
(2002) 04 GUJ CK 0016
In the Gujarat High Court
Case No : Criminal Appeal No. 1140 of 1997

Gani Mamad Bhagad Vagher	Vs	APPELLANT
State of Gujarat		RESPONDENT

Date of Decision : 15-04-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 374(1)
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 22

Citation : (2003) 87 ECC 57 : (2002) 4 GLR 3189

Hon'ble Judges : R.R. Tripathi, J;K.R. Vyas, J

Bench : Division Bench

Advocate : P.S. Champaneri, for the Appellant; K.T. Dave, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Ravi R. Tripathi, J.—This appeal is filed u/s 374(1) of the Code of Criminal Procedure, 1973 directed against the Judgment and order dated 30.9.1997 by the learned Additional Sessions Judge, Jamnagar, in Special Sessions Case No. 5 of 1997 by which the appellant is convicted u/s 22 of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "NDPS Act") (conviction is to be read to be u/s 20 of the NDPS Act) and punished him rigorous imprisonment for 10 years and fine of Rs. 1 lakh, in default simple imprisonment for one year.

2. On 20.1.1997, between 9.50 to 11.30 pm, the complainant of this case raided the residential premises of accused No. 1 situated in Juma Masjid Chowk at Bedi area of District Jamnagar and recovered 168 grams of Charas from the room, of Accused No. 1, from below the mattress and the pillow on the cot, which was alleged to have been purchased by Accused No. 1 from Accused No. 2. Both the accused had thus, indulged in purchase and sale of prohibited charas. Accused No. 1 keeping the said charas in his possession and by helping each other committed offence u/s 20 read with Section 29 of the NDPS Act. Further that

Accused No. 1 having kept the said charas in his possession for either personal use or to sell or for trading and. Accused No. 2 having helped Accused No. 1 committed offence u/s 27 read with Section 29 of the NDPS Act.

2.1 On 20.1.1997 the complainant, PSI Mr. G.D. Rajput was present at City "B" Division Police Station, Jamnagar. At that time, LCB PI Mr. B.M. Jadeja and P.I. Mr. B.K. Jadeja of task force, Jamnagar, had come and informed that in area under the jurisdiction of Jamnagar. "A" Division Police Station, contraband charas is seized and accused Abdul Sattar Abdul Karim is arrested under C.R. No. II-29 of 1997 and during interrogation, the said accused Abdul Sattar Abdul. Karim, had divulged information that some quantity of charas he (Accused No. 1) has sold to Gani Mamad Bhagad of Jamnagar and, therefore, a raid is required to be carried out at the place of said Gani Mamad Bhagad. Consequently, the P.I. of Jamnagar City "B" Division Police Station drew a resolution u/s 42(1) of the NDPS Act and called the panchas for the raid who were explained about the same. A preliminary Panchnama was. drawn and thereafter the complainant of this case, with P.I. Mr., B.K. Charan of "B" Division Police Station, Jamnagar alongwith his staff members, Panchas had started in a Government vehicle to go to the place of Gani Mamad Bhagad.

2.2. At about 9.50 p.m. at Bedi in Azad Chowk they stopped their Government vehicle and went on foot via Chandi Chowk and reached at the residence of Gani Mamad Bhagad, P.I. Mr. B.K. Charan in presence of Panchas instructed Shri G.D. Rajput, PSI to call Gani Mamad Bhagad. On knocking the door, a person came out and on inquiry he disclosed his name to be Gani Mamad Bhagad. P.I. Mr. Charan introduced himself, the complainant, the Police staff and the Panchas. Thereafter, P.I. Mr. B.K. Charan informed said Gani Mamad Bhagad that his house is required to be searched in presence of the Panchas as there is information that he is possessing contraband charas. P.I. Mr. Charan also informed he Accused No. 1 that if he wants the search to be carried out in presence of any other Gazetted Officer or any Magistrate he may opt for the same. Accused No. 1, Gani Mamad Bhagad, in presence of the Panchas informed that he ,will be satisfied with the search by the Police party. P.I. Mr. Charan had given this option in writing and his signature was obtained on a copy and thereafter search was carried out. On searching the premises having northern face door, from the cot below the mattress and the pillow, a handkerchief, containing a plastic bag was found in which black substance was found. On smelling it was found to be charas. There were seven pieces varying is size having no regular shape. Police Constable Anil Kumar was sent to call a man with weighing scale to weigh the substance. Police constable Anil Kumar brought one Jayesh Jethalal Soni alongwith scale and measurements and on weighing the substance it was 168 grams. It was kept in a plastic bag on which a slip bearing the signatures of Panchas and the Police Officer was placed. Then it was kept in a brown paper and was tied with a string. Then it was properly sealed affixing seal of "Jamnagar City PI" at four places. A signature seizure memo was prepared and served to Accused No. 1 and his signature was obtained on a copy. Accused No. 1 was communicated the grounds

