IN THE HIGH COURT OF SINDH CIRCUIT COURT, HYDERABAD.

Cr. Appeal No. D-13 of 2019.
Cr. Appeal No. D-14 of 2019.

***Present*:**
***MR. JUSTICE* KHADIM HUSSAIN TUNIO.**
MR.JUSTICE ZULFIQAR ALI SANGI.

Appellants:	Dilbar Chandio and Abdullah Brohi through M/s. Muhammad Saleem Leghari and Shahnawaz Brohi advocates.
Respondent:	The State through Mr. Shahzado Saleem Nahyoon, Addl. P.G for the State.
Date of hearing:	26.07.2022.
Date of decision:	02.08.2022.

J U D G M E N T

ZULFIQAR ALI SANGI, J:- By this common judgment, we intend to dispose of captioned appeals, which are the outcome of the judgment dated 29.12.2018, passed by learned Special Judge, CNS, Mirpurkhas in Special case No. 15 of 2014 re: (State vs. Dilbar and another) in Crime No. 03/2014, registered at PS Excise (DIO) Mirpurkhas for the offence under section 9 (C) of CNS Act, 1997, whereby they have been convicted and sentenced to suffer R.I for life imprisonment with direction to pay fine of Rs.200,000/- each. In case of default thereof, to suffer SI for six months more. However, the benefit of section 382-B, Cr.P.C. was also extended to the appellants.

2. Brief facts of the prosecution case as per FIR lodged by complainant A.E.N.O Muhammad Qasim Rahoo at P.S D.I.O Excise Mirpurkhas on 18-04-2014 at 9.00 p.m are that he along with his sub-ordinate staff left the Excise Police Station in the official vehicle under entry No.29 at 3.00 p.m for patrolling in Mirpurkhas City. After patrolling from different places when they reached Jarwari Shakh where received spy information that narcotics is trafficking in a Coure car bearing registration No.AJG-990 from Digri towards Mirpurkhas City. On such information when they reached Bair Mori Mirwah road, where they saw that the pointed out Coure car was coming. They stopped the said car. In the said car, two persons were boarded. On enquiry, the person who was sitting on the driving seat

disclosed his name to be Dilber s/o Umer by caste Chandio r/o Kandyari, District Sanghar; while another person who was sitting on the front seat of the car disclosed his name to be Abdullah s/o Din Muhammad by caste Brohi. Due to the non-availability of private mashir, the personal search of the accused persons was conducted in presence of EC Muhammad Zafar and EC Rafique Shah and recovered three notes of Rs.100/= each total Rs.300/= from the front pocket of the shirt of the accused Dilber so also recovered one Nokia mobile phone from the side pocket of his shirt. From the personal search of accused Abdullah, one note of Rs.1000/= and one note of Rs.500/= total Rs.1500/= and one Nokia mobile phone were recovered from his front pocket of the shirt. Then they searched the car and recovered five packets from the secret cavities of each door of the car total 20 packets. Each packet was containing four patties of chars. On weight, each recovered packet of chars stood to be 1 K.G. 10 grams of chars was taken from each packet of chars for chemical examination and sealed the same separately in brown envelops. The remaining chars, cash amount and mobile phones were sealed in a white-coloured bag / KATTA. Then the accused were arrested and such memo was prepared on the spot. Thereafter, they brought the arrested accused and recovered property at P.S where the complainant lodged the FIR. After the usual investigation, the excise police submitted a challan of the case.

3. After completing all the legal formalities the charge was framed against the accused u/s 9 (C) of CNS Act, 1997, to which they pleaded not guilty and claimed to be tried. The prosecution in order to substantiate the charge against the accused examined (PW-1) Complainant/IO AENO Muhammad Qasim Rahoo as Ex.09, who produced mashirnama of arrest and recovery, FIR, roznamcha entries of departure and arrival and chemical report at Ex.9-A to Ex.9-D and (P.W-2) mashir E.C Muhammad Zafar at Ex.10. Thereafter, learned SPP closed the side of the prosecution.

