

(2013) 07 GUJ CK 0063
In the Gujarat High Court
Case No : Criminal Appeal No. 350 of 1997

State of Gujarat	Vs	APPELLANT
Rajabhai Devrambhai Patel		RESPONDENT

Date of Decision : 16-07-2013

Acts Referred:

Citation : (2014) CriLJ 527 : (2014) 2 RCR(Criminal) 671

Hon'ble Judges : Abhilash Kumari, J

Bench : Single Bench

Advocate : H.K. Patel, Addl. P.P, for the Appellant; N.P. Chaudhary and Tushar Chaudhary, for the Respondent

Judgement

Abhilash Kumari, J.—These appeals are directed against the common judgment and order dated 20.02.1997, passed by the learned Additional Sessions Judge, Banaskantha at Palanpur, in Special Cases Nos. 80 of 1996, 126 of 1996 and 164 of 1996, whereby the respondents (original accused) in all three cases have been acquitted of the charge u/s 15 of Narcotic Drugs and Psychotropic Substances Act, 1985 ("the NDPS Act" for short). As the facts and evidence in these cases are common, they are being discussed together.

2. Briefly stated, the case of the prosecution is as follows:

On 22.11.1995, PSI, Tharad Police Station, Mr. Karshan Jivanbhai Jadav (PW-14), was on duty checking vehicles at Sanchor Road. While he was standing there, a Jeep bearing Registration No. GJ-8-T-8385, came from the direction of Khoda Village. It appeared that the Jeep was carrying more passengers than permitted under the Motor Vehicles Act, 1988 ("M.V. Act" for short). PW-14 stopped the jeep in order to carry out the procedure u/s 207 of the M.V. Act. Three passengers in the jeep, namely, the respondents-accused in the present appeals, had bags with them. This aroused the suspicion of PW-14, who proceeded to check the bags. Upon checking, it was found that the bags contained poppy straw. A Panchnama (Exh. 43) was prepared at the spot and the contraband was

seized. One Trilokchand K. Pandya (PW-5), was brought to weigh the contraband. It was found that the contraband from the bag of Rajabhai Devrambhai Patel, accused in Special Case No. 80 of 1996, weighed 2.8 Kgs., the contraband from the bag of Baubhai Gangabhai Harijan, accused in Special Case No. 126 of 1996, weighed 500 grams and the contraband found in the bag of Ukabhai Dhirabhai Harijan, accused in Special Case No. 164 of 1996, weighed 4 Kgs. A sample of 100 grams of the contraband from each bag was taken in the presence of Panch Witnesses who signed on slips that were attached to the samples. The accused were arrested and taken to Tharad Police Station along with the contraband. They were informed of the reasons for their arrest. Thereafter, the samples were sent for examination to the Forensic Science Laboratory ("FSL" for short), and the report confirmed that the substance that was seized from the bags of the accused, was poppy straw.

At the end of the investigation, as sufficient incriminating evidence was found against the accused, a charge-sheet came to be filed against them in the Court of learned Judicial Magistrate, First Class, Tharad. The learned Magistrate committed the case to the Special Court ("Trial Court" for short). Charges were framed against the accused which were read over and explained to them. They denied their guilt and claimed to be tried. After the recording of the evidence of the prosecution witnesses was over, the incriminating aspects emerging therefrom, were put to the accused. In their statements u/s 313 of the Code of Criminal Procedure, 1973 ("the Code" for short), the accused denied their guilt and stated that they have been involved in a false case. In support of its case, the prosecution has examined as many as 15 witnesses and produced documentary evidence. Having appreciated the oral and documentary evidence on record, the Trial Court recorded findings of acquittal in favour of all three accused vide impugned judgment, giving rise to the filing of the instant appeals.

3. Mr. H.K. Patel, learned Additional Public Prosecutor for the appellant-State of Gujarat, has submitted that the findings of acquittal are not supported by cogent evidence on record, as it has been rightly observed by the Trial Court that the provisions of Section 50 of the NDPS Act would not apply. It is further submitted that after recording a finding that a breach of the provisions of Sections 50 and 57 of the NDPS Act would not result in vitiating the trial in the absence of prejudice being caused to the accused, the Trial Court has erred in acquitting the accused, on the ground that the search has not been conducted in a proper manner. Learned Additional Public Prosecutor has further submitted that this aspect is not at all relevant in the background of the facts and evidence on record, which have not been appreciated in proper perspective. That there is no doubt regarding the fact that the accused were travelling in the Jeep that was searched by the Police personnel, as is evident from the Panchnama at Exh. 43, recorded u/s 207 of the M.V. Act. A list of passengers has been appended thereto, which includes the names of the accused. Learned Additional Public Prosecutor has submitted that the Panchnama as well as the evidence of PWs-1 and 4, make it clear that the bags containing the contraband belonged to the

accused who had alighted from the jeep; therefore, the possession of the contraband by the accused is established. In this view of the matter, the Trial Court ought not to have recorded a finding of acquittal in their favour. It is further submitted that the judgment of the Trial Court lacks cogent reasons and is perverse and legally unsustainable, therefore, it may be quashed and set aside, and the appeal allowed.

