am unable to accept this contention considering the decision of the Supreme Court.

In view of the above, I am left with no other option but to quash the prosecution, which is based on a police report for the offence punishable under the Act 1957.

This application is allowed. The proceedings of the Criminal Case No.794 of 2016 pending before the learned JMFC, Mandvi, Surat, is hereby quashed. Rule made absolute. Direct service is permitted.

It shall be open for the concerned department to initiate appropriate proceedings in accordance with law before the appropriate forum.

7. Thus, as observed by this Court, the offence punishable under the Act 1957 are hereby quash and set aside and the prosecution, which is based on a police report for the offence punishable under the Act 1957 are quash as it is clarified that it is open for the concerned department to initiate appropriate proceedings before appropriate forum. So far as Section 379 is concerned, liberty is also reserved in favour of the respondent authority to investigate the same and file appropriate report.

8. In view of the above, the present application is allowed. Rule made absolute to the aforesaid extent. Direct service is permitted.

Result:- Application allowed.

ABC 2019 (I) 315 GUJ
ACQUITTAL & BAIL CASES
HIGH COURT OF GUJARAT
(R.P.Dholaria, J.)
Criminal Appeal No. 2367 of 2006
Decided on 29 November, 2018

STATE OF GUJARAT ***- Appellant(s).***

Versus

IBRAHIM @ DHAFO ISMAIL TARKVADIYA ***- Respondent(s).***

Law Covered:- ***(A) Code of Criminal Procedure, 1973 — Section 378 — Appeal against Acquittal — Narcotic Drugs And***

Psychotropic Substances Act, 1985 — Sections 8B, 20B(II), 29 & 2 — Raid by police party on the basis of secret information — Police witness vis-à-vis independent witness — the entire case of prosecution is based upon the evidence of police officials only, who were the members of the raiding party —Panch witness accompanied at the time of raid — turned hostile — Receipt of secret information, raid, lodging of complaint by same police officer — presence of accused doubtful — Non-compliance of mandatory provisions — Acquittal upheld. (Para 7 & 8)

(B) Narcotic Drugs And Psychotropic Substances Act, 1985 — Sections 8B, 20B(II), 29 & 2 — Presence of the lady accused & minor accused — the accused were found at the residence — caught red-handed alongwith contraband articles in the Jar as well as from the pocket of the minor during the nocturnal hours, appears to be suspicious — Indian Evidence Act, 1872 — Section 3. (Para 7)

(C) Criminal trial — Confession by the accused — Documentary evidences confessional in nature, executed during the stage of trial — even statement of accused as well as other documents are also not admissible as such. (Para 7)

(D) Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 42 — Receipt of secret information & report on that basis — proving of — Admission by Investigating Officer & Raiding Officer — they had not proved the report regarding the secret information as well as for making report u/s 42(2) — entire procedure is vitiated. (Para 8)

(E) Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 50 — Lady accused & Minor accused — Recovery of contraband in their presence — Right to be searched in presence of either Magistrate or the Gazetted Officer — were not informed in letter and spirit regarding their right — violation of Section 50. (Para 8)

Facts:- *On receipt of secret information from a source the PSI, Crime Branch, made an entry in the Station Diary and prepared report that the said information received during the nocturnal hours and it was not possible to get warrant from the Competent Court to carry out search and seizure, and therefore, the team of police officials carried out raid. A case was registered u/ss 8B, 20B(II), 29 and 2 of the NDPS Act. At the conclusion of the trial, learned Trial Court acquitted the accused persons. Being aggrieved by the said order of acquittal, the appellant - State preferred the present appeal before the honourable Gujarat High Court. The honourable Court found the judgment of acquittal proper and dismissed the appeal.*

Law of relief:- ***In a case where independent witness turned hostile and all other witnesses are police officers, prosecution case becomes doubtful.***

