

(2009) 07 GUJ CK 0044
In the Gujarat High Court
Case No : Criminal Appeal No. 863 of 2007

Shahid @ Saido Haji Gani

APPELLANT

Vs

The State of Gujarat

RESPONDENT

Date of Decision : 13-07-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 374(1)
Official Secrets Act, 1923 — Section 11, 13(3), 3, 3(2), 5
Penal Code, 1860 (IPC) — Section 120B

Citation : (2009) 07 GUJ CK 0044

Hon'ble Judges : Z.K. Saiyed, J;K.S. Jhaveri, J

Bench : Division Bench

Advocate : Rekha H. Kapadia, for the Appellant; D.C. Sejpal, Ld. APP, for the Respondent

Final Decision : Dismissed

Judgement

Z.K. Saiyed, J.—The appellant has preferred this appeal u/s 374(1) of the Code of Criminal Procedure, against the impugned judgment and order of conviction and sentence passed by the learned Addl. Sessions Judge & Presiding Officer, Fast Track Court No. 11, Gondal, camp at Dhoraji in Sessions Case No. 12/2003, whereby, the learned Judge has convicted the appellant for the offence u/s 3 of Indian Official Secret Act, 1923 and sentenced him to undergo R/I for 10 years and he was also convicted for offence u/s 5 read with Section 9 of Indian Official Secret Act, and sentenced him to undergo R/I for 3 years. It was further ordered that the all the sentences to run concurrently.

2. The facts of the prosecution case is that on 3.9.2002 Mr Gohil, P.I., LCB, Rajkot was present with his staff members along with DY.S.P., Gondal Mr. Chauhan near Dhoraji Azad Police Chowki. At that time, from his informant, he received an information that one Mr. Shahid @ Shahido Memon, resident of Andhariawad, Dhoraji, has collected secret documents of Military of India, like Radar, Bridges, Airport, etc. which are prohibited areas, in the form of photographs and

documents for communicating the photographs of prohibited areas and other classified information to known/unknown foreign agents of Pakistan.

2.1 He has further received information that on that day the said Shahid would be sending prohibited photographs and the information to Karachi via Dubai through the Post and to do so he would be passing from the Three Darwaja to the Post Office on post office road, Dhoraji. On the receipt of this information, P.I. Mr. Gohil has called two panchas who were passers by and informed them regarding the information which he received and asked them to join as panchas in the raid and has also prepared preliminary panchnama between 20.30 hrs and 2.45pm and arranged to keep watch with his other staff members.

3. During the period of said watch, at about 21.15 hours, the said person was found coming from market side on Baja M-80 motorcycle bearing No. GJ-11-786. Therefore, as per the signal given by the informant, the said person was caught by the police and in the presence of both the panchas, he told his name as Sahid @ Sahido Haji Gani, aged 32 years, resident of Dhoraji. Therefore, his search was made and during the search, one mobile of panasonic company bearing No. 9825292017 of Rs. 1500/-, from the left side pocket of his pants, one envelop bearing address of one Prakas, P.O. Box No. 279, Dubai (UAE) was recovered, wherein, ten photographs were found which are of Radar, Small Radar, Railway Bridges, Airforce, Bridges, Runway and Military camp. The same were seized under panchnama and on further search, Rs. 520/- was found from the right side pocket of his pants.

4. The said person was interrogated by the Police and during the interrogation before P.I. Mr. Gohil the said person has stated that he has got married in the year 1994 with a girl residing at Karachi, Pakistan. Due to illness, his wife had gone to her parental home in Pakistan. Since he was having Indian Passport bearing No. A-1011348, he obtained Visa for five times and visited his wife and son three times in Pakistan. At that time, through his wife he came into contact with one secret agent in Pakistan and on his demand, he is working as his agent since 1998 and as per the instructions of the said secret agent he was sending prohibited photographs as aforesaid from India to Pakistan. The photographs which were seized from him were to be sent to Pakistan through Dubai based agent Prakas, Post Box No. 279. During the search of his house, some more photographs were also found which are of Seashore, Railway bridge, Runways, which were also seized. One chit was also recovered and on the over-leaf of the said chit, names of Army and Air-force officers were written. During the search the police has also recovered Indian Passport bearing No. A-1011348 valid from 19.3.97 to 30.5.2005 and one camera, which were also seized under panchnama.

