

(2002) 04 GUJ CK 0039
In the Gujarat High Court
Case No : Criminal Appeal No. 451 of 1998

Kanubhai Khodabhai Patel

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 22-04-2002

Acts Referred:

Bombay Prohibition Act, 1949 — Section 66B, 67A
Criminal Procedure Code, 1973 (CrPC) — Section 374(2)
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 17, 20,
42(1), 42(2), 43

Citation : (2002) 4 GLR 3660

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

Bench : Division Bench

Advocate : Roopa Sreedhar, for Roopa Sreedhar and K.B. Pande, for the Appellant; H.H. Patel, APP, for the Respondent

Final Decision : Allowed

Judgement

Ravi R.Tripathi, J.—This appeal is filed u/s 374(2) of the Code of Criminal Procedure, 1973 against the judgement and order dated 26th May, 1998 rendered by the learned Additional Sessions Judge, Nadiad, in Special NDPS Case No. 125 of 1992, by which the appellant is convicted u/s 17 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' for short) and punished with R.I. for 10 years and a fine of Rs. 1 lac (Rupees One lac Only), in default to undergo S.I. for 3 months.

2. In the year 1991, Mr. K.S. Savani, Police Sub Inspector of Task Force, was discharging his duties at Kheda (North). On 05/11/1991, he was in patrolling. During patrolling, when he was near Piplag Chokdi on Dabhan Highway, on his reaching at Dumral Chokdi, he received an information that in the 'Sim' of Village Dumral, Kanubhai Khodabhai Patel of Village Dumral, is in possession of contraband opium and he is selling the same. The PSI, therefore, called two panchas, who expressed their willingness to be the panch witnesses. After having inter se search of each other, they reached to the field of Kanubhai Khodabhai in

the 'Sim' of Village Dumral. On raiding the place, in presence of the panchas, one person tried to run away, but he was caught and on enquiry, he disclosed his name in the presence of panchas, to be Kanubhai Khodabhai. He was sitting on a cot. On searching that place and on personal search of Kanubhai, total 32 packets of opium were found, of which two were of large size and thirty were of small size. All these packets were on the cot, where Kanubhai was sitting. On personal search of Kanubhai, currency notes of Rs.114=00 of various denominations were found. Weighing scale and measurements of 100 gms., 50 gms. and two of 20 gms. were found. Kanubhai was asked as to whether he wish to keep any superior officer or any other officer present while carrying out Panchnama. The accused-Kanubhai Khodabhai declined. The opium found in presence of panchas weighing 420 gms. was seized along with other articles. The same was kept in a plastic bag with a slip containing signatures of the panchas. The same was sealed and taken in custody. The seal applied on it was "Police Sub Inspector Task Force, Kheda". After completing the panchnama, the police party went to Village Dumral, where the residential house of the accused-Kanubhai Khodabhai was searched, but nothing objectionable was found from the house. The police party, then, proceeded from Village Dumral to Nadiad Rural Police Station. There the Police Officer, Mr. K.S. Savani, filed his complaint against Kanubhai Khodabhai. It was registered as Nadiad Rural Prohibition Crime Register No. 276 of 1991 u/s 66B 67A of the Bombay Prohibition Act and Section 20 of the NDPS Act. The Police Officer took possession of muddamal and also the investigation of the case. The Police Officer sought remand of the accused for further muddamal and information. On expiry of the remand period, the accused was handed over in judicial custody. The Police Officer prepared a forwarding note for sending muddamal to FSL and sent that note to the Divisional Officer, Nadiad. On receipt of the necessary certificate from him, the muddamal was sent to the Forensic Science Laboratory (FSL), Ahmedabad with Police Constable, Hajaji Dhulaji on 28/11/1991. On receipt of the FSL Report and on completion of the investigation, the appellant was chargesheeted for the offence punishable u/s 17 read with Section 22 of the NDPS Act.

3. The learned Judge framed charge against the appellant for the offences punishable u/s 17 read with Section 22 of the NDPS Act. The charge was read over and explained to the appellant, who pleaded not guilty to the same and stated that he is falsely implicated and claimed to be tried.

4. The prosecution, therefore, examined Sureshbhai Manubhai Patel, PW-1, Exh.10; Dharmesh Jayantibhai Patel, PW-2, Exh. 12; Naranbhai Bhagaji, PW-3, Exh.15; Maniben Khengarbhai, PW-4, Exh.17; Hajaji Dhulaji Parmar, PW-5, Exh.20; Aatabhai Poonjabhai, PW-6, Exh.26; and, Kanaiyalal Shyamlalbai Savani, PW-7, Exh.28.