Held:- This Court has minutely gone through the entire evidence on record. Indisputably, out of 8 witnesses examined in order to prove the case of prosecution, 7 are the police officials who were the members of the raiding party to carry out investigation thereof. Only, Pw-1 Satarbhai - the Panch who was accompanied at the time of raid along with the raiding party and in whose presence, search and seizure was carried out as well as panchnama came to be drawn, had not supported the case of prosecution. Indisputably, the entire raid was based upon the secret information received by the Police Inspector, Mr. S.H. Kathi. Thereafter, he himself had proceeded to carry out entire raid in presence of his other subordinate officials, and thereafter, he himself lodged the complaint. Thereafter, rest of the investigation was handed over to the another police Sub-Inspector Pw -8 - Mr. C.K.Babaria. Precisely, the entire case of prosecution is based upon the evidence of police officials only. During the course of raid, presence of the lady accused as well as minor Sultan were found at the residence and they were caught red-handed alongwith contraband articles in the Jar as well as from the pocket of the minor Sultan during the nocturnal hours, appears to be suspicious. The documentary evidences which are confessional in nature, executed during the stage of trial, even statement of accused as well as other documents are also not admissible as such. Indisputably, Pw-7- Mr. S.H.Kathi holding post of Police- Inspector and all other members of raiding party were his subordinates. They are not authorized officers. Subsequently, therefore, they prepared report which came to be produced at Exh.29 indicating that it was not possible to seek authorization from the Competent Authority to carry out raid and under the circumstances, he proceeded to raid. Similarly, he also informed his Superior Officer that it was also not physically possible to obtain search warrant from the Competent Court during the nocturnal hours. (Para-7)

The evidence on record clearly indicates that the Investigating Officer as well as raiding officers had clearly admitted that they had not proved the aforesaid report regarding the secret information as well as for making report under Section 42(2) of the NDPS Act but, in fact, the same was received by the Police Inspector, Bhavnagar. Since,

the learned Trial Court recorded the findings that the investigating bench failed to compliance with the mandatory provisions of Section 42 of the NDPS Act seeking authorization as well as for making report is mandatorily envisaged under provisions of the said Act, the entire procedure is vitiated for want of compliance of the mandatory provisions of section 42 of the NDPS Act. Incidentally, this Court while going through the paper book also noted that though the contraband articles were came to be found from the presence of both the accused, who are women and minor Sultan and the search was undertaken during the nocturnal hours at around 20:50 hours, they were not informed in letter and spirit as laid down by the various decisions of the Supreme Court informing that the search and seizure against them could be carried out in presence of either Magistrate or the Gazetted Officers and there was violation of Section 50 of the NDPS Act, 1980. (Para-8)

Counsel:- ***For Appellant(s):*** *Ms Hansa Punani, Adv.*
For Respondent(s): *Mr Mihir H Pathak, Adv.*

JUDGMENT

R.P.DHOLARIA, J.: - 1. By way of this appeal under Section 378(1)(3) of the Code of Criminal Procedure, 1973, the appellant-State has challenged the judgment and order of the learned 2nd Additional Sessions Judge, Bhavnagar dated 21.09.2006 rendered in Special (NDPS) Case No.19 of 1999, whereby the learned Trial Judge acquitted the original accused-the respondents herein of the charges for the offence punishable under Sections 8B, 20B(II), 29 and 2 of the Narcotic Drugs and Psychotropic Substances Act, 1985(for short "the N.D.P.S Act").

2. The Record and Proceedings clearly indicate that in all there are three persons against whom chargesheet came to be filed, out of them one was minor, whose case was separated and sent before the learned Juvenile Court. Respondent no.1 namely Ibrahim @ Dhafo Ismail Tarkvadiya expired on 10.01.2013 during the pendency of this appeal. Consequently, therefore, appeal against him stands abated in view of Section 394 of the Code of Criminal Procedure. Though, rule is already served to respondent no.2, she has chosen not to remain present.

3. The precise facts giving rise to the present appeal are as under:

3.1 On 26.08.1991, the Police Sub Inspector, Mr. S.H.Kathi, who at the relevant point of time, was serving with Local Crime Branch, Bhavnagar received secret information from his secret source that one Ibrahim, who is resident of Khatkiwad, situated near by Rajshree cinema was dealing with Charas and he had kept the said contraband articles at his residence. Upon receiving such information, the said Police Sub-Inspector had got it verified through his subordinate Police Constable Ganshyambhai, and thereafter, he made an entry in the Station Diary with regard to the receipt of the secret information. Thereafter, he prepared report that the said information received during the nocturnal hours and it was not possible to get warrant from the Competent Court to carry out search and seizure, and therefore, the team of police officials had carried out raid on the said night itself.

3.2 During the course of the said raid, respondent no.1 Ibrahim was found present at the home, but noticing the presence of the police, he run away from the place of incident. Respondent no.2 (Ibrahim's brother's wife) as well as minor Sultan were found present. While making detailed search and seizure, the contraband articles Charas in weight of 180 gms worth of Rs.18,000/- came to be recovered from them. After detailed search and seizure, necessary samples were taken, proper seal was put, memo was issued and handed over to the accused. The accused were also informed that if they want, the detailed search and seizure would be carried out in the presence of Magistrate or any Gazetted Officer. Signatures of the accused were also obtained on the said writing.