4. The statements of accused u/s 342 Cr. P.C were recorded at Ex.13 and Ex.14, to which they denied the prosecution allegations, and claimed themselves to be innocent. However, accused persons neither examined themselves on oath as required u/s 340(2) Cr. P.C nor led any defence evidence. Then learned counsel for accused Abdullah Brohi filed application u/s 540 Cr. P.C r/w section 342 Cr.

P.C for summoning one Shoukat Palijo as defence witness; after hearing said application was allowed vide order dated 07-05-2015 and DW Shoukat Palijo was examined at Ex.18; thereafter learned counsel for accused filed statement for closing the side at Ex.19. After concluding of trial both accused were convicted and sentenced to suffer RI for life imprisonment and to pay fine of Rs.200,000/= each and in case of their failure to make payment of fine, each one of them would undergo SI for six months with benefit of section 382 (B) Cr. P.C vide judgment dated 19-10-2015.

5. The accused preferred appeals against the impugned judgment vide Crl. Appeal No.271 of 2015 and Crl. Appeal No.92/2016 (Crl. Appeal No.D-101 of 2015) before this Court and the said judgment of the trial court was set aside vide judgment dated 12-1-2018 and remanded the case for recording statements of accused u/s 342 Cr. P.C afresh by putting all the incriminating pieces of evidence brought on record against the accused for their explanation/replies and after hearing learned counsel for the parties, shall pass judgment within two months in accordance with the law.

6. The trial court recorded statements of accused persons u/s 342 Cr. P.C afresh at Ex.22 and Ex.23 respectively, to which, they denied the prosecution allegations, and claimed themselves to be innocent. Accused Dilber neither examined himself on oath as required u/s 340(2) Cr. P.C nor led any defence evidence whereas accused Abdullah examined himself on oath u/s 340(2) Cr. P.C at Ex.24 and then learned counsel for the accused Abdullah closed his side vide statement at Ex.25 without examining D.W Shoukat Palijo. After hearing the counsel for the parties the impugned judgment dated 29.12.2018 was passed which the appellants challenged before this court through instant appeals.

7. Learned counsel for appellant Dilber contended that there are material contradictions in the prosecution witnesses; that although complainant received spy information prior to the recovery but no private mashir/witness was associated in the recovery proceedings and violated S. 103 Cr. P.C; that the roznamcha entries were managed one; that the appellant has been falsely implicated in this case at the instance of one Ameer Azam to whom he was demanded his outstanding amount of Rs.800,000/=; that appellant has filed an

application to SSP Mirpurkhas on 10-04-2014 against Ameer Azam before the alleged incident and also shows apprehension about his involvement in criminal cases; that nothing was recovered from the possession of the appellant because he was not arrested from the Coure car; that the charas has been foisted upon the appellant. He lastly contended that the prosecution has failed to prove the case against the appellant beyond a reasonable doubt therefore; by extending him the benefit of the doubt appellant may be acquitted. In support of his contentions, learned counsel relied upon the cases of ***Fahad v. The State (2022 P.Cr.L.J. 279), Ahsan Marfani v. The State (2022 YLR Note-5), Nasaruddin v. The State (2021 YLR 457) (Balochistan) and Ayaz alias Imran v. The State (2021 YLR 1613) (Peshawar).***

