

IN THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha J.

Mr. Justice Zulfiqar Ali Sangi J.

CRIMINAL APPEAL NO. 384 OF 2021

Appellants : Shahnawaz s/o Abdul Ghafoor through
Mr. Liaqat Ali Khan, Advocate.

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

Date of Hearing : 26.10.2022

Date of Judgment : 04.11.2022.

J U D G M E N T

ZULFIQAR ALI SANGI-J., Appellant was tried by learned Special Court-II (CNS), Karachi in Spl. Case No.09/2020 bearing Crime No.05/2015 U/s 6, 9(C) of CNS Act, 1997 of P.S. ANF-I Gulshan-e-Iqbal, Karachi and was convicted U/s 6, 9(C) of CNS Act and sentenced to suffer life imprisonment with fine of Rs.500,000/- (Five Lac)and in default to suffer imprisonment for 02 years more with benefit u/s 382-B Cr.P.C vide judgment dated 01.07.2021. By means of this appeal, appellant has impugned his conviction and sentence.

2. Brief facts of prosecution case as per FIR are that on a tip off ANF officials headed by Inspector Tahir Ahmed Bhatti of P.S. ANF-1 Karachi reached near Tool Plaza, Super Highway, Karachi on 05.02.2015 at 1300 hours and got stopped Rickshaw bearing Registration No.D-1502762 and apprehended appellant sitting on driving seat and recovered two white nylon sacks, one containing 30 multicolor foil packets of charas and other containing 20 multicolor foil packets of charas total 50 packets weighing 50 Kilograms charas. Arrested accused and recovered property was brought at P.S. and FIR was lodged.

3. After usual investigation challan was submitted before the court having jurisdiction and there after the legal formalities were completed and the charge against the appellant was framed to which

he pleaded not guilty and claimed trial. At the trial, the prosecution examined 4 prosecution witnesses. PW-1 complainant Inspector Tahir Ahmed, PW-2 mashir SI Rashid Ali, PW-3 PC Muhammad Rizwan and P.W.4 Inspector Tahir Ahmed, who produced various documents i.e. FIR, mashirnama of arrest and recovery, report of chemical examiner etc. and then prosecution closed its side.

4. The Statement of appellant u/s 342 Cr.P.C was recorded wherein he denied the prosecution allegations and pleaded his innocence. Appellant gave evidence on oath and also examined two witnesses Abdul Wahid and Saeed in his defence.

5. On conclusion of the trial, learned trial court after hearing the parties convicted and sentenced the appellant as stated above through impugned judgment.

6. Learned counsel for the appellant mainly argued that the appellant is innocent and has been falsely implicated in this case; that despite having advance information the complainant did not bother to associate any independent mashir; that there is no evidence as to safe custody of alleged charas from the time of its recovery till arrival at the office of chemical examiner on 06.02.2015; that there are material contradictions between the evidence of the complainant and P.Ws as the P.W.2 mashir Rashid Ali stated that 10 grams sample was separated from each packet whereas P.W.1 complainant stated that from each packet he separated 20 grams and the report of chemical examiner shows 50 parcels of 20 grams each which renders their evidence unreliable; that the case property was not produced and exhibited at the time of evidence of complainant and it was later on produced during cross examination which is not sustainable in law; that prosecution had failed to prove the charge against the appellants beyond shadow of doubt and thus the appellant was entitled to be acquitted of the charge by being extended the benefit of the doubt. Learned counsel has relied upon the cases of ***Fahad Vs. The State (2022 P Cr. L J 279)***, ***Ahmed Vs. The State (2021 MLD 803)***, ***Abdul Aziz Vs. The state (2021 YLR 1166)***, ***Tahir uz Zaman Vs. The State/ANF (2019 P Cr. L J 1302)***, ***Khuda Bukhsh Vs. The State (2015 SCMR 735)***, ***Ameer Zeb Vs. The State (PLD 2012 SC 380)***.

