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IN THE HIGH COURT OF SINDH
AT KARACHI

Crl. Jail Appeal No. 480/11

Through:- The Superintendent
Central Prison Karachi

Applicant:-

BASHIR s/o. KABIR.
Presently Confin'd in
Central Prison Karachi

VERSUS

- - - - - Accused.

The State - - - - -

- - - - - Respondent
SPL Case No. 198/2008
FIR No. 11/2008
U/S 9-C Crs Act 1997
P.S. Excise (East) Karachi

CRL. JAIL APPEAL FOR "REVIEW"

Respected Honorable Sir,

It is most reverence and humble submitted as
under follows:-

On being partially dissatisfied by the imposed
Judgement on 17th Oct 2011, has been Passed by
the Spl. Crs Court No. 11th Karachi (East) whereby the
learned trial prosecution has pleaded to conviction
sentenced namely accused Bashir s/o. Kabir for an offence
under 6 punishable under section 9-C Crs Act, 1997
to suffer for "Life imprisonment" and fine -

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HIGH COURT OF SINDH AT KARACHI

Criminal Jail Appeal No. 480 of 2011

Present

Mr. Justice Naimatullah Phulpoto

Mr. Justice Mohammad Karim Khan Agha

JUDGMENT

Date of Hearing : 28.10.2016.
Date of Judgment : 10.11.2016.
Appellant : Bashir through Mr. Fazal-ur-Rehman Advocate.
Respondent : The State through Mr. Zafar Ahmed Addl. P.G..

NAIMATULLAH PHULPOTO, J.- Appellant Bashir son of Kabir was tried by learned Judge, Special Court-II (C.N.S) Karachi in Special Case No.198 of 2008 for offence u/s 9(c) of the CNS Act, 1997. After full-dressed trial, by judgment dated 17.10.2011, appellant was convicted was convicted u/s 9(c) of the CNS Act, 1997 and sentenced to imprisonment for life and to pay fine of Rs.1 Million and in case of default in payment of fine he was ordered to suffer five years R.I. Benefit of section 382-B Cr.P.C was extended to him.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 19.07.2008, Excise Inspector Harjimal was posted as Excise Inspector in District East, Karachi. On the same date, he along with his subordinate staff left the excise office at 10:15 a.m. for patrolling duty Excise Inspector received on spy information at New Town Chowrangi at 12:15 p.m that one person was standing at Shahzob Hotel, Old Sabzi Mandi, Karachi, and he had heroin powder in his attaché case. On such information, excise inspector along with his subordinate staff ECs Sarfraz Ahmed, Maqsood Hussain, Syed Abid Hussain, Rashid, Orangzeb, driver Tasawar Hussain proceeded to the pointed place in Government vehicle. Present accused was found standing there and he was carrying attaché case. Excise inspector inquired his name, to which he disclosed his name as Bashir son of Kabir. Excise inspector recovered attaché case form the possession of the accused in presence of mashirs ECs Abid Hussain and Sarfraz Ahmed and conducted personal search of the accused. Attache case was opened. There were 20 bags of the heroin powder in the attaché case/suitcase and each packed contained one kilogram heroin powder. Total heroin powder was 20 Kgs. From 20 packets, from each packet 10 grams each heroin

powder/narcotic substance was taken as sample for sending it to the chemical examiner. Personal search of the accused was conducted, during search cash of Rs.800/- and driving license in his name were also recovered. Excise inspector prepared mashirnama of the narcotic substance/samples and arrested accused in presence of the above named mashirs, sealed the same at the spot in presence of mashirs. Thereafter, Excise officials brought accused and narcotic substance to the Excise Police Station East. Where excise inspector lodged FIR against the accused on behalf of the State, it was recorded vide Crime No.11/2008 under section 9(c) of the Control of Narcotic Substances Act, 1997.

3. During investigation, samples were sent to the chemical examiner on 21.07.2008 for chemical report and positive report was received. After usual investigation, challan was submitted against accused u/s 9(c) of the CNS Act, 1997.

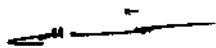
4. Learned Judge, Special Court-II (CNS), Karachi framed charge against accused u/s 9(c) of the CNS Act 1997 at Ex. 2. Accused pleaded not guilty and claimed to be tried.

