IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL NO. 971 of 2006

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE RAJENDRA M. SAREEN

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

==========

STATE OF GUJARAT
Versus
PARAMJIT @ KALI HIMMATSINGH CHIMA

==========

Appearance:
MR RC KODEKAR APP for the Appellant(s) No. 1
MR NASIR SAIYED(6145) for the Opponent(s)/Respondent(s) No. 1

==========

CORAM:**HONOURABLE MR. JUSTICE RAJENDRA M. SAREEN**

Date : 08/04/2022

CAV JUDGMENT

1. This Appeal is filed by the appellant – State of Gujarat under Section 378(1)(3) of the Criminal Procedure Code, 1973 against the judgment and order passed by the learned Additional Sessions Judge, Vadodara in Sessions Case No. 4 of 2003 dated 30.12.2005 acquitting the respondent - original accused from the offence punishable under sections 8(C), 20(B), 22 and 29 of the Narcotic Drugs and

Psychotropic Substance Act ("NDPS Act" for short).

2. The case of the prosecution case is that the complainant PSI S.M.Parmar DCB, Baroda filed the complaint on 15.04.2003 and with other police staff got the information regarding the accused as stated in complaint and after that as per the information received informing to the Dy. Police Commissioner and then after the police staff and the panch went on the place together in police Jeep. That during that when they were at the place watch was arranged and during that they obstructed and stopped the person and asked his name and after that the search was taken and during that they seized the powder of Brown sugar in one plastic bag and accordingly the panchnama was drawn sample was taken and hence after completing the whole of the formalities under the provisions of law during panchnama the complaint was filed as Stated in the complaint. Thereafter, the further investigation was made and the statements of witnesses were recorded and after completion of investigation the charge sheet was filed against the accused. It is submitted that after that the matter was came on evidence and on behalf of the prosecution in all 20 witnesses were examined inclusive of complainant, panchas, FSL officers and Investigating Officer. Out of that some of the witnesses were examined by predecessor. During the examination of the witnesses to some extent the panchas were declared hostile and the complainant and the other witnesses has supported the

case of prosecution and deposed that according to the facts stated by them. After hearing of the arguments of both the sides the Additional Sessions Judge has delivered the Judgment on 30.12.2005 and has acquitted the accused.

2.1. Being aggrieved by the judgment and order of acquittal passed by the learned Additional Sessions Judge, Vadodara in Sessions Case No. 4 of 2003 dated 30.12.2005, the appellant has preferred this criminal appeal.

3. Mr.R.C. Kodekar, Learned APP for the appellant – original complainant has vehemently argued that all the mandatory procedure has been followed by the investigating officer under the provisions of the NDPS Act. The trial court has not believed the evidence of the prosecution witnesses. The learned Judge has committed a grave error in not believing the deposition of the prosecution witnesses and documentary evidence on record. He has further submitted that the learned Judge has erred in acquitting the respondents – accused from the charges levelled against them. He has further submitted that the prosecution has proved that the respondents have committed offence under sections 8(C), 20(B), 22 and 29 of the NDPS Act. He has further submitted that the learned Special Judge has acquitted the respondents accused merely on some minor contradictions and omissions in the evidence of the witnesses. He has further submitted that the learned Special Judge has erred in not believing the evidence of the

investigating officer who had no reason to implicate the accused falsely in the case. He has further submitted that the offence punishable under section 8(C), 20(B), 22 and 29 of the NDPS Act, is made out, however, the same is not believed by the learned Judge. He has further submitted that though the prosecution witnesses have supported the case of the prosecution, the trial court erroneously not believed their evidence and acquitted the accused.

Making above submissions, he has requested to allow the present appeal.

4. Mr.Nasir Saiyed, learned advocate appearing for the respondent accused has vehemently submitted that there is hardly any substance in the submissions of learned APP. There is no admissible evidence on record connecting the accused with the commission of the offence. There are material contradictions and omissions in the evidence of the prosecution witnesses. There are breach of various mandatory provisions, as observed by the learned Judge in the impugned order. The witnesses and panchas have turned hostile. The prosecution has not proved the case beyond reasonable doubt. No illegality has been committed by the learned Judge while acquitting the respondent accused.