8. Learned counsel for appellant Abdullah contended that the complainant is also the investigation officer of the case which caused prejudice to the case of the appellant; that only one witness except the complainant was examined and other witnesses though their names were included in the chart of witnesses were not examined by the prosecution meaning thereby they were not going to support the prosecution case; that the chars was not recovered from the exclusive possession of the appellant and there is no evidence on record that whether appellants were knowing chars lying in the secret cavities of the car; that the appellant was not the owner of the car and the appellant was arrested by Excise inspector Saleemullah Samoon at the instance of Paryo Jamali from a hotel situated at Badin stop, Hyderabad; that the charas has been foisted upon him and the prosecution case is full of doubts, as such, he prayed for the acquittal of appellant Abdullah. In support of his contentions, he has relied upon the cases of ***Haji Inayat v. The State (2010 P Cr. L J 825), Shahzada v. The State (2010 SCMR 841), Nek Muhammad and another v. The State (2003 PLD (Pehsawar) 130), The State/Anti Narcotic Force v. Muhammas Siddiq (2010 YLR 2617) and Tarique Pervez v. The State (1995 SCMR 1345).***

9. Learned Addl. P.G. supported the case of prosecution by contending that there is no material contradiction in the evidence of complainant/I.O and the mashir; that the complainant/I.O and mashir have fully supported the case of prosecution because despite lengthy cross-examination the evidence of complainant/I.O and

mashir remain firm on material points; that huge quantity of charas weighing 20 KGs was transporting by both the appellants through Coure car and the defence taken by the appellants is an afterthought. He also contended that the chemical examiner's report is positive and the prosecution has proved its case against the appellants beyond any shadow of reasonable doubt, therefore, he prayed for dismissal of both the appeals.

10. We have heard learned counsel for the appellants, learned Addl. P.G for the State and perused the material available on record with their able assistance.

11. ***Muhammad Qasim (PW-1)***, complainant of the case deposed before the trial court that on the day of the incident while patrolling along with his sub-ordinate staff, under entry No. 29 (3.00) (which he exhibited in his evidence as Exh. 9/c) received spy information in respect of the appellants being trafficking the narcotics substance in Coure car AJG-990 had started Nakabandi at Bair Mori where the said car was stopped and on search recovered 20 packets having four patties in each packet of the charas from the secret cavities in all four doors of the vehicle which on weight become total 20 KG. As per the evidence of the complainant he separated 10 grams of chars from each packet as the sample for the chemical analysis and sealed the same so also the reaming charas. Both the appellants were arrested and on inquiry disclosed their names being Dilber s/o Umer Chandio and Abdullah s/o Din Muhammad Brohi on their search complainant recovered three currency notes of Rs. 100/= from Dilber and one Nokia mobile phone, From Abdullah one currency note of Rs. 1000/= and one of Rs. 500/= so also one Nokia mobile. Having no private person, the complainant made mashir EC Zafar and EC Rafique shah in all these proceedings and prepared such mashirnama of recovery and arrest. The complainant brought the accused and the property to the police station where he registered the FIR and he being himself investigation officer recorded statements under section 161 Cr. P.C of the witnesses and deposited the samples in the laboratory for chemical examination and report, after receiving the chemical report and completing legal formalities submitted the challan before the court. The complainant in his evidence has exhibited a memo of arrest and recovery at Exh: 9/A, a copy of FIR at Exh: 9/B, Entries in respect of departure and arrival at Exh: 9/C and the report of the

chemical examiner at Exh: 9/D. This witness was cross-examined by the counsel for both the appellants but his evidence was not shattered. ***Muhammad Zafar (PW-2)*** was examined being the mashir of the case in respect of arrest and recovery; he fully supported the case of the prosecution as deposed by PW-1 Muhammad Qasim (Complainant). He too was cross-examined at length by the counsel for the appellants but nothing favourable to appellants comes on record which benefited the appellants. Both the appellants were arrested at the spot and in their presence recovery of a huge quantity of charas was effected from the car in which they were sitting and no one else was available in the car. We have carefully examined the evidence of both the witnesses and have found no doubt in their evidence.

