

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

CrlA(D) No. 50/2022

Amir Ahmad Bhat

..... Appellant (s)

Through: Mr. Bhat Shafi, Adv.
with Mr. Abdul Basit Bhat, Adv.
V/s

Union Territory of J&K and Ors.

..... Respondent(s)

Through: Mr. Mubeen Wani, Dy. AG.

Coram:

Hon'ble Mr. Justice Atul Sreedharan, Judge.
Hon'ble Mr. Justice Sanjay Dhar, Judge.

JUDGMENT (ORAL)

19.12.2023

The present appeal has been filed by the appellant against the judgment of conviction dated 11.10.2022 passed in a case arising from FIR No. 01/2022 of Police Station, Zainapora for offence under Section 8/20 of NDPS Act. The Ld. Trial Court found the appellant guilty of having stored in his house, four nylon bags of contraband weighing 42 kilograms and one nylon bag containing 2 kgms for which he was sentenced to undergo 15 years of rigorous imprisonment.

2. The brief facts of the case are as follows. On 14.02.2022, Police Station, Zainapora, received a source information to the effect that the appellant Amir Ahmad Bhat, a resident of village Awneera, Zainapora, has

concealed some narcotics in his house with the intention of selling it.

FIR No. 01/2022 was registered for the offences under Section 8/20 of the NDPS Act and investigation was set into motion.

3. During investigation, search warrant of the appellant's residential premises was obtained from the Executive Magistrate, Zainapora, and in the presence of the Executive Magistrate, house of the appellant Amir Ahmad Bhat was searched and five nylon bags filled with ground Narcotics drug (Charas powder) was recovered from under the roof of the appellant's house. The Narcotic was weighed using digital weighing scale. Four of the nylon bags weighed 42 Kgs and one nylon bag was weighed 2 Kgs.
4. Samples were collected in presence of Executive Magistrate for FSL examination. The packets of samples were sealed and remaining Narcotics substance was packed in five bags and were sealed. Seizure memo and site maps were prepared, and the statements of the witnesses were recorded. During recording of the statement of the witnesses, it was revealed that the accused Ghulam Hassan Bhat S/o Bashir Ahmad Bhat and Saqib Abdullah S/o Mohammad Abdullah Bhat, residents of Awneera Zainapora, were also found to be involved as accomplices along with the appellant, as such, offence under Section 29 of the NDPS Act was added. During investigation, offence under Section 8/20-29 NDPS Act were established against all the three accused and so they were arrested. FSL opinion was obtained and the opinion of the FSL has established the recovered substance containing narcotic substance "Ganga". During the course of arguments on charge, vide

order dated 21.04.2022, accused No. 2 and 3 were discharged and offence under Section 29 of NDPS was dropped and also accused Gh. Hassan Bhat S/o Bashir Ahmad Bhat and Saqib Abdullah S/o Mohammad Abdullah Bhat Residents of Awneera Zainapora were also dropped from the list of accused. However, there was sufficient evidence collected by the Investigating Officer against the appellant and accordingly, charge under Section 8/20 NDPS Act was framed against the appellant. Contents of the charge were read over and explained to the appellant, who denied the charge and claimed to be tried. Accordingly, the prosecution was directed to lead evidence in support of their case. Statements of PWs-7 and 9 recorded under Section 161 of Cr.P.C have been admitted by the by the appellant on 14.09.2022 at the stage of admission and denial of documents. During the course of trial, prosecution has examined seven out of nine witnesses named in the police report.

5. PW-1 HC Bashir Ahmad No. 80/SPN stated during examination in chief that accused is known to him. On 14.01.2022 he was posted at Police Station Zainapora. At 4 p.m, officers have received information that the appellant Amir Ahmad Bhat has concealed some narcotics substance in his house and accordingly, ASI Khursheed Ahmad and other police persons proceeded to the spot. SHO is stated to have informed the Magistrate to be present at the scene of discovery. When the witness reached the house of the accused, the Inspector was already present there along with the Magistrate and the search process was conducted in presence of Magistrate. The police party is said to have

entered the house of and recovered five nylon bags among which, four bags contained ground bung bosa (ground narcotic). The bags containing narcotics were weighed in presence of Magistrate. All the proceedings were conducted in presence of Magistrate and contraband was sealed on the spot by IO.

