

(1994) 02 GUJ CK 0005
In the Gujarat High Court

Ibrahim Mohit Damanwala and Others

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 18-02-1994

Acts Referred:

Bombay Prohibition Act, 1949 — Section 66(1)(b), 66(1)(b)
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20(b)(ii),
20(b)(ii), 27(2), 27(b), 27(b)

Citation : (1995) 1 GLR 242

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

Bench : Division Bench

Judgement

K.J. Vaidya, J.—Appellant-Ibrahim Mohit Damanwala and three others who came to be tried in Sessions Case No. 81 of 1990 for the alleged offences punishable under Sees. 66(1)(b) of the Bombay Prohibition Act, 1949 and 20(b)(ii) and 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985 [for short - NDPS Act] by the learned Sessions Judge, Valsad at Navsari, were at the end of trial ordered to be convicted for the same and sentenced to undergo RI for ten years and to pay a fine of Rs. One lakh each, and in default, to undergo further RI for one year, etc. etc. No separate sentences for the offence u/s 66 (1)(b) of the Prohibition Act, and Section 29 of the NDPS Act have been passed.

2. The prosecution case as per the evidence of PSIH. Section Patil [PW-6, Exh. 58] is to the effect that when on 2-3-1990 he was in charge of Valsad City Police Station, at about 11-30 p.m. he was informed by Police Constable Vasudev Atmaram [PW-2, Exh. 26] that some persons were selling and smoking "Charas" behind the Dargah of Sheramsha Baba. On this tip-off, he requisitioned services of two Panch witnesses, viz., Mohan Ichharam [PW-1, Exh. 25] and Jemanji Kanji (not examined) and proceeded to the alleged scene of offence where he found that five persons sitting in circle were smoking "Charas". On interrogation, each one of them gave out their names as (i) Ibrahim M. Damanwala, (ii) Abbas Amir, (iii) Abdul Latif, (iv) Nasir Husain and (v) Umar Ibrahim Bhatti (absconding) respectively. Not only that but on taking search of each one of them in the

presence of aforesaid two panchas, different quantity of "Charas" - in all weighing 34 grams was recovered from them. One chalam was also recovered from the accused No. 1 which was quite hot indicating thereby that the same was used for smoking just before sometime it came to be seized. On his further search, a white piece of cloth and an amount of Rs. 270/- was recovered. Thereafter, on taking search of other accused persons, viz., Umar Ibrahim Bhatti [absconding], accused Nos. 1, 2, 3, & 4 "Charas" weighing 11.1 grams, 18.7 grams, 2.750 grams, and 1.450 grams, respectively were recovered from each one of them. Thereafter, muddamal sample was seized and sealed in presence of Panchas and the appellant accused were taken to Valsad Municipal Hospital where M.O. Ramratan H. Ramavat [PW-3, Exh. 28] examined them and took blood samples, which in turn were forwarded in "Form-B" to Forensic Science Laboratory at Surat. On receipt of report Exh. 50 to the effect that the muddamal sample was "Charas" and Chemical Analyser's Reports Exhs. 41 to 45 that the blood samples contained Chemical ingredients of "Channabis Sativa", Investigating Officer submitted Charge-sheet for the aforesaid alleged offence against the appellant accused to stand trial before the learned Sessions Judge, Valsad at Navsari.

3. At trial, the appellants pleaded not guilty and claimed to be tried counter alleging that they were falsely implicated by the police. The trial Court after duly appreciating the prosecution evidence brought on the record convicted and sentenced the appellants, as stated in detail in above para-1 of this judgment, giving rise to the present appeal.

4. Mr. A.D. Shah, the learned Advocate for the appellants submitted that the impugned judgment and order of conviction and sentence was ex-facie illegal in as much as the report of Public Analyst [Exh. 50] has no probative evidentiary value since the same does not contain the relevant data regarding the scientific tests applied while analysing the muddamal and sample. In support of this contention, Mr. Shah has relied upon decision of this Court (Coram: M/s. K.J. Vaidya & K.R. Vyas, JJ.) rendered in Criminal Appeal No. 972 of 1988, decided on 18-1-1994 Mahmad Hanif Shaikh Ibrahim Vs. State of Gujarat, . Mr. Shah further submitted that even the report of Chemical Analyser [Exhs. 41 to 45] regarding the finding of chemical ingredients of "cannabis sativa" in the blood samples cannot be read in evidence, as they too do not specifically report mat chemical ingredients found from the blood sample were "charas" and "charas" alone and noting else. Mr. Shah further submitted that the Panch - Mohan Ichharam (PW-1, Exh. 25) has not supported the prosecution case and that the prosecution has not cared to examine other Panch though available. This also, according to Mr. Shah is fatal to the prosecution. On the basis of all these submissions, Mr. Shah submitted that having regard to the comparatively small quantity of "Charas" found from the appellants, this Court should not place implicit reliance upon the interested testimony of the police witnesses who are always interested in showing some "quota work" to their credit! Mr. Shah in the alternative further submitted that in any case, if the Court is not inclined to accept the aforesaid submissions then

