

IN THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Abdul Mubeen Lakho,

Criminal Appeal No.477 of 2020

Appellant: Afzal S/o. Faiz Muhammad
through Mr. Khawaja Naveed
Ahmed, Advocate.

Respondent: The State through Mr. Muhammad
Iqbal Awan, Additional Prosecutor
General.

Date of hearing: 01.06.2021.

Date of Announcement: 03.06.2021.

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant Afzal S/o. Faiz Muhammad in the instant appeal has assailed the judgment dated 12.10.2020 passed by the Model Criminal Trial Court/Learned Additional District & Sessions Judge-I, Karachi East in a Sessions Case No.688 of 2020 arising out of Crime No.01/2020 2014 U/s. 6/9-B & C of CNS Act, P.S. Korangi Karachi whereby the appellant was convicted and sentenced to suffer R.I. for 10 years with fine of Rs.50,000/-. In case of failure of payment of fine he shall further undergo to S.I. for six months more.

2. The brief facts of the prosecution case as stated in the FIR are that on 14.01.2020 Assistant Excise and Taxation Officer Muhammad Waseem was on patrolling duty with his subordinate staff EI Nasir Baloch, EC Fatehyab, EC Arshad, EC Munawar, EC Umair Din in Government vehicle. During patrolling when they reached at 37-A, KDA Park near Zamanabad Chowrangi, Landhi No.4, Karachi after receiving spy information. On the pointation of spy informer they stopped one person on motorcycle bearing registration No.KMZ-7300 which was Honda 125 and apprehended him and inquired his name to which he disclosed his name as Afzal son of Faiz Muhammad. During personal search of accused complainant recovered one plastic shopper wrapped in yellow tape from

right fold of his shalwar that contained heroin powder. The complainant weighed such property on digital scale found to be 1040 grams. On further personal search of accused one packet was recovered from his left pocket of shirt which got opened and found ice powder which is called Methamphetamine which was weighed 400 grams and from further search Rs.1300/- were recovered from his front pocket. The complainant also secured one mobile phone lying in his pocket, which was of blue and yellow color. One registration book of motorcycle number KMZ-7300 was also secured which was in the name of Bilal. Thereafter, the complainant brought the accused and recovered property to Police Station where he lodged FIR of the incident.

3. The case was assigned to Assistant Excise and Taxation Officer Muhammad Waseem for investigation who proceeded to place of incident, prepared such memo, recorded statements of witnesses, dispatched property to chemical examiner, obtained remand of the accused and after completion of all codal formalities he submitted challan against the accused before the court of Magistrate for taking cognizance and sending the same to trial court.
4. After completion of the usual investigation charge was framed to which the appellant pleaded not guilty and claimed trial.
5. The prosecution in order to prove its case examined 02 prosecution witnesses and exhibited various documents and other items. The statement of accused was recorded under Section 342 Cr.P.C in which he denied all the allegations leveled against him and claimed false implication. After 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 conviction.
6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the judgment dated 12.10.2020 passed by the concerned 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 of any wrong doing; that he has been falsely

implicated in this case by the police; that the narcotics were foisted on him; that no independent Mashir as required under S.103 Cr.PC was present; that there is no evidence that the recovered narcotics were kept in safe custody and as such they could have been tampered with and thus for all the above reasons the appellant be acquitted of the charge by extending him the benefit of the doubt.

8. On the other hand, Additional Prosecutor General appearing on behalf of the State has fully supported the impugned judgment. He has contended that the appellant was caught red handed with the narcotics on him; that there was no enmity or ill will between the police PW's and the appellant and as such they had no reason to falsely implicate him in this case and as such their evidence could be safely relied upon; that safe custody of the narcotic had been proved and there was also a positive chemical report and as such the appeal should be dismissed.

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 appellant, and the impugned judgment with their able assistance and have considered the relevant law.

10. It is true that the appellant was caught red handed on the spot and that since no enmity has been proved between the appellant and the police that their evidence can be safely relied upon. Under the CNSA there is also no requirement for independent mashirs and that there is no absolute bar on the IO and complainant being one and the same. The chemical report has also proved positive.

11. We have however found a fatal defect in the prosecution case. Namely the prosecution has not been able to prove safe custody of the narcotic from the time it was recovered from the appellant to the time that it was sent to the chemical examiner and as such tampering with the narcotic cannot be ruled out. For example, PW 1 Muhammed Wasim who was the complainant as well as IO in this case states as under in his evidence;

"It is correct to say that from 14.01.2020 to 16.01.2020 the heroin powder was with me, while Ice was with me till 17.01.2020"

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12. Thus for 2 days the heroin was with him and for 3 days the Ice was with him so that there was ample opportunity for anyone to have tampered/interfered with the narcotic or even substituted it before it was sent for chemical examination. The recovered narcotic was never even placed in the malkana for safe keeping. It is well settled by now that the chemical report will be of no legal value unless safe custody of the narcotic is proven from the time of its recovery until the time it reached the chemical lab for analysis as in this case. In this regard 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.

13. In addition we note that no question regarding the recovery of the heroin or Ice was ever put to the appellant in his S.342 Cr.PC statement. Instead it was put to him that charas was recovered from him which was not the case and as such since the recovery of heroin and Ice was not put to him in his S.342 Cr.PC statement it is trite law that he cannot be convicted in connection with heroin or Ice as he was by the trial court as the recovery of these narcotics was never put to him at the time of recording his S.342 Cr.PC statement.

14. 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. In this respect reliance is placed on **Tariq Pervez V State** (1995 SCMR 1345).

15. Thus, for the reasons mentioned above we find that the prosecution has failed to prove its case against the appellant beyond a reasonable doubt and as such by extending the benefit of the doubt to the appellant we hereby allow the appeal, set aside the impugned judgment and acquit him of the charge. The appellant shall be released from jail unless wanted in any other custody case.

16. The appeal stands disposed of in the above terms.