

IN THE HIGH COURT OF SINDH AT KARACHI

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Before: Mr. Justice Ahmed Ali M. Shaikh
Mr. Justice Mohammed Karim Khan Agha

Criminal Jail Appeal No. 238 of 2013

Habib Khan S/o Ashraf Khan

Vs.

The State

Criminal Jail Appeal No. 239 of 2013

Gul Draz Khan S/o Mir Sahib Khan

Vs.

The State

Date of hearing:	08.02.2016 & 19.09.2016
Date of Order	01-11-2016
Appellants:	Through Mr. Liaquat Ali Hussain, Advocate
Respondents:	Through Mr. Muhammad Iqbal Awan, A.P.G.

JUDGMENT

Mohammed Karim Khan Agha, J. These criminal jail appeals are directed against the impugned judgment dated 22-03-2013, passed by learned Special Judge CNS Court-II, Karachi in Special Case No.228/2012 Re: State v. Habib Khan & others, whereby the learned Special Judge CNS has convicted the appellants named above for an offence falling under section 6 punishable under section 9-C CNS Act, 1997 to suffer Life Imprisonment each and fine of Rs.500,000/- (Rupees five hundred thousand only) each and in case of default in payment of fine they will suffer further Rigorous Imprisonment for two (02) years each with the benefit of section 382-B Cr.P.C. They prayed in their criminal jail appeals that they are innocent and entitled for acquittal in the larger interest of justice.

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2. Brief facts as disclosed in the FIR are that on 01.03.2012 ASI Muhammad Irfan Tanoli of PS Kharadar was called at Edhi Trust, Merewether Tower, M.A. Jinnah Road, Karachi who alongwith other police officials reached at Edhi Centre, Merewether Tower where Muhammad Suleman, Incharge Control Room Edhi Centre, Merewether Tower, Karachi told that Edhi Ambulance No.EA-3941 which was of Nipa Chowrangi, Karachi and the accused Habib Khan being driver of the said ambulance was coming from Mawach Goth towards city side through Hub River Road, Karachi alongwith accused Gul Draz and Asghar Khan with illegal load of 8 plastic/fiber drums in the said Edhi Ambulance to whom night duty manager Muhammad Farooq of Baldia Edhi Centre, Karachi caught and took to Merewether Tower Edhi Centre, Karachi for entering into another area without information after chasing their ambulance. Co-accused Asghar Khan fled away from Edhi Centre, Merewether Tower, Karachi. Complainant took the said 8 drums in custody and prepared memo of arrest and recovery in presence of Muhammad Suleman and Muhammad Farooq and brought the accused persons to PS Kharadar. Samples were drawn from the said drums and sent to the laboratory for testing and as per report dated 14.03.2012 the said 8 drums were found to contain raw heroin which was weighed and found to be 217.499 Kgs. Thereafter on 15.03.2012 FIR bearing Crime No.93/2012 under section 6/9-C CNS Act, 1997 was lodged.

3. Copies of the required documents were supplied to the appellants under section 265-C Cr.P.C. on 09.04.2012 as Exhibit 01.

4. A charge against the appellants was framed as Exhibit 3 to which they pleaded not guilty and claimed trial.

5. After framing of the charge, the prosecution examined its witnesses and they produced certain documents during the course of their evidence before the trial court. Learned DDPP for the State closed the prosecution side for evidence vide statement as Exhibit 12.

6. Statement under section 342(2) Cr.P.C. of the appellants were recorded respectively and in support of their version they also examined witnesses namely Khan Muhammad, Gul Farosh and

Sharifullah as Exhibit 18, 19 and 20 respectively where after the learned defense counsel closed the side of the defense.