5. Therefore, complaint was lodged against the said accused before the Dhoraji Police Station being CR No. II- 3163/2002 u/s 3 and 9 of Official Secrets Act and u/s 120-B of IPC. Thereafter, the investigation was carried out by DYSP Mr. VM Chauhan and statements of certain witnesses were recorded and the report was

submitted by Mr. Parghi to Mr. Chauhan, DYSP. After completion of the investigation, charge-sheet was filed in the Court of learned Judicial Magistrate, First Class, Dhoraji. As the offence was exclusively triable by the Court of Sessions, learned Magistrate has committed the said case to the Court of Sessions.

6. Thereafter, the charge (Exh. 1) was framed against the appellant. The accused pleaded not guilty to the said charge and claimed to be tried.

7. In order to bring home the charge levelled against the accused, the prosecution has examined the following witnesses:

PW-1 Kishor Bhikhabhai Rathod Ex. 16

PW-2 Harish Amrutlal Ex. 22

PW-3 Kishorbhai Anandbhai Koyani Ex. 25

PW-4 Anilkumar Indubhai Hirani Ex. 26

PW-5 Naranbhai Dhanajibhai, Ex. 27

PW-6 Bipinchandra Gunvantraï Kapoor Ex. 28

PW-7 Chetanbhai Jaysukhlal Dave Ex. 32

PW-8 Vanrajsinh Vajubha Gohil, PI, Ex. 36

PW-9 Abdul Raheman Haji Yusuf Bhadela Ex. 40

PW-10 Imtiyazbhai Gafarbhai Supediwala Ex. 42

PW-11 Azimbhai Harunbhai Chhapawala Ex. 45

PW-12 Becharbhai Ramjibhai Rudakiya Ex. 46

PW-13 Natvarsinh Umedsinh Vala Ex. 48

PW-14 Kanaiyalal Girdharlal Prajapati Ex. 14

PW-15 Sanjivbhai Kunjuraman Nambiyar Ex. 55

PW-16 Mahmad Iqbal Habib Memon Ex. 57

PW-17 Maheshbhai Dahyabhai Bhavsar Ex. 58

PW-18 Maksud Abdul Vahid Kudiya Ex. 59

PW-19 Pramodkumar Dayashankar Tripathi Ex. 67

PW-20 K.V. Sing, Wing Commandant Ex. 95

PW-21 Vanrajbhai Maganbhai Chauhan Ex. 91

PW-22 Milton Semual Sharma Ex. 95

PW-23 Vechatbhai Motibhai Parghi Ex. 106

To prove the case, the prosecution has produced the following documentary evidence:

Order for investigation Ex. 49

Complaint Ex. 121

Panchnama of raid Ex. 21

Discovery panchnama Ex. 123

Discovery panchnama Ex. 124

Panchnama of discovery of scene of photograph Ex. 125

Record of mobile Ex. 126

RTO Book Ex. 43

Record of Mobile (Sapna Telecom) ex. 44

Javak No. 1295/02 of LIB, Dhoraji Ex. 112

Javak No. 1293/02 of LIB, Dhoraji Ex. 96

Javak No. 1294/02 of LIB, Dhoraji Ex. 79

Javak No. 1296/02 of LIB, Dhoraji Ex. 52

Letter of Railway Ex. 68

Letter of Airforce Ex. 84

Letter of Western Railway Ex. 69

Affidavit Ex. 47

Reply of INS Valsura Ex. 97

Opinion of R & B, Gujarat Ex. 53

Sanction order of Home Department Ex. 107

Letter of Home Department, Govt. of India Ex. 108

Letter of Home Department, Govt. of India ex. 109

Javak No. 1535/02 of LIB, Dhoraji Ex. 110

Javak No. 1534/02 of LIB, Dhoraji Ex. 111

Letter of Govt. of Gujarat Ex. 128.

8. Thereafter, after examining the witnesses, further statement of the accused u/s 313 of Code of Criminal Procedure was recorded in which the appellant-accused has denied the case of the prosecution.

