

(2015) 06 GUJ CK 0021
In the Gujarat High Court
Case No : Criminal Appeal No. 2013 of 2004

State of Gujarat

APPELLANT

Vs

Nayanbhai Jeebhai Barot and Others

RESPONDENT

Date of Decision : 30-06-2015

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 18, 20(b) (ii), 25, 29, 41(3)
Penal Code, 1860 (IPC) — Section 120B, 164, 195, 302, 34

Citation : (2015) CriLJ 4432

Hon'ble Judges : Kaushal Jayendra Thaker, J.

Bench : Single Bench

Advocate : Ronak Raval, Add. Public Prosecutor, for the Appellant; J.V. Bhairavia, for the Respondent

Final Decision : Dismissed

Judgement

Kaushal Jayendra Thaker, J.—This Appeal has been filed by the appellant-State of Gujarat against the judgment and order of acquittal dated 7th July, 2004 passed by the learned Addl. Sessions Judge, Court No. 2, Ahmedabad City, in Sessions Case No. 291 of 1998, whereby the accused has been acquitted of the charges of offence under sections 120B and 195 of the I.P.C. r/w 20(b) (ii) , 18 , 25 and 29 of the Narcotic Drugs and Pscychotropic Substances Act (hereinafter referred to as the Act). The brief facts of the prosecution case are as under:

"The accused on 2nd July, 1998 along with Anandkumar K. Lal, Jitu Samarjitdan Gadhvi, Raman Nathalal Raval hatched the conspiracy and obtained charas and opium from the accused Ramanbhai Nathabhai Raval and placed it in the desk diary and kept it beneath the seat cover of the motorcycle which was in possession of Sashidharan bearing No. GJ-IN 2587 and informed the police about the possession of contraband articles by Shashidharan and thus they have committed the offence punishable under section 120B of the Indian Penal Code read with section 29 of the NDPS Act. The accused No. 1 on 2nd July, 1998

obtained 27 gm and 200 ml.gm. of the contraband article charas in violation of the provisions of NDPS Act and thus he has committed the offence punishable under section 20(b)(ii) of the NDPS Act. The accused No. 1 with a view to succeed in the conspiracy also obtained the contraband article opium to the tune of 14 gms. and thereby he has committed the offence punishable under Sections 18 and 29 of the NDPS Act. The accused No. 1 with a view to succeed in the conspiracy also obtained the contraband article opium to the tune of 14 gms. and thereby he has committed the offence punishable under Sections 18 and 29 of the NDPS Act. The accused No. 1 after obtaining the contraband article charas and opium placed it beneath the seat cover of motorcycle which was is occupation of Shashidharan and the accused No. 2 after the commission of the aforesaid act by accused No. 1 gave the information to the police and thereby both the accused have committed offence punishable under section 25 read with section 29 of the NDPS Act. The accused on the same day, with a view to foist illegal case against Shashidharan and Pravin Hirjibhai Patel placed the contraband articles of charas and opium beneath the seat cover of motorcycle of Shashidharan and thus both the accused have committed offences punishable under section 120B read with section 195 of the Indian Penal Code. In that regard, a complaint was registered for the same and the accused-respondents were charge-sheeted for the offences as stated above. However, the learned Judge has acquitted the accused. Hence, this appeal."

2. Learned APP, submitted that the learned Judge has erroneously arrived at the conclusion that the prosecution could not prove the case beyond reasonable doubt and the confessional statement recorded under section 164 does not fulfill the ingredients of the provisions as the endorsement is not made at the foot of the statement; that the same was explained to the witness or the accused that he was not bound to make the confessional statement and if he makes the confessional statement then the same can be used as evidence against him and further that it was made in the voluntarily manner and the confession was read over to the person.

