IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 783 of 1999

with

CRIMINAL APPEAL No 838 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

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

MANISH FULJI MEKWAN

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 783 of 1999
   MR IM MUNSHI for Appellant
   MR IM PANDYA, APP for Respondent
2. Criminal Appeal No. 838 of 1999
   MR MM TIRMIZI FOR MR RAJESH M AGRAWAL for Appellant
   MR IM PANDYA, APP for Respondent

CORAM : HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 29/10/2004

COMMON C.A.V. JUDGEMENT

(Per : HON'BLE MR.JUSTICE R.P.DHOLAKIA)

Criminal Appeal No.783 of 1999 under Sec.374 of the Code of Criminal Procedure, 1973 ('the Code' for short) has been filed by the original accused No.2-Manish Fulji Mekwan being aggrieved by the judgment and order of conviction dated 30-6-1999 passed in Sessions Case No.125 of 1998 under Secs.18 and 29 of the Narcotic Drugs and Psychotropic Substances Act ('the Act' for Short) sentencing him to suffer R.I. for ten years and to pay fine of Rs.1.00 lakh and in default, to undergo further R.I. for one year.

2. Criminal Appeal No.838 of 1999 under Sec.374 of the Code has been filed by the original accused No.1-Faruqbhai Ilahibax Qureshi being aggrieved by the judgment and order of conviction dated 30-6-1999 passed in Sessions Case No.125 of 1998 under Secs.18 and 29 of the Act sentencing him to suffer R.I. for ten years and to pay fine of Rs.1.00 lakh and in default, to undergo further R.I. for one year.

3. The brief facts of the case are that on 18-2-1998 2nd P.I., Gomptipur Police Station, Mr.G.H.Algotar, received one secret information at 10.30 a.m. that two persons travelling on scooter having contraband article were to pass from Rajpur and, therefore, he asked Police Constable, Mr.Kiritkumar, to bring two panchas and made relevant entries to that effect. He also informed his superior officer in writing about the said information. On arrival of panchas, they were made to understand the information received and informed about the raid to be carried out. As they agreed to act as panchas, preliminary panchnama was drawn in the police station and thereafter members of the raiding party along with panchas went near the dispensary of Dr.Pasavala and kept a vigil. At about 10.30 a.m., two persons were coming from Rajpur side on scooter and when they reached very near to the dispensary, they were stopped by P.I., Algotar. Both these persons were informed that based on the information received by him, he wanted to carry out raid and therefore, if they so desire, same can be carried out in presence of Magistrate or Gazetted Officer to which they denied. When their names were being asked,

the person who was driving the scooter told his name as Faruqbhai Ilahibax Qureshi and that of the pillion rider as Manish Fuljibhai Mekwan. Upon the search being carried out on the driver of the scooter, nothing was found. But the person who was travelling as a pillion rider was found to be in possession of two packets of contraband article in his pants pocket weighing 12.400 gms. and 11.950 gms. respectively having the features of opium and, therefore, after preliminary examination, Officer of FSL was called on the spot. On arrival of Mr.K.B.Sharma, FSL officer, he verified the muddamal and opined the same to be opium. Both the packets were placed in different boxes. After completing all other formalities of sealing, etc. and drawing panchnama, signatures of panchas were obtained in which P.I. also signed. After issuing the muddamal receipt, same was handed over to Crime Writer Head and upon completion of formalities, same was kept by him in safe custody. Arrangements were also made for sending the samples to FSL. Thereafter, complaint was prepared and it was sent along with panchnama, muddamal, primary FSL report together with the accused into Gomptipur Police Station for the purpose of registering the offence where it was registered as Gomtipur Police Station Prohi. C.R. No.5056 of 1998 on 18-2-1989 against both the accused. Seizure memo as well as arrest memo were also prepared and given to the accused. During the course of interrogation, as name of the accused No.3 was disclosed, he was also detained on 26-2-1998 and further investigation was started. Accused No.2 was released on bail on 27-2-1998 and accused No.3 on 4-3-1998 while accused No.1 remained in judicial custody. During the course of investigation, muddamal was sent to FSL and at the end of investigation, charge-sheet was submitted against all the accused. When accused appeared before the concerned Court, charge was framed against the accused Nos.1, 2 and 3 on 11-12-1998 vide Exs.16,17 and 18 respectively for the offences punishable under Secs.18 and 29 of the Act. Accused pleaded not guilty to the charge and prayed to be tried.