6. Witness has seen the recovery memo EXTP-01 and admitted its contents as true and correct. Witness has also seen the weighing memo EXTP-1/1 and admitted its contents as true and correct. Witness has seen the seizure memo EXTP-1/2 and admitted its contents as true and correct. Witness has seen the seizure memo with regard to contraband EXTP-1/3 and admitted its contents as true and correct. Witness has admitted contents of EXTP-1/4 and EXTP-1/5 with regard to seizure memo of weighing scale and Superdnama as true and correct. He further stated that none of the accused was present on spot. He says that during search, Nambardar, namely Mudasir Ahmad, was present on spot. Witness was shown the Narcotic in open court which he admitted being the same.
7. During cross examination, the witness stated that SHO, while present at the police station, has received information. He says he has no knowledge whether information was received through phone or any other source. He does not know whether information was written down by the SHO. Witness does not know whether SHO has informed the Higher Officers after receiving information. He says that he accompanied ASI Khursheed Ahmad and other police personnel to the spot. Witness does not know the name of other police personnel. He says that they left from police station at 4:45 p.m. Witness does not

know whether office of Executive Magistrate was closed at 4:45 p.m or not. He says that they did not go to the Office of Magistrate. He says that the Magistrate was already present at the scene of discovery when the witness along with other police personnel reached the spot at 5:30 p.m. he says that the house of the accused was identified by Nambardar Mudasir Ahmad who was perhaps called by SHO. He further says that the witness along with ASI Khursheed Ahmad, the SHO and Magistrate, entered into the house while other police personnel were outside the house of the accused. He says that it is true that what happened inside the house is to the knowledge of only four persons. He says that the mother of accused, his wife and children were present in the house at the time of the search. Witness further stated that the narcotics was recovered by him and ASI in presence of the Magistrate and SHO. The witness also says that at the scene of discovery, the bags were sealed, and Tehsildar had affixed his seal and the IO has stitched the bags. IO and SHO have not affixed any seal on the bags. Samples were obtained on spot from all the bags, but the affixed letter was not written on spot. Many people have gathered on spot, but no civilian entered into the house of the accused. Witness recorded his statement on 14.01.2022. Witness has not mentioned in his statement with regard to any conspiracy. No revenue record was called in his presence. Witness has knowledge to the extent that contraband was recovered and sealed in his presence.

8. PW-2 Ct Allaudin No. 327/IR2th, in his examination in chief stated that the accused in custody is known to him. On 14.01.2022 he was posted

in Police Station Zainapora. Police Station Zainapora received information through reliable sources that the appellant Amir Ahmad Bhat has concealed Narcotics in his house in village Awneera. On receiving information police reached the spot. ASI Khursheed Ahmad was also accompanying them. The Executive Magistrate was also present on spot. In the presence of the Executive Magistrate, the house of the accused was searched. During search five nylon bags were recovered which were containing ground Charas powder. Weighing scale was called for and the contraband was weighed. Four bags weighed 42 kilograms and one bag was weighed 2 Kilograms. In the presence of Magistrate, the Narcotics was sealed and was taken to Police Station.

9. During cross examination, this witness stated that he was sitting near the SHO when the SHO received information on phone. He further says that they left for the spot at 3:30 PM and returned at 5:30 PM. SHO was accompanied by four persons. Witness states that the SHO made a phone call to Executive Magistrate to visit the spot and the Magistrate reached there after five minutes. He further states that the SHO and three other persons entered into the house of accused and conducted search. ASI Khursheed Ahmad and other police persons were outside the house. One Iqbal was called on spot at the time of conducting search. Witness has recovered Narcotics from the spot which was on a slab under the roof of the stair. Contraband was weighed and taken to police station. Weighing scale was with them. The bags were of white colour. Magistrate collected the samples from all the bags. The samples

were not weighed. He says that the Contraband was taken to police station and does not know to whom contraband was handed over in police station. After returning from the scene of discovery, FIR was registered, and statements of witnesses were recorded.

