
(1995) 09 GUJ CK 0031
In the Gujarat High Court

Ahmed Mohmad Hakim

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 29-09-1995

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 29, 50, 50

Citation : (1996) 2 GLR 74

Hon'ble Judges : M.H. Kadri, J;K.J. Vaidya, J

Bench : Division Bench

Judgement

K.J. Vaidya, J.—Ahmed Mohmad Hakim, by this appeal has brought under challenge, the impugned judgment and order dated 17-11-

1990, rendered in Sessions Case No. 1 of 1988 passed by the learned Addl. Sessions Judge, Jamnagar, wherein, on his coming to be tried for the

alleged offences punishable under Sections 21 and 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (for short "N.D.P.S. Act")

was, at the end of the trial, convicted for the same and sentenced to 10 years R.I. and pay fine of Rs. one lac, in default of fine to undergo further

R.I. for 2 years.

2. The prosecution case in brief, as it emerges from the evidence of P.W. 9 - Mr. George Jacob, Customs Inspector, Jamnagar, is to the effect

that, on 3-2-1988, he received an information that on 4-2-1988, one person from South India was going to Bombay with some narcotic drugs by

an afternoon train from Hapa. On the basis of this tip-off, after recording the information immediately he rushed to Hapa railway station in a jeep

alongwith two panchas, viz. (1) P.W. 5, Baban Sriram Patil, and (2) P.W. 6, Dhanji Karsan (both declared hostile) and there lied in wait for

sometime on the platform watchfully expecting arrival of the suspected person. Accordingly, after sometime on seeing one person of the description given coming, he alongwith two accompanying panchas shadowed that man on the railway platform who thereafter took his seat on a bench. Thereafter, according to Mr. George Jacob, on making inquiry with the suspect in question, he gave out his name as Ahmed Mohmad Hakim, and stated that he was going to Bombay. On making further inquiry as to what was there in the Bistra (bedding), the person concerned could not satisfactorily reply. Not only that, but he appeared frightened and nervous, as a result Mr. George Jacob directed him to open the bedding, and on opening the same 20 white bags containing some substance were noticed. On opening those bags, some powder having greenish brownish colour was found out, which appeared to be narcotic drug. Thereafter, the bag which was opened was once again placed-back in the bedding alongwith other bags and the same was tied. Thereafter, Ahmed Mohmad Hakim alongwith his bedding was taken to the Customs Office at Jamnagar and was produced before P.W. 4 Ishwarbhai Dave, who at the relevant time was the Superintendent of Customs. Thereafter, after the muddamal article "HEROIN" weighing 19.500 Kgs. was seized under the panchnama Exh. 60 in the presence of the aforesaid two panchas, the appellant Ahmed Mohmad Hakim was allowed to go and was directed by P.W. 4 by serving a summons, to appear before him on the next day, apparently for the purpose of recording his statement. Accordingly, the statement of the appellant-accused came to be recorded on 5-2-1988. On the basis of these allegations, a complaint was filed by P.W. 4 against the accused Ahmed Mohmad Hakim before the learned Chief Judicial Magistrate, Jamnagar for the alleged offence under Sections 21 and 29 of the N.D.P.S. Act, for which he ultimately came to be tried by the learned Sessions Judge, Jamnagar and came to be convicted and sentenced for the same, as stated above in para 1 of this judgment, giving rise to the present appeal.

3. Mr. K.J. Shethna, learned Counsel appearing for the appellant-accused, though has raised very many points in his memo of appeal, at the time of hearing has pressed in the forefront, the only one point for our consideration which according to him goes to the root of the matter being

covered by two Supreme Court decisions entitling acquittal of the accused.

4. According to Mr. Shethna, the impugned order of conviction and sentence cannot be sustained even for a minute more, as the searching officer

has not complied with the mandatory provision as contained in Section 50 of the N.D.S.P. Act. Submits Mr. Shethna that Section 50 clearly

mandates that before taking a search of the accused in the public place, the searching officer is duty bound to inform the suspected person to be

searched as to whether he would like to be searched before the nearest Gazetted Officer or the Magistrate. This according to Mr. Shethna is the

vital statutory right of accused, and accordingly, if without complying with this mandatory requirement of Section 50, the accused is searched, this

vitiates his conviction and accordingly the accused is required to be acquitted forthwith. Making good his submission, Mr. Shethna has invited our

attention to two recent decisions of the Supreme Court rendered in the cases of (1) Saiyad Mohd. Saiyad Umar Saiyad and Others Vs. State of

Gujarat, ; and (2) Ali Mustaffa Abdul Rahman Moosa Vs. State of Kerala, . Placing reliance upon these two Supreme Court judgments, Mr.

