

(2017) 03 GUJ CK 0140
In the Gujarat High Court
Case No : 890 of 2003

SHAILESHBHAI MAVJIBHAI MAKWANA

APPELLANT

Vs

STATE OF GUJARAT

RESPONDENT

Date of Decision : 17-03-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 313](#), [Section 173\(8\)](#), [Section 374\(2\)](#) - Power to examine the accused - Report of police officer on completion of Investigation - Appeals from convictions
[Narcotic Drugs and Psychotropic Substances Act, 1985](#), [Section 42](#), [Section 22](#) - Power of entry, search, seizure and arrest without warrant or authorisation - Punishment for contravention in relation to psychotropic substances

Citation : (2017) 03 GUJ CK 0140

Hon'ble Judges : Z.K.Saiyed

Bench : Single Bench

Advocate : GIRISH PATEL, RI SHARMA, N.J.SHAH

Judgement

1. The present conviction Appeal has been filed by the appellant?original accused No.1, under Section 374(2) of the Cr. P.C., against the Judgment and order dated 23.05.2003 rendered in Special Case (NDPS) No.11 of 2002 by the learned Special Judge, 2nd Fast Track Court, Rajkot whereby the appellant-accused was convicted for the offence punishable under Section 22 of the NDPS Act and sentenced to undergo six months rigorous imprisonment with fine of Rs.3000/-, in default of payment of fine, further rigorous imprisonment of one month. As per the statement made by appellant-accused No.1 that he has already undergone the sentence, however, he has preferred the present appeal to acquit him from the charge levelled against him.

2. It is the case of the prosecution that Mr. K.N. Patel was serving as P.S.I in Anti Theft Squad at Rajkot. On 10.04.2002, when he was discharging his duties, he received an information though Police Constable Shri Indrajeetsinh Natubha Rana that the appellant-accused, resident of Rajkot was present at Rajkot Municipal

Corporation Garden situated in front of Sheth High School which is on 80 ft. road and he is in possession of brown sugar. On receiving the same, Shri Patel sent Head Constable Shri Mansukhlal Babulal to get an entry being made in Police Station Diary and according to the prosecution case, one report was sent to Dy. Police Commissioner, Rajkot through Police Constable Shri Ganpat Sinh. Thereafter, two panchas were called upon. Both the panchas arrived at Police Station. They were informed regarding the information received by complainant Shri Patel. The first part of the panchnama was drawn. Thereafter, Shri Patel carried out the raid. The entry to this effect was being made in the Station Diary Control Room. The said raid was carried out in the police vehicle and PSI Shri Patel alongwith panchas and members of the raiding party reached the place, where accused person was present. According to the prosecution case, the procedure laid down under the various provisions of the NDPS Act, 1985 was followed by Shri Patel. Further, according to the prosecution case, personal search of present appellant was carried out in presence of panchas. Rs. 1600/- and one polythene bag containing light brown coloured material was found from his possession. One challam was also found. Moreover, small size plastic begs and 300 empty plastic begs were also found from his possession. Some other articles were also found. All the articles were recovered and attached under the panchnama. Scientific officer was called upon at the scene of offence. Analysis of muddamal powder was carried out and it was found that appellant-accused was in possession of six grams brown sugar. One Mansukhlal Babulal was also called upon for weighing the muddamal powder. Thereafter, the appellant-accused was arrested. Second part of the panchanam was prepared at that place. Then, PSI Shri Patel drafted one complaint and forwarded alongwith the forwarding letter to PSO Bhaktinagar Police Station.

3. On receiving the said complaint, PSO of Bhaktinagar Police Station registered an offence against the appellant-accused at Prohibition Crime Register No.81 of 2002 for the offence punishable under Section 22 of the NDPS Act and investigation was handed over to PSI Shri V.S.Zala. During the course of investigation, Shri Zala recorded the statements of concerned witnesses. Thereafter, muddamal was sent to FSL for analysis. On receiving the report from FSL, it was kept alongwith police papers. According to the report, the muddamal recover from the accused was proved to be narcotic drug.

4. After collecting the evidence by the Investigating Agency, PSI Shri V.S.Zala, filed charge-sheet against the appellant-accused.

5. On the basis of above allegations, charge was framed against the appellant-accused at Exh.1 and read-over and explained to the appellant-accused for the alleged offences and plea was recorded at Exh.2, wherein, appellant-accused pleaded not guilty to the charge and claimed to be tried. As the accused pleaded not guilty to the charges, the case was fixed for recording the evidence.

6. In order to bring home the charges against the accused person, prosecution has examined several witnesses and also produced documentary evidences.

7. Thereafter, after filing closing pursis by the prosecution, further statement of the appellant-accused under Section 313 of the Code of Criminal Procedure, 1973 was recorded, wherein the appellant has come forward with the case of total denial. But the accused not pleaded on record any defence evidence except that the accused has submitted written explanation, where in, he stated that on 10.04.2002, he came from his duty from Municipal Corporation, Rajkot and had gone for nature's call. Meanwhile, police entered his house and caught hold of his tenant name Bhaskar and started shouting that he is Shailesh, as the accused came out after nature's call, he was taken to his residence office, where he was illtreated and thereafter, he was taken to police station and filed a false complaint against him.

