclusion on the instant aspect of the matter in so far as the recovery made from the accused is concerned, to the effect that for determining whether the recovery made from the accused is of "small quantity" or of "commercial quantity" the parameters laid down at serial No. 56 of the aforesaid notification alone would be applicable.

(Para 30)

Further held, that since the component of heroin/diacetyl morphine recovered from the accused was neither less than 5 grams nor more than 250 grams, the said recovery was more than the prescribed "small quantity" but less than the prescribed "commericial quantity".

For determining the punishment of the accused for having in his possession 25 grams of diacetyl morphine reference has necessarily to be made to Section 21 of the NDPS Act, 1985. Since the quantity of heroin in possession of the accused was less than the "commericial quantity" but more than the "small quantity" stipulated in the notification, the punishment to be imposed on him has to be the one expressed in clause (b) of Section 21 of the NDPS Act, namely rigorous imprisonment for a term which may extend to ten years and with fine which may extend to Rs. One lac.

(Paras 31 and 32)

H.S. Bhullar, Advocate, *for the appellant.*

V.K. Jindal, Additional Advocate General, Punjab, for the State.

J.S. KHEHAR, J.

(1) The instant appeal has been filed by the accused/appellant Anup Gupta against the judgment rendered by the Special Judge, Gurdaspur, in Session Case No. 16 of 2004 decided on 23rd December, 2005. By the impugned judgment the Special Judge, Gurdaspur, convicted both the accused Ruldu Ram and Anup Gupta under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the NDPS Act). By a separate order passed on the following date i.e. 24th December, 2005, both the convicts Ruldu Ram and Anup Gupta, were sentenced to undergo rigorous imprisonment for 12 years and with a fine of Rs. 1,00,000 each under Section 21 of the NDPS Act. In default of payment of fine, the defaulting convict was directed to further undergo rigorous imprisonment for one year.

(2) The prosecution version of the incident is based on the statement of SI Paramjit Singh PW2 recorded in the area of village Umarpur near bye pass, Jalandhar Road, adjoining the town of Batala on 24th August, 2003. In his aforesaid statement SI Paramjit Singh PW2 asserted that he along with other police officials from Police Station Civil Lines, Batala were holding a "nakabandi" at the Amritsar bye pass in connection with general checking, when he received secret information that one Ruldu Ram resident of Ujagar Nagar Batala who was a known

dealer of smack was to receive a consignment of smack, from Rajasthan, through one Anup Gupta. According to the secret information, if checking of buses and trucks is made, there was a possibility of apprehending the aforesaid persons along with their consignment. On receipt of the information, SI Paramjit Singh PW2 went to Jalandhar bye pass for the purpose of holding a special "naka". While on their way, the police party spotted two persons coming out of a deserted brick kiln. On seeing the police party the said two persons immediately turned back, thereby, raising a suspicion in the minds of the police party. SI Paramjit Singh PW2 then stopped the two persons, and apprehended them. The aforesaid two persons on inquiry disclosed their identity as Ruldu Ram and Anup Gupta. SI Paramjit Singh PW2 confronted Ruldu Ram and Anup Gupta by asking them whether they were carrying some drugs. On their denial, he asked them (Ruldu Ram and Anup Gupta), whether they desired to get themselves searched by a Gazeted Officer, or by a Magistrate. Both Ruldu Ram and Anup Gupta expressed their desire to get themselves searched by a Gazetted Officer. Accordingly, SI Paramjit Singh PW2 sent a wireless message to DSP Narinder Kumar Bedi PW2, with a request, that he should reach the spot where Ruldu Ram and Anup Gupta had been apprehended. In the meantime Fakir Singh, Sarpanch, who was passing by, was associated with the police party. After some time, DSP Narinder Kumar Bedi PW1 also reached the spot. Yet again DSP Narinder Kumar Bedi PW1, asked the apprehended persons Ruldu Ram and Anup Gupta, whether they would like to get themselves searched by him or by a Magistrate, after informing them that he (DSP Narinder Kumar Bedi PW1) was a gazetted officer, and further that, they had the legal right to get themselves searched before a magistrate. According to the statement of SI Paramjit Singh PW2, both Ruldu Ram and Anup Gupta had consented to be searched by DSP Narinder Kumar Bedi PW1. In this behalf, they also affixed their signatures on the consent memo. On being asked by DSP Narinder Kumar Bedi PW1, SI Paramjit Singh PW2 first of all conducted the personal search of Ruldu Ram and recovered one kilogram of brown sugar concealed in a glazed paper from a yellow colour "parna" which he had tied around his waist. Out of the recovered brown sugar 10 grams was separated as sample. The recovered sample, was then put into a small plastic box ("dhabbi") and the remaining 990 grams was put in

another plastic box ("dubba") along with the glazed paper. Both the aforesaid parcels were sealed with the seal of SI Paramjit Singh PW2 bearing the initials 'PS', as well as, with the seal of DSP Narinder Kumar Bedi PW1, with the initials 'NSB'SI Paramjit Singh PW2 then searched Anup Gupta and recovered half a kilogram of brown sugar wrapped in a glazed paper from an attaichicase which he was holding in his right hand. 10 grams of brown sugar was separated therefrom, as sample, and its parcel was prepared. A separate parcel was also prepared of the remaining 490 grams of brown sugar. Both the parcels were then sealed with the seal of SI Paramjit Singh PW2 bearing the initials 'PS', as well as, with the seal of DSP Narinder Kumar Bedi PW1 with the initials of 'NSB'. SI Paramjit Singh PW2 then handed over his seal, to DSP Narinder Kumari Bedi PW1. DSP Narinder Kumari Bedi PW1 retained his own seal with himself. Keeping in view the fact that Ruldu Ram was in possession of one kilogram of brown sugar, and Anup Gupta was in possession of half kilogram of brown sugar, a ruqqa was sent through Constable Gurpreet Singh to Police Station Civil Lines, Batala, for registration of a case. On the basis of the information submitted by SI Paramjit Singh PW1, First Information Report bearing No. 106 was registered at Police Station Civil Lines, Batala on 24th August, 2003 at 7:00 P.M.

