

IN THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha

Mr. Justice Khadim Hussain Tunio

Criminal Appeal No. 551 of 2019

Appellant(s): Ghulam Mustafa through Mr. Muhammad Akbar Khan, advocate.

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

Criminal Appeal No. 622 of 2019

Appellant(s): Abdul Majeed through Mr. Arshad Hussain Lodhi, advocate.

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

Date of hearing: 28.02.2022

Date of announcement: 04.03.2022

JUDGMENT

KHADIM HUSSAIN TUNIO, J- By this common judgment, we intend to dispose of captioned criminal appeals filed by the appellants Ghulam Mustafa and Abdul Majeed whereby they have challenged the judgment dated 12.09.2019 (*impugned judgment*) passed by Special Court-II (CNS) Karachi in Special Case No. 44 of 2015 as they are the outcome of one and same FIR bearing crime No. 02/2015 registered with Police Station ANF-C for the offence punishable u/s 6/9(c) Control of Narcotic Substances Act 1997 (*CNSA 1997*). Through the impugned judgment, the appellants were convicted and sentenced to suffer imprisonment for life and to pay fine of Rs. 1,000,000/- each, in default whereof to suffer further rigorous imprisonment for 5 years more; although benefit of S. 382(b) was extended to them.

2. Precisely, facts pertaining to Crime No. 02/2015 are that on 05.01.2015, Police Station ANF-II Clifton's Inspector Muhammad Muzzamil received spy information regarding appellant ASI Ghulam Mustafa, designated as the in-charge of City Courts Malkhana along with ASI Talat Mahmood stole narcotic contraband out of the malkhana and sold the same to appellant Abdul Majeed. Police was also informed that appellant Abdul Majeed, on his motorcycle bearing registration No. KBR-7153, used the entrance of judges lodges to enter and receive the narcotics and that he would collect a huge quantity of narcotics from his accomplices in the City Courts Malkhana. On the basis of such information, a raiding party was prepared which then reached the pointed out place and took cover while keeping the area under surveillance. Eventually, appellant Abdul Majeed was spotted on his motorcycle with a nylon sack and he was pointed out by the spy informer who had accompanied the police. Abdul Majeed was apprehended and the nylon sack recovered from him was opened and found containing 12 packets of charas rolled up in yellow tape. Each packet was cut open and was found containing rods of charas, totalling to 1153. The charas was weighed through an electronic scale available with the raiding party and was found to be 45.5 kilograms. The whole recovered charas was put back in the nylon sack and sealed for chemical examination. The appellant Abdul Majeed was inquired about the charas who disclosed that it was handed over to him by ASI Ghulam Mustafa and ASI Talat Mahmood for its sale. During this time, an individual was spotted by the ANF Police at the gate of the City Court Malkhana and the apprehended appellant Abdul Majeed disclosed that the same was ASI Ghulam Mustafa who then tried to escape from the police, but was apprehended. He was arrested on the spot as well. The case property along with the arrested appellants were brought back to the police station where the FIR was lodged against

them. On 06.01.2015, appellant Ghulam Mustafa, in the presence of Judicial Magistrate-XV, Karachi South pointed out the case property of FIR No. 686 of 2012 in the malkhana which, when opened, was found containing 12 nylon sacks, 3 of which were empty and the other 9 only contained wrappers. The 45.5 kilograms recovered from appellant Abdul Majeed were said to be the missing case property from Crime No. 686/2012 of Police Station KIA.

3. After usual investigation, a challan was submitted against the appellants. A formal charge was framed against them by the trial Court to which they pleaded not guilty and claimed to be tried. In order to substantiate its case, prosecution examined six witnesses namely PW-1 **Inspector Muhammad Muzzamil**, PW-2 **Judicial Magistrate Noor Muhammad**, PW-3 **SIP Abdul Sattar Gopang**, PW-4 **Watchman Rasheed Hussain**, PW-5 **PC Muhammad Majid Baloch** and PW-6 **HC Shamraiz Khan**. Prosecution also produced a number of documents and other items in evidence which were duly exhibited. Statement of accused were recorded under section 342 Cr.P.C. wherein they denied the allegations levelled against them. However, they neither examined themselves on oath nor produced any evidence in their defence to disprove the charge.

4. Trial Court, after considering the material available before it and hearing the counsel for respective parties, passed the impugned judgment and sentenced the appellants as stated supra.

