
(2007) 02 GUJ CK 0078
In the Gujarat High Court
Case No : Criminal Appeal No. 1414 of 2003

State of Gujarat	Vs	APPELLANT
Pathan Faridkhan @ Gandabhai Zafarkhan and Another		RESPONDENT

Date of Decision : 08-02-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 29

Citation : (2007) 02 GUJ CK 0078

Hon'ble Judges : Sharad D. Dave, J; J.R. Vora, J

Bench : Division Bench

Advocate : K.C. Shah, APP 1, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

J.R. Vora, J.—Heard learned APP Mr. K.C. Shah at length.

2. This appeal is preferred by the State against the judgment and order delivered by Special Judge and Additional Sessions Judge, Fast Track Court, Patan on 13.8.2003 in Special N.D.P.S. Case No. 2 of 2003, whereby both the respondents came to be acquitted for the charges levelled against them under Sections 20(b) and 29 of the N.D.P.S. Act.

3. One Mr. Harishchandra Vanubha Zhala who was serving as P.S.I., L.C.B. Patan on 10.11.2002 received information that at village Sami, respondent No. 1 i.e. Accused No. 1 residing at Desaivas was having in possession contraband narcotic substance i.e., ganja and was selling the said substance. Mr. Zhala is examined as P.W.1, made necessary entry in the record and informed his superior officers. Along with other police personnel, he went to Sami and reached village Sami at 20.30 hours where officers of Sami Police Station Mr. B.G. Bharvad and other constables were present. Thereafter, two panchas Takatsinh Chandansinh Chauhan and Manubhai Karamsinh Satwara both were called. Necessary procedure was followed and preliminary panchanama during 21.00 to 21.30

hours was drawn which was signed by panchas and police inspector K.K. Desai. Along with L.C.B. Police Inspector Mr. K.K. Desai and in the official vehicle with police party, a raid was arranged along with other necessary things like cloth, plastic bags, seal etc., the jeep was parked little bit away from the house at which raid was arranged. When police party reached on the residential house of accused No. 1 Faridkhan Pathan situated in Desaiwas, he was present there. His name was asked and police inspector Mr. Desai disclosed his identity. The accused No. 1 had been informed about the right of the accused to have search by any other gazetted officer than present one i.e. Inspector Mr. Desai which right was not exercised by him. On search being conducted in the residential house of accused No. 1 from north room from one cupboard in a drawer one plastic bag was found where dry leaves in form of ganja was found. Nothing was produced by accused No. 1 for having possession of said ganja. One witness Praful Thakkar was called for weighing substance found and the substance weighed about 224 grams. The said substance was seized. Sample substance of 10 grams was separately seized and sealed and panchanama was prepared in the presence of panchas in this regard. From the personal search of the accused No. 1, cash amount of Rs. 580/- in all was found. One electric bill in the name of one Rahimbhai Dalubhai Saiyed was found which was also seized. The police party, thereafter, returned to Sami police station along with accused No. 1 and P.S.I. Mr. Harish Zhala gave complaint to Police Inspector Mr. K.K. Desai which was placed on record by prosecution at Exh.11. During investigation, it was found that accused No. 1 Pathan Faridkhan obtained the said substance from accused No. 2 Shaikh Kamruddin Nizamuddin brother-in-law of accused No. 1. After due investigation, the charge sheet came to be filed as above said against both the accused. Learned Additional Sessions Judge framed the charge on 2.5.2003 and both the accused pleaded not guilty and hence prosecution examined 14 witnesses and produced on record collection of necessary documentary evidence like FIR, FSL report, entries made in official register of police station record etc. On evidence being over, the statement of both the accused came to be recorded by the trial Judge u/s 313 of Code of Criminal Procedure where the defence of both the accused was of total denial. No defence witnesses were examined and after hearing learned Counsel at length, learned trial Judge came to the above conclusion acquitting the accused giving them benefit of doubt and hence this appeal.

4. We have heard learned APP Mr.Shah at length and we have called for the record and proceedings from the learned trial Court which is available with us and we have gone carefully through each evidence recorded. It appears that relying upon the decision of this Court in the matter of Munnalal Mathura Prasad V/s State of Gujarat as reported in 1996(1) GLR 162 and other decisions, learned Judge came to the conclusion as recorded by him in para 24 of his judgment that the prosecution failed to prove that the accused No. 1 was having in conscious possession of the house in which the raid was carried out. The documentary evidence which prosecution referred and produced on record according to

learned trial Judge did not pertain to the house in which the raid was carried out and it could not be proved beyond reasonable doubt that the said residential house situated in the Desaivas was in conscious possession of accused No. 1. Referring to certain contradictions in the evidence, learned trial Judge came to the conclusion that benefit of doubt should be given to the accused No. 1. While accused No. 2 is concerned, learned trial Judge came to the conclusion that evidence against the accused No. 2 to the extent only that he indicated the house of accused No. 1 and except that there was no evidence at all against accused No. 2 to link him with accused No. 1 by virtue of Section 29 of N.D.P.S. Act and, therefore, accused No. 2 also came to be acquitted. Though the learned trial Judge came to the conclusion that the substance alleged to have been found from the possession of accused No. 1 was ganja and that of required mandatory provisions were complied with by the police authorities.

5. With the above said reasonings of the learned trial Judge, we have appreciated and assessed the evidence recorded during trial in detail and objectively. True that it could not be established from the official record that house in which the raid was carried out was sustained and owned by accused No. 1 but through the oral evidence it could be established that accused No. 1 was found in the said house for which the police officers examined gave cogent evidence while independent witnesses like panchas and the person who weighed the said substance turned hostile. There is substantial reason for us not to enter at this stage in the discussion and appreciation of that evidence as to whether the prosecution established beyond reasonable doubt whether accused No. 1 was in conscious possession of the house which was raided. This substantial reason is the amendment made in the N.D.P.S. Act which covered the trial and accordingly when if for the sake of argument, it was believed that 224 grams of ganja was found in the residential house of the accused No. 1 then also, the offence according to Section 20(b)(ii)(A) invites punishment with rigorous imprisonment for a term which may extend to six months or with fine which may extend to Rs. 10,000/- or with both. Undisputedly, as per the schedule attached to the said Narcotic Drugs and Psychotropic Substances Act, 1985 as amended as per item 55 small quantity of ganja would be less than 1000 gms. Now it is not in dispute that from date of his arrest i.e., from 10.11.2002 till the judgment was pronounced on 13.8.2003 apparently, for the period of more than six months accused No. 1 was in custody and maximum punishment for small quantity as above said for ganja is provided for six months or fine of Rs. 10,000/- or with both. These being the facts undisputed on record, no useful purpose would be served if academically we enter into appreciation of that evidence as to whether prosecution established beyond reasonable doubt that whether accused No. 1 was in conscious possession of residential premises in which the raid was carried out. Without entering into further appreciation and merits of the case, for this substantive reason we sustain the benefit of doubt given by the trial Court to accused No. 1.

6. While accused No. 2 is concerned, when we carefully have gone through the

reasoning of the learned trial Judge as well as through the evidence recorded, we do not find any circumstance linking accused No. 2 with the crime alleged and, therefore, there is no reason to interfere in the conclusion arrived at by the learned trial Judge for acquittal of accused No. 2 for the said offence.

7. In view of the above observation, we, after carefully going through the R & P dismiss this appeal.