10. PW-3 Mohammed Iqbal Bhat, S/O Ab. Ahad Bhat R/O Awneera Zainapora, stated in examination in chief that discovery is of 13-14 January 2022. On that date, he saw the police outside the house of the accused. Police called witness near the house of accused. Witness entered the gate of the house of the accused where he saw some bags near the police. Three bags were on the spot which were containing Bang bosa. Thereafter, Nambardar reached on spot. Police prepared recovery memo which is already exhibited as EXTP-1. Same is true and correct. Witness has appended his signature on the seizure memo in the Police Station. Witness has seen the seizure memo exhibited as EXTP-1/2. Contraband was not weighed in his presence, nor any document was prepared in his presence. The bags containing narcotics were shown to the witness and he identified them to be the same which were recovered from the spot.
11. Upon cross examination, this witness stated that witness reached spot at 12:30 PM. Police has shown him the Narcotics and stated that same was recovered from the house of the accused. Witness states that he had not accompanied the police for the search. He further says that it is true that police have not recovered contraband in his presence and cannot say where from same was brought. It is true that Tehsildar was not present on spot. Contraband was not weighed in his presence. There

was no roof of the house of the accused in case police will say that contraband was recovered from the roof is incorrect. Witness has seen only three bags in the courtyard of the house of accused but he was shown five bags in the court. It is relevant to state here that this witness has not been declared hostile even though his statement goes to contradict PW 1 and 2 severely. He has not been re-examined by the prosecutor in order to seek a clarification with regard to the conflicting part of his testimony qua PW1 and 2. Therefore, the prosecution is bound by the statement of PW3.

12. PW-4 is Mudasir Ahmad Rather, S/O Ali Mohammed Rather, R/O Awneera, Zainapora. He stated during examination in chief that accused in custody is known to him. Occurrence has taken place two to five months before the date of his testimony. On the date of occurrence, he was at his home. SHO Police Station Zainapora called him on phone and directed him to reach the house of the accused as the witness was a Numbardar. Tehsildar was also to reach on spot. Witness reached to the place of occurrence within ten minutes. Witness entered into the courtyard of the house of accused and saw police there on the slab. He also went on the slab and saw bung was laid on 'Trupal' for drying purpose. Thereafter the contraband was filled in bags and four bags were full and one bag was half. The bags were brought into the courtyard. The contraband was taken to the Police Station. At this stage witness was declared hostile and Ld. PP was permitted to cross examine the witness.

13. During cross examination by Ld. PP, witness stated that on the request of brother of the accused, the witness came to the court to testify. He further says that he has not received any summon from the court. He says that Tehsildar of the area is also known to him. Like PW3, this witness also says that the Tehsildar was not present on spot when police came to the house of accused. Contraband was not weighed on spot. Recovery memo regarding contraband was prepared by police. Contents of the recovery memo are true and correct which bears his signature. It is already exhibited as EXTP-1. Witness has admitted the contents of weighing memo over which he appended his signature in police station. He says that o weighing process has taken place in his presence. Seizure memo was prepared. Contents of seizure memo are true and correct over which his signature is appended. It is exhibited as EXTP-1/2 however he appended his signature over it in the police station. EXTP-1/3 is true and correct, however weighing process was not conducted in his presence. He identifies his signature over it. Contents of his statement recorded under section 161 Cr.P.C are true and correct but two things are not true, one that Tehsildar was present on the spot and another, that contraband was weighed in his presence. During cross examination, this witness stated that when he entered the house of accused, he saw police there and police was filling Bung in the bags. Witness has seen Bung on the slab. When he reached in the courtyard, he saw police on the slab and went towards them. No weighing process took place in his presence. It is true that Magistrate was not present there. His signatures were taken on paper in the Police

Station but do not know what was written on it. It is wrongly mentioned in the statement under section 161 Cr.P.C that contraband was sealed in his presence and Magistrate was present on spot. He has no knowledge about the weighment of the contraband. He has no knowledge about the weighment mentioned in the seizure memo.

