IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL NO. 2114 of 2006

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE RAJENDRA M. SAREEN

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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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THE STATE OF GUJARAT
Versus
ABDUL GAFAR KADARMIYA @ RAJPUTBAPU SAIYAD & 3 other(s)

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Appearance:
MR RC KODEKAR APP for the Appellant(s) No. 1
MR.HARDIK B SHAH(3751) for the Opponent(s)/Respondent(s) No. 1,2,3,4

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CORAM:**HONOURABLE MR. JUSTICE RAJENDRA M. SAREEN**

Date : 28/02/2022

CAV JUDGMENT

1. This Appeal is filed by the appellant – State of Gujarat under Section 378(1)(3) of the Criminal Procedure Code, 1973 against the judgment and order dated 31.05.2006 passed by the learned Special Judge, FTC No.2, Jamnagar in Special Case No.12 of 1998 acquitting the respondents Nos. 1 to 4 – original accused from the offence punishable

under sections 20(b), 22 and 29 of the Narcotic Drugs and Psychotropic Substance Act ("NDPS Act" for short).

2. The case of the prosecution case is that on 01/05/1998, Mr.M.J.Parmar, Police Inspector, was performing his duty at City "B" Division Police Station, Jamnagar and he received a Secret information that the accused Sanjay Babugar with other was buying and selling the Narcotic Substance "Bhang Ganja" in public with other accused persons at Jamnagar, near Khodiyar Colony, Jay Cooperative Society. After receiving the secret information, Shri Parmar started for raid and superior officers came to be intimated about the said secret information. Thereafter, with police staff, two panchas and necessary materials, they went to the scene of offence where they found that the accused persons Sanjay Babugar, Abdul Gafar Kadarmiya, Nanji Khimji and deceased Mohan Keshavji were sitting in circle with the pouch of narcotic substance which was in paper. After disclosing his identity and also informing about the power to search with the consent of the accused persons in the presence of staff and Panchas, carried out the search and seized the narcotic substance "Bhang Ganja' which was in old papers. Thereafter, Police Constable was sent to call a person to weigh Narcotic Substance. He came with one Soni Atul for weighing of seized Muddamal. On weighting it 567 Gram of Ganja was found, Shri Parmar took two samples of 25-25 Gram, and sealed the same in presence of panchas and police staff and rest of 517 Gram of ganja was seized

from the person of accused Sanjay Babugar, an amount of Rs. 770 was recovered and Rs.60 from accused Nanji Khimji as Muddamal and gave Seizure memo copy to the accused.

After completion of the investigation, charge-sheet was filed against all accused persons and thereafter, charge was framed against them for the offence punishable under section 8(C) & 21 of NDPS Act. The accused pleaded not guilty and claimed to be tried. The prosecution laid evidence. After evaluating evidence on record and hearing both the sides, the learned Judge acquitted the respondents herein – original accused, as aforesaid.

Being aggrieved by and dissatisfied with the aforesaid judgement and order of acquittal, present appeal has been filed by the appellant – State.

3. Learned APP Mr.R.C. Kodekar for the appellant – original complainant has vehemently argued that all the mandatory procedure has been followed by the investigating officer under the provisions of the NDPS Act. The trial court has not believed the evidence of the complainant. The learned Judge has committed a grave error in not believing the deposition of the witnesses and documentary evidence on record. He has further submitted that the learned Special Judge has erred in acquitting the respondents – accused from the charges levelled against them. He has further submitted that the prosecution has proved that the

respondents have committed offence under sections 20(b), 22 and 29 of the NDPS Act. He has further submitted that the learned Special Judge has acquitted the respondents accused merely on some minor contradictions and omissions in the evidence of the witnesses. He has further submitted that the learned Special Judge has erred in not believing the evidence of the investigating officer who had no reason to implicate the accused falsely in the case. He has further submitted that the offence punishable under section 20(b), 22 and 29 of the NDPS Act, is made out, however, the same is not believed by the Special Judge. He has further submitted that though the prosecution witnesses have supported the case of the prosecution, the trial court erroneously not believed their evidence and acquitted the accused.

Making above submissions, he has requested to allow the present appeal.

