

State Of J&K vs Shabir Ahmed Bhat And Others on 31 August, 2022

Author: Rajnesh Oswal

Bench: Rajnesh Oswal

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

Reserved on : 24.08.2022

Pronounced on: 31.08.2022

CRAA No. 43/2013

State of J&K

.....Appellant(s)/Petitioner(s)

Through: Mr. Amit Gupta, AAG.

vs

Shabir Ahmed Bhat and others

..... Respondent(s)

Through: None.

Coram: HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE
HON'BLE MR. JUSTICE RAJESH SEKHRI, JUDGE
JUDGEMENT

1. This appeal is directed against the judgment dated 19.11.2012 passed by the court of learned 2nd Additional Sessions Judge, Jammu (hereinafter to be referred as the "trial court") in file No. 1/Sessions titled "State of J&K Vs. Shabir Ahmed Bhat and others" arising out of FIR No. 17/2006 registered with Police Station, Bahu Fort, Jammu, for commission of offence under Section 21 NDPS Act, whereby the respondents have been acquitted by the learned trial Court.

2. The present appeal has been filed on the ground that the learned trial court has not properly appreciated the evidence, as the prosecution had established the case against the respondents by adducing documentary as well as oral evidence, that was sufficient to prove the guilt of the respondents.

3. Mr. Amit Gupta, learned AAG vehemently argued that the prosecution had successfully proved the case against the respondents beyond any reasonable doubt but despite that the learned trial court has acquitted all the respondents by wrongly appreciating the evidence.

4. Heard and perused the record of the trial court including the judgment impugned.

5. The case of the prosecution as it emerges from the charge-sheet is that on 24.02.2006,

information was received from a reliable source that at yard No. 6, near Javed Hotel, one Tata Sumo bearing registration No. JK08A- 5463 was parked, in which three persons were sitting and they were having narcotic drugs for the purpose of sale. On receipt of this information, FIR bearing No. 17/2006 for commission of offence under Section 21 of NDPS Act was registered and investigation was handed over to Nazir Ahmed-Sub Inspector, Incharge Police Post, Narwal. He along with other Police officials i.e. Head Constable Mohan-91/J, Constable Surinder Kumar-2774/J, Constable Tara Chand-3112/J, Constable Ghulam Mohammad-2258/J, and Constable Mohd. Sadiq 2742/J reached on spot and found one Tata Sumo bearing registration No. JK08A-5463 parked at yard No. 6, near Javed Hotel, Narwal. Besides driver, two other persons were also found sitting in the said Tata Sumo. An enquiry was made from them and during enquiry they disclosed their names as Shabir Ahmed Bhatt S/o Ghulam Qadir Bhat R/o Verinag, Tehsil Duru, District Anantnag-Driver of the Tata Sumo, Ashiq Hussain Malik S/o Ghulam Rasool Malik R/o Verinag Tehsil Duru, District Anantnag and Tahir Ahmed S/o Mohd. Abdullah R/o Nowgam, Banihal, District Doda. They were given an option of search and thereafter their search was conducted in presence of SDPO City (East), Jammu. Vehicle- Tata Sumo was also searched and during search narcotic drugs weighing 68 grams were recovered from Shabir Ahmed Bhatt. Besides Rs. 2,250/-, one identity card was also recovered from the left pocket of his pant. One packet having narcotic drug weighing 17 grams and 2 packets having narcotic drugs weighing 34 grams i.e. total 51 grams were recovered along with two identity cards, one watch and Rs. 8,720/- from right pocket of the pant of accused- Ashiq Hussain and one packet having narcotic drug weighing 17 grams and two packets having narcotic drugs weighing 34 grams i.e. total 51 grams along with Rs. 9,200/- and one Nokia Phone, one election card and one identity card were recovered from accused-Tahir Ahmed. The narcotic drugs were weighed and they were found to be 170 grams. They were seized on spot and samples weighing 5 grams each were also extracted for the purpose of chemical examination. Recovered packets containing narcotic drugs were marked as A, B, C, D, E, F and the samples were marked as A-1, B-1, C-1, D-1, E-1, F-1. Tata Sumo was also seized. Statements of witnesses were recorded under Section 161 Cr. P.C. FSL report was also obtained and as per the report "Heroin" was detected in the samples sent for chemical examination. After conclusion of the investigation, the charge-sheet for commission of offence under Section 21 NDPS Act was filed against the respondents. The respondents were charged for commission of offence under Section 21 (B) NDPS Act vide order dated 24.07.2006. The prosecution was directed to lead evidence as the respondents did not plead guilty.

