

IN THE HIGH COURT OF SINDH CIRCUIT COURT, HYDERABAD.

Cr. Appeal No.D-10 of 2020

Present
MUHAMMAD IQBAL KALHORO-J
KHADIM HUSSAIN SOOMRO-J

Appellant : Zahid Ali Mirjat through M/s.Noor-ul-Haque
Qureshi and Saad Salman, advocates.

Respondent : The State through Mr. Agha Abdul Nabi Special
Prosecutor ANF.

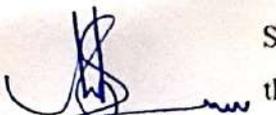
Date of hearing: 15.04.2023

Date of Announcement: 11.05.2023.

JUDGMENT

KHADIM HUSSAIN SOOMRO,J- This appeal has been preferred against judgment dated 28-01-2020 passed by the learned Special Judge, CNS / MCTC, Tando Muhammad Khan in Special Case No. 53 of 2019, whereby the appellant has been convicted under Section 245 (2) for the offence under Section 9(c) of C.N.S. Act 1997 and sentenced to suffer imprisonment for life, besides the fine of Rs.100,000/-. In case of default in the payment of fine, he is further sentenced to simple imprisonment for one year. The appellant is further sentenced to suffer rigorous imprisonment for six years for possessing 3600 grams of opium, with a fine of Rs. 10,000/-. In case of default thereof, he is subject to simple imprisonment for five months and 15 days.

2 As per facts of the prosecution case, FIR was lodged by Sub-Inspector Zahoor Shah at P.S. ANF, Hyderabad on 2nd October, 2019. It is stated therein that he received spy information from an informant through his high-ups that the notorious drug dealers Arbab son of Khamon and Saadat son of Qadir Bux R/o Tando Muhammad Khan were selling drugs through their agent, namely Zahid Ali, at their dwelling situated at Mir


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Muhalla Tando Muhammad. Upon receiving such an information, a special team was constituted, comprising of complainant, ASI Somia, HC Muhammad Umer, HC Iqbal Hussain, PC Akhter Rasool, PC Mohsin, PC Asif, PC Azmat, sepoy Afaz, and driver P.C. Sajid Akber DMT Owais. They left the police station via Roznamcha entry No. 09 at 1500 hours and reached the place of incident where the complainant entered the house with his crew, where a person available was captured. They tried to find a private mashir but none agreed due to dread of drug dealers, therefore, PC Mohsin and PC Azmat were appointed as mashirs and one black-coloured shopping bag carrying 1500 grams of chars was secured. The person who was held admitted that there were other drugs lying in the room. The raiding crew afterwards were led by him to seize a total of 10 kg and further 3 packets of opium, each weighing 1200 grams, total 3600 and cash amount Rs.115,000 in the shape of Pakistani currency were secured from the bag of grey colour. From the personal search, Rs. 2000 and CNIC were also recovered from the pocket of the shirt of the accused. On inquiry, he disclosed his name as Zahid and further disclosed that he is an agent of co-accused Arbab and absconding accused Saadat Ali. 10/10 grams sample was taken from each slab for chemical examination and sealed in 10 Khaki envelopes separately. The remaining property was sealed along with the shopper in a white cloth bag for chemical examination. A further search of the house was conducted, but no woman was found to be present in the house. Such mashirnama was prepared at the spot, the accused was formally arrested and the case property was brought to the P.S, where the FIR was lodged on behalf of the state under Crime No. 14 of 2019 under Section 9(c) of the CNS, Act, 1997, at Police Station ANF, Hyderabad

3. After usual investigation, Challan was submitted to the trial court along with a positive report from the chemical examiner. The trial court framed the charge against the appellant; he did not plead guilty and claimed to be tried. Co-accused Arbab joined the trial and he was granted bail by the learned trial court, whereas co-accused Saadat was declared as proclaimed offender after due process.

