

(1998) 02 GUJ CK 0030
In the Gujarat High Court
Case No : Criminal Appeal No. 35 of 1991

Dashrathbhai Govindbhai Shah and Another	APPELLANT
Vs	
State of Gujarat	RESPONDENT

Date of Decision : 06-02-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 391(1)
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 17, 41, 41(2), 41(3), 42

Citation : (1998) CriLJ 4634 : (1998) 2 GLR 758 : (1998) 4 RCR(Criminal) 253

Hon'ble Judges : S.M. Soni, J; J.R. Vora, J

Bench : Division Bench

Advocate : H.N. Jhala, for the Appellant; J.V. Bhairavia, for No. 2 and Public Prosecutor for No. 1, for the Respondent

Final Decision : Dismissed

Judgement

1. The appellants-original accused in Sessions Case No. 141/1990 who are held guilty u/s 17 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("NDPS Act" for short) and awarded rigorous imprisonment for 10 years and fine of Rs. 1,00,000/-, in default, rigorous imprisonment for three years by judgment and order dated 27th December, 1990 passed by the Additional Sessions Judge Vadodara have assailed that judgment in this appeal.

2. Facts which led to the prosecution of the accused are as under :

3. On 22nd June, 1990 when complainant of this case PSI Shri Puvar, PI Shri Rana and some police personnels were present in DCP Police Station they received information through their informant that two persons are to go with opium from Railway Station to Harni village via Salatwada on scooter bearing No. GJ-65147. PSI Shri Puvar called two Panchas and on informing them about the information drew preliminary Panchnama as they agreed to act as Panchas. They then went in a private vehicle to intercept that scooter. PSI Puvar before that made an entry of the said information in station diary and also gave a reasoned

report to PSO who entered the same as Janat Entry No. 11/1990 at 15-40 hrs. Deputy Police Commissioner (Administration) was also informed of the same. They then came near M.C. High School Salatwada Road and remained in watch in a scattered position. At that time a T.W. coloured scooter was coming from Phulbari point towards Salatwada. The same was intercepted by signal by hand, by whistle, by shouting and on being stopped it was cordoned by P.I. Shri Rana and PSI Shri Puvar by about 16-45 hrs. The said scooter bore No. GJ-6 5147. It was driven by one Dashrathbhai Govindbhai Shah and pillion riders named Bharat Shreeram Purohit. The driver was resident of Baroda, however, originally he belonged to Taluka District Banner, Rajasthan and said pillion rider also originally belonged to village Sevli Taluka Bhinmal, District Jalore, Rajasthan. Dicky of the scooter was opened by the key of the scooter itself and substance in two pieces one being round and the other being square were found in two different bags in two different plastic bags and they were in one white cotton bag. Substance was black in colour. On smell the same was felt to be opium. On inquiry from the said driver and pillion rider they had neither pass nor permit to possess the same. Necessary formalities to seize the same was carried out after taking sample therefrom. Samples were sent to the Forensic Science Laboratory. Forensic Science Laboratory after analysis found that substance to be containing segments of opium.

4. On receipt of the report from the Forensic Science Laboratory the substance having found to contain segments of opium, complaint was registered u/s 17 of the "NDPS Act". The accused pleaded not guilty and prayed to be tried. Prosecution led necessary evidence to prove the charge against the accused and after hearing the learned Advocates for the parties, learned Additional Sessions Judge found the appellant guilty u/s 17 of the "NDPS Act" and awarded sentence as referred to above. This judgment and order is under challenge in this appeal.

5. Before we deal with the merits of the case, in the light of the contentions raised by learned A.P.P. Mr. Barot, it will be necessary to deal with Criminal Misc. Application No. 353/1988 whereby appellants have prayed to allow them to lead additional evidence by production of certain documents in view of the provisions of Section 391(1) of the Code of Criminal Procedure, 1973. Though in the application, it is stated that the documents are annexed they were not annexed at the relevant time, however, learned Advocate has now produced before the Court. Documents which the learned Advocate wants to produce by way of additional evidence are certified copies of charge-sheet and Panchnamas. The question is whether this application u/s 391(1) of the Code should be allowed or not? If one refers to the evidence of Panchas P.W. 1, Exh. 12, it is clear from the cross-examination that necessary questions are put to the witness suggesting that he has been the Pancha and cited as witness in chargesheet in earlier cases. Witness has denied the same. At that stage it was the duty of the defence to confront the witness with the certified copy of the charge-sheet and or Panchnama and it appears that the counterpart of the learned Advocate has failed there. It is assumed that when the question was put to the witness

pertaining to the fact that he had been a Pancha in earlier cases necessary instructions and material must have been with the learned Advocate who represented the accused. Despite the documents being in possession (assumption of being in possession;,, the same are neither shown to the witness nor an attempt is made to produce the same. No useful purpose will be served by allowing the said documents to be produced here as witness is not available to look into the same and give necessary reply for the same Sub-section (1) of Section 391 of the Code empowers the Appellate Court to take additional evidence if felt necessary to be taken on record. In the instant case, when the said documents were required to be produced before the trial Court by way of confronting the witness with the same, the same is not done. We do not think such additional evidence is necessary in the facts of the present case. We, therefore, dismiss the said application.