of arrest by PI Mr. Charan in writing and his signature was obtained on a copy of the said communication. After preparing detailed Panchanama, the complainant, PSI Mr. G.D. Rajput filed, the complaint in presence of PI Mr. Charan which was registered by PSO. Further, investigation was handed over to Mr. D.K. Sanghani, PSI,after recording the statements of the witnesses and sending the sample to the Forensic Science Laboratory, Junagadh for analysis. As it was found that Accused No. 2 Abdul Sattar Abdul Karim was also involved in this case, he was shown to have been arrested as he was already under arrest in C.R. No. 29 of 1997. On receiving the report from the Forensic Science Laboratory Junagadh and having found that the substance recovered from the place of Accused No. 1 was charas, the appellant was charge-sheeted for the offence punishable under Sections 22 & 29 of the NDPS Act.

3. The learned Judge framed charge at Exh. 6 against the appellant. The charge was read over and explained to the appellant, who pleaded "not guilty" to the same and, therefore, came to be tried. The prosecution has examined Gulabsinh Dhaniram Rajput (G.D. Rajput), as PW. 1, Exh. 10, who is also the complainant in the present case; Narubha Rupsinh, PW. 2, Exh. 13, a Panch witness to the Panchanama, Exh. 14; Jayantilal Bhikhubhai, PW.3, Exh. 15, a Panch witness to Panchnama, Exh. 16, Jaysukh Ramaniklal, P.W. 4, Exh. 17, another Panch witness; Jayesh Jethalal, PW. 5, Exh. 18, the person who was called to weigh the substance; Ghanshyamsinh Gajubha, PW. 6, Exh. 20, who was PSO at City "B" Division Police Station, Jamnagar at the relevant time; Ghanshyamsinh Chanubha, PW. 7, Exh. 24, who was handed over the sample packet to be delivered at the Forensic Science Laboratory; Mr. B.K. Charan, PW. 8, Exh. 27, who was PI at City "B" Division Police Station, Jamnagar on 20.1.1997. Hiren Renumal Taktani, PW. 9, Exh.

35. one of the Panch to Panchnama, Exh. 14; Hasam Kasam, PW. 10, Exh.

36. who was examined to establish that the house where raid was carried out was sold by this witness to appellant, Accused No. 1; Babulal Kanjibhai Sanghani, PW. 11, Exh. 38, the Investigating Officer in the matter.

4. The prosecution had also produced documentary evidence, such as, the complaint of C.R. No. 37 of 1997; Panchnama, Exh. 14, Panchnama handing over the Muddamal charas packet to the PSO, Exh. 16; intimation sent to the Deputy Supdt. of Police, Jamnagar, Exh. 33; intimation given to appellant, Accused No. 1 about the search Exh. 28; intimation given to the appellant, accused about his arrest, Exh. 30; seizure memo, Exh. 29; forwarding letter sending sample muddamal to the Forensic Science Laboratory, Exh. 39; certificate of authority, Exh. 40; report sent by Forensic Science Laboratory; statement showing the details of muddamal sent to the Forensic Science Laboratory, Junagadh, Exh. 41, receipt issued by the Forensic Science Laboratory, Exh. 42; report by the Forensic Science Laboratory, Exh. 43; intimation sent to the Deputy Supdt of Police about the incident, Exh. 45; copy of FIR being C.R. No. 29 of 1997, Exh. 46; xerox copy of the papers relating to sale of house to appellant, Accused No.

