

IN HIGH COURT OF SINDH, AT KARACHI

Criminal Appeal No.463 of 2021

Haji Khan & others v. The State

PRESENT:

Mr. Justice Muhammad Karim Khan Agha

Mr. Justice Arshad Hussain Khan

Appellants : (i) Haji Khan son of Shah Wali Khan, (ii) Nasir Khan son of Karam Dad, (iii) Raja Nadeem Ashraf son of Raja Muhammad Ashraf, through M/s. Raja Babar Hameed and Syed Junaid Alam Rizvi, Advocates.

Respondent : The State/ANF through Mr. Habib Ahmed, and Shamsher A. Khan Azeemi, Special Prosecutors for the ANF.

Date of hearing : 22.11.2022

Date of Announcement: 02.12.2022

J U D G M E N T

Arshad Hussain Khan, J.— Appellants, (i) Haji Khan son of Shah Wali Khan, (ii) Nasir Khan son of Karam Dad, and (iii) Raja Nadeem Ashraf son of Raja Muhammad Ashraf, were tried by learned Judge of Special Court-II (C.N.S.), Karachi, in Special Case No.1589 of 2017, emanating from Crime No.42 of 2011 for offence under Section 6/9-C read with Sections 14/15 of the Control of Narcotic Substance Act, 1997, registered at police station ANF, Clifton, Karachi, and vide judgment dated 03.08.2021, the appellants were convicted under Section 265-H(ii), Cr.P.C. for offence under Section 6/9-C read with Sections 14/15 of the Control of Narcotic Substance Act, 1997, to life imprisonment with fine of Rs.1,000,000/- (Rupees Ten Lac only) *each* and in case of default in payment of fine, it was further ordered that appellants shall suffer further imprisonment for three (3) years more. However, benefit of Section 382-B Cr.P.C. was extended to the appellants.

2. The brief facts of the prosecution case leading to the filing of this appeal are that on 25.08.2011, complainant SI Nisar Ahmed of police station ANF Clifton, Karachi, through his high-ups received information that arrested accused persons, namely, (i) Haji Khan son of Shah Wali Khan, (ii)

Nasir Khan son of Karam Dad, and (iii) Raja Nadeem Ashraf son of Raja Muhammad Ashraf in crime No.41/2011, registered at police station ANF Clifton, under Section 6/9-C read with Sections 14 and 15 of the Control of Narcotic Substance Act, sent a consignment being container No.MSKU-9992767 through exporters M/s. Sadiq Enterprises and Importers M/s. Kamriza Marie Kyanza, Brundi, Tanzania and the said container had reached at Salala Port, Oman, after having been cleared from Pakistan, and the said container was brought back from Salala Port, Oman, to Pakistan through ship 'Glory' (GLY 1168). On such information, complainant SI Nisar Ahmed of ANF Clifton, Karachi, along with PCs Abdul Razzaque, Zeeshan Zaidi, Liaquat Ali, Rizwan, Majid Balouch, Pervez Lodhi and other staff left police station ANF Clifton, Karachi, in official vehicle duly armed vide Roznamcha Entry No.8 and reached at GW Yard at examination area of Qasim International Container Terminal, Port Qasim, Karachi, at 1530 hours on 25.08.2011, to check the container No.MSKU-9992767, PCs Ghulam Murtaza and Zulfiqar Ali were already available on their duty at Qasim International Container Terminal, Karachi. The raiding party reached the place of container and in presence of PC Abdul Razzaque and PC Shiraz Lodhi broke open the seal of the said container and found bags of Red Iron Oxide on the wooden stands. Complainant SI Nisar Ahmed checked the said bags and found no incriminating stuff, he thereafter broke one of the legs of wooden stands and found heroin powder wrapped in a plastic packet bounded by adhesive tape weighing 630 grams (gross). Thereafter, other 13 wooden stands were opened; each wooden stand had 12 legs and all wooden legs were broken and found heroin powder in similar manner and recovered 156 packets of heroin powder each weighing 630 grams (gross), thus, total weight 98.280 Kgs of the said 156 packets of the heroin powder were recovered and 10/10 grams of heroin powder from each packet were drawn as sample and marked serial Nos.1 to 156. While whole heroin powder weighing 92.280 Kgs was divided into 4 katas/bags after keeping 39 packets of heroin powder of each katas/bags marked on its serial Nos.1 to 4 and wooden stands was also marked at serial Nos.1 to 13. The wooden stand consignment items (Red Iron Oxide) and the said container was also taken into custody and sealed. Such memo of recovery was prepared on the spot in presence of the said PC Abdul Razzaq and PC Shiraz Lodhi and after completing all codal formalities, raiding party came back at police station ANF Clifton,

Karachi, where complainant lodged instant FIR under the aforementioned sections.

3. It appears from the record that after registration of aforesaid FIR, the investigation was carried out by Inspector Khalid Rasheed of police station ANF Clifton, Karachi, who after recording the statements of PWs under Section 161 Cr.P.C. and after completing all the formalities, submitted the final report under Section 173 Cr.P.C. on 17.01.2012 against the appellants in the court of law by showing the present appellants in custody while co-accused Iqbal Khan, Asif Raza and Tariq Khan shown as absconders.

4. The Charge was framed under Sections 6, 7, 8, 9, 13, 14 and 15 of the Control of Narcotics Substance Act, 1997, on 20.01.2012 at Exh.2, against the present appellants by the learned trial court under above referred sections, to which accused pleaded not guilty and claimed to be tried vide their pleas recorded at Exh.3, 4 and 5. It also appears from the record that thereafter, one absconding accused Gul Khan @ Tariq surrendered before the trial court and obtained interim pre-arrest bail and on 13.12.2011, amended charge was framed against all the accused persons, including Gul Khan @ Tariq at Exh.6, to which accused pleaded not guilty and claimed to be tried vide their pleas recorded at Ex.7, 8, 9 and 10.

