

(2015) 04 GUJ CK 0033
In the Gujarat High Court

Case No : Criminal Appeal Nos. 1210, 1513 and 1540 of 2011, 141 and 278 of 2012

Sanjay Patel

APPELLANT

Vs

Mohammad Irfan Gulam Jafar Shaikh and Others

RESPONDENT

Date of Decision : 07-04-2015

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20(b)(2)(c), 29, 35, 54, 67

Citation : (2015) 04 GUJ CK 0033

Hon'ble Judges : G.R. Udhwani, J.; Anant S. Dave, J.

Bench : Division Bench

Advocate : K.T. Dave, for the Appellant; Rajesh M. Agrawal, Advocates for the Respondent

Judgement

G.R. Udhwani, J.—All these criminal appeals arise out of judgment and order dated 3.8.2011 passed by learned Special Judge and Additional Sessions Judge, City Civil and Sessions Court, Ahmedabad in Sessions Case No. 246 of 2006 convicting Mohammed Irfan Gulam Jafar Shaikh, Shamsheer Mohammadhusain Butwala and Smt. Mumtazbanu Tazuddin Malek for the offences punishable under Sections 8(C), 20(b)(2)(c) and Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "N.D.P.S. Act"). They have been sentenced to rigorous imprisonment for ten years with fine of Rs. 1 lakh or simple imprisonment for one year in default of the fine. No separate sentence came to be passed under Section 29 of the Act.

2. The convicts were prosecuted by Narcotics Control Bureau (for short "NCB"). Criminal Appeal No. 1210 of 2011 has been preferred for enhancement of the sentence against the aforesaid persons by NCB. Criminal Appeal No. 1540 of 2011 has been preferred by NCB questioning acquittal of respondent No. 1-original accused No. 4. Rest of the three appeals question the conviction.

3. As per the prosecution case, a secret information about transportation of

contrabands on 10.1.2006 by the convicts and acquitted accused in Maruti Car bearing registration No. GJ18-AA-3080 was received on 9.1.2006 and therefore after necessary formalities P.W.2-Exh. 59 Jitendra Niranjanbhai Raghuvanshi constituted a raiding team, proceeded to the spot in question, intercepted the vehicle in question, found therein Mohammed Irfan Jafar Shaikh (accused No. 1) on the driver's seat and Shamsher Mohammad Hussain Bhutwala (accused No. 2) occupying the seat adjoining to the driver's seat and other accused Mumtazbanu (accused No. 3) occupying the rear seat. According to the prosecution, accused No. 4 was aide of the three accused aforestated.

4. After the interception of the car and on search, a concealed cavity beneath the rear seat containing six packets of charas weighing 18.490 kgs. was detected. The vehicle and contraband were seized and the accused persons were taken in the vehicle of NCB whereas one of the personnel of NCB drove the seized car to the office of NCB. All other formalities of drawing of the samples, packing and sealing etc. were done at NCB office and panchanama in that regard was also drawn there. The statements of the accused persons under Section 67 of the Act were also recorded in the NCB office.

5. In the aforesaid background, the complaint was registered and the case was ultimately tried as aforesaid and the Court on consideration of the material on record and rival contentions was satisfied that the offences as charged are proved against the three convicts herein and thus recorded the conviction as stated above.

6. We have heard learned advocate Mr. R.M. Agarwal, Mr. Vinod M. Gamara for the convicts and Mr. K.T. Dave for NCB.

7. Besides many other points, one convincing point going to the root of the matter has been advanced by the learned advocates for the convicts. According to them, right from the inception, the safe custody of the muddammal contraband was not ensured. While relying upon the oral and documentary evidence particularly that of P.W.2 and P.W.3, it was argued that though P.W.3 is godown incharge, he did not deal with the custody of muddammal but it is P.W.2- the raiding officer and investigator who was given a free hand to deal with the contraband after seizure. It was argued that the claim of P.W. 2 and P.W.3 that muddammal was safely dealt with was not supported by any documentary evidence in the trial Court and, therefore, substantial doubt about safe custody of contraband looms large.