Shethna finally urged that since the facts of the present case are squarely covered by the same, the appellant deserves to be acquitted forthwith.

In view of the aforesaid prima facie indisputable formidable legal submission made by Mr. Shethna, we straight-away called upon the learned

A.P.P. Mr. Divetia to point out from the evidence of the searching officer, viz., P.W. 9, Mr. George Jacob as to whether the requirements

mandated u/s 50 of the N.D.P.S. Act have been duly complied with by him?

5. To this, the learned A.P.P. frankly enough submitted that there is indeed not even a whisper in the evidence of P.W. 9, Mr. George Jacob, who

initiated search of the accused and ultimately seized muddamal heroin to show that he had complied with the mandatory provisions of Section 50 of

the N.D.P.S. Act. However, making a feeble attempt, to sustain the impugned order of conviction and sentence, the learned A.P.P. vehemently

contended that this Court may also take into consideration the huge quantity of the narcotic drug which is ""heroin"" a deadliest drug - as quite an

important and distinct distinguishing feature to take it out of the sweep of the aforesaid two Supreme Court decisions. The learned A.P.P. further

submitted that such huge quantity of 19.500 Kgs. of heroin cannot be ordinarily

and easily planted. This was indeed not a joke at all. Not only, but according to the learned A.P.P., there was no earthly reason for P.W. 9, Mr. George Jacob to pick and choose rather to say single-out only the accused person out of hundreds and hundreds of persons present on the platform at Hapa railway station to falsely implicate him on such a serious charge under the N.D.P.S. Act. Not only that but no enmity or any malice worth name is alleged, attributed to Mr. George Jacob raking up utterly false case. The learned A.P.P. still further submitted that the ultimate object underlying in enacting Section 50 of the N.D.P.S. Act as a mandatory provision was to protect innocent citizens from sometimes being falsely booked and implicated under the N.D.P.S. Act. The learned A.P.P. submitted that there can be instances where, once a while for the reasons best known to the searching officers, by planting some negligible quantity, innocent persons could be harassed and harassed to the extent of sending them to imprisonment for 10 years R.I. and a fine of Rs. one lac. In this regard we are indeed quite conscious of the fact that when a law empowers an authority conferring certain absolute powers like the power of search and seizure, it has indeed potency of abusing the power and the resultant consequence of making a person languish in jail for ten or more years, and precisely for this reason the Legislature in its wisdom with a view to see that absolute power may not corrupt absolutely the concerned authority, the mechanism by way of its inbuilt check-up, the provision by way of enacting mandatory provision u/s 50 has been engrafted into N.D.P.S. Act. It is perhaps with a view to protect innocent citizens from being falsely framed up that the Parliament in its wisdom has rightly provided safeguard by mandating the officers that before taking search, of any person suspected to be in possession of the narcotic drug, he should be informed as to whether he requires himself to be taken to the nearest gazetted officer of any of the departments mentioned in Section 42 or to the nearest Magistrates.

6. The learned A.P.P. further submitted that the State has utmost respect for the aforesaid decisions of the Supreme Court, but at the same time, in a case like the present one wherein such a huge quantity of narcotic drug has been seized, where possibility of planting can easily and safely be ruled out, to mechanically acquit the accused on technical ground would be to

act to the greatest detriment of public interest which has all the potency to virtually delegislate much needed drastic statute like the N.D.P.S. Act. Now as regards this submission, it is indeed quite true that such a huge quantity of heroin could not ordinarily be planted, and accordingly the person from whose possession the same is found out, may be a genuine accused. But then as long as Section 50 stands on the statute as it is and as interpreted by the Supreme Court, there is indeed nothing by which we can accept the contention of the learned A.P.P. The law declared by the Supreme Court, in the cases of Saiyad Mohd. Saiyad Umar Saiyad v. State of Gujarat (supra), is the law of the land and we are respectfully duty bound to honour and uphold the same. If the State has any grievance on the law laid down, by distinguishing the present case as argued above, the Supreme Court is the only forum which can be approached for reconsideration. However, so far as we are concerned, at the cost of repetition, we may say that we are not only bound by the same, but merely because the quantity of heroin is more that by itself does not of its own make the case distinguishable subject of course to what the Supreme Court ultimately may hold. Nothing other and further has been pointed out by the learned A.P.P. showing that the aforesaid two decisions of the Supreme Court has no binding effect in the instant case. In this view of the matter, though we are quite conscious of the fact that huge quantity of heroin weighing 19.500 Kgs. was found from the possession of the appellant-accused, he will have to be acquitted, and for this acquittal, the entire blame lies not at the doors of the Court, but upon the searching officer, who was not vigilant enough to comply with the mandated provision of Section 50 of the N.D.P.S. Act. In order that in future the prosecution does not lose some such serious good cases like the present one, showing great concern, in the case of Saiyad Mohd. Saiyad Umar Saiyad and Ors. (supra) the Supreme Court has observed as under:

Instructions in this behalf need to be issued so that investigation officers take care to comply with the statutory requirements and drug-pedlars do not go scot-free due to non-compliance thereof. Such instructions would be of great value in the effort to curb drug trafficking.

