

(2012) 03 GUJ CK 0123
In the Gujarat High Court
Case No : Criminal Appeal No. 2168 of 2010

State of Gujarat

APPELLANT

Vs

Mukeshbhai Chhaganbhai Boricha and 1

RESPONDENT

Date of Decision : 02-03-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 235(1), 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 21, 41, 42, 42(2)

Citation : (2012) 03 GUJ CK 0123

Hon'ble Judges : S.G. Gokani, J; Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Vaibhav A. Vyas, for the Appellant; Paresh Upadhyay for Opponent : 2, for the Respondent

Judgement

Honourable Ms. Justice Sonia Gokani

1. This Appeal is preferred by the State being aggrieved by the order and judgment passed by the learned Principal Sessions Judge as a Special Judge, Junagadh in Sessions (NDPS) Case No. 1 of 2010 conducted for the offences punishable u/s 20 and 21 of the Narcotic Drugs and Psychotropic Substances Act(NDPS Act for short), whereby he acquitted the respondent accused of all the charges on 27th September 2010. The brief outline of the prosecution case is as under :

2. A Traffic Constable Hanifhai Gulmohmedbhai received an information on 14th October 2009 that the respondent (original accused) had concealed 170 grams of charas worth of Rs 17,000/- in the head light of Hero Honda Motor Cycle serving registration No. GJ-11-DD-1718 and this was allegedly kept by the accused in his conscious possession.

2.1. FIR was lodged against the respondent accused which was registered as III CR No. 229/2009 with the City B division police station, Junagadh on 15th October 2009. On seizure, panchnama was prepared and after due investigation

charge sheet was placed before the learned Judicial Magistrate First Class. on 30th January 2010 he committed the case to the Court of Sessions at Junagadh and on committal, it has been registered as Special (N.D.P.S) Case No. 12/2010.

2.2. During the trial, prosecution examined as many as 12 witnesses and documentary evidences were also duly proved. The Court after recording the evidence, followed the provision of Section 313 of Criminal Procedure Code and recorded further statement of the respondent. After hearing both the sides, the Sessions Court passed the impugned order and judgment of acquittal u/s 235(1) Cr.PC acquitting him of both the charges leveled under the Section 20 and 21 of the NDPS Act.

3. The impugned order and judgment of Special Judge are at large before this Court by way of the present Appeal.

4. At the outset it is needed to be noted that vide order dated 12th August 2011 (Coram : D.H waghela and J.C UpadhyayJ,J.) this Court requested the learned Additional Public Prosecutor to keep the investigating officer and the complainant to remain present personally for explaining their role in the investigation of the complaint, and simultaneously records and proceedings of the trial court were called for.

4.1. On 29th August 2011, the Court in its order prima facie took note of illegality of seizure u/s NDPS Act, from the record and therefore, it directed the constable and the police sub-inspector to explain as to why appropriate order be not passed against them. On 13th September 2011 it granted time to the learned counsel appearing for officers who carried out investigation and on 20th September 2011, the affidavits of the officers were taken on record and hearing was adjourned to 27th September 2011.

4.2. The record reflects that vide its order dated 4th October 2011, this Court directed departmental proceedings against the enquiry officer concerned as under :

1. Even as the application and the criminal appeal were heard for admission and grant of leave to appeal, it was found that prima-facie the search and seizure of the contraband was illegal and unauthorized from the very outset. Under such circumstances, Ld. APP was called upon to explain the conduct of the Investigating Officers and staff concerned, due to which some of the Officers involved in the investigation have appeared before this Court in person or through their learned advocates.

2. It was further submitted by Ld. APP, on instructions of Dy. S.P. Shri P J Trivedi and S.P. Junagadh Shri Dipanker Trivedi that appropriate departmental proceedings are initiated against the Officers concerned and in case of necessity, even criminal cases will be filed by the Department so as to mete-out appropriate punishment, if any misconduct or criminal offence is found to have been committed. It was further stated by Ld. APP that the result of the inquiries,

which are presently underway, shall be known by the end of one month. Therefore, hearing of the present matters is adjourned to 15/11/2011.

5. After this said order, this appeal has come up before this Bench for final hearing.

6. We have heard the learned Additional Public Prosecutor Mr Kodedkar who submitted that as directed earlier on 4th October 2011, by the Court, departmental proceedings have already been initiated against all those who are found involved in the preliminary inquiry. A detailed report in that respect also has been placed on record dated 25th December 2011. It is also the submission of the learned Additional Public Prosecutor that the Traffic Constable, who is the complainant in the instant case, appears to have played a lead role in this entire episode however, appropriate course is resorted to as provided under the law.

6.1. This report dated 25th December 2010 is also prima facie indicative that the raid was planted by the complainant at the behest of one lady Krishnaba and her brother Pravinsinh with a motive to take revenge on the respondent who had refused to convert his relationship with Krishnaba into a marital tie for he being a married man. This proximity developed when the respondent was managing the gymkhana where he had met this lady. Mobile call details of Krishnaba her brother and the present complainant prima facie reveal that they were in constant touch prior to the raid carried out by the complainant. These prima facie findings are presented before this Court however, as the law is required to take its own course we do not propose to comment on any of these aspects at this stage as that may be prejudicial to the case of either side.