4. To prove the guilt against the accused, the prosecution examined, in all, 11 witnesses namely, Bachubhai Keshavbhai Solanki as P.W.No.1 at Ex.20; Gambhirbhai Jethabhai Barot as P.W.No.2 at Ex.24; Madansing Takhatsing Rana as P.W.No.3 at Ex.26; Dipsing Virsing Dekavadia as P.W.No.4 at Ex.27; Markand Kantilal Pathak as P.W.No.5 at Ex.30; Gnaneshwar Ramdas Jajjar as P.W.No.6 at Ex.32; Shripal Mohanlal Shah as P.W.No.7 at Ex.34; Dineshbhai Valjibhai Vaghela as P.W.No.8 at Ex.36, Gunvantbhai Arkhabhai Algotar, P.W.No.9 at Ex.38; Makaji

Punjabhai Vaghela, P.W.No.10 at Ex.53 and Gauridatt Dayanidhi Sharma as P.W.No.11 at Ex.57. They also relied on documentary evidences namely, report prepared under Section 157 of the Code and forwarded to the Officer-in-Charge of Gomptipur Police Station at Ex.42; the complaint at Ex.43; panchnama at Ex.44; copy of search memo of accused Nos.1,2 and 3 carried at Ex.45, 46 and 47; seizure memo at Ex.48; report forwarded to the higher officer at Ex.40; note written to FSL, receipt given by FSL and the FSL report at Exs.54,37 and 31 respectively; the report made by officer at Ex.59 and the letter written to FSL and intimation of the detention of the accused at Ex.50. On submission of closing purshis by the prosecution, further statements as required under Sec.313 of the Code of the accused were recorded. After giving opportunity to the learned advocates appearing for the respective parties and on appreciation of evidence, learned Addl. City Sessions Judge, Ahmedabad, vide judgment and order dated 30th June, 1999 held the accused Nos.1 and 2 guilty for the offences punishable under Secs.18 and 29 of the Act and were ordered to undergo R.I. for ten years and to pay fine of Rs.1.00 lakh in default, to undergo further R.I. for one year. The accused No.3 was, however, acquitted for the charges levelled against him. It is this judgment and order which gave rise to file Criminal Appeal No.783 of 1999 by the original accused No.2 and Criminal Appeal No.838 of 1999 by the accused No.1 against their conviction.

5. Heard Mr.I.M.Munshi, learned counsel for the appellant-original accused No.2 in Criminal Appeal No.783 of 1999, Mr.M.M.Tirmizi, learned counsel for the appellant-original accused No.1 in Criminal Appeal No.838 of 1999 and Mr.I.M.Pandya, learned Addl. Public Prosecutor for the State in the appeals. Learned counsel for the respective parties also placed reliance upon various reported judgments which would be considered as and when necessary.

6. It is mainly argued by Mr.Munshi, learned counsel for the appellant of Criminal Appeal No.783 of 1999, that there is violation of Sec.42 of the Act and that the complainant did not forward copy of the information received on telephone to his immediate superior officer and senior Police Inspector. The appellant was not informed of his valuable right of being searched in presence of a Magistrate or a Gazetted Officer and hence, there is violation of Sec.50 of the Act. According to him, Secs.42 and 50 of the Act are mandatory for the prosecution to be complied with. Since there is clear violation of the same in the present case, impugned

