

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 413 of 2002

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MR.JUSTICE K.A.PUJ

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, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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SANJAYKUMAR SHIVNARAYAN CHAUDHARY - Appellant

Versus

STATE OF GUJARAT - Opponent

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Appearance :

MS RV ACHARYA for Appellant.

MR KT DAVE, APP for Opponent.

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CORAM : HONOURABLE MR.JUSTICE
A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 31/01/2007
ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE K.A.PUJ)

1. Challenge in this appeal filed under section 374 (2) of the Code of Criminal Procedure ('the Code' for short) is to the correctness of the judgment and order dated 28.03.2002 rendered in Special (NDPS) Case No. 25 of 1999 by the learned Additional Sessions Judge, Valsad at Navsari by which the appellant - original accused has been convicted for commission of the offences punishable under Section 20-B, 21, 22 & 23 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' for short) and sentenced to suffer R.I. for ten years and fine of Rs.1,00,000/- and in default thereof, to undergo further sentence of S.I. For 2 ½ years.

2. Briefly stated, the prosecution case as disclosed from

the complaint as well as unfolded during trial, is as under :-

3. Mr.J.G. Mehta, P.I., ACB, Valsad has received secret information on 19.12.1998 that one hindi speaking boy aged about 18 to 20 years having 5½' height putting on a stuff coloured pant and almond coloured shirt with big forehead and having got the hair cut in triangle on front side at the left of the forehead, by taking Charas in an old cloth hanging bag, coming from Gundlav GLDC on the canal walking way for approaching a customer on the National Highway No. 8. As two panchas were required at the time of arrest, a L.C.B. Head constable Manharbhai B. Patel was asked to call upon panchas and then two panchas were called. Mr. Mehta, P.I., introduced himself to them and appraised them about the facts of the information. Then A.S.I. Mr. Natvarsinh U. Chauhan, Head constable Manohar B. Patel, Head constable Satishkumar B. Bhatt, Police Constable Musfic S. Saiyed of L.C.B. Raiding party staff were

introduced to the panchas and all the police personnels of the raiding party were checked in person and ascertained that none of them had any offendable thing like Ganja or Charas and accordingly, the panchas were also checked in person mutually and it was ascertained that none of them had any offendable thing like Ganja or Charas. Thereafter, the Head constable Suresh Omprakash Sharma, a driver of the Govt. Vehilce No. GJ-15-G-214 was also introduced to the panchas and it was ascertained by checking in person. Similarly, Govt. vehicle was also checked in detail and it was ascertained that no offendable thing was lying therein. Thereafter, the panchas were shown P.I. L.C.B. Valsad seal, wax candle stick, string, matchbox and small big plastic bags, stapler and gum etc. All the police persons of raiding party with the panchas started at 14.20 hours from Valsad Rural Police Station and came on Gundlav cross road and instructed the driver to park the govt. vehicle on a side and to bring the vehicle near Gundlav petrolpump as soon as contacted on walky-talky

instrument. The panchas and all the persons of the raiding party walked down from Gundlav cross road to almost 200 steps on the north side near the canal on the National Highway No. 8 and stood separately on the east side of the road at the canal.

4. The complaint further reveals that in the meantime, the person, as described in the information, came at about 16.00 hours from the walking way on the canal coming from Gundlav GIDC by keeping the hanging bag on the right shoulder. The raiding party stopped him and asked as to from where was he coming. He said, in hindi, that he was coming from Gundlav GIDC. On asking his name and address, he stated his name to be Sanjaykumar Shivnarayan Chaudhary originally residing at village Pipra post Rampur, Tal. Sohrangadh, Dist. Basti (U.P.). As the said person was hindi speaking and was resembling as per the description of the information, they checked the black green designed hanging clothbag with him. The article covered in brown coloured white checks