since the initial information with the police was regarding the sale and the consumption of "Charas", and further since the prosecution has failed to lead any evidence to substantiate the said allegation of sale, the prosecution case at the most would fall within the purview of Section 27(b)(ii) of the NDPS Act in view of small quantity of "Charas" and hot "Chalam" from their possession. Mr. Shah submitted that except the accused No. 2 Abbas Amir from whom 18.7 grams of "Charas" was allegedly recovered, the others were indisputedly in possession of less than 5 grams. According to Mr. Shah, if at all the accused can be convicted, three accused should be convicted u/s 27(b) of the NDPS Act, for which the imprisonment provided is for a term which may extend to six months or with fine or both. Mr. Shah finally urged that if this Court was ultimately inclined to accept his submission that the alleged offence so far as appellant Nos. 1, 3 & 4 are concerned, fall within the purview of Section 27 of the Act, then in view of Section 33 of the NDPS Act, benefit under the Probation of Offenders Act, 1958 should be given to them.

5. As against above, according to Mr. K.V. Shelat, the learned A.P.P. taking into consideration the well-considered judgment, no case is made out by the appellants to interfere with the impugned judgment and order of conviction and sentence passed against them. In the alternative, the learned A.P.P. further submitted that in case if this Court was ultimately inclined to accept the submissions of Mr. Shah to the effect that the appellants can be held at the most guilty for the offence of consumption of "Charas" and not for sale of the same, then in that case, as required u/s 27(2) of the NDPS Act, since the appellants have failed to discharge their burden, they are not entitled to get benefit u/s 27(b), and therefore, they should be punished for being in possession of muddamal "Charas" u/s 20(b)(ii) of the NDPS Act.

6. Having heard the learned Advocates for the respective parties at length and scanned the relevant evidence to which the attention of this Court was specifically invited to, it appears that Mr. Shah in a way is quite right when he submitted that the FSL report [Exh. 50] cannot be given any weightage as it did not contain any material data about the scientific tests applied while analysing the same. We have perused the said FSL report [Exh. 50] and find that except bare conclusion, there is nothing to show as to on basis of what tests, the particular conclusion by way of analysis was arrived at. In view of the judgment of this Court cited above by Mr. Shah, the FSL report [Exh. 50] cannot be accorded any weightage and that it has got to be discarded altogether from consideration as having no probative evidentiary value in the eye of law connecting the accused with the crime alleged against them. Similarly, Chemical Analyser's reports at Exh. 41 to 45 as regard the blood samples of each of the appellant-accused also do not specifically say that the same contained "Charas". The reports to the effect merely state that the blood samples contained chemical ingredients of "Cannabis sativa". Now the term "Cannabis sativa" standing by itself is indeed quite vague and wide in as much as it does not specifically say whether it was "Charas" or "Ganja" or "any other mixture of both." The perusal

of said reports show that the blood sample in question contained the ingredients of "Cannabis sativa" and does not specifically say that it contained "Charas". The term "Cannabis" has been defined in Section 2[iii] of the Act, which reads as under:

2. [iii] "Cannabis [Hemp]" means-

[a] Charas, that is the separated resin in whatever form, whether crude or purified, obtained from the cannabis plant and includes concentrated preparation and resin known as hashish oil or liquid hashish:

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

[c] any mixture, with or without any neutral material, of any of the above forms of cannabis or any drink prepared therefrom;

From this definition, it is indeed quite clear that "Cannabis sativa" can either be "Charas" or "Ganja" or "any other mixture", as described in Section 2[iii] (a), (b), (c) of the NDPS Act. Under these circumstances, it cannot be said with certainty, beyond doubt that what was consumed by the appellants was necessarily "charas" only and not "Ganja" or "any other mixture"! Further still, to fall within the limit of small quantity of "Charas", the quantity permitted by notification is only 5 grams! As against that, so far as "Ganja" is concerned, the small quantity permitted is 500 grams. Under these circumstances, in absence of any clear-cut report whether the blood contained "Charas" or "Ganja" or "any other mixture," it is not possible to say that the appellants necessarily and invariably had consumed "Charas" and that accordingly further, the appellant No. 2 was in possession of more than the small quantity of "Charas" permitted. Under such circumstances, the offence at the most made out on the basis of the reports Exhs. 41 to 45 of Chemical Analyser is that of the appellants having consumed some substances of "Cannabis sativa" only. What was this, in absence of any definite evidence is left to the mere allegation and the imagination! This can as well be "charas" or "ganja" or "any other mixture." In this view of the matter, it would not be safe to straightway accept the allegation that the appellants had consumed "charas" and "charas" only and nothing else and punish them accordingly.