5. The prosecution also produced documentary evidence, namely, (i) Exh.11, slip containing signatures of the panchas; (ii) Exh.13, panchnama; (iii) Exh. 18, report of the Police Sub Inspector, whereby the investigation was handed over to

Shri Savani; (iv) Exh. 21, forwarding note of Muddamal; (v) Exh. 22, a receipt as a token of having received a sealed parcel; (vi) Exh.23, a letter from FSL; (vii) Exh. 24, a report of FSL; (viii) Exh. 25, a report of Narcotic Division; (ix) Exh. 27, Abstracts of muddamal register; (x) Exh.29, complaint; (xi) Exh.30, yadi addressed to the Executive Magistrate; and, (xii) Exh.31, copy of the wireless message sent to the Divisional Police Officer.

6. After recording of evidence of the prosecution witnesses was over, the learned Additional Sessions Judge explained to the appellant the circumstances appearing against him in the evidence of the prosecution witness and recorded his statement, as required u/s 313 of the Criminal Procedure Code. In his statement, the appellant denied the case of the prosecution, but did not lead any evidence in support of his defence that the case of the prosecution was false. The appellant submitted that he was falsely implicated in the case and, therefore, he should be acquitted.

7. On appreciation of evidence adduced by the prosecution, the learned Additional Sessions Judge held that it was proved by the prosecution beyond reasonable doubt that the appellant was found in possession of 420 gms. of opium for which he did not possess any pass or permit and has, thus, committed an offence punishable u/s 17 of the NDPS Act. The learned Additional Sessions Judge concluded that it was proved by the prosecution that mandatory provisions contained in the NDPS Act were complied with and the appellant-accused could not satisfy the Court that breach of any mandatory provision of the NDPS Act was committed. After holding that the appellant had committed an offence punishable u/s 17 of the NDPS Act, the appellant was heard regarding punishment, as required u/s 235(2) of the Criminal Procedure Code. The accused stated that his advocate will make the submissions. After hearing the submissions made by the learned Advocate appearing for the accused, the learned Judge punished the appellant as mentioned earlier by judgement dated 26th May, 1998. Being aggrieved of which, the present appeal is filed.

8. Ms. Roopa Sreedhar for Mr. B.S. Patel, who appeared for Mr. K.B. Pande, the learned Advocate appearing for the appellant, submitted that in the present case, there is a breach of Section 42(1) and also Section 42(2) of the NDPS Act. She submitted that u/s 42, when any officer, who is empowered in this behalf by general or special order of the State Government, is acting on any information given by any person, such information is to be taken down in writing. She submitted that in the present case, Mr. K.S. Savani, Police Sub Inspector of Task Force, Kheda, who received the information when he was near Dumral Chokdi, has not taken down such information in writing and, therefore, there is a clear violation of the requirement provided u/s 42(1) of the NDPS Act.

9. The learned Advocate submitted that there is also a violation of provisions of Sub.Section-2 of Section 42 under which an officer who has taken down any information in writing under Sub.Section 1 of Section 42 is under an obligation to forthwith sent a copy thereof to his immediate official superior. She submitted

that in the present case, the officer concerned, who received the information and while acting on the basis of that information by raiding the field of the appellant-original accused, did not take down the information in writing nor he sent a copy thereof to his immediate official superior.

10. The learned Advocate for the appellant invited the attention of the Court to the deposition of the said officer, who was examined as PW-7 at Exh. 28, wherein he has stated that, "While we reached Dumral Chokdi, information was received". In his cross examination, he has stated that, "It is true that I did not make any note of the information received by me." So far as sending of the said information to his immediate official superior is concerned, neither in the chief, the officer has deposed anything nor there is any cross on the point. The learned Advocate submitted that from the aforesaid facts, it is clear that there is non-compliance of Sub-Section (1) of Section 42 and so far as Sub-Section (2) of Section 42 is concerned, it can be inferred that the officer concerned did not comply with the requirement of Sub-Section 2 of Section 42 also, which are mandatory in character.