7. The learned trial court framed the following points:-

POINTS

- A. Whether on or about 01.03.2012 principle accused Habib Khan driver of Edhi Ambulance (Dolphin) bearing registration No.EA-3941 of Edhi Centre, NIPA Chowrangi, Gulshan-e-Iqbal, Karachi alongwith co-accused Gul Draz Khan and absconding accused Asghar Khan knowingly and consciously were being shifted eight plastic/fiber drums (four big and four small) containing heroin powder weighing 217.499 Kgs net from Yousuf Goth, Mawach Goth, Karachi and were intercepted by Station Manager/Incharge at Edhi Centre, Balida Town, Karachi at the place on Machar Colony, near Mazar, Main Maripur Road, Karachi and brought at Edhi Centre, Merewether Tower, M.A. Jinnah Road, Karachi?
 - B. Whether the accused persons namely Habib Khan, Gul Draz Khan and Faqir Muhammad @ Lala son of Zanjeer Khan drug trafficking, transportation with conscious possession of narcotic contraband of heroin powder weighing 217.499 Kgs which were recovered from Edhi Ambulance bearing registration No.EA-3941 and arrested them after obtaining positive report of narcotic substance the FIR was lodged, if yes what is its effect?
 - C. Whether accused (i) Habib Khan (ii) Gul Draz Khan and (iii) Faqir Muhammad @ Lala are guilty for the offence of which they are charged?
8. After hearing the learned DDPP for the state, learned counsel for the appellants and perusal of the entire material and on the basis of the evidence, the appellants were convicted and sentenced as mentioned above.
9. Learned counsel for the appellants on 08.02.2016 argued this matter. However, counsel for appellants wanted to submit written synopsis and for this reason the matter was adjourned to 19-09-2016 where arguments of both the appellants and the state were concluded and the matter reserved for judgment.
10. Learned counsel for the appellants main line of argument was that the appellants had been set up by the police. Namely, that they had been kept in illegal confinement and the contraband substance had then been foisted upon them after their refusal to pay a bribe to the police, that the FIR was lodged after an inordinate delay of about 14 days, that S.21 of the CNS Act had

been violated namely the arrest, search and seizure had been carried out by an officer below the rank of sub inspector, that ASI Irfan Tanoli signed the arrest and seizure memo on 01-03-2012 whereas the witnesses appended their signatures on 15-03-2012 which was 14 days later which tied in with the case being foisted on the appellants as in reality there were no eye witnesses to the arrest search and seizure from the appellants, the statements of the PW's were contradictory and the benefit of the doubt should be extended to the appellants.

11. In support of his contentions, learned counsel for the appellants placed reliance on the cases of **Khalid Nawaz v. The State** (1999 P Cr. LJ 391), **Ali Murad v. The State** (2013 Y L R 1010), **Ghulam Qadir v. The State** (2014 P Cr. LJ 865), **Pervez alias Gidari v. The State** (2013 P Cr.L. J. 635), **Muhammad Hayat Khan v. The State** (2014 P Cr.L.J. 796), **Fayyaz Ahmed v. The State** (2014 P Cr. L J 1423), **Sherzada Pathan v. The State** (2012 Y L R 1042), **Riaz Ahmed v. The State** (2015 P Cr. L J 143), **Tariq Pervez v. The State** (1995 S C M R 1345), **Saeed Azam v. The State** (2015 P Cr. L.J. 62), **Ghulam Mustafa v. SHO PS Umerkot & 2 others** (2015 Y L R 1949) and **Ghulam Abbas Jamali v. The State** (2015 Y L R 2085).

12. Learned APG for the State vehemently opposed the contentions of the learned counsel for the appellants and fully supported the impugned judgment dated 22.03.2013 which according to him had been correctly decided on both legal and factual grounds and as such should be upheld and the criminal jail appeals dismissed.

13. We have considered the submissions of the learned counsel for the parties, carefully perused the material available on record including the impugned judgment and the case law cited at the bar.

