IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No. 466 of 2022

PRESENT:
Justice Naimatullah Phulpoto
Justice Khadim Hussain Tunio

Uzair son of Muhammad Yousuf

…Appellant

Versus

The State

…Respondent

For the Appellant: Mr. Zakir Hussain Bughio, advocate

For the Respondents: Mr. Khadim Hussain, APG Sindh

Amicus Curiae: Mr. Habib Ahmed, advocate

Date of Hearing: **18.01.2024**
Date of Decision: **30.01.2024**

JUDGMENT

KHADIM HUSSAIN TUNIO, J- Uzair ("**the appellant**") instituted this appeal, challenging the judgment dated 30.05.2022 ("**impugned judgment**") passed by the Model Criminal Trial Court of the First Additional Sessions Judge, Karachi South ("**Trial Court**") in Sessions Case No. 3745/2021 involving FIR No. 363/2021 lodged with Police Station Kalri, Karachi South for the offence punishable under section 9(c) read with section 6 of the Control of Narcotic Substances Act, 1997 ("**CNSA 1997**"). Through the impugned judgment, the appellant was convicted of an offence punishable under section 9, sub-section (c) of the CNSA 1997 and was sentenced to suffer rigorous imprisonment for life while subsequently being fined rupees one lac, failing which he was to suffer simple imprisonment for six (06) months more.

2. The appellant is charged with the possession of 900 grams of crystal methamphetamine,[1] a stimulant/psychotropic drug, recovered from him on 04.12.2021 by a police contingent under the supervision of ASIP Muhammad Shahbaz.

[1] (r-i) "methamphetamine" means an *addictive neurotoxic stimulant* which is used as a recreational drug…

3. Following investigation, chemical examination and other formalities, the challan was submitted against the appellant and then a charge was framed against him by the Trial Court to which he pleaded not guilty. Following commencement of trial, prosecution examined three witnesses; (1) ASIP Muhammad Shahbaz, (2) PC Afzal Mehdi who is the mashir of arrest and recovery; and, lastly (3) SIP Ishrat Abbas, the investigation officer, who produced the relevant property register entry No. 236/2021, the criminal record of the appellant and the chemical examiner's report among other documents. Then, statement of the appellant was recorded under section 342 of the Code of Criminal Procedure ("**CrPC**") wherein he reaffirmed his innocence and false implication in the case, however refrained from examining any witnesses, producing other evidence or deposing on oath. On conclusion of the arguments, Trial Court passed the judgment impugned herein.

4. Mr. Zakir Hussain Bughio, counsel for the appellant argued that the decision of the Trial Court is against established principles of law as despite material irregularities surfacing from the record, the appellant was convicted. He further contended that the Head Moharrer, the property warehouse incharge, was not examined; as such safe custody of the recovered contraband was doubtful. He also stated that the appellant was apprehended from his house by Rangers and subsequently handed over to the police where he was falsely involved in this case. He further asserted that each of the recovered sachets were not separately weighed nor were the original entries with respect to proceedings produced. He lastly asserted that despite the place of incident being a thickly populated area, not one private individual was brought to witness the proceedings. To support such assertions, he relied upon the cases of "Said Wazir and another v. The State and others" (2023 SCMR 1144), "Akhtar Gul v. The State" (2022 SCMR 1627), "Abdul Ghani v. The State" (2022 SCMR 2121), "Haneef v. The State" (2023 YLR 448) and an unreported judgment authored by one of us *(Naimatullah Phulpoto, J.)* dated 09.08.2023 passed in Criminal Appeals No. 142 and 160 of 2023. In concluding his arguments, learned counsel raised another ground, rather took an alternate plea, and stated that the sentence awarded to the appellant by the Trial Court is harsh and he would be satisfied

if the sentence awarded is reduced to the period already undergone by the appellant.

5. Mr. Khadim Hussain, learned *APG* contended that there is adequate material available on the record and the only logical conclusion drawn therefrom is of the culpability of the appellant.

