IN THE HIGH COURT OF SINDH. CIRCUIT COURT, LARKANA

Present:
Mr. Justice Muhammad Saleem Jessar
Mr. Justice Shamsuddin Abbasi

Cr. Jail Appeal No.D-65 of 2018

Appellants Himat Gul Pathan & another. : Through Mr. Irfan Badar Abbasi, Advocate.

The State : Through Mr. Ali Anwar Kandhro, Addl. P.G

Date of hearing : 29.03.2022.
Date of Judgment : 20th April, 2022.

J U D G M E N T

MUHAMMAD SALEEM JESSAR, J:- The appellants, Himath Gul S/o. Muhammad Anwar Khan and Nousherwan S/o Qadar Khan, were tried in Crime No.3/2017, Excise Police Station, Kandhkot Circle, under section 9(c) of the Control of Narcotics Substances Act and were convicted vide judgment dated 08.11.2018, passed in CNS Case No.22 of 2017, by the Sessions Judge / Special Judge for Control of Narcotic Substances, Kashmore at Kandhkot, and sentenced to suffer imprisonment for life and fine of Rs:100,000/- each and, in default thereof, S.I for One Year more. However, both accused were extended benefit of section 382-B, Cr.P.C.

2. Facts of the prosecution case, as gleaned from the FIR lodged by complainant Excise Inspector Shamasuddin Chachar, are that on 15.09.2017, the complainant along with his staff members, namely, ECs Waheed Ali, Abdul Fatah, Irshad Ali, Nadir Ali, Abdul Hameed and others, vide entry No:01, at 05.30 a.m., after receiving spy information

proceeded to Indus Highway near Verdag Petrol Pump, Kashmore and started checking. It was about 07.20 a.m., when one Trailer No. E4837 appeared there, wherein two persons were sitting, it was stopped by the Excise police party, on enquiry driver disclosed his name as Himat Gul Pathan, while Cleaner disclosed his name as Nousherwan. ECs Waheed Ali and Abdul Fatah were appointed as mashirs; thereafter, complainant conducted personal search of the driver and from his possession NIC, driving license and cash of RS:3000/- were recovered, while from possession of the cleaner accused Nousherwan, NIC and cash of Rs:1000/- were recovered; then Container was opened, wherein found secret cavities, in which 12 gunny bags were lying, in each bag there were 10 packets and in the said 12 bags there were 120 yellow colour packets concealed, wherein charas was hidden, on weighing each packet was found to be of one kilogram and in all charas was found to be 120 kilograms. It is further alleged in FIR that one kilogram of charas from each packet and gunny bag was separately sealed for sending to the Chemical Examiner, while remaining charas was also separately sealed, then such mashirnama of arrest and recovery was prepared on the spot, as such, complainant party brought the case property along with accused at Excise Circle Kandhkot, where the Excise Inspector lodged FIR on behalf of the State for the offence under sections 6, 8, and 9, Control of Narcotic Substances Act 1997.

3. After supplying the necessary case papers to the appellants, charge against accused was framed at Ex.2, to which accused Himat Gul & Nousherwan pleaded ‘not guilty’ and claimed to be tried, vide pleas at Ex:2-A & B.

4. In order to substantiate the charge, prosecution examined complainant/I.O Shamasuddin Chachar as PW-1 at Ex.3, he produced

entry, mashirnama of arrest & recovery, FIR, letter, mashirnama of Engine & Chassis Number of vehicle, letters forwarded by Excise Police to Motor Registration authority, report of Excise & Taxation Officer and positive Chemical Report at Ex.3-A to Ex:3-I, respectively; EC Waheed Ali was examined as PW-2 at Ex:4, who is mashir as well as eye-witness. Thereafter, learned 1/C DPP closed the prosecution side, vide statement at Ex.5.

5. Statements of the accused Himat Gul and Nousherwan were recorded under section 342, Cr.P.C at Ex.6, wherein they pleaded their innocence. They further pleaded that nothing was recovered from their possession and charas has been foisted upon them. Accused declined to examine themselves on oath and also not examined any defense witness.

