

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.376 OF 2013

HASHIM ABUBAKAR SHAIKH

)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA

)...RESPONDENT

Ms.N.S.K.Ayubi, Advocate for the Appellant.

Mr.P.H.Gaikwad-Patil, APP for the Respondent – State.

None for the Narcotics Control Bureau.

CORAM : A. M. BADAR, J.

DATE : 22nd NOVEMBER 2018

ORAL JUDGMENT :

1 The appellant/accused by this appeal is challenging the judgment and order dated 9th February 2009 passed by the learned Special Judge in N.D.P.S. Special Case No.124 of 2006, thereby convicting him of offences punishable under Sections 8(c) read with 21(c) of the Narcotic Drugs and Psychotropic

Substances Act (hereinafter referred to as NDPS Act for the sake of brevity) and sentenced him to suffer rigorous imprisonment for 10 years, apart from imposing fine of Rs.1 lakh and default sentence of rigorous imprisonment for 6 months.

2 Facts leading to the prosecution of the appellant/accused are thus :

- (a) In all four accused persons including appellant/accused no.1 Hashim Shaikh were put up for trial for offences punishable under Sections 8(c) read with 21(c) and 29 of the NDPS Act, 1985, with the allegations that appellant/accused no.1 Hashim Shaikh and accused no.2 Mohd.Usman Shaikh were found to be possessing two kilograms of heroine (Diacetyl Morphine) and the accused persons had conspired and abetted each other along with known and unknown persons for purchase, sale, transportation and possession of manufactured drug heroine.

- (b) According to the prosecution case, PW1 Jitendra Dubey, Intelligence Officer working with the Narcotics Control Bureau had received telephonic call from the First Informant for giving secret information regarding the narcotic drug. After receiving that telephonic call from the informant, PW1 Jitendra Dubey along with his colleagues Vipin Nair and Namboodiri met the informant outside the office building of the Narcotics Control Bureau at about 9.45 a.m. The informant then gave specific information Exhibit 18 to them which was reduced in writing. The information was to the effect that appellant/accused no.1 Hashim Shaikh was coming at the opposite side of the fire brigade station near Shalimar Hotel, Mandvi, Mumbai, to deliver substantial quantity of heroine to accused no.2 Mohd.Usman Shaikh at about 11.00 a.m. of 29th March 2006. Physical description of both accused persons was given by the informant and it was also reduced into writing. The information Exhibit 18 so received was placed before the Superintendent of the Narcotics Control Bureau PW7 Ajit Patil. He put his

endorsement on the said information and it was placed before Mrs.Alka Tyagi, Zonal Director of the Narcotics Control Bureau. PW2 Aashish Mangaonkar, Intelligence Officer of the Narcotics Control Bureau was then directed to conduct raid by forming a team. Brass seal bearing no.NCB 03 was handed over to PW7 Ajit Patil, Superintendent, and he was also to accompany the raiding team. Taking of necessary material including field testing kit, tool box, packing material etc., the team headed by PW2 Aashish Mangaonkar then went to the place disclosed by the informant.

- (c) On reaching the place, two panch witnesses namely Mohd.Rafique and Mohd.Irfan were summoned and they were told about purpose for calling them. Necessary formalities were undertaken. The members of the raiding team then took their positions.

- (d) According to the prosecution case, at about 11.15 a.m., accused no.2 Mohd.Usman Shaikh came opposite to the fire brigade building of Mandvi, Mumbai. At about 11.30 a.m., another person namely appellant/accused no.1 Hashim Shaikh came there carrying a green coloured shoulder bag and a silver coloured polythene carry bag. Appellant/accused no.1 Hashim Shaikh then handed over the silver coloured polythene bag to accused no.2 Mohd.Usman Shaikh. Thereupon, they were apprehended by the officers of the Narcotics Control Bureau in presence of the panch witnesses.
- (e) Accused persons were informed by PW2 Aashish Mangaonkar about their right as envisaged by Section 50 of the NDPS Act to be searched before a Magistrate or Gazetted Officer but both of them declined. They were then taken to the official vehicle which was parked nearby. The members of the raiding team including panch witnesses offered their personal search but the accused persons declined.