4. Per contra, Mr. N.P. Chaudhary, learned advocate for the respondents in all three appeals, has submitted that the conscious possession of the contraband by the accused has not been established. Referring to the evidence of PW-7, Madhabhai Jivabhai, it is submitted that this witness was a co-passenger in the jeep and being an independent witness, he has stated the correct version before the court. In his cross-examination, this witness has categorically stated that after the vehicle was stopped, the passengers got down and only thereafter, was the luggage taken down by the Police personnel. It cannot, therefore, be said that the bags containing the contraband were in the possession of the accused. Referring to the evidence of PW-1, Dholaji Motiji, who was a member of the checking squad, it is submitted that though this witness has stated in his examination-in-chief that the accused had bags with them, he has stated in cross-examination that he does not remember what luggage each passenger had with him. This witness has stated that it is only after the passengers got down from the jeep that the luggage was checked. Learned counsel for the respondents has next referred to the evidence of PW-4, Head Constable Chandansinh Abhjiji, who was also a member of the checking squad, wherein this witness has stated in cross-examination, that the jeep in which the accused were sitting did not have a carrier and that when the Panchnama was being recorded, the passengers were made to alight to get their names recorded. It is further pointed out that this witness has stated that he does not know in what manner the luggage was kept in the jeep before the passengers got down. Learned counsel for the respondents has further pointed out that this witness has denied having given a statement before the police, to the effect that the accused alighted from the jeep with their luggage and their luggage was checked on suspicion. It is submitted by learned counsel for the respondents that the above evidence reveals that the bags containing the contraband were not in the possession of the respondents, leave alone their conscious possession.

4.1 It is next submitted that the evidence of PW-5, Trilokchand Khanabhai Pandya, who has weighed the contraband, casts further doubt on the case of the prosecution. This witness has stated in his deposition that when he arrived at the spot, he found that three bags containing contraband, have been placed in a bigger bag, and he had taken the weight of the contraband contained in those three bags. It is submitted that this witness has categorically stated that when he reached the spot, the Police made him sign on certain papers. It is urged that this evidence creates further doubt regarding the possession of the contraband by the respondents. When it has not been established beyond reasonable doubt that the contraband was found in the conscious possession of the respondents,

the judgment of acquittal deserves to be upheld.

5. In the backdrop of the above submissions advanced by learned counsel for the respective parties, it would be germane to refer to the salient features of the oral and documentary evidence on record.

6. PW-1, Dolaji Motiji, who was serving as Head Constable at Tharad Police Station at the relevant point of time, was a member of the checking squad. He states that on 22.11.1995, at about 12:30 p.m., it was noticed that a jeep bearing Registration No. GJ-8-T-8385 was carrying more passengers than permitted. It was, therefore, stopped and the procedure u/s 207 of the M.V. Act was initiated. Passengers were made to alight from the Jeep. It was noticed that three passengers (the accused) had a bag each in their possession. Suspicion arose, and the bags of the accused were checked and found to contain poppy straw. The accused had no valid pass or permit to carry poppy straw. A Police vehicle was sent to call a person to weigh the contraband. This witness has described the manner in which the contraband was weighed and the weight of the contraband found from each bag, as also the procedure of taking samples and sealing them.

6.1 In cross-examination, this witness states that he does not remember the names of the other passengers or the details of the luggage in their possession. He states that no Panchnama was recorded regarding checking of the luggage of the passengers. This witness clearly states that when the passengers were sitting in the Jeep, their luggage was lying in the Jeep itself. He further states that he does not remember in which portion of the Jeep the accused were sitting, but adds that they were sitting at the back. This witness categorically states that the luggage was checked after the passengers alighted from the Jeep.

7. PW-2 is Hiralal Dahyalal one of the Panch Witnesses of the Panchnama at Exh. 43. He states that he was called to the Police Station and upon reaching there, he was made to sign upon certain papers by the Police. He denies the case of the prosecution in its entirety and has been declared hostile.

