

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD.

Criminal Appeal No.D-35 of 2022
Criminal Appeal No.D-36 of 2022

Present:-

Mr. Justice Muhammad Iqbal Kalhoro.
Mr. Justice Khadim Hussain Soomro.

Date of hearing: 01.06.2023

Date of decision: 01.06.2023

Appellants: 1. Mohan Lal s/o Peeiro Mal
2. Nand Lal s/o Chando Mal
Through Raja Jawad Ali Saahar, advocate.

The State: Through Agha Abdul Nabi, Special Prosecutor,
Anti-Narcotics Force (ANF).

JUDGMENT

MUHAMMAD IQBAL KALHORO, J:-Sub-Inspector ANF Hyderabad, on a tip off about presence of heroin powder, flagged down a Trailer near Toll Plaza Jamshoro on Super Highway traveling from Kotri side towards Karachi on 11.06.2014 at about 16:30 hours. Two drivers available in the Trailer were captured, who, upon inquiry, introduced themselves as Muhammad Shafique and Muhammad Mohsin. From search of Trailer 135 cotton bales booked by 'OK Qalandari Cotton Factory' (the Factory), Kotri Industrial Area, were discovered which the drivers disclosed were bound for Kiamari Karachi. Upon opening, plastic packets containing heroin powder weighing 01 KG each from 58 cotton bales were recovered. In addition, 10 packets, weighing 01 KG each, containing capsules of heroin from 10 cotton bales were recovered. The total weight of heroin powder recovered thus was 68 KGs. The entire recovered property was sealed for chemical examination and a report. The relevant documents from the Trailer, identifying its registration etc. were collected. From

personal search of the drivers, however, no incriminating articles, except personal belongings and some cash, were recovered.

2. Necessary memo of arrest and recovery, duly attested by Mashirs, chosen from ANF party, was prepared on the spot. Ultimately, arrested accused and recovered heroin, including the Trailer, were bought at Police Station ANF Hyderabad, where FIR was registered, and entire heroin deposited in Malkhana of the said PS. In investigation, the Investigating Officer came to know that one Anwar Ali of Malik Brothers Shahdadpur, the Manager of Adda, was approached by absconder accused Waqar for transportation of the cotton bales from the Factory to Karachi. Anwar Ali then had contacted the driver, Muhammad Shafique, over phone, to collect bill/receipt of loading from Hala Naka By-Pass, Hyderabad from the shop of one Qurban, a commission agent, and 135 cotton bales from the Factory for delivering the same in Lakargordi, Kemari, Karachi. The driver was further told that said Qurban would call him and make coordination with him in this regard. Finally, after gaining necessary information and bill/loading receipt, the drivers reached the Factory where accused Waqar Ahmed was present, who supervised loading of cotton bales and further told them that he would receive the same in Karachi.

3. Such disclosure led to further investigation and the IO came to know that both the appellants namely Mohan Lal and Nand Lal were owners of the Factory. He issued them notices for joining investigation but without any response from them. Hence, he submitted the Challan in the Court. On 04.07.2014, acting on spy information, the IO raided the Factory premises where he found the appellants present but seeing the IO they made their escape good. The IO, nonetheless, broke open locks of the Factory, found sealed, and succeeded in collecting NTN Certificate of the Factory issued by FBR and some other documents identifying the appellants as partners in the ownership of the Factory. He then prepared such memo and kept it on record. The IO also came to know in investigation that the stock in the Factory was pledged with the National Bank of Pakistan (NBP) and two guards namely Shamsuddin and Bilawal Hussain were deputed by the Bank to watch over the pledged stock. He verified this fact by examining the Bank Manager of NBP. He also examined both the guards who confirmed loading of cotton bales in the

said Trailer under the supervision of the appellants and others on the night between 10.06.2014 and 11.06.2014.

4. Meanwhile, the appellants apprehending their arrest, applied for pre-arrest bail, and were granted ad-interim pre-arrest bail initially. But subsequently, it was recalled, and they were taken into custody and remanded to jail. After due formalities, charge was framed against four accused, the appellants, and drivers of the Trailer namely Muhammad Shafique and Mohsin, who were arrested along with the Trailer, from which a total of 68 KGs of heroin was recovered. They pled not guilty and claimed trial. The prosecution was, as a result, invited to lead evidence. The first witness examined by the prosecution is Anwar Ali, who was the Manager in New Malik Goods Transport, Hala Road, Shahdadpur. He has deposed that at the instance of one Waqar, who had called him on phone, and after settling the fare with him, he made arrangements for transport of 135 cotton bales from Kotrito Karachi. He contacted Muhammad Shafique, the driver of the Trailer, in this connection and conveyed him the relevant information and asked him to collect builty/loading receipt from one Qurban available at Hala Naka Bypass.