14. PW 1 Mohammed Farooq was the station manger at Edhi centre Baldia town Karachi who intercepted the ambulance with registration No.EA 4329 at about 0045 hours on 01-03-2012 as it was off route and found the appellants in the ambulance where 8 drums had also been concealed under the seat. He directed the ambulance to go to the Edhi control centre where the drums were

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off loaded. As per his evidence the duty officer at PS Khardar was called and shortly after a police mobile arrived under the command of ASI Irfan Tanoli and 2 other police constables. Irfan Tanoli prepared memo of arrest and recovery at Eidhi control centre. This is corroborated by ASI Tanoli in his evidence. According to him after 14 to 15 days of the aforesaid event he was called to Edhi Control Centre where Moulana Abdul Sattar Edhi informed him that the chemical found in the drums was heroin powder.

15. PW1 was a disinterested witness who did not have any enmity with the appellants. His evidence was precise and was not dented on cross examination.

16. PW 2 was Irfan Tanoli who was the ASI who reached the Edhi control centre after being sent there via police wireless. He corroborated PW1's version of events about the interception of the ambulance and the 2 appellants and one other accused and the discovery of 8 drums as informed to him by PW 1 on his arrival at the Edhi centre. He considered the substance in the drums to be suspicious and prepared memo of arrest and recovery. The drums and 2 appellants and one accused were taken by him to PS Kharadar and he narrated the story to the duty Officer ASI Younis Khan. Initially there was a concern that the powder may have been an explosive substance so the bomb squad was called to check it out. After it was cleared as a non explosive substance it was sent for chemical analysis on 07-03-2012 to PCSIR Laboratory Karachi. He also drew samples which he took to Islamabad for the FIA. He spent about 8 days in Islamabad but before returning he was informed from PS Kharadar that the chemical analysis report had been received from PCSIR Karachi and it had proved positive. In cross examination he informed that the duty officer at PS Kharadar had released the appellants and one accused on bond.

17. PW 2's evidence largely corroborated that of PW1 with whom he had no connection. He was not dented on cross examination and exhibited all the relevant Roznamcha entries and other relevant documents in support of his actions.

18. PW 3 was Muhammed Ishaque who was SIP PS Kharadar. He assisted ASI Tanoli, made roznamcha entry for taking 8 drums into custody and questioned the appellants and the accused.

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22. PW 5 was Muhammed Anwar who was the IO of the case. In his evidence he confirms that he went to Mohammed Goth along with other policemen and arrested the appellants and the accused and made memo of arrest and search on 15-03-2012. He made a site inspection, recorded the S.161 statements, took the ambulance which had carried the drums into custody and prepared S.173 Report. He produced mobile cell phone data and record of appellants and accused.

23. PW 5 was not dented in cross examination and even admitted that there was no direct evidence against accused Faqir Muhammed who was later acquitted by the trial court due to a lack of evidence and admitted to failing to record the S.164 statements of the appellants. He also produced Roznamcha entries and other documents in respect of his movements and actions and was corroborated by other witnesses concerning the arrest of the appellants and the accused.

24. In his S.342 Statement the appellant Habib Khan denied all the allegations against him however he admitted driving the ambulance when it was intercepted.

25. Likewise appellant Gul Draz denied all the allegations against him however he admitted being in the ambulance being driven by Habib Khan at the time it was intercepted.

26. Appellant Habib Khan gave evidence under oath. He admitted that he was driving the ambulance and Gul Draz was with him when it was intercepted by PW1. He also admitted that there were 8 plastic fiber drums in the ambulance which he had collected from Mawach Goth. As per his evidence these drums belonged to the appellant Gul Draz and Asghar Ali who later escaped after being brought to the Edhi centre. He even candidly told the police that the 8 drums belonged to Asghar Ali who had escaped from the Edhi centre. He admitted that Gul Graz, Faquir Mohammed and Asghar Ali were all neighbours.

27. Basically appellant Habib Khan's sole defense as per his own evidence was that he did not know that heroin powder was contained in the drums.