4. Mr.Hardik B. Shah, learned advocate for the respondent Nos.1 to 4 - original accused has submitted that letters Ex.47 to 48 sent at one time to the office of DSP and the same were received at the same time by the office of the DSP and therefore, it is clear that procedural aspect has not been followed. That there is hardly any substance in the submissions of learned APP. There is no admissible evidence on record connecting the accused with the commission of the offence. There are material contradictions

and omissions in the evidence of the prosecution witnesses. The muddamal was lying at the place of offence and the muddamal has not been recovered from the possession of any of the accused. When the accused were produced before the PSO, no papers were found. Thus, nothing is found from the accused during the checking by PSO. That proves that no documents, which are mandatory, are given to the accused. There is breach of right of accused while checking, intimation regarding circular under section 42(1) of the NDPS Act. It is also doubtful that the copy of seizure memo was given to the accused and even the supply of copy of the letter regarding arrest of the accused. No report under section 102(3) of the Code of Criminal Procedure has been sent immediately to the concerned Magistrate. Even the slip of the signature of the panchas are not affixed on the top of the bag and there is no seal at cross side and therefore, the possibility of tampering with the muddamal cannot be ruled out. Therefore, the Special Judge rightly relied on the decision of this High Court in the case of Navinkumar alias Shambhuprasad alias bapji Chimanlal Vyas versus State of Gujarat, reported in 2006(1) GLH 409 in support of the finding that when the muddamal is not properly sealed, there are chances of tampering with the muddamal and in such circumstances, the accused are entitled to acquittal. Panchas of the panchnama of the raid and arrest of the accused Firiz Alarakha Ex.19, Mamad Ismail Ex.30, Mahendrasinh Virendrasinh Jadeja Ex.21 and Hardas Jethabhai Chavda Ex.22 have not supported the case of the

prosecution and they have not supported the details of the panchnama and they are declared hostile. The complainant who has been examined at Ex.33 has supported the case of the prosecution in examination-in-chief, however, in cross-examination he has admitted that he has not disclosed the fact clearly in the FIR that the muddamal Ganja has been recovered from the accused No.1 Sanjay Babugar and no report under section 102 of the Code of Criminal Procedure has been sent to the concerned Judicial Magistrate. He also admitted that the muddamal was lying on the land and the muddamal was not in possession of the accused. It is alleged that 568 Grams muddamal has been recovered from the accused, however, out of which, how much the leaves and how much the stick is not made out from the evidence of the prosecution witnesses. The evidence of the police witnesses does not inspire any confidence. The evidence of the police witness does not get corroboration from the other independent witness and panch witness. The mandatory requirement of provision of law has not been followed by the prosecution. There is no independent evidence except the statement of the accused.

Making above submissions, he has requested to dismiss the present appeal.

5. Heard the learned advocates for the respective parties and perused the impugned judgement and order of acquittal. Re-appreciated the entire evidence on record.

6. Before adverting to the facts of the case, it would be worthwhile to refer to the scope in Acquittal Appeals. It is well settled by is catena of decisions that an appellate Court has full Power to review, re-appreciate and consider the Evidence upon which the Order of Acquittal is founded. However, the Appellate Court must bear in mind that in case of Acquittal, there is prejudice in favour of the Accused, firstly, the presumption of innocence is available to him under the Fundamental Principle of Criminal Jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of Law. Secondly, the Accused having secured his Acquittal, the presumption of his innocence is further reaffirmed and strengthened by the trial Court.

7. On re-appreciation of evidence, it is clear that the main evidence in this case is of the police witness, persons from the raiding party, crime writer and the persons who has carried out the muddamal in the F.S.L. Besides this, four panch witnesses have been examined who were panch witness for arrest panchnama of the accused, panchnama at the time of seizure of the muddamal i.e. at the time of raid. The said panchas have not supported the case of the prosecution. Considering the evidence on it appears that witness Mr.Pravinsinh Chauhan who has been examined at Ex.30, who was crime writer of City B Division Police Station, Jamnagar, has stated that he has been handed

over the muddamal by Mr.Ravirajsinh Jadeja, he entered the muddamal in the muddamal register and mark-A the muddamal was handed over to PSI Mr.Gadhavi and other muddamal was kept with him. From the evidence of this witness, it only comes out that he has been handed over the muddamal by the PSO and he made entry in the muddamal register and one part of the muddamal was given to the investigating officer.

