

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No.678 of 2021
[Muhammad Irshad Khan v. The State]

PRESENT:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Arshad Hussain Khan

Appellant: Muhammad Irshad Khan son of Amanat Khan
Through Mr. Zakir Hussain Bughio, Advocate.

The State: Through Mr. Habib Ahmed, Special Prosecutor, ANF.

Date of hearing: 02.12.2022

Date of announcement: 09.12.2022

J U D G M E N T

Arshad Hussain Khan, J.— This Criminal Appeal is directed against the judgment dated 22.11.2021, passed by the Special Court-II (C.N.S.) Karachi in Special Case No.542 of 2015, FIR No.38 of 2015, registered at police station ANF-Clifton, Karachi, under Section 6/9-C of the Control of Narcotics Substance Act, 1997, whereby the appellant-Mohammad Irshad Khan son of Amanat Khan has been convicted under section 265-H(ii) Cr.P.C., for offence under Section 6/9-C of the Control of Narcotics Substance Act, 1997, and sentenced for Life Imprisonment with fine of Rs.200,000/- [Rupees Two Hundred Thousand Only] and in default in payment of fine he shall further undergo two (02) years more imprisonment. However, the benefit of Section 382-B, Cr.P.C. was extended to the appellant.

2. Succinctly, the facts of the prosecution as per FIR are that on 10.10.2015 upon spy information, complainant SI Mohammad Hasan Khoharo of police station ANF Clifton, Karachi, along with other ANF officials reached at Al-Farooq Hotel, near Railway Station Cantt. Karachi at 1000 hours and arrested the above named accused and recovered a black handbag containing 15 multicolor foil packet of charas [narcotics] weighing 15 Kgs from his possession. After observing the required formalities at the spot, the accused along with recovered contraband charas [narcotics] were brought at the police station, where instant FIR No. 38/15 under section 6/9-C CNS Act 1997 was registered.

3. After usual investigations a formal charge was framed against the accused at Exh.2, but he denied all the allegations leveled against him and claimed to be an innocent and prayed for trial, vide plea at Exh.3. At the trial, in order to establish accusation against the appellant / accused, prosecution had examined the following witnesses:-

- (i) PW-1/ASI Nawab Alam, mashir of arrest and recovery at Exh.4, who produced memo of arrest and recovery at Exh.4/A;
- (ii) PW-2/complainant/IO SI Mohammad Hasan Khoharo at Exh.5, who produced roznamcha entry of departure at Exh.5/A, FIR at Exh.5/B, letter addressed to chemical examiner at Exh.5/C, chemical report at Exh.5/C-1, letter addressed to law officer, Pakistan Railway, Quetta Baluchistan for provision of service record of accused at Exh.5/D, reply of law officer, Pakistan Railway along with record at Exh.5/D-1 to 5/D-5;
- (iii) PW-3 Ghulam Mohammad at Exh.6;
- (iv) Thereafter, learned counsel for the appellant filed an application under Section 539-B, Cr.P.C. at Exh.8 for inspection of place, which was allowed, vide order dated 15.02.2019 at Exh.8/A;
- (v) Statement of accused under Section 342, Cr.P.C. was recorded at Exh.9, in which he denied the allegations and professed his innocence; however, he neither examined himself on oath, nor produced any witness in his defence;
- (vi) Report of Nazir of trial court along with photographs at Exh.10;
- (vii) On an application of learned Special Public Prosecutor for ANF, under Section 540, Cr.P.C., at Exh.11, which was allowed, vide order dated 18.07.2019 at Exh.11/A, PW-4 Mr. Tahir Rehman, learned Judicial Magistrate was examined at Exh.12, who produced roznamcha entry at Ex.12/A, memo of sampling at Exh.12/B, memo of destruction at Exh.12/C and certificate of burning at Exh.12/D;
- (viii) PW-5 SI Attaullah Khan Jadoon at Exh.13, who produced attested photocopy of Register No.19 at Ex.13/A;

The above witnesses were cross-examined by counsel for the appellant. Thereafter, learned Special Prosecutor for the ANF closed the prosecution side, vide Statement at Exh.14.

4. It appears from the record that the statement of accused was recorded under Section 342, Cr.P.C. at Exh.15, in which the appellant though admitted that he was arrested outside the Cantt. Station, Karachi, however, he denied all the allegations and stated that he is innocent and nothing was recovered from his possession and claimed false implication by ANF. Nonetheless, the appellant did not give any evidence on oath nor produce any witness in support of his defence. Learned trial court, after hearing the parties' counsel and assessment of evidence, convicted and

sentenced the appellant as mentioned above, hence, this appeal has been preferred against the impugned judgment.

