

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD.

Criminal Jail Appeal No.D-118 of 2017.

Present:

**MR. JUSTICE NAIMATULLAH PHULPOTO
JUSTICE MRS. KAUSAR SULTANA HUSSAIN**

Date of hearing: 15.04.2021

Date of judgment: 26.05.2021

Appellants: Muhammad Zahid and others
through Mr. Shahnawaz Brohi, advocate

Respondent: The State
through Mr. Shahzado Salim Nahyoon Deputy
Prosecutor General Sindh

J U D G M E N T

KAUSAR SULTANA HUSSAIN, J:- Appellants Mohammad Zahid, Haji Arab and Tarique have impugned the judgment dated 17.10.2017, passed by learned Special Judge (N) / Sessions Judge, Jamshoro in Special Case No.30/2016, Crime No.13/2016 of P.S Khanoth for offence under section 9(c) of the Control of Narcotic Substance Act, 1997, whereby they were convicted u/s 9(c) CNS Act, 1997, and sentenced to imprisonment for life and to pay fine of Rs.50,000/- each, in default thereof, to suffer further simple imprisonment for six months each. Appellants, however, were extended benefit of section 382-B of the Code of Criminal Procedure, 1898.

2. Brief facts of the prosecution case are that on 10-05-2016 at 1530 hours complainant SIP Nooruddin Sakhirani Incharge CIA Jamshoro lodged an FIR at Police Station Khanoth, stating therein that on the same date, he along with his subordinate staff HC Shamsuddin, HC Manzoor Ahmed, HC Aziz Ahmed, PC Waheed Ali, PC Zulfiqar Ali, PC Mukhtiar Ahmed, driver ASI Mohammad Ibrahim, duly equipped with arms ammunition, ASI Nizamuddin Hingoro and ASI Ghulam Mohammad Chandio, left police station in Government Vehicle

vide entry No.04 at 1000 hours, for patrolling on the directions of high-ups. They received spy information that one Hino Mazda vehicle was coming from Sehwan to Jamshoro and huge quantity of chars was loaded in it. They were present at Manzoorabad stop according to spy, where Incharge Special Team Ghulam Sarwar Rahpoto, PC Mohammad Yaqoob, PC Bahadur Ali, PC Majid Ali, RI-PL Inspector Mohammad Khan Baloch with staff and DIB Incharge ASI Jalil Ahmed Abbasi and PC Vakeel Korejo with arms ammunition arrived in Government vehicles. They jointly started checking of vehicles coming from Sehwan side. At 1230 hours, one suspected Hino Mazda with blue show appeared, complainant signaled it to stop, but the driver stopped the vehicle at some distance. Five persons alighted from the Mazda and started running away, but they apprehended three persons, while two made their escape good taking benefit of vicinity. The vehicle was checked and they secured silver and red-colours of packets in huge quantity from the tank beside the diesel tank. The packets were checked and found 'Lavazz-Qualita-Rossa' were written on them. The packets contained chars wrapped in plastics on which 'Shere-e-Sindh' was written and two lions in silver colour were printed on the same. The total packets of the chars were 200 in number and its' total weight became 5-maunds. The property was sealed parcel in presence of mashirs and kept in four nylon bags, keeping 50-packs in each nylon bag, for chemical analysis. On enquiry, the apprehended accused disclosed their names as Mohammad Zahid s/o Gul Mohammad Brohi, Haji Arbab s/o Lal Mohammad Brohi and Tarique s/o Abdul Ghafoor Brohi. Two notes of Rs.1000/- in denomination and two notes of Rs.500/- in denomination, total Rs.3000/- and Nokia Mobile Phone was recovered from side pocket of shirt of accused Mohammad Zahid, one note of Rs.500/- in denomination and 4-notes of Rs.100/- in denomination were secured from side pocket of shirt of accused Haji Arbab & one note of Rs.500/- in denomination and two notes of Rs.100/- in denomination from side pocket of shirt of accused Tarique were secured. Such memo of arrest and recovery was prepared with signatures of mashirs ASI Nizamuddin and ASI Ghulam Mohammad Chandio. Accused and property were then brought at P.S Khanoth,

where complainant lodged FIR on behalf of the state against accused u/s 9(c) Control of Narcotics Substances Act, 1997.