6. The trial Court formulated the following points for determination in this case:

Point No.1 *Whether on 15.09.2017, at 07.20 a.m., on Indus Highway at Excise Check post situated near Verdag Patrol Pump Kashmore, present accused Himat Gul and Nousherwan were arrested when they were sitting in Truck Trailer No:D-4837, wherein 120 kilo grams Charas was concealed in secrete cavities of vehicle which was hidden by the present accused for trafficking, as alleged by prosecution?*

Point No.2. *Whether out of recovered 120 kilograms chars, 12 kilo grams was sent to Chemical Examiner and report of chemical examiner is received in positive?*

Point No.3. *What should the Judgment be?*

7. After answering the point No.1 in affirmative and point No.2 “as under”, the trial Court convicted and sentenced the appellants, as above. Hence, this appeal.

8. Learned Counsel for the appellants argued that there are contradictions in the evidence of the P.Ws with regard to weighing of the contraband, as, one deposed that it was weighed through computerized scale, whereas the other deposed that manual scale was used in weighing the contraband. He next submitted that EC Ramzan, through whom the contraband was sent to the laboratory, was not examined; even EC Zafar, for whom it was stated by the complainant that he was deployed as guard over the contraband, was not examined at the trial. He further submitted that in view of above contradictions, the prosecution miserably failed to prove its charge, which fact has not been appreciated by the learned trial Court, hence, the impugned judgment suffers from illegalities and is liable to be set aside. In support of his contentions, he placed reliance on the cases reported as *Abdul Ghani v. The State* **(2019 SCMR 608)**, *Qaiser Khan v. The State* **(2021 SCMR 363)** and *Mst. Sakina Ramzan v. The State* **(2021 SCMR 451)**.

9. On the other hand, learned Addl. P.G. opposed the appeal and submitted that the PWs have supported the case of prosecution in all respects and so far as the contradiction with regard to weighing of the Contraband is concerned, same are minor in nature and cannot be considered, particularly, when huge quantity of contraband was recovered, for which there was no denial and quantity of contraband being huge and the vehicle i.e. truck could not be foisted upon the appellants. He further focused upon the chemical report available at page-55 of the paper book and submitted that on the very same day the contraband was sent to the laboratory without any delay, which returned with positive report, therefore, the question of its weighing as well as examination of the guard or the bearer, through whom it was sent to chemical examiner, was immaterial and the prosecution has

successfully proved it's charge against the appellants. He submitted that the appellants have failed to pinpoint any infirmity in the impugned judgment, which may require interference by this Court. He, therefore, submitted that by dismissing the appeal, the impugned judgment may be maintained. In support of his contentions, he relied upon the cases reported as *Mushtaq Ahmad v. The State* **(2020 SCMR 474)** and *Shazia Bibi v. The State* **(2020 SCMR 460)**.

10. We have carefully heard learned counsel for appellants and the learned APG for the State and have examined the record and case-law cited before us.

11. Learned counsel for the appellants vehemently argued that there are contradictions in the evidence of the witnesses examined by the prosecution in support of it’s case. In this regard, he referred to the deposition of the two PWs, in which one states that the contraband was weighed through computerized scale and the other said that the contraband was weighed through manual scale. This contradiction is very minor and immaterial, as the recovery of the contraband has not been denied. The recovery in this case is very huge and it cannot be imagined that somebody will foist such huge quantity of charas on somebody just to incarcerate a stranger without any enmity with him / them. In the present case, there is no claim from the appellants that they had any enmity with the said complainant or any of the constables. It is well-settled principle of law that minor discrepancies in the evidence of raiding party do not shake their trustworthiness, as observed by the Hon’ble Apex Court in the case of STATE / ANF Vs. Muhammad Arshad (2017 SCMR 283).

12. Next, the learned counsel for the appellants contended that EC Ramzan, through whom the contraband was sent to the Laboratory and EC Zafar, who stood guard on the contraband, were not examined. He relied on the following cases in support of his arguments:

13. The first case relied upon by the learned Counsel is the case of ABDUL GHANI and others Versus The STATE and others (2019 SCMR 608), wherein the facts were that Abdul Ghani, Barkat Ali, Hakim Ali, Khan Muhammad and Abdul Majeed appellants were apprehended when a raid was conducted at a den of narcotics allegedly being run by the appellants and different quantities of charas, garda, opium and liquor were recovered from their individual and joint possession.

14. The cited case, therefore, does not lend any support to the contention of the learned counsel for the appellants, as, in the cited case there was delay in sending the samples to the chemical examiner, while in the present case there is no delay in sending the samples to the chemical examiner, as the incident occurred on 15.09.2019 at about 7.20 a.m., while the samples were sent to chemical examiner on the same date. Therefore, there is no question of any doubt about safe transmission of the samples of the recovered substance to the office of the chemical examiner.