11. The learned Advocate also submitted that so far as the requirement of Section 50(1) is concerned, whereby an officer who is about to search any person under the provisions of the NDPS Act, he is under an obligation to 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, if such person so desires. She submitted that now it is a well settled position of law that the words, "if such person so requires" are interpreted to the effect that the officer has to acquaint the person, who is subjected to search, that he has a right to get search in presence of a Gazetted Officer or in presence of a Magistrate. The learned advocate submitted that from the deposition of the officer concerned, it is clear that before the raid was carried out and before the appellant-original accused was searched on his person, during which currency notes of various denominations totaling to Rs. 114 were recovered, he was not conveyed that, "if he wishes, he can be taken to a Gazetted Officer or a Magistrate". She also submitted that stating at a later stage that if the appellant-accused wants any higher officer or any other officer to be present while making panchnama, is no compliance of Section 50(1).

12. She also submitted that so far as muddamal is concerned, in the present case, after having raided and completed the panchnama at the field of the accused, the officer went to the residential house of the accused in Village Dumral, where nothing objectionable was found; he went to Nadiad Rural Police Station. At Nadiad Rural Police Station, the Police Officer filed a complaint against the accused and thereafter, he obtained muddamal packets along with the investigation of the case. As is stated by the officer, he kept that muddamal with him and forwarded it to FSL only on 28.11.1991, that is, after 23 days. She submitted that, as is revealed in the cross examination, during this period, the officer concerned was also in possession of the seal which was applied on the

muddamal. She submitted that this assumes significance in view of the fact revealed by the officer in his cross examination that though the muddamal was received in sealed condition by FSL, they found only 31 packets of contraband substance. There were only 31 packets when opened in the Court, (Muddamal Article no.1 there were only 31 packets). The Police Officer has deposed that he had sent 32 articles. She submitted that the weight of the muddamal, as stated by the Police Officer and as stated by the FSL in its report, are not the same, there is difference between the two.

13. We heard learned Additional Public Prosecutor, Mr. H.H. Patel. His submissions have no merits. We have examined the evidence on record. Taking the last contention first, so far as the FSL Report is concerned, it is true that it is stated in the report that, "Exh. Mark 1 to 31 contained opium having 0.40% weight/weight Morphine Anhydrous."

14. So far as the first contention regarding breach of Section 42(1) and 42(2) is concerned, as the evidence stands, the Police Sub Inspector, K.S. Savani, PW-1, Exh.28, in the chief, has stated that he received the information while he was at Dumral Chokdi. Thereafter, he called two panchas, who expressed their willingness to remain as panch witnesses. Panch Witnesses and the police personnel inter se searched each other. Pursuant to the information, they reached the field of Kanubhai Khodabhai Patel (appellant-accused) in the 'Sim' of Village Dumral. The officer concerned has not stated in his chief examination that he recorded the information in writing on receipt of the same. It was suggested by Mr. H.H. Patel, the learned APP, that it may be a lapse on the part of the officer in deposing before the Court, but then the said submission regarding a lapse on the part of the officer, cannot be accepted in view of the fact that in the cross examination, it is specifically stated that, "It is true that I did not record the information received by me". It is also clear from the evidence of the said officer, that he did not send any such information to his immediate official superior. Mr. H.H. Patel, learned APP, submitted that there is a writing on record at Exh.30, which is addressed to the Executive Magistrate, Nadiad, and it is signed by the Police Sub Inspector, Task Force, Kheda (North), but, then, it is the case of the deponent himself that the said writing was not sent to the Executive Magistrate because the appellant-accused had declined for being searched in presence of any higher officer or Magistrate.

15. So far as Exh.31 is concerned, it is a writing by the concerned Police Sub Inspector, Mr. K.M. Savani, addressed to the Divisional Police Officer, Nadiad, dated 5th November, 1991. According to the deponent, Mr. Savani, the said intimation was sent to the District Police Officer, Kheda (North) by a wireless set. On reading the text, it is clear that the said intimation is only regarding the arrest being caused of the appellant-accused and that the investigation is being conducted by the deponent himself and that the accused is in the custody of Nadiad Rural Police. This intimation cannot amount to compliance of Section 42(2) inasmuch as u/s 42(2), the information received by the Police Officer taken

down in writing, is to be forwarded, forthwith to his immediate official superior. The intimation, Exh.31, is an intimation informing the completion of the raid, arrest of the accused and custody of the accused being with the Nadiad Rural Police.

