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IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Khadim Hussain Tunio.

CRIMINAL APPEAL NO.755 OF 2022

Appellant: Muhammad Nasir son of Sakhi Dar
through Mr. Liaquat Ali Awan, Advocate

Respondent: The State through Mr. Ali Haider Saleem,
Addl. Prosecutor General, Sindh.

Date of Hearing : 28.04.2023

Date of Judgment : 03.05.2023

J U D G M E N T

Muhammad Karim Khan Agha, J. Appellant Muhammad Nasir was tried in the Court of Additional Sessions Judge-VII/M.C.T.C.-02, Karachi Central in Special Case No.317 of 2022 arising out of Crime No.57 of 2022 under Section 6/9-C, CNS Act, 1997 registered at PS SIU, Karachi and vide Judgment dated 28.11.2022 the appellant was sentenced under S.9(c) CNS (Amendment) Act, 2022 to suffer R.I. for 14 years with direction to pay fine of Rs.4,00,000/- (Rupees Four Lac Only). In case of default to pay fine, he will have to suffer Simple Imprisonment (SI) for 01-year more. Appellant was also extended the benefit of Section 382-B Cr.P.C.

2. The brief facts of the case as narrated in the FIR are that on 10.03.2022 at about 0130 hours accused Muhammad Nasir was arrested from Qalandaria Chowk, Shahrah-e-Noor Jehan, Karachi by police party led by complainant SIP Farrukh Zaidi and recovered 06 kg & 50 grams Charas (05 packets Charas Chitter Type) from the possession of the accused in presence of police mashirs. Hence the subject FIR was lodged.

3. After usual investigation the matter was challaned and the appellant was sent up to face trial. He pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 04 PWs and exhibited various items and other documents. The appellant recorded his statement under Section 342 Cr.P.C. whereby he claimed false implication. He did not give evidence on oath or call any witness in support of his defence.

5. After appreciating the evidence on record, the learned trial Court convicted and sentenced the appellant as set out earlier and hence, the appellant has filed this appeal against his conviction and sentence.

6. Learned counsel for the appellant has contended that the prosecution case is highly doubtful; that it is lacking in material particulars and same is full of contradictions, inconsistencies and same have caused a serious dent in the prosecution case; that the narcotics were foisted on the appellant; that there was no independent mashir in violation of S.103 Cr.P.C; that the appellant had no knowledge of the narcotics in the rickshaw; that the prosecution had failed to produce safe custody and safe transmission of the narcotics to the chemical examiner and as such for any or all of the above reasons the appellant should be acquitted of the charge by extending him the benefit of doubt. In support of his contentions he placed reliance on the cases of **Haji Nawaz v The State** (2020 SCMR 687) and **Mst. Sakina Ramzan v The State** (2021 SCMR 451).

7. On the other hand learned A.P.G has fully supported the impugned judgment and contended that the prosecution had fully proved its case against the appellant through reliable eye witnesses; that the narcotic was kept in safe custody from the time of its recovery until trial which produced a positive chemical report and as such he submitted that the appeal should be dismissed as being without merit. In support of his contentions he placed reliance on the cases of **The State v Muhammad Arshad** (2017 SCMR 283) and **Faisal Shahzad v The State** (2022 SCMR 905).

8. We have carefully considered the arguments of the learned counsel for the parties, scanned the entire evidence and reviewed the relevant case law.

9. 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) That the FIR was lodged 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.

(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. Their 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 appellant was unable to prove through evidence any enmity between the police witnesses and the appellant who had no reason to falsely implicate the appellant in this case. Thus we believe the police evidence which is corroborative in all material respects and rely upon the same which we find to be reliable, trust worthy and confidence inspiring. Reliance in this respect is placed on the case of **Mushtaq Ahmad v The State** (2020 SCMR 474).

(c) That the Rickshaw which the appellant was driving when the narcotics were seized was recovered by the police.

(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 the case of **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) 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 and the malkhana entry exhibited, the person who took the narcotic to the chemical examiner one day later has also been examined and all the relevant malkhana entries have been exhibited and thus safe custody and safe transmission of the narcotic 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 appellant during cross examination.

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

(h) Being the driver of the rickshaw which contained the narcotics actual knowledge of the narcotics can be found. In this respect reliance is placed on the case of **Nadir Khan V State** (1998 SCMR 1899).

(i) 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 rickshaw has not been able to do so in this case. In this respect reliance is placed on the case of **Mehboob-Ur-Rehman V State** (2010 MLD 481).

(j) 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 are reluctant to be involved in cases concerning narcotic dealers. In this case it was night hours and as such few people would have even been available. 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).

(k) 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;

"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)

(l) 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 of the appellant which is that of false implication due to enmity with his cousins in his village. He did not give evidence on oath or call any witness in support of his defence case nor present a shred of evidence in respect of it. In the case of **Anwar Shamim V State** (2010 SCMR 1791) it was held that when a specific plea is taken in defence at least some evidence must be produced to support the plea. In this case no such evidence was produced. Thus we disbelieve the defence case in the face of trustworthy, reliable and confidence inspiring prosecution evidence.

10. Thus, for the reasons mentioned above, we find that the prosecution has proved its case beyond a reasonable doubt against the appellant and as such the appeal is dismissed.

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