1, Exh. 37; and the certificate issued by the person who weighed the muddamal, Exh. 19. After recording the evidence of the prosecution witnesses, the learned Judge explained the appellant the circumstances appearing against him in the evidence of the prosecution witnesses. Thereafter, the statement as required by Section 313 of the Code of Criminal Procedure was recorded. The appellant denied the case of the prosecution and stated that, "he has no house in Juma Masjid Chowk and that he was residing in Azad Chowk and that false case is filed against him".

5. On appreciation of evidence adduced by the prosecution the learned Judge held that it was proved by the prosecution beyond reasonable doubt that the appellant was found in possession of 168 grams of charas and that he had committed offence punishable u/s 22 of the NDPS Act. The learned Judge concluded that it was proved by the prosecution that mandatory provisions of the NDPS Act were complied with and that the appellant could not satisfy the Court that breach of any mandatory provision of the NDPS Act was committed by the prosecution. After holding that the appellant had committed offence punishable u/s 22 of the NDPS Act, the appellant was heard regarding punishment as required u/s 235(2) of the Code of Criminal Procedure. It was pleaded by Accused No. 1 that he is aged 28 years and that he is the only earning member in his family, he has four children, an aged mother and wife, the appellant belongs to labour class and is poor. Taking into consideration the economic and social conditions, this being his first offence, he should be awarded least punishment. The learned Judge thereafter punished the appellant as mentioned earlier by Judgment and order dated 30.9.1997,

6. Learned counsel for the appellant had fairly submitted that so far as the evidence on record is concerned there is no dispute that the substance found was analysed to be charas a prohibited substance under the NDPS Act and that from the evidence he will not be able to contend and satisfy the Court that there was breach of any mandatory provisions committed. He submitted that as stated by the appellant in his statement u/s 313 of the Code of Criminal Procedure, the appellant was not having a house in Juma Masjid Chowk and that the appellant was residing in Azad Chowk and in support of that plea he had produced documentary evidence with an application. He had produced a xerox copy of the family ration card bearing No. 1750248, a copy of production report in FIR bearing C.R. No. II-29 of 1997 of City "A" Division Police Station, a copy of remand application made in Jamnagar City "A" Division Police Station in C.R. No. II-29 of 1997.

7. Learned advocate for the appellant submitted that from these documents it is clear that the Police Officers had not received any information disclosing the name of the appellant and that the appellant is falsely implicated in the offence. Except these two contentions, no other contention is urged by the learned advocate for the appellant.

8. We have examined the evidence in detail and are satisfied that the learned

Judge is right in coming to the conclusion that the substances found at the place of the appellant was contraband charas and that there is no breach of any of the mandatory provisions of the Act.