12. During cross-examination appellant Abdullah took defence plea that he was arrested by Inspector Saleemullah Samoon on 18-04-2014 from Badin stop at 10-30 am with driver Shoukat Ali Paleejo as the appellant was called by Paryo Jamali in connection with some outstanding amount and on the following said Shoukat Ali Paleejo was released and he was booked in the present case. The complainant during cross-examination on such suggestion stated that *"It is incorrect to suggest that accused was arrested by Inspector Saleemullah Samoon on 18-04-2014 from Dadin stop at about 10.30 am. It is incorrect to suggest that taxi driver Shoukat Paleejo was also arrested by us from Badin stop. It is incorrect to suggest that we released Shoukat Paleejo on the following day."* The appellant Abdullah while recording his statement under section 342 Cr. P.C also took the same plea in reply to question No.6, however, the date of his arrest shown by him is 17-04-2014. Appellant Abdullah examined DW Shoukat Palejo who stated the date of arrest as 18-04-2014 and shows his release on the following day. It appears from the defence version as discussed above that it is contradictory, was managed and is an afterthought. The defence plea taken by the appellant Dilber was that he was having some dispute with Ameer Azam Narejo and was arrested by SHO Tanveer Shah and in his instance; the appellant was booked in this case. Appellant placed on record a copy of the application addressed to the SSP Mirpur Khas dated: 10-04-2014 while recording his statement under section 342 Cr.P.C. but he had not produced any proof in respect of the result of the said application. A perusal of such an application reflects that it

was also managed and is an afterthought. The Honourable Supreme Court of Pakistan in the recent case of ***Raja Ehtisham Kiyani v. The State (2022 SCMR 1248)***, has observed as under:-

> ***"Insofar as allegation of previous animosity on account of alleged demand of bribe by one of the members of the police party, against whom, the petitioner claims to have moved some application is concerned, nothing is on the record to even obliquely suggest an ongoing previous rancor, prompting the police to impose a false recovery of a substance with a price tag rather huge in terms; the plea surfaced, surprisingly late in the day without any attempt to the departmental recourse and, thus, at best can be viewed as an afterthought and at worst a ploy to subvert the prosecution. Even during the trial, the petitioner did not pick courage to enter the witness box in disproof of charge or to drive home his plea with a view to discharge adverse statutory presumption provided in section 29 of the Act ibid.***
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> ***On our independent analysis of the record, we have not been able to take a view than the one concurrently taken by the Courts below. Petition fails. Leave declined."***

13. The contention raised by the learned counsel for the appellants that AEN Muhammad Qasim himself is the complainant and the investigation officer of the case therefore his evidence cannot be relied upon and its benefit must be given to the appellants has no force as there is no prohibition in the law for the police officer to investigate the case lodged by him as held by Honourable Supreme Court of Pakistan in the case of ***Zafar v. The State (2008 SCMR 1254)***, wherein it is held as follows:-

> ***"11. So far as the objection of the learned counsel for the applicant that the Investigation 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 Office 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 Investigation 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 appellant has not been able to point out any error of law in the impugned judgment and the same is unexceptionable.***

14. Contentions that having prior information no private persons were associated as witness/mashir in the recovery proceeding hence the provision of section 103 Cr. P.C was violated by the complainant and the evidence of police officials cannot be relied upon while awarding the conviction in cases of capital punishment also has no force as the reluctance of the general public to become a witness in such cases had become judicially recognized fact and there was no way out to consider the statement of the official witnesses as no legal bar or restriction has been imposed. No direct enmity or ill will has been suggested by the appellants with the complainant or any of the officials who participated in recovery proceedings during cross-examination and therefore in the circumstances the police officials were good witnesses and could be relied upon if their testimony remained un-shattered during the cross-examination. However, the provision of Section 25 of the CNS Act has provided the exclusion of Section 103 Cr.P.C. during recovery proceedings as has been held by the Honourable Supreme Court of Pakistan in the case of ***Salah-ud-din v. The State (2010 SCMR 1962)***, which reads as under:-