thing was taken out and on seeing it, it was packed with yellow coloured cellotape. On removing the tapes, one black brown coloured rectangle piece with a peculiar smell of Charas was found. Immediately, the Govt. vehicle was called from the canal on wireless and persons of the raiding party were asked to keep watch on him. A message was also conveyed, on wireless, to the Valsad police control room and instructed to call for an officer from F.S.L. to examine the said Charas. The F.S.L. Officer Shri P.M. Patel, a scientific Officer came with kit from the F.S.L. Valsad. He was shown the person caught with the Charas. He was also asked to examine the quantity of Charas found from him. He examined and stated about the probability of Charas. So, the person who was caught was asked to produce any pass or permit for keeping Charas and he negatived the same. As Charas was an offendable article, he was asked whether any Gazetted Officer was to be kept while making panchnama ? A Head Constable Manharbhai B. Patel was asked to call upon a weigher for weighing the quantity. So, he

called a weigher Shri Hemantkumar Shantaram Soni residing at Ramvadi, Valsad. Thereafter, the quantity of Charas was weighed and it was 528 Grams, valuing at Rs. 52,800/-. The Head Constable Manharbhai was asked to take out 25 - 25 Grams Charas in the different plastic bags from the said quantity. Both the said plastic bags were sealed with the candle stick by the Head Constable Manharbhai and the slip bearing the signature of panchas and the Police Inspector were affixed thereon and kept in two brown coloured cover, whereon the signature of Panchas, P.I. and the person who was caught, were made and closed with gum and given mark A/1 and A/2 respectively. Then the said cover was tied with the wax-string. Thereafter, the waxing seal of P.I., L.C.B. Valsad, in English was affixed at upper and lower part and it was given Mark A.

5. A detailed panchnama, in respect of the aforesaid quantity of Charas mark 'A', A/1 & A/2 with the cloth

hanging bag valuing Rs. 10 and a lungi valuing Rs. 20 and yellow coloured plastic tape valuing Rs.00 was prepared between 16.00 and 18.00 hours and the same are seized for investigation. A seal of P.I. L.C.B. Valsad was also affixed in the margin of the panchnama.

6. Thereafter, the accused Sanjaykumar Shivnarayana Chaudhary was arrested for keeping 528 Grams quantity of Charas valuing Rs.52,800/- without any pass or permit and a complaint under Section 20-B, 21, 22 & 23 of the NDPS Act for taking appropriate legal action against him, was filed.

7. After filing of the complaint, the investigation was put into motion. During the course of investigation, the muddamal was sent to FSL for analysis and Investigating Officer recorded the statements and on receipt of the report from the FSL certifying that the muddamal sent for analysis was charas and as incriminating evidence was found against the

accused person, he was charge-sheeted before the Additional Sessions Judge, Valsad for commission of the offences punishable under sections 20-B, 21, 22 & 23 of the NDPS Act.

8. The learned Additional Sessions Judge, Valsad, to whom the case was made over for trial, framed charge against the accused for commission of the offences punishable under Sections 20-B, 21, 22 & 23 of the NDPS Act which was read over and explained to him. As the accused pleaded not guilty to the charge and claimed to be tried, he was put to trial and tried in Special (NDPS) Case No. 25 of 1999.

9. To prove the culpability of the accused, the prosecution has examined and relied upon the evidence of six witnesses, details of which are as under :-

Sr. No.	Exh. No.	Particulars	Page Nos.
01.	17	P.W. 1 - Nasruddin Nuriddin Kazi.	71-82
02.	20	P.W. 2 - Ravindrabhai Mangubhai Chaudhary.	93-98
03.	25	P.W. 3 - Abdul Rahim Abdul.	107-110
04.	28	P.W. 4 - Hemantbhai Shantaram Soni.	111-114
05.	31	P.W. 5 - Jaishankar Ganpatram Mehta.	115-134
06.	35	P.W. 6 - Jashwantsinh Pratapsinh Gohil.	143-146