9. From the evidence of Mr. G.D. Rajput, the complainant and Mr. B.K. Charan, PW. 8, Exh. 28, P.I., Jamnagar City "B" Division Police Station and the evidence in the form of Panchnama, it is clear that P.I. Mr. B.K. Charan had received information from P.I. Mr. B.M. Jadeja of LCB, who was accompanied by PSI Mr. P.K. Jadeja of Jamnagar Task Force, and had informed. P.I. Mr. B.K. Charan in presence of the complainant that the accused of C.R. No. II-29/97 of City "A" Division Police Station, one Abdul Sattar Abdul Karim and others are arrested and that a large quantity of charas is seized from them and that the accused (Abdul Sattar Abdul Karim) informed that some charas is sold to Gani Mamad Bhagad, resident of Bedi, the present appellant. On the basis of that information, P.I. Mr. B.K. Charan arranged a raid and asked the complainant, Police Constables-Arvind Kumar and Yogesh Kumar, Head Constable Mahipatsinh, Police Constable Bharatsinh, etc, to be a part of the raiding party. Two Panchas were called and after drawing Preliminary Panchnama between 9.30 to 9.50 p.m., in the Government vehicle bearing No. P-31 which was searched before being occupied. The members of the raiding party and the Panchas searched each other. They went to Azad Chowk via Irwin Hospital Road, K.V. Road. Railway Crossing and the slope of Bedi in Azad Chowk. They stopped the vehicle and they started on foot to reach the place of residence of the present appellant through Chandi Chowk. After reaching the place of residence of Gani Mamad Bhagad, his door was knocked and on knocking of the door, by switching on the light a person opened the door and came out. He was inquired of his name by the PI. In response to which he stated his name to be Gani Mamad Bhagad and that also stated it was his house. He was informed about the information that he is having contraband charas in his house and that his house is to be searched. He was given introduction of P.L that he is a Gazetted Officer from City "B" Division Police Station and the introduction of other members of the Police party. He was also told that if he wants the search to be carried out in presence of any Gazetted Officer or Magistrate, the same can be arranged, as the appellant responded by saying that he is satisfied if the search is carried out by the P.I., a written intimation was given to him and his signature was obtained in second copy. Thereafter, search was carried out.

9.1 P.I. Mr. B.K. Charan has deposed all these facts in his deposition at Exh. 27. The appellant stated in his statement u/s 313 of the Code of Criminal Procedure that a false case is filed against him and that he does not have any house in Juma Masjid Chowk and that he is residing in Azad Chowk and documentary evidence is produced with an application. He produced three documents. One family ration card bearing No. 1750248 as mark 8/1, a copy of production report in the matter of Jamnagar City "A" Division Police Station C.R. No. II-29 of 1997 and a copy of remand application filed in Jamnagar City "A" Division Police Station C.R. No. II-29 of 1997.

10. Xerox copy of the ration card is on record which is not incorporated in the Paper Book. We have perused the same from the original record/The document produced is a xerox copy of the family ration card bearing No. 1750248. Third page of the said document is having Clause 1, wherein the name of the card holder is to be written. This clause contains the name of Bhagad Gani Mamad, of which "Gani" is scored off and on the top of that "Haji AH Rukhiyaben1 is written. So far as Clause 2 is concerned it is for the full address with the name of village/city wherein "Bedi" is mentioned. In Sub-clause (2), "Azad Chowk, Bedi" is mentioned. In the next clause it is mentioned that there are six persons in this card. Even that is after scoring off the earlier figure "7". On the next page the names of the persons for whom the card is issued includes the name of Gani Mamad and in the next column it is mentioned "self, wherein relation is to be mentioned. Next is Hasam Gani, grand, son; Mamad Irfan, grand son; Shakila, grand daughter; Gani Jafar, grand son; and Rukiya. Next column is blank. One more name Gani Jaffar is mentioned. It is scored off. The aforesaid details do not inspire any confidence. This document cannot be looked into for any purpose much less for the purpose it is produced.

11. As against that one Hasam Kasam is examined as PW. 10, Exh. 36. whose deposition is very important for appredating the aforesaid contention raised by the appellant. The deponent has stated that he is the original resident of Bedi. He had a house in Bedi. He has sold that house to the appellant-original Accused No. 1. A writing was executed. Its possession was also handed over to Accused No. 1. At present the deponent is staying at Sachana. He has also produced a xerox copy of the writing executed between the parties, at mark 18/9. which is later on exhibited at Exh. 37. The cross examination of this witness is material because the defence is not able to get any material contradiction from the said witness. In the cross-examination he has stated that the house was that of his ancestors. The house consisted of a verandah and two rooms. Taxes were paid by the deponent. At the time when deposition was recorded the deponent was not paying taxes. He has also stated that, "It is true that light bill is still in my name". He has further deposed that, "when the deponent was to give an application, the accused restrained him and told that the accused will get the meter (light connection) transferred in his name". Further what is stated by the deponent is that, "It is not true that there is no house in my name. It is not true that I do not have any transaction with Accused No. 1." This witness has an end to the controversy which is tried to be created by Accused No. 1, namely, that he did not have any house in Juma Masjid Chowk and that he was residing at Azad Chowk. In view of the deposition of this witness and in view of the contents of Exh. 37. it is clear that the accused had a house in Juma Masjid Chowk. In view of the aforesaid evidence, the electricity bill produced at Exh. 30 loses its significance.