It is equally important to note that though it was pointed out to the Police Officer during his cross examination that in the panchnama, there is a mention of 32 packets, Muddamal Article 1 before the Court, contains only 31 packets and the FSL Report, which is on record, at Exhs. 23, 24 and 25, also suggests that only 31 articles were analysed by the FSL. It is also pointed out to the officer that from the papers of the FSL, it is clear that FSL had received only 31 articles. The police officer is not in a position to render any explanation worth name. If 32 packets were sealed while drawing the panchnama and the same were kept in a sealed condition, which were forwarded to FSL, how does FSL receive one packet less? In fact, the Police Officer has deposed that he handed over the muddamal to the Police Station Officer of Nadiad Rural Police Station, but thereafter, he obtained the muddamal along with the investigation of the case and he kept the same with him for 23 days and during this time, the seal affixed on the muddamal was also in his possession.

16. The learned Additional Public Prosecutor, strenuously submitted that the independent panch witness has supported the case of the prosecution.

Mr. Patel, learned APP, is right in his submission. We find that the panch witness, Mr. Dharmesh Jayantilal Patel, who is examined as PW-2 at Exh. 12, has supported the panchnama. But, then, in absence of any explanation by the prosecution to the effect that 32 packets were sealed at the time of drawing the panchnama while FSL received only 31 packets, even if the independent panch witness has supported the case of the prosecution, the same cannot be believed. It is equally important to note that the other panch witness, Suresh Manubhai Patel, who is examined as PW-1 at Exh. 10 has not supported the case of the prosecution.

17. The learned Advocate for the appellant invited our attention to the provisions of Section 52 of the NDPS Act which provides for disposal of persons arrested and articles seized. Sub.section 1 of Section 52 reads as under:

"Any officer arresting a person u/s 41, Section 42, Section 43 or Section 44 shall, as soon as may be, inform him of the grounds for such arrest."

In the present case, there is nothing on record to show that the appellant-accused was intimated the grounds of arrest.

So far as Sub.Section 3 of Section 52 is concerned, it provides that,

"Every person arrested and article seized under Sub.Section 2 of Section 41, Section 42, Section 43 or Section 44, shall be forwarded without unnecessary delay to :

- (a) the officer-in-charge of the nearest police station, or
- (b) the officer empowered u/s 53."

In the present case, it is clear from the deposition of the police officer himself that though the accused and the muddamal papers were brought to Nadiad Rural Police Station and were handed over to Maniben Khengarbhai, PW-4, Exh.17, who was Police Station Officer at the relevant time, the muddamal and the investigation were handed over back to the same officer, namely, Shri Savani. Thus, though the provision u/s 52 may not have been given the status of mandatory provisions, in the facts of the present case, taking into consideration the totality of the case of the prosecution, the same does not inspire confidence and suffers from more than one point of doubt and, therefore, the same is not accepted by this court.

18. We are aware of the fact that even in absence of supporting evidence of independent person like the panch witness, relying upon the evidence of the police officers and even in cases where the investigation is required to be carried out by one of the member of the raiding party, the evidence is not to be discarded only on that ground, but then the evidence placed before the Court must be such that it inspires confidence. In the present case, as discussed hereinabove, the case of the prosecution must fail as there is no compliance of Section 42(1), there is no compliance of Section 42(2), though muddamal was handed over to the Police Station Officer, it is taken back by the searching/ raiding officer and the investigation is entrusted to him at his own request, muddamal is kept by the officer and is sent to the FSL only after 23 days, during which period, the muddamal as well as the seal under which the muddamal was sealed in presence of the panchas had also remained with the same officer, the FSL has received only 31 packets while in panchnama it is specifically mentioned that 32 packets were sealed, the police officer is not able to render any acceptable explanation for the same, the accused was not intimated about the grounds of arrest, and the muddamal, which otherwise, is required to be handed over to the police station-in-charge of the nearest police station, was, though handed over, was taken back by the concerned police officer. Taking into consideration all these facts together, we hold that the case of the prosecution does not inspire sufficient confidence and is not acceptable to this Court.

19. For the forgoing reasons, the appeal succeeds and the same is allowed. The conviction of the appellant recorded u/s 17 of the NDPS Act as well as punishment imposed for commission of the said offence is hereby set aside. The accused is to be released forthwith, if not required for any other offence. Muddamal be disposed of in terms of the directions given by the learned Additional Sessions Judge, Kheda, in the impugned judgement.