
(2015) 11 GUJ CK 0020
In the Gujarat High Court
Case No : Criminal Appeal No. 809 of 2003

State of Gujarat	Vs	APPELLANT
Arvindbhai Bhulabhai Tadavi		RESPONDENT

Date of Decision : 02-11-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 378

Citation : (2015) 11 GUJ CK 0020

Hon'ble Judges : Rajesh H. Shukla, J.

Bench : Single Bench

Advocate : H.L. Jani, APP, for the Appellant; Bhunesh C. Rupera, for the Respondent

Final Decision : Dismissed

Judgement

Rajesh H. Shukla, J.—The present appeal is directed against the impugned judgment and order rendered in Special NDPS Case No. 8/2001 by the Special Judge, Vadodara dated 31st March, 2003 recording acquittal of the respondent-accused.

2. The facts of the case briefly summarized are as follows:

"2.1 The Police Constable working at Tilakwada Police Station received information that the respondent-accused is cultivating plants of ganja in a vada behind the house. Therefore on the basis of the information, which was intimated to PI, a raid was arranged and contraband article ganja was recovered from the rear door of the house and also plants in the vada. Therefore same was registered as C.R. No. II-23/2001.

2.2 On registration of the offence, the investigation was carried out and at the end of investigation, chargesheet came to be filed, which has been registered as Special NDPS Case No. 8/2001 before the Special Judge, Vadodara.

2.3 Thereafter, the court below proceeded with the trial and recorded the further

statements of the accused under Section 313 of the Criminal Procedure Code.

2.4 After hearing the learned APP as well as learned advocate for the defence and on appreciation of the evidence, the court below recorded acquittal of the accused."

3. It is this judgment and order which has been assailed on the grounds inter alia that the court below has failed to consider the relevant material and evidence including the fact with regard to the conscious possession as well as mandatory provisions and, therefore, urged that appeal may be allowed.

4. Heard learned APP Shri H.L. Jani for the appellant-State and learned advocate, Shri Bhunesh Rupera for the respondent-accused.

5. Learned APP Shri Jani referred to the charge as well as testimony of the witnesses including the testimony of PW-5 at Exh. 26, Talati and submitted that as stated by him, the house belonged to the father of the accused, which is constructed on the vest land. He emphasized that though in the statement, it is not mentioned about the area of the backyard or vada, the fact remains that after the house, there is one area for bathing and washing cloth and, thereafter, there is an open land. He submitted that therefore though he has stated that he does not have record with regard to the ownership or the possession, the fact remains that the house belonged to father of the respondent-accused. Learned APP Shri Jani emphasized that it is not disputed by the accused that he is not occupying or he is not in the possession and it has not been explained even in the statement under Section 313 of the Criminal Procedure Code. He submitted that if the panchnama of the scene of offence at Exh. 41 is seen, it would reveal that during the raid, the respondent-accused has not objected to the search and seizure of the person or premises and he has been intimated about the same in compliance with the provisions of the Act. Learned APP Shri Jani submitted that as recorded in the panchnama, one small stake of leaves of ganja, plant was found outside the rear portion of the house near the door of kitchen, which was recovered and it was 25 gram, which was recovered. Similarly, they proceeded further towards the vada and 16 plants of ganja were recovered. Therefore, learned APP Shri Jani submitted that the observations made by the Court below while recording acquittal are erroneous to the extent that the mandatory provisions have been complied with. Learned APP Shri Jani referred to Sections 50, 42 etc. of the Act and submitted that Section 50 of the Act would be attracted as there was search of a person and he was intimated. He submitted that PI is Gazetted Officer himself and, therefore, when he has not objected, it cannot be said that there is any violation of the mandatory provisions of the Act. Similarly, he referred to Section 42 of the Act and submitted that information was reduced to writing, which was intimated to the Higher Officer by the Constable. He pointedly referred to the reasons recorded on this aspect and submitted that it has been erroneously interpreted as intimation or information regarding the raid though it could also be said that the information received has been reduced to writing as required under Section 42 of the Act. Learned APP

Shri Jani has also referred to the judgment of the Hon''ble Apex Court in case of Mohan Lal Vs. State of Rajasthan on this aspect and submitted that even if there is some lapse, it would vitiate the trial and the Court below has misdirected while appreciating the evidence.

6. Learned APP Shri Jani also referred to other evidence including the testimony of PW-11, Exh. 39, IO and submitted that in his testimony, he has clearly stated that the Police Constable, Mahendrabhai has given information, on the basis of which, raid was carried out and how the contraband was recovered after the search and seizure, for which, the panchnama is also made at Exh. 41. He has clearly stated that the respondent was informed about the search and seizure of vada of his house in the presence of Dy. Mamlatdar and the respondent has not raised any objection. Learned APP Shri Jani therefore submitted that as offer was made and he had not raised any objection, if the recovery is made after making the panchnama, it cannot be said that there is non-compliance with the mandatory provisions. Learned APP Shri Jani submitted that in fact, PI himself was the Gazetted Officer. He also submitted that the Executive Magistrate was also asked to remain present during raid and entry has been made in the station diary. He pointedly referred to Exh. 45 in support of his submission about the intimation to the accused about the offer made to the accused and, therefore, there is sufficient compliance.