8. PW-3, Jodhabhai Mashrubhai, is the second Panch Witness of the Panchnama. Apart from stating that he was called by the Police to the Tharad Police Station on 22.11.1995, where he was made to put his thumb impression on some papers, he has denied the entire case of the prosecution: This witness has also been declared hostile.

9. The next witness is PW-4 Chandansingh Abhjiji, who was one of the members of the checking squad. He states in his deposition, that when the Jeep was detained for checking on 22.11.1995, and while the procedure u/s 207 of the M.V. Act was going on, the passengers were made to alight with their luggage. The three accused had bags with them, which were checked and the contraband was found therein.

9.1 In his cross-examination, this witness categorically states that while the

Panchnama was being recorded, the passengers were made to alight in order to record their names. He further states that he does not know in what manner the luggage was lying in the Jeep, before the passengers got down. He states that he has not given any statement to the Police to the effect that the accused alighted from the Jeep with their bags, which raised suspicion. This witness further states that he does not remember whether the passengers alighted from the Jeep with, or without, their luggage. He goes on to state that he does not remember whether the luggage of the passengers was checked individually, or together.

10. PW-5, Trilokchand Khanaji Pandya is the person who has weighed the contraband. This witness states that he was asked by the Police to come to the spot on 22.11.1995. On reaching there he was straightway made to sign some papers. He found about five to six persons sitting near the Bus Stand. There was a bag on the spot, containing three smaller bags. This witness states that he then went to weigh the substance contained in the three bags, which were placed in a bigger bag. He has described the weight of the contraband found from each bag.

10.1 In cross-examination, this witness states that he did not see the contents of the bags and does not know what it was. In spite of not knowing what the contents of the bags were, this witness has given a Certificate at Exh. 25, stating that he has weighed the contents of the bags that contained poppy straw.

11. PW-6 is Bhimjibhai Karshanbhai Patel. He was one of the passengers of the bus in which the accused were travelling. He has denied the entire case of the prosecution and has been declared hostile.

12. PW-7 is Madhabhai Jivabhaji, another co-passenger of the accused. He is an independent witness but has not supported the case of the prosecution. He states that there were about seven to eight passengers in the Jeep, whose names were recorded by the PSI. A substance was seized but he does not know whether it was poppy straw. He also does not know from whom it was seized. This witness states that he does not remember whether the accused were his co-passengers in the Jeep, or not, or whether anything was seized from them. He states that nothing was seized by the Police in his presence.

12.1 In cross-examination, this witness categorically states that after stopping the Jeep, the passengers were made to alight first and only thereafter, their luggage was taken out by the Police personnel. Though this witness has not supported the case of the prosecution, he has not been declared hostile.

13. PW-8, Virnabhai Ambabhai was waiting for the bus at the Bus Stand when the Jeep was stopped. This witness has not supported the case of the prosecution and has feigned ignorance regarding the manner in which the Jeep was stopped and the contraband recovered. He states that he was standing far away and has not seen anything. This witness has also not been declared hostile or subjected to cross-examination.

14. PW-9, Jakshibhai Devsibhai, is the driver of the Jeep in which the accused were travelling. He states that the Jeep was detained as it had more passengers than permitted. He was taken along with his Jeep and the passengers to Tharad Police Station. This witness has not supported the case of the prosecution and has been declared hostile.

15. PW-10 is Nanchandbhai Ghudabhai, who was serving as Police Station Officer at the relevant point of time. This witness narrates the procedure followed by the Police after the Jeep was detained and the manner in which the contraband was weighed and samples taken. The evidence of this witness is formal in nature and does not merit further discussion.

16. PW-11 is Hariji Motiji, who was serving as Writer Head Constable at Tharad Police Station, at the relevant point of time. He took custody of the muddamal and made an entry in the Muddamal Register.

17. PW-12 is Rameshdan Laxmandan, who was serving as a Police Constable at Tharad Police Station. He has taken the three samples of the contraband to the Office of the Local Crime Branch, located in the Office of the District Superintendent of Police, at Palanpur.

18. The next witness is PW-13 Sarathdan Bhavanidan Gadhvi, who was serving as a Police Constable in the Local Crime Branch at that time. This witness has taken the samples of the contraband to the FSL and has obtained a receipt for the same.

19. PW-14 is Karshan Jivanbhai Jadav, the Raiding and Investigating Officer of the case. This witness has narrated in detail, the procedure followed by him after detaining the accused and the manner in which the contraband was seized. His testimony is in conformity with the case of the prosecution.

20. The last witness is PW-15 Pravinchandra Harilal, who was a Constable in the Local Crime Branch at Palanpur at the relevant point of time. He received the samples of muddamal from PW-12 and made an entry regarding the same in the Muddamal Register. The samples were then given to PW-13, who took them to the FSL.