5. Learned counsel for the appellants collectively argued that the judgment passed by trial court is perverse and shocking and against the criminal administration of justice; that the trial Judge while awarding the conviction has not considered the contradictions made in the evidence of the PWs; that no independent witness has been cited by the prosecution at the time of arrest and recovery and all the mashirs are ANF officials; that the complainant himself

conducted the investigation of the case; that the co-accused Talat Mahmood was acquitted on the basis of same set of evidence; that the malkhana was under the control of ANF officials; that the ANF officials had taken away the malkhana register; that the CCTV footage so recovered was not authenticated; that nothing was recovered from the appellant Ghulam Mustafa. In support of their contentions, learned counsel has cited the case law reported as *Muhammad Mansha v. the State* (2018 SCMR 772), *Nuzam alias Nizamuddin v. The State*(2018 MLD 595), *Munir Ahmed and another v. The State and others* (2019 SCMR 79), *Umar Farooque v. The State* (2006 SCMR 1605), *Tariq Pervez v. The State* (1995 SCMR 1345), *Muhammad Akram v. The State* (2009 SCMR 320), *Dilshad Ahmed v. The State* (2018 YLR 860), *Nazar Muhammad alias Nazroo v. The State* (2018 YLR 1992), *Zahir Shah alias Shat v. The State through A.G KPK* (2019 SCMR 2004), *Ikramullah and others v. The State* (2015 1002), *Ishtiaq Ahmed Mirza v. The State* (PLD 2019 SC675), *Abdul Haque v. The State and another* (PLD 1996 SC 1), unreported judgment dated 23.09.2021 in *Safdar Ali Khan v. The State* (Cr.A No. 308 of 2021) and unreported judgment dated 05.08.2020 in *Pervaiz v. The State* (Cr.A No. 212 of 2019).

6. Conversely, learned Special Prosecutor ANF supported the impugned judgment while contending that the appellants were apprehended after receipt of spy information and from the appellant Abdul Majeed, 45.5 kilograms of charas was recovered; that the offence committed by the appellants is a heinous one and against the society; that contradictions, if any in the evidence of the PWs, are minor in nature; that safe custody of the narcotic substance from recovery to dispatch for chemical examination has been proved by the prosecution; that further 22 empty sacks were found in the malkhana; that the prosecution witnesses have fully implicated the

present appellants, as such he prays that the instant criminals appeals, being meritless, be dismissed.

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

8. A perusal of the record suggests that the appellant Ghulam Mustafa, in connivance with co-accused Talat Hussain stole charas from the City Court Malkhana which they were in-charge of and then handed the same over to appellant Abdul Majeed, who too was a former police officer whose service had been terminated. Then, appellant Abdul Majeed used to sell the same. On the day of their arrest, spy information was received by the complainant who was given the exact location wherefrom Abdul Majeed crossed while taking away the charas. He was apprehended and a nylon sack was found on him. From the sack, ANF officials recovered a total of 45.5 kilograms of charas. The total quantity of charas was placed back inside the nylon sack and sealed on the spot for chemical examination.

9. We have found that the prosecution witnesses have provided an uninterrupted chain of facts ranging from arrest and seizure to forensic analysis of the contraband. They are in comfortable unison on all the salient features regarding interception of the charas as well as all the steps taken thereafter. All the witnesses have unanimously deposed that the case property in Court is the same and when cross-examined on this point, they provided full justifications with respect to any minor changes in the case property such as the presence of a blue plastic shopper which the complainant pointed out being from the chemical examiner which too finds mention in the report as *“NOTE: One big blue plastic shopper*

in the white nylon sack from our side". Contraband so recovered from the appellant Abdul Majeed has been proved by examining the complainant Muhammad Muzzamil (PW-1), mashir of the arrest and recovery PC Muhammad Majid (PW-5) and the official responsible for delivering recovered contraband to the chemical examiner HC Shamraiz Khan (PW-6). The recovered charas was kept in safe custody from the time of its recovery to the time when it was taken to the chemical examiner. Furthermore, narcotics were sealed on the spot, had remained sealed in the malkhana before being transported to the chemical examiner on 06.01.2015. Seals on the same parcels delivered were found intact by the chemical examiner who noted in the chemical examination report that *"One sealed white nylon sac parcel with 01 seals, seals perfect and as per copy sent"*, further proving safe custody and transmission of the same. Reliance, in this respect, is placed on the case of *Zahid and another v. The State (2020 SCMR 590)*. The narcotics were sent to the chemical examiner within the 72 hours stipulated time as well. The narcotics were deposited in the malkhana by the complainant. We have also examined the report of chemical examiner available on record and found that it fully corroborates the evidence of all the prosecution witnesses. All necessary protocols were followed in the chemical report which further supports the prosecution case.