5. The next witness examined by the prosecution is Muhammad Qurban, the proprietor of Qurban Autos, and the commission agent. His evidence is to the effect of issuance of builty / loading receipt at the behest of Anwar Ali, PW-1, and mounting coordination with the drivers of Trailer for collecting builty/loading receipt from him and cotton bales from the Factory. The third witness examined by the prosecution is Shamsuddin, a Security Guard deputed at the Factory. He has narrated presence of the appellants on the day of incident in the Factory and loading of cotton bales in the Trailer by them and others. Then, the prosecution has examined SIP Syed Suleman, who is the IO/complainant of the case. He has narrated the entire story of the case, as reproduced above, and investigation, in his evidence. Mashir of the case, namely SI Ali Muhammad, has been examined as PW.5. He has supported the story revealed by IO in his evidence. The last witness examined by the prosecution is ASI Sher Muhammad, who had taken the entire case property/heroin to the office of Chemical Examiner on 12.06.2014 for examination and a report.

6. These witnesses have produced all the relevant documents: FIR, memo of arrest and recovery, report of chemical analyzer, bulity / loading receipt, etc. to support the case. After that, entire incriminating evidence was confronted to all the accused, including the appellants, u/s 342 CrPC for their explanation. They denied the same and pled innocence. Then, vide judgment dated 07.05.2019, learned trial Court convicted and sentenced the appellants to suffer imprisonment for life u/s 9(c) of Control of Narcotics Substance, Act, 1997, and acquitted co-accused Muhammad Shafique and Muhammad Mohsin, the drivers. The appellants were also directed to pay fine of Rs.500,000/-, and in case of default, to further undergo SI for three months. The said judgment was impugned by the appellants before this Court in Criminal Appeals No.D-85 and 91 of 2019 which were heard and decided in the terms whereby conviction and sentence of the appellants were set-aside and the case was remanded back to the learned trial Court to record statement of the appellants u/s 342 CrPC afresh and decide the case.

7. The trial Court duly complied and vide impugned judgment dated 19.03.2022, has again returned the appellants guilty verdict to suffer RI for life for committing an offence u/s 9(C) of the CNS Act, 1997, and to pay fine of Rs.300,000/-, in default, to further undergo SI for one year and six months, which they have challenged by means of appeals in hand.

8. We have heard learned counsel for the appellants and learned Special Prosecutor ANF. The former has urged innocence of the appellants quoting lack of evidence connecting them with commission of offence. The latter, however, has supported the impugned judgment.

9. We have considered contentions of the parties and perused material available on record. As far as ownership of the Factory by the appellants is concerned, it is not disputed. Therefore, there is no need to dilate upon documents to that effect produced by the IO in his evidence as it is not going to boost up prosecution case against the appellants any further. The entire case, insofar as the role of the appellants is concerned, has been disclosed by PW Shamasuddin Ex.12 in his evidence. He has stated that he was posted as a Security Guard over the Factory, where on 09.06.2014, appellants along with absconding accused Waqar and Dileep, arrived in a car. They took out some plastic bags/shoppers from

trunk of the car and went inside the Factory. Dileep, then, brought 10/12 laborers from outside and set the Factory on motion which worked for the entire night under supervision of the appellants. Next day i.e. 10.06.2014, a Trailer was brought inside the Factory by Waqarin which for a whole night the cotton bales were loaded. And, meanwhile, the drivers were made to sleep in some room. On the next day, i.e. 11.06.2014, at about 10.00 / 11.00 am, the Trailer driven by the drivers crossed (left) the Factory. This is the entire evidence, on the basis of which, mainly, the appellants have been convicted and sentenced in the terms as stated above.

