

(2003) 12 GUJ CK 0020

In the Gujarat High Court

Case No : Criminal Appeal No"s. 413, 462, 463, 555 and 672 of 1999

Iqbalkhan Ayubkhan Pathan

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 19-12-2003

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 374
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 29, 42, 42(1), 50

Citation : (2003) 12 GUJ CK 0020

Hon'ble Judges : K.R. Vyas, J;A.L. Dave, J

Bench : Division Bench

Advocate : E.E. Saiyed in Criminal Appeal No. 413 of 1999, M.M. Tirmizi in Criminal Appeal No. 462 of 1999, for the Appellant; I.M. Pandya, APP for Respondent No. 1 in Criminal Appeal No. 413 of 1999 and I.M. Pandya, APP for Respondent No. 1 in Criminal Appeal No. 462 of 1999, for the Respondent

Final Decision : Dismissed

Judgement

Kshitij R. Vyas, J.—The appellants (original accused nos. 1 to 5) of Sessions Case No.117 of 1998 have filed these appeals u/s 374 of the Code of Criminal Procedure against the common judgment and order dated 10.3.1999 passed by the learned Addl. City Sessions Judge, Court No.10, Ahmedabad convicting accused for offences punishable under sections 20(b)(ii) read with section 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 and sentencing each of the accused to suffer R.I. for ten years and to pay a fine of Rs. 1 lac, in default, to undergo further R.I. for one year. It may be stated that Firozabibi who is shown as accused no.6 in the judgment, is the accused in Sessions Case No. 321 of 1998. Both the Sessions Cases were tried together and by common judgment, the said Firozabibi was acquitted.

2. The facts giving rise to the prosecution case may be briefly stated as under:

On 12.1.1998 at about 23.55 hours, Raisinh Shivubha Gohil, who at the

relevant time was serving as Police Inspector, Dariapur Police Station, received written information from Police Constable Balvantsinh. He entered the said information in Station Diary Ex.60 vide Item No. 29. He contacted Assistant Commissioner of Police through mobile and conveyed the information received by him. The Asstt. Commissioner of Police Mr. Sadhwani informed him that he was coming at the police station. In the meantime, PI Gohil prepared a written report and enclosed the copy of the information and kept it in a sealed cover. ACP entered the chamber of PI Gohil at about 0.5 hours. PI Gohil obtained signature of ACP in Despatch Book and handed over sealed cover to him and also made necessary entry in the Station Diary. Police Constable Surendrasinh was thereafter sent to call panchas. The panchas were thereafter read over the information received by PI Gohil. Preliminary panchanama Ex. 147 was drawn at the police station duly signed by the panchas as well as PI Gohil and ACP Mr. Sadhwani. The raiding party including panchas as well as ACP and other staff members thereafter proceeded towards Sultan Maholla. After entering into Khajuri street, they entered yellow colour building situated near electric pole. After climbing steps, they entered the room and saw six persons sitting there. They were made to sit in the same position. However, one person tried to escape from the western door leading to gallery. He jumped from the gallery and fell down on tin sheet. After causing some damage to the tin sheet, he fell down on the ground. Head Constable Rambhai and Police Constable Abdul immediately caught hold of the said person. The blood was oozing out from the head of that person. On being inquired about him, he disclosed his name to be Rameshchandra Maneklal, A5. On being inquired about the names of the persons in the room, they disclosed their Iqbalkhan, A1, Firozkhan Mahmad, A2, Aslamkhan, A3 and Abdul Hamid, A4. One boy Shahnavaaz Khan Alamkhan was also present in the room.

PI Gohil thereafter informed those persons in writing as to whether they would like to be searched in presence of a Gazetted Officer or an Executive Magistrate and obtained their signatures and the signatures of panchas on the said writing at Ex.21. All the accused were given separate copy of Ex. 21. The accused did not show any inclination to call either a Gazetted Officer or Magistrate at the time of search. Those persons were also informed about the information received by PI Gohil. The search of A5 was carried out first in point of time. From the right pocket of his pant, the raiding party recovered smoking pipe. The same was seized and thereafter wrapped in a Khakhi paper and put in a cover. The cover was thereafter closed. The slips containing signatures of PI Gohil as well as panchas were affixed by applying sealing wax bearing the name of PI Dariapur. A5 was thereafter sent to Civil Hospital by police for the purpose of treatment. From the search of A1, from his right pocket of pant, plastic bags containing brown sugar were recovered. Head Constable Mavsinh Bhimsinh was sent for calling goldsmith. On searching left pocket of pant of A1, currency notes of Rs. 1240/- were also recovered. In the meantime, goldsmith came who weighed the said plastic bags which were found to be weighing 40 gms. 500 m.gms. The

entire powder of brown sugar was thereafter taken out from the plastic bags and again weighed and it was found to be 35 gms. Thereafter, the powder was packed in a plastic bag and the same was closed and put into Khakhi cover and the same was tied with thread. The slips containing signatures of panchas as well as complainant were affixed by applying seal bearing the same description.

