
(2011) 07 GUJ CK 0108

Gujarat High Court

Case No: Criminal Appeal No. 38 of 2005

Nazir Ahmad, Ahmad
@ Raju Ahmad
Nabibbhai Gohri

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision: July 6, 2011

Acts Referred:

- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 20B, 20C, 22, 29, 8

Hon'ble Judges: Bankim N. Mehta, J; A.L. Dave, J

Bench: Division Bench

Advocate: Pratik Barot, for Apurva A. Dave, for the Appellant; K.L. Pandya, APP, for the Respondent

Final Decision: Allowed

Judgement

A.L. Dave, J.

This appeal arises out judgment and order dated 28.12.2004 passed by the learned Special Judge, 3rd Fast Track Court, Patan in Special (NDPS) Case No. 1 of 2004 convicting the Appellant accused for the offence punishable u/s 20(B)(II)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the NDPS Act") and sentencing him to undergo RI for 10 years with fine of Rs. 1,00,000/-, in default, to undergo RI for 1 year.

2. The facts of the case, in brief, are that acting upon a tip off, Radhanpur Police raided house of accused Nazir Ahmad @ Raju Ahmad Nabibbhai Gohri on 12.10.2003 at about 1:00 p.m., located in the Ansari Pir Street and from that house, contraband Charas weighing 1 kg 52 gm valued at Rs. 15,750/- was seized. Accused No. 2 Salim Samsuddin Shaikh had contraband Charas in his possession. The samples were drawn, sealed and sent to FSL for report. They both were arrested and prosecuted before the trial Court. As

per the prosecution case, they had committed offence punishable u/s 8(c), 20(B), 22 and 29 of the NDPS Act. They pleaded not guilty to the charge and claimed to be tried. The trial Court, by the impugned judgment, found that charges against accused No. 1 - Appellant herein were duly proved by the prosecution and sentenced him to RI for 10 years with fine of Rs. 1,00,000/-, in default, RI for 1 year u/s 20(B)(II)(C) of the NDPS Act.

3. Heard learned advocate Mr. Pratik Barot for learned advocate Mr. Apurva Dave, learned advocate for the Petitioner and learned APP Mr. Pandya.

4. Learned advocate for the Appellant submitted that apart from other discrepancies, the case of the prosecution ought to have failed before the trial Court only on account of defect in the sealing procedure adopted by the investigating agency at the time of seizure and sampling. He submitted that the seizure and sampling would go to the root of the entire case and, therefore, other defects would be in addition to the major defect of sealing and sampling. The learned advocate submitted that while sealing the contraband seized and drawing samples therefrom, the investigating agency has not affixed slip/s signed by panch-witnesses on the outer cover of the packets, but, has placed slip/s inside the seized muddamal packets or the samples drawn therefrom. This would leave room for tampering with the muddamal seized because, without any dispute, the seal affixed is that of the Investigating Officer. They, therefore, submitted that the trial Court ought to have given the benefit to the accused-Appellant and acquitted him. He submitted that this Court has taken similar view in a number of cases. He relied on the following decisions:

(i) Criminal Appeal No. 323 of 1996 [Jitendra @ Sanjaykumar Suryakant Desai v. State of Gujarat] decided on 17.8.2001 [Coram: B.C. Patel & A.L. Dave, JJ.]

(ii) Criminal Appeal No. 287 of 1999 [Ganpatram Punmaram Vishnoi v. State of Gujarat] decided on 7.5.2002 [Kshitij R. Vyas & Ravi R. Tripathi, JJ.]

(iii) Navinkumar @ Shambhuprasad @ Bapji Chimanlal Vyas v. State of Gujarat, 2006 (1) GLH 409, wherein the above unreported judgments have been referred to and relied on.

(iv) Sohanlal Kasiram Brahmin and Anr. v. State of Gujarat and Anr. 2007 (1) GLH 131.

(v) Criminal Appeal No. 2088 of 2005 (Dipakkumar Babulal Patel v. State of Gujarat) with Criminal Appeal No. 2203 of 2005 (Vipulkumar Jaydevbhai Barot v. State of Gujarat) decided on 25.9.2008 (Coram: A.L. Dave & J.C. Upadhyaya, JJ.).