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28. Appellant Gul Draz gave evidence under oath. He admitted that he, Habib Khan and Asghar were all friends and that Habib Khan, who he described as a the principle accused, were all in the ambulance being driven by Habib Khan when it was intercepted by PW 1 containing the 8 drums which had earlier been loaded into it. According to him the drums contained oil and that PW 1 had told absconding Asghar that if they paid him a huge bribe he would release them. On cross examination he denied pretending to be a patient in the ambulance.

29. In connection with the question of bribe it is relevant that during the cross examination of PW 1 it was put to him by Gul Draz's lawyer that Asghar offered him bribe and not that he had demanded a bribe. There is also no mention of bribe in Habib Khan's evidence despite Asghar telling, "us" that if we paid bribe.

30. Basically as with appellant Habib Khan, appellant Gul Draz's sole defense as per his own evidence was that he did not know that heroin powder was contained in the drums. He thought that the drums contained oil.

31. The three Defense witnesses namely, Khan Mohammed, Gul Farosh and Sharifullah who gave evidence on behalf of the appellants were of little assistance to the case of the appellants and were essentially old friends who could perhaps at best be described as witnesses as to the good character of the appellants as opposed to the incident.

32. It would appear therefore from the evidence that the 2 appellants have been correctly identified, that by their own admission they were in the ambulance containing the 8 drums which they had recently collected when the ambulance was intercepted.

33. The main issues in this appeal appear to us to be:

1. Whether the narcotic substance was foisted on the appellants by the police.
2. Whether there were any irregularities/illegalities committed by the police which could prove fatal to the prosecution case

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3. Whether there were any material contradictions in the evidence of the PW's and exhibits as would justify the setting aside of the impugned judgment.
4. Whether the appellants had knowledge that narcotic substances were contained in the drums.

Turning to the first issue whether the narcotic substance was foisted on the appellants by the police.

34. At first sight it may seem slightly suspicious that the appellants and the accused were released on bond bearing in mind that the police suspected that the substance found in the drums may be a narcotics substance especially as it may have been of a large quantity. However, this was only their suspicion and in fact at one point in time they had also considered that the substance was of explosive material and therefore had to call the bomb squad. As such there may have been little justification, at the time of their initial arrest, of keeping the appellants in custody especially as it was not known whether the substance was narcotics or not. Indeed, the appellants alleged that it was oil and /or for making sandals and a personal bond was also taken from Mohammed Sharif who was a real brother of one of the appellants and could be deemed to be reliable due to his blood relation with one of the appellants.

35. Furthermore, none of the PW's including the 4 police officers were cross examined on the point as to whether the appellants had been released on bond so that they could arrange bribe money failing which a case would be foisted on them. It would also appear that it was only put to PW 3 Muhammed Ishaque that the case had been foisted on the appellants and no other PW. This defense therefore appears to be an afterthought.

36. Coupled with the fact that the appellants as mentioned above did not cross examine on the point that the appellants had been released in order to arrange bribe money and only one PW was cross examined in connection with foisting the substance on the appellants it does not seem that the appellants were released for any ulterior or malafide motive. Rather once the chemical report proved positive the FIR was immediately lodged and the appellants and the accused were immediately taken into custody. In fact the accused (Faquir Mohammed) was acquitted largely on

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account of the police's own admission that they had no direct evidence against him. Logic and commonsense would tend to suggest that if the case was to be foisted on the appellants then the police would have ensured that all the accused and not just the appellants would have been found guilty.

37. Generally speaking we find the prosecution evidence narrates a convincing chain of events, which was largely corroborated either by witnesses or documents (especially the chemical report which went unchallenged) and that none of the PW's were dented let alone shattered during cross examination. Furthermore, the initiator of the capturing of the appellants was an entirely disinterested person who had no enmity with the appellants. Likewise during cross examination it was not suggested by either of the appellants that the police had any ill will or enmity towards them.

38. The quantity of heroin recovered was huge being over 217 KG's and was split between 8 separate drums. Looking at the chain of custody the chances of the contents of the drums being changed or added to on such a large scale is in our view almost certainly non existent.