7. On the other hand, special prosecutor ANF has contended that the prosecution has successfully proved its case by examining the P.Ws, who have no enmity or ill will with the appellant; that the appellant was apprehended red handed and huge quantity of narcotics was recovered from him under mashirnama of arrest and recovery on the spot; that the prosecution also proved the safe custody and its safe transmission to the chemical examiner; that all the P.Ws have supported the prosecution case, therefore, conviction and sentence awarded by the trial court requires no interference by this court and the appeal may be dismissed. He has relied upon the case of ***Sharafat Khan Vs. The State (PLD 2022 SC 281)***.

8. We have heard learned counsel for the appellant as well as learned Addl. P.G and perused the material available on record with their able assistance.

9. In support of the case to prove the recovery of charas the prosecution examined PW-1 who is the complainant so also the investigation officer and was also examined as PW-4 being the carrier of samples to the chemical laboratory from Malkhana and PW-2 being the mashir of the recovery and arrest. Both the witnesses are on one line with each other and have deposed that on 05-02-2015 they were on the duty and after the spy information in respect of transpiration of narcotics to Malir via Toll Plaza super Highway by notorious drug dealer Abdul Ghaffar @ Jago through his agent Shah Nawaz s/o Abdul Ghafoor in Riskshaw No.D-1502762 of Mairoon and yellow colour, and under direction of higher ups a raiding party consisting of himself (complainant), ASI Rashid, PC Hafiz Shahid, Sepoys Ghous, Yaseen and other ANF staff was constituted. They alongwith spy informer, under supervision of AD Incharge of P.S Namely Manzoor Ahmed Phull, vide roznamcha entry No.4 at about 0900 hours in official vehicle made departure from police station and at about 0930 hours reached near Toll Plaza Super Highway, Karachi, cordoned of the area and started surveillance on the vehicles coming from Karachi side. At about 1300 hours they noticed the subject Rickshaw. On pointation of spy informer they halted the said Rickshaw through members of raiding party. The driver of the said Rickshaw was apprehended. The passerby persons were asked to act as witnesses but they due to fear of narcotics dealers did not

act as witnesses. ASI Rashid Ali and P.C Hafiz Shahid were made as mashirs and in their presence complainant inquired name from the apprehended accused, who disclosed his name as Shah Nawaz. On query the said accused produced two sacks contained narcotics lying at the foot mat/rest of rear seat of Rickshaw. Both the sacks were opened in presence of aforementioned mashir. From first sack 30 packets wrapped in multi colour wrappers words "Coconut Milk" printed on it recovered. When opened each packet contained two slabs of charas wrapped with plastic pani. The words "Gurnnam-2015" was embossed on each slab. Thenceforth second plastic sack was opened where 20 packets wrapped in multi colour wrapper were recovered and when the same were opened each packet contained two slabs of charas wrapped with plastic pani. The words "Shandar Sindh-2011/2012" was embossed on each slab. Each packet was quantified one kilogram. Accumulated weight of recovered 50 packets of charas was 50 kilograms. 20 grams of charas was extracted from each packet, sealed in Khaki colour envelope for analysis of its chemical compositions. For identification of samples and remaining charas numbers from 1 to 50 were written on the khaki colour envelop as well as on packets containing the remaining charas. Khakhi envelop contained samples sealed in white colour sack. Whereas remaining charas in the packets sealed in respective sacks. From personal search of accused complainant also recovered cash Rs.1300/-. The memo of arrest and recovery was prepared at the crime scene in presence of both mashirs, who being token of acknowledgement signed the same. Thereafter, accused, crime property and Rickshaw were brought at P.S. ANF Gulshan-e-Iqbal, Karachi where arrival entry and FIR of the instant crime was registered. On parcels of crime property FIR number was written and stored at Malkhana. On 06.02.2015 the deposited samples were sent to the chemical examiner through PC Muhammad Rizwan in consonance of his forwarding letter addressed to chemical examiner and also received chemical examiner's report dated 13.02.2015 which verified the material lying in packets are charas. All the case property and the Rickshaw were produced before the trial court and were exhibited in evidence. Both the witnesses were cross-examined and during cross-examination of PW-1 the suggestion was made that the Rickshaw was stopped by the ANF officials after crossing the toll