10.To prove the case against the appellant - accused, the prosecution has also produced and relied upon number of documents, details of which are as under:-

Sr. No.	Exh. No.	Type of Evidence	Page Nos.
01.	1	Charge	39-40
02.	18	Panchnama	83-92
03.	21	FSL Report	99-104
04.	22	FSL Report of Analysis	105-106
05.	33	Complaint	135-142

11.After recording of the evidence of the prosecution witnesses was over, the learned Additional Sessions Judge explained to the accused the circumstances appearing against him in the evidence of the

prosecution witnesses and recorded his further statement under Section 313 of the Code. In his further statement, he denied the case of the prosecution in toto. He has stated that he has been falsely implicated in the case. However, he has neither led any evidence nor examined any witness to support his defence.

12. On appreciation, evaluation, analysis and scrutiny of the evidence on record, the learned Additional Sessions Judge held that contraband article Charas was recovered from the appellant and the prosecution has been able to establish that the complicity of accused for commission of the offences with which he was charged, has been proved beyond reasonable doubt, and therefore, he recorded the order of conviction and sentence against him to which reference is made in earlier paragraph of this judgment, giving rise to instant appeal at the instance of the original accused.

13. Ms. R.V. Acharya, learned advocate appearing for

the appellant has submitted that she does not challenge the impugned judgment and order passed by the learned Additional Sessions Judge, Valsad so far as conviction of the accused for commission of the offences punishable under section 20-B of the NDPS Act is concerned. However, according to her, so far as conviction recorded under section 21, 22 & 23 of the NDPS Act is concerned, it is bad in law as it is not warranted. As per the prosecution case the accused was found with charas which is not a manufactured drugs within the meaning of Section 21 nor a psychotropic substance within the meaning of Section 22. It is also not a case of the prosecution that any illegal import is made to India or export is made from India or transshipment of narcotic drugs and psychotropic substance is made so as to give rise to an offence punishable under Section 23 of the NDPS Act. Therefore, conviction recorded under Sections 21, 22 & 23 of the NDPS Act against the accused deserves to be quashed and set aside.

14. So far as sentence awarded for commission of

offence under section 20-B of the NDPS Act is concerned, according to her, it is harsh in view of the fact that the contraband article charas recovered from the accused was only 528 grams, which is less than commercial quantity. In spite of that, the learned Additional Sessions Judge, Valsad has imposed the minimum sentence on the accused by considering the unamended Provisions prevailing prior to 02.10.2001. She has submitted that the accused is in jail since the date of his arrest i.e., 19.12.1998 and thus he has undergone imprisonment for more than eight years as on today. She has further submitted that considering the amended provision relating to rationalized sentencing structure depending upon the quantity of the contraband article and taking a liberal view, the imprisonment already undergone by the accused may be treated as substantive sentence for the offense proved against him. She has, therefore, submitted that the sentence of ten years of RI and fine of Rs.1,00,000 imposed on the accused may be modified by holding that the period of imprisonment

already undergone by the accused may be treated as substantive sentence and accordingly the appeal may be allowed to this extent.

15.Per contra, Mr. K.T. Dave, learned Additional Public Prosecutor, has fairly conceded that so far as conviction under Sections 21, 22 & 23 of the NDPS Act is concerned, the same deserves to be quashed and set aside by allowing the appeal to that extent as, according to him, the contraband article charas is neither manufactured drug nor psychotropic substance and there is no case of the prosecution under Section 23 of the NDPS Act and hence, conviction of the accused under Sections 21, 22 & 23 of the NDPS Act is bad in law.

16.So far as sentence imposed upon the accused for commission of offence under Section 20-B of the NDPS Act is concerned, according to him, it is proportionate to the guilt of the accused because the charas recovered from him was weighing 528 grams and, therefore, no lenient view may be taken. He,

therefore, urged to allow the appeal qua conviction under Sections 21, 22 & 23 of the NDPS Act by quashing and setting aside the same and the appeal may be dismissed qua conviction under Section 20-B of the NDPS Act is concerned.

