

(1991) 02 GUJ CK 0003
In the Gujarat High Court

State of Gujarat

APPELLANT

Vs

Rashish Ahmed Rafik Ahmed

RESPONDENT

Date of Decision : 14-02-1991

Acts Referred:

Bombay Prohibition Act, 1949 — Section 66(b)
Criminal Procedure Code, 1973 (CrPC) — Section 173, 293
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 20, 41 ,
42, 42(2)
Narcotic Drugs and Psychotropic Substances Rules, 1985 — Rule 2(c)

Citation : (1991) 1 GLR 548

Hon'ble Judges : M.B. Shah, J;B.J. Shethna, J

Bench : Division Bench

Judgement

M.B. Shah, J.—Being aggrieved and dissatisfied by the judgment and order dated 26th August, 1988 passed by the Sessions Judge, Junagadh, in Sessions Case No. 79 of 1988 acquitting the respondent-accused for the offence u/s 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985, the State of Gujarat has filed this appeal.

From the possession of the accused 1,800 Kgs. of Charas was found on February 28, 1988 at about 6 p.m. in Junagadh City. The accused was charged for the offences punishable u/s 66(b) of the Bombay Prohibition Act and Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985, hereinafter referred to as "Narcotic Act". The learned Sessions Judge convicted the accused for the offence punishable u/s 66(b) of the Bombay Prohibition Act and imposed the sentence of six months" S.I. and fine of Rs. 1,000/-, in default, two months" S.I. He acquitted the accused for the offence punishable u/s 20 of the Narcotic Act. Against the order acquitting the accused for the offence u/s 20 of the Narcotic Act, the State has filed this appeal.

2. It is the contention of the prosecution that P.S.I. Patil P.W. 2 received an information on 23th February, 1988 that one person was trying to sell Charas in the area known at Dolatpara Mafatiapara in Junagadh City. Information was

given to P.S.I. Vaghela and P.S.I. Jadeja and other persons of the staff. Two panchas were called. After preparing and necessary first part of the panchnama, they went near Sakkarbaug Bridge where they kept the vehicle and thereafter they went on foot in the area known as Dolatpara Mafatiapara. On the basis of information one person was identified and the P.S.I. inquired about his name from him. He stated that he was Ahmed Fakirmohmed of village Jafarpur (U.P.). From his possession one green colour basket containing his clothes was found. Beneath the clothes was one tin containing black colour pieces which were similar to Claras. In the presence of panchas on the basis of its smell it was decided that it was Charas. It was weighed and its weight was found to be 1,800 Kgs. It was thereafter seized by preparing proper panchnama. That panchnama is produced on record at Ex. 6. Thereafter F.I.R. was lodged against the accused and the accused was arrested.

3. After completing the investigation the accused was chargesheeted before the Chief Judicial Magistrate, Junagadh, who in turn committed the case to the Sessions Court.

4. For proving the case against the accused, the prosecution has relied upon the evidence of panch P.W. 1-Maganlal Pragjibhai Ex. 5 and on the evidence of P.S.I. Patil-P. "W. 2 Ex. 7. With the consent of the accused Chemical Analyser's Report is produced at Ex. 12. As per the Chemical Analyser's Report the paper packet containing one aluminum dibba weighing 1,800 Kgs. of dark greenish brown coloured material was identified as the botanical material of plant cannabis sativa (Charas).

5. The learned Judge has relied upon the aforesaid evidence of the prosecution witnesses as well as on the report of the Chemical Analyser and has convicted the accused for the offence punishable u/s 66(b) of the Prohibition Act. However, he has acquitted the accused for the offence punishable u/s 20 of the Narcotic Act on the grounds:

(i) that P.S.I. Patil has not complied with the provisions of Sub-section (2) of Section 42 as he has not sent his report to the higher officer, and (ii) that Rule 2(c) of the Narcotic Rules, 1985 is not complied with as the substance was not examined by the Chemical Examiner, Government of Opium and Alkaloid Works, Neeemuch or Ghazipur.

6. In our view, both the reasons given by the learned Judge for acquitting the accused for the offence u/s 20 of the Narcotic Act are not sustainable and are erroneous. As the investigation was carried out by the P.S.I. there was no question of complying with the provisions of Sub-section (2) of Section 42. u/s 37(l)(a) of the Narcotic Act every offence punishable under the Act is a cognizable offence. Under Clause (c) of Section 2 of the Criminal Procedure Code "cognizable offence" means a case in which, a Police Officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant. Section 156 of the Code empowers any officer-in-charge of a