3. In support of his submission, he has relied upon the decision of the Apex Court in the case of State of Rajasthan Vs. Ram Chandra, , wherein it is observed as under:

"18. If the person so requires, the officer referred to under sub-section (1) of Section 50 may detain the person to bring him before the Gazetted Officer or the Magistrate, as the case may be. As was noticed in Raghbir Singh Vs. State of Haryana, the Act affords the person to be searched a safeguard to the effect that he may require the search to be conducted in the presence of a senior officer. The senior officer may be a Gazetted Officer or a Magistrate depending upon who is conveniently available. That being the purpose of the Act, if any Gazetted Officer even if he is a police officer of a particular rank is present nearby when the accused is detained, the accused may be asked as to whether he would like to be searched in the presence of that officer or a Magistrate. The

foundation of the stand taken by the accused-respondent which found favour with the High Court is that if he is a member of the raiding party the requirements of Section 50 are not met. This is not legally tenable, and in any event on the facts of the present case it was not so because PW-3, the Deputy Superintendent of Police reached the spot after the person was detained.

19. As noted above, in *Ragbir Singh Vs. State of Haryana*, the option given to the accused is only to choose whether he would like to be searched by the officer making the search or in the presence of the nearest available Gazetted Officer or the nearest available Magistrate. The choice of the nearest Gazetted Officer or the nearest Magistrate has to be exercised by the officer making the search and not by the accused. In the instant case all the options were made known to the accused and he himself opted to be searched in the presence of the Deputy Superintendent of Police (PW3).

4. Therefore, he submitted that the order impugned in this appeal passed by the learned Additional Sessions Judge is required to be quashed and set aside.

5. Per contra, learned advocate for the respondents submitted that there is no infirmity in the impugned order. He submitted that the lower court has rightly appreciated the evidence on record and acquitted the respondent of the charges levelled against him. He also submitted that the learned trial Judge has rightly observed that some mandatory provisions of the Act have not been complied with by the prosecution. He has relied upon the decision of this Court in the case of *State of Gujarat Vs. Kalubhai Jivabhai Dungaria and Others*, wherein it is observed as under:

"26. Insofar as the compliance of Section-50 of the NDPS Act is concerned, the testimonies of the Police witnesses, as discussed hereinabove, reveal that though PW-4 has stated that he informed the accused that he is a Gazetted Officer and asked whether they would like to have their searches conducted before any other Gazetted Officer, there is no mention in his testimony or that of the other prosecution witnesses, that an offer was made to the accused that they could have their searches conducted before a Gazetted Officer or a Magistrate.

27. In *State of Punjab Vs. Baldev Singh, etc. etc.*, , elaborating on the provisions of Section-50 of the NDPS Act, the Supreme Court has held as below:

25. To be searched before a gazetted officer or a Magistrate, if the suspect so requires, is an extremely valuable right which the legislature has given to the person concerned having regard to the grave consequences that may entail the possession of illicit articles under the NDPS Act. It appears to have been incorporated in the Act keeping in view the severity of the punishment. The rationale behind the provision is even otherwise manifest. The search before a gazetted officer or a Magistrate would impart much more authenticity and creditworthiness to the search and seizure proceeding. It would also verily strengthen the prosecution case. There is, thus, no justification for the empowered officer, who goes to search the person, on prior information, to effect

the search, of not informing the person concerned of the existence of his right to have his search conducted before a gazetted officer or a Magistrate, so as to enable him to avail of that right. It is, however, not necessary to give the information to the person to be searched about his right in writing. It is sufficient if such information is communicated to the person concerned orally and as far as possible in the presence of some independent and respectable persons witnessing the arrest and search. The prosecution must, however, at the trial, establish that the empowered officer had conveyed the information to the person concerned of his right of being searched in the presence of a Magistrate or a gazetted officer, at the time of the intended search. Courts have to be satisfied at the trial of the case about due compliance with the requirements provided in Section 50 . No presumption under Section 54 of the Act can be raised against an accused, unless the prosecution establishes it to the satisfaction of the court, that the requirements of Section 50 were duly complied with.