6. Out of total 15 witnesses cited by the prosecution, 7 witnesses were examined whereas two witnesses i.e. PW1-Javed Iqbal and PW2-Sham Lal were given up by the prosecution. After closure of the prosecution evidence, the statements of the accused/respondents in terms of Section 342 Cr. P.C. were also recorded. After hearing the parties, the learned trial court vide judgment impugned acquitted the respondents.

7. In order to examine as to whether the learned trial court has rightly appreciated the evidence or not, it is apt to have a brief resume of the relevant portion of the prosecution evidence and the same is reproduced as under:-

8. PW3-Kewal Krishan stated that he does not know the accused. The Police asked him to come to the Police Station with the weighing scale and weights and he accordingly went to the Police Station

along with the weights and weighing scale. He expressed his ignorance about the nature of the thing that was weighed by him. He was declared hostile and despite cross examination, no incriminating material could be extracted by the learned Additional Public Prosecutor from him.

9. PW4-Surinder Pal (Constable) stated that he knows the accused present in the court and others as well. On 24.02.2006 he was posted at Police Post, Narwal and in the evening, Incharge Police Post received an information that a Tata Sumo bearing registration No. JK08A-5463 has been parked near Javed Hotel, Narwal at yard No. 6 in which three persons were sitting and they were having narcotic drugs. Sub Inspector- Nazir Ahmed along with his associates reached on spot and on seeing the Police, the respondents tried to run away but the Police gheraoed them. SDPO/SP city came on spot. Opinion was sought from the respondents as to whether they want themselves to be searched from the Magistrate or from the SDPO. They consented for their search from the Magistrate available on spot. He signed the said docket along with Narinder Kumar and Javed Ahmed. The dockets were marked as EXPW-SK, EXPW-SK/1 and EXPW-SK/2. From the accused-Shabir Ahmed, four packets weighing 46 grams having narcotics of brown colour were recovered. One more packet containing powdered substance weighing 24 grams was also recovered from him. Likewise from accused-Ashiq Hussain, three packets, one weighing 17 grams and other two weighing 34 grams in total were recovered. Simultaneously, from accused-Tahir Ahmed one packet weighing 17 grams and two other packets weighing 34 grams were recovered. 5 grams was extracted from each of the packet as sample. In cross-examination, he stated that the In-charge Police Post told him that he received information 5-7 minutes prior to 7.00 P.M. and they reached on spot within 4-5 minutes. All the three accused were sitting on the front seat of the vehicle. SP reached there after 5-7 minutes of their arrival. Sub Inspector-Nazir Ahmed searched the accused after bringing them out of the Vehicle. Four packets were recovered from the right pocket of the pants of the accused-Shabir Ahmed Bhat. Two Packets were also recovered from the back pockets of pant of each of the accused-Tahir Ahmed and Ashiq Hussain. All the four packets were weighed collectively. Weights were brought by the Gold Smith. Samples were not extracted from each of the packets. SHO did not seal the packets with his own seal. At 8.00 P. M. they returned back to the Police Post.