39. As such we find that the narcotic substance was not foisted on the appellants by the police

Turning to the second issue whether there were any irregularities/illegalities committed by the police which could prove fatal to the prosecution case

40. The main ground plead by the appellants in this respect was a violation of S.21 CNSA which reads as under:

"S.21. 1. Power of entry, search, seizure and arrest without warrant.

- (1) **Where an officer, not below the rank of sub-Inspector of police or equivalent authorized in this behalf by the Federal Government or the Provincial Government, who from his personal knowledge or from information given to him by any person is of the opinion that any narcotic drug, psychotropic substance or controlled substance in respect of which an offence punishable under this Act has been committed is kept or concealed in an building, place, premises or conveyance, and a warrant for arrest or**

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search cannot be obtained against such person without affording him an opportunity for the concealment of evidence or facility for his escape, such officer may:-

- (a) enter into any such building, place, premises or conveyance;
 - (b) break open any door and remove any other obstacle to such entry in case of resistance;
 - (c) seize such narcotic drugs, psychotropic substances and controlled substances and other materials used in the manufacture thereof and any other article which he has reason to believe to be liable to confiscation under this Act, and any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act; and
 - (d) detain, search and, if he thinks proper, arrest any person whom he has reason to believe have committed an offence punishable under this Act.
- (2) Before or immediately after taking any action under sub-section (1), the officer referred to in that sub-section shall record the grounds and basis of his information and proposed action and forthwith send a copy thereof to his immediate superior officer.

41. While it would appear that this section has been violated as admittedly Irshad Tanoli was only an ASI, rather than a sub-inspector, and no authorization either from the Federal or Provincial Government as required by S.21 was available on record the question is whether such violation is fatal to the prosecution case or is curable.

42. This question was answered by the Hon'ble Supreme Court in the case of **The State V Abdali** (2009 SCMR 291) where the Supreme Court held that such defects were not fatal to the prosecution case and were curable as under at P.293. (this extract is also relevant to the question of foisting the narcotics on the appellants as mentioned earlier)

"7. It would be seen that a huge quantity of 52 Kgs. of Charas was allegedly recovered from the taxi beside which the respondent was standing while closing its dickey. It is not possible that the police would foist such a huge quantity of Charas upon him. It appears that the learned High Court has relied heavily upon the technical aspect of the seizure and arrest which in our opinion are misconceived as in the first place no raid was carried out by the police personnel but the respondent apprehended during normal patrol duty. As such the provisions of section 21 are not applicable.

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Even otherwise it cannot be expected that upon apprehension of the accused the police party would go in search of the officer, who is entitled to arrest the accused being an A.S.I. At the most, this was an irregularity which was curable under section 537, Cr.P.C. as held by this Court in case of Muhammad Hanif (supra).

8. Similarly, the second ground which weighed with the learned High Court that the investigation was not carried out by an official authorized to do so, also is devoid of substance, since no prejudice has been caused to the respondent by such investigation. The case of Muhammad Farooq Khan v. The State 2007 PCr.LJ 1103 relied upon the impugned order is distinguishable from the facts of the present case as therein mala fides were alleged against the investigative agency in which event a learned Division Bench of the Sindh High Court came to the conclusion that the investigation should have been entrusted to another agency. **In this regard, the reference can be made to the case of State through Advocate-General v. Bashir (supra), wherein it was held that investigation by an officer not authorized to do so was merely an irregularity which is curable under section 537, Cr.P.C." (bold added)**


43. Thus, this defect is curable and is not fatal to the prosecution case. We have also not found any other defects or irregularities that would be fatal to the prosecution case.

Turning to the third issue whether there are any material contradictions in the evidence of the PW's and exhibits as would justify the setting aside of the impugned judgment.

44. It is correct that there may have been a few contradictions in the prosecution case but in our view these were very few and only of a minor nature and were not material to the final determination of the case.

