

## IN THE HIGH COURT OF SINDH, KARACHI

*Present:*

*Mr. Justice Mohammad Karim Khan Agha  
Mr. Justice Arshad Hussain Khan,*

Criminal Appeal No.525 of 2021.

<b>Appellant:</b>	Syed Nawaz S/o. Ziarat Gul through Mr. Muhammad Akbar Khan, Advocate.
<b>Respondent:</b>	The State through Mr. Habib Ahmed, Special Prosecutor ANF.
<b>Date of hearing:</b>	21.11.2022.
<b>Date of Announcement:</b>	28.11.2022.

### JUDGMENT

**MOHAMMAD KARIM KHAN AGHA, J:-** The appellant Syed Nawaz S/o. Ziarat Gul has preferred this appeal against the judgment dated 23.08.2021 passed by the Special Court No.1 (Control of Narcotic Substances) Karachi in Special Case No.97 of 2016 arising out of Crime No.D0207004 of 2016 U/s. 6/9, 14/15(c) of Control of Narcotic Substance Act, 1997 registered at P.S. ANF-I Karachi whereby the appellant was convicted and sentenced to R.I. for Life with fine of Rs.100,000/-. In failure to pay the fine he was ordered to undergo S.I. for one year more. Benefit of section 382-B Cr.P.C. was also extended to the appellant.

2. The facts of the prosecution case as set up in the FIR are that on 18.02.2016 at 1720 hours, SI Ali Muhammad of PS ANF Gulshan-e-Iqbal, Karachi lodged FIR stating therein that he received spy tip through high ups that provincial narcotic smugglers namely Raja son of not known resident of Peshawar and Papu son of not known resident of Kati Pahari, Orangi Town, Karachi through their special agent intended to deliver huge quantity of charas through motorcycle bearing registration No.DGN-605 to their special customer near Dil Passand Sweets North Nazimabad Karachi and on immediate action recovery of contraband and arrest of culprits would be possible. Upon such situation, on the direction of high ups he prepared a raiding party comprising of himself, ASI Rashid Ali, PC Liaquat, PC Abdul Hafeez, PC Muhammad

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Qasim, LNK Abbas, Sepoy Saeed, Sepoy Waris and other ANF staff under supervision of incharge of P.S. AD Muhammad Faisal duly armed with official weapons on government vehicles along with driver and special informer vide entry No.5 at about 1630 hours left police station and at about 1710 hours, they reached near Dil Passand Sweets, North Nazimabad Karachi and started secret surveillance. At about 1720 hours they saw one person coming on black colour motorcycle towards Dil Passand and informer pointed the said person to be required hence they stopped and apprehended him. On inquiry, apprehended accused disclosed his name as Zafran son of Mubarak Shah and secured two foil pack multi colour packet wrapped in solution tape from fold of his shalwar and handed over the same to him. He cut the said packets and found charas in shape of slabs. On quantification the weight of every packet become 1 kilogram and accumulated weight of both packets of charas became 2 kilograms. During spot inquiry apprehended culprit disclosed that another special agent of Raja and Papu while concealing huge quantity of charas in Rickshaw is coming at same place for supplying contraband to special customer. At about 1800 hours they saw one rickshaw was coming towards Dil Passant Sweets and arrested accused pointed said rickshaw to be the same, who stopped and on inquiry apprehended accused disclosed his name as Syed Muhammad Nawaz son of Ziarat Gul. After some resistance he disclosed that charas was lying inside back seat of rickshaw and inside speakers and then he himself took out 35 multi colour foil pack packets from inside the back seat of rickshaw and 10 multi colour foil pack packets from inside the speakers and handed over the same to the complainant. He opened 45 foil pack packets and found charas in shape of slabs. On quantification the weight of 45 foil pack packets become one kilogram each and accumulated weight of 45 foil pack packets became 45 kilograms. During personal search of both accused seizing officer recovered their belongings as per mashirnama. After completion of entire formalities at spot, they brought the arrested accused, case property along with rickshaw at police station where instant FIR was lodged against them.