3. After usual investigation, challan was submitted against the accused under section 9(c) of Control of Narcotic Substance Act, 1997. The learned trial court on 18.07.2016 framed the charge against the accused under above referred sections, to which they pleaded not guilty and claimed to be tried.

4. In order to prove it's case, the prosecution examined PW-1 complainant SIP-Nooruddin Sakhirani at Ex.06, PW-2 mashir ASI Nizamuddin was examined at Ex.08, PW-3 author of FIR ASI Ali Akbar Abro was examined at Ex.09. Thereafter, learned SPP for the State closed it's side vide statement at Ex.10.

5. The statements of accused under Section 342 Cr.P.C were recorded at Ex.11 to 13 respectively, wherein they denied the allegations of prosecution side and claimed to be innocent. They neither examined themselves on oath, nor led any evidence in their defense. All three accused stated that they were arrested from Jamshoro Railway Crossing at different time and dates.

6. On the conclusion of the trial, learned trial judge after hearing the learned counsel for the parties has convicted and sentenced the appellants as stated above.

7. We have heard the learned counsel for the parties and perused the evidence available on record with their assistance.

8. As per prosecution witness No.1/complainant/I.O SIP Nooruddin Sakhirani the appellants were apprehended by the police party of P.S C.I.A Jamshoro on 10.05.2016 at 12:30 hours. Prior to that while patrolling on receiving information they started checking of vehicle, when they saw that one Mazda vehicle was coming from Sehwan side, on their caution it was stopped at some distance from where five (05) persons alighted and tried to escape, but police with tactics apprehended three of them while two persons have managed to escape from there. Police searched said Mazda and

noticed one tank besides diesel tank, said tank was containing some packets of silver and red colour; they drawn out the same, the said packets were 200 in numbers (one K.G per packet) each packet was containing two slabs of charas; they weighed each packet, which came to 1-KG, total weight was 200-KGs (five (05) mounds). The complainant SIP Nooruddin Sakhirani has further deposed that they sealed the recovered charas in four parcels and each parcel was containing 50-packets, on enquiry appellants/convicts disclosed their names as Zahid, Haji Arab and Tarique all by caste Sasoli Brohi but they did not disclose the names of their absconded accomplices. The SIP Nooruddin Sakhirani / complainant has deposed that he arrested the appellants/convicts and prepared such memo of arrest and recovery in presence of mashirs ASIP Nizamuddin and ASIP Ghulam Muhammad Chandio and then the appellants/convicts were brought at Police Station and F.I.R. was lodged and challan was submitted by him before the court concerned. Per PW-1, the charas sealed in four parcels, each containing 50 packets were sent for chemical analysis. The report of chemical examiner has been produced by the PW-1 as Ex.6/E. The learned defense counsel has cross-examined the PW-1 at length but could not shake his evidence.

9. PW-2 has narrated almost same facts of the case on oath and remained firm on his assertion during his cross examination conducted by the learned defense counsel.

10. PW-3 is author of instant F.I.R. who deposed that on 10.05.2017 he was performing his duty as duty officer at PS Khanoth; at about 1530 hours CIA police party headed by SIP Nooruddin (PW-1) placed mashirnama of arrest and recovery before him, which he converted into F.I.R. (Ex.6/C) and he signed it. Thereafter the prosecution closed its side.

11. All the appellants denied the allegations as leveled by the prosecution in their statements under section 342 Cr.P.C. They professed about their innocence and when they were questioned what else they have to say, they all replied that they were arrested from Jamshoro Phattak when they were alighted

from coach coming from Karachi. The learned defense counsel then closed their side.

12. Learned counsel for the appellants contended that it was day time incident; inspite of prior information with the complainant/I.O. (PW-1 Inspector CIA) he did not associate any of the public witness at the time of alleged recovery and thus violated the provision of section 103, Cr.P.C. The learned D.P.G. has taken view while arguing on this point that the provision of section 25 of the Control of Narcotic Substances Act, 1997, has excluded application of section 103 Cr.P.C in narcotic matters. Hence this objection is of no value. Even otherwise, it is generally observed that in such type of cases people generally are reluctant to act as witness / mashir under the fear of earning only enmity with the drug paddlers.

