IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 974 of 1998

For Approval and Signature:

HON'BLE MR.JUSTICE D.K.TRIVEDI
and
HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

NASIR GANIBHAI SHAIKH

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 974 of 1998

MR EE SAIYED for Petitioner No. 1-2

Mr K C Shah, APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE D.K.TRIVEDI
and
HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 29/01/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.P.BUCH)

The appellants above namaed have preferred this appeal under sub-section (2) of section 374 of the Code of Criminal Procedure, 1973 (for short, 'the Code') challenging the judgment and conviction order dated 5.10.1998 recorded by the learned Addl.Sessions Judge, Court No.16, City Sessions Court, Ahmedabad in Sessions Case No.294/97 under which the learned Trial Judge convicted the present appellants for offence punishable under section 21 of the Narcotic Drugs Psychotropic Substance Acts, 1985.(for short, 'the said Act'). However, both the appellants were convicted for the offence punishable under section 29 read with section 21 of the said Act.

2. In fact four accused persons faced trial in the aforesaid case. However, accused no.3 and 4 in the said sessions case were ordered to be acquitted from all the offences for which they stood charged before the said court and, therefore, the original accused No.1 and 2 have filed this appeal as appellants no.1 and 2.

3. The facts of the case of the prosecution against the present appellants may be briefly stated as follows:

That on 17.9.1997, Head Constable Abdulmajid Yasimkhan Pathan was present in his police station and he received an information that the first appellant was to come to a particular place and was to sell narcotic drug to appellant no.2. Accordingly he conveyed the said information to Police Inspector Mr T A Barot. It is the case of the prosecution that the said information was reduced into writing by PSI Mr Barot and copy thereof was sent to his superior officer, Assistant Commissioner of Police Mr N R Parmar. Thereafter, an entry was also made in the police station diary being entry no.6 of 1997. Panchas were invited and all of them proceeded to the place in respect of which the information was received.

4. Accordingly Head Constable Abdulmajid Yasimkhan Pathan, Police Inspector T A Barot, PSI Rajput and other police personnel went to the spot. They have waited for the appellants to come. Ultimately appellant No.1 arrived there and PW 6, Abdulmajid Yasimkhan Pathan - Exh.30, showed him to

the other police officers. About half and hour thereafter, appellant no.2 also arrived there. There was some exchange of things between the two. The first appellant parted with something and handed over it to the second appellant which the second appellant put in his pocket. Same way, the second appellant also gave something to the first appellant and first appellant also put it in his pocket. At that point of time, the police officials went to the spot and they had given their introduction to the two appellants.

5. It was conveyed to them that if they wanted to be searched in presence of Magistrate of Gazetted Officer, then arrangement to that effect would be made. The information was conveyed in writing. At that time, the appellants showed their willingness to be searched in presence of police officers present there. Search was carried out and muddamal brown sugar was found from the persons of both the appellants. The said muddamal was seized, officers from FSL were invited on the spot. Mr Sharma from the FSL arrived at the spot and carried out preliminary analysis of the substance recovered from the appellants and it was found that the said substance was narcotic drug. Accordingly the said muddamal was seized. Panchanama was drawn and everything was sent to the police station with FIR. The FIR was accordingly registered and the muddamal and other things were received by the police station. Thereafter, further investigation was undertaken by PSI Rajput who carried out investigation and on completion of the investigation, charge sheet was filed. Case was registered as Sessions Case No.294 of 1997.

6. In the meantime, when appellants no.1 and 2 were arrested, it has come on record that original accused no.4 had given the muddamal to accused no.3 and accused no.3 had given it to the first appellant. Therefore, those two accused persons were also apprehended and charge sheeted, charge was also framed against them. But at the conclusion of the trial, the offence against them was not proved and, therefore, they came to be acquitted. It is required to be stated that against their acquittal, no acquittal appeal has been preferred by the State. Even at the stage of argument, learned APP in charge of the Sessions Case before the trial court was also not in a position to argue anything against those two

accused persons. Therefore, there being no evidence against them except bare statements of co-accused, which naturally were not admissible in evidence at trial, the said two accused were naturally acquitted by the trial court.

