IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL NO. 942 of 1994

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE S.H.VORA sd/-

and
HONOURABLE MR. JUSTICE SANDEEP N. BHATT sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	**NO**
2	To be referred to the Reporter or not ?	**NO**
3	Whether their Lordships wish to see the fair copy of the judgment ?	**NO**
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	**NO**

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STATE OF GUJARAT
Versus
UGAMSINH DHANRAJSINH

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Appearance:
MS CM SHAH APP for the Appellant(s) No. 1
NOTICE SERVED for the Opponent(s)/Respondent(s) No. 1

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CORAM:**HONOURABLE MR. JUSTICE S.H.VORA**
and
HONOURABLE MR. JUSTICE SANDEEP N. BHATT

Date : 02/03/2022

ORAL JUDGMENT

(PER : HONOURABLE MR. JUSTICE S.H.VORA)

1. Feeling aggrieved and dissatisfied with the judgment and order dated 21.6.1994 passed by the learned Addl. Sessions Judge, Gondal in Sessions Case No.70 of 1990 for the offences

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under sections 20, 21 and 22 of the NDPS Act and under Section 66(B) and 65(E) of the Prohibition Act, the appellant – State of Gujarat has preferred the captioned appeal inter alia challenging the judgment and order of acquittal in favour of the respondent-accused.

2. The brief facts of the case are that on 08/06/1990 at about 17:00 while the respondent-accused was passing near Juni Haji Dawod Hospital, Pehla Nala on Dhoraji Road to Jetpur Village carrying one bag, at that time the Police Personnel on suspicion made his search and found 1 Kilogram and 490 Gram of Charas for selling without having valid pass or permit and thus committed the aforesaid offence. The complainant lodged the complaint with regard to the incident before Jetpur City Police Station, which was registered as I – C.R. No.59 of 1990 for the aforesaid offences.

3. In pursuance of the complaint lodged by the complainant, investigating agency recorded statements of the witnesses, collected relevant evidence and drawn various Panchnamas and other relevant evidence for the purpose of proving the offence. After having found material against the respondent accused, charge-sheet came to be filed in the Court of learned Magistrate, Jetpur. As said Court lacks jurisdiction to try the offence, it committed the case to the Sessions Court, Gondal as provided under section 209 of the Code.

4. Upon committal of the case to the Sessions Court, Gondal, learned Sessions Judge framed charge at Exh.1 against the respondent accused for the aforesaid offence. The respondent accused pleaded not guilty and claimed to be tried

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5. In order to bring home charge, the prosecution has examined following prosecution witnesses and also produced various documentary evidence before the learned trial Court, which reads thus:

List of Prosecution Witnesses:-

Sr. No.	Exhibit	Particulars
PW-1	6	Mr.Natha Bhanji
PW-2	8	Mr.Sanjay Hiralal
PW-3	9	Mr.Shahbhai Alibhai.
PW-4	11	Mr.Ratilal Maganlal.
PW-5	12	Mr.Liladhar Meraman
PW-6	13	Mr.Jitesh Dharamsibhai
PW-7	14	Mr.Rahimbhai Amibhai
PW-8	17	Mr.Ajitsinh Jadeja
PW-9	18	Mr.Harisinh Jankat

List of Documentary Evidence:-

Sr. No.	Exhibit	Particulars
01	16	Copy of Station Diary Entry made in Jetpur City Police Station.
02	19	Original Complaint
03	20	Order of Depute.
04	21	Copy of Message.
05	22	Office Copy
06	23	Copy of letter
07	24 & 25	Copy of reports

6. On conclusion of evidence on the part of the prosecution, the trial Court put various incriminating circumstances appearing in the evidence to the respondent accused so as to obtain his explanation/answer as provided u/s 313 of the Code.

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In the further statement, the respondent accused denied all incriminating circumstances appearing against him as false. After hearing both the sides and after analysis of evidence adduced by the prosecution, the learned trial Judge acquitted the respondent accused of the offences, for which he was tried, as the prosecution failed to prove the case beyond reasonable doubt.