> ***"4. We have carefully examined the entire record and perused the judgment impugned with the eminent assistance of Mr. Kamran Murtaza, learned Advocate Supreme Court on behalf of petitioner. After having gone through the entire evidence by keeping the defence version in juxtaposition we have no hesitation in our mind to hold that prosecution has proved the factum of recovery on the basis of forthright and convincing evidence. The statements of prosecution witnesses namely Ghulam Hassan, IP/SHO (P. W.1), Muhammad Ansar, SI (P.W.2) and Amanullah Kethran SIP/I.O. (P.W.3) have been thrashed out in depth who all have supported the prosecution version and stood firm to the test of cross examination and nothing beneficial could be elicited casting any doubt on their veracity. The petitioner was apprehended at the spot from a double seater Datsun pickup bearing registration No.WAC-526 on whose search 20 kilograms hashish (charas) was found for which F.I.R. was got lodged with promptitude and samples from alleged recovered material were sent to Chemical Expert without any loss of time which were found "charas" as a result of chemical examination. No enmity whatsoever has been alleged against the prosecution witnesses and there is hardly any possibility for false***

implication without having any ulterior motive which was never alleged. In view of the overwhelming prosecution evidence the defence version has rightly been discarded which otherwise is denial simpliciter and does not appeal to logic and reason. We are conscious of the fact that no private witness could be produced but it must not lost sight of that reluctance of general public to become witness in such like cases by now has become a judicially recognized fact and there is no way out but to consider the statement of an official witness as no legal bar or restriction whatsoever has been imposed in this regard. We are fortified by the dictum laid down in Hayat Bibi v. Muhammad Khan (1976 SCMR 128), Yaqoob Shah v. The State (PLD 1976 SC 53), Muhammad Hanif v. State (2003 SCMR 1237). It is well settled by now that police officials are good witnesses and can be relied upon if their testimony remained unshattered during cross examination as has been held in case of Muhammad Naeem v. State (1992 SCMR 1617), Muhammad v. State (PLD 1981 SC 635). The contentions of Mr. Kamran Murtaza, learned Advocate Supreme Court on behalf of petitioner qua violation of provisions as enumerated in section 103, Cr.P.C. seems to be devoid of merit when examined in the light of provisions as contained in section 29 of the Act which provides exclusion of section 103, Cr.P.C. The learned trial Court has appreciated the entire evidence in accordance with well settled principles of appreciation of evidence and conclusion arrived at has been affirmed by the learned Division Bench vide judgment impugned which being well based does not warrant interference. The petition being meritless is dismissed and leave refused."

In another case of ***Shabbir Hussain v. The State (2021 SCMR 198),*** the Honourable Supreme Court of Pakistan has observed as under:-

"Mehmood-ul-Hassan Inspector (PW-3) joined by Mumtaz Bibi Lady Constable (PW-4) in the witness box furnished details of the arrest and recovery. We have gone through their statements to find them in a comfortable and confident unison on all the salient aspects of the raid as well as details collateral therewith. Learned counsel for the petitioner has not been able to point out any substantial or major variation or contradiction in their statements that may possibly justify to exclude their testimony from consideration. On the contrary, it sounds straightforward and confidence inspiring without a slightest tremor. Absence of a witness from the public, despite possible availability is not a new story; it is reminiscent of a long drawn apathy depicting public reluctance to come forward in assistance of law, exasperating legal procedures and lack of witness protection being the prime reasons. Against the above backdrop, evidence of official witnesses is the only available option to combat the menace of drug trafficking with the assistance of functionaries of the State tasked

> ***with the responsibility; their evidence, if found confidence inspiring, may implicitly be relied upon without a demur unhesitatingly; without a blemish, they are second to none in status. Similarly, forensic report is sufficiently detailed to conclusively establish narcotic character of the contraband. The argument is otherwise not available to the petitioner as he never disputed the nature of substance being attributed to him nor attempted to summon the chemical analyst to vindicate his position. A challenge illusory as well as hyper-technical is beside the mark in the face of "proof beyond doubt" sufficient to prove the charge to the hilt. Petition fails. Leave declined."***