judgment and order of conviction of the appellant is required to be set aside. The muddamal was not handed over to the Station House Officer but to the Crime Writer Head which, according to him, is violation of Secs.52 to 55 of the Act. Moreover, I.O. has not recorded the statement of Crime Writer Head, Dipsing Virsing Dekavadia and has not shown him as witness in the charge-sheet also and, therefore, it can be said that above witness is a got up witness and hence, his evidence has no legal value. Besides, the prosecution is not able to complete the chain starting from the search and seizure of the muddamal till it reached FSL. He has taken us through the evidence of Police Constable, Dineshbhai Valjibhai Vaghela, who was examined as P.W.No.8 at Ex.36 and who took the muddamal to FSL as well as evidence of P.I., Makaji Punjabhai Vaghela, who was examined as P.W.No.10 at Ex.53 and argued that there are contradictions in the evidence of these two witness and, therefore, benefit ought to have been given to the accused. It is also argued that recovery panchnama was not legally proved as both the panchas have not supported the same and, therefore, court below ought to have discarded the evidence of other persons. Taking us through the evidence of FSL Officer, Gauridatt Dayanidhi Sharma, who was examined as P.W.11 at Ex.57 and who was called for an on the spot analysis, it is argued that the primary report was produced from his possession at the time of his oral evidence and, therefore, said report is doubtful. As per say of the prosecution, scooter was without any number plate and hence, investigation about the ownership of the said scooter was required to be carried out which has not been done and, therefore, story of the prosecution is unbelievable. Since prosecution has failed to prove the guilt against the appellant accused No.2, it is requested that he may be acquitted. He has placed reliance on the cases of Commissioner of Police, Bombay Vs. Gordhandas Bhanji, AIR (39) 1952 S.C. page 16; Alihusen Najarali Vs. The State of Gujarat, 1974 Cri.L.J. page 524 and Valsala Vs. State of Kerala, 1994 Cri.L.J. page 1. He has also relied upon the cases reported in 80 Cri.L.J. page 99 and 1980 Cri.L.J.929 as well as 1993(2) G.L.R. 1743.

7. Mr.M.M.Tirmizi, who appears on behalf of the appellant of Criminal Appeal No.838 of 1999, has mainly argued that the appellant-original accused No.1 is totally innocent and has been falsely involved into the crime in question. While doing search and seizure, procedures as required under the Act were not followed by the prosecution. Even if it is believed that required procedures were followed, then also, nothing was

recovered from the accused No.1. Law on this point is very clear and when nothing was recovered from the person or the custody of the accused No.1, it cannot be said that he was having conscious possession or knowledge of the muddamal substance in question. Looking to the quantity of muddamal weighing 12.400 gms. and 11.950 gms. in two packets allegedly recovered from the pants' pocket of the accused No.2, the accused No.1 did not have any knowledge. As the case against the accused No.1 has not been proved at all beyond reasonable doubt, it is prayed that he may be acquitted.

8. It is the main point raised by the learned counsel for the appellants that Secs.42 and 50 are mandatory and any breach of the same would result into acquittal. They have taken us through the oral evidence of P.I., Mr.Algotar, P.W.. No.9 at Ex.38, Police Constable, Mr.Dinesh Waghela, P.W.No.8, FIR Ex.43, search and seizure panchnama Ex.44, search memo of accused Nos.1 and 2 at Exs.45 and 46, seizure memo Ex.48 and copy of the forwarding letter to the superior officer regarding the information Ex.40. It is contended that since mandatory provisions of the Act were not followed by the prosecution, appellants are required to be acquitted only on that point.

9. We entirely agree that Secs.42 and 50 of the Act are mandatory and if they are not complied with by the prosecution, conviction will be vitiated and not the trial. Keeping in mind the above law, we have evaluated the evidence on record. It is clear from the deposition of Mr.Algotar, P.I. of Gomptipur Police Station, that at the time when he received the telephonic information, necessary entry was made by him, information was passed on to his superior officer and has called two panchas at the Police Station. On the panchas showing willingness to act as such, preliminary panchnama was drawn there and thereafter they have proceeded for raid. So it has been established that P.I, Mr.Algotar, is the authorized person as per Sec.42(1) of the Act.

10. As far as compliance of Sec.50 of the Act is concerned, there are evidence on record namely, complaint, panchnama and evidence of P.I., Mr.Algotar, Police Constable, Mr.Dinesh Waghela, P.W.No.8, Ex.36, and other witnesses supporting the say of the prosecution. Mr.Algotar categorically deposed in his oral evidence at Ex.38 that he along with members of the raiding party and panchas went near Dr.Pasawala's dispensary and were keeping a watch at about 10.30 a.m. on the date of incident. At that time, when two persons of the