6.1 Incidentally enough, we may make it clear that nothing has been pointed out, and accordingly, we do not know whether the Chemical Analyser could have stopped at merely saying that the blood samples of appellants contained chemical substance, viz., "Cannabis sativa" only or he could have still further analysed the same by reaching to the positive conclusion that the blood samples specifically contained "Charas"! In the present case, neither despite the opportunity available to the prosecution, it has cared to examine the Chemical Analyser in the Court to clarify nor even on the basis of some expert commentary in text-book it has been made clear to us that "Cannabis sativa" is

nothing but "Charas" only. In fact, if indeed it was possible to conclusively analyse the blood samples in question by saying that the same contained "Charas" then in that case, we would have straightway accepted and relied upon the report of Chemical Analyser Exhs. 41 to 45 despite bare and laconic report Exh. 50 of the Public Analyst, which as stated above otherwise stand to suffer probative evidentiary value in the eye of Law not connecting the appellants with "Charas". The obvious reason for the same is, immediately after their arrest, the appellants were taken to Medical Officer where their blood-samples were taken and on the basis of which only the Chemical Analyser submitted its report that it was "Charas". In view of the proximity of time/situation and the attending circumstances, there could not have been any doubt or difficulty in our way to hold that the accused were found to be in possession of "Charas" though because of the laconic report, technically it did not connect the accused with the crime alleged against them.

7. That takes us now to yet another important question, viz., that the prosecution having come forward with the definite case that the accused were reported selling "Charas" whether it has ultimately substantiated the same by leading any independent evidence and if not what is the effect of the same? Now except the stray allegation of the complainant and his colleague Police Officers that the accused were selling "Charas", the prosecution has not led any independent evidence whatsoever to prove the same. What was with the police was merely an information that the accused were selling "Charas". That is the only thing which is deposed to by the police witnesses. Now "selling" is indeed a distinct act and, therefore, separate offence which can be proved by direct disinterested evidence of the independent witnesses on the point. In fact, when the police received the information that the accused were selling "Charas" in that case, nothing prevented it to verify the same by sending one or two bogus purchasers, decoy-witness[es] to the accused to purchase the same from the concerned accused person. This was indeed the best way in which such an allegation of "sale" can be verified and ultimately proved and brought home on the basis of the evidence of the bogus purchaser[s]. It appears that this practice of sending the bogus purchaser to the suspect for whatever reason has been forgotten or discontinued by the Investigating agencies, these days,! Not that in a given case, the Court cannot draw a reasonable inference from the attending circumstances whether the concerned accused was selling "Charas", but at the same time, if the prosecution without taking a chance of leaving it to the Court to infer the same in its favour, wants to connect the accused on the charge of "selling" the narcotic drug or substance, then it is ordinarily expected of it to lead proper direct evidence on the point. Of course, it is quite true that even though the prosecution does not lead any evidence on the point of "sale", the fact remains that if the accused was found to be "in possession of muddamal article" then in that case to that much extent u/s 20(b) of the NDPS Act, he can certainly be held guilty for the same. But then in such a case where small quantity is found and the accused ultimately taken up a defence of personal

consumption and prove the same, the prosecution case to that extent on the point of "sale" may suffer. Thus, ultimately it is for the Investigating Agency and then the prosecution to decide whether it should lead specific evidence for the alleged "sale" or merely rest contended by carrying out raid without the help of bogus-purchaser/s or decoy-witness[es]. Under the circumstances, whenever there is an information with the police that person is selling narcotic drug or substance, before raiding it should avail services of Punters, i.e., bogus purchaser with a view to verify the truthfulness and genuineness of the information which on verification found to be true will become a crucial evidence against the accused on the point of selling. If this is done, so far as the selling aspect of the offence is concerned, the Court has some material to pass an order, and in case if this formality is not resorted to, then in that case, despite the allegation of selling, the prosecution would be failing for want of evidence and then what will remain only will be by way of consumption.