3.3 After complaint came to be filed by Mr. S.H.Kathi, Police Sub-Inspector, Local Crime Branch, Bhavanagar, the said complaint was handed over to the Police Sub-Inspector, Mr. C.K.Babaria, who after conclusion of the investigation filed chargesheet before the Competent Court for the offences punishable under Sections 8B, 20B (II), 29 and 2 of the N.D.P.S. Act. Thereafter, the case was registered as Special (NDPS) Case No.19 of 1999 before the learned Trial Court.

3.4 The prosecution has examined 8 witnesses in support of their case and produced 23 documentary evidences on the record.

3.5 At the conclusion of the trial, after recording the statements of the accused under Section 313 of the Criminal Procedure Code and hearing the arguments on behalf of the prosecution and the defence, learned Trial Court has acquitted the

accused persons from the charges levelled against them vide order dated 21.09.2006 passed in Special (NDPS) Case No.19 of 1999.

3.6 Being aggrieved by the said order of acquittal, the appellant - State has preferred the present appeal before this Court.

4. Ms. Hansa Punani, learned Additional Public Prosecutor appearing for the appellant-State has taken this Court to the entire Record and Proceedings and argued that though the contraband articles namely Charas in weight of 180 gms worth of Rs.18,000/- was recovered from the respondent Hajuben w/o Valibhai Ismail as well as minor Sultan and they were caught red-handed alongwith the said contraband articles, the learned Trial Court acquitted the accused recording findings that the compliance of mandatory provisions of Section 42 of the N.D.P.S. Act was not done. According to the learned APP, the Trial Court has failed to appreciate the evidence in its proper perspective and in fact, there was no appreciation of evidence so far and hence, the impugned judgment and order of acquittal is required to be reversed, as such.

5. As per the prosecution version, on intervening night in between 26.08.1999 and 27.08.1999, during the course of search and seizure, the complainant and other members of raiding party caught red-handed the respondents with contraband articles charas in weight of 180 gms worth of Rs.18,000/- and thereby, committed offences punishable under Sections 8B, 20B(II), 29 and 2 of the N.D.P.S. Act.

6.1 **Pw1** - Satarbhai Mahmadbhai - the Panch in whose presence search and seizure was carried out, had not supported the case of prosecution. Consequently, he was declared to be hostile to the case of prosecution.

6.2 **Pw2** - Ghanshyambhai Hadabhai Barot - the Police Constable, who at the relevant point of time serving with the Local Crime Branch, Bhavnagar, deposed that the Police Sub- Inspector, Mr. S.H. Kathi, entrusted him for work of verifying this secret information, he verified and he found it to be true and thereafter, he along with the Police Sub-Inspector, Mr. Kathi, raided the premises. He deposed in detail with regard to the procedure undertaken during the course of raid.

6.3 **Pw3**- Anniruddhsing Chudasma and **Pw-4** - Champaben Jasani - were also the members of the raiding party. They have deposed in panchnama in the line of aforesaid witness Ghanshyambhai has deposed.

6.4 **Pw-7** - Sursing Kathi - The Police Inspector deposed that while he was on duty on 26.08.1999, he received secret information at around 20:50 hours that one Ibrahim @ Dhafo resident of Khatkiwad nearby Rajshree cinema had kept contraband article Charas in his custody and selling the same. On receiving such information, he got verified through Police Constable Ghanshyambhai and he ordered to make entry in the station diary regarding the information which he has received. Thereafter, he proceeded to raid at house without obtaining any search warrant from the Competent Court as it was not possible to get it during the nocturnal hours. He was apprehending that after framing raiding party availing services of other Police Officials, Panchas and Officers, they have proceeded to carry out raid during the nocturnal hours. They prepared detailed note with regard to the compliance of the Section 42 of the N.D.P.S. Act contending that such warrant would not be possible to obtain from the Competent Court and also the detail as to how the entire search and seizure was undertaken. Panchnama was drawn. Thereafter, after completion of raid, he himself lodged the compliant.

6.5 **Pw-8** - Chhaganbhai Khetabhai Babariya - the Police- Sub-Inspector, who was entrusted investigation, recorded the statements of members of raiding party, and thereafter, sent muddamaal articles to the FSL and after completion of the investigation, filed chargesheet. In his cross examination, he admitted that the reports to the Superintendent of Police at Exhs.29 and 30 were wrongly sent to him and he had no idea as to whether such reports came to be received by the Superintendent of police. He had not inquired as such.