26. The safeguard or protection to be searched in presence of a gazetted officer or a Magistrate has been incorporated in Section 50 to ensure that persons are only searched with a good cause and also with a view to maintain veracity of evidence derived from such search. We have already noticed that severe punishments have been provided under the Act for mere possession of illicit drugs and narcotic substances. Personal search, more particularly for offences under the NDPS Act, are critical means of obtaining evidence of possession and it is, therefore, necessary that the safeguards provided in Section 50 of the Act are observed scrupulously. The duty to inform the suspect of his right to be searched in the presence of a gazetted officer or a Magistrate is a necessary sequence for enabling the person concerned to exercise that right under Section 50 because after *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, it is no longer permissible to contend that the right to personal liberty can be curtailed even temporarily, by a procedure which is not reasonable, fair and just and when a statute itself provides for a just procedure, it must be honoured. Conducting a search under Section 50 , without intimating to the suspect that he has a right to be searched before a gazetted officer or a Magistrate, would be violative of the reasonable, fair and just procedure and the safeguard contained in Section 50 would be rendered illusory, otiose and meaningless. Procedure based on systematic and unconscionable violation of law by the officials responsible for the enforcement of law, cannot be considered to be a fair, just or reasonable procedure. We are not persuaded to agree that reading into Section 50 , the existence of a duty on the part of the empowered officer, to intimate to the suspect, about the existence of his right to be searched in presence of a gazetted officer or a Magistrate, if he so requires, would place any premium on ignorance of law. The argument loses sight of a clear distinction between ignorance of the law and ignorance of the right to a reasonable, fair and just procedure.

28. As held by the Supreme Court in the above-quoted judgment, the rationale behind this provisions is that the search before a Gazetted Officer or a Magistrate would impart much more authenticity and creditworthiness to the search and

seizure proceedings. A Gazetted Officer would not only mean a Police Officer but a Gazetted Officer serving in any other Department. In the present case, though it is stated by the prosecution witnesses that PW-4 informed the accused that he, himself, was a Gazetted Officer and made an offer to get themselves searched by any other Gazetted Officer, however, no offer was made to get themselves searched before a Magistrate. As per the dictum of the Supreme Court in the above-quoted judgment, the provisions of Section 50 are required to be complied with scrupulously. After discussing the provisions of Section 50 of the Act and various other decisions of the Supreme Court, certain conclusions have been arrived at by the Supreme Court in the above-quoted judgment. They are reproduced hereinbelow:

(1) That when an empowered officer or a duly authorized officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

(3) That a search made, by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.

(4) to (6) xxxx

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search.

29. The settled legal position of law in this regard is, therefore, that failure to inform the accused regarding the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to the accused. The trial itself may not be vitiated on this count, however, failure to adhere to the provisions of Section-50 scrupulously, would render the recovery of the illicit article suspect and vitiate the conviction and sentence of the accused. In a case where the conviction has been recorded only on the basis of the possession of

the illicit article, the contraband seized from the person of an accused during search conducted in violation of Section 50 of the NDPS Act cannot be used as evidence of proof of unlawful possession of the contraband against the accused.

30. Applying the principles of law enunciated by the Supreme Court hereinabove to the facts and circumstances of the present case, it is clear from the evidence of the prosecution witnesses that the provisions of Section 50 have not been scrupulously complied with. Partial compliance would amount to non-compliance, as it cannot be said that the mandatory provision of law has been complied with in letter and spirit. It may be possible that the accused would prefer to be searched in the presence of a Magistrate. If this option is never given to them, it would rob them of their valuable right enshrined in the Statute. This would certainly cause prejudice to the accused. In the view of this Court, the findings of the Trial Court that the accused are entitled to acquittal on the ground that there has been a violation of Section 50 of the NDPS Act, is just and proper.