7. On being satisfied that the order of the Division Bench dated 4th October 2011 is duly complied with. We make it clear that the departmental proceedings and any other fall out if ensue therefrom shall be dealt with by the authorities prescribed under the law, following due procedure, on availing sufficient opportunities to both the sides and it would not be desirable for the Court to henceforth monitor the departmental proceedings or any other proceedings, as shall be taken against the erring officers/personnels. With these observations the merit of this appeal is being examined hereinafter.

8. The State has challenged the impugned order and the judgment in Sessions Case No. 1 of 2010 raising following grounds in the Appeal memo.

(i). On 14th October 2009 information was received by the Traffic Constable that the accused had concealed 170 gram of charas in the head light of Hero Honda Motorcycle. Which was in his conscious possession. Not only the information was noted and FIR lodged, the panchnama was also carried out and muddamal along with the motorcycle was seized.

(ii). There was wrong evaluation of deposition of the complainant and non-acceptance of conscious possession on the part of the accused of contraband articles charas, is an erroneous conclusion.

(iii) Despite due compliance of mandatory provisions of NDPS Act namely Section 41, 42, 50 and 57 and the accused, was caught red handed, the order of acquittal is in contravention of the well laid down principles of the criminal trial.

(iv) The FSL report substantiated that the articles seized was charas from the accused respondent and non-acceptance of the prosecution's evidence is lamented.

9. As can be seen from the judgment of the trial court, following reasons are given by the learned judge of the Sessions Court in disbelieving the case of the prosecution and its witnesses (1) the complainant was serving as the traffic police constable who had no authority to undertake the process of search or seizure on having received information of contraband articles. (2) There were neither panchas present when he searched the motorcycle nor were there any authorised gazetted police officer present. (3) There were many motorcycles with silver colour, No particular features were mentioned in respect of the motorcycle where this contraband article was concealed and. it was not possible to identify the same. (4) Call details of complainant's mobile was ensured to be produced before the trial court and the same were never produced. (6) No narcotic substance was seized from the vehicle search of the accused.

10. Section 42 of the NDPS Act incumbent upon the traffic police constable receiving the information in connection with contraband articles to reduce the same into writing and send the report stating the grounds of his belief within 72 hours to his immediate superior. The Court noted complete and blatant violation of this mandatory provisions of Section 42(2) of the NDPS Act.

11. The full report of all the particulars, the arrest of the accused and the seizure of the contraband is required to be made u/s 57 of the said Act which was found absent and even the Senior PSI has not followed the mandatory provision of NDPS Act.

12. The alleged motorcycle was not of the ownership of the accused and was found in the public place. The respondent accused was not even found to be driving the motorcycle. The Court thus, on detailed discussion found complete violation of mandatory provisions of NDPS Act as well as vital provisions of Code of Criminal Procedure relating to the search and seizure.

13. Absence of panchas and the gazetted officer is also glaring facts led the Court to conclude against the prosecution and in light of breach of these provisions, other documents in the opinion of this Court pale into insignificance.

14. It is very unfortunate that serious case like the present one where the respondent is alleged to have possessed contraband articles like charas is initiated and conducted in the manner as shown eloquently in the judgment of the learned Sessions Judge who was not only aggrieved by the lack of authority of the complainant in intimating an investigation in respect of the contraband articles but he was also much perturbed by the fact that at every stage

mandatory provisions of the NDPS Act were found violated rampantly, so much so that the information received was also not reduced into writing as per the requirement under the law, nor was it intimated to his superior within the stipulated period of 72 hours. The very object of making these provisions mandatory is, to safeguard against the arbitrary and illegal exercise of power of those empowered to protect the society connection with the relation to the contraband articles. It is time and again held by the Higher Courts that for stricter punishment, scrutiny at every level correspondingly shall have to be stricter. In an absolutely impudent manner all the mandatory provisions are given a complete go by as emerged from the Court and this aspects gets further aggravated by the fact that there was no presence of panchas or the gazetted officer at the time of conducting search of the vehicle the head light of which is said to have concealed this contraband article. Again it never belonged to the accused as per the R.C book. The investigating officer Shri Dharmendra Khumansinh did raise the doubt that this was planted raid but after his transfer, the subsequent officer had noted by the Court did not conclude this issue.

15. However, we in the above mentioned circumstances and with such glaring factual details confirm the order of the learned Sessions Judge of acquittal. In the light of the discussion held hereinabove we express our anguish over such arbitrary exercise of powers in complete disregard to the settled position of law as found on the statute book as also as laid down by the Courts time and again. As disciplinary proceedings against violation are already initiated it is expected that the same would be pursued scrupulously to upkeep the faith of the citizens in the justice delivery system With these observations, this Appeal is dismissed and stands disposed of accordingly. Rule is discharged to the extent above.