6. The submissions of the learned counsel for the appellant are two-fold and we shall address them as such. On merits, we have re-examined the entire set of evidence and perused the impugned judgment in depth. The prosecution evidence is straight-forward, the police contingent responsible for the appellant's arrest, belonging to Police Station Kalri, was out for patrol duty when it spotted the appellant whom they found to be suspicious. He was heckled to stop but tried fleeing, however was caught hold of. On his physical/bodily search, police recovered a black shopping bag (shopper) wherein they found eighty-six (86) sachets (purries) of different sizes containing ice crystals, weighing 900 grams. The entire contraband was sealed after mashirs signed over the memos and then the appellant along with the case property was brought to the police station where he was booked in the present case. Prosecution examined two witnesses of the arrest and recovery; one being the complainant ASIP Muhammad Shahbaz and the other being the mashir PC Afzal. Their depositions to the extent of recovery of a black shopper wherefrom eighty six sachets were recovered was identical with no contradictions. Their depositions with respect to the vehicle they left to patrol in, the place where they found the appellant, his name, recovered currency notes, the sealing of the case property and signing of memos are also consistent. Even though learned counsel for the appellant asserted that there existed several contradictions, not one could be pointed out. The only contradiction that surfaced on the bare reading of the cross-examination of the two witnesses was with respect to the number of people who were asked by the investigation officer and by the complainant to witness the proceedings. The numbers, we believe were switched up and that could very well have been due to confusion. When adjudging contradictions, the Court ought to keep in view several factors that may lead to a switch of stance; the first and most common one can be confusing questions by a relentless cross-examiner who ends up intimidating the witness and the second

is the effect of such a contradiction. Undoubtedly, the first factor is present in almost every case and it is the second factor which is crucial for proper adjudication of justice. Not every contradiction could be deemed such that it devalues the entire prosecution case nor should such insignificant inconsistencies be taken as a ground sufficient to warrant falsification of the entire testimony of the witness deposing therewith.[2] Coming to the assertions with respect to the chain of custody, suffice it to say that the chain of custody in the present case is sufficient to the extent of justifying the outcome of the trial. Even though the chain of custody could have been stronger had the in-charge of the property/recovery warehouse been examined, his non-examination is immaterial where safe custody has been proved by other means. The recovery in the case was made on 04 December whereas the same was delivered to the chemical examiner on 06 December. Control of Narcotic Substances (Government Analysis) Rules 2001 provide that the narcotics must be delivered to the chemical examiner no later than 72 hours of the recovery and it is not the appellant's case that the narcotics were delivered with unreasonable delay. Even if that were the case, these rules are directory in nature and a deviation thereof would not invalidate the recovery.[3] During the two days intervening period, the recovered contraband was placed in the property/recovery warehouse (malkhana) and such entry[4] has been produced by SIP Ishrat Abbas, the investigation officer. This entry shows the description of the recovered contraband as a black (سیاہ) shopper containing eighty six (86) sachets of ice (آئس) of various sizes. Learned counsel for the appellant pointed out that the words *"white transparent shoppers"* had surfaced which contradicted the stance of the witnesses, however on perusing the original record containing the entry in Urdu, it appears that the white transparent shoppers is a reference to the sachets being transparent and the word shopper is a mistranslation as clear reference to a black shopper is made thereafter. Comparing this description to the description available in the letter addressed to the chemical analyst[5] and then the description available in the