10. We have minutely examined his evidence. The fact that he was a Security Guard and deputed at the Factory has not been satisfactorily established through any reliable evidence, and which fact, when asked from the learned special prosecutor, could not be even disputed by him. This witness has not produced any card either from the agency he was hired from or from the bank on whose behalf he was deputed to establish his identity as a security guard. The IO, in his evidence has stated that his designation was disclosed by the bank manager and who also confirmed his deputation in the Factory at the instance of the bank to watch over pledged-stock. The bank manager is neither mentioned as a witness in the case nor examined as such in the trial. In cross-examination, the IO has admitted that he did not examine the bank manager u/s 161 CrPC, nor made him a witness in the case. In our humble view in absence of relevant evidence like the one discussed above, both the interconnected claims by the prosecution that this person was a security guard and was therefore present in the Factory on the day of incident, are questionable.

11. From evidence of the IO, it emerges that over the Factory two security guards were deputed by the bank, PW Shamasuddin and one Bilawal Hussain. But the evidence of PW Shamasuddin shows a surprising fact that for three consecutive days, from 09 to 11.06.2014, when this whole episode was allegedly being played out: the appellants came in the factory in a car, took out some shoppers from the car, the Trailer was brought in the Factory, cotton bales were loaded in it for the whole night, etc. only he was present. There is no explanation why his shift was not changed and why the other guard did not join his duty for entire three days. The IO has revealed that pursuant to spy information

about presence of the appellants, he had raided the Factory on 04.07.2014, surprisingly found sealed, which is after submission of the interim Challan on 25.06.2014. But in his evidence he does not appear to suggest this witness's presence over there or for that matter presence of other security guard in the Factory or any explanation how and by whom the Factory was sealed, which is an additional circumstance putting a doubt over identity of PW Shamasuddin as a security guard and his deputation at the Factory.

12. The evidence of the IO further shows that the entire stock available in the Factory was pledged with the bank, and PW Shamasuddin was deputed there on its behalf as a guard to watch over that stock. But surprisingly when the appellants were getting cotton bales, pledged stock, loaded in the Trailer for an apparent removal, without permission of the bank, he did not raise any alarm. He did not make an effort to stop the appellants and others from doing so either. Nor did he inform the bank about the incident immediately or even after registration of FIR and filing of interim Challan on 25.06.2014 till miraculously he was discovered by the IO – his 161 CrPC statement was recorded on 08.07.2014-- and made a witness. We have also noted that there is no material to show that the bank, aggrieved by removal of pledged stock, ever decided to come forward and approach a proper forum for redress against the appellants. Or it took any action against PW Shamasuddin for his delinquency resulting in removal of the pledged stock and loss to the bank. It was duty of the IO to investigate this aspect of the case and bring on record such material to support this part of the story: availability of pledged stock, presence of security guards, unauthorized removal/loading thereof in their presence, bank's grievance, and bank's action against such loss, etc. But ostensibly these very important facts, necessary for proving charge against the appellants beyond a reasonable doubt, seem to have completely skipped his mind at the time of investigation. Resultantly, whatever material is before us is sketchy and inconclusive: a complete missing of various links of the chain, which could have linked appellants with commission of alleged offence or at least provided some stock for appreciation in this regard.

13. But, apart from that, although PW Shamsdin has confirmed presence of the appellants at the time when these cotton bales were being loaded in the Trailer on a night between 10.06.2014 to 11.06.2014

but he has not uttered a word that in those cotton bales heroin was being stuffed by the appellants. In his statement u/s 164 CrPC, recorded on 10.07.2014, much after submission of the interim Challan, he has stated that the appellants, along with Waqar, had come to the Factory on 11.06.2014, at about 9:00 or 10:00 a.m. which is the next day of loading of cotton bales in the Trailer, and which means that they were not present when the loading was taking place overnight. On the contrary, in the evidence, he has stated that appellants had arrived in the Factory on 10.06.2014, stayed overnight and got the Trailer loaded up with cotton bales from which heroin was recovered. Both are two different statements and spell a suspicion over actual arrival of the appellants in the Factory or their presence and alleged role at all. But in any case not a single word in both the statements about bringing heroin in the Factory or stuffing it in the cotton bales by the appellants has been uttered by this witness.

