

IN THE HIGH COURT OF SINDH, KARACHI

Present:

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

CRIMINAL APPEAL NO.706 OF 2021.

Appellant: Shah Nawaz S/o. Abdul Rehman
through Mr. Saifullah, Advocate.
Respondent: The State through Mr. Habib
Ahmed, Special Prosecutor ANF.

CRIMINAL JAIL APPEAL NO.389 OF 2022.

Appellant: Muhammad Saeed S/o. Shambay
through Mr. Moula Bux Bhutto,
Advocate.
Respondent: The State through Mr. Habib
Ahmed, Special Prosecutor ANF.
Date of Hearing: 01.12.2022
Date of Announcement: 07.12.2022.

JUDGMENT

Mohammad Karim Khan Agha, J:- Appellants Shah Nawaz S/o. Abdul Rehman and Muhammad Saeed S/o. Shambay were tried before the Special Court-II (CNS) Karachi in Special Case No.277 of 2016 arising out of Crime No.26 of 2016 U/s. 6/9-C r/w sections 14/15 of the CNS Act, 1997 registered at PS ANF Clifton, Karachi and vide judgment dated 03.12.2021 appellants Shah Nawaz and Muhammad Saeed were convicted and sentenced to Life Imprisonment with fine of Rs.,500,000/- each. In case of default in payment of fine they were ordered to suffer imprisonment of 05 years more. However, benefit of section 382-B Cr.P.C. was extended to the appellants.

2. The brief facts of the prosecution case are that on 02.05.2016 at about 1500 hours near Nihal Hospital, Malir, Karachi complainant Inspector Tahir Ahmed of PS ANF Clifton, Karachi along with other ANF officials on pointation of spy informer stopped a vehicle Suzuki bearing registration

No.CA-9297 and arrested accused Muhammad Saeed from the driving seat and accused Shah Nawaz sitting on the front seat and from the rear seat of the said Suzuki recovered a black color bag containing 79 foil packets of Charas weighing 79 Kgs. After observing required formalities at the spot the arrested accused brought at PS along with recovered contraband and Suzuki, thereafter FIR was lodged.

3. After completion of investigation I.O. submitted charge sheet against the accused to which they 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 appellants in their section 342 Cr.PC statements claimed false implication by the police however they did not give evidence on oath or call any DW in support of their defence case.

5. After hearing the parties and appreciating the evidence on record the trial court convicted the appellants and sentenced them as set out earlier in this judgment, hence, the appellants have filed these appeals against their convictions.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment 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 appellants have contended that the appellants are innocent and have been falsely implicated in this case by the police in order to show their efficiency; that the narcotics were foisted on the appellants; that the narcotics were not in the possession of the appellants; that the sampling of the narcotics which were sent to the chemical examiner had not been carried out in accordance with the law; that there are material contradictions in the evidence of the PW's which renders their evidence unreliable; that there was no independent mashir to the arrest and recovery of the narcotics in violation of S.103 Cr.PC; that the prosecution failed to prove safe custody of the narcotics and that for any or all of the above reasons the appellants be acquitted of the charge by being extended the benefit of the doubt. In support of their contentions they placed reliance on the cases of **The State v. Imran Bakhsh** (2018 SCMR 2039), **Minhaj Khan v. The State** (2019 SCMR 326), **Khair ul Bashar v. The State** (2019 SCMR 930), **Naveed Asghar v. The State** (PLD 2021

SC 600), **Tariq Pervez v The State** (1995 SCMR 1345) and **Wazir Muhammad v. The State** (1992 SCMR 1134).

8. On the other hand Special Prosecutor ANF appearing on behalf of the State has fully supported the impugned judgment. In particular he has contended that the evidence of the prosecution witnesses who made the arrest and recovery could be safely relied upon; that the appellants had been caught driving a private car which was filled with narcotics in the rear hidden in wrappers of chocolate and coffee; that the prosecution had proven safe custody of the narcotics which resulted in a positive chemical report; that the sampling of the narcotics which were sent to the chemical laboratory for analysis had been carried out in accordance with law; that the balance of the recovered narcotics had been destroyed on court orders and as such the prosecution had proved its case beyond a reasonable doubt against the appellants and the appeals be dismissed. In support of his contentions he placed reliance on the cases of **Raja Ehtisham Kiyani v. The State** (2022 SCMR 1248), **Faisal Shahzad v. The State** (2022 SCMR 905), **Naveed Akhtar v. The State** (2022 SCMR 1784), **Sharafat Khan v. The State** (PLD 2022 Supreme Court 281), **Ameer Zeb v. The State** (PLD 2012 Supreme Court 380) and **Khuda Bakhsh v. The State** (2015 SCMR 735).

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 appellants, the impugned judgment with their able assistance and have considered the relevant law including the case law cited at the bar.