7. On receipt of the charge sheet, police investigation papers were supplied to the appellants. Charge was prepared and framed against the present appellants at Exh.6. It was read over and explained to the appellants. They pleaded not guilty. Therefore, evidence was recorded. In the course of evidence, the prosecution has mainly examined the Head Constable Abdulmajid Yasimkhan Pathan, P.I. Mr T A Barot and PSI Mr Rajput. They were also present when the search in respect the muddamal in presence of the appellants was carried out. They have supported the case of the prosecution. At the end of the trial, the trial court recorded further statements of the appellants and other two accused persons under section 313 of the said Code. The appellants pleaded not guilty and they also claimed that no offence was committed by them. Arguments were advanced on behalf of the appellants. Written arguments were also placed on record. After hearing the learned Counsel for the parties, the trial court found that the offence against the present appellants was proved beyond reasonable doubt. Accordingly the trial court convicted the two appellants for offence under section 21 read with section 29 of the said Act. Learned trial Judge directed that the appellants to undergo R.I. for a period of 10 years and to pay a fine of Rupees One Lakh. In default of payment of fine, the appellants were required to undergo R.I. for a further period of six months for offence under section 21 of the said Act.

8. Feeling aggrieved by the said judgment and conviction order of the trial court, the appellants have preferred this appeal before this Court. It has been mainly contended here that the evidence of the prosecution was not satisfactory and the trial court has committed serious error in placing reliance upon the prosecution witness. Panch witness has not supported the case of the prosecution and that fact has not been properly appreciated by the trial court. Though the provisions made under sections 41,42,43,55 and 57 of the said Act have not been followed strictly, the trial court has omitted to consider the said

aspect of the case. That on the whole, the judgment and conviction order of the trial court are illegal and erroneous and deserve to be set aside. The appellants have prayed that the present appeal be allowed and the judgment and conviction order recorded against the appellants by the trial court be set aside, the appellants may be acquitted of the offence said to have been committed by them and they be set at liberty forthwith.

9. On receiving the appeal, it was admitted and bail was refused and, therefore, the appellants are still in jail. When the appeal came up for final hearing, Mr E E Saiyed, learned Advocate has appeared on behalf of the appellants whereas Mr K C Shah, learned APP has appeared on behalf of the State. Both of them have taken us through the entire evidence on record including oral and documentary evidence. They have also taken us through the observations made by the learned Judge during the course of the judgment.

10. It would be relevant to observe that the first important witness examined by the prosecution are PW 6 Exh.30 Aabdulmajid Yasimkhan Pathan. He is the Head Constable attached to the Crime Branch at Gaekwad Haveli police station. According to him he received information from the informant that the first appellant was possessing and selling brown sugar illegally and on the date of the information, i.e. on 17.9.1997, the first appellant was to come near Honest Cycle Repairing Works near Idgah Circle Bridge with brown sugar in his possession and that he also received and that the second appellant was also to come there to get the said brown sugar from the first appellant. He conveyed the same to P.I. Mr Barot by 14.30 hours. It is further stated that the police officer invited two panchas and the information gathered by Aabdulmajid Yasimkhan Pathan was conveyed by Mr Barot to the panch witness and entry was made in the DCB police station during Mr Barot's superior officers was informed about the same. Thereafter, they went to the spot and waited for the appellants. That after half an hour the first appellant arrived there. He stood by the aforesaid Cycle stores and thereafter second appellant also arrived there after half an hour. After the first appellant gave something to the second appellant, the second appellant put it in his pocket, in turn the second appellant gave something to the first appellant which was placed

by the first appellant in his pocket. At that point of time, the police officials rushed to the spot. Their introduction was given to the appellants. It was conveyed to them that as per the information, the appellants were in possession of narcotic drugs and therefore, they were required to be searched and hence, in case they wanted to be searched in presence of Magistrate or of a Gazetted Officer, then arrangement to that effect would be made.