45. In this respect reliance is placed on case of **Zakir Khan & others v. The State** (1995 SCMR 1793) which held as under:-

"The rule is now well established that only material contradictions are to be taken into consideration by the Court while minor discrepancies found in the evidence of witnesses, which generally occur, are to be overlooked".

46. Reliance is also placed on the case of **Ameer Ali V State** (1999 MLD 758 (Lahore)) which held as under; 

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"Learned counsel for the appellant also pointed out a few contradictions between the statements of these two witnesses, which are minor in nature and so insignificant that these deserve no comment. Even otherwise, it is well settled rule of law that some discrepancies are inevitably bound to occur in the statements of the eye-witnesses on account of lapse of memory owing to intervening period of their appearance before the police and their entry in the witness box during the trial. In the absence of any material discrepancies, the rejection of their testimony on this score is wholly unwarranted. On this point, the Supreme Court of Pakistan held in a case reported as Abdul Rashid v. Umid Ali and 2 others PLD 1975 SC 227, the relevant reproduced hereunder, finds mention at page 239;

"Of course, there have been cases where thoroughly drilled and well-tutored witnesses after going through several rehearsals made statements which were almost verbatim repetitions of their police statements as well as those of each other at the trial and the Courts have been very rightly skeptical about such parrot-like reproductions. It is only the material discrepancies coming into conflict with the natural probabilities that militate against the credibility of witnesses justifying the rejection of their testimony".....

47. In any event in our view there seem to be no major or material contradictions or discrepancies in the prosecution case. None of the PW's was dented on cross examination let alone shattered and numerous unchallenged exhibits were produced by the PW's to show that the proper procedure was followed during the course of investigation of this case most of which exhibits were not challenged by the appellants. As mentioned earlier the prosecution evidence which is corroborated in large part depicts a chain of events which lead to the interception of the ambulance carrying the appellants and the substance which later turned out to be heroin.

48. As such we do not find any material contradictions/discrepancies which would justify the setting aside of the impugned judgment.

Turning to the issue whether the appellants had knowledge that narcotic substances were contained in the drums.

49. Apart from the chemical report the prosecution produced 5 witnesses whose evidence we have already deemed to be reliable and approx 28 documents none of which were challenged by the

appellants including a chemical report which went unchallenged. Even at this stage the prosecution had in our view made out a strong case against the appellants.

50. It is an admitted position that the appellants were in the ambulance at the time when the drums were seized and the recovery of a substance from the drums has not been denied and as such S.29 CNSA is applicable which reads as under:

"29. Presumption from possession of illicit articles.— In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of:-

- a) **any narcotic drug, psychotropic substance or controlled substance;**
- b) any cannabis, coca or opium poppy plant growing on any land which he had cultivated;
- c) any apparatus specially designed or any group of utensils specially adapted for the production or manufacture of any narcotic drug, psychotropic substance or controlled substance; or
- d) **any materials which have undergone any process towards the production or manufacture of narcotic drug, psychotropic substance or controlled substance or any residue left of the materials from which a narcotic drug, psychotropic substance or controlled substance has been produced or manufactured, for the possession of which he fails to account satisfactorily."** (bold added)

51. The substance in the drums was found after a chemical analysis to be heroin and such report went unchallenged and as already mentioned the prosecution had already made out a strong case against the appellants and as such in our view had discharged its initial burden of proof. As such under S.29 CNSA the burden of proof shifted to the appellants to show that they had no knowledge that the substance contained in the drums was heroin.

52. We have examined the record and have come to the conclusion that the appellants have not produced any evidence to rebut the presumption which fell on them as per S.29 CNSA which is fully applicable to this case.

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Conclusion

53. Following the above discussion in this Judgment we find that the prosecution has proved its case against both the appellants beyond a reasonable doubt and that there are no infirmities in the impugned judgment which would warrant any interference in it and as such both the appeals are dismissed.

Dated: 31-10-2016