17. This Court has considered the submissions advanced by the learned advocates appearing for the parties and perused the impugned judgment and order. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record which is read and re-read by the learned advocates for the parties with reference to broad and reasonable probabilities of the case. In light of the caution sounded by the Hon'ble Supreme Court while dealing with NDPS cases, this court has examined the entire evidence on record for itself independently of the learned Additional Sessions Judge, Valsad and considered the arguments advanced on behalf of the accused and infirmities pressed, scrupulously with a view to find out as to whether the learned Additional

Sessions Judge, Valsad has rightly recorded the order of conviction and sentence.

18. So far as the conviction recorded under Sections 21, 22 & 23 of the NDPS Act is concerned, according to this Court, there is a lot of substance and force in the submission made by Ms. Acharya. Section 21 deals with punishment for contravention in relation to manufactured drugs and preparations. Section 22 deals with punishment for contravention in relation to psychotropic substances and Section 23 deals with punishment for illegal import into India, export from India or transshipment of narcotic drugs and psychotropic substances. It is not the case of the prosecution that the appellant has manufactured drugs and preparations nor it is the case of the prosecution that the appellant has manufactured, possessed, sold, purchased, transported, imported inter-State, exported inter-State or used any psychotropic substance. The word "psychotropic substance" is defined in Sub-section (xxiii) in Section 2 of the NDPS Act. As per the said definition,

psychotropic substance means any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the Schedule. A perusal of the schedule shows that Charas is not included therein. Therefore, framing of charge for commission of offense under Sections 21, 22 & 23 of the NDPS Act itself is contrary to the provision of the NDPS Act from the inception. Therefore, conviction recorded against the accused for commission of offence under Sections 21, 22 & 23 of the NDPS Act is against the statutory provisions contained under the NDPS Act and deserves to be quashed and set aside by allowing the appeal qua recording conviction under Sections 21, 22 & 23 of the NDPS Act.

19. There is no manner of doubt that a person indulging in the business of narcotic drugs is a menace to the society. He does not only break the economy of the country but also substantially causes damage to the youth of the country and also deteriorates their

health and, therefore, they become useless for society and the country. Therefore, to combat illicit drug traffic and drug abuse, both at the national and international levels, stringent punishment is provided under the NDPS Act. However, the parliament in its wisdom thought it fit that there should be rationalized sentencing structure depending upon the quantity of the contraband article i.e., narcotic substance recovered from the accused and, therefore, the parliament has enacted Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001.

20.The appellant - accused is also convicted for commission of offense punishable under section 20-B of the NDPS Act. Really speaking, the appellant is punished under Section 20 (b) and this section after amendment reads as under :-

Before Amendment of 2001 :-

“20. Punishment for contravention in relation to cannabis plant and cannabis.

Whoever, in contravention of any provisions of this

Act or any rule or order made or condition of license granted thereunder ;-

(a) cultivates any cannabis plant; or

(b) produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis,

shall be punishable -

(i) Where such contravention relates to ganja or the cultivation of cannabis plant, with rigorous imprisonment for a term which may extend to five years and shall also be liable to fine which may extend to fifty thousand rupees;

(ii) Where such contravention relates to cannabis other than ganja, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees and which may extend to two lakh rupees.

Provided that the Court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

After Amendment of 2001

"20. Punishment for contravention in relation to cannabis plant and cannabis.

Whoever, in contravention of any provisions of this Act or any rule or order made or condition of license granted thereunder ;-

(a) cultivates any cannabis plant; or

(b) produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable -

(i) Where such contravention relates to clause (a) with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine which may extend to one lakh rupees; and

(ii) Where such contravention relates to sub-clause(b) -

(A) and involves small quantity, with rigorous imprisonment for term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both;

(B) and involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years, and the fine which may extend to one lakh rupees;

(C) and involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees and which may extend to two lakh rupees.