8. This takes us now to the contention of the learned A.P.P. viz., that the appellants could not be said to have committed offence u/s 27(b) of the NDPS Act, firstly, because that was not their defence in the present cases, and accordingly, secondly, because they have clearly failed to discharge the statutory burden upon them u/s 27(2) of the NDPS Act. Now, it is indeed quite true that it was not the defence of the accused that the muddamal in question found from them was for personal consumption. It is equally true that the appellants have not led any evidence to discharge the same as warranted u/s 27 (2) of the Act. But at the same time quite an important glaring aspect which cannot be overlooked or shut-eye at are the facts, viz., [i] that the prosecution itself has come out with a case that Mr. Patil had an information that some persons [appellant accused] were selling and smoking "charas" and pursuant to the same, [ii] when the raid was carried out the appellants were found smoking "Charas" at the scene of offence, [iii] one hot chalam was also recovered from the possession of one of the appellants at the time of raid, [iv] that they were immediately taken to the Medical Officer for collecting the blood samples which on chemical analysis were found to contain chemical ingredients of "cannabis sativa". These eloquent four circumstances standing by themselves spell out without any manner of doubt whatsoever that the appellants were smoking narcotic substance alleged to be "Charas". When such is the case, where indeed is the need for the appellant-accused to have any defence and to lead any evidence in support of the same to prove their case of "personal consumption"! The requirements of Section 27(b) is not a matter of mechanical performance, as if in substance the prosecution evidence itself projects the defence version there is no necessity to lead evidence. When such is the state of affairs, it will be indeed too technical and quite unrealistic and wooden approach to ask the accused to prove their case u/s 27(2) by leading some evidence.

9. In view of the aforesaid discussion, the impugned judgment and order of conviction and sentence has got to be altered and modified. The prosecution having failed to bring home the charge against the appellants for the alleged

offence under Sections 20 and 29 of the NDPS Act beyond doubt, to that extent they shall have to be acquitted. However, taking into consideration the overall evidence brought on record, it appears that appellants have committed offence u/s 27(b) of the NDPS Act. At this stage, Mr. Shah requested the Court to call for the record of the Probation Officer, and thereafter, benefit u/s 33 of the NDPS Act can be extended to the appellants-accused, if the said report duly certifies so. Accordingly, we direct the Probation Officer, Valsad to submit his report on 22nd February, 1994.

10. In response to our order dated 11-2-1994, the Probation Officer, Valsad is present in the Court and has submitted that he has not been able to collect the necessary information with regard to all the appellants, therefore, some further time may be granted to do the needful. The request for the time, being quite reasonable, the same is granted. Matter to stand-over to 1st March, 1994.

11. Today, the Probation Officer, Valsad has submitted his report in the open Court, which in turn is also made available to the learned Advocate appearing for the respective parties. Perused the report. Heard the learned Advocates appearing for the respective sides. Mr. Ashok Shah, the learned Advocate for the appellant submitted that the report of Probation Officer deserves to be accepted and in view of the peculiar facts and circumstances of this case, mercy may be shown to the appellants by releasing them on probation for two years.

12. Now, on perusal of the aforesaid Probation report, frankly speaking, on some counts it appears to be quite perfunctory as it contains general, superficial information which just does not help the Court in any way deciding whether the appellants deserve to be released on probation or not! It may be stated that when a Court desires to exercise its discretion under the Probation of Offenders Act, 1958, or u/s 360 of the Criminal Procedure Code, 1973, the report from the Probation Officer is called for with an idea to have a clear view about the particular characteristics of the accused, that is to say whether the particulars are such on the basis of which if the concerned convict is released on probation, the interest of the Society would not in any way be put into jeopardy ! To give a probation is a matter of discretion of the Court and this discretion has got to be exercised with all judicial responsibility, in a manner which, while entertaining the overall anxiety for the accused on the one hand, should also on the other hand take into consideration the equally important overall interests of the Society. Now in order to properly assess the same by examining two sides of the coin, the report of the Probation Officer should contain clear, dependable particulars which can assist the Court in reaching the just and proper decision. Now, in the instant case, no doubt the Probation Officer has filled-up Form No. III as prescribed under the Probation of Offenders Act, 1958. In the said Form No. III, there is a column regarding the "Behaviour and Habits" of the accused. Still however, it is indeed too difficult for this Court to imagine over as to how a Probation Officer could have given his opinion as regard the "behaviour and habits" of the accused on the basis of his solitary interview in the jail for few minutes and on some