Police Station to investigate any cognizable case without the order of a Magistrate. Further, there is no provision in the Narcotic Act which provides any different procedure for investigation of the offence by a Police Officer. Therefore, for the offences punishable under the Narcotic Act a Police Officer is competent to investigate the case and arrest the accused without warrant from a Magistrate. Sub-section (2) of Section 4 of the Criminal Procedure Code provides that all offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any provision for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. In absence of a specific provision made under the Narcotic Act enacting that offences will have to be investigated, inquired into, tried and otherwise dealt with the Police Officer is entitled to investigate the case in accordance with the Code of Criminal Procedure. If the legislature intended to provide that Police Officers who are empowered to investigate the cognizable cases are required to follow a different procedure or the procedure which is required to be followed by the authorised officers of the different department who are authorised by various provisions such as Sections 41 and 42, than it would have specifically provided for it. It is apparent that considering the seriousness of the offence relating to Narcotic Drugs and Psychotropic Substances, apart from the Police Officers who can investigate the cognizable cases, the legislature has authorised the Central Government or the State Government to empower certain officers mentioned in Sections 41 and 42 to carry out search, seizure and arrest without warrant or authorisation as provided in Sections 41 to 49. But that would not mean that the Police Officer who are entitled to investigate the cognizable case also should follow the procedure which is prescribed for the authorised officers as provided in Sections 41 to 52. If we are required to hold that only officers authorised under Sections 41 and 42 of the Narcotic Act are required to investigate the offences under the Act, then Section 37(I)(a) which provides that all offences punishable under the Act shall be cognizable, would become otiose. If the arrest or seizure is made under Sections 41(2), 42, 43 or 44, the person arrested or the article seized has to be forwarded to the officers-in-charge of the nearest Police Station or the officer empowered u/s 53 of the Act. Special procedure has been prescribed for the disposal of Narcotic Drugs Psychotropic Substances having regard to the factors set out in Section 52A. The role of the officers effecting arrest or seizure, except in the case of a Police Officer, ends with the disposal of the person arrested and the article seized in the manner provided by Sections 52 and 52A of the Act. Section 57 obliges the officer making the arrest or seizure to report the same to his superior within 48 hours. A Police Officer is required to lodge first information report while authorised officer is required to file complaint. This would be clear from Section 36(A)(d) of the Narcotic Act. Hence for a Police Officer who has investigated the case there is no question of sending his report to the higher officer u/s 42(2).

7. This question is decided by this Court in the case of Aslambhai Ibrahimhai

Memon and Another Vs. The State of Gujarat, , wherein it is held if the competent Police Officer has investigated the offence under the Act, there is no question of following any procedure other than the procedure prescribed under the Criminal Procedure Code. It was held under the provisions of Sections 41, 42, 43 and 44 some other officers are also invested with the power of making search, seizure or arrest but there is no provision in the Act which states that if the investigation is carried out by the Police Officer who is competent to investigate the cognizable case, then also he is required to followed the other procedure which is prescribed for the other authorised officers. This would be further clear if we refer to Section 52 of the Narcotic Act which specifically provides that every person arrested and article seized under Sub-section (2) of Section 41, Section 42, Section 43 or Section 44 shall be forwarded without unnecessary delay to: (a) the officer-in-charge of the nearest Police Station, or (b) the officer empowered u/s 53. From this section also it can be said that special investigating agency, in addition to the investigating agency under the Criminal Procedure Code is created under Sections 41, 42, 43 and 44. Section 53 of the Narcotic Act further empowers the Central Government and the State Government to invest the officers mentioned therein with the powers of an officer-in-charge of a Police Station for the investigation of the offences under the narcotic Act. The aforesaid decision is also followed by the Division Bench of this Court in the case of Surajmal Kanaiyalal Soni Vs. The State of Gujarat, .

8. Apart from the aforesaid two decisions of this Court, if we refer to the observations made by the Supreme Court in the case of Raj Kumar Karwal Vs. Union of India and others, , in our view, the result is the same. In that case the Court considered whether the statement which is recorded by the officers of the Department of Revenue Intelligence who have been invested with the powers of an officer-in-charge of a Police Station u/s 53 of the Narcotic Act was admissible in evidence or not. The Court arrived at the conclusion that the officer appointed u/s 53 of the Act is other than a Police Officer and is not entitled to exercise "all" the powers in Chapter XII of the Criminal Procedure Code including the power to submit a charge-sheet u/s 173 of the Criminal Procedure Code and, therefore, the statement is admissible in evidence. For this purpose the Court has relied upon Section 36A of the Act and held that if the investigation is conducted by the police, it would conclude in a police report but if the investigation is made by an officer of any other department including the Department of Revenue Intelligence, the Special Court would take cognizance of an offence upon a formal complaint made by such authorised officer of the concerned Government. The Court has observed that special procedure has been prescribed for the disposal of Narcotic Drugs and Psychotropic Substances having regard to the factors set out in Section 52A. The role of the officers affecting arrest or seizure, except in the case of a Police Officer, ends with the disposal of the person arrested and the article seized in the manner provided by Sections 52 and 52A of the Act. Section 57 obliges the officer making the arrest or seizure to report the same to his superior within 48 hours. These powers are more or less similar to the powers