8. Police witness Somabhai Mohanlal Patel, who is complainant, has reiterated the version of FIR in his deposition. He has identified the muddamal and the accused. He has admitted in his cross examination that he has not made any report or sent any report to the Judicial Magistrate under section 102 of the Code of Criminal Procedure. He also admitted that the muddamal was lying in the open land and the muddamal is not found from the conscious possession of any of the accused and though he had many police officers with him, he has filed the complaint on behalf of the government at the instance of his police officers.

9. Police witness Vithhalbhai Laljibhai Kharadi has been examined at Ex.37. He was police constable in Jamnagar City B Division Police Station. He had taken the muddamal on 2/5/1998 to the FSL and has given receipt of the muddamal to the investigating officer. He has admitted in his cross examination that the muddamal was received on

1/5/1998 at 7 O'clock in the evening and in the next morning, he had gone to Junagadh and reached at Junagadh at 11.00 a.m. He also admitted that he is not aware how many seals were affixed on the muddamal. His statement is also not recorded by the investigating officer.

10. Police witness Ravirajsinh Jadeja PSO is examined at Ex.39. He has admitted that Mr.S.N. Patel, PSI had handed over complaint muddamal and the accused and Yadi for registering FIR and hence he registered the FIR. The investigation was handed over to PSI Mr.Gadhavi. He has admitted in his cross examination that he has not made any report under section 102(3) of the Code of Criminal Procedure to the Judicial Magistrate. He also admitted that nothing was found from the accused at the time of checking by him. He also admitted that no letter or any document had been found from the accused at the time of checking by him. Though he has served for 5 years in the City B Division Police Station, he has no knowledge regarding seals of the police station.

11. Police witness Shardulbhai Kanabhai is examined at Ex.43. He has stated that accused were sitting in the circle and one plastic bag was there wherein muddamal tween and seeds were found. Mr.Atulkumar Soni was called to weigh the muddamal and on weighing, muddamal was 567 grams and two samples, each of 25 grams were taken in two plastic bags and the same were sealed and the rest 517

grams were sealed in separate bag and the accused were arrested and Mr.M.J. Parmar lodged the FIR against the accused. He has admitted that nothing has been found from the custody of the accused at the time of raid and the amount found from the accused at the time of search was not of sale of any narcotic substance by the accused. Two panchas were called at the police station before making raid. Initial panchnama was made and the entire raiding party went to the place of offence as per the information received. Four persons were sitting at the place of offence, they were apprehended, they were searched and muddamal was found from the open place where the accused were sitting.

12. Police witness Ashwinkumar Chhaganlal Chauhan is examined at Ex.46. He forwarded three letters to the DSP Office which are produced at Ex.Nos.47 to 49. it is not known to him how the letters had reached to DSP Office and when it has been sent to DSP Office, as no time has been written on the letters regarding dispatch.

13. Mustakkhan Habibkhan is the witness before whom accused No.4 was apprehended by the investigating officer at Surat as per the information received by the investigating officer. House of the accused No.4 was raided and 25.500 gram Ganja was found and the accused No.4 was arrested and was brought to Jamnagar. He has admitted that no muddamal with respect to the offence of Jamnagar has been

found from the accused No.4.

14. Raiding Officer Mr.Mahendrasinh Parmar is examined at Ex.67. He is the person who had raided the place of incident after receiving the information. He identified the muddamal and the accused and has produced some documents in the evidence. He has admitted that his statement has not been recorded by the investigating officer. He admitted that he was in the raiding party and Mr.S.N. Patel – complainant has filed the FIR in his presence. However, it is denied that in the complaint names of the panchas were written afterwards. It was not mentioned at the time of writing the complaint. Sealing process was done by the writer. It is admitted that seals were not affixed on the opening of the bag. It is also admitted that no signatures were taken of the accused on the panchnama and only copy of panchnama was given to the accused. The raiding officer has stated that the accused were informed by letter regarding their right to search by gazetted officer and the accused has also given their consent for search and the accused have not raised any objection regarding search by the raiding party. It is also admitted that the muddamal was lying in the open land and it was not found in possession of any of the accused. However, regarding procedural aspect is concerned, he denied that there is any procedural defect in the raid.