5. At trial, prosecution examined complainant/Inspector Harjimal as Ex.4, who produced Roznamcha entry at Ex.4/A, mashirnama of arrest and recovery at Ex.4/B, FIR at Ex.4/C and chemical report at Ex.4/E. P.W-2 EC Sarfraz Hussain examined at Ex.5. Thereafter, prosecution side was closed at Ex.6.

6. Statement of accused was recorded u/s 342 Cr.P.C at Ex.7, in which accused has claimed false implication in this case and denied the prosecution allegations. Accused did not lead any defence and declined to give statement on oath in disproof of the prosecution allegations.

7. Learned trial Court after hearing the learned counsel for the parties and on assessment of entire evidence, convicted accused u/s 9(c) of the CNS Act, 1997 and sentenced as stated above. Appellant has preferred instant Criminal Jail Appeal against the impugned judgment.

8. Mr. Fazal-ur-Rehman Advocate for the appellant mainly contended that all the P.Ws are Excise officials, Inspector had received spy information, but he failed to associate independent and respectable persons of locality as mashirs in this case it was violation of Section 103 Cr.P.C. Learned counsel for the appellant submits that 4/5 private persons were available at the time of arrest and recovery of the accused, but deliberately they were not made mashirs in



this case. It is argued that evidence of excise officials was not corroborated by some independent piece of evidence. Lastly, it is argued that it was duty of the prosecution to prove its case against accused beyond any doubt but prosecution has failed to prove its case. In support of the contentions, he relied upon the cases of Noor Aslam & others vs. The State (2006 MLD 113) & Amjad Ali versus The State (2012 SCMR 577).

9. Mr. Zafar Ahmed Additional Prosecutor General Sindh argued that evidence of the excise officials is confidence inspiring and reliable; excise officials are competent witnesses like any other independent witness and their testimony could not be discarded merely on the ground that they are excise officials. In support of his contentions, he has relied upon the case reported as Zafar vs. The State (2008 SCMR 1254). As regards to the contention of defence counsel that private persons were not examined, he argued that private persons refused to act as mashir. Additional P.G further argued that huge quantity of the heroin was recovered from the possession of the accused on 19.07.2008 and samples were sent to the chemical examiner promptly. Learned Additional P.G. argued that Excise officials had no enmity or motive to falsely implicate the accused in this case and prosecution has proved its case. Lastly, argued that judgment of the trial court is based upon sound reasons and appeal is liable to be dismissed.

10. We have carefully heard the learned counsel for the parties and scanned the entire evidence.

11. P.W-1 Excise Inspector Harjimal has deposed that on 19.07.2008, he was posted Excise Inspector at District East. On the said date he along with ECs Sarfraz, Masood Hussain Pathan, Orangzeb and Syed Abid Hussain left Excise Police station for patrolling. During patrolling, he received spy information that one person was standing near Shahzob Hotel, Old Sabzi Mandi with attaché case. They reached at the pointed place and found one person standing he had attaché case it was recovered. Accused disclosed his name as Bashir son of Kabir. His personal search was conducted in presence of mashirs, cash as well as his driving license were recovered. The attaché case was opened, it contained 20 packets of heroin powder. Heroin was weighed at the spot, each packet was of 1 K.G total 20 K.G. 10 grams heroin, from each packet was taken and remaining heroin powder was sealed at the sport. Complainant prepared the mashirnama in presence of mashirs EC Abid Hussain and EC Sarfraz Ahmed. Thereafter, accused and case property were brought at Excise station where FIR



bearing Crime No. 11/2008 u/s 9(c) of the CNS Act was registered against accused on behalf of state. Excise Inspector was cross-examined at length. He denied suggestion that investigation was not fair. IO has denied the suggestion that he had let off real culprit and involved accused Bashir in this case falsely.