description reached very near to the dispensary of Dr.Pasawala, they were stopped by P.I. Both the persons were informed of the information received that raid is to be carried out on them and, therefore, if they so desire, it can be carried out in presence of Magistrate or a Gazetted Officer. Since they refused the same, search was carried out by him in the presence of panchas and other members of the raiding party. When name of the driver of the scooter was asked, he gave his name as Faruqbhai Ilahibax Qureshi and that of the pillion rider as Manish Fuljibhai Mekwan. On the search being carried out on the driver of the scooter, nothing was found. However, the person travelling as a pillion rider was found in possession of two packets of contraband article in his pants' pocket having the features of opium and, therefore, he called officer from FSL with a view to have a primary report on the spot of the muddamal article recovered from Manish. It was further deposed that on arrival of FSL Officer, Shri K.B.Sharma, muddamal was verified and he opined it to be opium. On a weight being carried of the said muddamal in presence of panchas, first packet was weighing 12.400 gms and second packet 11.950 gms. Thereafter, both the packets were placed in different boxes and seal was placed on both the boxes after putting the slip signed by both the panchas. They were seized for the purpose of investigation and panchnama to that effect was drawn there itself wherein he obtained signatures of panchas and he also signed the same. It was also deposed that all required formalities of search and seizure on the spot were carried out. It was also deposed that thereafter complaint was prepared there itself and same was sent to PSO, Gomptipur Police Station, for registering the offence along with panchnama, muddamal, primary FSL report together with the accused and offence was registered as Gomptipur Police Station C.R.No.5056 of 1998 punishable under Secs.18 and 29 of the Act. The FIR, panchnama, copy of the forwarding letter sent to FSL, copy of the letter written to superior officer, station dairy entry for calling the person on the spot, seizure memo, etc. were proved through the evidence of this witness. It is also supported by the evidence of Police Constable, Mr.Dinesh Waghela, who was examined as P.W.No.8 at Ex.36. Hence, prosecution is able to prove through the evidence of P.I., Algotar, and Police Constable, Mr.Dinesh Waghela, that all procedures as required under the Act have been strictly complied with by the prosecution at the time of search and seizure. It appears from their evidence that accused were informed of their valuable rights of being searched and seized in presence of a Magistrate or a Gazetted Officer and, therefore, it cannot be said that

there is any breach of Sec.50 of the Act. Merely because both the panchas have not supported the say of the prosecution and have been declared as hostile, it does not mean that evidence of police officers are to be discarded. In cross-examination of P.I., Mr.Algotar, he has stuck to his version. His evidence is trustworthy and hence, we are unable to accept the argument of the learned counsel for the appellants that there is any breach of mandatory provisions of Secs.42 and 50 the Act.

11. An argument has been advanced by the learned counsel for the accused No.2, Mr.Munshi, that P.I., Mr.Algotar has informed P.I. of Gomptipur Police Station, who, according to him, he is not his superior officer. The evidence of Mr.Algotar and Police Constable, Mr.Dinesh Waghela show that P.I. has informed his immediate Officer and also other officers and, therefore, we do not find any substance in the said argument of Mr.Munshi. Moreover, nothing has come out from the cross-examination of aforesaid witnesses.

12. Mr.Munshi has also argued that there are breach of Secs.52, 55, etc. of the Act and there are no evidence on record to show that after search and seizure, provisions of the Act as required have been strictly followed by the prosecution.

13. Keeping in mind the law on this point, we have evaluated the evidence on record. Evidence on record clearly shows that all required procedures have been strictly followed by the prosecution. There are documentary evidence on record namely, FIR, panchnama, seizure report, etc. as well as evidence of P.I., Mr.Algotar and Police Constable, Mr.Dinesh Waghela and FSL person, Mr.Sharma, who visited on the spot indicating that after the search and seizure, all other required formalities namely sealing, etc. have been done there itself. Even primary FSL report regarding the contraband article has been obtained by P.I., Mr.Algotar on the spot. There are evidence on record to show that muddamal was sent along with FIR, panchnama, accused etc. into Gomptipur Police Station where offence was registered and muddamal was handed over to PSO, who in turn, has handed over the same to Crime Writer Head. This has been established from the oral evidence of P.W.No.2, Gambhirbhai Jethabhai Barot, who was in charge Officer of Gomptipur Police Station and who has made relevant entry in Station Dairy with regard to the offence in question and handed over the muddamal to Crime Writer Head, Mr.Deepsing Virsing Dekavadia, P.W.No.4 at Ex.27. Mr.Deepsing had also deposed the same and through him,