5. At the trial, in order to establish accusation against the appellants/accused, prosecution had examined the following witnesses:-

- (i) PW-1/Complainant SI Nisar Ahmed at Exh.11, who produced memo of recovery of contraband at Exh.11/A;
- (ii) PW-2 Chowkidar of Godown, Rana Rafiq at Exh.12;
- (iii) PW-3 Mohammad Kafeel at Exh.13;
- (iv) PW-4 Mohammad Waseem at Exh.14;
- (v) PW-5 Customs Clearing Agent Imran Riaz at Exh.15;
- (vi) PW-6/IO, SI Khalid Rasheed at Exh.16, who produced 161, Cr.P.C. statements of accused Raja Nadeem Ashraf, Nasir Khan and Haji Khan at Exh.16/A and 16/C respectively; *Roznamcha* entry dated 24.08.2011 at Exh.16/D; memo of arrest of accused persons dated 26.08.2011 at Exh.16/E; FIR at Exh.16/F; letter addressed to the chemical examiner at Exh.16/G; chemical examination report at Exh.16/H; Bilty of Paidar Pakistan Goods at Exh.16/I; memo of arrest of accused Raja Nadeem Ashraf dated 08.09.2011 at Exh.16/J; letters addressed to Manager (Ops), QICT, Karachi, and Manager Maersk Shipping Line regarding provision of documents at Exhs.16/K and 16/L; letter addressed to the I/O Khalid Rasheed by DP World Karachi at Exh.16/M along with other documents at Exhs.16/M-1 to 16/M-5; ownership

documents at Exhs.16/N to 16/N-2; copies of FIR, roznamcha and charge sheet etc. in respect of FIR No.31/2011 at Exhs.16/O to 16/O-3; memo of recovery of documents dated 23.12.2011 at Exhs.16/P (25 folios); memo of recovery of documents dated 29.08.2011 at Exhs.16/Q (6 folios); memo of recovery of documents dated 15.09.2011 at Exh.16/R (16 folios); memo of recovery of documents dated 06.09.2011 at Exhs.16/S (13 folios); memo of recovery of vehicle and personal search of accused Raja Nadeem Ashraf at Exhs.16/T (3 folios); copy of FIR No.116/1997 along with relevant documents at Exhs.16/U (11 folios); letter of Assets Investigation Branch ANF addressed to SHO of police station ANF, Clifton, Karachi, at Exh.16/V (10 folios); letter addressed to Chief Commissioner, Inland Revenue, Karachi, at Exh.16/W (23 folios); letter addressed to OPS Branch regarding provision of record in FIRs No.41 and 42 of 2011 of police station ANF Clifton Karachi at Exh.16/X (17 folios); letter addressed to Manager, Maersk Shipping Line, Karachi, at Exh.16/Y (58 folios); letters written to different police stations in respect of conviction record of accused persons at Exh.16/Z (11 folios); call datas record of co-accused persons namely Nasir Khan and Raja Nadeem Ashraf in respect of cell phone Nos.0307-2392043, 0343-8562892, 0303-5116776 relating to accused Nasir Khan; 0300-8669906, 0321-3167070; 0303-7745945, 0321-4857500 relating to accused Raja Nadeem Ashraf along with memo and link charts as Exh.16/AA (355 folios);

- (vii) PW-8 SI Raja Asif Mehmood of police station ANF Rawalpindi at Exh.17, who produced memo of recovery of Heroin in FIR No.31/2011 at Exh.17/A; memo of recovery of Heroin at Exh.17/B; memo of recovery of documents at Exh.17/C, FIR No.31/2011 at Exh.17/D and memo of personal search at Exh.17/E.

6. The above witnesses were cross-examined by learned counsel for the appellants. Thereafter, leaned Special Prosecutor for the ANF closed the prosecution side vide statement at Exh.18.

7. It appears from the record that after recording of evidence, accused Tariq son of Noroz Khan was acquitted under Section 265-K, Cr.P.C. vide order dated 30.05.2012 at Exh.22.

8. Statements of appellants were recorded under Section 342 Cr.P.C. at Exhs.19, 20 and 21, respectively, in which they have denied the allegations leveled by the prosecution.

9. The record also transpires that learned Special Prosecutor for ANF filed an application under Section 540, Cr.P.C. at Ex.23 for re-calling the IO Khalid Rasheed and other un-examined witnesses, to which learned counsel for the appellants filed written objections and after hearing both parties, learned trial court allowed the aforesaid application under Section 540, Cr.P.C. on 02.02.2013 at Exh.24/A.

10. It also appears from the record that learned Special Prosecutor for ANF filed an application under Section 227, Cr.P.C. at Exh.25 for alter and amend the Charge, which was allowed after hearing both the parties vide order dated 03.04.2013 at Exh.26 and amended Charge against the accused persons, namely, Haji Khan, Nasir Khan and Raja Nadeem Ashraf was framed on Exh.27, to which, accused persons pleaded not guilty and claimed to be tried vide their pleas recorded at Exhs.28, 29 and 30, respectively.

11. Record further shows that Inspector Khalid Rasheed was re-called and examined on 19.09.2013 and then prosecution examined PW-9 Customs Clearing Agent Mohammad Sajid at Exh.31, who produced Form-E No.NBP-727762 at Exh.31/A; PW-10 Free Lancer Clearing Agent Mohammad Nadeem at Exh.32; PW-11 employee of M/s. Al-Rehmat Trading Company Malik Mustansir Hussain at Exh.33; PW-12 Manager of Pailer Pakistan Goods Naseer Ahmed at Exh.34. Thereafter, learned Special Prosecutor for ANF filed an application under Section 540, Cr.P.C. at Exh.35 for re-calling PW Mohammad Sajid regarding some typographical mistake in his evidence, which was allowed vide order dated 08.11.2013, after hearing both the parties, and thereafter, learned Special Prosecutor for ANF closed the prosecution side vide statement at Exh.36 and the statements of accused persons were recorded under Section 342, Cr.P.C. at Exhs.37, 38 and 39, respectively.