- 14.** PW-5 Ct Arif Ahmad No. 166664, stated during examination in chief that accused present in custody is known to him. On 14.01.2022 he was posted in Police Station Zainapora. SHO was Jaspal Singh. On the date of occurrence information was received by police about the presence of Narcotics substance in the house of accused. In this regard police personnel proceeded on spot. Witness accompanied ASI Khursheed Ahmad to the place of occurrence. After ten minutes they reached the spot. ASI Khursheed Ahmad informed the Magistrate on phone for visiting the spot. House of the accused was identified on spot. House of the accused was cordoned. Thereafter, Magistrate, ASI Khursheed Ahmad and other police persons entered the house of the accused. Family members fled away from the windows of the house. They searched the house of accused and during search five bags containing Bung Bosas were recovered. Bags were brought on the ground and were weighed. The weight of contraband was 42 kilograms of Bung Bosa and 2 kilograms ground Bung Bosa. ASI Khursheed Ahmad prepared one memo regarding the search. Contents the same are true and correct over which his signature is appended. It is exhibited as EXTP-05. Contents of EXTP-5/1 are also true and correct.

15. During cross examination, PW5 stated that he heard that information was received about the occurrence. Besides witness Ct. Allaudin, Arfat Hussain, ASI Khursheed Ahmad and SPO Amir Ahmad had proceeded to spot. SHO did not come of his own to the spot. In case any witness has stated that SHO has also visited the spot the witness might have stated the same of his own. It would be also wrong in case any witness has stated that SHO has entered into the house for searching purpose. ASI Khursheed Ahmad identified the house of the accused. No person was taken with them to the spot. Numbardar was not brought on spot however Numbardar came at later stage. Witness and other police personnel entered into the house of accused but he does not remember their names. Magistrate reached the spot after two, three minutes. Magistrate also entered the house. Magistrate has reached the spot in a private vehicle. He has stated in his statement under section 161 Cr.P.C that some persons have fled from the windows, but statement was read over to the witness but same is not mentioned in it. Contraband was weighed by digital scale. ASI Khursheed Ahmad directed for bringing the weighing scale from police station but does not know who brought the same on spot because witness was busy in search. Witness was present on spot at the time of weighing process. Witness does not know where the weighing scale was kept later on, same can be knowledge with the IO. Contraband was taken to police station and witness does not know what proceedings were conducted by IO in the police station. Witness recorded his statement next day in the police station.

16. PW-6 Shri Manzoor Ahmad is the Executive Magistrate Ist. Class Zainapora. During examination in chief, the witness stated he has seen the accused in custody. He further stated that on 14.01.2022 he was posted as Executive Magistrate Zainapora, Shopian. On that date, ASI Khursheed Ahmad came to his office and requested that they have received information that accused Amir Ahmad Bhat has concealed some narcotic drugs in his house and also requested for issuance of search warrant. In this regard witness has issued search warrant bearing No. TZ/JC/21- 22/76 dated 14.01.222. Witness has seen the warrant and identifies his signature over it. It is exhibited as EXTP-B. Thereafter, witness did not go to the spot. However, he directed his subordinate Patwari. Thereafter police produced contraband in his office and same was sealed and weighed. The bags were five in number. Samples were obtained and sent to FSL. 200 grams from each bag were collected for sending the same to FSL and contraband was resealed. The samples were marked as A,B,C,D and E and were sealed. Remaining contraband was also resealed. Witness also issued letter bearing No. TZ/JC/21- 22/77 dated 14.01.2022 to the FSL. Witness has seen the letter in the court and identifies his signature over it. It is exhibited as EXTP-6/1. Recovery memo annexed with the file is already exhibited as EXTP-1. Seizure memo is not correct to the extent that contraband was recovered in his presence but there is only his signature on the seizure memo. The search memo is also incorrect to the extent that search was conducted in his presence however, his signature is appended over it. It is exhibited as EXTP-5. Weighing memo exhibited as EXTP-1/1 is true

and correct and he identifies his signature over it. Contents of seizure memo are not true to the extent that the same was seized in his presence. It is already exhibited as EXTP-1/3. Seized contraband has been seen by the witness in the court and he says it is the same which was produced before him.