plaza to which PW-1 replied that *"It is incorrect to suggest that the rickshaw was stopped after crossing the toll plaza. Vol. says that the rickshaw came from Northern Bypass."* Further on a suggestion this witness stated that *"It is a fact that the sacks were lying on the footrest on the rear seat and the rear seat covered with the veiling sheets on both sides of rear seat."* These suggestions confirm the recovery from the rickshaw and from the place where it is alleged it was recovered from by the prosecution. No enmity or ill-will was suggested to show that the appellant was booked due to some grudge or with malafide intentions. We also do not find any major/substantial contradiction in their evidence and as such we find their evidence to be reliable, trust worthy and confidence inspiring and believe the same.

10. The prosecution also in order to prove the safe custody of the recovered narcotics has examined PW-4 who has deposed that on 05.02.2015 he was posted at P.S. ANF, Gulshan Iqbal, Karachi being Inspector/Malkhana Incharge. Upon returning after arrest the accused Shah Nawaz he had lodged the FIR and after mentioning the FIR number on the parcels of case property deposited it into the Malkhana under Register No.19 at Serial No.156. He also produced attested photocopy of such Entry at Ex.10/A. He was cross-examined and during cross-examination it was suggested that the case property was in his exclusive possession to which he negated and stated that the property was deposited in the Malkhana he also negated that he has produced false entry in respect of depositing the case property in the Malkhana. The recovery was effected on 05-02-2015 and it was sent for chemical examination on 06-02-2015 through PW-3 Muhammad Rizwan who deposed that on 06.02.2015 he was posted at P.S. ANF, Gulshan Iqbal, Karachi being PC, Inspector Tahir Ahmed Bhatti handed over to him one sealed parcel viz. white cloth bag to him with regard to FIR No.05 of 2015 for depositing the same at Sindh Chemical Lab. He had gone to Sindh Chemical Lab alongwith Inspector Tahir Ahmed and other officials in an official vehicle vide entry No.3 at about 0820 hours. He has seen such entry at Ex.6/F, which according to him is same and correct. He had deposited the case property to the concerned official at Sindh Chemical Lab under a proper letter which is also seen at Ex.6/D and

stated that it is same and correct. He had handed over such receiving to Inspector Tahir Ahmed and after returning at PS an entry No.6 was maintained at about 1300 hours which he also produced at Ex.9/A. The contention of defence counsel that the report reflects that the samples were deposited by the Inspector Tahir Ahmed and not by the police constable Rizwan which creates doubt has no force as according to the letter dated: 06-02-2015 the samples were sent through P.C Rizwan by the inspector Tahir and P.C Rizwan during his evidence deposed that at the time of depositing the samples in the office of chemical examiner Inspector Tahir and other ANF officials were also with him. The name of inspector Tahir might have appeared as he was with the P.C Rizwan at the time of depositing the case property in the office of chemical examiner. The report reflects that the parcel was perfect and the seals were perfect as per the copy sent. Both the witnesses were cross-examined but nothing favourable to appellant was brought on record by the defence counsel or any enmity or ill-will is suggested against the witnesses. We have carefully examined the evidence of the prosecution witnesses and found the same reliable, trustworthy and confidence inspiring. The recovery of huge quantity of charas was affected from the possession of accused and the same was kept in safe custody and with shortest period it was sent for chemical examination. The prosecution also proved the safe custody and its safe transmission by producing the witnesses in whose custody the property was in the Malkhana and through whom it was sent for chemical examination. All the chains from the recovery of the narcotics till sending the same for chemical examination have been proven by the prosecution beyond a reasonable doubt.

11. The defence counsel mainly contented that PW-1 and 4 are the same person namely Tahir Ahmed who himself is the complainant and the investigation officer of the case so also the incharge of the Malkhana therefore his evidence cannot be relied upon and its benefit must be given to the appellant however this contention 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 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 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.*

12. The next argument of learned counsel for the appellant 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 has become a judicially recognized fact and there was no way out but to consider the statement of the official witnesses as no legal bar or restriction has been imposed and even then there was no time to collect independent witnesses. No direct enmity or ill will has been suggested by the appellant against 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. Even otherwise, 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-uddin 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.”