3. After completion of investigation I.O. submitted charge sheet against the arrested appellant accused Syed Nawaz to which he pleaded not guilty and claimed trial.

4. The prosecution in order to prove its case examined 05 witnesses and exhibited various documents and other items. The accused in his S.342 Cr.PC

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statement claimed false implication however he did not give evidence on oath or call any DW in support of his defence case.

5. After hearing the parties and appreciating the evidence on record the trial court convicted the appellant and sentenced him as set out earlier in this judgment, hence the appellant has filed this appeal against his conviction. At this stage it is worth mentioning that co-accused Zafran was also convicted albeit sentenced to a lesser sentence based on the amount of recovery being much lesser than that from the appellant. He has not filed any appeal against conviction so far as we are aware. The other co-accused Saifur Rehman was acquitted of the charge and no appeal against his acquittal has been filed by the ANF so far as we are aware.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 23.08.2021 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellant has contended that the appellant is completely innocent and has been falsely implicated in this case by the ANF; that he was picked up from his house prior to the incident and that the narcotics were foisted on him; that a joint mashirnama has no sanctity in the eyes of the law; that the rickshaw he was allegedly driving was not produced; that in any event there was no evidence to link him to the rickshaw; that S.103 Cr.PC was not complied with and as such for any or all of the above reasons the appellant be acquitted from the charge by extending him the benefit of the doubt.

8. On the other hand Special Prosecutor ANF appearing on behalf of the State has fully supported the impugned judgment. He has contended that the accused was arrested on the spot where a huge quantity of narcotics were recovered from the rickshaw which he was driving which were kept in safe custody and which lead to a positive chemical report and as such the prosecution had proved its case against the accused beyond a reasonable doubt and as such the appeal should be dismissed. He has placed reliance on the cases of **Raja Muhammad Nadeem v. The State and another** (PLD 2020 Supreme Court 282), **Akbar v. The State** (2017 YLR Note 277) and **The State/ANF v. Muhammad Arshad** (2017 SCMR 283).



9. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the learned counsel for the appellant, the impugned judgment with their able assistance and have considered the relevant law including the case law cited at the bar. We have excluded the evidence of PW 2 Muhammed Qasim as he died before he was able to be cross examined as per record.

10. After our reassessment of the evidence we find that the prosecution has proved its case beyond a reasonable doubt against the appellant for the following reasons:-

(a) The FIR was registered with promptitude giving no time for concoction and the S.161 Cr.PC statements were recorded promptly which were not significantly improved upon by any PW at the time of giving evidence. The complainant and the IO were also separate police officers so there was no conflict of interest.

(b) That the arrest and recovery was made on the spot and the **appellant was caught red handed with the narcotics** in the rickshaw which he was driving by the police whose evidence fully corroborates each other in all material respects as well as the prosecution case. There evidence was not dented despite a lengthy cross examination. It is well settled by now that the evidence of a police witness is as reliable as any other witness provided that no enmity exists between them and the accused and in this case no enmity has been suggested against any of the police PW's and as such the police had no reason to implicate the appellant in a false case. Thus we believe the police evidence which is corroborative in all material respects. Reliance in this respect is placed on the case of **Mushtaq Ahmad v The State** (2020 SCMR 474) where it was held by the Supreme Court in material part as under at para 3;

*"Prosecution case is hinged upon the statements of Aamir Masood, TSI (PW-2) and Abid Hussain, 336-C (PW-3); being officials of the Republic, they do not seem to have an axe to grind against the petitioner, intercepted at a public place during routine search. Contraband, considerable in quantity, cannot be possibly foisted to fabricate a fake charge, that too, without any apparent reason; while furnishing evidence, both the witnesses remained throughout consistent and confidence inspiring and as such can be relied upon without a demur."*

(c) That the accused was the driver of the rickshaw which was stopped and the narcotic was recovered from a secret



place in the rear of the rickshaw and inside speakers at the back of the rickshaw **which was pointed out** by the accused which was secured and sealed on the spot. There were no other passengers in the rickshaw which was recovered from the accused and as per the record of the court was inspected outside the court by the counsel for the appellant as well as the State. The appellant is further linked to the rickshaw by the warranty book which was recovered from inside the rickshaw and was in the name of the appellant. The acquitted co-accused was not arrested on the spot and no recovery was made from him. He was implicated solely on the statement of a co-accused and as such the appellant's case is on a completely different footing to his acquitted co-accused so he can not take advantage of his acquittal.