6. Over and above the aforesaid oral evidence certain documentary evidences are required to be noted for effective disposal of this appeal. Exh.29 is the letter prepared by Police Inspector, Mr. S.H.Kathi, informing District Superintendent of Police, Bhavnagar with regard to the secret information which he received under secret source and inter-aila stated that he has received secret information that one Ibrahim @ Dhafo resident of Khatkiwad is dealing in Charas and has got it verified through his sub-ordinate Police Constable, Ghanshyambhai. Another documentary evidence at Exh.30 was also came to be addressed on the same day, which also came to be addressed by the Police Inspector, Mr. S.H.Kathi to the District Superintendent of Police, Bhavnagar informing that in pursuant to the secret information, the team of raiding party carried out search and seizure during the nocturnal hours without obtaining search warrant

or any authorization on the part of the members of raiding party under the provisions of the N.D.P.S. Act.

7. This Court has minutely gone through the entire evidence on record. Indisputably, out of 8 witnesses examined in order to prove the case of prosecution, 7 are the police officials who were the members of the raiding party to carry out investigation thereof. Only, Pw-1 Satarbhai - the Panch who was accompanied at the time of raid along with the raiding party and in whose presence, search and seizure was carried out as well as panchnama came to be drawn, had not supported the case of prosecution. Indisputably, the entire raid was based upon the secret information received by the Police Inspector, Mr. S.H. Kathi. Thereafter, he himself had proceeded to carry out entire raid in presence of his other subordinate officials, and thereafter, he himself lodged the complaint. Thereafter, rest of the investigation was handed over to the another police Sub-Inspector Pw -8 - Mr. C.K.Babaria. Precisely, the entire case of prosecution is based upon the evidence of police officials only. During the course of raid, presence of the lady accused as well as minor Sultan were found at the residence and they were caught red-handed alongwith contraband articles in the Jar as well as from the pocket of the minor Sultan during the nocturnal hours, appears to be suspicious. The documentary evidences which are confessional in nature, executed during the stage of trial, even statement of accused as well as other documents are also not admissible as such. Indisputably, Pw-7- Mr. S.H.Kathi holding post of Police- Inspector and all other members of raiding party were his subordinates. They are not authorized officers. Subsequently, therefore, they prepared report which came to be produced at Exh.29 indicating that it was not possible to seek authorization from the Competent Authority to carry out raid and under the circumstances, he proceeded to raid. Similarly, he also informed his Superior Officer that it was also not physically possible to obtain search warrant from the Competent Court during the nocturnal hours.

8. The evidence on record clearly indicates that the Investigating Officer as well as raiding officers had clearly admitted that they had not proved the aforesaid report regarding the secret information as well as for making report under Section 42(2) of the NDPS Act but, in fact, the same was received by the Police Inspector, Bhavnagar. Since, the learned Trial Court recorded the findings that the investigating bench failed to compliance with the mandatory

provisions of Section 42 of the NDPS Act seeking authorization as well as for making report is mandatorily envisaged under provisions of the said Act, the entire procedure is vitiated for want of compliance of the mandatory provisions of section 42 of the NDPS Act. Incidentally, this Court while going through the paper book also noted that though the contraband articles were came to be found from the presence of both the accused, who are women and minor Sultan and the search was undertaken during the nocturnal hours at around 20:50 hours, they were not informed in letter and spirit as laid down by the various decisions of the Supreme Court informing that the search and seizure against them could be carried out in presence of either Magistrate or the Gazetted Officers and there was violation of Section 50 of the NDPS Act, 1980.

9. This Court, therefore, of the considered opinion that the findings recorded by the Trial Court in acquitting the accused of the charges levelled against them are absolutely just and proper and in recording the said findings, no illegality or infirmity has been committed by it. This Court in complete agreement with the reasonings given and the findings arrived at by the Trial Court. No interference is warranted with the judgment and order of the Trial Court.

10. In view of the above discussions, This Court is of the opinion that the learned Judge committed no error in passing the impugned judgment and order. Hence, the present appeal deserves to be dismissed.

11. In the result, the appeal fails and is ***dismissed***. The judgment and order of the Trial Court dated **21.09.2006** stands confirmed. Bail and bail bonds of the accused, if any, stands discharged. R & P be sent back to the concerned Trial Court, forthwith.

***Result*:-** Appeal Dismissed.