14. Evidence of complainant and FIR show that the Trailer, coming from Kotri and heading towards Karachi, was stopped at about 16:30 hours near Jamshoro Toll Plaza, which is hardly at a distance of 8 to 10 kilometers from Industrial Zone, Kotri, where the Factory is allegedly situated. Evidence of PW Shamasuddin shows that the Trailer had left the Factory (crossed the Factory) at about 10.00/11.00 am; its arrival at Jamshoro Toll Plaza after more than 5 ½ hours, if time is counted from 11 am, or 6½ hours, if time is counted from 10 am, is completely inexplicable and raises a suspicion. Because, ostensibly, there is no explanation of time-lapse of 5 ½ hours, or 6½ hours in covering a distance by a Trailer coverable by it at the most in 20 to 30 minutes and, when asked, none was offered by Special Prosecutor ANF either. A possibility of happening something between the Trailer's leaving the Factory and reaching the Toll Plaza, and the drivers' role in it, in these circumstances cannot be completely ruled out.

15. Apart from above, it has come on record that the cotton bales for transpiration were booked by co-accused Waqar, who is still absconder, and not by the appellants. He was found in contact with the relevant agencies responsible for booking the cotton bales and its transportation. The appellants do not picture anywhere in this entire episode, and most importantly, what is their connection with accused Waqar has not been found out in investigation. And not even the drivers of the Trailer, the co-accused, whose disclosure of events led the IO to make further

investigation, and which is part of IO's evidence, appear to support presence of the appellants overnight in the Factory at the time of loading of the cotton bales, or ever having seen them. It is also very fuzzy and unexplainable that when the drivers, on arrest on 11.06.2014, had disclosed entire episode of loading of cotton bales in a Factory at Kotri, why the IO did not consider it fit and necessary to make a search of the Factory and necessary details about its ownership to reach the appellants, till 04.07.2014, after about 24 days, when he on a tip off about presence of appellants, raided the Factory and collected some documents identifying them. It is also admitted position that Muhammad Shafique and Mohsin, found driving the Trailer from which heroin was recovered, have been acquitted by the trial Court, and their acquittal has not been challenged by the prosecution.

16. A sum up of above discussion would indicate that the case against the appellants is not free from a doubt. There is no direct evidence against them except that they are owners of the Factory where allegedly cotton bales found stuffed with heroin were loaded in the Trailer in their presence. But this insinuation has been voiced by a witness who has not been found trustworthy and reliable. The cotton bales were, in fact, the property of the bank and not of the appellants, as confirmed by the IO in investigation, and over which the bank had allegedly deputed its guards. The conduct of the bank not taking the issue of removal of pledged stock from the Factory to any court against the appellants and of the security guards, not sounding alarm for entire period until they were examined by the IO u/s 161 CrPC on 08.07.2014 after submission of the interim Challan introduces doubts about the prosecution's case over this point. PW Shamsuddin, who claims to be a Security Guard, has not succeeded in establishing his identity as a security guard through any evidence, let alone reliable one, and thus his presence at the crucial time in the Factory is not free from a doubt. The bank manager, who allegedly confirmed his identity, is neither a witness nor examined by prosecution in the trial as such in support of such fact. Besides, there is unexplained delay of 5 ½ or 6 ½ hours by the Trailer in reaching the place of incident, 8 to 10 KM away from the Factory. In our view, on the basis of such sketchy and shoddy evidence, the conviction and sentence of life imprisonment of the appellants cannot be maintained. Save evidence of PW Shamasuddin that is found full of doubt, otherwise, there is no cogent

evidence connecting the appellants to the commission of the offence. It is settled that once a doubt is introduced in the prosecution case, its benefit has to go to the accused, not as a matter of grace but as a matter of right. In this case, as discussed above, the prosecution case qua role of the appellants is questionable and not free from a doubt. In our view, the appellants are entitled to the benefit of doubt.

17. Accordingly, both the appeals are allowed. The convictions and sentences awarded to the appellants Mohan Lal and Nand Lal vide impugned judgment dated 19.03.2022 passed by learned 1st Additional Sessions Judge/ Model Criminal Trial Court, Kotri, in Special Case No.12/2014 arising out of Crime No.09/2014, u/s 9(c), 13 & 14 of CNS Act, 1997, at PS ANF Hyderabad are hereby set-aside. The appellants are acquitted of the charges. They shall be released forthwith if they are not required in any other custody case. The above are the reasons of our short order dated 01.06.2023 allowing the appeals and acquitting the appellants.

The appeals in hand are accordingly disposed of.

JUDGE

JUDGE