prosecution has proved all relevant entries of Crime Writer Register. His evidence categorically proves that the muddamal remained with him in sealed condition till it reached the FSL through Police Constable, Mr.Dinesh Waghela. It is also proved through his evidence that the same muddamal which was searched and seized from the accused No.2 was sent to FSL through Police Constable, Mr.Dinesh Waghela and which was brought back by him. Relevant entry to that effect has also been proved. It has also been proved that thereafter muddamal, scooter, etc. were sent to the Court through Head Constable, Gopalbhai Amarbhai, Buckle No.5493. He has proved relevant entry from Anamati Register at Ex.28. A contention has been raised by Mr.Munshi that Crime Writer Head has not been named as witness in the charge-sheet. I am unable to agree with that contention. It is not necessary that his name is required to be mentioned as witness in the charge-sheet. However, facts remain that he is the person in whose custody muddamal remained till it reached the FSL in tact condition and thereafter when it brought back till it was produced in Court. Since the muddamal has remained in tact condition till it was analyzed by the FSL and thereafter its production in Court, it can safely be said that there were any possibility of tampering with the same. In view of this, the argument to that effect advanced by the learned counsel for the accused No.2 has no substance.

14. It has been argued by Mr.Tirmizi, learned counsel on behalf of the accused No.1, that the contraband allegedly seized on 18-2-1998 was neither under the control nor in custody of the accused No.1. Even as per the say of the prosecution, nothing has been recovered from him or from the scooter driven by him and whatever allegedly recovered has been from the pants' pocket of the accused No.2 for which the accused No.1 had no knowledge. Drawing our attention towards the weight of muddamal, it is contended that the muddamal were weighing 12 gms. and 11 gms. for which accused No.1 cannot be fastened with the burden of knowledge. It is also contended by him that ingredients of Secs.21 and 22 of the Act have not been proved and mere possession is not an offence but there must be conscious possession and ingredients of offence of conscious possession has to be proved before the Court strictly, then only presumption under Secs.35 and 54 of the Act can be drawn. In this connection, he has placed reliance upon the case of Sanjay Dutt Vs. State, JT 1994(5) S.C. 540 for the purpose of showing the meaning of the word "possession". He has also relied upon the cases of State of Punjab Vs. Baldev Singh, JT 1999(4) S.C. 595, Avtar Singh & Ors.

Vs. State of Punjab, (2002)7 S.C.C. 419 and also Ismailkhan Aiyubkhan Pathan Vs. State of Gujarat, (2000)10 S.C.C. 257 regarding conscious possession. He has drawn our attention towards the evidence of P.I., Algotar and Police Constable, Mr.Dinesh Waghela and also FIR, panchnama, etc. in this regard.

15. The aforesaid contention of Mr.Tirmizi has not been disputed by the learned counsel for the State, Mr.I.M.Pandya, who appears on behalf of the State and, therefore, this question is required to be dealt with by us keeping in mind the law on this point.

16. As far as the contraband article is concerned, it has been established from the evidence on record as discussed above that while doing search and seizure, as soon as the contraband article was recovered from the possession of accused No.2, P.I., Mr.Algotar had sent the person with yadi to call the FSL person on the spot and in turn, one Mr. Gauridatt Dayanidhi Sharma from FSL had visited the scene of offence. On an analysis of the contraband article on the spot, he gave his primary opinion that it was opium and the report to that effect was given to P.I., Mr.Algotar. The prosecution has proved yadi at Ex.58 and primary report of FSL expert, Mr.Gauridatt D. Sharma at Ex.59. A contention has been raised by Mr.Munshi, learned counsel for the accused No.2, that original report has been produced by FSL expert, Mr.Sharma, from his record at the time of his oral evidence. It is but natural that when he has issued the primary report on the spot on the basis of analysis done by him on the spot, original report would be with him. Hence, there is no substance in this contention also. To prove the final FSL report, the prosecution has examined Mr.Markand Kantilal Pathak as P.W.No.5 at Ex.30. It is through him prosecution has proved that the muddamal seized from the accused No.2 was analyzed as opium vide FSL report Ex.31. He has deposed in detail as to how he arrived at the above referred conclusion and nothing has come out from the cross-examination of the above two witnesses and, therefore, prosecution could prove that the muddamal seized from the accused No.2 was analyzed to be contraband article opium.