10. PW5-Mohd. Sadiq (Constable) stated that he knows the accused. On 24.02.2006 he was on patrol duty along with the In-charge Police Post, Narwal-Nazir Ahmed-ASI, Head Constable-Mohan Lal, Constables-Gh. Mohd., Tara Chand and Surinder Kumar. They found a Tata Sumo bearing registration No. JK08A-5463 of Maroon colour coming from Yard No. 7 to Yard No. 6 of Transport Nagar. In-charge Police Post- Nazir Ahmed stopped the said vehicle. The accused were travelling in the same. He enquired their names and the driver disclosed his name as Shabir Ahmed Bhat. The accused tried to flee. Option was given to them as to whether they want themselves to be searched by the Magistrate or some Gazetted Officer. Accused opted for getting themselves searched from SP-SDPO. Thereafter, SDPO-Rajinder Gupta was requested through wireless message for coming on spot. He came on spot. Thereafter, the accused were searched in his presence by Officer In- charge Police Post and Head Constable. During search, four packets were recovered from accused Shabir Ahmed but he does not remember the weight of each of the packet. Three packets were recovered from accused Ashiq Hussain. Three packets were also recovered from accused-Tahir Ahmed. Five grams was extracted as sample from each of the packets recovered from the accused. Seizure memos were prepared and sealed. Seal was kept on supurdnama of Javed Iqbal. He proved the supurdnama

marked as EXPW-MS. In cross examination, he stated that the vehicle in question was earlier parked in front of shops at Yard No. 6. He does not remember as to when the vehicle was parked there. He could not identify the accused-Ashiq Hussain amongst the accused present in the court and also he could not identify the other accused. He further stated that he knows only Shabir Ahmed and Tahir Ahmed because they remained in their custody. He cannot tell after how much time SDPO came on spot after the message was sent to him, however, he came on spot after 15-20 minutes. Two packets from right pocket and two from left pocket were recovered from the pant of accused Shabir Ahmed. Three packets were recovered from the pocket of pant of accused-Tahir Ahmed. Two packets were recovered from the right pocket of the pant and one packet was recovered from left pocket of the pant of accused-Ashiq Hussain. Some civilians namely Javed Iqbal, Sham Lal and Som Nath came on spot. Narcotic was in granule form. There were total 10 packets. Five grams was taken out from each packet as sample. SDPO and Officer Incharge signed on the packets after sealing them. Signatures of this witness were not obtained on the same.

11. PW7-Tara Chand (Constable) stated that on 24.02.2006 he was posted at Police Post, Narwal and in the evening at 7.00 P.M. he along with Constables-Surinder Kumar, Mohd. Sadiq, Gh. Mohd, Head Constable- Mohan Lal and Sub Inspector-Nazir Ahmed were going towards Yard No. 6 for investigation of the present case. Tata Sumo bearing registration No. JKO8A-5463 was parked there. Three persons were sitting in the said vehicle. As soon as they reached near the vehicle, the accused tried to run away but they were gheraoed. The driver disclosed his name as Sanjay Kumar and the others disclosed their names as Ashiq Hussain and Tahir Ahmed. Thereafter, by a written docket, Sub-Inspector told them that he was interested to search them and simultaneously they were asked as to whether they want themselves to be searched through Magistrate or some Gazetted Officer. In reply, all the three opted for getting themselves searched from SDPO. In the meanwhile, the SDPO also came on spot and Sub Inspector-Nazir Ahmed searched the accused in presence of SDPO. Three packets having narcotic drugs in the form of granules were recovered from the accused-Shabir Ahmed who was the driver of the Tata Sumo. One more packet containing brown powder was recovered from him. Three packets weighed 44 grams and fourth packet of brown powder was having weight of 24 grams. From accused-Ashiq Hussain two packets of brown powder and one packet of granules substance were recovered. Two packets weighed 34 grams and third one weighed 17 grams. It was morphine. From accused-Tahir Ahmed one packet of granular substance and two packets containing powdered substance were recovered. Two packets weighed 34 grams and third one was having weight of 17 grams. Tata Sumo was also seized. Five grams of narcotic substance was extracted from three packets containing granular substance as sample. Similarly, 5 grams from the packets having powdered substance were also extracted as sample. Samples were marked as A-1, B-1, C-1 and D-1. The narcotics were also sealed and were marked as A, B, C, and D. Ring was kept on supurdnama of Javed. Weighing scale was brought from Goldsmith and supurdnama regarding weighing scale was marked as Ext-P. He identified his signatures on Ext- P. In cross-examination he stated that at 7.00 P.M. they proceeded from Police Station. Nazir Ahmed got information regarding the parking of Tata Sumo and they left from the Police Station and reached Yard No. 6 within 10-15 minutes. SDPO was informed by the Sub Inspector-Nazir Ahmed and SDPO came there within half an hour. He does not know as to whether the pocket was inside the Phiran or outside it. Packets were recovered from the pant of Ashiq Hussain. He does not remember from where the packets were recovered from third accused. None of the accused signed the packets. SDPO also did not put

his signatures over the same.