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Thereafter search of A3 was carried out and currency notes of Rs.200/- and a smoking pipe were recovered. They were attached under panchanama. On making search of A4, an amount of Rs. 150/- and a smoking pipe were recovered. They were also attached under panchanama. From child accused Shahnavaz, one note book and amount of Rs. 14,300/- were recovered. One white metal box containing scale, two scissors, two spoons, two other scales, 5 gram weight, coin of 25 paise, rubber tags, plastic bags, stainless steel bowl having some powder were also attached. Over and above the same, one cigarette butt, burnt silver foil, match sticks were also attached. The accused were given seizure memo. In the meantime, A5 returned from hospital after taking treatment. The raiding party thereafter went to police station. The complainant gave complaint at Ex.25. PSI was handed over complaint, report u/s 157, panchanama, muddamal and the accused. The accused were thereafter arrested. The result of the raid was sent to the higher officer. The investigation was thereafter handed over to 2nd PI Mr. M.A.Chauhan. Mr. Chauhan sent muddamal samples for analysis to FSL. After obtaining FSL report, chargesheet was filed against the accused.

3. The learned Trial Judge framed charge at Ex.2. The accused pleaded not guilty to the same and claimed to be tried.

4. The accused have come out with a defence of total denial on their involvement in the offence in question. As stated above, the learned Trial Judge, at the end of the trial, after appreciating the evidence on record, held that the prosecution has proved the charge levelled against the accused beyond reasonable doubt and convicted and sentenced the accused as stated above. Hence these appeals.

5. We have heard at length Mr. EE Saiyed, learned Advocate appearing for A1, Mr. MM Tirmizi, learned Advocate for A2 and A4, Ms.Subhadra Patel for A3 and A5 and Mr.IM Pandya, learned APP. We have also gone through the evidence on record and judgment of the trial court.

6. It is the contention of learned Advocates appearing for the appellants that the complainant has failed to follow the mandatory requirement of section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 inasmuch as joint offer to all the accused was made in writing as to whether they would like to be searched in presence of a Gazetted Officer or a Magistrate. Without getting any written answer to the offer, search was conducted. In the submission of learned advocates, the novel procedure adopted by the complainant amounts to breach of provisions of section 50 and, therefore, the entire trial is bad and illegal. Since

we have narrated the entire facts in detail from the evidence of the complainant, it is not necessary for us now to re-narrate the evidence of the complainant as well as other PWs who are the members of raiding party.

7. Ex. 21 is the written offer made by the complainant asking each of the accused as to whether they would like to be searched in presence of a Gazetted Officer or Magistrate. It is also stated therein that all the accused were at liberty to make search of police party as well as panchas. The said written offer was read over to each of the accused. The said writing is signed by complainant Mr. Gohil, ACP Mr. Sadhwani, two panchas as well as all the accused. The complainant Mr. Gohil, in his evidence, has stated that he does not remember as to whether all the accused were given individual copy or a single copy of Ex. 21. However, the fact remains that all the accused have individually signed Ex. 21. In the cross examination, Mr. Gohil has stated that all the accused declined to be searched in presence of either a Gazetted Officer or Magistrate. The complainant Mr. Gohil has explained in the cross examination that the said fact is not mentioned in Ex. 21 as all the accused had given same answer after they signed Ex. 21.

8. It is, thus, clear that the written offer was made to all the accused as to whether they would like to be searched in presence of a Gazetted Officer or Magistrate and after acknowledging the said offer, they turned down the offer orally and, therefore, naturally that fact did not form part of Ex. 21. Thus, the procedure adopted by the complainant cannot be criticised as violative of section 50 of the Act. We accordingly see no substance in the first submission advanced on behalf of the accused.

9. It was then submitted that the complainant has also committed breach of section 42(1) of the Act inasmuch as the raid was carried out between sunset and sunrise and that too, without obtaining any warrant for search and without recording reasons for the same. Learned advocates for the appellants submitted that for carrying out search between the sunset and sunrise, warrant is a must and for dispensing with the same, reasons are required to be recorded. This being a mandatory requirement of section 42(1), breach thereof, in the submission of learned advocates, would vitiate the entire search and seizure. Our attention is invited to the decision rendered by the Division Bench of this Court in the case of R.B. Rami Vs. State 2002(3) GLR 2100. True, in the said decision, this Court has taken a view that search of house carried out after sunset without recording grounds of belief that obtaining warrant or authorisation would afford opportunity of concealment, would vitiate the trial for non compliance of mandatory provisions.