12. Trial court, after hearing the parties' counsel and on the assessment of evidence, convicted and sentenced the appellants vide Judgment dated 11.03.2014 at Exh.41 whereby present appellants were convicted for life imprisonment with fine of Rs.1,000,000/- each and in case of default, it was further ordered that appellants shall further undergo imprisonment for five years more.

13. Record further reveals that thereafter appellant Haji Khan filed Criminal Appeal No.105 of 2014 and appellants Nasir Khan and Raja Nadeem Ashraf filed Criminal Jail Appeals No.109 and 120 of 2014 before this Court, challenging the judgment of trial court, which was set-aside and the case was remanded back to the trial court with the directions that all the witnesses who were not examined after framing of third Charge shall be examined.

14. It further appears from the record that in compliance of the aforesaid directions of this Court, trial court examined the witnesses and prosecution produced PW-1 complainant Inspector Nisar Ahmed at Exh.44; PW-2 HC Abdul Razzaque at Exh.45; PW-3 Inspector ANF Rawalpindi Asif Mahmood at Exh.46. Thereafter, learned Special Prosecutor for ANF filed an application under Section 540, Cr.P.C. at Exh.48 for calling PW HC Abdul Razzaque, private witnesses namely Mohammad Kafeel, Mohammad Waseem and Imran Riaz and another application under Section 540, Cr.P.C. at Exh.49 and stated that HC Abdul Razzaque has already been examined. Furthermore, PW Mohammad Wasim Clearing Agent was examined at Exh.50; PW Imran Riaz Ex-Employee of Art Shipping and Logistic Multan was examined at Exh.51; PW Mohammad Kafeel was examined at Exh.52; thereafter, side of the prosecution was closed vide order dated 31.08.2019 at Exh.53 and the statements of appellants/accused were recorded under Section 342, Cr.P.C. at Exhs.54, 55 and 57 and the accused persons professed their innocence. Appellant Haji Khan produced photocopy of order under Section 265-K, Cr.P.C. in FIR No.50 and 51 of 2011 under Section 6/9-C of the Control of Narcotics Substance Act, 1997, registered at police station ANF Clifton, Karachi dated 16.08.2012 in which all three appellants were acquitted under Section 265-K, Cr.P.C. and copy of Judgment passed by the Hon'ble Supreme Court of Pakistan in Criminal Appeal No.366 of 2018. However, neither appellants examined themselves on oath, nor called any witness in their defence; they prayed for their acquittal.

15. Moreover, learned Special Prosecutor for ANF filed an application under Section 540, Cr.P.C. at Exh.58 before the trial court for calling *Malkhana* Incharge and PW Majid, to which learned counsel for the appellants gave his No Objection and the same was allowed vide order dated 06.11.2019 and PW PC Mohammad Majid Balouch examined at Exh.59, who produced *Roznamcha* entry at Exh.59/A. Thereafter, learned Special Prosecutor for ANF filed another application under Section 540, Cr.P.C. at Exh.60 for calling Assistant (Retired) Naeem Gul and by consent, such application was allowed vide order dated 28.11.2019 and PW Assistant (R) Naeem Gul examined at Exh.60, who produced *Roznamcha* entries at Exhs.60/A and 60/B respectively. Learned Special Prosecutor for ANF filed another application under Section 540, Cr.P.C. at Exh.61 for recalling Inspector Nisar Ahmed, which was allowed by consent by the trial

court vide order dated 05.12.2019 and PW Inspector Nisar Ahmed re-examined at Ex.62, who produced *Roznamcha* entry No.62/A; thereafter, learned Special Prosecutor for ANF closed the side of the prosecution vide statement at Exh.63; and statements of accused persons were recorded under Section 342, Cr.P.C. at Exhs.64, 65 and 66 and reiterated the same statements as in the earlier statements.

16. Trial court, after hearing the parties' counsel and on the assessment of evidence, convicted and sentenced the appellants as stated above. Hence, instant appeal has been preferred against the impugned judgment.

17. Mr. Raja Babar Hameed, learned counsel for the appellants contended that the appellants are innocent and falsely dragged into this case due to malafide intention and ulterior motives; that the prosecution has not been able to prove the case as alleged against the appellants beyond the shadow of reasonable doubt; that trial Court has seriously erred by not considering the material evidence brought on record by the appellants as ignoring the cross-examination which completely and absolutely shatters the case of the prosecution against the appellants; that learned trial court has failed to apply judicial mind and passed the impugned judgment in hasty manner without considering the evidence so brought on record by the prosecution; that all the prosecution witnesses are ANF officials and their evidence required independent corroboration; that after the arrest of accused persons, the officials of ANF recovered the container of containing heroin from QICT, but no private witness was cited as witness from the aforesaid place of recovery; that learned judge while passing the impugned judgment failed to consider the malafide on the part of the prosecution that how can the container in which the heroin was found was brought back to Pakistan from Sala Port of Oman in one day as the alleged disclosure was made on 24.08.2011 whereas container reached at Karachi on 25.08.2011 and the prosecution did not produce any record in respect thereof; that the impugned judgment is based on surmises and conjectures and no proper appreciation of evidence has been made by the learned trial court; that the evidence led by the prosecution does not support the conviction and it is a fit case for acquittal; that neither the appellants are exporters nor alleged contraband recovered from their possession; that the prosecution has failed to bring a single piece of evidence against the appellants and failed to