11. Simultaneously a written intimation to that effect was also conveyed to them and their thump mark/signature were obtained on the said writing. The said writing has been produced on record by the prosecution. It has been mentioned in panchnama also. Their writings can be gathered at Exh.34. It bears thump mark of the first appellant and signature of the second appellant. Thereafter search was carried out in presence of panchas and brown sugar was seized from the appellants. One Rameshchandra Soni was invited on the spot for carrying out the weighment of the muddamal recovered from the appellants. The muddamal was weighed and entry was made in the panchnama. Simultaneously, Mr Sharma was invited from the FSL and he carried out preliminary examination of the muddamal article and found that it was brown sugar. Thereafter, the muddamal was seized. The appellants were apprehended and the muddamal was sent to the police station. This is the evidence of this witness. Similar evidence has been given by Mr Barot, P.I. PW 7 at Exh.31. Even Mr Rajput has also given similar evidence as he was also present when the search was carried out.

12. Learned Advocates for the parties have taken us through the evidence of the aforesaid witnesses. However, it is found that all the three witnesses have given consistent evidence. Their evidence is consistent with the prosecution case. and it is found consistent inter se also.

On the receipt and recording of information, three witnesses have given consistent evidence to the effect that Aabdulmajid Yasimkhan Pathan Exh.30 conveyed the information to Mr Barot, P.I. which was reduced into writing. It is true that the police station entry No.6/97 has not been produced on record but it is also a fact that subsequently the information was given to the Asstt.Commissioner

of Police in writing and the said writing has been proved by the prosecution. Moreover, police station diary Exh.19 also contains the said fact. Thus we find that Mr Barot has conveyed the said fact to the police station officer of DCB police station about the seizure of muddamal brown sugar and arrest of accused persons. Yadi Exh.22 which has been proved by Mr Barot during the course of his evidence. We also found Exh.32 a letter written by Mr Barot to the Asstt.Commissioner of Police, Crime Branch, Ahmedabad City wherein it has been mentioned that the above information was received by the police station and therefore, after making entry No.6/97 at 15.30 hours, the staff had proceeded for raiding the spot. It seems that the said information was received by the Asstt.Commissioner of Police and, therefore, when the search was being carried out, this police Officer had also reached the spot and that is the evidence of Mr Barot. Other two witnesses referred to above have also supported the evidence of Mr Barot on the point. It shows that the information was reduced into writing and it was conveyed in writing to the superior officer concerned i.e. Asstt.Commissioner of Police. This shows that the legal requirement of section 41 and 42 have been complied with by Mr Barot. Mr E E Saiyed, learned Advocate for the appellants strongly contended, while arguing, that the provisions of sections 41 and 42 have not been complied with. He has taken us through provisions of section 41 and 42 of the said Act. It would be relevant to refer to the said two provisions which are reproduced below for ready reference:

"41. Power to issue warrant and authorisation

(1) A Metropolitan Magistrate or a Magistrate of the first class or any Magistrate of the second class specially empowered by the state Government in this behalf, may issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under Chapter IV, or for search, whether by day or by night of any building, conveyance or place in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed.

(2) Any such officer of gazetted rank of the departments of Central Excise, narcotics, customs, revenue intelligence or any other department in this behalf by general or special order by the Central Government, or any such officer of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from that any person has committed an offence punishable under Chapter IV or that any narcotic drug or psychotropic substance in respect of which any offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence has been kept or concealed in any building, conveyance or place, may authorise any officer subordinate to him by superior in rank to a peon, sepoy or constable, to arrest such a person or search a building, conveyance or place whether by day or by night or himself arrest a person or search a building conveyance or place.

(3) The officer to whom a warrant under sub-section (1) is addressed and the officer who authorised the arrest or search or the officer who is so authorised under sub-section (2) shall have all the powers of an officer acting under section 42.

42. Power of entry, search, seizure and arrest without warrant or authorisation (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of Central Excise, narcotics, customs, revenue intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) or the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Govt.

if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place may, between sunrise and sunset -

(a) enter into and search any such building, conveyance or place

(b) in case of resistance, break open any door and remove any obstacle to such entry

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under chapter IV relating to such drug or substance and

(d) detain and search and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under Chapter IV relating to such drug or substance;

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub section (1) or records grounds for his belief under the proviso

thereto, he shall forthwith send a copy thereof to his immediate official superior."