conferred on Customs Officers under the Customs Act, 1962. In paragraph 22 the Court has further considered the provisions of Criminal Procedure Code and powers of investigation and power of submitting report u/s 173 of the Criminal Procedure Code and has observed that the Important attribute of police power is not only the power to investigate into the commission of cognizable offence but also the power to prosecute the offender by filing a report or a charge-sheet u/s 173 of the Code. The officers of any other department including the Department of Revenue Intelligence would have no power to submit charge-sheet or report as provided u/s 173. They are required to file complaint as provided u/s 190 of the Code.

In this view of the matter, in our view the learned Judge materially erred in holding that P.S.I, was required to follow the procedure prescribed u/s 42(2) i.e., of taking down an information in writing under Sub-section (1) or record grounds for his belief under the proviso thereto and of sending a copy thereof to his immediate official superior.

9. Further, the learned Judge has obviously committed an error in holding that the muddamal article ought to have been examined by Chemical Examiner as defined under the Narcotic Drugs and Psychotropic Substances Rules, 1985. These Rules nowhere prescribe that Narcotic Drugs and Psychotropic Substances which are seized by Police Officers or by the officers authorised under Sections 41, 42, 43 and 44 are required to be sent for examination to the Chemical Examiner, Government Opium and Alkaloid Works, Neemuch or Ghazipur. The Rules are framed for the purpose mainly of governing cultivation of opium poppy and production of opium and poppy straw as well as manufacture, possession and sale of manufactured drugs and its licence, transport or storage. Section 9 of the Narcotic Act specifically, provides that the Central Government may, by Rules permit and regulate the cultivation, or gathering of any portion of coca plant, or the production, possession, sale, purchase, transport, import inter-State, export inter-State, use or consumption of coca leaves; the cultivation of the opium poppy or its derivatives including manufacture of manufactured drugs and other things as mentioned therein. Rule 22 provides for confiscation of adulterated opium. It provides that if opium is found to be adulterated on examination by the Chemical Analyser in Government opium factory, it is liable to confiscation by the General Manager. Rule 24 prescribes for determination of final price of opium payable to the cultivator. It is to be determined by the General Manager on the basis of the analysis report of the Chemical Analyser or such other officers as may be authorised. It is, therefore, apparent that the definition of word "Chemical Analyser" is limited only for the purposes of the aforesaid Rules. The aforesaid Rules, therefore, would have no application in the present case. The Rules also nowhere provide that "Chemical Analyser" as defined under the Rules shall examine all drugs or substances for which prosecution is filed. Rule 2 of the aforesaid Rules inter alia specifically states "in these Rules, unless the context otherwise requires". So the definitions which are given in the Rules, are for the purpose of the Rules meaning thereby, with regard to Chemical Analyser,

wherever the word "Chemical Analyser" is used, it would mean the "Chemical Examiner, Government Opium and Alkaloid Works, Neemuch or, as the case may be, Ghazipur". But it does not mean that for all purposes under the Act "Chemical Analyser" as defined in the Rules has to analyse or examine the drugs or substances. Further, if this interpretation is accepted, it would result in chaos because the Chemical Examiner at Neemuch or Ghazipur would be flooded with drugs or substances for which prosecution is launched all throughout the country under the Narcotic Act.

10. Apart from the aforesaid aspect, Section 4 Sub-section (2) of the Criminal Procedure Code specifically provides that all offences under any law shall be investigated, inquired into, tried or otherwise dealt with according to the provisions of the Criminal Procedure Code but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. Section 37(I)(a) provides that every offence punishable under this Act shall be cognizable. Section 51 further provides that the provisions of the Code of Criminal Procedure, 1973 shall apply, insofar as they are not inconsistent with the provisions of this Act, to all warrants issued and arrests, searches and seizures made under this Act. Further, wherever the Legislature wanted to exclude the provisions of the Criminal Procedure Code, it has specifically provided for it. Therefore, the entire criminal procedure Code would be applicable except for which inconsistent provisions are made applicable by the provisions of the Narcotic Act. Hence Section 293 of the Criminal Procedure Code would be applicable in such type of cases. Section 293 provides that any document purporting to be a report under the hand of a Government Scientific expert upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code may be used as evidence in any inquiry, trial or other proceeding under this Code. Sub-section (4) of Section 293, inter alia, provides that the Director, Deputy Director or Assistant Director of a Central Forensic Science Laboratory or a State Forensic Laboratory would be Government Scientific experts.