17. During cross examination, this witness stated that ASI Khursheed Ahmad has given application to him on 14.01.2022 but witness has not seen the application in the court file. The witness says that it is wrong to suggest that the warrant was not issued on 14.01.2022. At this stage exhibit EXTP-6 was shown to the witness wherein the date is shown as 15.01.2022, it means that warrant was prepared on next day of. Witness further stated that exhibit EXTP-1 and EXTP-6/1 were signed by the witness on the same date. Exhibit EXTP-6/1 bears date as 18.01.2022 under the signature but besides the number, the date is given as 14.01.2022. It is true that search was conducted on 14.01.2022 and police obtained his signature on 18.01.2022. It is also true that witness has not gone on spot. The witness further states that any other witness who has stated that Executive Magistrate was also on spot, has stated incorrectly. Witness has no knowledge what proceedings were conducted by the police on the spot. Shri Nabi Ahmad Andrabi Scientific Officer FSL Srinagar has issued certificate bearing Report No. 217-CT dated 03.03.2022 wherein it is stated that the Exhibit No's NA-42/22 to NA-46/22 were identified as "Ganja" plant material of cannabis. The said certificate/opinion has been admitted by the accused through counsel on 14.09.2022.

18. PW-8 ASI Khurshid Ahmad No. 41/HC stated during examination in chief that the accused in custody is known to him. On 14.01.2022 witness was posted in Police station Zainapora. On the said date investigation of case FIR No. 01/2022 was entrusted to him wherein police station has received information that some contraband is lying in the house of accused Amir Ahmad Bhat and the said contraband is being sold by the accused. During investigation he at first informed Executive Magistrate and also obtained search warrant. After obtaining warrant, witness and Magistrate went to the spot. Witness has requested the Magistrate to visit the spot after half an hour they reached to the house of accused. Numbardar of village was also called on spot thereafter; they entered into the house of the accused in presence of Magistrate. Witness, Magistrate and Numbardar entered into the house. During search five bags were recovered from the stair of roof. Four bags were containing Bung Bosa and one bag was containing ground Bung Bosa. Witness brought the contraband in the courtyard and made phone call to the police station for bringing digital weighing scale. Thereafter, HC Mohammad Yaqoob came on spot and the contraband was weighed in presence of the Magistrate. Four bags were containing 42 Kilograms and one bag was containing 2 Kilograms of ground Bung Bosa. Samples were obtained and sealed. Next day samples were sent to the FSL. After sealing the contraband same was brought to the police station. Witness prepared site map. Seizure memo was prepared on spot and also recorded the statements of witnesses. Accused was not present on spot, he had fled away. Thereafter, accused Amir Ahmad Bhat,

Sadam Hussain and Sadiq Abdullah were arrested on 18.01.2022. After obtaining FSL opinion and as per the statements of witnesses, accused were found to be involved for the commission of offences under section 8/20-29 NDPS Act.

19. In cross examination, witness stated that the source information received at was not reduced into writing at the police station. He says that there was no complainant in the FIR but police of its own started for the spot at 5:10 p.m and reached there at 5:30 p.m. Constable Bashir Ahmad, Alauddin, Amir Ahmad and the witness went to the spot. He further says that the Magistrate was given signal but they did not go to the office of Magistrate as it was late and that the Magistrate came to the spot of his own upon the request of the witness. Magistrate issued search warrant. Application is present in the case file. Magistrate and SHO came on spot in separate vehicles. In case any witness has stated that SHO has not come on spot, it is incorrect. He also says that in case any witness has stated that Magistrate has not come on spot, that too is incorrect. A question was put to the witness that when the SHO came on the spot, why was he not been cited as witness to which witness has replied that he did not deem it proper to keep the SHO as witness. The witness says that all the documents were prepared on spot, which is in contradiction to the statements of PW3 and 4 who say that they signed the memorandums in the police station. Recovery memo, search memo and arrest memo are of his handwriting and were scribed by one person. On spot witness made phone call to the Mohammad Yaqoob for bringing weighing scale but said Mohammad Yaqoob has not been