establish any link between the appellants and the said consignment; that amended charge was framed against the appellants in which the allegations leveled against them are that on or about 25.08.2011 on the disclosure of appellants who were already arrested in crime No.31/2011 of police station ANF Rawalpindi and crime No.41/2011 of police station ANF Clifton, Karachi, authority brought back the container from Salala Port, Oman to Pakistan Karachi from which alleged recovery of heroin powder weighing 98.280 kilograms was recovered and such recovery was effected on the disclosure of the appellants Haji Khan and Nasir Khan before the ANF Rawalpindi. Moreover, the appellants have already been acquitted in crime No.31/2011 and 41/2011 and the said orders upheld up to the Supreme Court. Lastly, it is argued that the prosecution has failed to prove its case against the appellants; thus, according to him, under the above mentioned facts and circumstances, the appellants are entitled for their acquittal. In support of his arguments learned counsel has relied upon the case of *Abdul Rehman and another v. The State* [PLD 2022 Lahore 235].

18. Conversely, Mr. Habib Ahmed, learned Special Prosecutor for the ANF while supporting the impugned judgment, has argued that prosecution has proved its case against the appellants; huge quantity of Heroin was recovered from the Container on the disclosure of the appellants; that ANF officials have no enmity to foist such huge quantity of contraband narcotics upon the appellants. During his arguments he very candidly admitted that there is no direct evidence against the present appellants however he contended that there was strong circumstantial evidence available on record connecting the present appellants with the crime. In this regard he has put emphasis on the depositions of PW-3, PW-6 and PW-12. Lastly, it is argued that trial Court has rightly appreciated the evidence, convicted and sentenced the appellants in accordance with law and as such the appeals be dismissed.

19. We have heard learned counsel for the parties and scanned the entire evidence available on the record.

20. The present case, primarily, based upon the disclosure of the appellants namely Haji Khan and Nasir during their custody at ANF Rawalpindi in crime No.41/2011 that they have smuggled heroin under export consignment of Red Iron Oxide through container No. MSKU-992767 to Borandi Tanzania. The information of such disclosure was

conveyed to ANF Karachi by R.D. Rawalpindi in writing on 24.08.2011. Pursuant to such information, the said container which had reached at Salala Port, Oman, was brought back to Pakistan on 25.08.2011 and upon checking the said container recovered 156 packets each containing 630 grams, total 92.280 Kgs heroin powder and on 26.08.2011 at 0700 hours the complainant SI Nisar Ahmed lodged FIR being Crime No. 42/2011 subject matter of instant proceedings. Pursuant to the above said information Appellant Raja Nadim Ashraf was also arrested on 26.08.2011 by ANF Faisalabad.

21. From the record, after careful analysis of the evidence on record and considering the pros and cons so put forth by learned counsel for the parties, we have gathered that the entire case of the prosecution revolves and rests upon the circumstantial evidence as there is no direct evidence against the present appellants. As such, the circumstantial evidence brought forward needs to be scanned and appreciated on the yardsticks enumerated by the Apex Courts through various judgments reported in the cases of *Imran Alias Dolay v. The State and others* (2015 SCMR 155) and *Azeem Khan and another v. Mujahid Khan and others* (2016 SCMR 274).

22. In view of the reported judgments referred to hereinbefore, we have derived that the circumstantial evidence requires to be appreciated on the dictum that in such like matters, while appreciating the evidence and holding an accused guilty of the charge, the facts of the case must be consistent with guilt of the accused, chain of evidence must be complete in all respects leaving no reasonable ground about the innocence of the accused. The suspicion, however, strong, cannot be given preference over proof. The chain of events shall not break, which must be conclusive beyond any shadow of doubt.

23. In cases of circumstantial evidence, there are chances of procuring and fabricating evidence, therefore, courts are required to take extra care and caution to narrowly examine such evidence with pure judicial approach to satisfy itself, about its intrinsic worth and reliability, also ensuring that no dishonesty was committed during the course of collecting such evidence by the Investigators. If there are apparent indications of designs on part of the investigating agency in the preparation of a case resting on circumstantial evidence, the court must be on its guard against the trap of

being deliberately misled into a false inference. If the court fails to observe such care and caution and hastily relies on such evidence, there would be a failure of justice. Reference may be made to the case of *Fazal Elahi v. Crown* (PLD 1953 FC 214) and of *Lejzor v. The Queen* (PLD 1952 PC 109), it was held therein with considerable emphasis that circumstantial evidence may sometimes appear to be conclusive but it must always be narrowly examined, if only because this type of evidence may be fabricated in order to cast suspicion on another, therefore, it is all the more necessary before drawing inference, if the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances, which weaken or destroy the inference then, in that case alone it may be relied upon otherwise, not at all.

24. Keeping in view the broader principles, so laid down, we have now to deal with the evidence of the prosecution, adduced at the trial.

25. The Case of the prosecution mainly hinges upon the evidence of prosecution witnesses viz. **PW-3** (Muhammad Kafil- owner of the godown), **PW-6** (Imran Riaz-representative of M/s. Art Shipping a Customs Clearing Forwarding Agent), **PW-7** (Khalid Rasheed-I/O) **PW-12** (Naseer Ahmed-Manager M/s. Paidar Pakistan Goods Transport Company) and **PW-1**-(Nisar Ahmed-the complainant). Here, it would be conducive to reproduce the relevant portions of the testimony of above PWs, which are as follows:

Testimony of PW-3

“I am owner of the godown of the case. It was rented out to one Raja Nadim in the month of April, 2010. There was an agreement of tenancy. I have the copy of the same. I gave such copy to Khalid Rasheed the I.O. of the case. I do not have any copy of the same. I cannot produce the same in Court. The police called me in the police station at Faisalabad and informed me to have visited the godown and secured the red colour bags and wooden pieces called pallats. I have not seen them in person. I have not seen such type of stuff as lying or being present in the godown premises. I never visited the godown for the reason that it never stood opened in day time but remained under use in night time. The godown is situated in the market. I am one of the five owners of the same. The chowkidar Rana Rafique serves the market as chowkidar. I pay Rs.5000/- to him per month. The chowkidar did not inform me any noticeable event or happening with reference to either Raja Nadim or his men. In the month of January, 2012, the police came again to the godown and secured the remains of the stuff already secured on their part three to four months ago, in the matter. The police had applied its lock at the godown. The same was not sealed by the police. The rent for the said period of police custody has not stood paid to me. I have never seen Raja Nadim prior to April, 2010. I cannot say exactly because of short of memory that as to when I saw him lastly. It was January 2011 probably. I have seen him four to five times in my life. One police man had already met me in the

police station before Khalid Rasheed arrived there to examine me in the matter. The said constable had already shown to me the mobile phone set, he possessed in which there was photos captured by its camera. I identified one photo as that of Raja Nadim. Khalid Rasheed did not record my statement although he examined me orally as witness. Raja Nadim was present in custody of the police but when I visited the police station he was not shown to me. I was also not produced before any magistrate for identification purpose. I identified him today in the Court as he had been my tenant. I had no knowledge of any criminal record of Raja Nadim.”

“I do not have the record of the title of the godown in question and it is incorrect to suggest that the present Raja Nadim was not my tenant.”

[Emphasis supplied]

Testimony of PW-6:

“I cannot say, in Criminal. Case No.41/11, I am shown as accused by ANF. It is a fact that I was examined by the Magistrate u/s 164, Cr.P.C. on 30-8-11 in the matter in question. I have given the statement on the basis of information, I have received from time to time by my arranged people and physically I did not handle any sort of work, I have stated above. My company received freight charges in each matter and nothing else. I have no record to prove payment of such freight charges at the moment. I have maintained file of each consignment with regard to each arrangement of the container and aforesaid facilities to same person but I have not brought anything today, they are lying in my office. I cannot prove my employment as I have claimed with reference to the company aforesaid. Similarly, I have no proof to show that I was authorized to represent my company or to make arrangements and or providing such facilitating to the people like Raja Nadim in terms of their need and demand as happened in the cases, I have stated above. I do not have any personal knowledge about the crime stuff. I cannot say anything about the criminal activities of Raja Nadim, if any, involved in the matter as I have not seen him so involved throughout the period of my relations and never heard of him to be drug criminal. I do not know his companions or partners of business or crime associates etc. The Magistrate did not author my statement of 164 Cr.P.C. but his Reader did so. The Magistrate also recorded my statement separately. The Magistrate was sitting at some distance to me. It was Reader who came to me with such statement and obtained my signature. I cannot say if the statement was either written by the Reader or Magistrate. I have gone through the statement I have given u/s 164 Cr.P.C. today. I cannot say if the Magistrate issued the certificate there under, endorsing that the statement of mine had been recorded by him and not anybody else. I do not know the procedure in that regard. There was no accused present in Court at the time of my statement by the Magistrate. 164 Cr.P.C. statement’s narrative does not show that Raja Nadim loaded the container and dispatched it, on the contrary, the same shows that it was me who did so. I produce the 164 Cr.P.C. statement (from defence side) as Ex.20/A.

[emphasis supplied]

Testimony of PW-7:

It is a fact that Haji Khan does not appear in his statement Ex.16/A to have made my reference of the container No.MSKU-9992767, which is subject matter of the instant case. Vol. says: this

reference is available in relevant Zimni with reference to my interrogation against him. It is a fact that the statement Ex.16/A carries no reference at all. It is incorrect to suggest that the accused is innocent and falsely implicated in the matter. It is incorrect to suggest that the FIR and the memo of recovery have shown different time of incident. It is a fact that the G.D. Ex.16/1 to 16/1-5 shows submission of consignment for examination on 10-8-11 at port. I do not know date of "allowed loading" by the customs authorities, after examination and clearance of the consignment. I did not record any statement of the officials who had examined the consignment, checked the same in all respects including dog sniffer work, and clearance of Drug Cell, ANF etc. and Custom clearance as well as sealing of the container etc. of the consignment. I do not know how long the container remained awaited for being loaded, at the port before it was loaded. I do not know about the proceedings of Doha port against such consignment. It is a fact that Haji Khan is not appearing on record, which I produced or the record pertaining to such consignment, which is the subject matter of the instant case, as consigner, agent, partner or their representative etc. He also does not appear on record as beneficiary or importer. He was not present at the time of search and recovery under the memo at QICT. It is a fact that the accused had already been in the custody at Rawalpindi in FIR No.31/11 since 22-8-11, much earlier to the recovery aforesaid that took place on 26-8-11. It is a fact that the memo prepared with respect to the arrest of the accused in the cases launched against him, by the ANF, and investigated on my part, carried no reference of his having exported or dispatched abroad for the purpose of smuggling, heroin powder, or narcotics, through the process under reference including as many as 9 containers which are the subject matter of the aforesaid cases. It is a fact that no material incriminating is secured out of the possession of the accused Haji Khan or on his pointation or in his presence any place, which could have had any nexus with this case."