15. Next case referred to by the learned Counsel for the appellants is the case of QAISER KHAN V. The STATE through Advocate-General, Khyber Pakhtunkhwa, Peshawar (2021 SCMR 363), which is also on same point, as the case of Abdul Ghani Khan and others (supra), therefore, the same is also distinguishable on facts.

16. The case of Mst. SAKINA RAMZAN V. The STATE (2021 SCMR 451), relied upon by the learned Counsel for the appellants, is also distinguishable from the facts and circumstances of instant case, therefore, is not helpful for the appellant.

17. It would be seen that in the case of *Mst. SAKINA RAMZAN* (supra), the recovered substance was deposited in the warehouse for some time. It further transpires that the alleged narcotic drug was recovered on 26.11.2014 while it was received by the chemical examiner on 28.11.2014 and the prosecution failed to prove the safe custody and transmission of the recovered substances, as the person who was said to have delivered the recovered substances by hand to chemical examiner did not say so in his evidence. Hence, it is distinguishable and is not applicable in this case.

18. However, in the present case there was no occasion to deposit the recovered substance in any warehouse for a long period of time, as the same was delivered to the chemical examiner on the same day. Therefore, there is no doubt about the safe custody of the recovered substance.

19. Learned Addl. P.G. forcefully opposed the present criminal appeal, mainly on the ground that huge quantity of contraband was recovered from the custody of the appellants, who were in an empty truck trailer. The contention of the learned Addl. P.G. was that such a huge quantity of contraband could not be foisted by the police. In support of his contention, he relied on the case of *SHAZIA BIBI Versus The STATE* (2020 SCMR 460).

20. In the above cited case, a plea was taken by the defense that the lady was made a scapegoat by the police, who had enmity with the husband of the lady. The plea was not taken seriously. However, in the present case, even this plea was not taken nor is there any hint that the appellants have made any claim of enmity against the police. A perusal of the statements of the appellants recorded under section 342, Cr.P.C. reveals that bald statements have been made by the appellants to the effect that they are innocent and that nothing was recovered from them and that charas has been foisted upon them. However, they have not stated anything in their above statement with regard to the factum as to how this huge quantity of the charas was put in the trailer.

21. The learned Addl. P.G. also relied on the case of *Mushtaq Ahmed v. The State* (2020 SCMR 474), in which the Hon'ble Supreme Court held as under:

> *"3. Prosecution case is hinged upon the statements of Aamir Masood, TSI (PW-2) and Abid Hussain, 336-C (PW-3); being officials of the Republic, they do not seem to have an axe to grind against the petitioner, intercepted at a public place during routine search. Contraband, considerable in quantity, cannot be possibly foisted to fabricate a fake charge, that too, without any apparent reason; while furnishing evidence, both the witnesses remained throughout consistent and confidence inspiring and as such can be relied upon without a demur."*

22. There was also an objection with regard to non-joining of private witnesses in the recovery proceedings. In the case reported as *Muhammad Riaz Vs. the State* (2018 P.Cr.L.J. Note 179), in which the appellant/accused (therein) was arrested while he was in possession of Truck and from its secret cavity 120 kgs charas was recovered. Appellant was found sitting on driving seat of the Truck, while co-accused Bakht was sitting with him. In this case also, all the witnesses were police officials. A Division Bench of this Court held as under:

> “11. Adverting to the contention of learned counsel for the appellant/ accused that the complainant acted as investigating officer of his own FIR and that there is violation of section 103, Cr.P.C. that no private person was joined in recovery proceedings except officials. There appears no force in his contention as it has already been held by honourable Supreme Court in case of Zafar v. The State (2008 SCMR 1254) as under:
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> > "Police officer was not prohibited under the law to be a complainant if he was witness of an offence. Such officer could also be an investigating officer so long as it did not prejudice accused person" and that the "Police employees are competent witnesses like any other independent witness and their testimony cannot be discarded merely on the ground that they are police employees."