15. Investigating officer Mr.Vishnudan Gadhvi is examined

and he has stated on oath the fact regarding investigation and arrest of the accused No.4 from Surat and as there was ample evidence, he has filed charge-sheet. He has admitted in cross examination that except the statement of the accused, no statement of independent persons are recorded by him. Perusing the entire evidence of the police witness, it is an admitted fact on record that the muddamal has not been found from the person or body of the accused but the muddamal has been found from the open place. There is no transaction of sale or purchase by the accused when the raid was conducted. No sale proceeds has been recovered from the accused.

16. It is also case on record that when the accused persons were produced before the PSO and PSO checked the accused, nothing was found from them, as admitted by PSO, which suggests that there was no letter or any kind of document with the accused including seizure memo or copy of the panchnama or any of the letters, stating that the accused are ready to be searched through gazetted officer as required under section 42(1) of the NDPS Act and the admission of the PSO that nothing was found from the accused at the time of search by him brings procedural aspect of the raid into a suspicious and doubt. As such, the raiding procedure as stated by the raiding officer Mr.Parmar does not inspire any confidence.

17. As per the case of the prosecution, all the letters were

given to the accused at the place of offence. If the papers were given to the accused at the place of offence, it would have been with them at the time of checking by PSO but nothing has been found as per the PSO. Neither any letter nor paper was found by PSO at the time of checking of accused by him. It appears no any papers has been given to the accused which suggests that mandatory procedure under section 42(1) of the Code of Criminal Procedure has not been complied with by the raiding officer.

18. It is also required to be noted that Mr.Parmar has also not sent any report regarding information received by him. One more aspect which is to be noted is letter regarding raid after receiving information and also letter after successful raid i.e. Ex.47 to 49, are received in DSP Office which have been produced before the Court by police witness Mr.Radhod. These three letters are in chronological order and inward number is 713 to 715, no time of receiving the letters endorsed on the letters by the office of the DSP. It appears that all the three letters were sent at one time to the office of the DSP and though the letter of the information is 3.10 a.m. and the complaint is 13.35 p.m. there must have been some gap between the two letters sent to the office of the DSP and if the letters are sent separately, the inward numbers would have been different and not in chronological order. Here in this case, all the letters are in chronological order. It cannot be denied that the papers are sent separately to the office of the DSP but are sent together

at the same time.

19. Considering the Ex.34 it also comes out on record that names of the panchas are written afterwords. The panchas are ignorant about the writing in the panchnama and ignorant of procedure or any aspect of the panchnama. The entire procedure adopted by the prosecution agency is doubtful and suspicious. It is also admitted position that no report has been sent to the Magistrate and thereby not followed the procedure as required under section 102(3) of the Code of Criminal Procedure.

20. It has also come on record that panch slips are not affixed in a cross manner at the opening of the bags in which the muddamal was taken as a samples and no seal are affixed in cross. Under the circumstances, the chances of tampering of the muddamal cannot be ruled out. Thus, the procedure of sealing is also defective and the benefits of which goes to the accused. Slips bearing signatures of the panch witnesses should be affixed on the sample and thereafter, seals should be applied so that if any attempt is made to tamper with the sample, the slips affixed would get torn. On re-appreciation of evidence, this court is satisfied that correct and fool proof procedure of sealing was not resorted to and possibility of tampering with muddamal was not ruled out at all. The deficiency will have to be evaluated in light of other discrepancies brought on record of the case.

21. Besides police witness, independent witness as panch witness have not supported the case of the prosecution at all. The entire evidence of the police witness besides panch witness do not inspire any confidence.

22. Accused No.4 is arrested only on the basis of statement of co-accused. Nothing is found from him pertaining to the offence of Jamnagar. He cannot be linked in any manner with this case merely on the basis of statement of co-accused.

23. Further, as per the evidence of the prosecution witness, the muddamal was found from the open place and the same is not found from the conscious possession of any of the accused.