On a bare perusal of these provisions, it is very clear that sections 41 and 42 of the Act will come into play only when an offence is committed in a building, conveyance or enclosed place for which there are reasons to believe that the offence relating to narcotic and psychotropic substance is kept or concealed. On a bare reading of section 41, it becomes extremely clear that this provision will not apply when the seizure and search have taken place in a public place.

13. Mr Saiyed has also argued that even under section 42 of the Act, Police Inspector was required to follow certain procedure which has not been followed. It may be made clear that section 42 of the said Act will not apply when a search which has been carried out in a public place. In the present case, we find that the search of the present appellants was carried out in a public place and not in a building or closed premises. In that view of the matter, the Investigating Police Officer was not required to follow the procedure laid down under sections 41 and 42 of the said Act.

14. Learned Advocate for the appellants has also contended that the information received by Mr Barot was not reduced into writing and, therefore, the provisions of sections 41 and 42 have not been followed. As said above, three prosecution witnesses have consistently deposed that the information received by Mr Barot was reduced into writing. As said above, PW 6 - Aabdulmajid Yasimkhan Pathan Exh.30, PW 7 Mr Barot Exh.31, PW 8, Mr Rajput Exh.41, all have given consistent evidence that the information received was reduced into writing and Entry No.6/97 was made and the information was conveyed to immediate superior, i.e. Asstt.Commissioner of Police Mr Parmar.

15. During the course of cross examination, it has not been suggested that no such information was received and that it was not reduced into writing and such information was not conveyed to Mr N R Parmar. So on the one hand there is positive evidence of three witnesses on record. Their evidence is very convincing and consistent and there is no cross examination on the point about the receipt of information, registration of the

information in writing and forwarding of the same to the immediate superior police officer. This would show that though the requirement of sections 41 and 42 are mandatory and though the said information was not required to be reduced into writing and though the said information was not required to be conveyed to the superior officer, since the search was carried out in a public place still the prosecution appears to have substantially complied with the provisions of sections 41 and 42 of the Act.

16. On this point we may also refer to a decision of this Court in the case of Abdul Salam Yusufbhai Shaikh v. State of Gujarat, , reported in 2003 (2) GLR 1643, wherein it has been expressly held by this Court that when a search has been carried out in a public place, there is no question of applicability of sections 41 and 42 of the said Act.

17. So looking to the facts and circumstances of the case the prosecution was not required to follow the procedure laid down in sections 41 and 42 of the said Act. In the aforesaid decision, there is a reference to the previous decision of this court and also the decision of the Supreme Court, according to which the procedure mentioned in section 41 and 42 does not apply to a search carried out in a public place. Despite this position, it seems from the record that the prosecution has complied with the provisions of sections 41 and 42. It is true that the defence has raised an issue that the information was not conveyed to the superior officer. At this stage, again at the cost of repetition it may be said that so far as the receipt of information and recording of information in writing is concerned the said fact has not been seriously challenged during the cross examination. The only challenge is that the information received and reduced into writing was not conveyed to the superior officer.

18. All the three witnesses referred to hereinabove have consistently deposed that the said information was conveyed to the immediate superior police officer i.e. the Assistant Commissioner of Police Mr Parmar. It is true that the original information received by Mr Parmar has not been brought on record. Then it is also the consistent evidence of all the three witnesses that Mr Parmar

reached the spot when the search was going on. This means that the said officer had previously received the said information otherwise, if he had not received the said information, he would not have reached the spot at odd hours.

19. Above aspects further show that the above procedure was not required to be followed and yet the prosecution has proved that the said procedure of conveying the said information to the Superior Officer has also been followed and the said requirement can be said to have been complied with substantially.

19.1. Learned Advocate for the appellant has also taken us through the provisions made in section 52 of the said Act. For the purpose, he has drawn our attention to the provision of sub-section (3) of section 52 of the said Act. This provision shows that every person arrested and article seized shall be forwarded without unnecessary delay to the officer incharge of the nearest police station or the officer empowered under section 53. Mr Saiyed has argued here that DCB police station was not the nearest police station and, therefore, the police officer ought to have forwarded the appellants as well as the muddamal article to the nearest police station and not to the DCB police station.