8. Being aggrieved by and dissatisfied with the impugned judgment and order of conviction and sentence passed by the learned learned Special Judge, 2nd Fast Track Court, Rajkot, the present appellant-accused has preferred this appeal.

9. Heard Mr.Girish Patel, learned advocate for Mr. R.I.Sharma, learned advocate for the appellant-accused and Mr. N.J.Shah, learned Additional Public Prosecutor for the respondent-State.

10. Mr.Girish Patel, learned advocate for the appellantaccused contended that the judgment and order passed by the learned trial Judge is illegal, invalid and improper. He has also contended that the learned trial Judge has not considered the case of the defence and material evidence produced on record and has passed absolutely wrong order. He has contended that the prosecution has miserably failed to prove its case beyond reasonable doubt, yet the learned trial Judge has not considered the probable defence of the appellant and has wrongly convicted the appellant. He contended the Trapping Officer has not followed the mandatory provisions of law. The muddamal was recovered on late hours night on 10.04.2002, however, the same was sent for FSL on 15.04.2002 and therefore, chance of tampering with the muddamal cannot be ruled out and hence, benefit of doubt may be given to the accused. Panchas are subsequently declared hostile, eventhough contents of the panchnama is proved beyond reasonable doubt, which cannot be believed. He contended that specimen of seal affixed on the muddamal is required to be sent to FSL as well as specimen is also required to be placed before the Court for comparison, but in the instant case, specimen of seal is not sent to FSL. He then contended that as per provisions of Section 42 of the NDPS Act, the received information is required to be reduced in writing, which is not done in the present case. He contended that the appellant-accused was serving as swimming Instructor in the Municipal Corporation, but he was not present when the Trapping Officer sealed and seized the Muddamal and therefore, an opportunity of hearing was not given to the appellant-accused. Further, no independent witnesses were examined by the prosecution. Here in present case, main and star witness Police Constable is not examined and therefore, there is lacuna on the part of the prosecution, which is fatal to the case of the prosecution. He argued at length and contended that the judgment

and order of the learned trial Judge is against the provisions of law and learned trial Judge has wrongly considered the evidence of the prosecution and wrongly convicted the appellant-accused for the alleged offences. He contended that at the time of hearing of the appeal, affidavits sworn by the neighbours were produced, which were not considered by the learned trial Court. Therefore, considering the above aspects, the learned trial Judge committed grave error by convicting the appellant-accused for the alleged offence and therefore, he prayed to allow this appeal by quashing and setting the judgment and order of the learned trial Court.

11. As against this, Mr.N.J.Shah, learned Additional Public Prosecutor has contended that the judgment and order passed by the learned trial is absolutely just and proper. He has contended that the prosecution has proved its case beyond reasonable doubt. He contended that prior to the search, the Trapping Officer had informed the appellant-accused that he is a Gazetted Police Officer and the appellant-accused was informed that whether he wanted to make search in presence of Gazetted Officer is not. In the instant case, Mr.Patel complainant received an information through Police Constable and on receipt of the said complaint, the complainant send the Head Constable to get an entry made in Bhaktinagar Police Station, which thereafter, sent to Deputy Police Commissioner, Rajkot and reduced in station diary No.27 of 2002. The aforesaid shows that the entire exercise has been done in accordance with law. The contention raised by learned advocate regarding the affidavits sworn by the neighbours at the time of hearing of appeal, is clearly an afterthought. The present appellant-accused has never never filed an application under Section 173(8) of the Code of Criminal Procedure, 1973 directing the Investigating Agency to make further investigation with regard to alibi. Therefore, looking to the overall facts and circumstances of the case, and evidence produced on record, the order passed by the learned trial is absolutely just and legal and is not required to be interfered with.

12. I have gone through the impugned judgment and order passed by the learned Judge and oral as well as documentary evidence produced on record of the case. I have read the oral evidence of prosecution witness and also perused the charge framed against the appellant.

13. In cases of narcotic drugs, mandatory provision is required to be followed and it is the duty of the prosecution to establish and prove that one has not breached mandatory provisions of law. Here in present case, Mr.Patel-complainant received an information through Police Constable and on receipt of the said complaint, the complainant send the Head Constable to get an entry made in Bhaktinagar Police Station, which thereafter, sent to Deputy Police Commissioner, Rajkot and reduced in station diary No.27 of 2002 and hence, mandatory provisions of law is followed. The contention raised by the learned advocate for the appellant that narcotic cases, the Investigating Agency frequently calls Mr. Kishor Mohanlal Bhati to weight the Muddamal. In the instance case also, he was called to weight the muddamal and therefore, some

doubt is created with regards to sealing and seizure. I have minutely perused the FSL report, which shows that FSL has received the muddamal intact and therefore, the aforesaid contention cannot be considered at all as per the seal made by the Trapping Officer.

14. I am, therefore, of the opinion that the learned trial Judge has not committed any error in convicting the appellant-accused. Therefore, no interference is required. The judgment and order of conviction dated 23.05.2003 rendered in Special Case (NDPS) No.11 of 2002 by the learned Special Judge, 2nd Fast Track Court, Rajkot is hereby confirmed. The present Appeal deserves to be dismissed and is hereby dismissed. Record and Proceedings, if any, be sent back to the trial Court concerned, forthwith. Since the appellant-accused has already undergone the sentence awarded to him, he is not required to be surrendered before the jail authority.