24 Further, there is violation of mandatory procedure as required under section 102(3) of the Code of Criminal Procedure.

25. Under the circumstances, this court is of the opinion that the prosecution has failed to prove the case against the accused beyond reasonable doubt. No illegality or error has been committed by the court below in acquitting the respondents accused.

26. It may be noted that as per the settled legal position, when two views are possible, the judgment and order of

acquittal passed by the trial Court should not be interfered with by the Appellate Court unless for the special reasons. A beneficial reference of the decision of the Supreme Court in the case of **State of Rajasthan versus Ram Niwas** reported in **(2010) 15 SCC 463** be made in this regard. In the said case, it has been observed as under:-

> *"6. This Court has held in Kalyan v. State of U.P., (2001) 9 SCC 632 :*
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> *"8. The settled position of law on the powers to be exercised by the High Court in an appeal against an order of acquittal is that though the High Court has full powers to review the evidence upon which an order of acquittal is passed, it is equally well settled that the presumption of innocence of the accused persons, as envisaged under the criminal jurisprudence prevalent in our country is further reinforced by his acquittal by the trial court. Normally the views of the trial court, as to the credibility of the witnesses, must be given proper weight and consideration because the trial court is supposed to have watched the demeanour and conduct of the witness and is in a better position to appreciate their testimony. The High Court should be slow in disturbing a finding of fact arrived at by the trial court. In Kali Ram V. State of Himachal Pradesh, (1973) 2 SCC 808, this Court observed*

that the golden thread which runs through the web of administration of justice in criminal case is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The Court further observed:

"27. It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilised society. Suppose an innocent person is convicted of the offence of murder and is hanged, nothing further can undo the mischief for the wrong resulting from the unmerited conviction is irretrievable. To take another instance, if an innocent person is sent to jail and undergoes the sentence, the scars left by the miscarriage of justice cannot be erased by any subsequent act of expiration. Not many persons undergoing the pangs of wrongful conviction are fortunate like Dreyfus to have an Emile Zola to champion their cause and succeed in getting the verdict of guilt annulled. All this highlights the importance of ensuring, as far as possible, that

there should be no wrongful conviction of an innocent person. Some risk of the conviction of the innocent, of course, is always there in any system of the administration of criminal justice Such a risk can be minimised but not ruled out altogether It may in this connection be apposite to refer to the following observations of Sir Carleton Alien quoted on page 157 of "The Proof of Guilt" by Glanville Williams, second edition:

"I dare say some sentimentalists would assent to the proposition that it is better that a thousand, or even a million, guilty persons should escape than that one innocent person should suffer; but no responsible and practical person would accept such a view. For it is obvious that if our ratio is extended indefinitely, there comes a point when the whole system of justice has broken down and society is in a state of chaos."

28. The fact that there has to be clear evidence of the guilt of the accused and that in the absence of that it is not possible to record a finding of his guilt was stressed by this Court in the case of Shivaji Sahebrao, (1973) 2 SCC 793, as is clear from the following observations:

"Certainly it is a primary principle that the

accused must be and not merely, may be guilty before a court, can be convicted and the mental distinction between 'may be' and 'must be' is long and divides vague conjectures from sure considerations."

"9. The High Court while dealing with the appeals against the order of acquittal must keep in mind the following propositions laid down by this Court, namely, (i) the slowness of the appellate court to disturb a finding of fact; (ii) the noninterference with the order of acquittal where it is indeed only a case of taking a view different from the one taken by the High Court."

8. In Arulvelu and another versus State reported in (2009) 10 Supreme Court Cases 206, the Supreme Court after discussing the earlier judgments, observed in para No. 36 as under:

"36. Careful scrutiny of all these judgments lead to the definite conclusion that the appellate court should be very slow in setting aside a judgment of acquittal particularly in a case where two views are possible. The trial court judgment can not be set aside because the appellate court's view is more probable. The appellate court would not be justified in setting aside the trial

court judgment unless it arrives at a clear finding on marshaling the entire evidence on record that the judgment of the trial court is either perverse or wholly unsustainable in law."

27. In that view of the matter, the Criminal Appeal being devoid of merits is dismissed.

(RAJENDRA M. SAREEN,J)

R.H. PARMAR