23. In the case reported as *GHULAM SHABIR SHAR Vs. The STATE* (2018 PCr.LJ 829), a Division Bench of this Court, after discussing the evidence brought on record, held as under:

> *“8. All three P.Ws have implicated the appellant to have been apprehended on/at aforementioned day, time and place on being in possession of 2 kgs charas. The evidence of PWs. in respect of arrest and recovery of charas is consistent and confidence inspiring. There appears no material contradiction in the depositions of P.Ws rendering the prosecution case as doubtful. Admittedly none of the prosecution witnesses had any enmity with the appellant nor was it ever suggested. In absence thereof, there appears no reason why the appellant should be falsely implicated. It goes without saying that in narcotic cases the Courts should have a dynamic approach in appreciating the evidence and the discrepancies, which may occur in the statements of prosecution witnesses due to lapse of time or those having no impact on the material aspects of the case, have to be ignored.”*

24. In the case of *ABDUL REHMAN alias JUMAN Vs. The STATE* (2018 P.Cr.L.J. 1015) a Division Bench of this Court dismissed the appeal of the appellant while holding as under:

> “ANF officials are the competent witnesses like other independent witnesses and their testimony cannot be discarded merely on the ground that they are ANF employees as held by the honourable Supreme Court in the case of Zafar v. The State (2008 SCMR 1254). Moreover, ANF officials had no animosity against the appellant. We see no reason for the ANF officials to foist such huge quantity of opium upon the appellant. As regards to the contention of the defence counsel of non-performing of the provisions of section 103, Cr.P.C, it would be appropriate to refer section 25 of C.N.S. Act, which is reproduced hereunder:-
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> > "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."

15. It is clear that the applicability of section 103, Cr.P.C. in narcotic cases has been excluded and non-inclusion of any private person is not a serious defect to vitiate the conviction of appellant. So far as the objection of the learned counsel for the appellant that the Investigation Officer is the complainant and witness of the occurrence and recovery a police officer is not prohibited under the law to be the complainant if he is a witness to the commission of offence and also to be the Investigation Officer, so long as it does not in any way prejudice to the accused person as held in the case of State through the Government of Sindh v. Bashir and others (PLD 1993 SC 408). In this case complainant was SIP Tahir Ahmed and he was the Investigation Officer and mashir was PC Muhammad Ibrahim of ANF. They had no animosity against the appellant to foist 15kg opium upon him. The defence theory appears to be after thought. Accused had raised plea that he is serving as a School Teacher in Education Department Government of Sindh. He was posted as Supervisor of the Schools. He was on duty on 16.05.2006 and had visited two schools namely N.F.B.E. Girls School Baladi situated at Taluka K.N. Shah District Dadu and School Ibrahim Chund. At 2:30 p.m. when he was returning on his motorcycle and reached at Khoonhar petrol pump, he saw three vehicles in which several persons were sitting in civil dresses including the ANF officials in the uniform. They apprehended accused, maltreated him and brought at the police station ANF Hyderabad. Accused raised plea that ANF officials demanded the illegal gratification to which he expressed his inability and he was falsely implicated in this case. Application submitted by his son as Ex.12/A in this regard has also been placed on record. All the prosecution witnesses have deposed in line to support the prosecution evidence. Report of chemical examiner was positive. Witnesses have passed the test of lengthy cross-examination but the defence failed to make any dent in the prosecution evidence or to pin point any material contradiction fatal to the prosecution evidence. No enmity whatsoever has been brought on record against prosecution witnesses. Even otherwise, defence theory appears to be afterthought and does not appeal to logic and reason. As such defence version has rightly been disbelieved by trial court."

25. There is also another aspect of the case. As per the deposition of the complainant and the eye-witness, PW-1 and PW-2, the contraband was recovered from secret cavities found in the truck trailer. In such view of the matter, it becomes crystal clear that the sole purpose of the movement of the trailer was to transport the contraband in its hidden / secret cavities. Perusal of the cross-examination of the prosecution witnesses reveals that no question was asked about the presence of secret / hidden cavities in the trailer.

26. The perusal of cross-examination of the PWs further reveals that a suggestion was put to them that the appellants were involved in the present case due to non-payment of illegal gratification. This plea would have been considered if the recovery of contraband was not in such a huge quantity which, as stated above, cannot possibly be foisted by police on any person just to ask for illegal gratification.