“It is incorrect to suggest that there is no reference in the charge sheet, which I have submitted in the court and the documents which I have produced today in evidence and stated about such purpose. It is fact that I do not possess E-form, account details of the exporter, bank details that issued the E-form, account number and name of the bank etc. it is fact that there is no approval record, I have produced nor I have made any investigation as to the approval if any of the State Bank in favour of the bank of the container that issued the E-form to him. Sadiq Enterprises is account holder of such bank. It is exporter that puts entire information as to the consignment in terms of the condition of the buyer i.e. importer requirement as to quality, quantity, weight and C&F value etc. I cannot say that invoice in export cases carries number of the contractor between the export and import of such consignment. It is incorrect to suggest that in order to conceal the facts as to such details, I have not produced invoice which is always on letter head of consigner/exporter and in such contract number thereof. It is a fact that the bank concerned of the export in question has not been concealed in any manner whatsoever in the matter. I did not seized/freeze and or investigated the account of the said exporter. It is a fact that I have not investigated if the amount of the invoice has been received by the bank from concern party i.e. importer. B/L Ex.16/M-5 issued by Mask Line, shows that all sort of information pertaining to the consignment export, import concerned, port of shipment, port of discharge etc. and distribution of quality and quantity, weight etc. were furnished by the shipper. It is a fact that the said exhibits shows US & 2324 as freight paid by the shipper to the shipping company. The container release order issued by the shipping company as Ex.16/M-5 is showing the date of issuance of the

container No.MSKU-9992767 on 10-8-11. Sardar Aijaz is mentioned in CRO as representative of the ART shipping instead of Imran Riaz. I cannot say if the same Sardar Aijaz has shown as representative of the shipping line and in the record of other cases the position is same as is in the instant case that Sardar Aijaz is mentioned instead of Imran Riaz. Seal No.PK-0656343 is mentioned to have stood broken in as per the FIR, challan and the seizure memo in the matter in hand. It is a fact that Ex.16/1-4 which is expert receiver advice pertaining to the consignment of export under container No.MSKU-9992767 shows line seal No.PK-0662455 which is different to the seal No.PK-0656343, which I have deposed. The clearing agent trade the international has put its same endorsing the export receiver advice entries information in all respect including the aforesaid seal number. It is a fact that as per the advice the container mentioned therein proceeded from Lahore for Karachi and not from Faisalabad for Karachi. As per the said advice AG goods is the transporting company and GP 9522 is the trading number pertaining to the transport of the container mentioned therein from Lahore to Karachi. It is a fact that on 10-08-11 the said container had entered the QICT port area. All the statements I have recorded or endorsed by me under my signature and capacity as I.O. and such statement pertaining to PWs Muhammad Rafiq, Kafil, Imran Riaz, Wasim Raja, Jehan Khan, Bashir, Wasim, Sajid, Muhammad Abdullah and Malik Mustansir Hussain. It is a fact that the statement of Imran Riaz u/s 161 Cr.P.C. shows that Imran Riaz himself arranged the transport of the container in the case through MASC shipping line and the entire record pertaining there to had already been handed over to me by Imran Riaz before 29-8-11 and the same shows Usman Goods Transport Company but I have not obtained any document being the transporter of the said truck No.TLE-211 which carried the said container and not Paider Goods Transport Company. It is a fact that the builty Ex.16/I of Goods company I have produced in my evidence shows the departure of the transport TLE-211 on 31-7-11. It is a fact that Ex.16/I i.e. builty does not show any office or branch of the goods company concern to be at Faisalabad. It is a fact that said exhibit builty shows that the transport expenses or cost is paid I cannot say who had paid the same. It is a fact that the builty Ex.16/I shown container No.MSKU-9992767 with date of transportation by the company that issued such builty as Ex.16/I on 31-7-2011 and the truck No.211. Whereas the CRO shows same container to have been issued released for shipper at his request on a subsequent date i.e. 10-8-11 in the instant matter and therefore both documents contradicted each other and which cuts route of the case. Since the same shows improbability to the extent that the container issued on 10-8-11 is shown to have been dispatched through truck by transport company from Faisalabad under builty issued at Multan on 31-7-11 which has no nexus with the former. In other words before issuance of the container how can it be said to have been loaded by goods company which is not the owner of the container and such container is always issued from shipping line for such purpose. I cannot place reliance certainty is on all the documents I have produced and both the contradicted documents referred to above and I cannot say which one is authentic and which one is unauthentic out of them both. It is incorrect to suggest that the builty Ex.16/I is forged documents to my knowledge. It is also incorrect to suggest that the Naseer is false witness. It is a fact that there is no documentary prove to show accused Raja Nadim occupation either as tenant or otherwise of godown which is said to have belonged to him. The witness Kafil handed over to me ownership documents pertaining to building in question I have not produced it in Court. It is a fact that the witness Kafil is deposed before the Court to have held no documents in respect of such property. He has not given to me any tenancy record

in favour of the accused Raja Nadim. I produce the record of such ownership of Kafil as Ex.16/N to 16/N-2. The said documents does not show ownership of Muhammad Kafil of any people or godown like property but agricultural land property bearing No.Chak No.202 of Taluka and District Faisalabad of 16 marla. The same does not pertain to or show any constructed premises. It is a fact that I have not produced in the case anything which proves that Muhammad Rafique Chowkidar or employee of the said builty or under employment of Muhammad Kafil. I have no proof of ownership or tenancy etc. and even of occupation of Raja Nadim against the office where from I claim to have secured photocopies of B/L etc. It is a fact that B/L and other consignment papers had been in our possession already since received from Imran Riaz much earlier to alleged recovery of the copies thereof either from the office of Raja Nadim or from the car of the other accused namely Nasir. It is a fact that the said recovery of the documents from such places has no nexus with the accused concern since they do not show that as signatory author of the container, assignee, exporter, importer, agent, shipper, shipping agent, career and transporter customs etc. It is a fact that against such accused only the said recovery of the documents and the articles secured from the godown and the statements of the witnesses are the only material against them in the case. B/L is issued to the exporter which being to be documents is found kept in all the record of concern quarter. It is a fact that the B/L issued on 19-8-11. It is a fact that the date of reaching of the container in the instant case on 28-8-11. I do not know the proceedings adopted by the department to bring the container back and what procedure was followed and proceedings took place in that regard between the concern quarter of both the countries and both sides during the intervening period. It is a fact that we have no record to such effect. I cannot prove the return of the container with the stuff claim to have been secured. It is incorrect to suggest that Raja Nadim is innocent and falsely implicated and there is no incriminating evidence against him and the record produced in the matter against him does not prove any offence with which he is charged or otherwise as a matter of law.”