(d) Based on the particular facts and circumstances of the case where the appellant and his co-accused were arrested at the same place albeit 40 minutes after each other before the first memo of arrest and recovery had been completed there was no illegality in making a joint memo of arrest and recovery which will not vitiate the case against the appellant. In this respect reliance is placed on the case of Akbar (Supra) where it was held as under;

*"8. With regard to the strong objection of learned counsel for the appellant over the preparation of joint memo of arrest and recovery of different incriminating articles found at the spot that are punishable under different penal laws, it may be observed that writing a joint or a separate memo has never been considered an absolute requirement of law to be followed at every cost. Law would only require identification of each item distinctively and independently in the memo of recovery to fend off any chance of vagueness or confusion in the trial. It is the rule of convenience favouring the prosecution to present its case unambiguously before the Court or at times to be used for the benefit of the accused if the memo lacks the necessary details to recognize each incriminating article properly against the accused from whom it is alleged to have been recovered. Even a separate memo wanting in necessary particulars in respect of a recovered article cannot be construed to have furnished sufficient incriminating evidence warranting conviction of the accused. The issue, therefore, in the context would not be of writing a joint or separate memo of arrest and recovery at the spot in case of a joint recovery from either one or more than one accused, but is of the requirement of law pertaining to clear, explicit and precise particulars relating to each incriminating article so that the cause of justice could be served adequately to the satisfaction of all concerned. A joint memo regarding more than one incriminating articles punishable under different and separate penal laws either recovered from one accused or more than one arrested simultaneously would be admissible in evidence and can be safely relied upon and it*



would not be fatal to the prosecution case, if it precisely mentions the recovery of each illegal article against the specific accused from whom it is effected explicitly. In support of our view, we rely upon the case of State through Advocate General, Sindh v. Basher and others (PLD 1997 Supreme Court 408). The Honorable Supreme Court has observed in paragraph No. 11 as under:-

*"11. Referring to the fourth submission of Mr. Aqil that even the Mashirnama of recovery could not have been relied upon as it was a joint Mashirnama of recovery of the arrest as well as recoveries of the arms and ammunition, it may be stated that simpliciter the fact that there is a joint Mashirnama of recoveries of the incriminating articles, may not be fatal if the same identifies each of the recovery with the accused concerned with all relevant particulars but if such a joint Mashirnama is vague and cannot identify with certainty the articles recovered from a particular accused, such a Mashirnama cannot be relied upon."*(bold added)

(e) Even otherwise, in dealing with narcotics cases the courts are supposed to adopt a dynamic approach and not acquit the accused on technicalities. In this respect reliance is placed on the case of **Ghualm Qadir V The State** (PLD 2006 SC 61) which held as under at para 8 P.66.

*"We are not agreeable with the contention of the learned counsel because fact remains that "Poppy Flowers" were found lying on the roof of the vehicle therefore, the technicality, which is being pointed out by the learned counsel, would not be sufficient to acquit him. In addition to it in such-like cases Courts are supposed to dispose of the matter with dynamic approach, instead of acquitting the drug paddlers on technicalities, as it has been held in (1993 SCMR 785) and (PLD 1996 SC 305)".* (bold added)

(f) That there are no **material** contradictions in the evidence of the PW's and exhibits and it is well settled by now that minor contradictions which do not effect the materiality of the evidence can be ignored. In this respect reliance is placed on **Zakir Khan V State** (1995 SCMR 1793).

(g) That most of the relevant police entries have been exhibited including those relating to departure and safe custody of the narcotic.