5. Learned counsel for appellant has argued that the appellant is innocent and has falsely been implicated in this case with malafide intention and ulterior motives; that no recovery has been effected from possession of the appellant and the alleged recovery has been foisted upon him; that there are serious discrepancies in respect of safe custody and transmission of allegedly recovered narcotics from malkhana to chemical examiner and further there is a delay of two days in sending the narcotics to the chemical examiner; that there is no previous criminal record of the appellant; that no private witness was associated by the police despite having spy information; that there are major contradictions and discrepancies in the evidence of prosecution witnesses, which cuts the root of the prosecution case; it is also argued that learned trial court while passing the impugned judgment has failed to take into consideration the evidence of PW-3 in its true perspective wherein the said PW admitted that Exh.5/C [letter to Chemical Examiner Govt. Of Sindh, Karachi dated 12.10.2015] having fake stamp of the chemical examiner, Govt. of Sindh Karachi; that the prosecution has failed to produce any single piece of evidence against the appellant; that the impugned judgment is perverse and contrary to facts and law, the same is not sustainable in law and is liable to be set-aside. Hence, per learned counsel, the appellant is entitled for his acquittal. In support of his arguments he has relied upon the cases of *Qaiser and another v. The State* [2022 SCMR 1641], *Mst. Sakina Ramzan v. The State* [2021 SCMR 451], *Qaiser Khan v. The State* [2021 SCMR 363], *Haji Nawaz v. The State* [2020 SCMR 687], *The State v. Imam Buksh & others* [2018 SCMR 2039], *Minhaj Khan v. The State* [2019 SCMR 326], *Tajammul Hussain Shah v. The State and another* [2022 SCMR 1567], *Abdul Ghafoor v. The State* [2022 SCMR 1527], *Kashif Ali alias Kaloo v. The State and another* [2022 SCMR 1515], *Mst. Rukhsana Begum and others v. Sajjad and others* [2017 SCMR 596], *Muhammad Ramzan v. The State and others* [2014 SCMR 749], *Muhammad Akram v. The State* [2009 SCMR 230], *Tariq Pervez v. The State* [1995 SCMR 1345], *Ahsan Marfani v. The State* [2022 YLR Note 5] and Unreported Judgment dated 16.11.2022 passed by this court in Criminal Appeal no.470/2021 [*Muhammad Yousuf and another v. The State*].

6. On the other hand, learned Special Prosecutor for the ANF while supporting the impugned judgment has argued that the prosecution has proved its case against the appellant; that the incident took place on 10.10.2015 and complainant SI Mohammad Hasan Khoharo along with other ANF staff arrested the accused at the spot and recovered black colored handbag from his possession, which contained 15 packets of chars [narcotics] weighing 15 Kgs and such memo of recovery and arrest was prepared at the spot; that during investigation, accused disclosed that he was employee of Pakistan Railway; that accused has not established any enmity on the part of prosecution; that all the prosecution witnesses have fully supported the prosecution version; that chemical report was produced in positive; that there is no discrepancy in safe custody and transmission of the recovered narcotics; that the trial court has properly appreciated the evidence and rightly convicted and sentenced the appellant in accordance with law. Hence, he has prayed that instant appeal may be dismissed and in support of his arguments, he has relied upon the case of *Faisal Shahzad v. The State* [2022 SCMR 905].

7. We have heard the arguments of learned counsel for the appellant and learned Special Prosecutor for ANF and perused the entire evidence available on the record. The evidence produced before the trial court finds an elaborate mention in the impugned judgment and as such the same is not being reproduced here to avoid unnecessary repetition.

8. Perusal of the record shows that the prosecution in order to substantiate the charge against the appellant/accused examined 05 PWs and all of them supported the stance of the prosecution. Whereas learned defence counsel failed to point out any material discrepancy in the evidence available on the record. The prosecution on its part had established the recovery of the narcotics from the appellant. The FIR was lodged promptly and after a thorough search of the handbag of the appellant and 15 Kg. chars [narcotics] was recovered in presence of the mashirs/witnesses. Entire quantity of the recovered narcotics sent for chemical examination and chemical examiner's report is in positive. It is also worth mentioning here that there is no suggestion [from the defense side] regarding any enmity of prosecution witnesses against the appellant for implicating him falsely and foisting such a huge quantity of contraband narcotics upon him.

9. Insofar as the contention of learned counsel for the appellant with regard to the admission of PW-3 that *Exh.5/C having false stamp of chemical examiner* is concerned, a perusal of Exh.5/C shows that it is a letter bearing No. D0107038/15/ANF.PS/RD/Sindh-817 dated 12.10.2015 addressed by the complainant-Muhammad Hassan Khoharo to the chemical examiner, Government Sindh, Karachi, whereby the parcel containing recovered chars[narcotics] from the appellant was sent to the chemical examiner for chemical analysis and report. The signature of the recipient clerk along with date and the stamp of chemical examiner's office, Government of Sindh, Karachi, is very much available on the said letter. Moreover, the reference of the said letter is also visible in the chemical examiner's report dated 19.10.2015 at Exh. 5/C-1. Besides this, since the letter Exh. 5/C was sent under the signature of the Complainant as such he produced the said letter in his examination-in-chief, however, interestingly, learned defence counsel did not put a single question in this regard. In the circumstances, keeping in view the deposition of HC Ghulam Muhammad, as whole the alleged admission viz: "*It is correct to suggest that Exh.5/C having fake stamp of the chemical examiner, Government of Sindh*" seems nothing but merely a typographical error as has also been rightly held by learned trial court.