20. It is required to be considered that there is a special cell in the DCB police station which is known as Narcotic Cell. When narcotic jurisdiction of the entire city is vested in the said Narcotic cell, even if some other police station may be nearer, it would not be illegal on the part of Mr Barot to have sent the accused with the muddamal to the DCB police station. It is required to be considered here that soon after the search was over, FIR was filed by him before DCB police station having jurisdiction over the area where the offence was committed. Therefore, when the FIR was registered before the DCB police station, it was proper for Mr Barot to send the accused persons and the muddamal article also to the DCB police station. Therefore, it cannot be said that there is a violation of the provision of sub-section (3) of section 52. Even otherwise without any difficulty, it has to be accepted that the provision contained in sub-section (3) of section 52 of the Act cannot be regarded as a mandatory provision and when the provision is not

mandatory, it would be for the accused person to show that some prejudice has been caused to the interest and defence of the accused by not following the procedure laid down in sub-section (3) of section 52. It appears that the appellants were unable to point out any prejudice being caused to the present appellants for non-observance of the procedure of sub-section (3) of section 52 of the Act. Even before us Mr Saiyed was unable to show that serious injustice or prejudice has been caused to the interest of the appellants for not referring the appellants to the nearest police station. At the cost of repetition, it has to be observed that when the offence was committed within the jurisdiction of DCB police station and when the FIR was registered there and when searching officers belonged to DCB police station, then sending of muddamal and the accused to DCB police station has to be accepted to be substantial compliance of sub-section (3) of section 52 of the Act.

21. On the other hand, Mr K C Shah, learned APP has drawn our attention to section 54 of the Act which reads as under:

> "54. Presumption from possession of illicit articles - In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under Chapter IV in respect of -
>
> (a) any narcotic drug or psychotropic substance;
> (b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;
> (c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drugs or psychotropic substance; or
> (d) any material which have undergone any process towards the manufacture of a narcotic drug or psychotropic substances, or any residue left of the materials from which any narcotic drug or psychotropic substance has been manufactured."

According to his argument, when the muddamal

articles have been seized from the two appellants, a presumption would arise in favour of the prosecution in terms of section 54 of the Act. In the present case, we find that the evidence of Mr Barot, Abdulmajid Yasimkhan Pathan and Mr Rajput is consistent on the point that the muddamal brown sugar was seized from the possession of the two appellants. Therefore, possession of contraband article has been established against the appellants and, therefore, Mr Shah is right in arguing that the above presumption will hold good in favour of the prosecution. Mr E E Saiyed has argued that Mr Barot has not given description of appellant no.1 whose name was not known to the Police Inspector in the past. However, on the date of the information, PW 6, Aabdulmajid Yashimkhan Pathan had conveyed to him about the name of the appellants and nature of clothes which would be put on by the first appellant at the relevant point of time. Even after the arrival of appellant no.1 on the spot, he was shown, introduced and identified by Abdulmajid Yashimkhan Pathan. This shows that P.I. Mr Barot has sufficient information with him for searching the first appellant. Even after arrival of the second appellant, his introduction was also disclosed by PW 6 and PW 7. When PW 6 was present on the spot by the side of Mr Barot, then it would not be relevant or material, if Mr Barot did not know the two appellants in past. Moreover, while receiving the information, PW 6 Abdulmajid also received an information that the first appellant was to come at a particular place and in fact the first appellant had arrived at that particular spot which further supports the fact of information received by Abdulmajid at the relevant point of time. He further says that it was conveyed to the Police Inspector. Efforts were made to argue that so far as document Exh.22 is concerned, it is not reliable and the trial court has not properly appreciated the said position. If we refer to document Exh.22, it is a Yadi sent by Mr Barot to the DCB police station showing that the FIR, muddamal and the accused persons were forwarded to the police station. Thus the routine procedure was adopted by the police officer and when the oral evidence of Mr Barot is substantiated by documentary evidence at Exh.22, there is no reason to discard his evidence on record. He also referred to a document at Exh.32 which is a letter sent by P.I. Mr Barot to Assistant Commissioner of Police disclosing the information received by him

which further shows that the information was disclosed to him by Head Constable Abdulmajid Yashimkhan Pathan and on that information the police officials were to proceed to the spot.