9. After considering the oral as well as documentary evidence and after hearing

the parties, the learned Addl. Sessions Judge, vide impugned judgment and order dated 16.4.2007, held the appellant - accused guilty to the charge levelled against him for the offence punishable u/s 3 of the Official Secrets Act, 1923 and convicted and sentenced the appellant - accused to suffer R/I for 10 years, and the appellant - accused was also convicted for the offence u/s 5 read with Section 9 of the Official Secrets Act, 1923 and sentenced him to suffer R/I for 3 years. Both the sentences were ordered to run concurrently.

10. Being aggrieved by and dissatisfied with the impugned judgment and order of conviction and sentence passed by the learned Addl. Sessions Judge, Gondal, camp at Dhoraji, the present appellant - accused has preferred this appeal.

11. Heard Ms. Rekha Kapadia learned advocate appearing for the appellant and Mr. DC Sejpai learned APP appearing for the respondent - State.

12. Learned advocate Ms. Kapadia has submitted that PW-2 Hari Amrutlal, PW-3 Kishor Anand Kochani, PW-4 Anilkumar Indubhai Hirani, W-5 Naran Dhanji, PW-6 Bipinchandra Gunvantrai and PW-7 Chetanbhai Jaysukhlal Dave have deposed before the trial court and put their signatures as per the direction of the police officers and they did not support the case of the prosecution. It was submitted that the police officers have shown the prohibited places/locations to the panchas, but as per the oral version of the panchas, the same are not matched with each other. It was further submitted that as per the statement of the accused u/s 313 of CrPC when appellant was at his residence, the DYSP came and asked him to come with him for the purpose of recording the statement and took him to the Govt. Guest House and when he asked about the intention, he was brutally beaten and to that effect he lodged a complaint before the Ld. Magistrate on 4.9.2002.

12.1 Ms Kapadia learned advocate has further submitted that the police has not put seal of his designation on the muddamal and thereby opened the door for tampering with the muddamal and, therefore, benefit of doubt for not sealing the muddamal should be given to the appellant. She has further submitted that without any search warrant the raid was carried out and therefore, the police has violated the provisions of Section 11 of the Official Secrets Act. She has further submitted that as per the case of the prosecution, the appellant was searched when he went to drop the cover to the post office. In this connection, the police has not taken the help of FSL to verify or identify the hand writing on the cover. Ms. Kapadia has further submitted that the wife of the appellant holds the Pakistan Passport and therefore she visits Pakistan frequently because her entire family is residing there. Lastly, she has submitted to reduce the sentence of appellant awarded by the learned Judge.

13. On the other hand, Mr. DC Sejpai, learned APP appearing for the State has submitted that the charges levelled against the appellant are of very serious nature, against the security and integrity of the nation at large and the same were successfully proved by the prosecution before the Court below. He has

further submitted that while convicting and sentencing the appellant - accused, the trial court has considered all the aspects of the case and the prosecution has proved the case beyond any reasonable doubt and, therefore, the impugned judgment and order of conviction and sentence required to be confirmed.

14. Mr. Sejpai learned APP has further submitted that the appellant has been working as an agent of ISI (Inter State Intelligence) - the spying agency of Pakistan, living in India and supplying very sensitive information about the integrity and security of the nation. He submitted that the appellant has visited Pakistan on more than one occasion as per the details of his passport and has sent many persons to Pakistan as per the details of their names and expenses given in Muddamal Articles No. 9 to 17 as recovered vide Panchnama Ex. 123 prepared on 8.9.2002, which show involvement of the appellant in worst activity against the nation at large and in the wake of Terrorism prevailing world over and particularly in India and, therefore, the Court below has rightly imposed appropriate punishment against the appellant.