(3) During the course of investigation SI Paramjit Singh PW2 took into possession the attaichicase belonging to Anup Gupta, out of which half kilogram of brown sugar was recovered (*vide* recovery memo Exhibit PE), currency notes of Rs. 2490 recovered from Anup gupta during the course of his "jama talasi" (personal search) (*vide* recovery memo Exhibit PG), currency notes of Rs. 3040 recovered from Ruldu Ram during the course of his "jama talasi" (personal search) (*vide* recovery memo Exhibit PF). The Investigating officer also took into possession the yellow "parna" with which Ruldu Ram had tied brown sugar around his waist. SI Paramjit Singh PW2 prepared the rough site plan of the place from where the recovery of the yellow "parna" Exhibit PH, was made. During the interrogation of the accused Ruldu Ram and Anup Gupta, they told the investigating officer SI Paramjit Singh PW2 that the recovered smack had been supplied to them by Tarsem Singh. On the basis of the information furnished by the

accused/appellants, SI Paramjit Singh PW2 arrested Tarsem Singh on 1st September, 2003 but nothing was recovered from Tarsem Singh, and a memo was accordingly prepared, to the aforesaid effect. The two samples prepared out of the recovered brown sugar, from Ruldu Ram and Anup Gupta, were then sent to the Chemical Examiner for analysis, who reported that the samples contained 4.9 to 5% diacotyle morphine. After completion of the investigation, the challan against the accused was presented before the Special Judge, Gurdaspur.

(4) The Special Judge, Gurdaspur arrived at the conclusion that a *prima facie* case punishable under section 21 of the NDPS Act, was made out against the accused Ruldu Ram and Anup Gupta. He however, found no evidence against the accused Tarsem Singh for framing any charges against him, and therefore, Tarsem Singh was discharged from the case at the very inception. The accused Ruldu Ram and Anup Gupta, were however, charged under section 21 of the NDPS Act.

(5) The accused when confronted with the charge framed against them, pleaded not guilty, and claimed trial.

(6) During the course of trial, the prosecution examined a number of witnesses. The brief description of the statements of the witnesses produced by the prosecution is being summarized hereunder. The prosecution first of all examined DSP Narinder Kumar Bedi as PW1. Suffice it to state, that DSP Narinder Kumar Bedi PW1 reiterated the factual position narrated by SI Paramjit Singh PW2 on 24th August, 2003, on the basis whereof FIR bearing No. 106 was registered on 24th August, 2003 at Police Statiom Civil Lines, Batala. The prosecution then produced SI Paramjit Singh PW2. SI Paramjit Singh PW2 also reiterated the factual position stated by him, while conveying the written information to Police Station Civil Lines, Batala on 24th August, 2003. The statement of ASI Daljit Singh was recorded as PW3. ASI Daljit Singh PW3 testified that he was accompanying SI Paramjit Singh PW2 on 24th August, 2004 when the accused Ruldu Ram and Anup Gupta were stopped and detained, and were searched, and recoveries were made from them. While deposing before the trial Court ASI Daljit Singh PW3 corroborated the factual position asserted by SI Paramjit Singh PW2. The statement of Constable Amarjit Singh was recorded as PW4.

He tendered into evidence his affidavit Exhibit PO. A perusal of Exhibit PO reveals that he was required to deposit two samples of ten grams each, taken from the accused Ruldu Ram and Anup Gupta, in the office of the Chemical Examiner, Forensic Science Laboratory, Chandigarh. The cross-examination of constable Amarjit Singh PW4 is relevant. In the cross-examination Constable Amarjit Singh PW4 stated that he in the first instance on 27th August, 2003, had taken two samples and deposited the same in the office of he Chemical Examiner, Forensic Science, Laboratory, Chandigarh, on 28th August, 2003, but the office of the Forensic Science Laboratory, Chandigarh returned the said samples with some objections on 29th August, 2003 to SI Paramjit Singh PW2. MHC Sardul Singh appeared as PW5 and reiterated the factual position asserted by Constable Amarjit Singh PW4. Constable Kabul Singh appeared before the trial Court as PW6 and tendered into evidence his affidavit Exhibit PP. A perusal thereof would reveal that he had taken the special report and deposited the same with the concerned Magistrate at Batala. After recording the statement of constable Kabul Singh PW6, on the asking of the prosecution, the evidence of the prosecution was closed by order.

(7) The statements of the accused/appellants Ruldu Ram and Anup Gupta were then recorded under section 313 of the Code of Criminal Procedure. Suffice it to state, that when confronted with the incriminating evidence appearing on the record of the case, both the accused denied the correctness thereof. The stance adopted by the accused/appellants Ruldu Ram and Anup Gupta in their defence was, that they were innocent, and that, nothing was recovered from them, and that, a false case was planted on them.

(8) The accused Ruldu Ram and Anup Gupta were then afforded an opportunity to lead evidence in their defence. Neither of the accused produced any evidence in their defence. On the statement made by the accused, their defence was closed by order.

(9) The Special Judge, Gurdaspur, delivered the judgment in Sessions Case No. 16 of 2004 on 23rd December, 2005. Both the accused Ruldu Ram and Anup Gupta were held guilty of the offence

under Section 21 of the NDPS Act. On 24th December, 2005, both the accused Ruldu Ram and Anup Gupta were heard on the question of sentence, whereupon, the Special Judge, Gurdaspur, by his order dated 24th December, 2005, sentenced both the accused Ruldu Ram and Anup Gupta to undergo rigorous imprisonment for 12 years, and to pay a fine of Rs. 1,00,000 each, under section 21 of the NDPS Act. In default of payment of fine, the defaulting convict(s) were directed to undergo further rigorous imprisonment for a period of one year.

(10) A perusal of the evidence produced on behalf of the prosecution, as well as, the judgment rendered by the Special Judge, Gurdaspur, reveals that while convicting the accused Ruldu Ram and Anup Gupta, the trial Court placed reliance on ocular, as well as, expert evidence. In this behalf, it would be pertinent to mention that primarily reliance was placed on the statement of SI Paramjit Singh PW2 and the corroborating testimony thereof, emerging from the statements of DSP Narinder Kumar Bedi PW1 and ASI Daljit Singh PW3. In so far as the expert evidence is concerned, reliance was placed on the report of the Forensic Science Laboratory, Chandigarh (Exhibit PM) which revealed that on examination of two samples (each containing 10 grams) of a brown substance, it was found that percel No. 1 contained 4.9% diacetyl morphine, whereas, parcel No. 2 contained 5.0% of diacetyl morphine. It would be pertinent to mention, that the report of the Forensic Science Laboratory, Chandigarh, Exhibit PM, also reveals both the samples had two seals each (a total of four seals) with impression 'PS' and 'NP'. The noting at Serial No. 6 of the report also reveals that the seals on the parcels were intact.

(11) In order to assail the finding recorded by the trial Court and in order to establish that the ocular evidence produced by the prosecution was not worthy of credit, learned counsel for the accused/ appellant Anup Gupta has raised a number of pleas. Learned counsel for the accused/appellant Anup Gupta has vehemently contended that there is no credible evidence on the record of this case to establish the guilt of the accused/appellant Anup Gupta in respect of the charges levelled against him. In the aforesaid context, three pleas have been raised on behalf of the learned counsel for the accused/appellant

Anup Gupta. Each of the pleas is being dealt with in the succeeding paragraphs.