4. The prosecution, in order to establish its case, P.W.-1 Inspector Zahoor Shah as Exh.09, he produced departure entry as Exh.09/A the

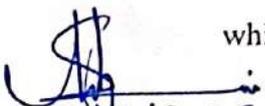

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memo of arrest and recovery as Exh.09/B, Arrival entry No 11 as Exh.09/C, FIR as Exh.9/D, Letter addressed to the Chemical Examiner as Exh.09/E , The report of Chemical Examiner as Exh.9/F. PW- 2 PC Mohsin, as Exh.11, Pw- 3 Sub Inspector Muhammad Salman at Exh.12 he is also in charge Malkhana, he produced property register serial No 193 at Exh.12/A, PW- 4 PC Asif Hisbani at Exh.13 he took the property to the chemical examiner and produced entry No 06 showing the departure of witnesses to the office chemical examiner at Karachi at Exh.13/A and arrival & return entry bearing No 14 at Exh.13/B, thereafter learned special prosecutor ANF closed the prosecution side of evidence vide statement at Exh.14.

5. Statements of accused were recorded under Section 342 Cr.P.C. The accused denied the prosecution's allegations and pleaded innocence. They did not examine themselves on oath under section 340 (2), Cr.P.C and further stated that Mir Muhammad Ali has got evil eye over the house, therefore they have been implicated in the present case. The appellant has examined his son, namely Muzahir Ali in his defence at Ex.17.

6. At the end of the trial, after hearing arguments from the counsels for both sides, the learned trial court acquitted co-accused Arbab and found the appellant guilty of the offence he was charged with, hence convicted and sentenced him through the impugned judgment in the terms as above.

7. Learned counsel for the appellant, while advancing his arguments, contended that the location of the purported recovery is a densely populated region, I.O. made no attempts to contact independent locals to make them mashirs and no private individual from the area was examined as an independent witness to corroborate the version of the prosecution case. It is also argued that the trial court did not take into account inconsistencies and contradictions in the witness's testimony. As per learned defence counsel, the statements under Section 161 Cr.P.C of all the police officials, who accompanied the complainant during the raid, were not recorded except few ones. The learned counsel for the appellant pointed out that the handwriting of Mashirnama is identical to that of the FIR, which demonstrates that the whole investigation took place inside the


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police station rather than at the scene of the crime. It is further claimed that the Mashirnama does not show the time of its preparation. He next contended that if the informer was present during the police raid, he should be considered as a witness in the case rather than a spy / informer. There was neither description of the cars on which the whole ANF raiding crew were boarded, nor that of the house from which the recovery was effected. Additionally, it is not stated how the raid conducting party was seated in the vehicles. As per the learned defence counsel, there is a major contradiction, such as the Mashir, namely Moshin Ali has said that the place of the incident was Mir Muhalla whereas the complainant claimed that the home of recovery was located at Pir Muhalla, which casts doubt on the prosecution's version about the incident. Lastly, the learned counsel for the appellant argued that the report of the chemical examiner came after a lapse of two and a half months. According to the Mashirnama, 10 grams of Chars were separated and sealed for chemical analysis, however, the chemical examiner's report indicates that there were 20 grams of Chars in each sample received by him for examination. While concluding his arguments, he finally submitted that the bag from which contraband Chars was recovered, was not produced before the trial court and prayed for acquittal.. He relied upon the following case laws to support his arguments, Criminal Petition No 959 of 2017 [DavidYousaf and others versus The State], Jail Petition No 42 of 2017 [Zafar khan & Others versus The State], ZAHIR SHAH alias SHAT v. THE STATE [2019 SCMR2004], THE STATE v. ABDUL WAHAB and others [2019 MLD 2048], THE STATE v. IMAM BUX and others [2018 SCMR 2039], AMEER ZEB v. THE STATE [PLD 2012 SC 380].

8. In contrast, the learned counsel for ANF refuted the arguments advanced by the appellant's counsel, arguing that the prosecution has proved its case beyond a reasonable doubt as there are no major contradictions in the prosecution case; however, if there is any contradiction on the part of the prosecution, it is based on immaterial facts, therefore, it carries no weight in the eyes of the law. Lastly, he argued that the prosecution has successfully proved its case beyond any reasonable doubt and prayed for dismissal of this appeal.


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9. We have given careful consideration to the arguments advanced by learned counsel for appellants as well as counsel for the ANF and perused the material available on record as well as the case laws cited at bar.

10. The record reflects that in support of the case, prosecution has examined complainant PW-1 Inspector Zahoor Shah as Exh.09. He has deposed that on 02.10.2019 he received spy information from his high-ups that Arbab son of Khamo and Saadat Ali son of Qadir Bux were selling charas through their agent. After receiving such information he along with his team conducted raid at the house of accused and recovered 1500 grams of charas wrapped in black colour shopper and on the pointation of accused, he recovered a grey colour beg containing 10 packets of charas wrapped with solution tape and weight of each packet was 1kg. Apart from above property, the complainant party also secured 3600 grams of opium and recovered currency of Rs.115,000/-, which was lying in the same bag. Each packet was weighing 1200 grams, from which samples were taken separately for sending the same to the chemical examiner. Thereafter the chemical report was collected by the I.O. which is positive and has been produced at Ex.9/F.