17. In Sanjay Dutt Vs. State, JT 1994(5) S.C. 540 which of course pertains to TADA, the Supreme Court while dealing with the question of possession has held that in the context, the word "possession" must mean possession with requisite mental element i.e. conscious possession and not mere custody without awareness of the nature of such possession. There is mental element in the concept

of possession. It has been further held that presumption can only be drawn if the ingredients of the offences are established. The judgment rendered in Sanjay Dutt's case has been followed in State of Punjab Vs. Baldev Singh, JT 1999(4) S.C. 595.

18. It has been held by the Apex Court in Ismailkhan Aiyubkhan Pathan Vs. State of Gujarat, (2000)10 S.C.C. 257 at head note as under:

"Narcotic Drugs and Psychotropic Substances Act, 1985--S.20(b) r/w S.29--Conviction under, held, cannot be sustained only on the basis of presence of accused person in a room which was in possession of another person (not an accused in the case) and in which room was found a gunny bag containing narcotic substance "Charas"--No presumption can be drawn from such evidence that the narcotic substance was in possession of the accused--burden does not lie on accused to explain their presence in the room--Evidence Act, 1872, Ss.114 and 103."

As per the aforesaid reported judgment, if the accused is not in possession of the narcotic substance, presumption cannot be drawn against the accused. Mere presence of accused in a room which was in possession of another person wherein a gunny bag was found containing narcotic substance would not be sufficient to convict the accused.

19. In the case of Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat, JT 2001 S.C. page 471, it has been held by the Apex Court that if the Court on an appraisal of the entire evidence does not entertain doubt of a reasonable degree that he had real knowledge of the nature of substance concealed in the gunny bag, then the appellant is not entitled to acquittal. However, if the Court entertains a strong doubt regarding awareness of the accused about the nature of substance in the gunny bag, it would be a miscarriage of criminal justice to convict him of the offence keeping such strong doubt undispelled. It was further held that presumption can be rebutted by circumstances appearing in the case of the prosecution or in the evidence such as to give reasonable assurance to the Court that the appellant could not have had knowledge or required intention burden cast on him under Sec.35 of the Act would stand discharged. Same view was taken by the Apex Court in Avtar Singh & Ors. Vs. State of Punjab, (2002)7 S.C.C. 419.

20. There cannot be any dispute regarding the

principles laid down in the aforesaid judgments relied upon by the learned counsel for the respective parties. Keeping in mind the above law laid down by the Apex Court and also the evidence on record, it is clear that nothing was recovered from the possession of accused No.1 nor from the scooter driven by him. Whatever substance allegedly recovered was from the pants' pocket of accused No.2 and that too also two small packets weighing 12.400 grams and 11.950 gms. Thus, it cannot be said that the accused No.1 had real knowledge of the nature of substance concealed by the accused No.2 in his pants' pocket. It cannot also be said that he had a conscious possession. Therefore, prosecution will not get any benefit of Secs.35 and 54 of the Act and the question of rebuttal will also not be arisen. In these circumstances, judgment and order of conviction qua accused No.1 is required to be quashed and set aside.

21. As far as accused No.2 is concerned, there are evidence on record which clearly proves that P.I., Mr.Algotar had received secret information over telephone with description etc. and entry to that effect was made and after following required procedure, he went at the place of information along with panchas and members of the raiding party and the accused were intercepted. After following procedures as required under the provisions of Sec.50, search was carried out on the accused No.2. Muddamal substance was recovered from the pants' pocket of the accused No.2 which is a conscious possession which prosecution has been able to prove beyond reasonable doubt by cogent oral as well as documentary evidence. It has also been proved that the muddamal article recovered from the accused No.2 was contraband article opium and, therefore, in view of the aforesaid discussion and also in view of the law laid down by the Apex Court in the aforesaid reported cases, he cannot be acquitted for the offence charged against him. Hence, impugned judgment and order is required to be confirmed qua the accused No.2.

22. Thus, Criminal Appeal No.783 of 1999 is hereby rejected. Criminal Appeal No.838 of 1999 is allowed. Judgment and order of conviction dated 30-6-1999 passed in Sessions Case No.125 of 1998 qua appellant-accused No.1-Faruqbhai Ilahibax Qureshi is quashed and set aside and he is acquitted of the charges levelled against him. Appellant-accused No.1-Faruqbhai Ilahibax Qureshi is ordered to be set at liberty if not required in any other case.

23. Office is directed to place a copy of this

judgment in each appeal.

(R.P.DHOLAKIA,J.)

(SHARAD D.DAVE,J.)
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