

Narcotics Acquitted : No Sfe Custody

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IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

Crl. Jail Appeal No.D-62 of 2019

PRESENT:

Mr. Justice Mohammad Karim Khan Agha,
Mr. Justice Zulfiqar Ali Sangi,

Appellant : Asmatullah son of Azizullah Pathan.

Respondent : The State.

Mr. Khalil Ahmed Panezai advocate for the appellant.
Mr. Ali Anwar Kandhro, Additional Prosecutor General.

Date of hearing : 02.02.2021.

Date of Judgment : 17.02.2021.

J U D G M E N T.

Mohammad Karim Khan Agha, J.- Through this appeal preferred from jail, appellant Asmatullah Pathan has challenged the judgment, dated 03.09.2019, passed by learned Sessions Judge/Special Judge (CNSA & MCTC), Jacobabad, in Special Case No.63/2018, re-State Vs. Asmatullah Pathan, based on Crime No.05/2018, registered at Excise Police Station, Jacobabad, whereby the appellant was convicted for offence under Section 9(c), Control of Narcotic Substances Act, 1997 and sentenced to suffer R.I. for 12 years and 6 months, with fine of Rs.60,000/- (rupees sixty thousand); in case of default thereof to undergo simple imprisonment for nine months more. However, benefit of Section 382-B, Cr.P.C was extended to the appellant.

2. The prosecution case as set out in the FIR is that:

"Complaint on behalf of State is that on 08.12.2018 I and EI Gul Mohammad Bhutto of Excise P.S Jacobabad along with subordinate staff, namely, Hakim Ali, Mohammad Aslam, Mohammad Nawaz, proceeded in the official vehicle No.GSB-535 from P.S under Roznamcha entry

No.1, at 7.00 a.m., towards Excise Check Post situated near Zarai College on Shikarpur Road, Jacobabad, for checking the suspect vehicles, where we started checking. During checking, we found one Car No.AXE-355 Karachi coming from northern direction, which on being signaled was stopped and found one person sitting in the driver seat in suspected condition, whom we apprised about the narcotics law and got him down, enquired about his name etc., who disclosed his name as Asmatullah son of Azizullah, by caste Pathan, resident of Kachlak Mohalla, Quetta. E/C Mohammad Aslam and E/C Hakim Ali were nominated as mashirs, his personal search was conducted and secured hard cash Rs.1100/- from the right side pocket of his shirt and on search of the car 40 patties of charas lying in it's secret cavity were recovered. Each of the patties were weighed, which became 500 grams each, total 40 patties became 20 kilograms, out of which 20 patties weighing 10 kilograms were wrapped and sealed in a white cloth for chemical examination, while remaining 20 patties of charas weighing 10 kilograms were sealed separately in white cloth. The car along with key were taken in possession and the accused was arrested. Such mashirnama was prepared at the spot, which after going through was signed by the mashirs. Accused and the case property along with the car were brought at P.S, where this case for offence u/s 9-c, CNS Act, 1997 has been registered against the accused."

3. On completion of usual investigation, the appellant/accused was sent up to face trial. The accused pleaded not guilty to the charge and claimed trial.

4. The prosecution to prove the charge examined 02 PW's who exhibited various documents and other items in support of the prosecution case, where after the prosecution closed its side. The statement of accused was recorded under S. 342 Cr.P.C in which he denied the allegations leveled against him by the prosecution witnesses and claimed false implication by the police as he refused to pay a bribe to them. The accused did not examine himself on oath, however he produced 2 DW's in support of his defence case, who were his father and brother.

5. Learned Sessions Judge/Special Judge (CNSA & MCTC), Jacobabad after hearing the learned counsel for the parties and assessment of evidence available ↵

on record, vide judgment dated 03.09.2019, convicted and sentenced the appellant as stated above, hence this appeal against conviction has been filed by the appellant.

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

7. Learned counsel for the appellant has contended that the appellant is completely innocent, that he has been falsely implicated in this case by the police because he refused to pay a bribe to the police; that he was not arrested from the vehicle as alleged but was taken out of a wagon in which his father and brother were also sitting and taken to the PS where he was arrested after he refused to pay the bribe; that no recovery was made from him and that the narcotics were foisted on him after his refusal to pay a bribe to the police; that there are major contradictions in the evidence of the 2 PW's; that the complainant was also the IO which lead to an unfair investigation being carried out against him; that there were no independant mashirs; that not all the recovered narcotics were sent to the chemical examiner for testing and most importantly there was no unbroken chain of safe custody of the alleged narcotics and thus they could easily have been tampered/interfered with and thus for any of the above reasons the appellant be acquitted of the charge by being extended the benefit of the doubt. In support of his contentions he placed reliance on the cases reported as **Kamran Shah v. The State** (2019 SCMR 1217), **Qaiser Javed Khan v. The State through Prosecutor General Punjab** (PLD 2020 Supreme Court 57), **Ikramullah v. The State** (2015 SCMR 1002), **Ameer Zeb v. The State** (PLD 2012 Supreme Court 380), **The State through Regional Director ANF v. Imam Bakhsh** (2018 SCMR 2039), **Khair-UL-Bashar v. The State** (2019 SCMR 930) and **Khuda Bakhsh v. The State** (2015 SCMR 735).

