

HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU

Cr. Acq. Appeal No. 21/2013

Date of Order: 26 .04.2013

State of J&K.	V.	Ashfaq Ahmed Sofi & anr.
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Coram:

Hon'ble Mr. Justice Mohammad Yaqoob Mir, Judge.
Hon'ble Mr. Justice Bansi Lal Bhat, Judge.

Appearing Counsel:

For Appellant(s) : Mr. B. R. Chandan, GA.

For Respondent(s) : Mr. M. A. Bhat, Advocate.

i)	Whether approved for reporting in Press/Media	:	Yes
ii)	Whether to be reported in Digest/Journal	:	Yes

Per Bansi Lal Bhat-J

This Appeal is directed against Judgment dated 28.08.2012 passed by learned Sessions Judge, Rajouri in case File No. 29/Challan titled *State v. Ashfaq Ahmed Sofi & anr.* in terms whereof respondents Ashfaq Ahmed Sofi and Iftar Ahmed Bhat (hereinafter referred as **accused**) have been acquitted of Offences under *Sections 8/21 of Narcotic Drugs and Psychotropic Substances Act, 1985*. The impugned Judgment has been assailed on the ground that the learned Trial Court has failed to appreciate the evidence brought on record by prosecution properly and it is contended that the prosecution evidence on record warrants conviction of accused on the aforesaid charges.

Heard the rival sides at the Admission Stage and perused the impugned Judgment.

The prosecution case, **in a nutshell**, is that on 21.09.2011 SDPO Thana Mandi had laid a Naka at TCP Thana Mandi. While checking vehicles at Naka Point a Tata Sumo bearing Registration Number JK13/1999 coming from Srinagar and proceedings towards Rajouri was subjected to checking. Three persons were traveling by the said vehicle in addition to the Driver. One of the passengers was found behaving suspiciously. On questioning by Police he disclosed his identity as Ashfaq Ahmed Sofi and stated that he was carrying narcotic substance viz. Heroine in a Polythene bag which was meant for delivery to co-accused Iftar Ahmed Bhat. His personal search yielded a Polythene Bag containing a substance weighing 500 gms which was seized on spot. Accused was apprehended by the Police. A Docket was sent to Police Station Thana Mandi for registration of FIR. The investigation culminated in filing of the Charge Sheet against the accused. However, the learned Trial Court, on consideration of the material assembled during investigation, discharged co-accused Iftar Ahmed Bhat. Accused Ashfaq Ahmed Sofi was charged for commission of Offences under Section 8/21 of NDPS Act. Since he pleaded not guilty and claimed to be tried. Prosecution adduced evidence at the trial. It has examined Mohd. Iqbal, Altaf Hussain, Mohd. Sageer, Mohd. Arif, Mohd. Zakheer, Suresh Kumar, Mohd. Sabar, Raj Kumar, Pawan Abrol and Niyaz Ahmed-Inspector as prosecution witnesses at the trial.

After closing of the prosecution evidence, the lone accused facing trial was examined to explain the incriminating circumstances emanating from prosecution evidence. He denied the allegations leveled by prosecution witnesses and claimed to be innocent. He did not adduce evidence in defence.

PW-Mohd. Iqbal –Constable deposed that on the eventful day a Tata Sumo No. 1999/JK13 coming from Srinagar side was intercepted at TCP Thana Mandi. It happened at 11.30 am. Three passengers were found inside the vehicle. One of the passengers tried to conceal something. He was asked to alight from vehicle. On enquiry he disclosed his name as Ashfaq Ahmed. He handed over a Polythene Bag containing Heroine to SDPO. A Docket was sent to Police Station for registration of case. SHO arrived on spot. SDPO handed over the recovered Heroine together with Recovery Memo to SHO. His **cross examination** reveals that Police party comprised of 7/8 personnel.

PW-Altam Hussain-Constable has deposed on identical lines. He further stated that a sample of 20 gms was taken by SHO after recovered substance was weighted and found to be 500 gms. The witness proved the Recovery Memo EXTP-2/1 and the Seizure Memo EXTP-2/2. His **cross examination** reveals that Heroine was not recovered from personal search of accused and SDPO had not informed the accused that he had an option of being searched by a Gazetted Officer or a Magistrate.