7. We have heard learned APP Ms. Shah appearing for the appellant-State and re-examined the record and proceedings conducted before the learend trial Court. The case ended into acquittal mainly on the premise that there was non-compliance of mandatory provisions of the NDPS Act on the part of the Investigating Agency. The learned trial Court in nutshell recorded non-compliance in paragraph 7 of the impugned judgment and order (free translation in English) which reads thus:

> *"(7) As discussed above, when the independent Pancha witnesses have not corroborated the case of prosecution, it is to be taken into consideration as to whether the accused can be held responsible for the stated offence only on the basis of evidence of police witnesses? If this question is taken into consideration, it appears that it cannot be answered except in negative. Because, as per the provisions of the NDPS Act and the established principles of law, the complainant and the investigator cannot be the same. The offence should have been investigated by an independent agency. In the present case, the complainant P.S.I. Shri Jankate has also investigated the case. Thus, the investigation in the present case is against the established principles of law. It cannot be said to be a neutral investigation. Further, as per the provisions of the NDPS Act, it is mandatory to record in writing the information received by a Police Officer. Despite this fact, it has been stated that P.S.I. Shri Jankat had received the information at*

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3:45 hours, he reached the so called place of incident at 4:00 hours and he had recovered the muddamal from the accused at 5:30 hours. Thus, though he had sufficient time for making an entry regarding receiving of information, he has not made an entry in writing in this regard. Such circumstances make the case further doubtful and important provisions of the NDPS Act have been violated. It is important to note that it is clear from the depositions of Police Witness Shri Shah and the complainant that P.S.I. Jankar had not given understanding to the accused as to the fact that under the provisions of N.D.P.S Act, an accused has a right to get his physical examination done before a gazetted officer or a Magistrate. A remark in this regard is also not made in the panchnama. Further, Shri Jankat has admitted this fact during his cross-examination. Thus, the accused had been deprived of such an important right and thereby the important provisions of the NDPS Act have been violated. Further, the muddamal of the incident has been recovered by him on 08/01/1990 and he has not undertaken any procedure regarding sending it to the F.S.L. Further, not any clear evidence has been produced by him which corroborates that he had handed over the muddamal to the P.S.O. Thus, the investigating officer has kept the muddamal with him for a long time. Under such circumstances the facts of complainant become doubtful. It is pertinent to note that, as stated by P.S.I. Shri Jankat and as per the remark on the panchnama, he had sent 40 grams of Hashish to the F.S.L., whereas, as per the letter of F.S.L., 28.526 grams of Hashish has been stated as received, which means that the quantity sent to F.S.L. had not been weighed in presence of the accused or Shri Jankat had recorded the estimated weight. This is a serious nature of irregularity and it also makes the case of prosecution doubtful. It is pertinent to note that, with a view to show that he had informed the recovery of muddamal to his seniors, the complainant has produced the letter at Exhibit-21. But, any statement of the C.P.I. has not been produced with regard to receiving the letter by the C.P.I. Further, there is a noteworthy contradiction in the depositions of Shri Jankat and the deposition of the constable. As stated by Jankat, when the muddamal was

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recovered at the place of incident, it was kept in a clothe bag which had been made by stitching the cloth with a needle and thread. Whereas, in the muddamal produced before the court, the bag appears to have been stitched with a machine on three sides and this fact has been admitted by the complainant. Thus, all the procedure, i.e. seizing the muddamal, applying seal thereon and sending it to the F.S.L., done by P.S.I. Shri Jankat appears to be doubtful. Under such circumstances and on the basis of such evidences of the police witnesses including the complainant and the Investigating Officer, it appears not to be in the interest of justice that the accused be held guilty for violation of such serious provisions of the N.D.P.S. Act. Therefore, consequent to determining Point no.1 and 2 accordingly, following order is issued."

8. In view of the fact that there is an allegation and also prosecution case that the respondent was carrying 1 Kilogram and 490 Gram Charas on 08/06/1990 at about 5:00 p.m. while passing through Dhoraji Road to Jetpur Village, we have re-assessed and re-analyzed the evidence placed on record to verify the fact as to whether there is non-observance of provisions of NDPS Act or not.