4.1 In view of above, he submitted that the impugned judgment may not be interfered with and it may be confirmed."

6. I have heard learned APP for the appellant and Mr. Shah appearing for the respondent. I have also gone through the judgment and order passed by the trial court. I have also perused the oral as well as documentary evidence led before the trial court. It is observed by the trial Court that the defence has relied on various decisions of the Supreme Court, wherein it is observed that the accused has a right to be searched in presence of a Magistrate or Gazetted Officer and such officer should remain present before the Court to give his deposition and in absence of such deposition, the Court can believe that no such contraband article was found from the accused. In view of this, it is found that Sections 42 and 50 as well as Section 41(3) of the Act are mandatory in nature and the prosecution has not followed such provisions, therefore, the accused is acquitted of the charges levelled against him. The decision relied on by the learned APP cannot be applied to the present case because in the present case panchas have not supported the case of the prosecution that contraband article is recovered from the accused nor any gazetted officer is examined with regard to search and seizure of the contraband article. It is also found that panchas have not supported the case of the prosecution. The trial court while considering the oral as well as documentary evidence has clearly observed that the provisions of the Act have not been complied with by the investigating officer. Therefore, the prosecution has failed to prove contravention of Section 20 (B) of the Act and, therefore, it could not prove its case beyond reasonable doubt. Even in the present appeal, nothing is produced or pointed out to rebut the conclusion of the trial Court. Thus, from the evidence itself it is established that the prosecution has not proved its case beyond reasonable doubt.

7. It is a settled legal position that in acquittal appeal, the Appellate Court is not required to rewrite the judgment or to give fresh reasonings when the Appellate Court is in agreement with the reasons assigned by the trial court acquitting the

accused. In the instant case, this Court is in full agreement with the reasons given and findings recorded by the trial Court while acquitting the respondent accused and adopting the said reasons and for the reasons aforesaid, in my view, the impugned judgment is just, legal and proper and requires no interference by this Court at this stage. Hence, this appeal requires to be dismissed.

8. Even in a recent decision of the Apex Court in the case of *State of Goa Vs. Sanjay Thakran and Another*, , the Court has reiterated the powers of the High Court in such cases. In para 16 of the said decision the Court has observed as under:

"16. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the appellate court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate court, in such circumstances, to reappraise the evidence to arrive to a just decision on the basis of material placed on record to find out whether any of the accused is connected with the commission of the crime he is charged with."

9. Similar principle has been laid down by the Apex Court in the cases of *State of Uttar Pradesh Vs. Ram Veer Singh and Others*, and in *Girja Prasad (Dead) by LRs. Vs. State of Madhya Pradesh*, . Thus, the powers which this Court may exercise against an order of acquittal are well settled.

10. Even in a recent decision of the Apex Court in the case of *Mookkiah and Another Vs. State rep. by the Inspector of Police, Tamil Nadu*, , the Apex Court in Para 4 has held as under:

"4. It is not in dispute that the trial Court, on appreciation of oral and documentary evidence led by the prosecution and defence, acquitted the accused in respect of the charges levelled against them. On appeal by the State, the High Court, by impugned order, reversed the said decision and convicted the accused under Section 302 read with Section 34 of IPC and awarded RI for life. Since counsel for the appellants very much emphasized that the High Court has exceeded its jurisdiction in upsetting the order of acquittal into conviction, let us analyze the scope and power of the High Court in an appeal filed against the order of acquittal. 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, "]

11. Learned APP is not in a position to show any evidence to take a contrary view of the matter or that the approach of the trial court is vitiated by some manifest illegality or that the decision is perverse or that the trial court has ignored the material evidence on record.

12. In the above view of the matter, I am of the considered opinion that the trial court was completely justified in acquitting the respondent of the charges levelled against him.

13. I find that the findings recorded by the trial court are absolutely just and proper and in recording the said findings, no illegality or infirmity has been committed by it. I am, therefore, in complete agreement with the findings, ultimate conclusion and the resultant order of acquittal recorded by the court below and hence find no reasons to interfere with the same. In the result, the appeal is hereby dismissed. The impugned judgment and order dated 7th July, 2004 rendered in Sessions Case No. 291 of 1998 by the learned Additional Sessions Judge, Ahmedabad City, acquitting the respondent, is hereby confirmed. Record and proceedings, if any, be sent back to the trial Court concerned forthwith. Bail and bail bonds, if any, stand cancelled.