15. Mr Sejpai has further submitted that the material recovered from the appellant pertained to vital Military installations of Gujarat including radars, Air force base, runway, Indian Navy Ship Valsura (INS Valsura) Navy base, most important civil Bridges connecting Kutchh to rest of the Gujarat. This clearly shows the intention and involvement of the appellant in specific direction, acting according to the instructions of ISI. Mr. Sejpai has submitted that PW-1 Kishorbhai Bhikhabhai Ex. 16 has supported the case of the prosecution and proved the panchnama of recovery Ex. 21. Mr. Sejpai further submitted that the sanction was granted by the Central Government as required u/s 13(3) of the Act and, therefore, mandatory procedure required under the law was strictly followed. He further submitted that during the search, two photographs were found from the person of the appellant and during investigation further 5 photographs were recovered from the house of the appellant. Such pictures were testified by concerned witnesses and officer of the armed forces who were examined before the trial court, to be of the vital installations of armed forces and bridges as described in the charge. Mr. Sejpai learned APP has further stated that PW-18 Maksud Abdul Wahid Ex. 59 in his oral evidence has stated that the appellant went to Pakistan on more than one occasion in the year 2000 as he is working as booking agent of travelling tickets and he had arranged for the tickets of the appellant. Mr Sejpai learned APP has placed reliance on the decision of Division Bench of this Court reported in Kasam Lakha Sama Vs. State of Gujarat, on the point of sanction u/s 13(3) of the Act as well as on the point that since the photographs are not of any aesthetic value, it clearly can be presumed that the same were taken to expose the vital military installations to the enemy country. Lastly, Mr. Sejpai learned APP has submitted that considering the oral as well as documentary evidence on record, legal position as on the date and looking at the safety of the nation at large, the impugned judgment and order dated 16.4.2007 is required to be confirmed.

16. Mr. Sejpal learned APP for the State has contended that there is voluminous reliable, trustworthy and clinching evidence on record which unequivocally and unerringly proves that the appellant - accused had committed the crime with which he was charged. He further contended that the evidence of the complainant and other witnesses as well as from the documentary evidence, the prosecution has proved the guilt of the appellant-accused. He further contended that the prosecution has established its case beyond reasonable doubt and prayed that the judgment and order passed by the trial court is required to be confirmed. He also contended that the trial Court, after fully appreciating the evidence, has rightly convicted and sentenced the appellant-accused. There is no lacuna in the judgment and of the trial Court and prayed to confirm the judgment and order of conviction and sentence awarded by the trial Court.

17. We have perused the oral as well as documentary evidence produced by the prosecution. From the oral evidence of Trapping Officer, it is established by the prosecution that through the informant he has received proper information regarding the criminal conduct of the present appellant-accused and, therefore, two independent panchas were called by him and information which he received was explained to them.

17.1 We have also perused the panchnama. From the contents of the panchnama, it appears that information was explained before the panchas and then as per the information, when the present appellant came there on motorcycle a search was made out in the presence of two independent panchas.

17.2 We have also perused the oral evidence of panchas, in which, we find that oral evidence of independent panchas fully corroborated with the panchnama as well as with the oral evidence of the Trapping Officer and the complaint.

17.3 We have also perused the documentary evidence produced by the prosecution which were seized and sealed by the Investigating Agency from the possession of the present appellant- accused. We have not found any evidence to say that sealing and seizure was concocted by the Trapping Officer.

17.4 We have also perused the oral evidence of Trapping Officer PW-8 VV Gohil Ex. 36 and PW-1 Kishorbhai Bhikhabhai Rathod Ex. 16. From the oral evidence of these witnesses, it is found that the secret documents were recovered from the possession of the present appellant-accused. In the oral evidence of PW-9 Abdul Raheman Haji Usuf Bhadela Ex. 40, he stated that the present appellant has visited Pakistan and he met this witness. PW-10 Imtiyazbhai Gafarbhai Supediwala Ex. 42 deposed that the present appellant - accused has purchased sim card from him, which is established from the entry Ex. 44 of the register itself. From the oral evidence of PW-13 Natvarsinh Umedsinh Vala Ex. 48, it appears that he has registered the offence. The prosecution has also examined PW-14 Kanaiyalal Girdharlal Prajapati, photograph expert, at Ex. 51.

17.5 We have also perused Ex. 53 letter of opinion and considered the oral as well as documentary evidence produced on record. From the oral evidence of

P-15 Sanjivbhai Kunjuraman Nambiyar Ex. 55. It is also established by the prosecution that the present appellant - accused had talked to persons in Pakistan. We have perused the oral evidence of PW-22 Milton Samuel Sharma Ex. 95.

18. From the entire evidence on record, we have found that the prosecution has proved case against the respondent-accused beyond reasonable doubt.

18.1 As regards the possession of the said secret document is concerned, from the oral evidence of panchas as well as Trapping Officer and other evidence produced in support of the case by the prosecution, we find that present appellant was in conscious possession of the said prohibited documents. No plausible explanation was offered for keeping those secret documents with the accused. In our opinion, therefore, under the provisions of Sub-section 2 of Section 3 of the Official Secrets Act, presumption as to spying can be raised.