Yet in another case of ***Mushtaq Ahmad v. The State & another (2020 SCMR-474)***, the Honourable Supreme Court of Pakistan has also 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”.

13. The defence counsel also emphasized that only samples taken from the slabs were sent for the chemical examination and not the entire property. Therefore, the conviction in respect of entire recovered charas is not sustainable. We have examined the evidence of prosecution witnesses on the point and found that PW-2 the mashir during examination-in-chief has clearly deposed that from

every slab 10 grams samples were withdrawn and 20 grams from each packet which were put in the brown envelopes and numbered 1 to 50 for identification and sealed in white color sack for the purpose of chemical analysis whereas the rest of the narcotics in the same order were sealed in the sacks and for the purpose of identification number 1 and 2 marked on them. As per the prosecution case every packet has two slabs and from every slab 10 grams were separated which became 20 grams from every packet and 20 grams of every packet were sealed for analysis. It has come in evidence that from each slab of charas samples were separated and after sealing the same were sent for chemical examination, therefore it can easily be said that the prosecution has proved each slab to be the charas. The Honourable supreme court of Pakistan in the case of **Sharafat Khan Vs. The State (PLD 2022 SC 281)**, has observed that “The underlining principle that emerges from the reading of the Act, Rules and Ameer Zeb’s case is that before an accused is burdened with a criminal liability under the Act of possessing the alleged narcotic drug, a representative sample of that alleged narcotic drug must be drawn and dispatched to be tested and analyzed by the Government Analyst. Testing and analysis of the alleged narcotic drug is a sine qua non for holding the accused liable under the Act, and the accused cannot be saddled with any liability under the Act unless the report of the Government Analyst is in the affirmative. As the severity of the punishment under the Act varies with the quantity of the narcotic drug recovered, it is therefore essential for the prosecution to establish that the entire alleged narcotic drug stood tested and analyzed by the Government Analyst by drawing representative sample(s) of the alleged narcotic drug. The test and analysis of the representative sample of an alleged narcotic drug amounts to test and analysis of the entire quantity of that narcotic drug. The acts of taking and testing of the representative sample become critical as they feed the assumption that the entire quantity from which the sample was drawn stands tested and analyzed. Therefore, the sample to be representative must be drawn for each and every physically independent and separate unit of the alleged narcotic drug recovered from the accused. A separate and independent unit of the alleged narcotic drug cannot be left out from test and analysis on the assumption that a representative sample

has been drawn from other similar physically independent and separate units of the alleged narcotic drug. Any such assumption would offend the fundamental right to fair trial and due process of the accused guaranteed under Article 10A of the Constitution, besides militating against the safe administration of justice. Right to fair trial of the accused under Article 10A of the Constitution requires that the sample drawn from the alleged narcotic drug must be truly representative of the alleged narcotic drug recovered and therefore must be drawn from all the physically separate and independent units of the alleged narcotic drug. In this regard, the mode of packaging of the alleged narcotic drug by the accused is totally inconsequential; for example, in this case each of the 25 packets have 14 slabs of the alleged narcotic drug, which could have easily been re-packaged as separate 350 packets with one slab each of the alleged narcotic drug or one big packet of 350 slabs of the alleged narcotic drug. The representative sample can only retain its representative character and be also constitutional compliant, if it is drawn from every physically separate and independent unit of the alleged narcotic drug.”

14. Thus based on the particular facts and the circumstances of the case in hand as discussed above, we have found that the prosecution has proven its case against the appellant beyond a reasonable doubt by producing the reliable, trustworthy and confidence inspiring evidence in shape of oral/direct and documentary evidence corroborated by the report of chemical examiner. 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. Resultantly, the appeal in hand is dismissed.

15. The appeal is disposed of in the above terms.

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