8. As against that, learned counsel Mr. K.T. Dave invited the attention of this Court to the testimony of P.W.2 and P.W.3 and would contend that on 1.1.2006, from the place of incident on search of the car in question six packs of charas were found and therefore the car along with two panchas and Jitendra Raghuvanshi P.W.2 was taken to NCB office and during the cross-examination, suggestion regarding tampering of muddammal was denied by P.W.1. Learned counsel would also argue that P.W.3 has deposed on oath that after sampling and

sealing the muddammal, it was entrusted to him on 10.1.2006 and on 12.1.2006, six samples were obtained from P.N. Sarvaiya (P.W.3) by Jitendra Raghuvanshi (P.W.2) for the purpose of scientific examination by CRCL and the entry about the same was made in godown register and thereafter on receipt of the samples from CRCL, again they were entered into the godown register and thereafter for the purpose of production in the Court, the muddammal and the sample received from CRCL with the report were taken by Sanjay Patel (P.W.1) on 6.7.2006 and necessary entry was made in the register and the above muddammal was produced before Nazir of the Court on 7.7.2006 and that muddammal was identified by the witnesses during their examination. Relying upon the aforesaid material emerging from the evidence of various witnesses, it was argued that the safe custody of the muddammal samples and the contraband was ensured.

9. In the context of above arguments, we would first notice the manner of dealing with the contraband and samples at the time of seizure and subsequent thereto. In examination-in-chief of various witnesses, the Panchnama of seizure etc., the facts as indicated in para 3 and 4 above are brought on record. P.W.1 at Exh. 40 a Panch Witness for seizure and other activities carried out by NCB states that the seals to the contrabands and the samples were applied by employees of the Narcotic Cell. But, he fails to recall the name of such employee and is also unable to confirm as to whether Raghuvanshi, P.W.2, applied such seal, but confirms the fact that the contraband and the samples were sealed by only one person. The witness deposes having handed over the apparatus used for sealing the aforesaid articles to P.W.2 and there is no indication in the entire evidence as to the safe custody of such apparatus. Further, this witness notices no other writing on the seal except the mark of NCB.

10. There is no dispute that P.W.2 headed the raiding party and also was incharge of investigation for quite some time and as testified by him, he assisted P.W.4 even after investigation was handed over to P.W.4. It is sought to be proved from the testimony of P.W.1-panch, P.W.2-raiding head and P.W.3-the godown incharge that contraband and the car and other articles were seized from the accused as per secret information received on 9.1.2006. It is not in dispute and is clear from the testimony of P.W.1 that after noticing the contraband in the concealed cavity of the car, the ambassador car driven by driver of NCB and occupied by panchas and P.W.2 along with another vehicle of NCB occupied by accused and others were taken to NCB and thereafter substantial procedure was completed in NCB office under the plea that the said rest procedure was not possible at scene of offence being a public place.

11. P.W. 2 and P.W. 3 are unanimous in their respective depositions about P.W.2 having handed over and P.W.3 having received from P.W.2 the contraband and samples thereof, as also P.W.3 having passed the acknowledgment receipt therefor to P.W.2 on 10/01/2006 in the godown. However, the above testimony of P.W.2 comes only in the cross-examination in response to the suggestions made

by defence to him and he is silent on this aspect in his examination-in-chief. No such acknowledgment receipt forms the part of the record. Furthermore, in the trial Court, oral evidence for entering the details of the contraband and samples thereof in the register in the charge of P.W.3; and the withdrawal of the samples for scientific examination was tendered and despite several questions in that context during the evidence of the witnesses, particularly P.W.2 and P.W.3, no supporting documentary evidence was placed on record of the trial Court. An impression was created by P.W.3 in examination-in-chief, without producing the aforesaid record, as if the contraband and the samples thereof were in his exclusive custody and that P.W.2 had to rely upon him for any further action in the context of the contraband and its samples. This impression was removed in the cross-examination, inasmuch as both P.W.2 and P.W. 3 had to admit in their respective cross-examination that handing over of contraband/samples to P.W.3 by P.W.2 was based upon their oral statement sans documentary evidence in the form of acknowledgment receipt and godown register etc. A mere look at an attested true copy of the extracted muddammal register produced and relied upon by the learned Counsel Mr. K.T. Dave during the course of hearing of these appeals would remove the impression that contraband samples were in exclusive possession of P.W.3 after its seizure.