“It is a fact that my earlier evidence was recorded in Special Court-I (C.N.S.) Karachi probably in the month of July 2012 as Ex.16/PW-7. It is a fact that in my earlier statement I produce several documents as Ex.16/A to 16/N-2. I see the application under section 540 Cr.P.C. as Ex.24 in which I have specifically stated that some ambiguity in Ex.16/M to 16/M-5 and ambiguity in Ex.16/C. It is a fact that when my earlier statement was recorded and according to the witness those documents was refused to be exhibited by the Court and statement was not filed in this regard at that time as well as the SPP for ANF and in this regard SPP for ANF had filed application under section 540 Cr.P.C. It is incorrect to suggest that the subsequently documents Ex.16/O-I to 16/AA filed to fill up the lacuna. It is correct to suggest that Ex.16/O to 16/X are certified original copies and Ex.16/Y are photocopies under original letter heading form of KICT. It is a fact that the consignment in respect of Crime No.42/2011 was in the port on 10.08.2011. It is correct to suggest that the customs authorities after thoroughly examined and cleared and allowed shipment. It is a fact that on 25.08.2011 the said consignment was called back from Salala Port, Oman to Karachi on the disclosure of accused persons. The said consignment was called back through ‘Glory’ vessel at Port Qasim, Karachi. It is a fact that on the said date I was busy in investigation with accused Haji Khan and Nasir Khan at Rawalpindi in other cases. It is correct to suggest that accused Haji Khan was not exporter neither clearing agent or transporter of the said consignment. It is correct to suggest that PW SI Raja Asif of RD

Rawalpindi who has disclosed those facts to me when I was recorded his 161 Cr.P.C. statement. It is a fact that I did not examine the said consignment at Port Qasim, Karachi at the time of recovery and I first time seen the said consignment at ANF Clifton, Karachi. I do not remember the color of container.”

“It is correct to suggest that I obtained the copies from Criminal Acquittal Appeal No.35/2013 being Crime No.41/2011 filed by ANF and the same documents are included in charge sheet of present case also. It is incorrect to suggest that I produced those documents afterthought as they will go to favour of accused.”

“It is correct to suggest that accused Raja Nadeem Ashraf is not exporter; transporters or clearing agent of said consignment. I see Ex.16/R (16 folios) are the same which were I produced earlier. It is incorrect to suggest that those exhibited are not related to present case. It is correct to suggest that I obtained those documents from clearing agent Malik Mustansir of M/s. Al-Rehmat Trading, Karachi. It is correct to suggest that clearing agent Malik Mustansir was clearing agent of consignment of FIR/Crime Nos.50 and 51 of 2011 and not Crime No.42/2011. It is correct to suggest that FIR/Crime Nos.50 and 51 of 2011 were lodged probably after three months of the instant FIR Crime No.42/2011. I see Ex.16/W (23 folios) these are same documents which were exhibited by me in which I wrote letter on 01.01.2012 (after the lapse of 04 months of instant FIR) to FBR for ownership details of wealth tax. It is a fact that I received replied letter from FBR, Faisalabad with date 28.02.2012. It is a fact that in reply of FBR that they have no record from the financial year 2008 which was issued FBR, Regional Office, Faisalabad. It is correct to suggest that I raided the office of accused Raja Ashraf in the month of September, 2011. I see Ex.16-T (three folios) these are same. It is correct to suggest that Ex.16/T (three folios) pertaining to the Crime No.41/2011 and also included in the charge sheet of this case. It is incorrect to suggest that I made improvement in present statement. It is incorrect to suggest that I falsely implicated the accused Raja Nadeem Ashraf by hook and crook.”

[Emphasis supplied]

Testimony of PW-12:

“It is correct to suggest that I had recorded my statement under section 161 Cr.PC before I.O/ANF. It is correct to suggest that it was specifically mentioned in my 161 Cr.PC statement that on 01.08.2011, one Imran Riaz has given CRO number to me. It is correct to suggest that it was not specifically mentioned in my 161 Cr. PC statement that on 06.08.2011 that on 06.08.2012 said Imran Riaz through telephone conversation directed me to send the trailer to Chak Jamhra Road, Faisalabad Dry Port Punjab at the godown of Co-accused Raja Nadeem for loading purpose. It is fact that whatever I have stated in 161 Cr.PC statement is true and correct. It is correct to suggest that I was informed by driver Abdul Rehman through telephone but the word ‘telephone’ was not mentioned in my 161 Cr.PC statement. It is correct that it was not specifically mentioned in 161 Cr.PC statement that I handed over the Bilty to the I/O inspector Khalid Rasheed of ANF at the relevant time. It is correct to suggest that carbon copy of the Bilty as Exh.16/1 is not brought in evidence. It is incorrect to suggest that Bilty as Exh.16/1 is false and forge one. It is incorrect to suggest that I am deposing falsely at the instigation of ANF. It is correct to suggest that it was not specifically mentioned in my 161 Cr.PC statement that I met with co-accused Raja

Nadeem. It is correct to suggest that I have no authority letter which shows that I am Manager of M/s. Paidar Pakistan Goods Company, Multan, Punjab whose owner/self-proprietor Malik Safeer.”