13. The learned counsel for the appellants while advancing his arguments has further argued that prosecution has failed to prove the safe custody of the charas at the police station and transmission to the chemical examiner. Record shows that the appellants were arrested along with narcotics substance on 10.05.2016 and F.I.R. was registered on same day at about 15:30 hours and entire case property was sent by the I.O. to Director Laboratories and Chemical Examiner to the Government of Sindh Karachi dated 11.05.2016, received on 12.05.2016 within 72 hours as provided in law. Chemical examiner received sealed parcels as it is mentioned in chemical report at Ex.6/E. Even otherwise the record further shows that the learned counsel for the appellants did not put any suggestion before the complainant / I.O. while cross-examining him, regarding safe custody or tempering with case property. The learned counsel for the appellants has further submitted that the police officials who had taken the sample to the chemical examiner has not been examined by the prosecution at trial. While going through the evidence of P.W-1/complainant/I.O. it revealed that he himself sent the recovered charas for chemical analysis and also produced such report of chemical examiner as Ex.6/E. The said report (Ex.6/E) reflects that four sealed parcel sent by incharge CIA Centre Jamshoro District Jamshoro received on 12.05.2016 as per his letter No.CR-13/2016

dated 11.05.2016 by the hand of ASI Nizamuddin. Record further reflects that the prosecution has examined the said ASI Nizamuddin as PW-2, who was duly cross-examined by the learned counsel for the appellants before trial court. Per learned defense counsel additional tank fixed in the Mazda in question besides the diesel tank was not produced before the trial court and only the vehicle was produced. While going through the examination-in-chief as well as cross-examination of PW-1 it reveals that the Mazda in question was produced before the trial court at the time of recording evidence of the PW-1, who had recognized it as same, whereas the learned defense counsel did not ask during cross-examining him that additional tank from which the alleged case property i.e.200 KG charas was recovered is not present. At this stage, the learned defense counsel raised this plea for first time while, when the witness was in witness box and if said additional tank was not produced by the I.O. before the trial court, why he avoided to ask him about not producing the additional tank before the trial court therefore, contention raised by defence counsel is devoid of legal force. The learned counsel for the appellants raised further objection that the complainant/I.O has not produced departure as well as arrival entries of the day of incident. While going through the evidence of the complainant/I.O (PW-1) we found that both required entries were produced by PW-1 and available on record as Exh.6/A (departure entry No.4 at 10:00 hours) and Exh.6/D (arrival entry No.8 at 20:30 hours).

14. Besides the points / objections raised by the learned counsel for the appellants in his arguments the appellants have also raised objections in their appeal that PW-1 Inspector CIA Nooruddin was the complainant and he also acted as Investigating Officer thus independent investigation in this case was conducted. Admittedly, in the instant matter the complainant had also conducted investigation, but the learned counsel for the appellants in his arguments did not point out that under which provision or rule it is barred. However, there is no absolute rule that a police officer who in such like cases especially in narcotic cases where the persons intercepted / arrested and from their possession narcotics / contraband are recovered obviously the incharge of

that police party has to act as complainant and in these cases investigations are to be carried on then and there and investigation only can be carried on at the spot to interrogate the accused, prepare the relevant documents / memos, about the recovery of the substance, etc and then to proceed further subsequently towards the remaining part of the investigation. In the view of above, it is held that complainant / police officer can investigate the case, there is no legal bar / restriction.