5. The learned Additional Public Prosecutor has opposed this appeal.

6. We have considered the rival side submissions.

7. On perusal of the record, we find that the panchnama drawn at the time of seizure and drawing of samples clearly indicates that the slips signed by the panch-witnesses were placed into the packets containing the contraband article, or the samples drawn

therefrom. Thereafter the packets were sealed, tied with a thread and wax-seal of the Investigating Officer was affixed. This is reflected in the F.S.L. Report as well. The FIR also indicates the same situation.

7.1 Learned A.P.P. Mr. Pandya does not dispute the above factual aspect regarding slip/s being inside the packet and not affixed on the packet below the wax-seal.

8. In our opinion, the contention regarding laxity in following the procedure relating to sealing of the seized contraband article has some substance. It is clear from the panchnama (Exh. 19), FIR (Exh.44) and FSL report (Exh.79), so also the deposition of the raiding officer (Exh.43) that the correct procedure for sealing has not been followed to rule out the possibility of tampering with the contraband article seized or samples drawn therefrom. It is found that after drawing the samples, at the time of sealing the samples as well as the remainder of the contraband seized, the slips containing signatures of the panch-witnesses and the police officer were placed inside the packets and, therefore, the possibility of tampering with the muddamal at the later stage and then again resealing the same by the investigating agency, cannot be ruled out. The very purpose behind carrying out the search, taking of sample and sealing in presence of panch-witnesses is to ensure that there is no scope for any mischief in the procedure required to be followed. At the time of sealing, slips containing signatures of panch-witnesses as well as the Investigating Officer are affixed on the articles seized and a seal is applied over it, so that, in case of any attempt for tampering with the article seized, the seal would be broken or the slip would be torn, which would immediately reveal such an attempt. If the slip is put inside as was done in the instant case, the possibility of tampering cannot be ruled out. Under the circumstances, the procedure followed for sealing in the instant case cannot be said to be proper and free from any possibility of tampering. The procedure, therefore, cannot be said to be beyond the scope of any reasonable doubt and in that event, benefit must go to the accused.

9. This Court has taken similar view in (i) Criminal Appeal No. 323/1996, (ii) Criminal Appeal No. 287/1999, (iii) Navinkumar @ Shambhuprasad @ Bapji Chimanlal Vyas v. State of Gujarat, 2006 (1) GLH 409, (iv) Sohanlal Kasiram Brahmin and Anr. v. State of Gujarat, 2007 (1) GLH 131, and (v) Criminal Appeal No. 2088/2005 with Criminal Appeal No. 2203/2005.

10. Since the defect in sealing procedure while sealing the contraband article or drawing samples therefrom would go to the root of the prosecution case and affect the investigation and the trial and since we have found such a defect in the procedure, we do not propose to deal with the other aspects of the appeal.

11. Being conscious about the menace of narcotic drugs and psychotropic substance in the society, we only quote what has been observed by this Court in Criminal Appeal No. 323/1996, as under:

It cannot be overlooked that society is facing the menace of drugs and persons involved in such drugs need to be appropriately dealt with. The society needs to be protected from persons indulging in such activities. The Legislature has, for that purpose, enacted laws with stringent arrangements. But for that purpose, the prescribed procedure has to be strictly followed by the Investigating Agency. Failure on the part of the Investigating Agency may result in non-fulfilment of the purpose behind the enactments. The Apex Court, in the case of *State of Punjab v. Baldev Singh*, 1993 (3) GLR 2483, in paragraph 31, observed as follows:

"31. There is indeed a need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the officials concerned, so that the laxity on the part of the investigating authority is curbed.

We only hope that the authorities concerned will take appropriate action to avoid such eventualities, as in the instant case.

12. Resultantly, this appeal succeeds and is accordingly allowed. The judgment and order dated 28.12.2004 passed by the learned Special Judge, 3rd Fast Track Court, Patan, recording conviction of the Appellant accused for the offence punishable u/s 20(B)(II)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 in Special (NDPS) Case No. 1 of 2004 is set aside. The Appellant accused Nazir Ahmad @ Raju Ahmad Nabibhai Gohri is ordered to be released forthwith, if not required in any other case. Fine, if paid, be refunded to the Appellant.