10. Insofar as the contention of learned counsel for the appellant with regard to discrepancies in the safe custody and transmission of the alleged recovered narcotics from malkhana to chemical examiner is concerned, it is a settled position that the chain of custody of sample parcels begins from the recovery of the narcotics by the police including the separation of representative samples of the recovered narcotics, their dispatch to the Malkhana and further dispatch to the testing laboratory. The said chain of custody and transmission is pivotal as the entire construct of the Act 1997 and the Control of Narcotic Substances (Government Analysts) Rules, 2001 (Rules 2001), rests upon the report of the analyst. Reliance in this regard can be placed on the case of *Qaiser and another v. The state* [2022 SCMR 1641].

11. Keeping in view the above when we examined the evidence available on the record, it manifestly appears that the entire recovered narcotics from the appellant was weighed at the spot and the entire

quantity i.e. 15 Kg. was sealed by the complainant-SI Muhammad Hasan Khohar before the mashirs/witnesses under his signature and on the same date it was deposited with Malkhana, vide Entry at serial No. 171 under Register No.19. The signature of Malkhana Incharge namely Attahullah Khan Jadoon, who had received the recovered contraband in the Malkhana, is very much available at the bottom of the entry. The said Attahullha Khan Jadoon (PW-5) as Exh. 13 appeared before the trial court and produced the Malkhana entry as Exh. 13/A. Record also reflects that on 12.10.2015 HC Ghulam Mohammad (PW-3), took the parcel containing the recovered contraband from Malkhana and handed it over on the very same date to the Chemical Examiner, Government of Sindh, Karachi. The Chemical Examiner's report at Exh. 5/C-1 also confirms such fact that the parcel containing 15 Kg. chars [narcotics] received by it by the hand of HC- Ghulam Mohammad on 12.10.2015. Insofar as the contention of learned counsel with regard to the delay in sending the parcel to the chemical examiner is concerned, from perusal of the record it appears that the recovery was effected on 10.10.2015 while the recovered contraband was sent to the office of the chemical examiner on 12.10.2015 within forty-eight hours, which is within time prescribed under Rules 4 (2) of the Control of Narcotic Substances (Government Analysts) Rules, 2001. Even otherwise, mere delay in sending the sample to the laboratory is not at all fatal to the prosecution case specially when there is nothing on the record to establish that the parcel was ever tampered with rather the evidence led by the prosecution clearly established that when the parcel was received by the chemical examiner, it remained intact. In view of the above, it is clear that the prosecution has proved the chain of circumstances under which the recovered contraband was shifted from the spot to the Police Station, then kept in safe custody for onward transmission to the chemical examiner for chemical analysis. All the PWs have been subjected to lengthy cross-examination by the defence counsel but nothing beneficial to accused was extracted from them. In this view of the matter, the prosecution has successfully established that the case property has been safely kept in Malkhana and subsequently it was safely transmitted from Malkhana to Chemical Examiner and as per chemical report [Exh.5/C-1] the case property having gross weight of 15 Kgs and net weight 14.625 Kgs was declared as chars [narcotics].

12. Insofar the as the contention of learned counsel for the appellant with regard to the discrepancies and contradictions in the testimonies of the prosecution witnesses is concerned, a distinction is always to be made between minor inconsistencies or variance in the testimony of witness from the contradiction in the evidence. Only such statements shall be termed as contradictory, which are either destructive of each other or they are totally different to the extent that two versions cannot be reconciled. Such contradiction shall always lead to the benefit of defence, however, the variance of testimony of witnesses or inconsistencies on the point shall not lead to such conclusion, which are not material in nature and do not introduce or suggest a totally different version to the prosecution case. The minor discrepancies in instant case are not of such nature, which could bring the case within the exception *supra*. Reliance in this regard can be placed on the case reported as *Sarfaraz alias Sappi v. The State* [2000 SCMR 1758].

13. The close analysis of the whole prosecution evidence i.e. the recovery of huge quantity of narcotics from the appellant (an employee of Pakistan Railway) outside the Cantt. Railway Station, Karachi, the happening of the occurrence in broad daylight, and sending the entire quantity to the chemical examiner, report of the chemical examiner and the statements of the prosecution witnesses when evaluated conjointly, leaves no room to come to a different conclusion than what has been arrived at by the learned trial court. The case law relied upon by learned counsel for the appellant has been gone through and found distinguishable from the facts of the present case as such the same are not applicable to the present case.

14. The upshot of the above discussion is that the prosecution has proved its case beyond a reasonable doubt against the appellant and as such his convictions and sentences in the impugned judgment are upheld and his appeal is dismissed.

Judge

Judge