PW-Mohd. Zakheer-Constable also supported these witnesses in regard to search and recovery of the substance alleged to be Heroine. According to his testimony the accused

handed over Polythene bag containing Heroine to SDPO when the vehicle was stopped for being searched. It is in his **cross examination** that the accused alongwith contraband was brought to the Police Station where the contraband was handed over by SDPO to SHO.

PW- Mohd. Sageer-Constable, who too was a Member of Naka Team, supported the other witnesses in regard to recovery of Heroine. According to his account, the accused handed over a bag containing Heroine to the SDPO. SHO was called on spot and the accused as also the documents prepared on spot were handed over to SHO. It is in his **cross examination** that the vehicle was searched by SDPO himself and the Recovery Memo was also prepared by SDPO on spot. No Magistrate was called on spot. The bag containing Heroine was handed over by SDPO to SHO and no sample of contraband was lifted in his presence.

PW-Mohd. Arif-Constable has deposed that accused brought out a Polythene Bag from his luggage when the SDPO enquired about his particulars after the vehicle was intercepted at Naka Point. The bag containing Heroine was seized. A Docket was sent to Police Station and SHO came on spot. Heroine and its Seizure Memo were handed over to SHO.

In **cross examination** he stated that there was prior information that the accused was carrying contraband in the vehicle. The Polythene bag was brought by accused from the luggage kept in the vehicle. No Magistrate was called on spot. No sample was taken from the seized contraband.

PW-Suresh Kumar-Constable deposed that when the Sumo was stopped for search, accused traveling therein started

trembling out of fear and informed SDPO that he was having Heroine in his possession. He handed over the Polythene Bag to SDPO and the Heroine was seized on spot. A Docket was addressed to SHO who came on spot and the seized Heroine together with Seizure Memo was handed over to him. Sample of seized contraband was not taken in his presence.

PW-Mohd. Saber-Constable deposed that accused traveling in Tata Sumo handed over a Polythene Bag containing Heroine to SDPO which was seized on spot.

In his **cross examination** he stated that information was given to Police Station. SHO arrived on spot. Accused along with contraband was handed over to him.

PW-Raj Kumar- stated that it was **evening time** when a Tata Sumo coming from side of Dera Gali was stopped at Naka as the accused tried to conceal something, he was asked to get down from the vehicle. He alighted from the vehicle and handed over a bag containing Heroine to Police. Docket was sent to SHO who came on spot and seized the Heroine and the documents. The witness supported the Recovery Memo and Docket.

In **cross examination** stated that there was no prior information about the carrying of Narcotic by the accused. He denied that the accused had brought out the bag containing Heroine from his luggage. He did not support the Docket to the extent that SHO was with him at the time of recovery of contraband. He also did not support the Recovery Memo to the extent that Heroine was recovered from personal search of accused.

PW-Pawan Kumar Abrol- Assistant Scientific Officer, FSL deposed that he had examined the contents of sealed packet received in his office on 23.09.2011 through ASI Som Dutt. On examination it was found that the sample contained Dicetyl Morphene (Heroine). He proved the certificate marked EXTP-A.

PW- Niyaz Ahmed-Inspector is the Investigating Officer. He claimed that he was accompanying SDPO Thana Mandi at TCP for checking of vehicles. The Tata Sumo in question was intercepted at 5.30 pm. Accused traveling by the same vehicle was searched by SDPO. Accused told SDPO that he was having Heroine in his possession which was to be delivered to Iftar Ahmed at Rajour. A black colored packet containing Heroine was recovered from the possession of accused. Same was seized on spot. It contained Narcotic substance weighing 500 Gms. FIR was registered on the Docket of SDPO. The witness claimed that he had prepared the Site Plan, Recovery Memo and Seizure Memo of the Heroine, he lifted the sample of contraband and got it resealed from FSL Jammu. He recorded the statement of witnesses and found the accused involved in commission of alleged offence.

His **cross examination** reveals that checking at the Naka Point was started at 5.30 pm. He was with SDPO when search of the vehicle was conducted. He denied the suggestion that he was not accompanying SDPO at the time of recovery of contraband. He has further stated that the contraband was recovered at the instance of accused **from beneath the seat of vehicle**. He denied that Heroine was recovered from personal

search of accused. He has further stated that the Heroine was seized on spot but it was not sealed.