10. At the outset we have observed that one PW's evidence in chief (PW 3 Anis-ur-Rehman) was recorded in the absence of one of the appellants defence counsel although the other defence counsel was present and both defence counsel cross examined the PW. We asked learned counsel for the appellants whether they wanted the appeals remanded on this ground. Both the learned counsel for the appellants stated that they did not want the case remanded on this ground and that they wanted to proceed on merits as in their view they had good cases and most importantly no prejudice had been caused by the absence of one of the defence counsel at the time of recording the evidence in chief of the concerned PW. We are also in agreement that no prejudice was caused to the appellant whose counsel was absent during the evidence in chief of the concerned PW 3 and as such have proceeded to decide these appeals on merit.

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

(a) The FIR was lodged with promptitude giving no time for concoction and the S.161 Cr.PC statements of the witnesses who gave evidence were recorded promptly which were not significantly improved upon by any PW at the time of giving evidence.

(b) That the arrest and recovery was made on the spot and the **appellants were caught red handed with the narcotics** in the car which one of the appellants was driving and the other appellant was sitting in the passenger seat 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 the appellants were unable to prove through evidence any such enmity. 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 one of the appellants was the driver of the car whilst the other was sitting in the front passenger seat of the car which was stopped after specifically being pointed out by a spy informer and the narcotics were recovered from the back of the car **secretly concealed in wrapping papers of chocolates and coffee which were recovered from the rear of the car on the pointation of the appellants and were secured and sealed on the spot.**

(d) 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).

(e) That most of the relevant police entries have been exhibited including those relating to departure, arrival and safe custody of the narcotic and mashirnama of arrest and recovery which was prepared on the spot which all support/corroborate the prosecution case.

(f) That that from the evidence it is found that the samples taken from the recovered packets of narcotics was carried out in accordance with the law. In this respect reliance is placed on the cases of **Sharafat Khan v. The State** (PLD 2022 SC 281) and **Ameer Zeb v. The State** (PLD 2012 Supreme Court 380).

(g) The narcotics were sealed at the time of recovery and kept in the malkhana for which the person who recovered the narcotics was examined, the person who deposited the narcotics in the malkhana was examined, the head of the malkhana was examined, the person who took the narcotics to the chemical examiner one day later was examined and all the relevant malkhana entries have been exhibited and thus safe custody of the narcotics has been proven from the time it was recovered until the time it was sent to the chemical examiner. Even no suggestion of tampering with the narcotics was made by the appellants during cross examination.

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

(i) The balance of the recovered narcotics which were not sent for chemical analysis apart from a representative sample was burnt on the orders of the court as per evidence of PW 3 Anis Rehman who produced both the memo and certificate of sampling and burning respectively and this is why the whole case property was not available before the court.

(j) That is extremely difficult for such a large amount of narcotics to be foisted on the appellants which is not readily available with the ANF. 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) The appellants being the driver and passenger of the car, which was also recovered, who pointed out the narcotics concealed in the rear of the car hidden in chocolate and coffee wrappers had actual knowledge of the narcotics. 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 appellants who were the driver of the car and sitting in the front passenger seat of the car respectively have not been able to do so in this case as the evidence shows that the narcotics were recovered from the car which one appellant was driving and the other appellant was sitting in the front passenger seat of the car after the appellants pointed out to the police where the narcotics were hidden in the car and as such the appellants were caught red handed and arrested on the spot along with the narcotics which were recovered hidden in wrappers from the back of the car. 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 unrebutted".

(m) That although no independent mashir was associated with the arrest and recovery of the appellants and the narcotics 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) That 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)

This position was reiterated in the following terms in the case of **Faisal Shahzad** (*supra*),

"9. This Court has time and again held that the menace of drugs is increasing day by day to various reasons. It is very disheartening to observe that every day there are many reports of drug peddlers being caught with drugs. This menace is great threat to a peaceful society and is affecting many lives especially the youngsters, therefore, immediate steps are required to be taken to curb these nefarious activities. The proceeds of narcotics are largely utilized in anti-state / terrorist activities, which this country is facing since decades. When the prosecution is able to prove its case on its salient features then unnecessary technicalities should not be allowed to hamper the very purpose of the law on the subject. The close analysis of the whole prosecution evidence i.e. the recovery of huge quantity of narcotics, the happening of the occurrence in broad daylight, separating the samples from each packet in a prescribed manner and sending them to the Chemical Examiner, report of the Chemical Examiner and the statements of the prosecution witnesses when evaluated conjointly leaves no room to come to a different conclusion than what has been arrived at by the learned courts below."

(o) 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 is false implication simplicitor by the police. However no enmity has been suggested against any police official to suggest that he had any reason to falsely implicate either of the appellants. Neither of the appellants gave evidence on oath and did not call any DW in support of their defence case that they were arrested from there house by the police and falsely implicated in this case and thus we disbelieve the defence case in the face of trustworthy, reliable and confidence inspiring prosecution evidence.

12. Thus, for the reasons discussed above, we find that the prosecution has proved its case beyond a reasonable doubt against the appellants, the impugned judgment is upheld and the appeals are dismissed.

13. The appeals are disposed of in the above terms.