5. Heard the learned advocates for the respective parties and gone through the impugned judgemenet and order of

the trial court as well as the entire material on record.

6. Before adverting to the facts of the case, it would be worthwhile to refer to the scope in Acquittal Appeals. It is well settled by is catena of decisions that an appellate Court has full Power to review, re-appreciate and consider the Evidence upon which the Order of Acquittal is founded. However, the Appellate Court must bear in mind that in case of Acquittal, there is prejudice in favour of the Accused, firstly, the presumption of innocence is available to him under the Fundamental Principle of Criminal Jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of Law. Secondly, the Accused having secured his Acquittal, the presumption of his innocence is further reaffirmed and strengthened by the trial Court.

7. On perusal of the record and from the deposition of the investigating officer, it is clear that the Police Inspector has not made investigation as to whether the secrete letter was forwarded after registering in the register or not. On the other hand, there is no investigation as to whether the higher officer has received the said secrete letter or not. Likewise he has admitted that it has not come out from his letter that any letter was written to the Commissioner. This witness admitted that there is mention of zip-lock plastic bag. From the Panchnama and evidence of the raiding party and search officer, it is clear that the bag was sealed by candle and on the other-hand, it is not the say of any of

the witness that the zip-lock plastic bag, as stated by the FSL Officer, was used. Thus, there is suspicion regarding the bag in which the muddamal was packed. Thus, the investigation of the investigating officer is faulty.

8. Though it is the case of the prosecution that the accused was searched by the police inspector in presence of the witnesses and not only that it is further case of the prosecution that the muddamal found from the bag which was hanging on the shoulder of the accused and even though secrete information to that effect was also received, there is no strict compliance of section 42(2) of the NDPS Act. There is nothing on record to show that any option for search was given to the accused or there is no writing that the accused refused to exercise the option of search. Thus, there is violation of mandatory provision of section 50 of the NDPS Act. As per section 52 the officer who arrests the accused has to disclose the reasons for arrest at the earliest. In the present case, nobody including search officer disclose the reasons for arrest of the accused. There is violation of mandatory provision of section 52 of the NDPS Act. After recovering the muddamal, seal is required to be affixed on the muddamal but in the present case no such seal was affixed and hence there is violation of mandatory provisions of section 55. There is no evidence on record as to the report to be made regarding reasons for arrest of the accused and complete details of the muddamal seized. Thus, there is violation of mandatory provisions of section

57 of the NDPS Act.

9. The prosecution has failed to prove that both the accused known to each other or they hatched conspiracy for transportation of muddamal goods. The prosecution has failed to prove that from where the accused No.2 brought the muddamal. There is no evidence that accused No.1 brought the muddamal from the accused No.2. There is no evidence that the accused have helped each other in commission of the offence.

10. As held by the Hon'ble Supreme Court in the case of ***Prabhashankar Dube Vs. State of Madhya Pradesh***, reported in AIR 2004 (MP) procedure under section 50 should be done in just and proper manner. In the present case, there is no just and proper compliance of section 50. Hence, as per the aforesaid decision of the Hon'ble Supreme Court, the accused is entitled to acquittal.

11. As held by the Hon'ble Supreme Court in the case of ***Ali Mustufa Vs. State of Kerala,*** reported in ***AIR 1995 SC 244***, when prior information is received, it is mandatory for the department to explain to the accused about his right, otherwise the entire procedure and penal order are vitiated. In the present case, there is no compliance of section 50 of the NDPS Act and hence also the accused is entitled to acquittal.

12. As held in the case of ***Vinod Vs. State of Maharashtra*** reported in ***2004(1) EFR 333***, it is not only required to give option to the accused but it is required to explain to the accused regarding his rights conferred under section 50 of the NDPS Act and if such procedure is not adopted, the issue of punishment is vitiated. In the present case, section 50 of the NDPS Act is not complied with and hence the accused cannot be convicted.

13. As held in the case of ***Bodokan Abdul Raheman*** reported in ***2002(2) EFR 87***, under the NDPS Act, the provision for punishment is rigorous and therefore, the complainant side has to comply with the mandatory provisions strictly and if there is breach of mandatory provision of section 42 and 50, it can be said that the case is not proved and the accused is entitled to acquittal. In the present case also mandatory provisions of section 42 and 50 are not complied with and hence, the accused is entitled to acquittal.