21. Insofar as the documentary evidence is concerned, the Panchnama is at Exh. 43. It is mentioned therein, that an option was given to the accused to get themselves searched before a Gazetted Officer or a Magistrate. It is also mentioned that the passengers alighted from the Jeep with their luggage in their hands and that, on search of the bags of the accused, it was found that they contained poppy straw. However, both the Panch Witnesses have turned hostile, therefore, this Panchnama could not be proved.

22. The above, are the salient features of the oral and documentary evidence adduced by the prosecution. Upon appreciation of the evidence on record, the Trial Court has recorded a finding that as the present is a case of chance recovery and not of prior secret information regarding the contraband, the

provisions of Section 50 of the NDPS Act would not be attracted. This Court finds itself in agreement with this finding.

23. The next finding recorded by the Trial Court is to the effect that even though it could be stated that provisions of Sections 52 and 57 of the NDPS Act have been violated, the said provisions are not mandatory in nature and neither have the accused proved any prejudice on account or the breach. Looking to the evidence on record and the submissions advanced on behalf of the accused before the Trial Court, as recorded in the judgment, it appears that there is no mention regarding prejudice, if any caused to the accused due to the alleged breach of the above provisions of law. This Court is in agreement with the finding recorded by the Trial Court regarding this aspect, as well.

24. The Trial Court has based its conclusion of acquittal upon a judgment of a Division Bench of this Court, in the case of Shivabhai Gajmalbhai Vs. State of Gujarat, wherein it has been held that even if it is assumed that the provisions of Section 102(3) of Code of Criminal Procedure, 1973 are directory, a substantial compliance thereof would still be necessary; failing which the trial would be vitiated. According to the learned Trial Judge, the procedure u/s 102(3) of the Code of Criminal Procedure has not been followed in the present case, and as he is bound by the above judgment he has no option but to acquit the accused.

25. It deserves mention that while recording this finding the learned Trial Judge has entered into an unnecessary and irrelevant discussion regarding the ratio laid down by the Division Bench of this Court in Shivabhai Gajmalbhai v. State of Gujarat (supra) in a manner that is rather critical and in bad taste. The observations made by the learned Trial Judge, are nothing short of a veiled criticism of the above judgment of the Division Bench. The learned Trial Judge has gone to the extent of saying that this judgment of the Division Bench needs to be referred to a larger Bench, as though he is sitting in appeal over it. In the considered view of this Court, this is a serious breach of judicial discipline.

26. The learned Trial Judge has referred to the judgment of the Supreme Court, in the case of State of Punjab Vs. Balbir Singh, while commenting on the above-referred judgment of the Division Bench. However, apart from acquitting the accused on the ground that the judgment the Division Bench in Shivabhai Gajmalbhai v. State of Gujarat (supra), is binding upon him, even while hinting that it is not good law, no proper or detailed reasons, based on the evidence on record, have been recorded by the learned Trial Judge in support of his conclusion. It does not lie in the mouth of the learned Trial Judge to attempt to undertake a veiled criticism of a judgment of the Division Bench of this Court. If the learned Trial Judge was aware of the law laid down by the Apex Court, it was open for him to record an appropriate finding on law and facts, rather than making tongue-in-cheek observations regarding the judgment of the Division Bench, as has been done in the impugned judgment. Such conduct is deprecated by this Court.

27. This Court is of the view that the finding recorded by the learned Judge on the basis of the alleged violation of Section 102(3) of the Code is not at all relevant considering the evidence on record. This Court, therefore, does not agree with the reasons recorded by the learned Trial Court in this regard.

28. The Trial Court has missed an important aspect which is, that the evidence on record is not sufficient to establish the possession, leave alone the conscious possession, of the bags containing the contraband, by the accused. Though it is recorded in the Panchnama at Exh. 43 that the passengers alighted from the jeep with their luggage in their hands, this document has not been proved, as both the Panchas have turned hostile. It would, therefore, not be safe to place reliance on it. PW-1 Dholaji Motiji, who was a member of the checking squad, has stated that from amongst the passengers who alighted from the jeep, three passengers (the accused) had bags, which were checked upon suspicion being aroused. However, in cross examination this witness states that the bags of the passengers were lying inside the jeep when they were sitting therein and only after the passengers got down, was their luggage checked. From the evidence of this witness it does not clearly emerge that the respondents were in possession of the bags containing the contraband. Looking to the testimony of PW-4 Chandansinh Abhjiji, who was also a member of the checking squad, it emerges that the passengers alighted from the jeep with their luggage. However, in cross-examination, this witness categorically admits that he does not remember whether the luggage of the passengers was taken out before they alighted from the jeep, or later on. He further states that he did not give any statement to the police to the effect that the accused alighted from the jeep with their luggage, which was checked when suspicion was aroused. He further states that he does not remember whether the luggage of the passengers was checked together, or individually.