10. Learned counsel for the appellants contended that evidence of the police officials is not trustworthy and that no independent or private person had been cited as a witness, as such the prosecution case is doubtful. This contention however has very little merit to it. There is no universal rule that evidence of an interested witness per se must be invariably corroborated by independent evidence. Police officials are as good witnesses as any other private witness and their evidence is subject to same standard

of proof and principles of scrutiny as applicable to any other category of witnesses; in absence of any animus, infirmity or flaw in their evidence, their testimony can be relied upon without demur. Reliance is placed on the case of *Hussain Shah and others v. The State* (PLD 2020 Supreme Court 132). Moreover, 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 which principle was enunciated by the Hon'ble Apex Court in the case of *Muhammad Hanif v. The State* (2003 SCMR 1237). Despite the exclusion, the depositions of the witnesses suggest that the complainant had made valid attempts at getting passersby to act as mashir, however they had excused themselves, as such having no other alternative, PW-5 PC Muhammad Majid and PW-6 Shamraiz Khan were appointed as mashirs of arrest and recovery. Even otherwise, it also appears rather unbelievable that such a huge quantity of charas could be foisted on the appellants without any reason to falsely implicate them. Reliance in this respect is placed on the case of *The State v. Abdali Shah* (2009 SCMR 291) and *Mushtaq Ahmed v. The State* (2020 SCMR 474). So far the contention raised regarding conducting of investigation by the complainant himself is concerned, it is well settled that complainant being a Police Officer was competent to investigate the case if he was witness of offence, and such proceedings could not be defeated merely on the ground that the complainant and the Investigating Officer was the same officer, if no *mala fide* was established against the said complainant. In the case of *Zafar v. The State* (2008 SCMR 1254), the honourable Supreme Court has observed that plea raised by accused that complainant himself was Investigating Officer was devoid of any merit. It was held that:-

“11. So far as the objection of the learned counsel for the appellant that the Investigating Officer is the

complainant and the witness of the occurrence and recovery, the matter has been dealt with by this Court in the case of State through Advocate-General Sindh v. Bashir and others PLD 1997 SC 408, wherein it is observed that a Police Officer is not prohibited under the law to be complainant if he is a witness to the commission of an offence and also to be an Investigating Officer, so long as it does not in any way prejudice the accused person. Though the Investigating Officer and other prosecution witnesses are employees of A.N.F., they had no animosity or rancor against the appellant to plant such a huge quantity of narcotic material upon him. The defence has not produced any such evidence to establish animosity qua 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 the defence failed to make any dent in the 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 appellant to the hilt by placing ocular account, recovery of narcotic material, the Chemical Examiner report G.1, Exh.P.3. The learned counsel for the appellant has not been able to point out any error of law in the impugned judgment and the same is unexceptionable."

(emphasis supplied)

11. The argument that the co-accused Talat Hussain was acquitted on the same set of evidence is also of no assistance to the defence. A perusal of the material available on the record clearly suggests that the only incriminating piece of evidence available on the record against the co-accused Talat was the disclosure by the spy informer. He was not present at the place of incident nor was witnessed by anyone to be involved with appellant Ghulam Mustafa and Abdul Majeed. Moreover, it is significant to note that the appellant Abdul Majeed had arrived at the City Court on his motorbike having number KBR-7153 which was pointed out by the spy informer as well. The interaction between both the appellants inside the City Court was not only caught on the CCTV footage, but also witnessed by PW-4 Rasheed Hussain who was the watchman at

the gate through which the appellants entered and exited. Even if the said CCTV footage is excluded from consideration in the wake of no authentication, the depositions of PW-4 are straightforward enough to form a connection between the two appellants and the recovery of 45.5 kilograms of charas. Rasheed Hussain deposed in his cross-examination that on the day of the incident, he was told by ASI Ghulam Mustafa to let Abdul Majeed enter through the gate, however he did not open the gate for him instead Abdul Majeed came in along with a group of other cars. Both the appellants were also known to PW-4 Rasheed who deposed in his examination-in-chief that *"I do not have any concern with ASI Ghulam Mustafa and Abdul Majeed nor with their work. ASI Ghulam Mustafa was the incharge of the Malkhana and he used the same gate for his exit and entry for his job and Abdul Majeed also used to come to ASI Ghulam Mustafa, therefore, I know him."* This not only proves that the appellants had met each other on the date of their arrest, but also the fact that this was not the first time they had met each other and stolen narcotics from the city malkhana to sell the same. Rasheed deposed in his examination-in-chief that once Abdul Majeed snuck inside, after a few minutes he saw both the appellants standing in a nearby street inside the premises of the City Court and he also saw a white nylon sack on the motorbike. Then, Abdul Majeed boarded his motorbike and while Rasheed was opening the gate for a lawyer, Abdul Majeed snuck in behind the lawyer's car and left the area. Learned defence counsel also contended that there are various contradictions in the evidence of the PWs which we rightly considered. However, it is pertinent to note here that the depositions of all the prosecution witnesses on material aspects of the case remained consistent. PW-1 complainant deposed in his examination-in-chief that *"At about 0925 hours, a motorcycle rider having a nylon sack on his tank of motorcycle came from Judges Lodges gate going towards Light House and spy informer pointed out*