A *cursory look* at the summary of prosecution witnesses incorporated in the impugned Judgment brings it to fore that the evidence adduced by prosecution gives conflicting versions in respect of material particulars. There is no *love lost* amongst the prosecution witnesses in regard to the time of conducting of search and effecting seizure of substance alleged to be Heroine from the possession of accused and the manner and circumstances attending upon such search and seizure. It is shocking that the prosecution witness examined at the trial, despite belonging to Police establishment, came up with inconsistent versions in material particulars of alleged occurrence. It is flabbergasting that while PW(s) Mohd. Iqbal, Altaf Hussain, Mohd. Zakheer, Mohd. Sageer, Mohd. Arif and Suresh Kumar-Constable(s) claimed that the search and seizure of contraband from the possession of accused was effected when the Tata Sumo coming from Dhera Gali side was intercepted at Naka Point at **11.30 am**, PW(s) Raj Kumar and Niyaz Ahmed-Inspector claimed that the vehicle was intercepted at **5.30 pm**. This apart while some witnesses claimed that the accused on being questioned by the SDPO delivered bag containing 500 gms of Heroine to SDPO informing him that he was carrying the same for delivering it to co-accused Iftar Ahmed at Rajouri, others reiterated that the bag was lying under the seat and it was recovered during search. It also appears that while all witnesses except Niyaz Ahmed-Inspector deposed that SHO was not accompanying SDPO and it was only after effecting recovery of contraband

from the possession of accused by SDPO that a Docket was sent to Police Station and SHO arrived on spot, PW-Niyaz Ahmed-Inspector has maintained that he was accompanying SDPO at TCP for checking of vehicles and it was in his presence that the accused laid the information before the SDPO about the illegal possession of Heroine by him followed by recovery of contraband which was seized on spot.

Perusal of Recovery Memo and Seizure Memo and the Docket sent to Police Station for registration of case reveals that Heroine was recovered from personal search of the accused. The factual position emerging from this contemporaneous record runs parallel to the ocular testimony of most of the witnesses who maintained that the recovery of bag containing Heroine was effected from beneath the seat inside the Tata Sumo. Apart from the major contradictions brought out in regard to the time of occurrence when search, seizure and recovery of contraband was conducted and assuming that factual position emanating from the Recovery memo, Seizure Memo and the Docket sent to Police Station for registration of case is the correct version, there is no evidence on record to arrive at a finding that a meaningful option was given to the accused for his search before a Magistrate or any of the Gazetted Officers specified in *Section 42 of the NDPS Act*. There is nothing on record even to suggest that upon receiving of information about illegal possession of Heroine by accused, he had taken down the same in writing and that he had sent a copy thereof to his immediate official superior within 72 hours as mandated under *Section 42 of NDPS Act*. No memo has been drawn up in this regard and no evidence

adduced in regard to compliance of mandatory provisions of *Section 42, 50 and 57 of NDPS Act*.

What is worst is that identity of SDPO has not been disclosed and he has not been produced and examined at the trial to prove that the exercise of search, seizure and recovery of contraband and the arrest of accused was a *legitimate and lawful exercise* conducted in conformity with the mandatory provisions of NDPS Act. The evidence tendered by the prosecution witnesses comprise of only Police Personnel who were members of *Naka team*. It is shocking that they have given two different, inconsistent and mutually exclusive versions in regard to time of search at Naka, the manner in which the recovery was made and in regard to sealing of material and lifting of sample from the recovered substance.

On a cumulative consideration of the facts and circumstances projected by evidence we find it ***extremely hazardous and unsafe to rely*** on either of the inconsistent conflicting versions. The case is doomed to fail as it has before the learned Trial Court. The failure is squarely attributed to the shoddy investigation and the conduct of officers comprising the Naka team. This conclusion is deductable on the basis of appreciation of prosecution evidence. The recovery of Narcotic substance identified as Dicetyl Morphene from the person of accused in the manner alleged is highly doubtful. Admittedly, the recovered substance was neither sealed nor was a sample lifted on spot to attach any credibility to the prosecution version that the sample analyzed at FSL did represent the recovered substance.

We find *no compelling and substantial reasons* to take a view different from one taken by the learned Trial Court on appreciation of evidence.

Appeal is, accordingly, **dismissed**.

(Bansi Lal Bhat)
Judge

(Mohammad Yaqoob Mir)
Judge

Jammu:

Sunita.

26.04.2013