22. Looking to the contents of document Exh.32, it is very clear that entry 6/97 was recorded at 15.30 hours. Therefore, this document Exh.32 initially records the information received by Mr Barot from Head Constable Abdulmajid Yashimkhan Pathan. It further disclose that the information related to the first appellant and the clothes which were to be put on by the first appellant at the time of committing the offence have also been described in the document. The place at which the offence would be committed and the place at which the first appellant would come has also been there. It has further been disclosed that the second appellant was to come there for receiving or for purchasing contraband narcotic drugs. Having regard to the details mentioned therein the document cannot be treated to be an ingenuine one. Moreover, it is a matter of record that the Asstt.Commissioner of Police Mr Parmar had come to the spot when the search and seizure were in progress. This shows that the said Officer actually received this communication Exh.32 and then proceeded to the spot for witnessing the further events which took place at the place of offence. In that view of the matter, document Exh.32 is found to be genuine and the trial court was justified in depending upon the same.

23. Mr Saiyed has also drawn our attention to page no.157 wherein it has been indicated that the first entry was not handed over to the I.O. Now this entry was there in the police station diary. Therefore, it was not required to be handed over to the I.O. Therefore, this is no a lapse on the part of the prosecution.

24. It has then been contended by Mr Saiyed that Mr Barot has not followed the procedure laid down in section 52 A of the said Act. On a bare perusal of section 52 A of the said Act, it is very clear that it relates to the disposal of seized narcotic drugs and there cannot be any doubt about the same. However, on a careful perusal of section 52 A of the Act, it is very clear that this provision will come into play and the procedure enunciated therein will be required to be followed, if the contraband

muddamal article is required to be disposed of before the conclusion of the trial. If the said muddamal is required to be preserved or is not required to be disposed before the conclusion of the trial, then the procedure laid down in section 52 A of the Code is not required to be followed. Therefore, it cannot be said that the prosecution or I.O. has committed a serious lapse by not following the procedure laid down in section 52 A of the Act. In this connection, we can refer to a decision in the case of Abdulkader Jusab Sandhi v. State of Gujarat, reported in 2002 (2) GLR 1212. This decision clearly shows that section 52 A applies only when the muddamal article is required to be disposed of before trial and not when it is required to be preserved till conclusion of the trial. Indisputedly, the muddamal articles have not been disposed of at the stage of investigation in the present case. Therefore, there was no question of following the said procedure.

25. Mr Saiyed has also argued that muddamal polyethylene bags were wrapped in a paper and the said paper did not contain signatures of panch witness or of the I.O. Now when the number and other things have been written on the said bags and when paper slips were placed in the said bags, then it was not necessary for the I.O. to again obtain signatures of panchas on the paper in which those polyethylene bags containing muddamal article were wrapped. It is required to be considered that each polyethylene bag was separately preserved and sealed and muddamal was tested from each of them. Therefore, absence of signature on the said paper would not help the appellants to any extent. It has also been contended that the prosecution has not examined Constable Mahendra Singh and Constable Nanjibhai. These constables have simply reduced into writing whatever dictated to them by Mr Barot. When Mr Barot has proved handwriting of the writings and when Mr Barot has placed his signature on such writings, non-examination of these two witnesses would not be fatal. It has also been contended that there is some contradiction on the point whether Exh.22 was in the hands of Mahendrasingh or in the hands of Nanjibhai. Even if we take that there is a minor discrepancy in the evidence of the two witnesses namely ; Mr Barot and Mr Rajput, then Mr Barot was in a better position authentically on the point as to whom the dictation was given by him. Even otherwise when the document