[Emphasis supplied]

Testimony of the PW-1

“I received information of such consignment from the high ups on 25.08.2011. I do not know or any guess that there is distance of 4 to 5 days voyage through ship in between Salala Port and QICT, Pakistan. It is a fact that neither I mentioned the names of those persons who refused to act as mashir nor issued any notice u/s 160 Cr.P.C. I do not remember that I have not produced the FIR and the letter addressed to the chemical examiner in my first examination-in-chief in this case. Vol. says that I had deposed before the Court that I had lodged the FIR and sent the samples before the chemical lab. Yes I was I/O of this case. I do not remember whether I had identified the accused persons in my examination-in-chief in FIR No.41 of 2011. Vol. says that the defence counsel in FIR No.41 of 2011 had put a question to me that whether I had arrested the accused persons and I replied that I had not arrested them.”

“It is a fact that I did not mention the name of those high ups who informed me to check such container. It is a fact that it was verbally directed me to check the container and after checking and recovery then I lodged the FIR against the accused persons. I had not received any document to show that the Haji Khan exported such container.”

“I was posted at port area in 2011 at QICT. It is a fact that QICT is a prohibited area and without permission of any stranger cannot enter in such area. It is a fact that the container was lying in the examination yard under the custody of QICT. It is incorrect to suggest that without permission of QICT authority the container could not open. Vol. says that ANF has authority to check it and open any container if there is some information. It is a fact that I had no any export document of such container when I opened it. Vol. says that I had verbal order of high ups of ANF. I had not made any request to bring the container at examination yard. Vol. says that when I reached there the container was already at GW Yard examination area of QICT. I do not know whether the container was already taken up by the high ups of the ANF in the examination yard. Probably the FIR No.41 of 2011 was lodged few days before FIR No.42 of 2011. It is a fact that the accused persons were in custody in FIR No.41 of 2011 when I lodged the FIR No.42 of 2011, but in another PS not in PS ANF Clifton. It is not in my knowledge that in whose custody accused Nadeem Ashraf was when I lodged FIR No.42 of 2011, but he was not at PS ANF Clifton. Obviously when I lodged FIR No.42 of 2011 accused Nadeem Ashraf was in the custody of ANF. Vol. says that Inspector Khalid Rasheed can tell about the custody of Nadeem Ashraf. I do not know when I lodged the FIR No.42 of 2011 accused Nadeem Ashraf was in Faisalabad prison. It is incorrect to suggest that I nominated accused Nadeem Ashraf on the direction of high ups of ANF. It is a fact that on the information of high ups I nominated the accused Nadeem Ashraf in FIR No.42 of 2011. I had not seen the Nadeem Ashraf when I lodged the FIR No.42 of 2011.

[Emphasis Supplied]

26. From perusal of the above evidence, it manifestly appears that the appellants were neither the owners, nor the exporters, nor clearing agents nor transporters and nor the beneficiaries of the subject consignment and the only evidence to link them to the consignment is their alleged admission to the police whilst in custody which admission before the police is inadmissible in evidence and apart from that no other evidence has come on record to link the appellants to the consignment.

27. Besides above, after careful reappraisal of the entire evidence, we are entertaining no amount of doubt that prosecution has failed to bring home guilt of the accused/appellants as the evidence furnished during the trial is full of factual and legal defects. In this case, from the evidence available on the record the doubts are emerging regarding the appellants involvement in this crime and it is settled since centuries that benefit of doubt automatically goes in favour of an accused. Even if a single circumstance creates reasonable doubt in a prudent mind regarding guilt of an accused then the accused shall be entitled to such benefit not as a matter of grace and concession but as a matter of right and such benefit must be extended to the accused person(s) by the courts without any reservation. Reliance can be made upon the case of *Muhammad Mansha v. the State* (2018 SCMR 772) which held as under :

“Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, “it is better that ten guilty persons be acquitted rather than one innocent person be convicted”. Reliance in this behalf can be made upon the cases of *Tariq Pervez v. The State* (1995 SCMR 1345), *Ghulam Qadir and 2 others v. The State* (2008 SCMR 1221), *Muhammad Akram v. The State* (2009 SCMR 230) and *Muhammad Zaman v. The State* (2014 SCMR 749).”

28. We are conscious that huge quantity of heroin powder was recovered from the container but admittedly the said Narcotics was not recovered from the possession of the appellants, either actual or constructive. Mere fact that huge quantity of contraband material was recovered by itself would not be sufficient to prove the guilt of appellants because in order to establish their culpability, prosecution was bound to establish the link of the appellants with the recovered Narcotics in which the prosecution has utterly failed to do. The prosecution has miserably failed to complete the chain of

circumstances so as to establish conclusively the guilt of the appellants in a manner that can rule out every hypothesis inconsistent with their innocence.

29. Insofar as the prosecution story that the contraband narcotics was recovered on the disclosure of the appellants is concerned, the appellants have denied this fact in their 342 Cr.PC Statements, therefore, their involvement in crime on the basis of their own disclosure during custody without corroboration by other strong and cogent evidence is not sufficient to establish guilt of appellants for the offence carrying punishment of life imprisonment. The Honorable Supreme Court of Pakistan in the case of *the State through P.G. Sindh and others v. Ahmed Omar Sheikh and other* [2021 SCMR 873], inter alia, has held that ‘*Any confession, even recorded under section 164 Cr.P.C. will become invalid if the accused is produced before the Magistrate remained in handcuff while making such confession*’.

30. For what has been discussed above, we find that the prosecution has **not** proved its case beyond reasonable doubt against the appellants and the learned trial court has not properly appreciated the evidence and other material produced before it while awarding conviction and sentence to the appellants vide impugned judgment, which is not sustainable in the eye of law. As such, this appeal is allowed, the impugned judgment is set aside and the appellants/convicts are acquitted of the charge. They are in custody and shall be released forthwith if not wanted in any other custody case.

Judge

Judge

*Jamil****