12. PW8-Mohan Lal (Head Constable) stated that he knows the accused.

On 24.02.2006 he was posted at Police Post, Narwal. On the same day, In-charge, Police Post, Narwal-Nazir Ahmed received information that three persons are boarding Tata Sumo bearing No. JK08A-5463 and they are having narcotic drugs in their possession. After recording the report, he along with officer Incharge, Constables-Tara Chand, Ghulam Mohd. Mohd. Sadiq and Constable-Surinder Kumar proceeded for Yard No. 6, Transport Nagar, Jammu, where they found Tata Sumo parked and three persons were sitting in the same. Thereafter, SDPO-City East namely Sh. Rajinder Kumar came on spot on the request of Officer Incharge, Police Post, Narwal. In his presence, officer In-charge searched the respondents and Tata Sumo. Three packets of granular substance were brought out from the Phiran of the accused-Shabir Ahmed and one packet containing powder was also recovered from him. Granular substance was weighed and the same was found to be weighing 44 grams and packet containing powdered substance was weighing 24 grams. Accused-Ashiq Hussain was having one packet of granular substance and two packets of powdered substance. All the three packets were weighed and were found to be weighing 51 grams. Out of these three packets one packet was weighing 17 grams. From accused-Tahir Ahmed, two packets of powdered substance and one packet of granular substance were recovered. Each of those packets was weighing 17 grams. Total packets were weighing 51 grams. Five grams of narcotics was taken out as sample from each of the seized packets. In cross-examination, he stated that at 7.00 P.M. the information was received and they proceeded from the Police Post at about 7.15 P.M. After reaching on spot, the SDPO came there within 2 minutes. Recovered material was weighed by Goldsmith. He does not remember as to what item other than the contraband was recovered from the accused during their search. Granular substance and powdered substance were separately packed. Samples of those were also separately packed. In his presence, none of the witnesses signed on the seizure memo.

13. PW-Rohit Koul, Assistant Scientific Officer stated that on 02.03.2006 six sealed packets were forwarded by SDPO City (East) Jammu in case FIR No. 17/2006 for commission of offence under Section 21 NDPS Act vide letter No. 1660-SDEC-J dated 01.03.2006 through Constable-Zaffar Iqbal No. 516 of Police Post, Narwal which were marked as A-1, B-1, C- 1, D-1, E-1 and F-1. All the six packets were having intact seals and they were found to contain some light brown colour material in each packet. Each packet weighed 5 grams respectively. They were marked as exhibit No. K-285/2006 to K-290/2006 respectively. They were subject to various chemical and chromatographic examination and they were identified as "Heroin". The report dated 04.04.2006 (Ext-RK) was proved by him.

14. PW9-Jawed Ahmed Bhat stated that the vehicle-Tata Sumo bearing registration No. JK08A-5463 was kept on his supurdnama.

15. As is evident from the charge-sheet, all the three respondents were given an option vide exhibit EXPW-SK, EXPW-SK/1 and EXPW-SK/2 as to whether they want themselves to be searched in presence of the Magistrate or Gazetted Officer. In order to prove the said memos, the prosecution