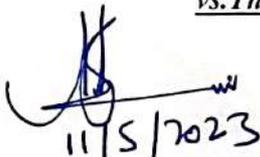
11. A lengthy cross-examination of I.O. was carried out by learned defense counsel who mainly contented that there is no private mashir or witness in the case and 161 statement of few witnesses are recorded. No descriptions of the house from where the recovery is effected is given and the property was foisted upon the accused. We are not convinced with these submissions as in lengthy cross-examination no material contradiction on salient features of the case in favour of defense have come on record. The huge quantity of narcotics is recovered from inside of the house of accused along with Pakistani currency in presence of witnesses and mashirs. The report of chemical examiner about contraband narcotic material is positive. The accused in his statement recorded under section 342, Cr.P.C. has alleged false implication at the instance of Mir Muhammad Ali but no documentary evidence in this regard has been brought on record by him to show any ill-will on the part of complainant and witnesses. We also do not find any reason or malice influencing ANF to implicate appellant falsely or with any mala fide. We have been guided


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by the following case law on this point. Naveed Akhtar Versus The State reported in 2022 SCMR 1784

"Perusal of the record would reveal that recovery of narcotics, noted above, was made by one Muhammad Nazir S.I. (PW.5) which was received by Jameel Hussain Shah constable (PW.1) for safe custody. The 35 sealed parcels of narcotics were handed over to one Muhammad Ashraf HC (PW.2) by said Jameel Hussain Shah constable for its onward transmission for chemical analysis. The Narcotics Analysis Report is present on file as Exh-LPF which confirms that the recovery, effected from the appellant, on his disclosure, was charas. The appellant in his statement recorded under section 342, Cr.P.C. alleged false implication and mala fide but record of the case would show that he could not explain and establish the same. We also do not find any reason or malice for which appellant was implicated falsely or with any mala fide. While replying to Question No.6 he submitted that he would appear as his own witness under section 340(2), Cr.P.C. The record shows that besides three defence witnesses the appellant did not appear as his own witness to face the test of cross-examination. The defence version is nothing more than an effort in futile as the defence witnesses failed to shatter the evidence brought on record by the prosecution".

12. PW-2 PC Moshin Ali has been examined by the prosecution in support of its case. He is the mashir of recovery, in presence of whom the contraband drugs were recovered and sealed. He signed the memo of arrest and recoveries along with co mashir. He has fully supported the prosecution case on material facts. Learned defence counsel conducted a detailed cross examination mostly on the point of non-association of a private individual to act as mashir and the distance between PS and the place of incident so also the seating arrangement of the raiding crew in their vehicles. But he stood the ground and did not contradict on any material facts. There are some discrepancies but they are minor in nature and do not lead to the acquittal of the appellant. It is established principle of law that section 103, Cr.P.C. has been dispensed with in narcotics cases in terms of Section 25, C.N.S. Act, 1997. It is recognized fact that people have got tremendous fear and they do not come forward to give evidence against narcotic dealers. In such situation, we do not feel convinced from the argument of learned counsel that due to non-association of private persons to witness the recovery proceedings, the case has become doubtful. In this context, reference can be placed on a case of Zafar Iqbal vs. The State (2022 SCMR 1375), wherein it has been held as under:-


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"This court in a number of the judgments has held that testimony of official witnesses is as good as any other private witness unless it is

proved that they have animus against the accused. However no such thing could be brought on record by the appellant in the case. This court has time and again held that reluctance of general public to become witness in such like cases has become judicially recognized facts and there is no way out to consider statement of official witness, as no legal bar or restrictions has been imposed on with regard. Police/official witness are as good witness and could be relied upon, if their testimonies remain un-shattered during cross-examination. In this view of the matter, the statements of the official witnesses are sufficient enough to sustain conviction of the appellant."