cited as witness. On spot Executive Magistrate, witness, HC Bashir Ahmad, Mohammad Arif together recovered the contraband, this is contradicted by the Magistrate who says that he never went to the scene of discovery. It took one hour in conducting proceedings up to 6:30 p.m. Light was brought from the police station. Seal was used as + and seal was kept in Malkhana but no receipt was obtained from in charge Malkhana. Seal was not seen by him in the court. Contraband was kept in the Malkhana but no receipt was obtained from him but same was entered into the Roznamcha. Copy of Roznamcha was not kept in CD file. Samples were sent to FSL next day. Same is entered in Roznamcha. Due to Covid-19 pandemic, letter to FSL was prepared on 25th of January 2022 and till then samples were in Malkhana.

20. PW-9 Inspector Jaspal Singh, Police Station Zainapora. The statement of this witness has been admitted by the accused through counsel on 14.09.2022, who is only witness to the satisfaction of the charge sheet. This is the evidence of the prosecution on the basis of which the appellant has been convicted.
21. Having gone through the trial court judgment, it appears that the discrepancy which the learned trial court has seen in the statement of the witnesses are extremely minor in nature. The learned trial court has entered into an extensive discourse on the legal aspects of the case without connecting the same to the facts and circumstances adduced through evidence in this particular case. The exposition of the learned trial court on the legal aspects of the case would have been much

appreciated had the relevance of the same been established with the evidence adduced.

- 22.** Learned counsel for the appellant has argued at length. He has submitted that the charges against the appellant have not been proved beyond any reasonable doubt. He has further submitted that when PW-1 and PW-2 (HC Bashir Ahmad and Ct. Allaudin) of Police Station, Zainapora have reached the scene of occurrence, the Executive Magistrate was also present there and they have recovered five nylon bags filled with grinded Narcotic Drugs (Charas powder) out of which four bags were weighing 42 Kilograms and one nylon bag was containing 02 Kgms. However, the Executive Magistrate who has been examined as a witness in this case on behalf of the prosecution has categorically stated that he never went to the scene of discovery and that he only executed the search warrant.
- 23.** Under the circumstances, from the evidence adduced in this case, it is apparent that the police witnesses have stated that the contraband material was found at the house of the appellant in the presence of the Executive Magistrate and the witnesses. The seizure witnesses PW-3 and PW-4 who are the independent witnesses have given versions which contradict in material particulars that go to the root of the prosecution's case as is the version of PW1, 2 and 5 who are police witnesses of the police. Where the police says that five bags of the contraband seized, PW-3 says that there were only three bags with the police and that there was no Executive Magistrate at the scene of discovery. PW-3 has not been declared as hostile and his testimony

contradicts the prosecution's case in material particulars and therefore, his version of the events, is binding on the prosecution. PW-4 has been declared hostile, but what has he stated has corroborated partly the statement of PW-3. The statement of Executive Magistrate reflects that he only executed the search warrant of the house sitting in his office where the police came. His version does not corroborate the police version that he was also there at the scene of discovery. Besides, the date under the signature of the Executive Magistrate on the search warrant is 18.02.2022. On 18.02.2022 which reflects that the police had first of all gone to the scene of discovery, carried out the seizures, in a ham-handed manner and thereafter secured the search warrant ex-post facto on 18.02.2022. Therefore, this court is of the opinion that in view of the serious contradictions between the witnesses and most importantly the statement of the Executive Magistrate, the alleged seizure and the charge against the appellant has not been proved beyond reasonable doubt.

24. Therefore, the trial court judgment of conviction dated 11.10.2022 is set-aside and the appeal is allowed. The appellant shall be released forthwith, if not required in any other case.

(Sanjay Dhar)
Judge

(Atul Sreedharan)
Judge

SRINAGAR

19.12.2023

Aasif