is on record and both the witnesses were present. The above infirmity cannot come to the rescue of the appellants. It has also been argued that FSL Officer Mr Sharma has not been examined as a witness. It is a fact that he has simply carried out preliminary test to ascertain if the muddamal was a contraband narcotic drug. His report is admissible without his examination. He was not a witness to the event of seizure and search. Therefore, non-examination of Mr Sharma cannot be of any help to the present appellants. It has also been contended that even before arrival of Mr Sharma, numbers were given to the polyethylene bags. I.O. was not required to wait for the arrival of Mr Sharma since Mr Sharma had merely to undertake preliminary chemical analysis of the substance in question. Therefore, if the search and seizure were over and if numbers were given to the polyethylene bags, then that would not vitiate the proceedings against the present appellants.

26. It has also been argued that panch witness has not supported the police officers and, therefore, evidence of police officers should not be relied upon for the purpose of convicting the present appellants. There is no dispute that the panch witness has not supported the prosecution. We can gather from the evidence of panch witness Exh.17 that he has been treated hostile by the prosecution and the learned P.P. was permitted by the trial court to put the question which could be put in cross examination. Once the witness has been treated hostile by the prosecution, it would not be open to the appellants to depend upon the evidence of such a hostile witness. Even otherwise, if we go through the evidence of panch witness, it is clear that he supports the case of the prosecution on several aspects. He states that the entire raiding party had gone to the spot and they waited for someone to come. He has also stated that one person was found coming to the Honest Cycle Stores and he was identified by Head Constable Abdulmajid. It is true that on search and seizure, he does not lend hands to the prosecution but the fact remains that this witness has supported the case of the prosecution on the point that the entire raiding party had gone to the spot. As per the settled position of law, evidence of a hostile witness is not required to be discarded outright and if his evidence or a portion of his evidence is supported by other material,

then that part of his evidence can be relied upon by the court. Applying the said principle to the present case, it is clear that even according to the case of the hostile panch witness, raiding party had gone to the spot and one person was identified by Head Constable Abdulmajid. Here we have to consider that as per the defence, the police officer had kept the present two appellants in their custody right from 9 a.m. on the said date. That on that day two other persons were also arrested and muddamal article was actually seized from them. Thereafter the said two persons were allowed to go away and case has been lodged against the present two appellants. On reading the evidence of the aforesaid hostile panch witness, it is very clear that the appellants were not in custody at the time when the police party raided the spot. Therefore, the above defence has been negatived by the evidence of the hostile panch witness.

27. It is well settled that when the appellate court, by and large, agrees with the finding and reasoning recorded by the trial court, it would not be necessary for the appellate court to go for detailed discussion of evidence of each and every witness. In the present case also we are in general agreement with the finding and reasonings recorded by the trial court. The prosecution has led sufficient evidence before the trial court in order to prove the guilt of the present appellants. The trial court has given cogent and convincing reasons for arriving at a finding that the two appellants were found in possession of contraband muddamal article without any valid pass or permit to possess the same. The trial court has also considered the evidence in its entirety and in absence of any material improvement or material contradiction in the evidence of the witnesses, the trial court was perfectly justified in relying upon the evidence of the witnesses examined by the prosecution. On reassessment of the evidence on record, with the help of the learned Advocates for the parties, we find that the evidence tendered by the witnesses inspires confidence and therefore, the evidence of the witnesses is found to be trustworthy and reliable and, therefore, we also find that the prosecution has proved the case against the appellants beyond any reasonable doubt. So on the one hand, on our independent assessment of evidence on record, we are satisfied that the

case against the appellants has been brought home and on the other hand, we also find that the trial court has not committed any error in assessment of evidence produced before it . For accepting the evidence of the witness, the trial court has given reasons and the reasons have been based on appreciation of evidence. The findings have not been recorded contrary to the evidence on record. In that view of the matter, we find there is absolutely no scope for interfering with the reasonings and findings recorded by the trial court.

28. In above view of the matter we find there is no substance or merit in the present appeal. Therefore, the appeal is required to be dismissed and the judgment and conviction order impugned in this appeal are required to be confirmed.