(12) The first contention of the learned counsel for the accused/ appellant Anup Gupta was that the seals with which the two samples were eventually sent to the Forensic Science Laboratory for chemical analysis, were retained by the DSP Narinder Kumar Bedi PW1, and that, he could have easily tampered with the samples because both the seals affixed on the two samples were in his possession and custody. In this behalf, it is the contention of the learned counsel for the appellant Anup Gupta that the seals affixed on the samples should have been entrusted to an independent party as for instance Fakir Singh Sarpanch who was associated by the police in the present case. Another contention has been advanced at the behest of the accused/appellant Anup Gupta suggesting an infirmity with the samples deposited with the Forensic Science Laboratory for chemical analysis. In this behalf, reliance has been placed on the statement of Constable Amarjit Singh PW4 wherein during the course of his cross examination, he asserted that he had originally deposited the samples with the Forensic Science Laboratory on 28th August, 2003 but the same were returned back with objection on 29th August, 2003.

(13) We have closely examined the two submissions projected in the first contention advanced by the learned counsel for the accused/ appellant Anup Gupta. In so far as the retention of the seals with DSP Narinder Kumar Bedi PW1 is concerned, we are of the view that the plea of tampering with the samples in question can be raised only if it is further shown that DSP Narinder Kumar Bedi PW1 at any stage after the preparation of the samples under reference and the sealing thereof on 24th August, 2003, came into possession of the said samples. It is in evidence through the testimony of MHC Sardul Singh PW5 that he had retained the case property in the malkhana with effect from 24th August, 2003 till the same was handed over to Constable Amarjit Singh PW4 for onward transmission to the Forensic Science Laboratory, Chandigarh on 27th August, 2003. It is, therefore apparent that there was no occasion for DSP Narinder Kumar Bedi PW1 to have misused the seals in his possession by consigning the contents of the sealed

samples taken from the accused Ruldu Ram and Anup Gupta on 24th August, 2003. Accordingly, we find no merit in the instant submission advanced by the learned counsel for the appellants.

(14) In so for as the second submission in the first contention of the learned counsel for the accused/appellant is concerned, there was some defect, in the samples, and therefore, the Forensic Science Laboratory, returned the same on 29th August, 2003. We are of the view that if there was any doubt about the aforesaid aspect of the matter, it was open to the accused to summon the original record, so that the exact nature of the objections could be brought out. In the absence thereof, we would have to rely on the report Exhibit PM received from the Forensic Science Laboratory, Chandigarh, revealing that the two parcels received for chemical analysis by the Forensic Science Laboratory, were having two seals each, and further that, the seals on the parcels were intact. Thus viewed it is apparent that the objection with which the parcels were returned did not relate to tampering with the samples, as already noticed above, which could have been of any advantage to the accused. Thus viewed, we find no merit in this contention of the learned counsel for the appellant Anup Gupta.

(15) The second contention advanced at the hands of the learned counsel for the appellant is that the police party headed by SI Paramjit Singh PW2 had associated Fakir Singh, Sarpanch, who was passing by at the spot from where the accused Ruldu Ram and Anup Gupta were stopped and apprehended. All the formalities of search etc. after the accused were detained, were witnessed by the said Fakir Singh, Sarpanch. Fakir Singh, Sarpanch, was an independent witness having no links either with the accused or the police, and as such, the truth of the matter would have emerged from the mouth of Fakir Singh, Sarpanch. It is, however, pointed out that the said Fakir Singh was not produced as a witness during the course of recording the prosecution evidence. It is the contention of the learned counsel for the accused/appellant Anup Gupta that non-examination of the said independent witness associated by the police at the time of the apprehension of the two accused reveals the infirmity in the prosecution case itself. It is also the contention of the learned counsel for the accused/appellant that an inference should

be drawn in the facts of this case, that if Fakir Singh, Sarpanch, had appeared as a witness, he would have testified against the prosecution version of the incident.

(16) We have considered the second submission advanced by the learned counsel for the appellant. The instant aspect of the matter has been considered by this Bench while disposing of Crl. A. No. 720-DB of 2004 (**Ajit Singh** *versus* **State of Punjab**) on 13th February, 2008, wherein, so far as the non examination of an independent witness is concerned, it has been *inter alia* held as under :—

> "It was next contended by the learned Counsel for the appellants that Amarjit Singh, PW was joined, but he was not examined and, as such, the case of the prosecution became doubtful. The submission of the learned Counsel for the appellants, in this regard , also does not appear to be correct. No doubt, Amarjit Singh, was joined by the police party by Sikander Singh, Sub Inspector, the Investigating Officer, at the time of recovery. Since, Amarjit Singh joined hands with the accused, during the trial of the case, on the basis of the application, moved by the Investigating Officer, he was given up, as won over, by the Additional Public Prosecutor for the State,—*vide* statement dated, 10th April, 2003. The Public Prosecutor is the master of the case. It is for him to decide as to how many witnesses he wanted to examine to prove his case. Since, Amarjit Singh was going to damage the case of the prosecution, the Additional Public Prosecutor for the State, thought it better, not to examine him. It was, in these circumstances, that he was given up as won over. In **Roop Singh** *versus* **State of Punjab (1),** a Division Bench of this Court, held that no adverse inference, can be drawn, when the independent witness was given up, by the prosecution, was won over by the accused. It was further held, in the said authority, that the panch witnesses, being human beings, are quite exposed and vulnerable to human feelings of yielding, browbeating, threats and inducements,

(1) 1996(1) RCR 146

and giving up of the public witnesses, as won over, is fully justified, in the present day situation, prevailing in the society. In **Karnail Singh** *versus* **State of Punjab (2)** it was held that where the independent witness, was won over, by the accused, and only the official witnesses were examined, by the prosecution, who were considered to be not interested persons, their evidence cannot be doubted, on the ground of their official status Similarly **in Appa Bai and another** *versus* **State of Gujrat (3)** it was held that the prosecution story cannot be thrown out, on the ground, that an independent witness had not been examined by it. It was further held that civilized people, are generally insensitive, when a crime is committed, even in their presence, and they withdraw from the victim's side, and from the side of he vigilant. They keep themselves away from the Courts, unless it is inevitable. Moreover, they think the crime like a civil dispute, between two individuals, and do not involve themselves in it. In **State of NCT of Delhi** *versus* **Sunil** (4), it was held as under :—

> *"It is an archaic notion that actions of the Police Officers should be approached with initial distrust. It is time now to start placing at least initial trust on the actions and the documents made by the Police. At any rate, the Court cannot start with the presumption that the Police records are untrustworthy. As a proposition of law, the presumption should be the other way round. The official acts of the Police have been regularly performed is a wise principle of presumption and recognized even by the Legislature".*

In view of the above, we are of the view that the non examination of Fakir Singh, Sarpanch, at the hands of the prosecution is not fatal to

(2) 1983 Crl. Law Journal 1218 (DB)
(3) AIR 1988 S.C. 696
(4) (2000) 1 SCCC 748

the prosecution case. We therefore, find no merit in the second contention advanced by the learned counsel for the appellant.