27. The trial court has also discussed the veracity of the chemical examiner's report (Exh.3-F) and has reached a conclusion that the same is worthy of reliance. The relevant part of the impugned judgment is as under:

> *"23. The prosecution has brought on record the report of chemical examiner through complainant Excise Inspector who has produced it at Ex.3-F. The perusal of the report of Chemical Examiner reveals that on 15.09.2017 he received 12 Kilograms of Charas. The Chemical Examiner has further opined that each packet was containing Chars. The report of chemical examiner has not been challenged by the accused and not a single question has been put to witnesses by learned counsel for the accused. The oral evidence is fully supported and confirming with the Chemical report, therefore, points No.I & 2 are answered in affirmative."*

28. Admittedly, the appellants were arrested by the ANF officials and from their possession a huge quantity of chars was recovered and it would be enough for a person of prudent mind to realize that such huge quantity of contraband could not be foisted upon the accused; besides, the samples of chars so recovered from them were sent to chemical examiner and the report of chemical examiner came in positive. At this juncture, we are fortified by the dictum laid down by the Hon'ble Supreme Court in a judgment dated 08.01.2020 passed in the case of SHAZIA BIBI Vs. The STATE (Jail Petition No.847 of 2018), in which it has been observed as under:-

> "3. …… Argument that the forensic report sans protocol is beside the mark as well inasmuch as tests carried out by the analyst are vividly mentioned therein, reproduced for the convenience of reference.
>
> "Test performed on Received Item(s) of Evidence.
>
> 1. Top load balance was used for weighing.

2. Chemical Spot Tests were used for Presumptive Testing.

3. Gas Chromatography-Mass Spectrometry was used for confirmation.

Result and Conclusions.

Item # 01 3982 gram(s) of dark brown resinous material in sealed parcel contains Charas."

Above details mentioned in the forensic report substantially / sufficiently qualify to meet the statutory requirements. Findings concurrently arrived by the Courts below, being well within the remit of law, do not call for interference. Petition fails. Leave declined."

29. We have also examined the impugned judgment from various angles like the plea taken by the appellants before the trial Court that entire case property i.e. the entire 120 Kgs. of charas recovered in the case, was not sent to the chemical examiner for analyzing and non-association of two or more respectable persons of the locality and have found that these pleas have been discussed and answered with supporting case law. For the purpose of the first plea i.e. the entire quantity of the recovered contraband was not sent to the chemical examiner, reliance was placed on section 36 of the CNS Act, 1997 which speaks of "sample of any narcotic drugs,…" and it does not require that the entire quantity of the recovered contraband be sent for chemical examination.

30. So far as the plea raised on behalf of the appellants with regard to non-association of two respectable persons of the locality, the trial Court rightly relied on the judgment of this Court reported in **2017 P.Cr.L.J. Note-155** to rebut the plea of the learned counsel for the appellants. We do not find any infirmity or illegality in the impugned judgment on this score.

31. Reference in this regard may be made from the case of ***IZATULLAH and another v. The STATE*** (supra), wherein the Honourable Apex Court has observed as under:-

> "3…….Absence of public witnesses is beside the mark; public recusal is an unfortunate norm. Prosecution witnesses are in a comfortable unison: being functionaries of the Republic, they are second to none in status and their evidence can be relied upon unreservedly, if found trustworthy, as in the case in hand. Both the courts below have undertaken an exhaustive analysis of the prosecution case and concurred in their conclusions regarding petitioners' guilt and we have not been able to take a different view than concurrently taken by them. Petitions fail. Dismissed."

Same view has also been taken in the case of ***HUSSAIN SHAH and others v. The STATE (PLD 2020 Supreme Court 132)*** wherein the honourable Supreme Court of Pakistan has held as under:-

> "3. …….....a huge quantity of narcotic substance had been recovered and subsequently a report received from the Chemical Examiner had declared that the recovered substance was Charas. The prosecution witnesses deposing about the alleged recovery were public servants who had no ostensible reason to falsely implicate the said appellant in a case of this nature. The said witnesses had made consistent statements fully incriminating the appellant in the alleged offence. Nothing has been brought to our notice which could possibly be used to doubt the veracity of the said witnesses."

32. Before parting with the judgment and after analyzing the evidence brought on record, we are of the firm opinion that evidence so far brought on record by the prosecution is confidence-inspiring and the appellants/convict have not brought on record any iota of evidence, through which it could be deduced that prosecution had implicated them malafidely by managing and foisting huge quantity of charas/ contraband. It has further been proved that the contraband was recovered from their possession while transporting / trafficking the

same, the appellants being driver & cleaner of the vehicle, where-from charas was recovered, the presence of appellants has been established, as such, the appellants were well in knowledge about the contraband, which was lying and secured from the secret cavities of the vehicle being driven by them.

33. The upshot of the above discussion is that we do not find any infirmity or illegality in the impugned Judgment, which is hereby maintained and the appeal of the appellants is dismissed being without any merits.

Judge

Judge

Larkana, the 20th April, 2022.