

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/CRIMINAL MISC.APPLICATION NO. 1478 of 2022**

With
R/CRIMINAL APPEAL NO. 125 of 2022

UNION OF INDIA THRO AMITKUMAR, INTELLIGENCE OFFICER OR HIS
SUCCESSOR IN OFFICE
Versus
STATE OF GUJARAT

Appearance:
MR KARTIK V PANDYA(2435) for the Applicant(s) No. 1
for the Respondent(s) No. 2
MS CM SHAH APP for the Respondent(s) No. 1

CORAM: HONOURABLE MR. JUSTICE S.H.VORA
and
HONOURABLE MR. JUSTICE SANDEEP N. BHATT

Date : 23/03/2022

ORAL ORDER

(PER : HONOURABLE MR. JUSTICE S.H.VORA)

Feeling aggrieved and dissatisfied with the judgment and order dated 15/02/2020 passed in NDPS Case No.5 of 2013 by the learned Additional Judge, Court No.19, City-Civil & Sessions Court, Ahmedabad whereby the learned trial Court acquitted the respondent No.2 herein-original accused No.2-Ruksanabanu wife of Shaikh Mohammad Rafik for the offences punishable under Sections 8(c), 20(b) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("NDPS Act" for short), the original complainant-Union of India through Narcotics Control Bureau has preferred the captioned application seeking special leave to appeal under Section 378(4) of the Code of Criminal Procedure, 1973 ("**the Code**" for short).

2. Briefly stated; the case of the complainant is that all the original three accused committed the offence punishable under Sections 8(c), 20(b) and 29 of the NDPS Act; inasmuch as; when accused No.3 was searched; found with contraband Charas weighing 7.79 Kg from the bag held by him. It is also the case of complainant that all the three accused were intercepted by the complainant near Naroda Patiya Bus Stop when they disembarked from Bus no. RJ01PA2003 coming from Himmatnagar. It is also the case of complainant that accused No.3-Imtekhab Rafikbhai Rangrej was in possession of bag and refused to provide its key and therefore lock of the bag was forced open and the aforesaid quantum of Charas was found therein. Apart from this; various other articles such as phone and ID Card were found from the possession of all the three accused.

3. On a trial, the accused No.3-Imtekhab Rafikbhai Rangrej and accused No.1-Shaikh Mohammed Rafik were found guilty for the offences punishable under the NDPS Act; whereas the respondent No.2-original accused No.2 was given benefit of doubt.

4. In order to bring home the charge, the prosecution has examined 07 prosecution witnesses and have proved various documentary evidence through depositions of PW 1 to 7, more particularly, as described in paragraph 10 of the impugned judgment and order.

5. We have heard learned Advocate Mr.Pandya appearing for the applicant-original complainant and have minutely examined the material placed before us for consideration of

application filed for special leave to appeal under Section 378(4) of Code, as also the findings recorded by the learned trial Judge.

6. According to learned Advocate Mr.Pandya for the applicant-original complainant, the acquittal recorded qua respondent No.2-original accused No.2 is bad in law and against the evidence on record; inasmuch as; the learned trial Judge has overlooked the provisions of Section 67 of NDPS Act though the learned trial Judge found and observed that the provisions of Sections 42 and 50 of the NDPS Act which are mandatory provisions of the Act is complied with. It is further urged by him that the learned trial Judge has misread the evidence; inasmuch as; respondent No.2 who is wife of accused No.1 was all through out with other two accused who are convicted and she travelled with them from Jaipur to Ahmedabad in the Luxury Bus No.RJ01PA2003 and as per tour pass (Exhibit-26) and thus respondent No.2 being wife of accused No.1 culpability presumption of Section 35 of NDPS Act triggers.

6.1 It is vehemently argued by learned Advocate Mr.Pandya that respondent No.2; being wife of accused No.1, she has knowledge of the contents of the bag where-from the contraband Charas was found and therefore she is said to have culpable intention. In other words, Mr.Pandya tried to demonstrate and explain that possession in a case may not be physical possession; but can be constructive having power and control over the article and accused No.3 was holding physical possession; subject to the power and control of respondent No.2 and her husband. In order to substantiate the submission,

learned Advocate Mr.Pandya has drawn attention of this Court to the fact that all the three accused travelled together from Ahmedabad to Jammu and back as per railway charts and tour pass placed and proved before the trial Court. Not only that; the statement of respondent No.2 recorded under Section 67 of the NDPS Act (Exhibit-89) is also corroborative piece of evidence if not a statement of confession and therefore the learned trial Judge ought to have looked into such statement. In nutshell, it is submitted by learned Advocate Mr.Pandya that respondent No.2; being wife of accused No.1 and she travelled from Jammu to Ahmeabad and back through railway and bus and stayed together with other convicted accused persons, there can be no iota of doubt that all the accused were in conscious possession of contraband Charas and thus the learned trial Judge ought to have raised presumption under Section 35 of the NDPS Act and thereby to record conviction rather than acquittal of respondent No.2.

