**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**CRIMINAL APPEAL NO. 1210 of 2007**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE MR.JUSTICE KS JHAVERI**

**and**

**HONOURABLE MR.JUSTICE K.J.THAKER**

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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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VICKYKUMAR,S/O.BHARATSING BHUMIHAR(RAJPUT)....Appellant(s)

Versus

STATE OF GUJARAT....Opponent(s)/Respondent(s)

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Appearance:

MS SADHANA SAGAR, ADVOCATE for the Appellant(s) No. 1

MS CM SHAH APP for the Opponent(s)/Respondent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE KS JHAVERI**
and
**HONOURABLE MR.JUSTICE K.J.THAKER**

**Date : 28/06/2013**

**ORAL JUDGMENT**

**(PER : HONOURABLE MR.JUSTICE K.J.THAKER)**

1. The present appellant has preferred this appeal under sec. 374(2) of the Code of Criminal Procedure, against the judgment and order of conviction and sentence dated 7.9.2007 passed by the learned Special Judge, Fast Track Court No. 2, Vadodara in N.D.P.S. Case No. 6/2006, whereby, the learned Judge has convicted the appellant under sec.8(C) of NDPS Act and sentenced to undergo R/I for 12 years and to pay a fine of Rs. 1,00,000/- in default, to undergo further imprisonment of one year. which is impugned in this appeal.

2.1 The brief facts of the prosecution case is that accused no. 2 had ordered for 'Ganja' on mobile phone to accused no. 1 and accused no. 1 had obtained 'ganja' from one Ramkishan Sitaram Sharma, resident of village Pirpaity, the appellant had boarded the train and came to Vadodara railway station and was sitting on the bench near "sulabh sauchalaya" on platform no. 1, on 4.4.2006, at about 10.55 O'clock. The Vadodara Railway Police cordoned the appellant on platform no. 1. On the basis of the information which they have received,the Police Inspector, LCB, Vadodara arranged for raid and the raid was carried out. In the raid, 20kg and 760 grams "ganja', in all six packets, were

taken. The accused no. 1 has given his false identity as Vikkikumar Bharatsing. Unarmed Police Head Constable Badharsinh Maganbhai Buckle no. 1245, Vadodara Local Crime Branch, Western Railway and Police Constable Vijaysinh Pothubha, Police Constable Girvatsinh Shabhai have received an information that a person aged between 25 to 30 years, who is sitting on platform no. 1, on southern side near 'sulabh sauchalaya' wearing military colour dress, having bedding of military colour with one black colour cotton bag with 'ganja'. On such information, they cordoned him and entries were made in the police diary and search were made as per the provisions of law and panchas were called and followed the necessary procedure of law.

2.2 After completing all the procedure as per mandatory provisions by the police officials, the samples were sent to the FSL and then on finding that it was 'ganja' and nothing but the 'ganja, the accused were charge-sheeted.

3. Thereafter, the charge was framed at Ex. 6 against the appellant. The appellant – accused has pleaded not guilty and claimed to be tried.

4. In order to bring the home the charge levelled against the appellant- accused, the prosecution has examined 13 witnesses and also relied on 29 documents

5. Thereafter, after examining the witnesses, further statement of the appellant-accused under sec. 313 of CrPC was recorded in which the appellant-accused has denied the case of the prosecution.

6. After considering the oral as well as documentary evidence and after hearing the parties, learned Judge vide impugned judgment and order dated 7.9.2007 held the appellant – accused guilty to the charge levelled against him under sec. 8(C) of NDPS Act and convicted and sentenced the appellant accused, as stated above.

7. Heard Mr. Sadhana Sagar learned advocate for the appellant and Ms CM Shah learned APP for the respondent-State.

8. Learned advocate Ms. Sagar appearing for the accused has strenuously urged that there is tempering with the seal and the seal was applied by the LCB. It has been contended that the seizure was done by the LCB. They were near the railway station and panchnama of the muddamal and other procedural formalities were done at the police station. The learned trial Judge has properly considered the evidence on record and therefore the appeal may be allowed.

9. On the other hand, learned APP has strongly opposed the contentions raised by the learned advocate for the present appellant and has submitted that the trial court has passed the impugned judgment and order after taking into

consideration the facts and circumstances of the case as well as the material, in the form of oral and documentary evidence, produced before it and hence, no interference is called for and the appeal deserves to be dismissed.

10. We have gone through the oral as well as documentary evidence produced on the record. We have read the oral evidence of prosecution witness-complainant and also perused the charge framed against the appellant. The learned Judge has given cogent reasons. The appellant has not discharged the burden under sec. 54 of NDPS Act, which reads as under:

> **[Presumption from possession of illicit articles.-** In trials under this Act, it may be presumed, unless anduntil the contrary is proved, that the accused has committed an offence under this Act in respect of -
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> a) any narcotic drug or psychotropic substance or controlled 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 drug or psychotropic substance or controlled substance; or
> d) any materials which have undergone

any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured,

for the possession of which he fails to account satisfactorily.]

