

(1988) 08 GUJ CK 0001
In the Gujarat High Court
Case No : Criminal Appeal No. 407 of 1991

Sodha Darbar Hamirsinh Vardhaji and Another

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 17-08-1988

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 374
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 22,
29, 41, 42

Citation : (1988) 08 GUJ CK 0001

Hon'ble Judges : J.N. Bhatt, J;A.L. Dave, J

Bench : Division Bench

Judgement

J.N. Bhatt, J.—In this appeal, the Appellants-original accused persons (A1 and A2) in Sessions Case No. 169 of 1989 were found guilty for having committed offences punishable under Sections 21 and 29 for contravention of provisions of Section 8 of the Narcotic Drugs and Psychotropic Substances Act (N.D.P.S. Act) and sentenced to R.I. for 15 years and to pay fine of Rs. 2,00,000 and in default, to undergo S.I. for three years, by the impugned judgment and order dated 25.4.1991 passed by the learned Additional Sessions Judge, Mehsana, which is directly under challenge before us in this appeal u/s 374 of the Code of Criminal Procedure, 1973 the Code").

2. In order to appreciate the merits of this appeal and challenge against it, a few material and relevant facts may be articulated at this juncture. According to the prosecution case, the accused persons were travelling in truck No. GTY 7348 along with brown sugar of the quantity 1 kg. each. When the truck was proceeding from village Chanasma to Harij, upon the information received, head constable Akbarshah and other members of the police stopped the truck at the junction of four roads at Harij, on 1.9.1989 at 7.30 p.m. After the truck stopped, immediately, thereafter, one person wearing black paint and white shirt fled away. Members of the police force tried to chase and catch hold of him but were not successful.

3. Both the accused persons who were travelling in the truck along with contraband psychotropic substance, brown sugar, were caught. The brown sugar was in the suit cases and it was the prosecution case that in the suit case of A-1 Hamirsinh, one plastic bag was found in which brown sugar of 1 kg. was detected. He was serving in the Border Security Force. A-2 Bhimsinh was also found to have two bags, wherein, one plastic bag covered under the cloth was found and brown sugar of 1 kg. was also detected. The value of the quantity of brown sugar found from each of them was at that, time, assessed at Rs. 1 crore. After observing necessary formalities, search was done and panchnama was prepared in presence of panchas, by the Investigating Officer, complainant PSI, Harij Police Station, Mr. R.D. Patel. In course of the search, one knife was also recovered. The complaint was lodged by the PSI which is produced at Exh. 32. Muddamal articles along with contraband items were forwarded to forensic science laboratory for opinion and report. As per the report of the forensic science laboratory, the contraband items were heroin. The accused persons were, therefore, charge-sheeted by the Investigating Officer and the Sessions Court framed the charge at Exh. 5 against the accused persons on 27.12.1990 u/s 22 read with Section 29 for violation of provisions of Section 8 of the N.D.P.S. Act.

4. In order to substantiate the charge against the accused, the prosecution relied on the evidence of the following witnesses:

P.W. 1 Parshottam Khemjibhai, Exh.12 P.W. 2 Khodabhai Becharbhai, Exh. 16 P.W. 3 Dinesh Kumar Nathalal, Exh. 19 P.W. 4 Rasaiklal Mafatlal. Exh. 20 P.W. 5 Narsinhdan Shambudan, Exh. 23 P.W. 6 Nanjibhai Madhabhai, Exh. 24 P.W. 7 Gautamkumar Kantilal, Exh. 26 P.W. 8 Akarbarsha Motisha, Exh. 28 P.W. 9 Ramabhai Dalabhai, Exh. 30 5. The prosecution also placed reliance on panchnama, Exh. 17, forensic science laboratory report at

Exh. 13 complaint, Exh. 32 to which reference will be made by us at an appropriate stage.

6. Upon the assessment and evaluation of the evidence of the prosecution, the trial court found the accused persons guilty for the offences punishable u/s 21 read with Section 29 for violation of provisions of Section 8 of the N.D.P.S. Act and sentenced each of them to R.I. for fifteen years and to fine to Rs. 2 lacs and in default, to undergo S.I. for three years, which is challenged before us.

7. Before we examine the merits of the case, we may state that the following question was referred to the larger Bench along with other matters by an order of this Court recorded on 31.1.1997.

Whether the search of the bag carried by the Appellant should be regarded as search of the person of the Appellant or not within the meaning of Section 50 of the N.D.P.S. Act?