7. Learned APP Shri Jani submitted that the Court below has also referred to the aspect of muddamal and while recording reasons for the acquittal has also emphasized about the movement of muddamal or some discrepancy in the record. Learned APP Shri Jani submitted that however the Court below has failed to appreciate that the muddamal was recovered after making panchnama and it was sent to FSL in a sealed condition as acknowledged by FSL, Gandhinagar. For that, he referred to and relied upon Exh. 12 as well as Exh. 11. Learned APP Shri Jani submitted that the report of the FSL along with Exh. 10 and submitted that it confirms about the canabinol (CBN), canabidiyol (CBD), teta hydro canabinol (THC) and the plants were the cannabis satavia. He therefore submitted that the charge with regard to the conscious possession is established, which has not been appreciated and the acquittal which has been recorded merely on some surmises and conjecture with some observation that the muddamal was given to one Sunilbhai and during the period between 13.09.2001 to 24.09.2001, it was in whose custody, is not clarified and, therefore, the benefit of doubt should be given. He also referred to the testimony of PW-1, FSL Officer at Exh. 9 and emphasized that as stated, it was received with seal from PSI which confirms about the muddamal being received in a sealed condition and, thereafter, analyst was carried out. It has been stated that it was received with forwarding letter, for which, acknowledgment was also given as stated above and, therefore, the Court below could not have raised any doubt merely because initially it was given to one Sunilbhai and, thereafter, it was sent to FSL, Gandhinagar and merely delay in sending sample, would not make any difference. Again in support of his submission, he referred to the judgment in case of Mohan Lal (supra) and also

judgment of the Hon"ble Apex Court reported in 1999 (2) GCD 991.

8. Learned advocate, Shri Bhunesh Rupera referred to the testimony of witnesses and emphasized the testimony of PW-5, Talati at Exh. 26 that he has clearly stated that he cannot say about the ownership or the possession of the vada land as there is no record maintained by them. He therefore submitted that as there is no evidence with regard to the land from which such plants are recovered, conscious possession of the respondent-accused cannot be said to have been established. He also referred to Sections 2, 3(b) and submitted that it refers to the possession and first small parcel, which has been recovered from outside the rear portion of the house was only leaves and not ganja. Similarly he submitted that 16 plants which have been recovered from the vada, which cannot be said to be in possession of the accused as there is no evidence to establish that vada land was in possession of the respondent-accused. He further submitted that the application, Exhs. 15 & 16 was given and on the basis thereof, further evidence was laid and only fruit was required to be considered and 16 Kg. which has been recovered, would include the leaves and whole plant and therefore, actual quantity would be about 500-700 gram, which would be a small quantity. Learned advocate, Shri Rupera therefore submitted that the conscious possession cannot be said to have been established. He referred to and relied upon the judgment in case of Mohd. Alam Khan Vs. Narcotics Control Bureau and another, .

9. Similarly, he referred to the observations made by the Hon"ble Apex Court in a judgment in case of Om Prakash @ Baba Vs. State of Rajasthan, and emphasized the observations made in para No. 12. Learned advocate, Shri Rupera therefore submitted that if the possession is not established, the charges cannot be said to have been proved and, therefore, the judgment and order recording acquittal is just and proper when there is no evidence with regard to the ownership or possession of the vada land. He again emphasized the testimony of PW-5, Talati, Exh. 26.

10. Learned advocate, Shri Rupera also referred to the testimony of witnesses to emphasis about the discrepancy in the movement of the muddamal and possession of the muddamal. He submitted that as stated by PW-10, Exh. 36, he is Crime Writer Head and he had handed over the muddamal to Police Constable, Sunilbhai. In cross-examination, he had admitted that muddamal was in his custody from 13.09.2001 to 24.09.2001. he submitted that on one hand, he has denied during this period, he has not given muddamal to anyone and on the other hand, he had given muddamal to Police Constable, Sunilbhai. He has also stated that it was given to Sunilbhai for taking it to Surat, who in turn brought it back. He submitted that there is no entry made in the register. He therefore submitted that there is no explanation or justification as to why this muddamal is handed over to Sunilbhai for taking at Surat. Learned advocate, Shri Rupera therefore submitted that there is discrepancy and contradiction in the evidence of the prosecution with regard to the conscious possession as well as movement of

the muddamal. He further emphasized that Sunilbhai has not been examined and, therefore considering the relevant evidence, the judgment and order recording acquittal is just and proper.