11. The seizure memo and arrest memo also clinches the issue. The submission that the seizure was done at the police station and there is tempering with the seal, is not believed by the learned trial Judge, and we are unable to persuade ourselves to take a different view then the one taken by the learned trial Judge. All the mandatory provisions under the NDPS Act are full-filled. Para-27,28 and 29 of the judgment of the learned trial Judge show that the accused had mobile phone which clinches the issue. Therefore, we are unable to take a different view then the one taken by the learned trial Judge. The provisions of section 42 and 43 of the NDPS Act are complied with. The evidence of PW-6 J.T. Rana, P.I. Ex. 38 and PW-7 Badharsing Maganlal Ex. 50 are on the basis of giving information. They have full-filled all the rights of the accused. They have no reason to give incorrect deposition. They have nothing against the accused and their evidence inspires confidence. The report at Exh. 51 and the testimony of PW-6 J.T. Rana Ex. 38 shows

that the information was given by PW-7 Badharsing Maganlal Ex. 50 and the said message was given at 8.00a.m. and 9.30 a.m. which was received, and therefore, P.I. Mr. J.T. Ranan LCB, Vadodara was present there. Head Constable Badharsinh Maganlal has given report in writing which was accepted by Mr. J.T. Rana, P.I. He has mentioned the same in his evidence. There does not seem to be any kind of material contradiction in the same which would even raise suspicion about the procedure which was followed. The duties performed by Mr.J.T. Rana, Police Inspector, LCB in his official capacity. As per the provisions of sec. 42(2) of the NDPS Act,the information which they have received it should be written. In this case,it has been reduced to documents and the provisions of sec. 42(2) has been fulfilled by the police, and therefore, it has been rightly held by the learned trial Judge that the information received regarding the present appellant sitting with military colour dress with black cotton bag, is proved. The panchnama, the evidence of panch witnesses and the evidence of PW-7 Badharsinh complete the chain. The tickets are also found from the accused. The provisions of section 50 of NDPS Act are also complied with. We are unable to persuade ourselves to accept the submission of learned advocate for the appellant that he procedure was doe in the police station and the same was without following due procedure as envisaged under the provisions of NDPS Act. The PSI LCB, Railway, Vadodara had applied the seal. That aspect has also been very elaborately discussed by the learned trial Judge and

we are also satisfied that the reasons given by the learned trial Judge are cogent and requires no interference. Para-46 and 47 of the judgment clinches the issue and we are unable to take a different view then the one taken by the learned trial Judge. The last endeavor which was made by the learned advocate was with reliance on the judgment of Hon'ble the Apex Court so as to contend that Hon'ble the Apex Court in the case of **Shantilal vs. State of M.P., reported in (2007)11 SCC 243,** has reduced the default sentence. The submission of the learned advocate that the default sentence is too harsh and she has heavily relied on the decision of Hon'ble the Apex Court in the case of **Shantilal v. State of M.P. (supra),** wherein, the Hon'ble Apex Court has while confirming the conviction by the two courts below, reduced the default sentence.

> "31.The next submission of the learned counsel for the appellant, however, has substance. The term of imprisonment in default of payment of fine is not a sentence. It is a penalty which a person incurs on account of non-payment of fine. The sentence is something which an offender must undergo unless it is set aside or remitted in part or in whole either in appeal or in revision or in other appropriate judicial proceedings of "otherwise". A term of imprisonment ordered in fault of payment of fine stands on a different footing. A person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. He, therefore, can always avoid to undergo imprisonment in default of payment of fine by paying such amount. It is, therefore, not only the power, but the duty of the court to keep in view the nature of offence, circumstances which it was committed, the position of the offender

and other relevant considerations before ordering the offender to suffer imprisonment in default of payment of fine.

12. In the said judgment, a general principle of law reflected in Sections 63 to 70 IPC is that an amount of fine should not be harsh or excessive, is what the Apex Court has held. We have carefully gone through the said judgment. Emphasis was made on para-39 of the said judgment and a request was made that the default imprisonment was on a very high side and has held by Hon'ble the Apext Court, it should be six months and not one year. We are unable to persuade ourselves to accede to the request made by the learned advocate for the appellant the reason being that the learned trial Judge has ordered imprisonment only for one year even if the provisions of sections 63 to 70 IPC were adverted by the Apex Court. Section 64 and 65 of IPC also will not permit us to take a lenient view as submitted by the learned advocate for the appellant. Even in the above cited judgment, it is very categorically held in para-31 that the term of imprisonment in default of payment of fine is not a sentence and it is the duty cast upon the court to keep in view the nature of offence, the circumstances under which it was committed, position of the offender and other relevant considerations. Looking to the totality of the circumstances and the recent decision of the Apex Court in the case of **Mohinder vs. State of Haryana, reported in 2013(2) Crimes 206 (SC),** there also the Apex Court, where the possession was

only 3 ½ kg of opium, did not reduce the fine of Rs. 1 lac and default imprisonment of R/I for a period of two years. Here in this case, the learned trial Judge has ordered that in default of payment of fine of Rs. 1 lac which is minimum, awarded imprisonment of one year. In light of the latest decision of Hon'ble Apex Court, we are unable to persuade ourselves to accede to the request made by the learned advocate for the appellant that leniency should be shown to the appellant, if the appellant is unable to pay the fine.

13. We are in complete agreement with the findings, ultimate conclusion and resultant order of conviction and sentence passed by the trial Court and we are of the view that no other conclusion except the one reached by the trial Court is possible in the instant case as the evidence on record stands. Therefore, there is no valid reason or justifiable ground to interfere with the impugned judgment and order of conviction and sentence.

14. In the result, this appeal is dismissed. The impugned judgment and order dated 7.9.2007 passed by the learned Special Judge, Fast Track Court No. 2, Vadodara in NDPS Case No. 6/2006 is confirmed. R & P to be sent back to the trial Court, forthwith.

**(K.S.JHAVERI, J.)**

**(K.J.THAKER, J)**

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