(17) The third and the last submission advanced at the hands of the accused/appellant is that recovery of 500 grams of the narcotic drug/psychotropic substance was allegedly made by the police party from an attaichi-case in possession of the accused/appellant Anup Gupta. On chemical analysis it came to be revealed that the material recovered from him contained 4.9% to 5% diacetyl morphine. On calculation, it is submitted that, the total quantity of the said drug in his possession was 25 grams. 5% of 500 grams comes to 25 grams. It is, accordingly, the contention of the learned counsel for the accused/ appellant Anup Gupta, based on the notification issued under clauses (vii-a) and (xxiii-a) of section 2 of the NDPS Act (specifying "small quantity" and "commercial quantity"), that the recovery from the accused/ appellant Anup Gupta should be treated as less than "commercial quantity". In this behalf, reliance has been placed on Serial No. 56 in the said notification pertaining to heroin (chemical name whereof is diacetyl morphine), for which column No. 5 postulates 5 grams as "small quantity", and column No. 6 postulates 250 grams as "commercial quantity". It is, therefore, submitted by the learned counsel for the accused/appellant Anup Gupta, that the trial Court erroneously took into consideration the quantity of heroin found in possession of the accused/ appellant Anup Gupta as 500 grams, and held that the drug in his possession was of "commercial quantity". It is the contention of the learned counsel for the appellant that the quantity of heroin in possession of the accused/appellant Anup Gupta should have been taken as less than "commercial quantity" as only 25 grams of diacetyl morphine was recovered from him. As such, it is submitted that the sentence awarded to the accused/appellant should have been based on the fact that, he was in possession of heroin which was less than the prescribed "commercial quantity", though more than the prescribed "small quantity".

(18) In order of support his contention that the quantity of heroin found in the possession of the accused/appellant Anup Gupta should not be treated as 500 grams, but should be treated as 25 grams, reliance

was also placed on the decision rendered by the Delhi High Court in **Ansar Ahmed** *versus* **State**, (5) wherein it was *inter alia* held as under :—

> "Upon a plain and uncomplicated reading of the above Entry No. 56 it is clear that the content of heroin to qualify as a "small quantity" is less than 5 grams of it. The content of heroin in excess of 250 grams would qualify as a "commercial quantity". But, going back to our hypothetical case, heroin and some other substance are mixed together having a combined weight of 500 grams. As such, the learned counsel for the State submitted that Entry 239 would come into play and, as a consequence, the entire weight of the substance would have to be taken. I am unable to agree with this reasoning. What entry 239 deals with is, a situation where two or more narcotic drugs or psychotropic substances are mixed of a preparation derived therefrom, with or without the addition of neutral material. It does not deal with a situation where a mixture or preparation contains only one narcotic drug or psychotropic substances along with neutral material. To make things clear, let us suppose we have two narcotic drugs P and Q and some neutral material N. Entry 239 would apply to a situation where the mixture is of P and Q, with or without N. It would not apply where the mixture is of P and N or Q and N. In our prototype case, the mixture is of a neutral substance and heroin (a narcotic drug). Hence, Entry 239 would have no application. In fact, as rightly submitted by the learned counsel for the petitioners, even the significations for small and commercial quantities in respect of Entry No. 239 favour such an interpretation. "Small quantity" relative to Entry 239 means "lesser of the small quantity between the quantities given against the respective narcotic drugs or psychotropic substances mentioned above forming part of the mixture". This, in itself, contemplates a mixture of more than one narcotic drug or psychotropic substance. For example, if against a narcotic

(5) 2005(4) RCR (Crl.) 393

drug P, the small quantity prescribed in 5 grams and for narcotic drug Q, the small quantity specified is 1 gram, then, the small quantity for mixture of P and Q (with or without neutral substance) would be I gram being the "lesser of the small quantity between the quantities given against the respective narcotic drugs or psychotropic substances mentioned above forming pail of the mixture". But, this Entry 239 would not come into play when the mixture is of a narcotic drug such as heroin and a neutral substance.

It is, therefore, Entry 56 Which shall apply. The quantities of heroin (diacetylmorphine) specified therein are by weight. Keeping in mind that the object of introducing this classification was to rationalize the sentencing structure 'so as to ensure that while drug traffickers who traffic in significant of drugs are punished with deterrent sentences, the addicts and those who commit less serious offences are sentenced to less severe punishment", it does not appear to me that what has to be seen is the content of heroin by weight in the mixture and not the weight of the mixture as such. Otherwise, anomalous consequences would follow. While a recovery of 4 grams of heroin would amount to a small quantity, the same 4 grams mixed up with say 250 grams of powdered sugar would be quantified as a "commercial quantity"! And, where would this absurdity stop ? Suppose one were to throw a pinch of heroin (0.5 gram), into a polythene bag containing small steel ball bearings having a total weight of 1 kg; would the steel ball bearings be also weighed in and it be declared that it commercial quantity (1000.5 grams) of heroin was recovered ! Surely, it is only the content of heroin (0.5 gram) in the "mixture" of heroin and steel ball bearings that is relevant ? Clearly, then it would qualify as a small quantity. Therefore, in a mixture of a narcotic drug or a psychotropic substance with one or more neutral substances, the quantity of the neutral substance or substances is not to be taken in considering whether a small quantity or a commercial

quantity of the narcotic drug or psychotropic substance is covered. Only the actual content by weight of the narcotic drug or the psychotropic substance (as the case may be) is relevant for determining whether it would constitute a "small quantity" or a "commercial quantity".

Reliance was also placed to the decisions rendered by the Single Benches of the High Court of Delhi in **Mohd. Sayed** *versus* **Customs (6),** and **Masoom Ali @ Ashu** *versus* **State (7),** wherein, the same conclusion was arrived at, namely, that the actual quantity of the drug was to be taken into consideration, and not the weight of the whole substance (which contained the said drug).