11. Mr. Pathan, learned Advocate appearing on behalf of the appellant, however, relied upon the decision of the Bombay High Court in the case of Vasant Shanker Gawade v. State of Maharashtra, reported in 1989 (3) Crimes 450, wherein the Court arrived at the conclusion that the Assistant Director, Regional Forensic Science Laboratory, Aurangabad, was not duly authorised by Rule 2(c) of the Maharashtra Narcotic Drugs and Psychotropic Substances Rules, 1985. Rule 2(c) of the said Rules defines "Chemical Analyser" to mean the Director, Forensic Science Laboratory and Chemical Analyser to the Government of Maharashtra of the Director, Haffkins Institute, Bombay or the Assistant Director, Drugs Control Laboratory of Food and Drug Administration, Griha Nirman Bhavan, Kalanagar Bandra Bombay and includes any officer authorised respectively by them in this behalf. On record it was proved that Assistant Director who had analysed the substance was not authorised by any of the persons named above on the date on which the carried out analysis in respect of the contraband in question. Hence

the Court held that no reliance could be placed on the report which was produced on the record. In our view, the aforesaid judgment is solely based upon the specific Rules framed by the Maharashtra Government and it would have no bearing on the present case because u/s 293 of the Criminal Procedure Code the report submitted by the Senior Scientific Assistant-cum-Assistant Chemical Analyser to the Government of Gujarat. Regional Forensic Science Laboratory, is admissible in evidence and can be used as evidence in any inquiry, trial or other proceedings under the Code.

12. Learned Advocate Mr. Pathan further referred to the decision of the Madhya Pradesh High Court in the case of Sheru v. State of Madhya Pradesh 1990 (2) EFR 46. The Madhya Pradesh High Court considered Rule 2(c) of the Narcotic Drugs and Psychotropic Substances Act, 1964 and held that the report should be that of Chemical Analyser of Neemuch or of Ghazipur. For the reasons stated above, with respect it is difficult to agree with the said finding. It seems that the attention of the Court was not drawn to Section 293 of the Criminal Procedure Code.

13. Further, the legislature has specifically provided in Section 36C of the Narcotic Act (after the amendment of Section 36 by Act 2 of 1989 with effect from 29th May, 1989) that save as otherwise provided in the Act, the provisions of the Code of Criminal Procedure shall apply to the proceedings before a Special Court. u/s 36A(2) a Special Court is also entitled to try an offence other than an offence under the Act. Therefore, there cannot be any doubt with regard to application of Section 293 of the Criminal Procedure Code as the Legislature has put it beyond the pale of controversy by providing that the provisions of the Criminal Procedure Code shall apply to the proceedings before a Special Court which is empowered to try the offences under the Narcotic Act. Hence there is no question of obtaining a report from the Chemical Examiner, Government Opium and Alkaloid Works, Neemuch or Ghazipur.

14. In this view of the matter, in our view both the reasons given by the learned Judge for acquitting the respondent for the offence punishable u/s 20 of the Narcotic Act are not sustainable.

However, the learned Advocate for the respondent further submitted that the learned Judge ought not to have relied upon the evidence of Mr. Patil, the investigating officer for holding that from the possession of the accused the muddamal Charas was found. In our view, there is no reason for us for discarding the evidence of panch witness who is absolutely independent person. He is neither connected with the investigating officer nor with the accused who is resident of a different State, i.e., U.P. The accused was found in possession of Charas in Junagadh City which is at a far off distance from the native place of the accused. The panch has fully corroborated the say of the P.S.I. that he was called as a panch and in his presence from the possession of the accused 1.800 Kgs. of Charas as found which was properly sealed and seized. Hence, in our view, the learned Judge was right in appreciating the aforesaid evidence and in relying

upon it.

15. In the result, the appeal is allowed. The judgment and order dated 28th August, 1988 passed by the Sessions Judge, Junagadh, in Sessions Case No. 79 of 1988 acquitting the respondent for the offence punishable u/s 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 is quashed and set aside. The respondent-accused is convicted u/s 20 of the Narcotic Drugs and Psychotropic Substances Act. Considering the facts and circumstances of the case, as we are imposing the minimum sentence prescribed under the Act, it is not necessary for us to hear accused on the point of sentence. The accused is sentenced to suffer R.I. for 10 years and to pay a fine of Rs. 1,00,000/- in default, to suffer further R.I. for one year.

The accused is in Jail as non-bailable warrant was issued during the pendency of the appeal. The Jail authorities are directed to give appropriate setoff in accordance with law for the period for which the accused was kept in Jail as under-trial prisoner and also during the pendency of the appeal.