has cited PW1-Javed Iqbal and PW4-Constable Surinder Pal. The prosecution dropped the PW1-Javed Iqbal and did not examine him and examined only the PW4-Constable Surinder Pal, who has stated that the respondents opted for their search from the Magistrate available on the spot. A perusal of the record further reveals that the search has been conducted in presence of Rajinder Gupta-SP/SDPO City (East), Narwal, Jammu. Thus, the exhibits EXPW-SK, EXPW-SK/1 and EXPW-SK/2 run contrary to the statement made by the PW4-Constable Surinder Pal. As the recovery has been effected from the personal search of the respondents, the Investigating Officer was required to comply with the provisions contained in Section 50 of the NDPS Act. The prosecution in the instant case has miserably failed to prove by cogent evidence that the requirements of Section 50 of the NDPS Act were complied with by the Investigating Officer. Besides non compliance, there are material contradictions between the statements of the PW5-Mohd. Sadiq, PW4- Surinder Pal and PW7-Tara Chand. PW5-Mohd. Sadiq has stated altogether a different story by stating that a Tata Sumo was going from Yard No. 7 to Yard No. 6 and it was stopped by Nazir Ahmed-ASI whereas the prosecution story is that the said vehicle was parked at Yard No. 6 near Hotel Javed, Narwal, Jammu. More so, PW5-Mohd. Sadiq stated that two packets each were recovered from right and left pocket of the pant of accused-Shabir Ahmed whereas PW4-Surinder Pal stated that 4 packets were recovered from the right pocket of the pant of accused- Shabir Ahmed and 1 packet was recovered from back pocket of his pant. Also, PW5-Mohd. Sadiq could not identify the accused/respondent-Ashiq Hussain and could not identify the other accused by their names in the Court. PW5-Mohd. Sadiq stated that three packets were recovered from pant of accused-Tahir Ahmed whereas PW4-Surinder Pal stated that 2 packets each were recovered from the back pockets of each of the accused-Tahir Ahmed and Ashiq Hussain. PW-7 Tara Chand has further demolished the prosecution case by stating that two different substances one in granular form and the other in powdered form were recovered and they were separately packed. This runs contrary to the FSL report (Ext- RK). These are the material contradictions those assume significance in view of the fact that the independent witnesses have been given up by the prosecution.

16. Further, perusal of the seizure memos reveal that the PW1-Javed Iqbal and PW2-Sham Lal have been cited as marginal witnesses to the seizure memos and the PW12-Rajinder Gupta has certified the said seizure memos that search has been made in his presence. Neither PW12- Rajinder Gupta nor PW1-Javed Iqbal and PW2-Sham Lal have been examined by the prosecution and as such the seizure memos have remained unproved on record.

17. Further, from record it is not forthcoming that after the seizure of the contraband and after samples were extracted from the contraband, they were kept in safe custody. In this case, neither the receipt nor any record regarding the deposit of the contraband and its samples in Malkhana- Police Station, Bahu Fort has been placed on record. Also the In-charge Malkhana has not been examined by the prosecution. As such, doubt is created as to whether the samples those were extracted from the seized contraband were the same, those were sent to FSL for chemical examination or not. It assumes significance in view of the fact that recovery was effected on 24.02.2006 and the seized contraband as well as samples were re-sealed on 28.02.2006 and thereafter, they were sent to FSL on 02.03.2006. Even resealing of the samples has not been proved, as PW10-Sh. Dev Raj-Naib Tehsildar, who resealed the samples and the remaining contraband was never examined by the

prosecution. Thus, the link evidence is also missing in the instant case.

18. Last but not the least, non examination of the Investigating Officer is also fatal to the prosecution case. We have gone through the judgment passed by the learned trial court carefully and we find that the learned trial court has rightly acquitted the respondents. We find, in view of the non examination of the material witnesses, the trial court had no other option but to acquit the respondents, but at the same time we do not agree with one of the reasoning of the learned trial court while acquitting the respondents/accused that the Investigating Officer who happens to be the complainant as well, should not have Investigated the case. However, the learned trial court has meticulously considered all the other issues while acquitting the respondents.

19. Viewed thus, we do not find that there is any perversity in the judgment impugned, passed by the learned trial court, rather on the basis of the evidence led by the prosecution, the only option available before the trial court was to acquit the accused-respondents. As such, the judgment impugned is upheld. The present appeal is dismissed.

20. Record of the trial court be sent back forthwith.

(RAJESH SEKHRI)
JUDGE

(RAJNESH OSWAL)
JUDGE

Jammu
31.08.2022
Sahil Padha

Whether the order is speaking:	Yes/No
Whether the order is reportable:	Yes/No