(19) As against the aforesaid contention of the learned counsel for the accused/appellant, we came across a decision rendered by a Division Bench of the Kerala High Court in **Shaji** *versus* **Kerala State (8).** The relevant observations recorded by the Kerala High Court on the issue in hand are being extracted hereunder :—

"The definition of psychotropic substance contained in Section 2(xxiii) reads as follows :

"psychotropic substance' means any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the schedule" (emphasis supplied :

Going by this decision, apart from natural substance as mentioned in the Schedule to the Act, "preparation of such substance" is also a psychotropic substance. Therefore, the weight shall be with reference to the substance, as defined, whether it be natural substance or preparation thereof. Section 2(xx) of the Act defines the term 'preparation' as follows :

(6) 2002(4) R.C.R. (Crl.) 162 (Delhi)
(7) 2005(3) R.C.R. (Crl.) 280 (Delhi)
(8) 2004(4) R.C.R. (Crl.) 643

"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", (emphasis supplied).

The Schedule to the Act contains a list of psychotropic substances. Item No. 92 thereof is 'Buprenorphine'. Admittedly by the petitioners, each of the ampules contained in 0.3mg. Of 'Buprenorphine' dissolved in water. So, it is a solution of 'Buprenorphine'. When it is solution, going by the definition, the entire solution, being a "preparation of psychotropic substance", is by itself psychotropic substance as defined in Section 2 (xxiii) of the Act.

The notification S.O. 1055 (E), dated 19th October, 2001, issued in terms of Clauses (viia) and (xxiiia) of Section 2 of the Act, stipulates what is small quality or commercial quantity of each of such substance. The said notification does not introduce a new psychotropic substance other than those mentioned in the Schedule to the Act. The intention of the notification is only to prescribe small quantity and commercial quantity of psychotropic substances, the statutory definition of which remains as such. Item No. 169 in the notification is 'Buprenorphine'. The small quantity is one gram and commercial quantity is twenty grams.

Whether the stipulation of these quantities is with reference to the natural or pure ingredient of 'Buprenorphine' or the entire content of the preparation of 'Buprenorphine', is the issue involved. Going by the definition of psychotropic substance', independent of the pure or natural ingredient, the preparation of the substance is also a 'psychotropic substance', as found above. Necessarily, therefore, the substance involved in each of these cases, viz. a solution of Buprenorphine will come to more than the small quantity of such psychotropic substance, which includes a solution, being a preparation thereof. Even the least of the quantities

> involved in these three cases will thus come beyond one gram. So, the appellants were having in their possession, as per the case of the prosecution, such substance in excess of the small quantity, in which case, the punishment, if the allegations are proved, shall be imprisonment for a term which may extend to ten years under clause (b) or even to twenty years under clause (c) of Section 22 of the Act, depending upon the quantity involved."

It is apparent from the conclusion recorded by the Division Bench that the weight of the entire material recovered, is to be taken into consideration, to arrive at the conclusion whether the drug/substance recovered from the accused was of "small quantity" or "commercial quantity".

(20) If we go by the judgment rendered by High Court of Delhi, the recovered narcotic drug/psychotropic substance will be deemed to be 25 grams, and therefore, more than the "small quantity" but less than the "commercial quantity" depicted in the notification referred to above. If we go by the judgment rendered by the Kerala High Court, the recovered narcotic drug/psychotropic, will be deemed to be 500 grams, and therefore, of "commercial quantity". Our aforesaid conclusions are based on the fact that the aforesaid notification at serial No. 56 postulates less than 5 grams of diacetyl morphine as "small quantity", and more than 250 grams of the aforesaid drug as "commercial quantity".

(21) It is imperative for us to mention, that learned counsel for the respondent, in order or substantiate his contention placed reliance on the judgment rendered by the Calcutta High Court in **T. Paul Kuki @ Pabul Youthband** *versus* **State of West Bangal (9),** wherein it was *inter alia* held as under :—

> "Considering the evidence and other materials on record in all its bearing, there is no room for any reasonable doubt that from the possession of the appellant at the place, date and hour alleged by the prosecution, a quantity of white powder

(9) Crimes XI 1993 (3) 660

was recovered which on test in the office of bureau was found to be heroin. Now, it has been deposed by some of the Intelligence Officers such as Amitava Chatterjee P.W.2 and Chanchal Bhattcharjee P.W. 3 that representative sample was drawn which was sent to the chemical examiner under a test memo which appears on the recorded as Ext. 5. The sample appears to have been received by the laboratory with the seals of the Bureau intact on its together with the test memo referred to above. Bijan Behari Devy P.W. 7, a Chemical Assistant of the laboratory has given evidence to this effect and he has also stated that he tested the powder in presence and under the supervision of the Assistant Chemical Examiner B.N. Roy who has examined as P.W.8. The result of the examination has been noted on the reverse of this memo Ext. 5 in the hand writing of Bijan Behari Dey P.W.7 and under his signature and counter signed by the said Assistant Chemical Examiner. There is no missing link whatsoever to raise any doubt that the sample which was sent to and tested by the laboratory was not drawn from what was recovered from the possession of the appellant. There is also nothing on the record to suspect the finding or the result of the examination which revealed that the sample responded to the test for heroin. It has been noted in the laboratory report that to determine percentage of heroin in the sample it might be forwarded to the Central Revenue Control Laboratory, New Delhi. The sample however, was not sent to the laboratory but since an offence punishable under section 21 of the Act for unauthorised possession of a manufactured drug like heroin does not depend upon the percentage of heroin content the fact that the sample was not sent to the Central Revenue Control Laboratory, New Delhi, is of no consequence. It is the evidence of the Assistant Chemical Examiner that heroin is nothing but diacetyl morphine which is an opium derivative according to there definition given in section 2(xvi) of the Act. Against an opium derivative is a manufactured drug according to its definition

> given in section 2(xi) of the Act and all manufactured drug are also narcotic drug in view of its definition in section 2(xvi) of the Act. Thus the appellant was found in possession of narcotic drug possession of which is prohibited by section 8 of the Act except for purpose specified therein. It is in the evidence that the appellant failed to account for his possession and indeed, he never took any plea that he was authorised to possess the contraband. Section 54 of the Act also permits a presumption that a person who possess any narcotic drug has committed an offence under Chapter 4 of the Act if he fails to explain his possession satisfactorily. In such circumstances, the irresistible conclusion is that the appellant has committed an offence punishable under section 21 of the Act for unauthorised possession of manufactured drug and he has rightly been convicted and sentenced by the learned Court below".