13. On the same point of law, as mentioned above, the Supreme Court of Pakistan, in the case of Zulfiqar Ahmed vs. The State (2006 SCMR 800) has decided as follow:

"Learned counsel for the petitioner has contended that no independent witness of recovery has been cited and that only one gram of heroin has been sent to the Forensic Science Laboratory for analysis which makes the case of the petitioner doubtful and also entitled him to the reduction of sentence. None of his contention is having force. Section 103, Cr.P.C has been specifically excluded under the provisions of Control o Narcotic Substances Act, 1997 and the non-citing of any witness from the public is not fatal to the prosecution case. It is not the case of prosecution that the heroin was contained in separate packet rather it was alleged to have been contained in a shopping bag and only one sample of one gram heroin is sufficient for chemical analysis."

14. In another case law of Zafar vs. The State (2008 SCMR 1254), it has been held as under:-

"Police employees as competent witnesses like any other independent witness and their testimony cannot be discarded merely on the ground that they are police employees."

15. PW-3 Sub Inspector Muhammad Salman incharge of 'Malkhana' was examined. He has deposed that on 02-10-2019, the complainant handed over to him 16 sealed parcels and a cash amounting to Rs.115,000/- and cash of Rs 2000/- together with original CNIC of the accused. After receiving the same, he kept them in 'Malkhan's' in safe custody. PW-4 PC Asif Hisbani has deposed that on 03-10-2019, he was handed over a white-coloured sealed packet weighing 1500 grams and 10 other samples sealed in 'Khaki' [camel colour] envelopes weighing 20 grams each, three samples of opium sealed in 'Khaki' envelopes weighing 10 grams each, for chemical examiner Karachi. Entry No.06 shows his departure towards the office of the chemical examiner at Karachi at Exh.13/A and his arrival entry No. 14 at Exh.13/B. Learned defence counsel put so many questions


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from these witnesses in order to break the chain of safe custody of contraband from Malkhana to office of chemical analyzer, however, nothing worthwhile in defence was discovered by him.

16. The safe custody and transport of the drug samples from the location of its recovery to the Narcotics Testing Laboratory have been satisfactorily established. The chain of custody begins with the ANF's recovery of the seized substance and includes separation of representative sample(s) and their shipment to the Narcotics Testing Laboratory. This chain of custody is vital to prove safe separation of sampling and its safe and secure transportation to the laboratory. The prosecution has fully established that the chain of custody was uninterrupted, unimpeachable, undeniable, and secured. No break in the chain of custody or lapse in control of possession of the sample has been brought on record. We have been guided on this point by the case law reported in Zafar Iqbal vs. The State (2022 SCMR 905), wherein it has been observed as under:-

"The close analysis of the whole prosecution evidence i.e the recovery of the huge quantity of narcotics, the happening of the occurrence in broad light day separating the samples from each packet in prescribed manner and sending them to the Chemical Examiner, report of the Chemical Examiner and the statement of the prosecution witnesses when evaluated conjointly leaves , no room to a different conclusion than what has been arrived at the learned courts below"

17. Now we are reverting to another submission made by the learned counsel for the appellant with regard to the weight and texture of the contraband. The defense counsel submitted that the memo of recovery shows that 10 grams of sample from each slab were separated, whereas the lab reports show that from every packet, 20 grams of sample were separated. We have reviewed the forensic report, which contains a detailed description of the chemical examiner's analysis, including each test conducted to corroborate the narcotic nature of the samples. These discrepancies in weight in the recovery memo and the Chemical Examiner report have been clarified by P.W-4. We cast a glance at examination-in-chief of P.W- 4 Asif he has said that there were two slabs in each parcel weighing 1 kg and from every slab 10 grams of charas was separated which means from each packet 20 grams of charas as sample were separated


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which is in line with prosecution case, therefore, this point of difference does not carry weight. In this context, reference can be placed on the case of Muhammad Rasool vs. The State (2022 SCMR 1145), wherein it has been observed as follows:

"It is off late noted, particularly, more often than not, in cases of narcotics that an application, rather late in the day, is moved for de-sealing of parcel to fish out a discrepancy, notwithstanding, a plea of loud denial and false implication from the day one . it is rather intriguing to comprehend as to show as accused pleading innocence, all of sudden in the mist of the trial, prophetically learns about a change, having occurred in weight or texture of the contraband kept in safe custody, it does not require a genius of smell the rate . In this first place there is no occasion for the trail judge, in absence of any plausible reasons, to obligingly accede to such a request for exercise , manifestly calculated to subvert the prosecution case through methods sinister and stained. it is otherwise not possible without connivance of" MoharrirMalkhana and the Naib Court to lay the ground for such a venture, therefore , it is imperative for the prosecution to keep a watchful and vigilant eye upon its unscrupulous functionaries so as to ensure that stream of justice runs pure and clean . Any attempt or act to destroy or contaminate evidence lawfully collected is a cognizable offence in itself, commission whereof, must be visited with zero tolerance".