9. It is a matter of fact that the Investigating Officer acted on prior information as deposed by him below Exhibit-18 as PW 9. In view of such position, PW 9, complainant-IO while acting on prior information and before making search of a person, it is imperative for him to inform the respondent-accused about his right to sub-section (1) of Section 50 of the NDPS Act for being taken to the nearest Gazetted Officer or the Magistrate for making search in their presence. It also appears that neither such procedure is followed; nor any note to the said effect is made in the Panchnama drawn while making search of the

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person of the respondent-accused. As laid down in the case of ***State Of Punjab vs Baldev Singh [1999 (6) SCC 172]***, the respondent-accused must be made aware of his right for being search to be carried out in presence of a Gazetted Officer or a Magistrate. Learned APP could not point out any evidence or document showing that respondent-accused was made aware of his right before the Magistrate or Gazetted Officer. On perusal of deposition of PW 9, the complainant, no evidence has been adduced to show that respondent-accused was communicated of his such right and thus there is a non-compliance of provisions of Section 50 read with Section 43 of the NDPS Act.

10. There also appears to be breach or violation of Section 50 of the NDPS Act, because it is a statutory requirement of writing down or conveying information to Superior Officer. In the case on hand, neither such intimation is sent to Superior Officer; nor any entry is made in the station diary. It has also come on record that PW 9 has sent 40 Gram of muddamal to FSL.; whereas, as per letter of FSL, it has received only 28.526 Gram. No explanation as to difference in weight is brought on record, the learned trial Court has considered the same as serious nature of irregularity and lapse on the part of the prosecution. No any information has been forwarded to the Superior Officer with regard to the recovery of muddamal.

11. Similarly, there is contradiction in the deposition of PW 9-complainant and Police Constable; inasmuch as the muddamal was recovered on the place of incident which was kept in clothe bag which had been made by stitching the cloth with needle and thread. Whereas, the muddamal produced before

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the Court in the bag which appears to have been stitched with a machine on three sides and thus all the procedure seizing of the muddamal, sealing of the muddamal and sending to FSL were found doubtful and procedure precedent to the search was done in utter disregard to the mandatory provisions of law and therefore, the learned trial Court has rightly extended the benefit of doubt to the respondent-accused and we also endorse the view/finding of the learned trial Judge leading to the acquittal.

12. It is a cardinal principle of criminal jurisprudence that in an acquittal appeal if other view is possible, then also, the appellate Court cannot substitute its own view by reversing the acquittal into conviction, unless the findings of the trial Court are perverse, contrary to the material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable. (Ramesh Babulal Doshi V. State of Gujarat (1996) 9 SCC 225). In the instant case, the learned APP has not been able to point out to us as to how the findings recorded by the learned trial Court are perverse, contrary to material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable.

13. In the case of Ram Kumar v. State of Haryana, reported in AIR 1995 SC 280, Supreme Court has held as under:

> *"The powers of the High Court in an appeal from order of acquittal to reassess the evidence and reach its own conclusions under Sections 378 and 379, Cr.P.C. are as extensive as in any appeal against the order of conviction. But as a rule of prudence, it is desirable that the High Court should give proper weight and consideration to the view of the Trial Court with regard to the credibility of the witness, the presumption of innocence in favour of the accused, the right of the accused to the benefit of any doubt and the slowness of appellate Court in justifying a finding of fact arrived at by a Judge who had the advantage of seeing the witness. It is settled law that if the main grounds on which the lower Court*

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has based its order acquitting the accused are reasonable and plausible, and the same cannot entirely and effectively be dislodged or demolished, the High Court should not disturb the order of acquittal."

14. As observed by the Hon'ble Supreme Court in the case of Rajesh Singh & Others vs. State of Uttar Pradesh reported in (2011) 11 SCC 444 and in the case of Bhaiyamiyan Alias Jardar Khan and Another vs. State of Madhya Pradesh reported in (2011) 6 SCC 394, while dealing with the judgment of acquittal, unless reasoning by the learned trial Court is found to be perverse, the acquittal cannot be upset. It is further observed that High Court's interference in such appeal in somewhat circumscribed and if the view taken by the learned trial Court is possible on the evidence, the High Court should stay its hands and not interfere in the matter in the belief that if it had been the trial Court, it might have taken a different view.

15. Considering the aforesaid facts and circumstances of the case and law laid down by the Hon'ble Supreme Court while considering the scope of appeal under Section 378 of the Code of Criminal Procedure, no case is made out to interfere with the impugned judgment and order of acquittal.

16. In view of the above and for the reasons stated above, present appeal deserves to be dismissed and is accordingly dismissed while confirming the judgment and order of acquittal rendered by the learned Court below.

(S.H.VORA, J)

(SANDEEP N. BHATT,J)

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