14. It may be noted that as per the settled legal position, when two views are possible, the judgment and order of acquittal passed by the trial Court should not be interfered with by the Appellate Court unless for the special reasons. A beneficial reference of the decision of the Supreme Court in the case of **State of Rajasthan versus Ram Niwas** reported in **(2010) 15 SCC 463** be made in this regard. In the said case, it has been observed as under:-

"6. This Court has held in Kalyan v. State of U.P., (2001) 9 SCC 632 :

"8. The settled position of law on the powers to be exercised by the High Court in an appeal against an order of acquittal is that though the High Court has full powers to review the evidence upon which an order of acquittal is passed, it is equally well settled that the presumption of innocence of the accused persons, as envisaged under the criminal jurisprudence prevalent in our country is further reinforced by his acquittal by the trial court. Normally the views of the trial court, as to the credibility of the witnesses, must be given proper weight and consideration because the trial court is supposed to have watched the demeanour and conduct of the witness and is in a better position to appreciate their testimony. The High Court should be slow in disturbing a finding of fact arrived at by the trial court. In Kali Ram V. State of Himachal Pradesh, (1973) 2 SCC 808, this Court observed that the golden thread which runs through the web of administration of justice in criminal case is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the

accused should be adopted. The Court further observed:

"27. It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilised society. Suppose an innocent person is convicted of the offence of murder and is hanged, nothing further can undo the mischief for the wrong resulting from the unmerited conviction is irretrievable. To take another instance, if an innocent person is sent to jail and undergoes the sentence, the scars left by the miscarriage of justice cannot be erased by any subsequent act of expiration. Not many persons undergoing the pangs of wrongful conviction are fortunate like Dreyfus to have an Emile Zola to champion their cause and succeed in getting the verdict of guilt annulled. All this highlights the importance of ensuring, as far as possible, that there should be no wrongful conviction of an innocent person. Some risk of the conviction of the innocent, of course, is always there in any system of the administration of criminal justice Such a risk can

be minimised but not ruled out altogether It may in this connection be apposite to refer to the following observations of Sir Carleton Alien quoted on page 157 of "The Proof of Guilt" by Glanville Williams, second edition:

"I dare say some sentimentalists would assent to the proposition that it is better that a thousand, or even a million, guilty persons should escape than that one innocent person should suffer; but no responsible and practical person would accept such a view. For it is obvious that if our ratio is extended indefinitely, there comes a point when the whole system of justice has broken down and society is in a state of chaos."

28. The fact that there has to be clear evidence of the guilt of the accused and that in the absence of that it is not possible to record a finding of his guilt was stressed by this Court in the case of Shivaji Sahebrao, (1973) 2 SCC 793, as is clear from the following observations:

"Certainly it is a primary principle that the accused must be and not merely, may be guilty before a court, can be convicted and the mental distinction between 'may be' and 'must be' is long and divides vague conjectures from sure considerations."

"9. The High Court while dealing with the appeals against the order of acquittal must keep in mind the following propositions laid down by this Court, namely, (i) the slowness of the appellate court to disturb a finding of fact; (ii) the noninterference with the order of acquittal where it is indeed only a case of taking a view different from the one taken by the High Court."

8. In Arulvelu and another versus State reported in (2009) 10 Supreme Court Cases 206, the Supreme Court after discussing the earlier judgments, observed in para No. 36 as under:

"36. Careful scrutiny of all these judgments lead to the definite conclusion that the appellate court should be very slow in setting aside a judgment of acquittal particularly in a case where two views are possible. The trial court judgment can not be set aside because the appellate court's view is more probable. The appellate court would not be justified in setting aside the trial court judgment unless it arrives at a clear finding on marshaling the entire evidence on record that the judgment of the trial court is either perverse or wholly unsustainable in law."

15. In view of the above, this court is of the opinion that the prosecution has failed to prove the charges levelled against the appellant accused beyond reasonable doubt and the trial court has rightly acquitted the accused.

16. In the result, present appeal is dismissed.

(RAJENDRA M. SAREEN,J)

R.H. PARMAR.