It is apparent from the judgment rendered by the Calcutta High Court, that the percentage of the narcotic drug/psychotropic substance is inconsequential, and that, the weight of the entire material is to be taken into consideration. It was sought to be concluded by the Calcutta High Court that diacetyl morphine was an "opium derivative" in view of the express definition of the term "opium derivative" under section 2(xvi) of the NDPS Act. Presumably, the aforesaid assertion has been made keeping in view the drug at Serial No. 93 of the notification mentioned above, against which, small and commercial quantities of "opium derivatives" have been mentioned. This judgment, in our view, has no bearing on the issue which is subject matter of consideration before us. In our view, although the material recovered from the accused/appellant Anup Gupta was diacetyl morphine and is as such an "opium derivative" but the same would not be of any consequence in so far as the drug at Serial No. 93 is concerned, as the description in Column No. 4 (at Serial No. 93) excludes diacetyl morphine, i.e. the narcotic drug/psychotropic substance recovered from the accused/ appellant in the case in hand. Presumably, this aspect of the matter was overlooked when the decision was rendered in T. Paul Kuki @ Pabul Youthband's case (*supra*). Further analysis of the effect of the entry at

Serial No. 93 has also been attempted by us while examining different entries of the notification under reference.

(22) Reference was also made by the learned counsel for the respondent to be decision rendered by the Supreme Court in **Amar Singh Ramjibhai Barot** *versus* **State of Gujarat (10).** Learned counsel for the respondent placed reliance on the observation made in paragraph 16 of the aforesaid judgment. Paragraph 16 of the aforesaid judgment is being extracted hereunder :—

> "The learned counsel for the appellant raised a further contention that even if the appellant is guilty of an offence under Section 21 of the NDPS Act, the punishment could only fall within clause (a) of Section 21 as the "manufactured drug" involved was of "small quantity". In our view, this contention is untenable. The amending Act of 2001 introduced the concept of "small quantity" and "commercial quantity" for the purpose of imposing punishment. The punishment thereunder is graded according to whether the contravention involved "small quantity", "commercial quantity" or a quantity in between the two. By reason of Section 41(1) of the amending Act of 2001, the amended provisions apply to pending cases. Simultaneously, with the Act of 2001 coming into force, by a notification S.O. No. 1055(E), dated 19th October, 2001 issued in exercise of the powers conferred by clauses (vii-a) and (xxiii-a) of Section 2 of the NDPS Act, the Central Government specified what would amount to "small quantity" and "commercial quantity" respectively, of different substances".

The conclusion in respect of the aforesaid consideration was recorded in the following two paragraphs (17 and 18) wherein the Apex Court arrived at the conclusion that as per the notification at Serial No. 93 of the notification, 5 grams of "opium derivatives" was specified as "small quantity" and 250 grams of "opium derivatives" was specified as "commercial quantity". It was pointed out by the learned counsel for the respondent that the Apex Court concluded, that the High Court

(10) 2005(5) Supreme Court Cases 550

was right and justified in concluding that the appellant was guilty of unlawful possession of "commercial quantity" by taking the total quantity of the narcotic drug/psychotropic substance recovered from the accused. It is therefore the submission of the learned counsel for the respondent that the total weight of the substance recovered from the accused/ appellant Anup Gupta should be taken into consideration, to determine whether the drug/substance recovered from his possession was "small quantity" or "commercial quantity".

(23) Having perused the judgment in Amar Singh Ramjibhai Barot's case *(supra)*, we are of the view that the same is wholly irrelevant to the issue in hand. In the aforesaid case the appellant before the Supreme Court was found carrying 920 grams of opium, and jointly in conspiracy with the deceased (in the said case) in possession of 4.250 grams of opium. The Supreme Court upheld the decision of the Calcutta High Court in taking into consideration the total quantity of prohibited substance into consideration (i.e. from the joint possession of the two accused) to determine whether or not the recovered material was more than the prescribed "commercial quantity". This aspect of the matter is not the one being canvassed by the learned counsel for the accused/appellant in the instant appeal. The issue before us is, whether the weight of the entire recovered material is to be taken into consideration, even if the material recovered has some other neutral substance(s) besides the narcotic drug/psychotropic substance mixed in it ; or whether, the actual weight of the drug alone, has to be taken into consideration, to determine whether the material answered the description of "small quantity" or "commercial quantity". As such, we are of the view that the instant judgment cannot be taken into consideration to determine the pointed issue in hand.

(24) We have also perused the conclusions drawn in the judgements rendered by the Delhi High Court. In our view, the final determination on the issue in hand will have to be rendered on the basis of the interpretation of the provisions of the NDPS Act, 1985, and the notification issued under section 2 thereof. We shall therefore attempt a harmonious construction of the provision of NDPS Act, with the notification aforesaid.

(25) Having given our thoughtful consideration to the issue in hand, we are of the view, that it is extremely essential to refer to certain drugs/psychotropic substances reflected in the notification referred to above. For the purpose in hand, we are satisfied that a reference to narcotic drugs/psychotropic substances indicated at Serial Nos. 56, 92, 93 and 239 of the notification will suffice for recording our conclusions. Accordingly, an extract from the notification, pertaining to the aforesaid serial numbers, is being reproduced hereunder :—

Sr. No.	Name of narcotic drug and psychotropic substance (international non-priprietary name (INN)	Other non proprietary name	Chemical Name	Small quantity (in gm.)	Commercial Quantity (in gm./kg.)
1	2	3	4	5	6
56	Heroin	—	Diacetylmorphine	5	250 gm.
92	Opium	3	And any preparation containing opium	25	2.5kg
93	Opium Derivatives	—	Other than diacetyl morphine (heroin), morphine and those listed herein	5	250 gm.
239	Any mixture or preparation that of with or without a natural material, of any of the above drugs			Lesser of the small quantity between the quantities given against the respective narcotic drugs or psychotropic substances mentioned above forming part of the mixture	Lesser of the Commercial quantity between the quantities given against the respec-tive narcotic drugs or psychotropic substances mentioned above forming part of the mixture.

(26) (i) In the case in hand the drug recoverd from the accused/ appellant Anup Gupta was eventually found to be diacetyl morphine. In respect of the aforesaid drug, reference must be made to Serial No. 56 which depicts less than 5 grams of diacetyl morphine as "small quantity", and more than 250 grams as 'commercial quantity". It would be pertinent to mention that the general name of the drug under reference at Serial No. 56 is "heroin". Reference may also be made to Serial No. 92 of the notification, wherein, as against the generic name of "opium", (without describing any chemical name thereof) the notification in column 4 clarifies that the drug/substance at serial No. 92 would include "any preparation containing opium". A preparation containing opium would necessarily imply that it is a mixture with opium as one of the components. Serial No. 92, therefore, mentions a narcotic drug/ psychotropic substance wherein the content of the drug/substance may be only a percentage of the whole. It is also apparent that for the entry at Serial No. 92, the substance, in which heroin is mixed has to be a neutral substance, and not some other narcotic drug/psychotropic substance, because for the latter, the notification has prescribed the required parameters (for determining "small quantity" and "commercial quantity") at Serial No. 239. For Serial No. 92, the notification mandates the "whole" of the mixture recovered is treated as a narcotic drug/ psychotropic substance. Therefore, the total weight of the mixture has to be taken into consideration to find out whether the material recovered answers the description of "small quantity" or "commercial quantity". From Serial No. 92 it is inevitable also to notice that where the notification issuing authority desired to take into consideration a narcotic drug/psychotropic substance mixed with some neutral substance, it took cudgels to specify the same. This leads us to record our first conclusion, namely, the notification refers to specific narcotic drug(s)/psychotropic substance (s) where the intention is to take into consideration the weight of the drug/substance in its pure form, and expressly described the narcotic drug/psychotropic substance, in the form of a mixture where it was the intention to take the total weight of the mixture (to determine whether the possession constituted "small quantity" or "commercial quantity").