Provided that the Court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

21.The chemical name of 'charas' is cannabis or cannabis resin and as per the table, so far as charas is concerned, small quantity specified is 100 grams

whereas commercial quantity specified is 1 Kg. There is no manner of doubt that the quantity recovered from the possession of the accused was weighing 528 grams and thus the contraband article recovered from the accused was less than commercial quantity but greater than small quantity and therefore as per the amended provision, RI could have been extended upto ten years and fine could have been extended to Rs. 1 lakh.

22.In the instant case, the learned Additional Sessions Judge, Valsad after hearing the accused and the learned advocates appearing for the parties on the question of quantum of punishment, imposed sentence of R.I. for ten years and fine of Rs.1,00,000 and in default thereof, S.I. for further period of 2 ½ years. Therefore, the learned Additional Sessions Judge, Valsad has imposed the maximum sentence in terms of Section 20 (b) (ii)(B) of the NDPS Act which is obviously harsh and disproportionate to the contraband article charas found from the possession of the accused.

23.It appears to us that while imposing the sentence, the learned Additional Sessions Judge, Valsad has not taken into consideration that though the offence was committed prior to the Amended NDPS Act 2001 came into force, the impugned judgment and order was passed when the said Act has come into force. Section 41 of the Amended NDPS Act, 2001 deals with application of the said Act to pending cases. Sub Section-1 of Section-41 of the Amended NDPS Act, 2001 reads as under:-

“Sub Section-1 of Section-41 :- Notwithstanding anything contained in sub-section (2) of Section 1, all cases pending before the Courts or under investigation at the commencement of this Act shall be disposed of in accordance with the provisions of the principal Act as amended by this Act and accordingly, any person found guilty of any offence punishable under the principal Act, as it stood immediately before such commencement, shall be liable for a punishment which is lesser than the punishment for which he is otherwise liable at the date of the commission of such offence;

Provided that nothing in this section shall apply to cases pending in appeal.”

24.In the case of **Basheer alias N.P.Basheer vs.**

State of Kerala, reported in (2004) 3 Supreme Court Cases 609, the interpretation of Section 41 (1) of the Amended NDPS Act, 2001 has come up for consideration before the Supreme Court. In the said case, the Supreme Court has observed that by this section, Parliament has declared its intention to apply the amended provisions of the Act to: (a) all cases pending before the court on 2.10.2001; (b) all cases under investigation as on that date; and provides that these categories of cases shall be disposed of in accordance with the provisions of the NDPS Act, 1985 as amended by the Amended NDPS Act, 2001. In other words, the benefit of the rationalized sentencing structure would be applicable to these categories. The proviso, however, makes an exception and excludes the application of the rationalized sentencing structure to cases pending in appeal. The Court further observed in para-12 of the judgment that all statutes must be interpreted as prospective in operation, unless retrospectivity is expressly declared by the

statute or to be inferred as the necessary intendment from the language used in the statute. As far as the amendments introduced in the NDPS Act, 1985, by Act 9 of 2001 are concerned, Section-41, in term, says that the amending Act would apply to all cases pending before the court or under investigation on the date of commencement of the amending Act. In other words, it is to be applied retrospectively. If the Act had contained any provisions to the detriment of the accused, then undoubtedly, it would have been hit by the rule against post facto legislation contained in Article 20(1). However, the court found that the amendments (at least the ones rationalising the sentencing structure) are more beneficial to the accused and amount to mollification of the rigour of the law. Consequently, despite retrospectivity they ought to be applied to the cases pending before the Court or even to cases pending investigation on the date on which the amending Act came into force. Such application would not be hit by Article 20(1) of the Constitution.