6. This brings us to the merits of the appeal. The conviction is challenged substantially on two grounds, namely, (i) that the appellants were not in conscious possession and the prosecution has failed to prove that the appellant were in possession of narcotic substances and (ii) that there is a breach of mandatory requirements of Section 50 of the NDPS Act and therefore the trial is vitiated. We will deal with the second contention first, we do not detain ourselves to hold that Section 50 is a mandatory provision as held by the Supreme Court in the case of State of Punjab Vs. Balbir Singh, . The Supreme Court in that case has also held that any breach of any of the provisions which is a mandatory one vitiates the trial. In our opinion, in the facts of the present case, Section 50 is not attracted at all. If the case of the appellants was to be covered u/s 50 it was not necessary for the legislature to provide for Section 49 which reads as under :

49. Power to stop and search conveyance.- Any officer authorised u/s 42, may, if he has reason to suspect that any animal or conveyance is, or is about to be, used for the transport of any narcotic drug or psychotropic substance, in respect of which he suspects that any provision of this Act has been, or is being, or is about to be, contravened at any time, stop such animal or conveyance, or, in the case of an aircraft, compel it to land and -

(a) rummage and search the conveyance or part thereof;

(b) examine and search any goods on the animal or in the conveyance;

(c) if it becomes necessary to stop the animal or the conveyance, he may use all lawful means for stopping it and where such means fail, the animal or the conveyance may be fired upon

7. Section 50 contemplates for conditions under which search of persons shall be conducted. Section 49 as referred to above contemplates power to stop and search conveyance. Conveyance is not covered under person as has been specifically intended by the legislature. Therefore two separate provisions as to persons and conveyance are enacted in the Act. If one reads Clause (c) of Section 49, it is very clear that the legislature has not at all intended

"conveyance" to be covered under head of "person". Clause (c) of Section 49 reads : "If it becomes necessary to stop the animal or the conveyance, he may use all lawful means for stopping it and where such means fail, the animal or the conveyance may be fired upon." This is not intended by the legislature so far as the person is concerned and therefore, there is a specific provision in Section 50 of the Act which says that a person can be searched in presence of a Gazetted Officer referred therein if asked for by the accused. Person is required to be searched in further compliance of necessary provisions of search and seizure under the Code which is made applicable by Section 51 of the "NDPS Act". Thus, in our opinion, Section 50 is not attracted in the instant case.

8. Even assuming that Section 50 is applicable, in our opinion, there is no breach in the instant case, Sub-section (1) of Section 50 contemplates that when any officer duly authorised u/s 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate. In the instant case, P.W. 7 who is Police Sub-Inspector, DCB was in company of PI Shri Rana. Police Inspectors are Gazetted Officer. This court in the case of Dhanpalsingh Barunsingh Thakur and Others Vs. State of Gujarat, in para 26 has held as under:

26. Mr. Keshwani, learned counsel for the appellants, further contended that there is non-compliance of Section 50 of NDPS Act. Section 50 of NDPS Act reads as under :

50. Conditions under which search of persons shall be conducted :- (1) when any officer duly authorised u/s 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall if such person so requires, take such person without unnecessary delay to the nearest gazetted officer of any of the Departments mentioned in Section 42 or to the nearest Magistrate.

Sub-section (2) & (3) are not relevant for our purpose at this stage. Relying on this provision, Mr. Keshwani contended that in the instant case, P.W. 7 has not asked either of the accused as to whether they would like to be searched in presence of a gazetted officer or the nearest Magistrate. Section 50 refers to search by officer duly authorised u/s 42 of NDPS Act. As we have discussed earlier, the officers referred to in Section 41(2) and Section 42(1) are different officers. It is required to be "made clear that for the officers referred to in Section 41(2), who are carrying out the search, provisions of Section 50 are not attracted. P.W. 7 himself is a gazetted officer. When a gazetted officer is carrying out the search and if provisions require that he should enquire from the persons to be searched as to whether they would like to be searched in presence of gazetted officer as contended by Mr. Keshwani, in our opinion is travesty of Section 50(1). Section 50(1) contemplates faith in a gazetted officer or a Magistrate. If enquiring officer himself is a gazetted officer, can it be said that faith reposed in a gazetted officer referred to in Section 50(1) is taken away. It is