that he was same Abdul Majeed, who was stopped with strategy and apprehended with the help of the ANF staff and the registration number of his motorcycle was KBR-7153. HC Shamraiz Khan and PC Majid Baloch were nominated as witnesses and inquired the name of the accused, who disclosed his name as Abdul Majeed son of Kalo Khan... The white nylon sack marked with Five Stars was checked in the presence of the witnesses which was containing the charas in shape of rods in cutting shape wrapped with the red plastic panni in huge quantity as well as 12 packets of charas wrapped with yellow adhesive solution tape.” PW-5 Muhammad Majid Baloch with regard to the arrest and recovery deposed that “At about 0925 hours, one person riding on a motorcycle having white colour sack on the petrol tank of the motorcycle came out from the judges parking gate and was proceeding towards Light House and spy pointed out towards him that he was the same Abdul Majeed, and Inspector Muzzamil Ahmed with the help of the accompanied staff after a strategy stopped and apprehended him. Passersby were requested to act as mashir, but refused due to fear of narcotics sellers, therefore inspector Muzzamil Ahmed nominated me and HC Shamraiz as witness. The registration number of the motorcycle was KBR-7153. Inspector Muzzamil had opened the sack marked with ‘5 star’ in presence of the witnesses and checked which was containing huge quantity of charas in shape of rods wrapped in red plastic sheet and cut from one side recovered and 12 more packets wrapped in yellow adhesive solution tape.” PW-6 Shamraiz Khan also deposed similarly while stating that “At about 0925 hours, one person riding on a motorcycle having white colour sack on the petrol tank of motorcycle came out from the judges parking gate and spy pointed out towards him that he was the same Abdul Majeed and Inspector Muzzamil Ahmed with the help of the accompanied staff after a strategy stopped him and apprehended him and requested passersby to act as mashir, but they refused to act as mashir due to fear of narcotic sellers, therefore, Inspector Muzzamil Ahmed nominated me and PC Majid Baloch as witnesses and inquired the name of the person who disclosed his name as Abdul Majeed son of Kalo Khan r/o Kala Pull, Railway Colon Kachiabadi.

Inspector Muzzamil had opened the sack in the presence of the witnesses and checked which was containing huge quantity of charas in shape of pieces wrapped in red plastic sheet and 12 more packets wrapped in yellow adhesive solution tape.” Even the malkhana was inspected by the complainant under supervision of PW-2 Judicial Magistrate-XV and in their presence, appellant Ghulam Mustafa pointed out the case property of Crime No. 686/2012 of Police Station KIA. The total case property, as evident from the deposition of PW-2, consisted of 22 nylon sacks from which 10 sacks were intact whereas 12 sacks were empty. Of those 12 sacks, 3 had nothing inside them, whereas the other 9 had empty wrappers inside.

12. As far as the defence plea raised by the appellants is concerned, appellant Abdul Majeed has given stereotypical answers in his statement of accused and has raised no specific plea besides false implication for which no animus has been alleged or proved against the prosecution. As far as the defence plea alleged by the appellant Ghulam Mustafa is concerned regarding his arrest from inside the Malkhana, suffice it to say that nothing was brought on record to suggest the occurrence of any such incident inside the malkhana, rather the story appears to be a second version of prosecution's case in a manner that favours the appellant. Mere assertion of appellants that they had been involved falsely in the narcotics case, in absence of any tangible evidence, was of no consequence nor did it create any doubt about the recovery of narcotics. The appellants were bound to establish the defence plea agitated by them by adducing tangible evidence and such allegation in absence of sound evidence, could not be considered in view of Article 121 of Qanun-e- Shahadat, 1984. It was observed by the Hon'ble Apex Court in the case of *Anwar Shamim and another v. The State (2010 SCMR1791)* that it is duty and obligation of an accused

person to prove the plea taken by him in his defence in terms of Article 121 of Qanun-e-Shahadat, 1984. More so, S. 29 of CNSA, 1997, casts burden upon an accused to establish his innocence and absolve himself from the allegations of the recovered substance. Prosecution only has to show, by tangible evidence, that accused has dealt with narcotics substance or has had physical custody of it or was directly concerned with it, unless accused proves by preponderance of probability that he did not knowingly or consciously possess the articles; without such proof, accused can be held guilty by virtue of S. 29 of the CNSA, 1997. Therefore, prosecution has successfully discharged its burden in proving the recovery of the narcotics from the appellant Abdul Majeed and the role played by the appellant Ghulam Mustafa.

13. For what has been discussed above, we find that the prosecution has undoubtedly proven the guilt of the appellants beyond reasonable shadow of doubt. As such, conviction and sentence awarded to the appellants, vide impugned judgment, are upheld. As such, instant criminal appeals, being devoid of any merit, are dismissed.

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