8. The Full Bench of three Hon'ble Judges by its judgment dated 13.1.1998 answered the aforesaid question referred to it by observing that search of the

bag carried by the Appellant should be regarded as search of the person of the Appellant within the meaning of Section 50 of the N.D.P.S. Act. The said decision is also, now, in *Sodha Darbar Hamirsinh Vardhaji v. State of Gujarat* 1998 (1) GLR 442. It is, therefore, very clear by virtue of the decision of the Full Bench that provisions of Section 50 are attracted even in case of search of the bag carried by the accused. In short, it has been held by the Full Bench that search of the bag carried by the accused should be regarded as search of the person of the accused within the meaning of Section 50.

9. Section 50 of the N.D.P.S. Act prescribes the conditions in which search of the person shall be conducted, it would be profitable at this stage to refer to Section 50 in view of the decision of the Full Bench that search of the bag carried by the Appellants should be regarded as search of person of the Appellant within the meaning of Section 50:

(1) when any officer duly authorised u/s 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, 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;

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in Sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by any one excepting a female.

Reliance is also placed on the decision of the Hon''ble Apex Court in *State of Punjab Vs. Balbir Singh*, and it is contended that provisions of Section 50 are mandatory and in the present case, the mandatory provisions are not followed.

10. Section 50 is evidently introduced to avoid any unnecessary harassment or harm to the innocent persons and to obviate allegations of manipulation, misuse or abuse of powers of certain authorities while performing duties under the N.D.P.S. Act. Mandatory requirement u/s 50 is to inform the person to be searched of his right to be searched in presence of a Gazetted Officer or a Magistrate. This decision is followed by the Hon''ble Apex Court in *Saiyed Mohamad Saiyad Umar Saiyad v. State of Gujarat* 36 (2) GLR 1315, wherein, it is also held that it is necessary that the court dealing with the offences under the N.D.P.S. Act should be very cautious and careful to see that it is established to its satisfaction that he had right to have him searched before a Gazetted Officer or a Magistrate. It was further held that no presumption should be drawn that the police officer had discharged his duties. It is obligatory on the part of the police officer to inform the party that he has right to have him searched in the presence

of a Gazetted Officer or a Magistrate and failure to so inform the party is fatal. It was, also, held that if no evidence to this effect is coming out, the Court can presume that the person to be searched was not informed of the protection law offered him and the alleged find of possession of illicit articles under the Act was not established.

11. In *State of Punjab Vs. Jasbir Singh and Others*, , the decision in *Balbir Singh*'s case was followed:

12. The proposition of law that provisions of Section 50 are mandatory and failure to comply with them would be fatal has been very well expounded. Therefore, the only question which now remains for examination is as to whether provisions of Section 50 are observed or followed or not. In fact, there is hardly any dispute about noncompliance of provisions of Section 50 in the present case. The Investigating Officer who made raid and searched the accused persons was one PSI of Harij Police Station Mr. R.D. Patel. It is also not in dispute that PSI is not a Gazetted Officer. Even, it is very clear from the evidence of PSI Patel, Exh. 30 that he had not informed the accused of their right for being searched by a Gazetted Officer or Magistrate. Where any officer authorised u/s 42 does not follow the provisions of Sub-section (1) of Section 50, possession of illicit item or contraband substance is not proved in search taken by the PSI who is not a Gazetted Officer in violation of provisions of Section 50.

13. Again, as held by the Full Bench, search of the bag carried by the accused should be regarded as search of person of the Appellants within the meaning of Section 50 of the N.D.P.S. Act. Even in case of search of container or bags carried by the accused persons ought to be regarded as search of the person of the accused within the meaning of Section 50. In the circumstances, the search carried out by the PSI of the suit-cases of the accused persons in violation of provisions of Section 50 of the Act would not prove possession of the illicit item or contraband substance ipso facto. Therefore, we have no hesitation in finding that the impugned order of conviction and sentence for violation of provisions of Section 50 and in absence of any other evidence, would vitiate trial. Therefore, the appeal is required to be allowed.

14. In the result, the impugned conviction and sentence of the accused persons recorded by the trial Court under N.D.P.S. Act are quashed and set aside. The amount of fine if paid, shall be refunded to the accused, on due verification. The appeal shall stand allowed accordingly. The accused persons are in jail. Therefore, they shall be released forthwith, if not required in connection with any other case.