7. We have extensively heard learned advocate Mr. Pandya for the applicant. The testimony of PW-2-Mr.Sajansing Dhisaramsing, Intelligence Officer, Serving with NCB Office, Ahmedabad whose deposition recorded below Exhibit-32 establishes that accused No.3-Imtekhab was found with contraband Charas contained in a bag he hold. It is found and noticed by us that accused Nos.1 and 2 did not hold the bag and neither anything incriminating was found from their person. On scrutiny of evidence, the learned trial Judge found that respondent No.2 was merely a companion of her husband-accused No.1-Shaikh Mohammed Rafik and she was not an accomplice in the crime. The submissions of learned Advocate Mr.Pandya that all the three accused were travelling together

and not strangers to one other in their tour from Ahmedabad to Jammu and back and therefore the culpability presumption of Section 35 of NDPS Act comes into play and burden shifts upon respondent No.2 to prove that she was not aware or had any knowledge to the fact that the bag contains the contraband Charas. No doubt, the moment the person had intention or knowledge of the fact, he or she is said to have culpable intention. In a case on hand, accused No.3-Imtekhab was holding the bag with key. As deposed by PW 2, he did not part with the key and therefore the Officer broke open the lock and thus respondent No.2 being companion of her husband and except for her presence as her husband's companion right from the receipt of information, her conscious possession as understood under the law does not surface even reasonable doubt. No any call details prior to and after the incident is placed on record between accused No.3-Imtekhab and respondent No.2.

8. Thus, the learned trial Judge on appraisal of entire evidence and so also here no doubt of a reasonable degree can be entertained that she had real knowledge of the nature of the substance locked in the bag and key in possession of accused No.3.

9. Lastly, the submissions based on confessional statement of respondent No.2 so as to implicate her in offence which needs not to be taken any further in light of a decision rendered in case of Tofan Singh VS State of Tamil Nadu, (2014 1 Crimes(SC) 42), because the confessional statement is recorded when respondent No.2 was in custody and therefore, it being the weak piece of evidence and in absence of any

corroborative evidence, no reliance can be placed upon such statement and thus the learned trial Judge has rightly done so. Under the circumstances, the learned trial Judge has rightly acquitted the respondent No.2 for the elaborate reasons stated in the impugned judgment and we also endorse the view/finding of the learned trial Judge leading to the acquittal of respondent No.2.

10. It is a cardinal principle of criminal jurisprudence that in an acquittal appeal if other view is possible, then also, the appellate Court cannot substitute its own view by reversing the acquittal into conviction, unless the findings of the trial Court are perverse, contrary to the material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable. (Ramesh Babulal Doshi V. State of Gujarat (1996) 9 SCC 225). In the instant case, the learned APP has not been able to point out to us as to how the findings recorded by the learned trial Court are perverse, contrary to material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable.

11. In the case of Ram Kumar v. State of Haryana, reported in AIR 1995 SC 280, Supreme Court has held as under:

"The powers of the High Court in an appeal from order of acquittal to reassess the evidence and reach its own conclusions under Sections 378 and 379, Cr.P.C. are as extensive as in any appeal against the order of conviction. But as a rule of prudence, it is desirable that the High Court should give proper weight and consideration to the view of the Trial Court with regard to the credibility of the witness, the presumption of innocence in favour of the accused, the right of the accused to the benefit of any doubt and the slowness of appellate Court in justifying a finding of fact arrived at by a Judge who had the advantage of seeing the witness. It is settled law that if the main grounds on which the lower Court has based its order acquitting the accused are reasonable and plausible, and the same cannot entirely and effectively be dislodged or demolished, the High Court should not disturb

the order of acquittal."

12. As observed by the Hon'ble Supreme Court in the case of Rajesh Singh & Others vs. State of Uttar Pradesh reported in (2011) 11 SCC 444 and in the case of Bhaiyamiyan Alias Jardar Khan and Another vs. State of Madhya Pradesh reported in (2011) 6 SCC 394, while dealing with the judgment of acquittal, unless reasoning by the learned trial Court is found to be perverse, the acquittal cannot be upset. It is further observed that High Court's interference in such appeal in somewhat circumscribed and if the view taken by the learned trial Court is possible on the evidence, the High Court should stay its hands and not interfere in the matter in the belief that if it had been the trial Court, it might have taken a different view.

13. Considering the aforesaid facts and circumstances of the case and law laid down by the Hon'ble Supreme Court while considering the scope of appeal under Section 378 of the Code of Criminal Procedure, no case is made out to interfere with the impugned judgment and order of acquittal.

14. In view of the above and for the reasons stated above, present application for special leave to appeal fails and same deserves to be dismissed and is accordingly dismissed. In view of dismissal of the application for special leave to appeal, captioned Criminal Appeal also deserves to be dismissed and is accordingly dismissed.

(S.H.VORA, J)

sompura

(SANDEEP N. BHATT,J)