Thereafter, PW2 Aashish Mangaonkar asked accused no.2 Mohd.Usman Shaikh to hand over silver coloured polythene bag for examination. By taking that bag in possession, it was examined in presence of the panch witnesses. It was found to be containing a grey coloured VCD/MP3 player of Goldstar make. Upon opening it, two pockets each containing one kilogram heroine were found to be concealed in it. The contents of those packets were tested by the field testing kit. Heroine was detected in the substance contained in those packets.

- (f) Appellant/accused no.1 Hashim Shaikh informed that he has procured the narcotic drug from one Shahrenawaz. Accused no.2 Mohd.Usman Shaikh informed that the contraband was to be delivered to accused no.3 Kadar Shaikh.
- (g) Contents of both the packets were then put in transparent polythene bag. After mixing the contents thoroughly, two samples each weighing five grams were drawn. Those

samples were kept separately in two polythene sachets which were heat sealed and kept in separate carton. The samples were then packed, labelled and sealed. Those were marked as S1 and S2. The balance quantity of 1.990 kilograms of heroine also came to be packed, heat sealed and labelled. Personal search of both the accused persons was taken and sundry articles were found on their person. However, no incriminating material were found on their person.

- (h) PW4 Sanjay Bhatt, Intelligence Officer of the Narcotics Control Bureau then conducted the search of residential premises of accused no.2 Mohd.Usman Shaikh but no contraband was found. Certain documents were seized from him. Search of premises of accused no.2 Mohd.Usman Shaikh also resulted in seizure of some documents.
- (i) The events which took place at the time of effecting search and seizure were recorded in Panchnama Exhibit 20 which

was prepared in presence of panch witnesses Mohd.Rafique and Mohd.Irfan.

- (j) During the course of investigation, statement of accused nos.1 to 3 were recorded as per provisions of Section 67 of the NDPS Act. In the meanwhile, the information regarding arrest of accused no.4 Mohsin Khan was received. He was then brought to Mumbai where his statement under Section 67 of the NDPS Act came to be recorded.
- (k) On completion of investigation, a complaint came to be filed before the learned Special Judge, Mumbai, who took cognizance of the offence. The Charge came to be framed against all four accused persons for offences punishable under Sections 8(c), 21(c) and 29 of the NDPS Act. The accused persons pleaded not guilty and claimed trial.
- (l) In order to bring home the guilt to the appellant/accused no.1 so also other accused persons, the prosecution has

examined as many as eight witnesses. Defence of the accused persons was that of total denial. They alleged false implication.

- (m) After hearing the parties, the learned Special Judge, by the impugned judgment and order dated 9th February 2009 was pleased to convict appellant/accused no.1 Hashim Shaikh for the offence punishable under Section 8(c) read with 21(c) of the NDPS Act and accordingly, he was sentenced as indicated in the opening paragraph of this judgment. During the course of trial, accused no.2 Mohd.Usman Shaikh died and as such, case against him stood abated. Accused no.3 Kadar Shaikh and accused no.4 Mohsin Khan were acquitted by the learned Special Judge by the impugned judgment and order.

3 I have heard Ms.Ayubi, the learned counsel appearing for appellant/accused no.1 Hashim Shaikh at sufficient length of time. She argued that appellant/accused no.1 Hashim Shaikh is

wrongly convicted of the alleged offence on the basis of lacunae and interested evidence of officers of the Narcotics Control Bureau. She further submitted that right under Section 50 of the NDPS Act was required to be explained to appellant/accused no.1 Hashim Shaikh by giving a written communication describing his right to be searched in presence of a Magistrate or Gazetted Officer. Oral evidence regarding explanation of such right is not sufficient. The learned counsel further urged that in absence of examination of panch witnesses, the offence cannot be held to be proved merely on the basis of interested version of the prosecution. She, therefore, submitted that the impugned judgment and order needs to be quashed and set aside.

4 None appeared for the Narcotics Control Bureau, Mumbai. The learned APP appeared for the State of Maharashtra.

5 I have carefully examined the submissions so advanced on behalf of appellant/accused no.1 Hashim Shaikh. I have also perused record and proceedings including oral as well as

documentary evidence. I am of the considered view that the appeal is devoid of merits and the same is required to be dismissed for the reasons stated in subsequent paragraphs.