12. It may be recalled that the acknowledgment receipt does not form the part of the record and in the light of the said fact we proceed to appreciate the afore-stated extract of the godown register. From the cross-examination of P.W.2 and P.W.3, it is clear that the said extract contains the signature only of P.W.2 in various columns, except a signature in relation to the endorsement made at the bottom of the column No. 16 which admittedly is that of P.W.4, the investigating officer who was a part of the raiding party under the guidance of Raghuvanshi P.W.2 and also investigated the matter alongwith Raghuvanshi and lodged the complaint. He appears to have signed the muddammal register for the purpose of withdrawing the contrabands for production in the Court on 07/07/2006. Concededly, P.W.3 was the controlling Officer of P.W.2 and P.W.4 and was also a godown in-charge and except passing few administrative routine orders, he did not play any active part in investigation. Such being the position and, particularly, he being the Officer in-charge of the godown, it is obvious that and it is the prosecution case that P.W.3 received the contraband/its samples from P.W.2 and deposited in the godown and made necessary entries and dealt with the same as and when necessary during the course of investigation. However, the evidence on record indicate the dealing of contraband/its samples by persons other than P.W.3; particularly by P.W.2 to the exclusion of P.W.3, the godown in-charge. In absence of the receipt acknowledging the contrabands/samples by P.W.3 and in absence of documentary evidence to indicate safe movement of said articles, the credibility of P.W.2 and his claim that he handed over the said articles to P.W.3, is rendered doubtful. It is significant to note at this stage that even the apparatus used for sealing the contrabands and its samples has not been deposited in the godown; nor was it sent to the laboratory for its

comparison with the seals on the aforesaid articles. Thus, the nature of evidence aforestated in the context of the safe custody of contrabands and its samples persuade us to raise a serious doubt about safe custody and tampering of the said articles during the course of investigation.

12.1 Learned counsel Mr. K.T. Dave would however argue that at the time of despatch and receipt of samples from the laboratory, the seals were found in tact and therefore possibility of tampering with the muddammal was ruled out. We are not convinced with the said argument for the simple reason that what is material is whether there is any room for tampering with the muddammal and whether it was kept in the custody of the officer other than the raiding head or the investigating officer to rule out the bias of raiding head or investigator who would obviously be interested in justifying their acts. We are not able to get any convincing reason from the evidence on record of circumventing the godown in-charge and retention of the custody of contraband and its samples only under the signature of P.W.2 and not P.W.3, in the godown register. The facts discussed above reveal undue interest of P.W.2 even in interfering with the duties of P.W.3 in handling the seized articles particularly the contraband as also continue to investigate even after he ceased to be Investigating Officer under the pretext that his help was required by the investigation officer. Even if we believe that muddammal was deposited in the godown, there is nothing on record to indicate that P.W.3 had any knowledge of such deposit, except his oral statement. It, therefore, appears that it was possible to move the muddammal and the samples or contraband at the sweet will of P.W.2 without the knowledge of P.W.3, if at all, P.W.2 deposited it in the godown.

12.2 Unfortunately, this aspect was not noticed by the Court below and thus the impugned judgment and order cannot be sustained.

13. When the aforesaid serious doubts looms large on record, the statements allegedly made by the accused under Section 67 of the N.D.P.S. Act are of no consequences and we do not intend to go into the same for the said reasons, in detail and suffice it to say that when the case against the prime accused cannot be sustained, it also cannot be sustained against accused No. 4 who has been acquitted by the trial Court against whom only evidence relied upon was a statement under Section 67 of the N.D.P.S. Act. The said accused was alleged to have aided and abetted the offence allegedly committed by accused Nos. 2 and 3 who by this judgment and order are ordered to be acquitted.

14. It is well settled that a strict law imposes extra burden requiring the strict proof from the prosecution. Under the N.D.P.S. Act, mere possession of contraband is an offence. There are presumptions under Section 35 (presumption of culpable mental state) and Section 54 (presumption from possession of illicit articles) of the N.D.P.S. Act against the accused. Prosecution is entitled to the benefit of such presumption only if it discharges its burden of proving the facts upon which the presumptions afore-stated can be based. As noticed above, the manner in which the contraband has been dealt with by the investigating agency

opens room for its tampering.

15. In view of the aforestated reasons, we are inclined to allow Criminal Appeal Nos. 1513 of 2011, 141 of 2012 and 278 of 2012 and dismiss Criminal Appeal Nos. 1210 of 2011 and 1540 of 2011 and accordingly quash and set aside the impugned judgment and order dated 3.8.2011 passed in Special Sessions Case (N.D.P.S. Case) No. 246 of 2006 and order the release of all the convicts viz. Smt. Mumtazbanu Tazuddin Malek, Shamsheer Mohammadhusain Butwala and Mohammed Irfan Gulam Jafar Shaikh, and forthwith, if not required in any other case.