11. He submitted that the Hon''ble Apex Court may also consider the scope of Section 378 of the Criminal Procedure Code in acquittal appeals. He emphasized that merely because there are two views, the judgment of acquittal may not be disturbed. In support of his submission, he also referred to and relied upon the judgment of the Hon''ble Apex Court in case of S. Anil Kumar @ Anil Kumar Ganna Vs. State of Karnataka, and emphasized the observations made in para No. 14. Similarly, he referred to and relied upon the judgment of the Hon''ble Apex Court in case of State of Rajasthan Vs. Shera Ram @ Vishnu Dutta, and emphasized that the presumption of the innocence is reinforced with the order of acquittal, which may not be disturbed unless there are compelling circumstances. He therefore submitted that the present judgment and order recording acquittal may not be disturbed.

12. In view of these rival submissions, it is required to be considered whether the present appeal deserves consideration.

13. The submission made by learned advocate, Shri Rupera that the possession is required to be established, for which, he referred to the testimony of witnesses requires a closer scrutiny. As could be seen from the testimony of PW-5, Talati, Exh. 26, he has stated in his testimony that one packet was found outside the house belonging to the father and another material was found in an open space (vada). He has admitted that there is no record maintained with regard to such vada area, meaning thereby, it was an open space, for which, it could not be said that it was in exclusive possession of the accused or even his father. In the cross-examination, it has been specifically admitted that there is no record or evidence with regard to the ownership or possession of this open space (vada). Thus apart from the ownership, even the exclusive possession of this vada land is not established and, therefore, whatever contraband article recovered from such land, cannot be said to be in possession or conscious possession of the respondent-accused. Reliance placed by learned advocate, Shri Rupera on the judgment of the Hon''ble Apex Court in case of Om Prakash @ Baba (supra) with some what similar circumstances has clearly observed that there was no evidence to show the appellant's exclusive possession of the house and seized contrabands belonged to the accused, the conviction was set aside. Therefore, the ownership or the possession of the premises or the area is required to be established and the recovery of the contrabands before the person/accused could be convicted. The witness has also stated that this is a gauchar land or vest land.

14. Further on the aspect of movement of the muddamal, testimony of PW-10, Exh. 36 is also required to be considered. This witness in his testimony has stated that he had given to Police Constable, Sunilbhai. He has admitted that when the muddamal is to be sent to the FSL, entry is made in the register, for which, he has produced the entry at Exh. 38. However in the cross-examination,

he has stated that when he had handed over the said muddamal to Police Constable, Sunilbhai, he has not taken signature and he has proceeded to explain that only name with buckle number of the Constable, who carries the muddamal, is mentioned. Assuming that to be true, still there is no explanation with regard to the muddamal being sent to Surat between 13.09.2001 to 24.09.2001. He had admitted that he cannot establish that it was in his possession during this period. Therefore as recorded in the judgment of the Court below for recording acquittal and the reasons thereof, cannot be said to be erroneous. Therefore though the submissions made by learned APP Shri Jani with regard to the reasons recorded by the Court below or error with regard to the reasons regarding compliance with the mandatory provisions relaying upon the judgment of the Hon"ble Apex Court in case of Mohan Lal (supra), may be accepted, still other relevant issues stare in the face, for which, acquittal recorded may not be called for any interference.

15. Therefore without any further elaboration on the aspect of scrutiny of the evidence, the moot question which is required to be considered, is whether the present appeal deserves consideration even if other view may be possible. The Hon"ble Apex Court has laid down broad guidelines with regard to the scope of Section 378 of the Code of Criminal Procedure, 1973 and other relevant criteria to be considered. A useful reference can be made to the judgment of the Hon"ble Apex Court in case of Chandrappa and Others Vs. State of Karnataka, laying down the guidelines which has made observation. In the said judgment, it has been observed referring to the scope of power of the appellate court dealing with the appeal against acquittal,

"42.....(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

16. Further, same aspect has been reiterated in subsequent judgment of the Hon"ble Apex Court in case of Mookkiah and Another Vs. State rep. by the Inspector of Police, Tamil Nadu, and it has been observed,

"This Court in a series of decisions has repeatedly laid down that as the first appellate court the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be reappraise the entire evidence, though while choosing to interfere only the court should find an absolute assurance of the guilt on the basis of the evidence

on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinctions or differences in approach are envisaged in dealing with an appeal as such merely because one was against conviction or the other against an acquittal. [Vide State of Rajasthan Vs. Sohan Lal and Others,]"

17. Therefore as it has been observed time and again with a word of caution that if the view taken by the Court below is plausible view then, it may not be disturbed merely because other view is also possible. The interference on the ground that other view is to be avoided unless there are good reasons for the interference as it has been observed and reiterated in the judgment in case of Rohtash Vs. State of Haryana, .

18. It is in this background, having regard to the aforesaid broad guidelines and observations made by the Hon"ble Apex Court, the present appeal deserves to be dismissed and accordingly stands dismissed.