6 Evidence of PW1 Jitendra Dubey is very categoric and it shows that he along with his colleagues Vipin Nair and Namboodiri received secret information regarding possession and sale of contraband. This witness proved the information which was then reduced into writing and the same is Exhibit 18. Evidence of PW1 Jitendra Dubey, Intelligence Officer, shows that the information so reduced in writing was then placed before the Superintendent of Narcotics Control Bureau – PW7 Ajit Patil. After getting his endorsement to the effect of taking necessary action in pursuant to that information, the said information was also placed before the Zonal Director of the Narcotics Control Bureau. Evidence of PW1 Jitendra Dubey to that effect is gaining corroboration in material particulars from the information at Exhibit 18 as well as evidence of PW7 Ajit Patil, Superintendent of Narcotics Control Bureau. There is no material in cross-

examination of both these witnesses to disbelieve their evidence regarding receipt of information regarding possession of manufactured drug heroine and placing of that information before the official superior including PW7 Ajit Patil and the Zonal Director of the Narcotics Control Bureau. Perusal of the information at Exhibit 18 shows that it is containing signatures of those officers upon endorsement made on them. Thus, with this evidence, the prosecution has established due compliance of Section 42 of the NDPS Act. However, it is seen that the information was regarding possession of contraband at the public place. Section 42 of the NDPS Act is applicable if the search is to be conducted in any building, conveyance or enclosed place. The information was regarding possession of the narcotic drug at the public place and the search was to be conducted in a public place. Evidence adduced by the prosecution does show that the search and seizure was effected opposite the building of fire brigade station of Mandvi, and as such, provisions of Section 42 of the NDPS Act were not attracted in the case in hand. Section 43 of the NDPS Act does not require information to be taken down in

writing and forwarding the copy of such information to the immediate official superior. Still, it is seen that the prosecuting agency has followed the provisions of Section 42 of the NDPS Act.

7 Now let us examine whether the prosecution has established the fact that in contravention of the provisions of the NDPS Act, appellant/accused no.1 Hashim Shaikh was found in possession of the narcotic drug in commercial quantity. For establishing this fact, the prosecution is heavily relying on evidence of PW2 Aashish Mangaonkar, Intelligence Officer, Narcotics Control Bureau, and that of PW7 Ajit Patil, Superintendent of the Narcotics Control Bureau. For establishing non-availability of panch witnesses to adduce evidence, the prosecution has examined PW8 Haresh Gangan, a Sepoy working in Zonal office of the Narcotics Control Bureau. Unchallenged version of this witness shows that in order to serve witness summons on these panch witnesses, he had been to the addresses of those witnesses but those witnesses were not found on the given address. He has proved his reports at Exhibits 73 and 74.

By now it is settled that non-examination of panch witnesses is not fatal to the prosecution case. However, in absence of evidence of panch witnesses, evidence of official witnesses is required to be scrutinized with due care and caution. Even otherwise, it is wise principle of law even recognized by the legislature that the official acts are regularly done.

8 Let us examine what is the version of PW2 Aashish Mangaonkar, the Intelligence Officer of Narcotics Control Bureau, who has headed the team which effected search and seizure of the narcotic drug in commercial quantity on 29th March 2006. This witness has deposed about disclosure by PW7 Ajit Patil, Superintendent, regarding the secret information about possession of contraband and directions to him for effecting search and seizure of the contraband. PW2 Aashish Mangaonkar has spoken about formation of the team comprising employees of the Narcotics Control Bureau and collection of material necessary for effecting search and seizure. He testified that the team raided the spot disclosed in the secret information at about 10.50 a.m. of 29th

