

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL NO. 873 of 1999****FOR APPROVAL AND SIGNATURE:****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 or any order made thereunder ?
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STATE OF GUJARAT....Appellant(s)

Versus

DASHRATHLAL MANILAL MODI....Opponent(s)/Respondent(s)

Appearance:

MS CM SHAH, ADDL. PUBLIC PROSECUTOR for the Appellant(s) No. 1

MR RATHIN P RAVAL, ADVOCATE for the Opponent(s)/Respondent(s) No. 1

CORAM: **HONOURABLE MR.JUSTICE K.J.THAKER****Date : 27/02/2015****ORAL JUDGMENT**

1. By way of this appeal, the appellant-State has challenged the judgment and order of the learned Addl. Sessions Judge, Ahmedabad (Rural) at Gandhinagar (for short, 'the trial Court'), Dated : 31.03.1999, rendered in Sessions Case (NDPS) No. 37 of 1998, whereby, the learned trial Court acquitted the original accused-Respondent, herein, of the offence punishable

under Sections 15 and 22 of the NDPS Act, 1985.

2. The brief facts of the case of the prosecution, as set out before the trial Court, are that on 25.07.1998, the original complainant received an information that the original accused-Respondent, herein, who has been residing at House No.15 and running a grocery shop in the name of 'Modi Kirana Stores' from the said premises, Sector-24, Gandhinagar, illegally keeps and sells opium poppy. Hence, the complainant along with the panchas and the other police officials raided the aforesaid premises, whereupon, opium poppy, weighing about 14.50 kgs., was found, and hence, a complaint was lodged against him. Pursuant thereto, police carried out investigation into the alleged offence and on finding sufficient evidence, filed charge-sheet against respondent-accused.

3. At the time of trial, the prosecution, in support of its case, examined thirteen witnesses.

4. Apart from that the prosecution also produced several documents to strengthen its case, viz. the complaint, recovery panchnama, report of FSL etc..

5. After recording the evidence of the witnesses and perusing the material on record, the trial Court passed the impugned order. Hence, the present appeal.

6. Ms. Shah, learned APP for the appellant-State, submitted that the judgment and order of the trial Court be upturned, as same is highly perverse and is beyond the evidence on record and that the learned Judge has considered the evidence, which were never before him, and thereby, omitted to consider the evidence before him. Ms. Shah has taken this Court through the charge and the documentary evidences as well as the oral evidence on record. She submitted that it is an admitted position, which is not denied by the accused, that the contraband weighing about 14.50 kgs. was found from the premises of the accused. She submitted that, though, the accused was having the permit to possess only 1.50 kgs. Of opium poppy, he had kept 14.50 kgs. Of opium poppy. She submitted that the learned Judge committed a grave error in relying on the minor discrepancies, like whether the accused was the owner of the premises in question or his wife or whether any neighbours were inquired at the stage of investigation to establish the ownership of the premises in question or not etc.. It is submitted that once the contraband was found from

the premises of the accused, the learned trial Judge could not have taken the matter so lightly, when it appeared that the premises in question belonged to / managed by the accused. Ms. Shah, particularly, invited the attention of this Court to the evidence of P.W.s- 6 and 8 and submitted that at the relevant point of time, the accused was present at the premises in question and just because one witness is not able to state as to where the accused was etc. minor discrepancies ought not to have resulted into acquittal. She, therefore, prayed that the appeal be allowed.

7. *Per contra*, Mr. Raval, learned Advocate for the accused-Respondent, supported the order of the trial Court and submitted that only police witnesses supported the case of the prosecution and panchas have turned hostile. He submitted that one Jitendrasinh's evidence, who was brought to weigh the contraband, are not found to be trustworthy by the trial Court. He heavily relied on the finding of facts recorded by the trial Court as to ownership of the premises in question and submitted that the factual scenario will also not permit this Court to take a different view, than the one, taken by the learned trial Court. He, hence, submitted that the trial Court committed no error in passing the order of acquittal and the present appeal being without

merit be dismissed.

8. Heard learned APP for the appellant-State and the learned Advocate for the accused-Respondent and perused the material on record with their assistance.