(ii) Next in sequence of consideration is Serial No. 93 of the notification referred to as "opium derivatives". Column 4 at Serial No. 93, depicts, that the aforesaid derivatives should be *inter alia* other than diacetyl morphine. To determine what is an "opium derivative", reference has to be made to Section 2(xvi) of the NDPS Act where the said term is defined. Section 2(xvi) aforesaid, is accordingly reproduced hereunder :

"(xvi) " opium derivative" means—

(a) 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 the extract suitable for smoking and the dross or other residue remaining after opium is smoked.

(c) phenanthrene alkaloids, namely, morphine, codeine, the baine and their salts ;

(d) diacetylmorphine, that is, the alkaloid also known as diamorphine or heroin and its salts; and

(e) all preparations containing more than 0.2 per cent. of morphine or containing any diacetylemorphine;

(xvii) .....".

It is essential for us to highlight that sub-clause (e) of clause (cvi) of section 2 (extracted above) also refers to a mixture of a naroctic drug/ psychotropic substance, with a neutral substance. In our view, therefore, the conclusions drawn by us above in respect of the entry at serial No. 92 will be equally applicable to the entry at serial No. 93. In other words, since sub-clause (e) of clause (xvi) of section 2 extracted above, accepts a mixture containing more than 0.2 per cent of morphine

as an "opium derivative", and the same also accepts a preparation containing diacetyl morphine as an "opium derivative", the entire mixture has to be accepted as a narcotic drug/psychotropic substance. Therefore, the entire weight of the mixture has to be treated as a narcotic drug/psychotropic substance. The total weight of the mixture will, therefore, have to be taken into consideration to determine whether the recovery is of "small quantity" or "commercial quantity".

(iii) The last in the sequence is the entry at serial No. 239. A cursory perusal of the notification referred to above reveals, that for most entries, a specific narcotic drug/psychotropic substance is reflected ; for some of the entries (serial Nos. 92 and 93) a drug/substance in the form of a mixture with a neutral substance, has been envisaged. The entry at serial No. 239 puts forth a third hybrid. Serial No. 239 envisages a mixture of two or more narcotic drugs/psychotropic substance. For determining "small quantity" of the mixture envisaged by the entry at serial No. 239 of the notification, it is clarified in column 5 (of the entry at serial No. 239) that the lesser of the "small quantity" or the drug(s)/substance(s) constituting the mixture, will be taken into consideration. Illustratively, if the mixture is of the drug(s)/substance(s) mentioned at serial Nos. 1 and 2 of the notification. Since for the drug/ substance mentioned at serial No. 1 the "small quantity" is less than 2 grams, and for the drug/substance mentioned at serial No. 2 the "small quantity" is less than 0.005 grams. The prescribed lesser (of the two drugs/substances) of "small quantity", is of the drug/substance at serial No. 2 of the notification. Therefore, for the mixture of the drug/ substance referred to in the instant illustration 0.005 grams will have to be taken as the "small quantity" in case of a mixture containing the drug/substance mentioned at serial Nos. 1 and 2 of the notification. Likewise for determining the "commercial quantity" of the mixture envisaged in the item at serial No. 239, the aforesaid notification which postulates that it would be the lesser of the "commercial quantity" of the drug(s)/substance(s) constituting the mixture has to be taken into consideration; 0.1 gram will have to be treated as "commercial quantity" because 0.1 gram is the lesser of the "commercial quantities" prescribed for the two drugs/substances, of which the mixture is constituted.

(iv) We would like also to attempt a comparison of the entry at serial No. 92 with the entry at serial No. 230. The former takes into consideration the total weight of the mixture even though the mixture is with a neutral substance, which is not a narcotic drug/psychotropic substance, the latter talks about a mixture wherein all the components are narcotic drug(s)/psychotropic substance(s) and takes into consideration the cumulative weight of the drug(s)/substance(s) to determine "small quantity" or "commercial quantity".

(v) It is, therefore, clear that for the entries in the notification where a specified narcotic drug/psychotropic substance has been mentioned, the precise component of the narcotic drug/psychotropic substance mentioned (and not of the mixture of which it is a component) is to be taken into consideration to determine "small quantity" or "commercial quantity". In other words, if the specified drug/substance is mixed with a neutral substance, the weight of the neutral substance has to be excluded. In case of a mixture of one or more narcotic drug(s) with a psychotropic substance(s), the manner of calculating "small quantity" and "commercial quantity" is specifically mentioned namely, i.e. the lesser of the prescribed "small quantity" or "commercial quantity" out of the components constituting the mixture. Herein the entire weight of the mixture is taken into consideration. Likewise, in the case of a mixture of a narcotic drug/psychotropic substance with a neutral substance, which has been expressly provided for in the notification the "small quantity" and "commercial quantity" has to be determined by taking into consideration the total weight of the mixture including the weight of the neutral substance.

(27) From the aforesaid we hereby conclude :

Firstly, for narcotic drugs/psychotropic substance(s) expressly mentioned by their generic, as well as, chemical names in the notification under reference, the precise component of the narcotic drug/psychotropic substance only, has to be taken into consideration to determine the "small quantity" or "commercial quantity" thereof. In the case of

drug(s)/substance(s) mentioned by generic and chemical name where the recovery is in the from of a mixture, the weight of the neutral substance included in the mixture will have to be excluded to determine the "small quantity" or "commercial quantity".

Secondly, only when the notification visualizes a mixture and specifies a weight as "small quantity" and "commercial quantity" in reference to the mixture, then and only then, the total weight of the mixture is to be taken into consideration. In other words, the weight of the neutral substance has to be included in the total weight for finding out "small quantity" and "commercial quantity", for this category of narcotic drug(s)/psychotropic substance(s).

Thirdly, in case of a mixture falling in the category envisaged by the entry at Serial No. 239 of the notification under reference, the total weight of the narcotic drug(s)/psychotropic substance(s) will have to be clubbed together to determine the "small quantity" or the "commercial quantity" for this category. Herein, lesser of the prescribed "small quantity' or "commercial quantity", out of the components constituting the mixture shall be accepted as the determining factor.