25. So far as the offence registered against the accused is concerned, admittedly the incident had taken place on 19.12.1998. When the contraband article Charas was seized and at that time NDPS Act, 1985 was in force. The judgment was delivered on 28.03.2002 and the Amended NDPS Act, 2001 came into effect from 2.10.2001. Admittedly under the NDPS Act, 1985 punishment for commission of offence under Section 20 (b) is not less than ten years but which may extend to 20 years and shall also liable for fine which shall not be less than Rs.1 lakh whereas under the Amended NDPS Act, 2001, the commission of the offence under Section 20 (b) (ii) falls in three categories as per the quantity of the contraband article seized :

- (i) *Small quantity*
- (ii) *Less than commercial quantity but more than the small quantity;*
- (iii) *Commercial quantity.*

26. The contraband article Charas recovered from the accused was weighing 528 grams which is

admittedly not a commercial quantity but it is also not a small quantity. The quantity seized from the accused is more than small quantity but less than commercial quantity. Therefore, the punishment is to be awarded as per clause 20 (b) (ii) (B) of the Amended NDPS Act, 2001.

27. The learned Additional Sessions Judge, Valsad has imposed minimum sentence under Section 20 (b) (ii) of the NDPS Act, 1985 as it stood before the Amended NDPS Act, 2001 came into force with effect from 02.10.2001. Therefore, according to us, the punishment imposed by the learned Additional Sessions Judge, Valsad under the NDPS Act, 1985 does not stand to scrutiny of this court as the learned Additional Sessions Judge, Valsad has considered the minimum sentence of ten years as appropriate for commission of the offence under Section 20 (b) (ii) of the NDPS Act, 1985 but in fact the learned Additional Sessions Judge, Valsad ought to have imposed sentence under the Amended NDPS Act, 2001 wherein the punishment prescribed is

rigorous imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees by virtue of Section 20 (b) (ii) (B), meaning thereby, the Court can impose rigorous imprisonment upto 10 years but there is no question of imposing minimum sentence of ten years in instance case. In this case, the appellant has undergone sentence of more than eight years and, therefore, according to us, looking to the facts and circumstances and considering the defence raised and mitigating factors pointed out by Ms. Acharya and further considering the fact that the appellant-accused has already undergone imprisonment for a period of more than eight years, while maintaining the order of conviction, we are of the opinion that the sentence of R.I. for 10 years imposed on the appellant-accused under the NDPS Act, 1985 is required to be altered into sentence under the Amended NDPS Act, 2001 by imposing sentence of six years and fine of Rs. 50,000/- and in default thereof, to undergo S.I. for six months as the case is covered under clause (b) of Section 20 (b) (ii) of the

Amended NDPS Act, 2001.

28. Seen in the above context, the judgment and order of conviction recorded under Sections 21, 22 & 23 of the NDPS Act, 1985 against the accused deserves to be quashed and conviction recorded under Section 20 (b) (ii) of the Act is confirmed and maintained. However, it is altered into conviction under Section 20 (b) (ii) (B) of the Amended NDPS Act, 2001 and, therefore, the sentence imposed on him is required to be reduced in terms of the final order as per this judgment.

29. For the foregoing reasons, the appeal succeeds in part and accordingly the appeal is partly allowed qua sentence only. The impugned judgment and order of conviction, convicting the accused for commission of offence punishable under Section 20 (b) (ii) of the NDPS Act, 1985 is altered into conviction under Section 20 (b) (ii) (B) of the Amended NDPS Act, 2001 and accordingly, the appellant is sentenced to

suffer RI for six years and to pay fine of Rs.50,000/- and in default of payment of fine, SI for six months.

30.Since the appellant has already undergone the sentence of more than eight years, he is required to be released forthwith. The respondent - State of Gujarat and jail authorities are hereby directed to release the appellant forthwith, if his presence is not required in relation to any other offence.

31.The appeal is accordingly partly allowed to the aforesaid extent.

[A. M. KAPADIA, J.]

[K. A. PUJ, J.]

Savariya