15. The appellants have raised further plea that no public person had been cited as witness of arrest and recovery, though the place of alleged incident was a road and complainant party had prior information. Record shows that the complainant / Investigating Officer Inspector Nooruddin accompanied by ASIP Ghulam Muhammad Chandio, HC Manzoor Ahmed, PC Shamsuddin, HC Aziz Ahmed, PC Zulfiqar Ali, PC Mukhtiar Ahmed and PC Waheed Ali, while patrolling received spy information that one Hino Mazda was coming from Sehwan and huge quantity of charas was loaded in it. On such information, they proceeded to the place of occurrence and intercepted appellants/convicts from whose search the 200 KG charas was recovered and taken into possession. At the time of occurrence and arrest of the appellants/convicts the police officials who were the members of the patrolling party were associated in the proceedings of recovery and arrest. The said police officials were the natural witnesses. The police employees are the competent witnesses like any other independent witness and their testimony cannot be discarded merely on the ground that they are the police employees. Even otherwise, the provisions of section 103 Cr.P.C, have been made inapplicable by section 25 of the Control of Narcotic Substances Act, 1997, it would be appropriate to refer to section 25 of Control of Narcotic Substances Act, 1997, which is reproduced herein under :

“25.Mode of making searches and arrest.—The provisions of the Code of Criminal Procedure, 1898, except those of section 103, shall, mutatis mutandis, apply to all searches and arrests in so far as they are not inconsistent with the provisions of sections 20, 21, 22 and 23 to all warrants issued and arrests and searches made under these sections.”

16. It would mean that applicability of section 103 Cr.P.C in the narcotic cases has been excluded and non-inclusion of any private witness is not a serious defect to vitiate the conviction. We rely upon the judgments reported in 1999 SCMR 1367 (State versus Muhammad Amin) and 2001 SCMR 36 (Fida Jan versus The State).

17. In the instant case all the appellants were transporting narcotics in vehicle. In this connection section 6 of the Control of Narcotic Substances Act, 1997 is material, which provides that possession of narcotic drugs is an offence which is punishable under section 9 of the Act. Section 6 reads as under :

“6. Prohibition of possession of narcotic drugs etc.- No one shall produce, manufacture, extract, prepare, possess, offer for sale, sell, purchase, distribute, deliver on any terms whatsoever, transport, dispatch, any narcotic drug, psychotropic substance or controlled substance, except for medical, scientific or industrial purposes in the manner and subject to such conditions as may be specified by or under this Act or any other law for the time being in force.”

18. Mere reading of above mentioned provision of law it is clear that this section does not have any condition or qualification that the possession should be an exclusive possession, therefore, possession can be joint with two or more persons.

19. The learned D.P.G. for the State has pointed out that all appellants/convicts belong to Quetta and Shikarpur and they were transporting the narcotics and when the narcotics was recovered from the vehicle the burden shifted upon the appellants to explain but they failed to explain it. The learned D.P.G supported the impugned judgment and in support of his contentions relied upon the following case law:

- i. 2008 SCMR 1254 (Supreme Court of Pakistan)
ZAFAR versus THE STATE.
- ii. 2011 P.Cr.L.J 1593 (Lahore)
IMTIAZ MASIH and others versus THE STATE
- iii. 2006 MLD 459 (Lahore)
FAIZ AHMED versus THE STATE
- iv. 2010 SCMR 927 (Supreme Court of Pakistan)
MUHAMMAD NOOR and others versus THE STATE

20. Upshot of above discussion is that the prosecution had succeeded to prove its case against the appellants/convicts. In case in hand 200 K.G. of charas has been recovered from secret cavities of additional tank besides diesel tank under control of appellants/convicts, which exceeds 10 K.Gs and as per proviso to section 9(c) of Control of Narcotic Substances Act, 1997, such cases are punishable with sentence not less than imprisonment for life. Though the investigating officer and other prosecution witnesses are police officials, they had no animosity against the appellants/convicts to plant such a huge quantity of narcotic material upon them. The appellants/convicts have not produced any such evidence to establish animosity against the prosecution witnesses. All the prosecution witnesses have deposed in line to support the prosecution case. The witnesses have passed the test of lengthy cross-examination but appellants have failed to make any dent in prosecution story or to extract any material contradiction fatal to the prosecution case. The prosecution has been successful to bring home the guilt of the appellants to the hilt by producing confidence inspiring evidence, recovery of narcotic material, positive chemical examiner report Exh.6/E. The learned counsel for the appellants has not been able to point out any error of law in the impugned judgment. Impugned judgment requires no interference. For what has been discussed above, the appeal being devoid of any merit is dismissed.

JUDGE

JUDGE