(28) When the instant order/judgment was placed before my learned brother Sham Sunder, J. for perusal, he happened to come across (on the internet) the judgment rendered by the Apex Court in **E. Micheal Raj** *versus* **Intelligence Officer, Narcotic Control Bureau** (Criminal Appeal No. 1250 of 2005 decided on 11th March, 2008). Since the aforesaid judgment is pointedly on the issue canvassed before us, the instant paragraph has been included in the instant order/judgment. The issue deliberated in E. Micheal Raj's case *(supra)* was referred to in paragraph 4 which is being extracted hereunder :—

"The only submission made by Shri V. K. Viswanathan, learned counsel for the appellant is confined to the limited issue relating to sentence of the appellant under Section 21 of the

NDPS Act. As per the learned counsel, the conviction and sentence of the appellant is contrary to law because the total quantity of contraband seized from him was 4.07 kgs. Since the purity of heroin if 1.4% and 1.6% respectively in two samples, therefore, the quantity of heroin in possession is only 60 gms. (1.4+1.6)/2=1.5% of 4.07 kgs=60 gms. Thus, the total quantity of heroin seized is below 250 gms. i.e., below the commercial quantity. It is submitted that it is not the total weight of the substance allegedly recovered that is material, but the percentage content of heroin translated into weight that is relevant".

The conclusion in respect of the proposition advanced by the counsel representing the appellant was recorded in paragraph 16 in **E. Micheal Raj's** case *(supra)*. Relevant extract thereof is being reproduced thereunder:—

"....The black-coloured liquid substance was taken as an opium derivative and the FSL report to the effect that it contained 2.8% anhydridemorphine 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 *(supra)* 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 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."

The aforesaid determination at the hands of the Supreme Court, affirms the "First" conclusion drawn by us in the foregoing paragraph.

(29) It is on the basis of the aforesaid conclusions that we will venture to determine whether the recovery made from the accused/ appellant Anup Gupta constituted "small quantity" or "commercial quantity". Before we embark on the instant issue, it will have to be determined whether or not the recovery of diacetyl morphine made from the accused/appellant Anup Gupta will fall under serial No. 56 or under serial No. 93. Serial No. 56 refers to the drug heroin chemical name whereof is diacetyl morphine. Serial No. 93 however, refers to "opium derivatives" and in terms of the definition of opium derivative expressed in sub-clause (e) of clause (xvi) of section 2 of the NDPS Act, a mixture containing more than 0.2% of morphine or containing any diacetyl morphine has to be accepted as a opium derivative. In the judgment rendered by the Calcutta High Court in T. Paul Kuki @ Pabul Youthband's case *(supra)* the recovery (in the said case) of a mixture containing heroin (diacetyl morphine) was treated as an "opium derivative", and as such, in terms of the entry at serial No. 93 the total weight thereof, was taken into consideration, to determine that the recovery made from the accused/appellant in the aforesaid case constituted "commercial quantity".

(30) In spite of the aforesaid conclusion recorded by the Calcutta High Court, we are of the view, that the mixture containing diacetyl morphine recovered in the present case from the accused/appellant Anup Gupta (in spite of the fact that the component of diacetyl morphine recovered was between 4.9% to 5% of the mixture) cannot be examined as against the entry at serial No. 93 "opium derivative". This conclusion

of ours is based on the express indication recorded in column 4 of the entry at serial No. 93, wherein, it has been specified that "opium derivatives" to be taken into consideration against entry No. 93 would be "other than diacetyl morphine (heroin)". Therefore, even though the recovery made from the accused/appellant Anup Gupta, in the present case, is that of an "opium derivative" but on account of the express exclusion of a mixture containing diacetyl morphine (heroin) for the drug envisaged at serial No. 93 of the notification, referred to determine "small quantity" or "commercial quantity" in the present case cannot be made to serial No. 93. Having recorded the aforesaid conclusion the only other entry under which the recovery made from the accused/appellant Gupta can be taken into consideration, is the entry serial No. 56. We, therefore, record our conclusion on the instant aspect of the matter in so far as the recovery made from the accused/ appellant Anup Gupta is concerned, to the effect that for determining whether the recovery made from the accused/appellant Anup Gupta is of "small quantity" or of "commercial quantity" the parameters laid down at serial No. 56 of the aforesaid notification alone would be applicable.

(31) In so far as the entry at serial No. 56 is concerned, the same will have to be determined in consonance with our first conclusion recorded in paragraph 27. Since the component of heroin/diacetyl morphine recovered from the accused/appellant Anup Gupta was neither less than 5 grams nor more than 250 grams, we are of the view, that the said recovery was more than the prescribed "small quantity" but less than the prescribed "commercial quantity".

(32) For determining the punishment of the accused/appellant Anup Gupta for having in his possession 25 grams of diacetyl morphine reference has necessarily to be made to Section 21 of the NDPS Act, 1985. Since the quantity of heroin in possession of the accused/appellant Anup Gupta was less than the "commercial quantity" but more than the "small quantity" stipulated in the notification, the punishment to be imposed on him has to be the one expressed in clause (b) of Section

21 of the NDPS Act, namely, rigorous imprisonment for a term which may extend to ten years and with fine which may extend to Rs. One Lac.

(33) In view of the above we hereby uphold the judgment rendered by the trial Court to the extent that the accused/appellant Anup Gupta is guilty of the offence punishable under section 21 of the NDPS Act. It is however, not possible for us to accept the determination rendered by the Special Judge Gurdaspur in the impugned judgment that the accused/appellant Anup Gupta was in possession of "commercial quantity" of the narcotic drug/psychotropic substance recovered from him. We accordingly hereby set aside the impugned judgment limited to the aforesaid determination, and hereby, record our conclusion that the accused/appellant will be deemed to have been in possession of more than the prescribed "small quantity" but less than the prescribed "commercial quantity" of diacetyl morphine.

(34) Having recorded the aforesaid conclusion, the appeal is partly allowed. The judgment of conviction dated 23rd December, 2005 is upheld, whereas, the order of sentence dated 24th December, 2005 is modified to the extent that the accused/appellant Anup Gupta will undergo rigorous imprisonment for a period of six years and to pay a fine of Rs. 25,000, and in default in payment of fine to undergo rigorous imprisonment for one year for having been found in possession of 25 grams of heroin, falling within the ambit of non-commercial quantity, under section 21(b) of the NDPS Act. The period of detention already undergone by the appellant during investigation, enquiry or trial and before the date of conviction, in this case, shall be set off against the substantive sentence awarded to him, as envisaged by the provisions of Section 428 of the Code of Criminal procedure.

(35) The Chief Judicial Magistrate, Gurdaspur, shall comply with the judgment, with due promptitude.

R.N.R.