9. The case of the prosecution before the trial Court was that from the premises of the respondent-accused contraband weighing about 14.50 kgs. Was found. Now, here, the charge framed against the accused is for the contravention of the provisions of the NDPS Act and as per Section 50 of the NDPS Act, before carrying out a search, the officer concerned is required to inform the suspect about his right to get himself searched in the presence of a gazetted officer or a Magistrate. Section 50 of the NDPS Act, reads as under;

"50. Conditions under which search of persons shall be conducted.- (1) When any officer duly authorized under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he

can bring him before the Gazetted Officer or the Magistrate referred to in sub-section(1).

(3) The Gazetted Officer of the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female."

10. In the instant case, the prosecution is unable to show that the provisions of Section 50 of the NDPS Act was complied with. Further, panch No.1, who was examined at Exhibit-15, stated that police had called him and the second panch at the office of LCB, where, a middle aged person was shown to them and they were told that the police has arrested them for possessing opium poppy. The evidence of second panch(Exhibit-17) is also to the said effect. Both the panch witnesses denied to have gone anywhere else, except, LCB office. Here, it may be noted that the prosecution examined one Jitendrasinh, who was called to come with weighing machine to weigh the contraband, in his evidence stated that he had gone to Sector-24 along with a police personnel and had weighed the contraband. However, this witness does not state anything as to which shop he had gone. Here, it may be noted that the premises at which the police authorities carried

out the alleged raid, itself, is a grocery shop, and therefore, there must have been weighing machine. Apart from that in the vicinity of the premises in question, other shops were also there and despite that the police authorities called aforesaid Jitendrasinh, all the way from Sector-30 to weight the contraband in question. The prosecution has offered no explanation in that regard. Further, from the evidence of Jitendrasinh, who was the independent witness, the presence of the accused is not coming out, at the time of raid. Besides that there are a number of contradictions in the evidence of the complainant and other police witnesses, which go to the root of the matter. In view of the above, this Court has to look into the matter from the touchstone of the decisions of the Hon'ble Apex Court.

11. The principles which would govern and regulate the hearing of an appeal by this Court, against an order of acquittal passed by the trial Court, have been very succinctly explained by the Apex Court in catena of decisions. In a latest decision in the case of **"MURALIDHAR @ GIDDA AND ANR. VS. STATE OF KARNATAKA"**, AIR 2014 SC 2200, the Apex Court has laid down the powers of the High Court in appeal against the order of acquittal. In para 12 of the said decision, the

Apex Court has observed as under;

"12. In dealing with appeals against acquittal, the appellate court must bear in mind the following:(i) There is presumption of innocence in favour of an accused person and such presumption is strengthened by the order of acquittal passed in his favour by the trial Court, (ii) The accused person is entitled to the benefit of reasonable doubt when it deals with the merit of the appeal against acquittal, (iii) Though, the power of the appellate court in considering the appeals against acquittal are as extensive as its powers in appeals against convictions disturbing the finding of fact recorded by the trial Court. It is so because the trial court had an advantage of seeing the demeanour of the witnesses. If the trial Court takes a reasonable view of the facts of the case, interference by the appellate court with the judgment of acquittal is not justified. Unless, the conclusions reached by the trial court are palpable wrong or based on erroneous view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice, the reluctance on the part of the appellate court in interfering with such conclusions is fully justified, and (iv) Merely because the appellate court on re-appreciation and re-evaluation of the evidence is inclined to take a different view, interference with the judgment of acquittal is not justified if view taken by the court is a possible view. The evenly balanced views of the evidence must not result in the interference by the appellate

court in the judgment of the trial Court."

12. The Hon'ble Apex Court in "**SHIVASHARANAPPA & ORS. VS. STATE OF KARNATAKA**", JT 2013 (7) SC 66 has held as under;

"That appellate Court is empowered to re-appreciate the entire evidence, though, certain other principles are also to be adhered to and it has to be kept in mind that acquittal results into double presumption of innocence."

13. The ratio laid down in the aforesaid decisions will not permit this Court to take a different view, than, the one taken by the trial Court. In this case it is not proved beyond doubt that the complainant complied with provisions of Section 50 of the NDPS Act. Hence, the present appeal deserves to be dismissed.

14.. In the result, this appeal fails and is **DISMISSED**. The judgment and order of the trial Court, Dated : 20.02.1997, stands **CONFIRMED**. Bail bonds of the accused, if any, on bail, stands discharged. R & P, if received, be sent back to the concerned trial Court, forthwith.

(K.J.THAKER, J)

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