(h) The narcotics were sealed at the time of recovery and kept in the malkhana for which the person who recovered the narcotic was examined, the person who deposited the narcotics in the malkhana has been examined, the head of



the malkhana has been examined, the person who took the narcotic to the chemical examiner one day later has been examined and all the relevant malkhana entries have been exhibited and thus safe custody of the narcotic has been proven from the time it was recovered until the time it was sent to the chemical examiner. There was no delay in sending the narcotics for chemical examination as they were sent the next day. Even no suggestion of tampering with the narcotics was made by the appellant during cross examination.

(i) The chemical report proved to be positive and all relevant protocols were followed.

(j) That is extremely difficult for such a large amount of narcotics to be foisted on the appellant which is not readily available with the police whilst on patrol. In this respect reliance is placed on the cases of **Mustaq Ahmed's case** (Supra) and **The State V Abdali Shah** (2009 SCMR 291).

(k) Being the driver of the rickshaw which was linked to the appellant through the warranty book recovered from it actual **knowledge** of the narcotics can be found especially as the appellant was able to point out where a huge amount of narcotics (45KG) was hidden in the rear of the rickshaw and in speakers whilst being the driver of the car. In this respect reliance is placed on the case of **Nadir Khan V State** (1998 SCMR 1899) where it was held as under,

*"We have gone through the evidence on record and find that the petitioners had the charge of vehicle for a long journey starting from Peshawar and terminating at Karachi. They had the driving licences also. As being person incharge of the vehicle for such a long journey, they must be saddled with the necessary knowledge with regard to the vehicle and its contents. The probabilities or the presumptions are all dependents on the circumstances of each case and in the present case the circumstances fully establish their knowledge and awareness of the contents and their explanation showing the ignorance actually strengthens that conclusion rather than weakening it". (bold added)*

(l) Furthermore, under Section 29 CNSA 1997 once the recovery has been proven as in this case the onus shifts to the accused to show his innocence in that at least he had no knowledge of the narcotics. The appellant who was the driver of the vehicle has not been able to do so in this case as the evidence shows that the narcotics were recovered from a rickshaw which he was the driver and sole occupant after he pointed out to the police where they were hidden in the rickshaw and as such he was caught red handed and arrested on the spot along with the narcotics which were recovered from the rear seat and speakers of the rickshaw which he was driving and



connected with. In this respect reliance is placed on the case of **Mehboob-Ur-Rehman V State** (2010 MLD 481) where it was held as under in this respect at P485 Para 14

*"Under the provisions of section 29 of the C.N.S. Act once the recovery of contrabands was made from a private car which was by then in control of the two appellants, the burden to explain the possession whether actual or constructive was on the appellants to discharge but neither they have led any evidence in defence nor have appeared in disproof of the prosecution evidence under section 340(2), Cr.P.C. thus the charge laid upon them has remained un rebutted".*

(m) That although no independent mashir was associated with the arrest and recovery of the appellant and the narcotic this is not surprising because people despite being asked, as in this case, are reluctant to be involved in cases concerning narcotic dealers. Even otherwise, S.103 Cr.P.C is excluded for offenses falling under the Control of Narcotic Substances Act 1997 by virtue of Section 25 of that Act. In this respect reliance is placed on the case of **Muhammad Hanif V The State** (2003 SCMR 1237).

(n) No doubt it is for the prosecution to prove its case against the accused beyond a reasonable doubt but we have also considered the defense case which in essence as per the appellants cross examination and S.342 Cr.PC Statement was just a basic plea of false implication in that he had been picked up from his house and was falsely implicated in this case. He did not give evidence on oath and did not call any DW in support of this defence case. No body moved any application concerning his illegal removal from his home and subsequent detention and no enmity or ill will has been suggested to any police witness to suggest that they might have falsely implicated the appellant in this case and thus we find the defence case to be an afterthought and disbelieve the same in the face of trustworthy, reliable and confidence inspiring prosecution evidence.

11. Thus, for the reasons mentioned above, we find that the prosecution has proved its case beyond a reasonable doubt against the appellant, the impugned judgment is upheld and the appeal is dismissed.

12. The appeal is disposed of in the above terms.