

# IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No. 193 of 2020

*Before:*

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

Appellant: Nasrullah Khan son of Haji Noor through  
Syed Zakir Hussain, advocate

Respondent: The State through Mr. Habib Ahmed,  
Special Prosecutor, ANF.

Date of hearing: 14.02.2022

Date of announcement: 22.02.2022

## J U D G M E N T

**KHADIM HUSSAIN TUNIO, J-** Through captioned criminal appeal, appellant Nasrullah Khan son of Haji Noor has challenged the judgment dated 31.01.2020 (*impugned judgment*) passed by the learned Judge, Special Court-I, (CNS), Karachi in Special Case No. 118/2016 (*Re: State v. Nasrullah Khan*), culminated from FIR No. 05/2016 registered at P.S. ANF-I, under section 9(c), 14 and 15 Control of Narcotic Substances Act (CNSA), 1997. Through the impugned judgment, appellant was convicted and sentenced to suffer R.I. for five years and to pay fine of Rs.50,000/- (*fifty thousand only*), in default in payment whereof to further undergo S.I. for five months more. Benefit of Section 382-B Cr.P.C. was extended to him.

2. Brief facts of the prosecution case are that the complainant received spy information regarding narcotic dealers Naseebullah and Naqeebullah's presence and that they would hand over a huge quantity of narcotics to their customers at Caltex Petrol Pump near Al-Asif Square between 0030 hours to 0130 hours after receipt of such information, he constituted a raiding party of other ANF officials headed by himself, in an official vehicle along with spy informer, through Roznamcha Entry No. 7

at about 0015 hours and reached the pointed out place at about 0030 hours and started surveillance of the area. At about 0040 hours, a person was spotted coming toward Caltex Petrol Pump while having a multi-coloured shopping bag in his hand. On the pointation of the spy informer, they apprehended him. Complainant directed the people present there to act as mashir, but they refused, hence ASI Rashid Ali and PC Abdul Hafeez, members of the raiding party, were made mashirs. On inquiry, apprehended person disclosed his name to be Nasrullah son of Haji Noor Muhammad and on his personal search, complainant secured a shopper, opened it and found three big packets contained heroin lying below a red colour cloth. The contraband was weighed through an electric scale which became 3 kilograms, out of which 100 grams of heroin powder from each of the three packets was separated as sample for examination and sealed in a brown colour envelope at the place of scene for examination by the chemical examiner. The remaining property was sealed separately and serial No. 123 was mentioned on sample parcel as well as on the remaining case property. On further search of Nasrullah, complainant secured cash of Rs.550/- and a mobile phone. Memo of arrest and recovery was prepared. Thereafter accused and case property were brought to P.S. ANF-I where the FIR was lodged.

3. After usual investigation, challan was submitted against the appellant, whereafter a formal charge was framed against accused by the trial Court to which he pleaded not guilty and claimed trial. In order to substantiate its case, prosecution examined two witnesses namely PW-1 **Inspector Shiraz Sadiq** and PW-2 **ASI Rashid Ali**. Prosecution witnesses also produced a number of documents and other items in evidence which were duly exhibited. Statement of accused was recorded under section 342 Cr.P.C. wherein he denied the allegations made against him and claimed false implication at the instance of his uncle with whom he had dispute over landed property. Appellant examined himself on oath under section 340(2) Cr.P.C. in disproof of the charge. He also examined Defence witnesses DW-2 **Abdul Wasay** and DW-3 **Nadeem Khan** in his defence. Thereafter prosecution moved an application under section 540 Cr.P.C. for

summoning and examining **PC Abdul Hafeez**, who had delivered the narcotic samples to the chemical examiner, which was allowed and PW Abdul Hafeez was examined. Thereafter, learned Special Prosecutor ANF closed the prosecution side while the counsel for accused adopted the statement of accused and defence evidence; vide statement dated 05.08.2019.

4. Learned trial Court, after considering the material available before it and hearing the learned counsel for the respective parties handed down the impugned judgment and sentenced the appellant as stated supra.

5. Learned counsel for the appellant has argued that PW-2 ASI Rashid Ali has made several improvements in his evidence; that PW-2 remained present on his duty after finishing his duty on the directions of the Deputy Director; that CW Abdul Hafeez has not given full details of the case during his examination in chief; that fresh statement of accused has not been recorded after recording of CW PC Abdul Hafeez; that malkhana incharge has not been examined; that no independent witness has been cited by the prosecution and all the PWs are ANF official; that safe custody of alleged recovered contraband has not been established; that place of arrest and recovery is situated in a thickly populated area, but no independent mashir from the vicinity was made a party to the proceedings; that the complainant himself conducted investigation of the case. In support of his arguments, learned counsel has placed his reliance on case law reported as **2021 SCMR 492** (*Zubair Khan v. The State*); **2021 SCMR 451** (*Mst. Sakina Ramzan v. The State*); **2021 SCMR 363** (*Kousar Khan v. The State through Advocate-General, KPK, Peshawar*); **2022 YLR 84** (*Iftikhar Ahmed alias Imtiaz & another v. The State*) and **2020 PCRLJ 524** (*Allah Rakha v. The State and another*).