In the case of Sajan Abraham Vs. State of Kerala, 2001 SC 3190, while considering section 42 of the Act, the Apex Court observed as under:

"It is true under S. 42(1), the Officer concerned, when he has reason to believe from his personal knowledge or information received from any person, he is obliged to take it down in writing if such information constitutes an offence

punishable under Chapter IV of the Act and send it forthwith to his immediate superior. In construing any facts to find, whether prosecution has complied with the mandate of any provision which is mandatory, one has to examine it with pragmatic approach. The law under the aforesaid Act being stringent to the persons involved in the field of illicit drug traffic and drug abuse, the legislature, time and again, has made some of its provisions obligatory for the prosecution to comply which the Courts have interpreted it to be mandatory. This is in order to balance the stringency for an accused by casting an obligation on the prosecution for its strict compliance. The stringency is because of the type of crime involved under it, so that no such person escapes from the clutches of law. The Court, however, while construing such provisions strictly should not interpret it so literally so as to render its compliance, impossible. However, before drawing such an inference, it should be examined with caution and circumspection. In other words, if in a case, the following of mandate strictly results in delay in trapping an accused, which may lead the accused to escape, then prosecution case should not be thrown out."

In the case before the Apex Court, Head Constable had got information only at about 7.00 p.m. that the accused person was selling injectable narcotic drug. When he was proceeding for police station to give this information to his immediate superior SI of Police, he found S.I. of Police along with his police party, who were on patrol duty coming, hence the said information was communicated there. Thereafter Superior S.I. of Police along with his police party and Head Constable immediately proceeded towards the place where the accused was standing. Had they not done so immediately, the opportunity of seizure and arrest of the accused would have been lost.

The facts of the present case are almost similar to the facts of the case of Sajan Abraham (*supra*). In the present case also, no sooner the complainant Mr. Gohil received information, he tried to contact ACP Mr. Sadhwani and after contacting him, he conveyed him the information. ACP Mr. Sadhwani immediately rushed to the police station where Mr. Gohil passed on information in a sealed cover. Immediately both of them, with the raiding party, proceeded to the spot and raided the premises. With this fact, in our opinion, the ratio laid down by the Apex Court in the case of Sajan Abraham (*supra*) is clearly applicable. In the present case also, had the raiding party not done so immediately, the opportunity of seizure and arrest of the accused would have been lost. In fact, no sooner the raiding party reached the spot, A5 did make an attempt to escape by jumping from gallery of the premises. Therefore, we are in respectful agreement with the observations of the Apex Court that the Court, while construing provisions of law, should not strictly interpret it so literally so as to render its compliance, impossible. In other words, if in a case, the following of mandate strictly results in delay in trapping an accused, which may lead the accused to escape, then the prosecution case should not be thrown out. Considering the facts and circumstances of the present case, in our opinion, the complainant Mr. Gohil was justified in raiding the premises without following requirement of

section 42(1) of the Act. The Division Bench of this Court in the case of RB Rami (supra), has while dealing with the case, not considered the matter from this angle and especially when the decision of Sajan Abraham (supra) was not cited before it. In any case, as the law on this point is clearly explained by the Apex Court in Sajan Abraham (supra), it is not necessary to discuss the point any further.

We, therefore, see no merit in the second submission also.

10. It was then submitted that as the only panch witness Pinakin, PW 1 has not supported the prosecution case, in absence of any independent evidence, no reliance can be placed on the sole evidence of the complainant. It is true that the panch witness Pinakin has not supported the prosecution and was declared hostile. However, the seizure of brown sugar and charas cannot be doubted merely because the raid was carried out by police. The complainant Mr. Gohil has acted on the basis of information received by him and followed the due procedure of law, by conveying the said information to the higher officer and by keeping the higher officer, namely ACP Mr. Sadhwani present, as a member of the raiding party at the time of raid. Not only that, on the basis of the information, the raiding party, in fact, successfully carried out the operation by seizing substantial quantity of brown sugar and charas from the accused. Nothing is shown to us that there was any animosity of the accused with the complainant or with any other member of the raiding party. In view of this, there is no reason for us to disbelieve the evidence of the complainant and other prosecution witnesses. We, therefore, see no merit even in this submission too.

11. On behalf of A3, A4 and A5, it is submitted that since no brown sugar or charas is recovered from their possession and only smoking pipe and some currency notes are recovered from them, they could not have been convicted for the offence under the NDPS Act. We see no substance in this submission. From the FSL Report Ex.39, chemical analysis indicated traces of Morphine, Codeine, Acetone, Thiofentanyl, Narcodeine and Methaqualone from smoking pipes seized from A3 to A5. A3 to A5 have not come out with a case that the consumption of psychotropic substances or narcotic drugs was for their own personal use.

12. The aforesaid discussion would lead us to the conclusion that there is no substance in these appeals. Consequently, the judgment and order of conviction and sentence passed by the learned Trial Judge is confirmed. Appeals accordingly stand dismissed.