general questions put before the friends, relatives and family members of the accused persons!! Assessment of "behaviour and habits" is not something like clicking camera and taking instant snap of the person concerned! Examining behaviour and habits of any person is something like judging the under-currents of the river which ordinarily cannot be seen on surface at the first sight! Behaviour and habits many a times appears just like ripples and waves on the surface and that unless the under current is not assessed one cannot have an exact idea of the depth! The reason is whenever an interview is taken, the accused is quite conscious and accordingly, bound to project himself as a well behaved, ideal sort of gentleman. In fact, bearing few exceptions, ordinarily no person is ever ready to show his real face which remains always hidden beneath the deceptive mask of the painted culture which he is wearing for the social consumption!! Under such circumstances, if the Probation Officer is to submit a real report observing by way of verification the "behaviour and habits" of the convict concerned, that can be done only and only if for some reasonable time he [i] either from a distance watches the "behaviour and habits" of the accused and take a note of the same, [ii] thereafter collect report about the same from teacher, employer under whom he had studied/ worked and/or [iii] family members, friends and relatives, [iv] when the accused is in jail, his characteristics about his behaviour and habits can be gathered from the co-prisoners as well as from the Welfare Officer of the jail and by examining the jail report, case-history, etc., etc., and [v] thereafter, carefully study the same, prepare report for the Court. Out of the aforesaid manner, the first is the real beginning on which "behaviour and habits" of the concerned accused can be properly traced. In other words, if on some loose off-hand information based on rough and ready first-hand verification of the same by the concerned Probation Officer, the probation report just loses all its credibility to command the respect of Court. Such mechanical compliance of the duty in preparing the report by collecting item-wise material have indeed no throb, heart-beats or pulsation indicating any life in it! In this view of the matter, it could be easily seen that this particular column of "Behaviour and Habits" is not an idle formality on a mechanical proforma! At me cost of repetition, it may be stated that unless this Court is satisfied that the report of the Probation Officer regarding the "Behaviour and Habits" of the accused is studied one and not formal from which it could be reasonably gathered that if the benefit of probation is extended to the appellant-accused they will not abuse the same to the disadvantage of the Society, it would not be proper to grant the probation, For these reasons, from die remarks submitted by the Probation Officer against the column "Behaviour and Habits" regarding the appellants, it is indeed not possible to accept the same to extend the benefit of probation u/s 33 of the NDPS Act. Still however, taking into consideration the other facts and circumstances of the case available from the particulars furnished in the said report, such as [i] None of the appellant accused have any criminal antecedents; [ii] that all the appellants are convicted for the offence u/s 27(b)(2) of the NDPS Act, which is meant for consumption of narcotic substance for the first time; [iii] that they have already undergone the period of

imprisonment for two months and 10 days, out of the punishment prescribed for the said offence, which may extend to six months or with fine or with both; [iv] that the appellant No. 1 is hailing from a respectable family, [v] that the appellant No. 2 and his wife both are poor, handicap persons with practically no source of permanent income, [vi] that the appellant No. 4 is also poor and was at the relevant point of time only 19 years of age, we think that the ends of justice would quite meet with if they are ordered to undergo sentence of imprisonment already undergone and in addition to pay some more amount of fine. Out of the four appellants, it has been reported by the Probation Officer that the appellant No. 1 was serving as a Tailor in London and was drawing 1000 dollars per week. So far as the appellants Nos. 2, 3 & 4 are concerned, it has been reported by the Probation Officer that they are quite poor having no permanent source of income. Taking into consideration the undisputed financial capacity of the appellants, we feel that the ends of justice would be fully met, if the appellant No. 1 is ordered to pay a fine of Rs. 25,000/- as ultimately suggested by Mr. Ashok Shah, the learned Advocate for the appellants. So far as rest of the appellants are concerned, to direct them to pay a fine would be hitting them below the belt and sending them to jail for non-payment of the same, and that would be punishing them for poverty.

13. In the result, this appeal is partly allowed. The impugned order of conviction and sentence passed by the trial Court for the alleged offence punishable u/s 20(b) of the NDPS Act is ordered to be quashed and set aside, and in its place, the appellants are convicted for the offence punishable u/s 27(b) of the NDPS Act. The appellants are accordingly ordered to undergo sentence of imprisonment already undergone. The appellants are ordered to be released forthwith unless their presence in the jail is necessary in connection with any other offence. So far as the fine aspect is concerned, the appellant No. 1 - Ibrahim Mohit Damanwala is ordered to pay a fine of Rs. 25,000/- on or before 10-3-1993 before the Sessions Court, Valsad at Navsari, and in default, to undergo RI for one and half month. So far as rest of the three appellants are concerned, no orders regarding the fine is passed. Direct service permitted.