29. The above evidence throws considerable doubt upon the conscious possession of the contraband by the respondents, as there is conflicting and contradictory evidence regarding whether the passengers alighted with their luggage in their hands or whether the luggage was taken down from the jeep, after the passengers got down. PW-7 Madhabhai Jivabhai, is one of the co-passengers of the accused. He is an independent witness and has categorically stated that the passengers were first made to alight from the jeep and only thereafter was their luggage taken down by the police. There is no reason to disbelieve the testimony of this witness, who has no axe to grind either with the police or the accused. If the testimony of this witness is believed, as this Court is inclined to do, it emerges that the passengers were made to get off the jeep first and their luggage was taken down by the police later. This further strengthens the conclusion that there is no cogent evidence to the effect that the bags of contraband were in the possession of the accused, leave alone their conscious possession.

30. Another aspect that casts doubt upon the conscious possession of the

contraband by the accused is the evidence of PW-5 Trilokchand K. Pandya, who weighed the contraband. From his testimony it transpires that when he was brought to the spot by the police, he was immediately made to sign upon certain papers. Thereafter, he went with the police personnel to get the weighing Scales. He categorically states that there was a big bag lying at the spot, which contained three smaller bags. The three smaller bags were opened and he was told to weigh their contents. The testimony of this witness further indicates that the bags of contraband were not lying with the luggage of the passengers but were kept separately in a bigger bag. It cannot, therefore, be assumed that the bags containing the contraband which was weighed by this witness, were in the possession of the accused.

31. In *Supdt. and Remembrancer of Legal Affairs, West Bengal Vs. Anil Kumar Bhunja and Others*, the expressions "possession" and "conscious possession" have been discussed by the Supreme Court in the following terms:

13. "Possession" is a polymorphous term which may have different meanings in different contexts. It is impossible to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the contexts of all statutes. Dias and Hughes in their book on Jurisprudence say that if a topic ever suffered from too much theorising it is that of "possession". Much of this difficulty and confusion is (as pointed out in Salmond's Jurisprudence, 12th Ed., 1966) caused by the fact that possession is not purely a legal concept. "Possession", implies a right and a fact; the right to enjoy annexed to the right of property and the fact of the real intention. It involves power of control and intent to control. (See Dias and Hughes, *ibid.*)

14. According to Pollock and Wright, when a person is in such a relation to a thing that, so far as regards the thing, he can assume, exercise or resume manual control of it at pleasure, and so far as regards other persons, the thing is under the protection of his personal presence, or in or on a house or land occupied by him or in any receptacle belonging to him and under his control, he is in physical possession of the thing.

15. While recognising that "possession" is not a purely legal concept but also a matter of fact, Salmond (12th Ed., page 521 describes "possession, in fact", as a relationship between a person and a thing. According to the learned author the test for determining "whether a person is in possession of anything is whether he is in general control of it."

(Emphasis supplied)

32. From the sequence of events and facts emerging from the depositions of the prosecution witnesses, the factum of possession of the bags by the accused is not established beyond reasonable doubt.

33. In the case of *Madan Lal and Another Vs. State of Himachal Pradesh*, , it has been held that:

23. The word "conscious" means awareness about a particular fact. It is a state of mind which is deliberate or intended.

34. The Apex Court goes on to say that once the possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. In the present case, it is evident from the evidence adduced by the prosecution that it has failed to establish that the "possession" of the bags containing the contraband was with the respondents. There is no conclusive evidence that the accused had the bags containing the contraband in their hands. Rather, the evidence is also to the effect that the luggage of the passengers was taken down after they got off the jeep. Under the circumstances, when it is not established to whom the bags containing contraband belonged in the first place, the accused are absolved of the onus to prove that they were in their conscious possession. When possession has not been proved, there can be no conscious possession of the bags containing the contraband.

35. In this view of the matter, this Court does not find itself in agreement with the reasons advanced by the Trial Court in Support of its findings of acquittal. However, this Court is inclined to uphold the final conclusion of acquittal, on the ground that the conscious possession of the contraband by the respondents has not been proved.

36. The cumulative effect of the above discussion is that this Court does not consider it appropriate to interfere with the final conclusion of acquittal recorded by the Trial Court, though for different reasons, as stated hereinabove. The appeals, therefore, fail and are dismissed.