To this enlightening observation of the Supreme Court, we may also quite

humbly add that when the statute mandates the searching officer to comply with the provision of Section 50 of the N.D.P.S. Act before search is carried out, and yet, if the same is not complied with, and as a result, the accused gets acquitted, then in that case, in each and every such cases of acquittal the explanation must be called for by the Department from the concerned searching officer and appropriate action must be taken against him. We indeed believe that non-compliance of Section 50 and the resultant acquittal, in a given case can as well be the case of abetting the offence under the N.D.P.S. Act where on the one hand the concerned officer arrests the accused and with the second hand helps him out getting released by keeping some loop-holes in the mandatory procedure.

When the legislature with utmost concern and anxiety has passed the Act like N.D.P.S. Act, the same would remain only lifeless paper statute unless the spirit in which the legislature enacted the same is shared by or infused into the officers manning the narcotic offences. As reported by learned Advocates, and if it is true that the officers who search and arrest accused for offences under the N.D.P.S. Act, are prized and rewarded some percentage of value of muddamal goods recovered, then in that case, if the accused ultimately gets acquittal because of the patent lapse of duty on his/their part in not complying with the statutory requirements of the Act, no award should be given to the concerned officer, and if given, the same should be withdrawn. In order to activate, motivate efficiency, there is indeed nothing wrong if the concerned officers' services are appreciated -- prized by suitable reward ! But if he is found to have played double-role; then in that case to prize such officers out of public money is not permissible. Any officer so illegally prizes such officer is ultimately accountable. This is perhaps the only way to make concerned searching officers statutory duty conscious, and thereby the laudable object underlying N.D.P.S. Act realised to the greatest benefit of the society.

7. Further still, incidentally it may also be pointed out that this matter was placed on the final hearing Board on the special request made by Mr.

Shethna that the period of sentence of 10 years imposed on the convict-prisoner is already over, specially taking into consideration the remissions

granted by the jail authorities. When this statement was made, we were greatly alarmed because, having regard to Section 32-A of the N.D.P.S.

Act, the jail authorities have, indeed, no powers, no business to traverse the sanctity of the statute that is to say, Section 32-A of the N.D.P.S. Act

by granting remission as they liked. Said Section 32-A reads as under:

32-A. No suspension, remission or commutation in any sentence awarded under this Act.: Notwithstanding anything contained in the Code of

Criminal Procedure, 1973 (II of 1974) or any other law for the time being in force, but subject to the provisions of Section 33, no sentence

awarded under this Act (other than Section 27) shall be suspended or remitted or commuted.

Thus, in view of the aforesaid submission made by Mr. Shethna, we immediately asked the learned A.P.P. to inquire from the jail authorities

whether as a result of such remissions, any prisoner under the N.D.P.S. Act is released earlier before completing 10 years of R.I., and also to

inform the jail authorities that no remission of sentence to convict-prisoner under the N.D.P.S. Act is available by virtue of prohibition contained in

Section 32-A of the said Act. It is simply unfortunate that such an important provision u/s 32-A of the N.D.P.S. Act mandating no suspension,

remission, commutation of sentence awarded under the N.D.P.S. Act, if Mr. Shethna is right, has missed the notice or has been given a go-bye, by

the concerned jail authorities. We hope and trust that the carelessness if at all committed in not honouring the provision of Section 32-A will be

stopped forthwith and person accused/convicted of alleged offences under N.D.P.S. Act would not be henceforth given any remission, and if given

the concerned jail officers would be liable to departmental action, ultimate dismissal and criminal prosecution.

8. the result, this appeal is allowed. The impugned judgment and order of conviction and sentence passed by the trial Court is hereby quashed and

set aside, except the order as regards destruction of muddamal articles which stands confirmed. Appellant Ahmed Mohmad Hakim is acquitted

and accordingly ordered to be set at liberty forthwith unless his presence is so required in jail in connection with any other proceedings. Fine, if

paid, be refunded to the appellant.

9. The Registry is directed to immediately forward the copy of this judgment to (1) Inspector General of Prisons, Gujarat State, Ahmedabad, with

a request to immediately issue circulars to all Jail Superintendents, regarding the

prohibition in matter of releasing prisoner on parole or furlough, as the case may be, as envisaged in Section 32-A of N.D.P.S. Act, and (2) the Director, Narcotic Control Bureau, Government of India, New Delhi for information and necessary action.