March 2006 and two panch witnesses were arranged for witnessing the events happening thereafter. Evidence of this witness shows regarding personal search of panchas as well as members of the raiding team. PW2 Aashish Mangaonkar categorically deposed that when the members of the raiding team had taken their position, they witnessed accused no.2 Mohd.Usman Shaikh arriving at the spot opposite to fire brigade station at about 11.00 a.m. He further stated that at about 11.30 a.m., appellant/accused no.1 Hashim Shaikh also reached the spot and went towards accused no.2 Mohd.Usman Shaikh. As testified by this witness, appellant/accused no.1 Hashim Shaikh was holding a green coloured shoulder bag and a silver coloured polythene bag. He gave that silver coloured polythene bag to accused no.2 Mohd.Usman Shaikh. PW2 Aashish Mangaonkar further deposed that then both the accused persons were intercepted and they were apprised of their right of getting searched in presence of a Magistrate or Gazetted Officer. Upon declining to exercise such right by accused persons, PW2 Aashish Mangaonkar had taken them near the official vehicle where silver

coloured polythene bag was taken from accused no.2 Mohd.Usman Shaikh. Evidence of PW2 Aashish Mangaonkar shows that it was containing a VCD/MP3 player. Upon opening that instrument two packets each weighing one kilogram of heroine were found concealed in it. The contents of those packets were tested by the field testing kit and the tests were positive for detection of heroine. Evidence of PW2 Aashish Mangaonkar further shows that then in presence of panch witnesses, the contents of those packets were transferred in the polythene bag and after thorough mixing, two samples each weighing five grams were taken in polythene sachet. Those polythene sachets were heat sealed and kept in paper envelopes. The polythene bag containing remaining bulk weighing 1.990 kilograms was also heat sealed. Evidence of this witness shows packing and labelling of the samples as well as the bulk. He also spoke about preparation of Panchnama Exhibit 20 in presence of panch witnesses.

9 Evidence of PW2 Aashish Mangaonkar, Intelligence Officer, is not shattered in the cross-examination. In paragraph 16 of his cross-examination, the learned Special Judge has noted opening of the envelope containing remnant sample. That envelope was dated 30th February 2006. With the aid of this endorsement it was sought to be argued that the raid was effected on 29th March 2006 and then the contraband was seized. According to the learned counsel for the appellant/accused, date packed of remnant sample falsifies the prosecution case. However, it needs to be noted that the remnant sample was sent back by the forensic laboratory and the author of the date is somebody from that laboratory. Wrong mentioning of the date by some third person is not sufficient to dislodge the version of PW2 Aashish Mangaonkar, Intelligence Officer, regarding search and seizure of the narcotic drug.

10 Evidence of PW2 Aashish Mangaonkar is gaining corroboration from the contemporaneous Seizure Panchnama Exhibit 20.

11 PW7 Ajit Patil, Superintendent, had also accompanied the raiding party and he has also spoken about the minute details of the events that took place at the time of effecting raid, apprehending appellant/accused no.1 Hashim Shaikh, accused no.2 Mohd.Usman Shaikh, so also seizure of the narcotic drug heroine. Evidence of this witness is substantially corroborating version of PW2 Aashish Mangaonkar. His evidence regarding seizure of two kilograms of heroine concealed in the VCD/MP3 player, drawing of samples, labelling and concealing them under the panchnama Exhibit 20 is not shattered in the cross-examination.

12 With this evidence, the prosecution has established seizure of two kilograms of heroine which is a narcotic drug as seen from the result of the field testing of that substance. Furthermore, evidence of PW2 Aashish Mangaonkar shows that one of the seized samples was sent for chemical analysis to the forensic science laboratory at Kalina. That sample was then examined by PW6 Bhausaheb More, Assistant Chemical Analyser.

Evidence of this witness shows that he had conducted fifteen tests on the sample of the substance seized from appellant/accused no.1 Hashim Shaikh. Evidence of the Assistant Chemical Analyzer shows that upon conducting various tests, the result which came out was to the effect that the sample was that of narcotic drug heroine. This witness has also proved the data sheet Exhibit 61. Thus, case of the prosecution is corroborated by the forensic evidence adduced by the prosecution.

13 The net result of foregoing discussion shows that appellant/accused no.1 Hashim Shaikh was found in possession of two kilograms of heroine on 29th March 2006 and as the same was in excess of the prescribed commercial quantity of the manufactured drug, the learned trial court has rightly convicted him of the offence punishable under Section 8(c) read with 21(c) of the NDPS Act. The punishment for this proved offence is minimum prescribed punishment and as such, the same is also not requiring any interference.

14 In the result, the appeal fails, and therefore, the order:

ORDER

The appeal is dismissed.

(A. M. BADAR, J.)