12. so far as the second contention raised by the learned advocate appearing for the appellant original accused is concerned, the same is found to be without any merit inasmuch as there is no reason to disbelieve the deposition of the

complainant g.d. rajput, the deposition of the other members of the raiding party and that of Mr. B.K. Charan, a police officer who had carried out the raid. The application given by PSI, Investigation Branch, City "A" Division, Jamnagar to the Chief Judicial Magistrate, Chief Court, Jamnagar is concerned, the same was never expected to have any information regarding the present case, namely, the information received or conveyed and that the raid carried out at the place of the appellant.

12.1 Learned advocate Mr. Champaneri strenuously submitted that in view of the fact that the remand application submitted by PSI, Investigation Branch, City "A" Division, Jamnagar dated 21.1.1997 to the Chief Judicial Magistrate Court, Jamnagar, does not contain an averment to the effect that the accused Abdul Sattar Abdul Karim gave the information that he had sold the contraband charas to Gani Mamad. He submitted that the learned Judge ought to have held that the case of the prosecution to the effect that P.I. Mr. B.M. Jadeja; P.I. Mr. B.K. Charan had the said information as was given by Abdul Sattar Abdul Karim is not believable. Mr. Champaneri could not explain as to whether it is necessary that PSI, who gave that remand application is expected to know the aforesaid information. Not only that it is also not expected that all the minute details should form part of the remand application. In that view of the matter only because no reference of the information is made in the remand application, the case of the prosecution does not become unbelievable. Thus, the submission is far fetched submission which this Court is not able to accept. P.I. Mr. B.K. Charan has deposed in terms along with the deposition of G.D., Rajput, the complainant of this case about the aforesaid information being passed on by P.I. Mr. B.M. Jadeja, Learned advocate Mr. Champaneri is not able to point out any good reason for which said deposition of those two officers should not be believed.

13, Mr. Champaneri, learned advocate placed reliance on the Judgment of this Court in the matter between Munnalal Mathura Prasad and Another Vs. State of Gujarat, , to contend that there must be "conscious" possession of the contraband articles "charas" Mr. Champaneri submitted that in the present case the premises were raided and at that time charas was recovered from the handkerchief lying below the mattress and pillow on the cot of the residential premises of the appellant-accused No. 1. Mr. Champaneri submitted that in the said premises accused was not the only resident, there were other members of the family. Therefore, it should be held that the accused was not in conscious possession of the contraband article-charas. We have examined the facts of the case before this Court in the aforesaid decision wherein the Investigating Officer had not even bothered to record the statement of the person residing in the adjoining bungalows in the society to establish that Accused No. 1 is residing in Bungalow No. 9 of Krishna Nagar Society. On the other hand Accused No. 1 led sufficient evidence to show that he was residing at a different place, i.e., Paramanand Chawla and the prosecution had failed to prove by leading cogent and satisfactory evidence that Accused No. 1 was the occupier of the premises raided. In such circumstances the Court; had preferred to believe the defence

version. In our case though it was contended by the appellant Accused No. 1 that he has no house in, Juma Masjid Chowk and that he is residing at Azad Chowk, it is not proved. Not only that from the deposition of Hasam Kasam, the person who sold the house to the appellant, it is clear that the appellant Accused No. 1 was in occupation of the premises. In that view of the matter said Judgment has no application to the fact of the present case.

14. Except these two contentions, no other contention is raised and pressed. The Court having found no substance in either of these two contentions, same are rejected.

15. For the foregoing reasons, the appeal fails. The conviction recorded u/s 22 of the NDPS Act is to be read as conviction u/s 20 of the Act and punishment imposed for commission of the said offence is maintained. Muddamal is to be disposed of in terms of the directions given by the learned Judge in the impugned judgment.