improper to say that a gazetted officer if he is carrying out the search becomes less trustworthy and is required to take the accused person to some another gazetted officer or a Magistrate. Section 50(1) makes it clear that said provisions are attracted when officer duly authorised u/s 42 has to inquire from the accused to exercise his option to be searched in presence of a gazetted officer or a Magistrate. Section 42(1) makes it clear that the officers duly empowered thereunder are not necessarily gazetted officers. For the empowered officers referred to in Section 41(2), provisions of Section 50 are not attracted. Reason is that such empowered officers are exercising power of search, seizure u/s 41(2) itself. No doubt, u/s 41(3), they are entitled to exercise powers of search, seizure u/s 42(1). Therefore, we do not find any substance in the contention raised by Mr. Keshwani that the search carried out by P.W. 7 is in contravention of the provisions of Section 50 of the Act.

9. Thus, in our opinion, firstly, this Section 50 of the "NDPS Act" is not attracted in the facts of the present case and secondly even assuming that it is attracted, the same stands complied with and there is no breach of any mandatory provisions as contended by the learned Advocate.

10. The question now is whether prosecution has proved that the accused were found in conscious possession of narcotic substance i.e. opium, in the instant case. Before we appreciate the evidence on record, it will be relevant to refer to Section 54 of the "NDPS Act" which reads as under:

54. Presumption from possession of illicit articles.- In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under Chapter IV in respect of--

- (a) any narcotic drug or psychotropic substance;
- (b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;
- (c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance; or
- (d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance, or any residue left of the materials from which any narcotic drug or psychotropic substance has been manufactured. for the possession of which he fails to account satisfactorily.

11. In view of Section 54 of the "NDPS Act" if an accused is found in possession of narcotic substance, it is presumed that he has committed an offence under Chapter IV in respect of narcotic substance for which he fails to account satisfactorily. Keeping this provision in mind we will now discuss the evidence on record to find out whether the prosecution has proved that accused are found in possession of any narcotic substance i.e. opium. When PSI Shri Puvar was in company of PI Shri Rana he was informed by his informant that the scooter No. GJ-65147 was to come with opium from railway station side and were to go to

Harni Road via Salatwada Road. PW 1 and other Panch were called. They were informed about the same and before that PSI Shri Puvar, P.W. 7, had got made necessary entry in the station diary. He has also communicated the same to his superiors in writing. In company of Panchas and other police officers, PW. 7 in company of PI Shri Rana went near Salatwada and when the concerned scooter came, the same was intercepted and searched. On search from the dicky opium was found in two packets. The same was seized in accordance with law. On inquiry it was found that the owner of the scooter was someone else. It is contended by the learned Advocate Mr. Barot that when the accused are not the owner of the scooter whatever is found from the dicky cannot be said to be in conscious possession of the persons who are found with the scooter. Mr. Barot contended that the probability that the owner might have placed the said opium in dicky cannot be ruled out. We are not concerned in these cases for the ownership of the opium. Possession is also an offence if one possesses a narcotic substance in breach of the "NDPS Act". There is no dispute to the fact that the opium found is a narcotic substance possession of which is prohibited under the "NDPS Act". Undisputedly, appellants were going on a scooter which was intercepted from the dicky of which opium was found. When they were asked about the opium they had neither pass nor permit nor any authorization to produce the same. Their defence is that they had simply borrowed a scooter and they did not know what are the contents of the dicky. In our opinion, it is fully proved that the appellants are found with scooter from the dicky of which opium is found. It is therefore presumed that appellants are in possession not only of the scooter but also the contents in the dicky which in the instant case is opium. Section 54 as referred to hereinabove makes it clear that unless satisfactory account is given for possession of opium found from the dicky of the scooter on which appellants were moving there is a presumption that accused have committed an offence under Chapter IV in respect of opium. The burden is on the appellants to prove that when they took scooter from the owner of the scooter, opium was already there in it or it is planted by someone as dicky was opened by someone. The burden is heavily on the accused. More particularly, as the dicky was found locked when the scooter was intercepted by the police. A person is presumed to be in possession of the contents of which he has a control over it. We therefore do not find any substance in the contention that prosecution has failed to prove that the appellants were not in conscious possession of the opium found from the dicky.

In the result, the appeal is liable to be dismissed and is hereby dismissed.