6. Conversely, learned Special Prosecution ANF supported the impugned judgment while submitting that minor omissions had no bearing on the outcome of the case. He has placed his reliance on the case law reported as **2017 SCMR 283** (*The State/ANF v. Muhammad Arshad*).

7. We have heard the arguments advanced by the learned counsel for the appellant as well as learned Special Prosecutor ANF and have gone through the entire evidence available on record with their assistance.

8. Perusal of record suggests that the incident took place on the intervening night of 02.03.2016 and 03.03.2016, raiding party headed by complainant Inspector Shiraz Sadiq went on a search for two known narcotic dealers named Naqeebullah and Naseebullah for whom they had received spy information. However, the raiding party instead apprehended the present appellant, Nasruallah when he was pointed out by the spy informer who had accompanied the ANF officials. It is the prosecution case that the appellant was carrying a multi-coloured shopper from wherein the ANF officials recovered 3 kilograms of heroin in three different cloth packets which they had weighed on an electronic scale. From the recovered heroin, ANF officials separated 100 grams from each packet as representative sample for the chemical examiner and sealed the samples within khaki envelopes. The rest of the case property was also sealed and then brought back to Police Station ANF-I along with the appellant who was apprehended. The complainant who deposed that he had placed the recovered substance in the malkhana failed to examine the malkhana in-charge and also failed to produce the relevant entries from the property register regarding the deposit or withdrawal of the case property as well as narcotic sample from the malkhana. CW Abdul Hafeez who had delivered the same to the chemical examiner also deposed that he had received the same from the complainant himself, therefore there is no way to ascertain whether the property was actually kept in the malkhana or not and if not, how could safe custody from recovery to dispatch to the chemical examiner be proven. Therefore, by failing to prove the safe custody of the recovered contraband, the same could not be used against the appellant as held in the case of *MST. SAKINA RAMZAN v. THE STATE (2021 SCMR 451)*. Depositions of prosecution witnesses, memo of arrest and recovery alongside the FIR all show that a cellphone along with a SIM was also recovered from the appellant; however the cell number/SIM number of the same or the brand of the mobile phone was

never mentioned so as to be later ascertained. When putting the deposition of PW-1 complainant/Inspector Shiraz Sadiq and the FIR in juxtaposition, it is also evidently clear that the raiding party was constituted for two narcotic dealers namely Naqeebullah and Naseebullah and at no point was the present appellant ever mentioned, let alone described so as to find him involved. No description of his whatsoever was mentioned by the spy informer to then later point him out and accuse him of his involvement in the offence. The prosecution witnesses had also contradicted each other on the members who had accompanied them on the raid.

9. The appellant also examined himself on oath while stating that he was picked up from his house by police officials and then his custody was handed over to ANF Officials where he was falsely involved in the case. To support his version of the incident, he also examined DW-2 Abdul Wasay and DW-3 Nadeem Khan, both of whom supported his version while deposing that they had also known the appellant for a long time and had never known him to get in trouble and that he had a clean record. To disprove this, the investigation officer also failed to collect the CRO of the appellant. Both the defence witnesses are also independent and not related to the appellant, rather just neighbours who had witnessed him being arrested on the day of the incident. As such, the defence plea set up by the appellant appears to have some weight in the absence of any counters provided by the prosecution. This coupled with the observations made above creates doubts in the prosecution case. The principle of benefit of doubt needs no reiteration, however the Hon'ble Apex Court in the case of *TARIQ PERVEZ v. THE STATE (1995 SCMR 1345)* that even if there is a single infirmity in the prosecution case creating sufficient doubt, the benefit of the same would go to the appellant.

10. After going through the evidence of this case, we have found that no sufficient evidence has been produced by the prosecution to establish possession of the recovered heroin on the part of the present

appellant. For what has been discussed above, we find that the prosecution has failed to establish the guilt of the appellant beyond reasonable shadow of doubt. Therefore, instant Criminal Appeal No. 193 of 2020 is allowed, the impugned judgment passed by Special Court-I (CNS) Karachi is set aside and the appellant is acquitted of the charge. As per jail report, the appellant has already been released after serving out his sentence, as such no order in that regard is needed.

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