8. On the other hand, learned Addl. P.G fully supported the impugned judgment and contended that there was no legal bar on the complainant also being made the IO; that the police witnesses were as good as any other witness and their evidence was reliable and confidence inspiring; that the PW's had not made any material contradictions in their evidence; that no private person was prepared to act as mashir despite them being asked and even otherwise this was not required under the CNSA which was a special law; that safe custody of the narcotic was proved from the time of its recovery to the time it reached the

chemical examiner under seal; that the appellant had been caught red handed whilst driving the car from where the narcotics had been found in a hidden cavity and the arrest and recovery was made on the spot; that the police had no reason to falsely implicate him and the accused had raised the usual defence of refusing to pay a bribe for which he had no evidence; that the recovered amount was too much to be foisted and as such the appeal should be dismissed. In support of his contentions he has placed reliance on **Mst. Haseena Baloch v. The State** (2018 YLR 32).

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.

10. After our reassessment of the evidence we find that the prosecution has **NOT** proved its case beyond a reasonable doubt against the appellant for the following reasons;

(a) In our view **the key and crucial aspect** of this case is the one of the safe custody of the narcotic from the time of its recovery to the time it was sent for chemical examination. In this case the recovery was made on the spot and sealed and then taken back by the police to the PS where it remained for two days before being taken for chemical examination in sealed condition. During this two day period there was no evidence as to where the narcotics were kept and whether they were kept in safe custody or not. For example neither was the in charge of the malkhana examined nor was an entry exhibited to prove that the narcotics had been kept safely in the malkhana during this two day period or any other witness to prove the safe custody of the narcotics in this respect. In addition when the narcotic was taken to the chemical examiner the chemical report states that it was delivered by PW 2 Muhammed Aslam however the receipt from the chemical examiner reveals that it was delivered by EC Hakim Ali which again creates doubts about this aspect of safe custody i.e from the PS to the chemical examiner. Thus, from the above discussion **we find** that the prosecution have not been able to prove safe custody of the narcotic from the time of its recovery to the time it was sent for chemical examination which means that there

was an opportunity for such narcotics to be interfered with and/or tampered with which means that the chemical report cannot be safely relied upon on to convict the appellant which in effect ends the prosecution case against the appellant. In this respect reliance is placed on the as yet unreported recent Supreme Court judgment in the case of **Ms Sakina Ramzan V State** in Crim.Appeal No.184 of 2020 dated 06.01.2021.

In addition to the above finding we have also noticed the following points.

(b) That there are some contractions in the evidence of the PW's which we consider to be relevant. For example, PW 1 Muhammed Iqbal in his evidence states that the narcotics were recovered from the car by PW 2 Muhammad Aslam whilst PW 2 Muhammad Aslam states that the narcotics were recovered from the car by PW 1 the complainant. PW 2 Muhammad Aslam initially states that the narcotic was found in the back seat of the car and was recovered by using a screw driver and later in cross examination states that the narcotics were hidden in the petrol tank. The complainant states that the secret cavity was accessed by using a hammer and not screw driver.

(c) That only half of the available narcotic was sent for chemical testing with no explanation why the remainder was not sent. The mention on the chemical report of the protocols used for testing also seems to be very cursory.

(d) That although we accept that the complainant can also be the IO of the case in a narcotics case and that in narcotics cases no mashir is required especially when some private persons are asked but declined as in this case it would however, based on the particular facts and circumstances of the case, have strengthened the prosecution case if there had been a separate complainant and IO and independent mashirs.

(e) The recovered vehicle did not belong to the appellant and he had no concern with its owner.

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(f) No doubt it is for the prosecution to prove its case against the accused beyond a reasonable doubt but we have also considered the defence case. In this case although the accused did not give evidence on oath on cross examination of the PW's he consistently suggested that he was taken from the wagon and the narcotics foisted on him because he would not pay the police a bribe. He stuck to this stance in his S.342 Cr.PC statement and both his 2 DW's despite being father and brother supported this contention during their evidence. The fact that the accused has adopted the same defence from the word go and produced witnesses in support of it, albeit closely related, also gives some weight to the defence case.

(g) It is a well settled proposition of law that the benefit of doubt must go to the accused as a matter of right and not by way of concession.

11. Thus, for the reasons mentioned above, we find that the prosecution has NOT proved its case beyond a reasonable doubt against the appellant mainly on the basis of its inability to prove safe custody of the narcotics from the time of their recovery until they were taken to the chemical examiner and as such by extending the benefit of the doubt to the appellant we hereby acquit him of the charge and set aside the impugned judgment and allow the appeal. The appellant shall be released unless wanted in any other custody case.

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