---

[2] See Zakir Khan v. The State, 1995 SCMR 1793, and Khadim Hussain v. The State, PLD 2010 Supreme Court 669
[3] See Tariq Mehmood v. The State, PLD 2009 Supreme Court 39
[4] Register 19; Entry No. 236/2021
[5] Page 73 of the file

chemical analyst's report[6] wherein it is described as *"One black poly bag (Shopper) contain eight six (86) small and large size plastic poly bags each contains white crystalline material"* shows that the property so recovered was the one that was delivered to the chemical analyst. The chemical analyst also marked the condition of the seal as satisfactory which, as held by the Supreme Court in the case of *Zahid v The State*,[7] is sufficient for proving safe custody as it establishes that the parcel that was sealed on the spot at the time of recovery was opened by the chemical analyst himself. With regard to the absence of original entries and only photocopies being produced, it is not the case of the appellant that the record was tampered with as no such plea was taken at trial nor is the same established merely on the basis of absence of the original record alone. Learned counsel for the appellant also pointed out three distinct cases of different police stations where the appellant had been acquitted for the possession of methamphetamine, in varying quantities, however unless the appellant's plea is that the every police officer has a grudge against him, which is as implausible and unlikely as it sounds, those acquittals are of no help to his present case because not only is each case constructed on a different set of facts that has no bearing on the other.

7. The case fails on merit; as such we shall consider the plea of reduction of sentence. Bare reading of section 9 of the CNSA 1997, as amended[8] to the extent of its application in the Province of Sindh, provides in sub-section (c) that where the quantity of narcotic drug/psychotropic substance or controlled substance in category (i) or category (ii) exceeds the parameters of sub-section (b), the offence shall be punishable by death, imprisonment for life or imprisonment for a term which may extend to fourteen years. Sub-section (b) prescribes the limits for category (i) as exceeding hundred grams but not exceeding one kilogram and for category (ii) as exceeding fifty grams.[9] Category (i) contains cocoa leaf, cannabis and poppy straw; whereas category (ii) among other substances contains

[6] Page 81 of the file
[7] 2020 SCMR 590
[8] Notification No.PAS/Legis-B-01/2021
[9] S. 9(b) …[t]he quantity of psychotropic substance or controlled substance or narcotic drug category (i) exceeds one hundred gram but does not exceed one kilogram, or if the quantity of narcotic drug category (ii) is fifty grams or less.

methamphetamine which is defined in section 2, sub-section (r-i) as an addictive neurotoxic stimulant which is used as a recreational drug, having chemical formula C10 H15 N and includes Ice, Meth and Crystal. This suggests that a possible punishment for the possession of methamphetamine in excess of 50 grams can be death or imprisonment for life. However, a perusal of the proviso after sub-section (c) captures the wisdom of the legislature in providing a threshold for when the sentence of life imprisonment or death, in the alternate, is mandatory – where the narcotic drug category (ii) exceeds two kilograms. The same is reproduced hereunder for reference:-

> "Provided that ***if*** the quantity of narcotic drug category (i), psychotropic substance or controlled substance ***exceeds ten kilograms or narcotic drug category (ii) exceeds two kilograms***, the punishment **shall** not be less than imprisonment for life."

This, indirectly, cautions a Judge to show restraint where the quantity does not exceed two kilogram and to go with an alternate sentence because it would defy logic if a person found in possession of 60 grams of ice would serve life imprisonment the same as someone found in possession of 6000 grams of ice. The appellant possessed 900 grams of methamphetamine, less than half of the quantity provided for in the proviso after sub-section (c), therefore, we deem his case to be fit for reduction in sentence. At the same time, we also recognize the growing menace of drugs which, despite best efforts, finds no end. Therefore, we deem it appropriate to not dub the sentence awarded by the Trial Court as harsh because there can certainly be cases where such an approach of harsh sentences would be reasonable and likely the best recourse, just not this one.

8. Given these observations, the conviction awarded to the appellant for the offence punishable under section 9, sub-section (c) of the CNSA 1997 (Sindh Amendment, 2021) is upheld, however the sentence awarded to him therein of life imprisonment is reduced to 10 years of rigorous imprisonment, leaving the fiscal penalty as is. The impugned judgment is therefore upheld subject to the above modifications in sentence and the captioned appeal is dismissed in the above terms.

Judge

Judge