29. At this stage, stage Mr Saiyed has argued on behalf of the appellants that out of the two appellants, appellant no.1 is suffering from cancer and appellant no.2 is aged 62 years. On the strength of these two grounds, Mr Saiyed has submitted that the appeals may be allowed and the appellants may be acquitted. We are afraid, it is not legal or permissible to allow the appeal and set aside the judgment and conviction order recorded by the trial court, if otherwise legal and proper, on the ground that one appellant is suffering from cancer and another is aged 62 years. For extending leniency in the quantum of punishment, this may be a relevant factor in a fit case but for allowing the appeal and for acquitting the accused persons, this cannot be considered a legal ground. The appeal cannot be allowed on this ground.

30. So far as the quantum of punishment is concerned, Parliament has made provision for minimum punishment and the sentence imposed on the appellants is not more than the minium. Therefore, now there is no further scope for reducing the quantum of punishment also. Therefore, the aforesaid prayer of Mr Saiyed for allowing the appeal on the aforesaid ground deserves to be rejected. It is also required to be made clear that Mr Saiyed has fairly conceded that considering the illness and age of the two appellants, they are being provided with proper medical and other facilities in accordance with the rules of the jail

authority. Therefore, no further direction is required to be issued to the jail authority in this behalf also.

31. At this stage, Mr Saiyed, learned Advocate for the appellant has submitted that though an entry at sr.no.6 is said to have been recorded in station diary on 17.9.1997 at 15.30 hours, the said entry or a copy thereof has not been produced before the trial court and instead entry No.9 posted at 11 p.m. has been produced on the records of the trial court which has also been entered in the said station diary on 17.9.1997. Mr Saiyed has expressed an apprehension that the entry at sr.no.6 has not been produced on the record of the trial court since the name of the first appellant was not mentioned therein. Therefore, he requested the court to get the original entry from the concerned police station. In view of the aforesaid submission, with a view to satisfy our conscience, we requested Mr K C Shah, learned APP to arrange to bring the said police station diary in the second sessions. Fortunately enough, Mr Shah was able to procure the said original police station diary and show to us that it was an entry at sr.no.6 which has been recorded at 15.30 hours. It has been read in open court and even Mr Saiyed had also read the same. On reading the said entry, Mr Saiyed was also satisfied on the point that the said entry really speaks about mentioning the names of both the appellants. Description about the clothes to be put on by the first appellant has also been disclosed therein. It has also been disclosed that the first appellant was going to sell narcotic drugs to the second appellant. The second appellant was also to come at the spot. It has further been mentioned therein that the copy of the aforesaid information was conveyed in writing to the superior officer. We direct that a copy of this entry shall be taken on record. In view of the above entry at sr.no.6, above contention of Mr Saiyed stands negatived and on the contrary, the said entry substantially supports and corroborates the prosecution case that the information was received involving both the appellants, that the description about the clothes to be put on by the first appellant at the relevant point of time was stated in the entry, that the place at which the two appellants were to meet together and an entry was posted in the station diary and that a copy of the information was forwarded to the superior

officer in writing. All these things have been stated in the entry of the diary and, therefore, the entire fact, prior to the search in question, has been reduced into writing. This shows that the prosecution case is genuine. There is absolutely no room or scope for creating any doubt in the prosecution case.

In response to our request, Head Constable Ramesh Nanjibhai from DCB police station has come to the court in the second sessions. He has brought the aforesaid original police station diary containing entry No.6 of 17.9.1997. After going through the same and after obtaining copy thereof, the said original police station diary was returned to him.

32. The above discussion clearly indicates that the prosecution has produced sufficient and satisfactory evidence before the trial court. The evidence is trustworthy and reliable. The appreciation of the evidence by the trial court is proper. The appreciation of legal aspects is also proper. The findings of facts are proper and acceptable and the reasons for arriving at the said findings are cogent and convincing. There is no scope for interference with the same. The appeal is therefore, meritless and hence, deserves to be dismissed.

33. For the foregoing reasons, the present appeal is ordered to be dismissed. The judgment and conviction recorded by the trial court are confirmed.

[D K Trivedi, J.]

[D P Buch, J.]

msp