The Honourable Supreme Court of Pakistan in the case of ***Mushtaq Ahmad v. The State & another (2020 SCMR-474),*** has held as under:-

> ***"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".***

15. As regards to the contention of the learned counsel that the prosecution has failed to prove the safe custody of the narcotics substance and the safe transmission of the samples towards the chemical laboratory for analysis as no witness as being the incharge of malkhana was examined nor the person who transmitted the samples was examined and for such defect, the appellants are entitled to be acquitted has too no force as the complainant during his cross-examination stated that ***"The samples were within my possession till its dispatch to the chemical examiner. It is fact that the samples were deposited at the office of chemical examiner on 21-4-2014. The samples were lying in the office under my custody and I deposited myself samples at the office of chemical examiner."*** Such fact is corroborated from the perusal of the chemical examiner's report available on page 41 of the paper book which reflects that the samples were deposited by the complainant Muhammad Qasim. The chemical examiner's report further reflects that the twenty Khaki envelope parcels each with 03 seals were received and the seals were perfect as per the copy sent. The report further reveals that parcel No. 1 to 20 each parcel containing one plastic theli contains four greenish brown semisoft pieces with the smell of Chars and the result of the report is that

parcel No1 to 20 contains chars. During cross-examination, such fact has not been challenged by the appellants ***nor was any question put to a witness who transmitted the samples for chemical analysis.*** Therefore, we are of the view that the prosecution also proved safe custody of the recovered substance and its safe transmission to the Forensic Science Laboratory. The Honourable Supreme Court of Pakistan in the case of ***Izzatullah and another v. The State (2019 SCMR 1975),*** has observed as under:-

> ***"Other pieces of evidence have been found by us as independently sufficient to drive home the charge; forensic report confirms the lethal nature of the substance, recovered in a quantity that cannot be possibly foisted in routine; seizure of the vehicle clinches the case. Argument of safe custody does not hold much water as Abdul Faraz 28/C (PW-10) took the sample to the Forensic Science Laboratory along with Rahdari Ex.PW8/3 was not cross-examined despite opportunity. Forensic Report (Ex.PZ) corroborates the position taken by the said PW. 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."***

In the case of ***Zahid and another v. The State (2020 SCMR 590)***, the Honourable Supreme Court of Pakistan observed as under:-

> ***.....The chemical examiner's report produced by the lady doctor states that the seals of specimens sent for chemical examination were received intact and it was the chemical examiner who had broken open the seals, therefore, the contention of the petitioners' learned counsel regarding the safe transmission of the specimens is discounted both by this fact as well as by the fact that no question was put regarding tampering of the said seals.***

16. Learned advocate for the appellant emphasized that there are material contradictions in the case of prosecution but no such material contradiction has been highlighted to create doubt in the prosecution story. Courts are supposed to dispose of the matter with a dynamic approach, instead of acquitting the drug paddlers on technicalities as has been held by the Honourable Supreme Court of

Pakistan in the case of ***Ghulam Qadir v. The State (PLD 2006 SC 61)***. In another case ***The State/ANF v. Muhammad Arshad (2017 SCMR 283),*** it is observed by the Honourable Supreme Court of Pakistan that no proper investigation was conducted, but the material that came before the court was sufficient to connect the accused with the commission of the crime, the accused could still be convicted, notwithstanding minor omissions that had no bearing on the outcome of the case.

17. Thus based on the particular facts and the circumstances of the case in hand as discussed above, we reached at the conclusion that the impugned Judgment passed by the learned trial court does not suffer from any illegality, gross irregularities or infirmities so as to call for interference by this court. The learned trial Court has advanced valid and cogent reasons for passing the impugned Judgment and we see no legal justification to disturb the same. Consequently, appeals are without merits and the same are dismissed.

JUDGE

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