19. Admittedly, it is established by concrete evidence that the said seized documents were recovered from the conscious possession of the present appellant. It is to be presumed that the accused must be conscious of acceptance of the documents, articles in his possession and has actual control over it and we are of the opinion that when the said prohibited documents were recovered from his possession, then it can be presumed that he was in conscious possession of the said documents/articles.

20. The principles of proof beyond reasonable doubt is applicable in the matter of testing the guilt of the accused. It has no operation in the arena of proof of primary facts, particularly in cases where the guilt of the accused is sought to be established by circumstantial evidence. The proof of primary fact is one thing and inference of facts to be drawn from primary facts is another thing. In regard to the proof of basic or primary facts the court has to judge the evidence in the ordinary way and in the appreciation of evidence in respect of proof of these basis or primary facts. There is no scope for the application of the principles of benefit of doubt. The Court considers the evidence and decides whether that evidence proves the particular facts or not. When it is held that certain facts are proved, the question then arise whether these facts lead to an inference of guilt of the accused or not and in dealing with these aspects, the guilt of the accused can be drawn only if the proved facts is incompatible with his innocence and is compatible with the guilt of the accused.

21. We are of the opinion that if the substratum of prosecution case remains unaffected and remaining part of the evidence is trustworthy, the prosecution case should be accepted to the extent it is considered safe and trustworthy. There is un rebuttable evidence on record to connect the appellant with the offence alleged against him.

22. This Court has considered the submissions advanced by the learned advocates appearing for the parties and perused the impugned judgment and order. This Court has undertaken a complete and comprehensive appreciation of

all vital features of the case and the entire evidence on record which is read and re-read by the learned advocates for the parties with reference to broad and reasonable probabilities of the case.

22.1 In light of caution sounded by the Supreme Court while dealing with criminal appeals, this Court has examined the entire evidence on record for itself independently of the trial Court and considered the arguments advanced on behalf of the appellant-accused and infirmities pressed, scrupulously with a view to find out as to whether the trial Court has rightly recorded the order of conviction and sentence. From the oral as well as documentary evidence adduced by the prosecution, in our opinion, the learned trial Judge has rightly convicted and sentenced the appellant - accused. Therefore, the conviction and sentence awarded by the trial court against the appellant - accused does not call for any interference of this Court in exercise of appellate powers.

23. The appellant has been working as an agent of ISI (Inter State Intelligence) - the spying agency of Pakistan, living in India and supplying very sensitive information about the integrity and security of the nation. The material recovered from the appellant belonged to vital Military installations of Gujarat including radars, Air force base, runway, Indian Navy Ship Valsura (INS Valsura) Navy base, most important civil Bridges connecting Kutchh to rest of the Gujarat. This clearly shows the intention and involvement of the appellant in specific direction, acting according to the instructions of ISI. Therefore, this is a serious offence affecting the security of the nation, which cannot be taken lightly in view of the overwhelming evidence on record.

24. In case of Sama Alana Abdulla Vs. State of Gujarat, the Apex Court held that if the evidence show that the accused was in conscious possession of prohibited articles and if no explanation is given for the said possession presumption u/s 3(2) as to Spying can be raised.

25. In the case of Kasam Lakha Sama Vs. State of Gujarat, it is held that even though the structures photographed not to be found of aesthetic value inference is drawn that the structures were photographed for supplying information to the enemy.

26. We find ourselves in complete agreement with the said findings, ultimate conclusion and resultant order of conviction passed by the trial Court and we are of the view that no other conclusion except the one reached by the trial Court is possible in the instant case as the evidence on record stands. Therefore, there is no valid reason or justifiable ground to interfere with the impugned judgment and order of conviction and sentence.

27. For the foregoing reasons, the Appeal fails and is hereby dismissed. The impugned judgment and order of conviction and sentence dated 16.4.2007 recorded by the trial Court against the appellant - accused in Sessions Case No. 12/2003 is hereby confirmed and maintained. Muddamal be disposed of in terms of directions contained in the impugned judgment and order passed by the trial

Court.

This appeal is accordingly dismissed.