18. The learned counsel while concluding his arguments submitted that entire proceeding of investigation was carried out at the police station and nothing was recovered from the accused. Mashirnama of recovery shows that a huge quantity of charas and opium were recovered from the house of the appellant and such mashirnama was prepared at the place of incident in presence of mashirs and he was arrested at the spot. Thereafter, recovered property and accused were brought at Police Station where FIR was lodged. Therefore, in our view, such contention of learned counsel about false implication of appellant does not have any substance. In this regard, reference can be made to the case of Raja EhtishamKiyani vs. The State (2022 SCMR 1248), wherein it has been laid down by apex court which is as under:-

"We are not intrigued by the Investigation Officers conduct on his having swiftly concluded various investigative steps / requirement, himself to bring the prosecution to its logical end, attestation of inventories by the other members of the contingent confirmed their presence in the episode, otherwise an official business protected statutory presumption of being in order/genuine „on the contrary efficient promptitude deserves acclaim. "

19. We have examined the evidence of all the PWS recorded by the trail court and also profoundly scrutinized all the documents exhibited by the prosecution. We are satisfied with probate value of evidence.


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Consequently, we conclude that the incriminating portion of the evidence is consistent, coherent, trustworthy, and natural, i.e., devoid of any exaggeration. We are guided by the case law viz. Sarfaraz alias Sappi v. The State (2000 SCMR 1758), wherein the Honourable Supreme Court has observed as follows:-

"In the cross-examination of both the PWs i.e. Ahmed Khan and Sakhawat Hussain their above version was not shaken at all inasmuch as concerning the incriminating portion of their testimonies there was no sufficient impeachment. Resultantly, we have to form a positive opinion that incriminating portion of the evidence is consistent, coherent, trust worthy as well as natural i.e. free from any exaggeration. However, we may mention here that if in cross-examination intrinsic value of incriminating evidence of a witness has not been shaken his statement cannot be discarded for minor contradictions etc. Reference may be made to the case of Mushtaq alias Shaman v. The State PLD 1995 SC 46"

20. The statements of appellants / accused were recorded under section 342 Cr.P.C to establish their innocence. The appellant though gave the name of two DWs each namely Ali Bux who is his real brother and Assadullah Rind but those defense witnesses were not examined by the appellant despite an opportunity provided to him, according to his Statement, he was allegedly implicated due to a dispute with Mir Muhammad Ali over a property, but neither he produced a copy of civil nor a criminal proceedings between him and Mir Muhammad. Moreover, in the cross examination of all the prosecution witnesses, no single suggestion were put forward that the accused was implicated at the Instance of Mir Muhammad Ali.

21. As for as plea raised by the accused that the narcotic material is foisted upon him. There is no record of malice, mala fide, or animosity on the part of prosecution witnesses for foisting such huge quantity of Chars and opium on the accused falsely. In this respect, reference can be made to the case of Riaz Ahmad alias Raju vs. The State(2004 SCMR 988), wherein it has been held as under:-

"We have considered the contentions and have gone through the documents appended with this petition. The argument of the learned counsel that the testimony of police officials does not inspire confidence is totally devoid of any force. Nothing has been brought on record that any of the witnesses was having any


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malice against the petitioner. The police officials are as good witnesses as private persons of the society. The testimony of the prosecution cannot be thrown over board simply on the ground that it has come from the police officials"

22. All prosecution witnesses have passed the test of extensive cross-examination by the defense. The trial court has correctly disbelieved defense's explanation. We have thoroughly reviewed the defense's assertions and determined that they are not supported by credible documentary evidence. The prosecution has been able to establish its case against the accused beyond any reasonable doubt.

23. The case law cited by the appellant's counsel in the peculiar circumstances of this case is inapplicable and distinguishable from the facts and circumstances of the present case.

24. The prosecution has established its case beyond any reasonable doubt. Accordingly, the instant appeal of the appellant is dismissed and the judgment of the trial court is maintained. Nonetheless, the appellant is entitled to the benefits specified in section 382-B of the Criminal Procedure Code.

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