12. P.W-2 EC Sarfraz Ahmed has deposed that 19.07.2008, he was performing his duty at Excise Police Station District East, Karachi. On the same date, he along with other staff, under the supervision of Inspector Harjimal left Excise office in the Government vehicle No.GS-9909 at 1015 hours and reached at Shahzob Hotel, Old Sabzi Mandi, Karachi at 1240 hours where they saw accused in the suspicious manner, he was carrying attaché case in his hand. Accused was surrounded and caught hold of. Excise Inspector enquired his name to which he disclosed his name as Bashir son of Kabir. Inspector recovered attaché case from the accused and conducted personal search by making him as mashir. Co-mashir was EC Abid Hussain. Cash of Rs.800/- and original driving license were recovered from his possession. Attaché case was opened, there were 20 heroin thelies/bags lying in it. EC Sarfraz has further deposed that 10 grams heroin powder was taken as sample from each packet of the heroin, for sending to the chemical examiner. Mashirnama of arrest and recovery was prepared. Accused and case property were brought at Excise station where FIR was lodged against accused on behalf of state. He was cross-examined by learned counsel for the accused. He denied the suggestion that all the recovery proceedings were carried out at Excise police station. He has denied the suggestion that he was deposing falsely at the instance of the complainant/Excise Inspector.

13. We have come to the conclusion that evidence of the Excise Inspector is quite trustworthy and confidence inspiring. Mashir has supported the evidence of Excise Inspector. From the minute examination of the evidence it transpired that there is no major contradiction or inherent defect in the evidence of Excise officials on any material point. During cross-examination of the Excise officials, no specific enmity has been suggested. In the statement of accused recorded u/s 342 Cr.P.C, accused neither examined himself on oath nor examined any witness in defence. It is unbelievable that Excise Inspector would foist huge quantity of 20 KG heroin powder upon the accused. We have no reason to disbelieve the evidence of Excise officials as they had no enmity with accused. In the case of Zafar vs. The State (2008 SCMR 1254), it is held that police employees are competent witnesses like any other independent witness

and their testimony cannot be discarded merely on the ground that they are police employees. Relevant portion is produced as under:

"7. A huge quantity of narcotic material has been recovered from possession and pointation of the appellant on the day of occurrence on receipt of information from an informer and the Investigating Officer Syed Liaqat Ali accompanied by Ghulam Abbas, Inspector, Siraj Khan Pervez Shah etc., while on patrolling duty proceeded to the place of occurrence and intercepted Zafar appellant from whose search a nylon bag was taken into possession. On checking opium in 11 plastic balls was found in the bag. On weightage each packet was found to be of one kilogram and total 11 kilograms of opium was recovered and taken into possession. At the time of occurrence and arrest of the appellant Zafar, the employees who were the members of the patrolling party were associated in the proceedings of recovery. They were the natural witnesses. Syed Liaqat Ali, S.-I. categorically stated that he had invited the members of the public to join the proceedings but they excused and there was no option left except to complete the proceedings of arrest and recovery in the presence of members of the raiding party. The police employees are the competent witnesses like any other independent witness and their testimony cannot be discarded merely on the ground that they are the police employees as laid down in the cases of Muhammad Azam v. The State PLD 1996 SC 67, Muhammad Hanif v. The State 2003 SCMR 1237, Riaz Ahmad v. The State 2004 SCMR 988 and Naseer Ahmad v. The State 2004 SCMR 1361."

14. As regards to the other contention of the learned defense counsel regarding non-performance of provision of Section 103 Cr.P.C, it is evident that applicability of Section 103 Cr.P.C in the narcotics cases has been specifically excluded. Section 25 of the CNS Act, 1997 is reproduced herein under:

'25 Mode of making searches and arrest:- The provisions of the Code of Criminal Procedure, 1898, except those of section 103, shall mutatis mutandis, apply to all searches and arrests in so far as they are not inconsistent with the provisions of section 20, 21, 22 and 23 to all warrants issued and arrests and searches made under these sections.'

15. Excise Inspector Harjimal in his cross-examination has replied that he asked 4/5 private persons to act as mashir but they had refused. It indicated that Excise Inspector made efforts to make private persons as mashirs in this case but they refused. Reluctance of general public to become witness in such like cases is a judicially recognized fact and there was no option left but to consider the evidence of official witnesses as no legal bar has been imposed in that regard. Huge quantity of the heroin powder was recovered from the attaché case of the accused. Samples were sent to chemical examiner within 02 days and chemical report was positive. Evidence of the Excise officials is fully corroborated by the positive chemical report.

16. So far as the contention of learned counsel for the appellant that investigation officer was complainant in this case, this legal aspect has been dealt with by Honourable Supreme Court of Pakistan in the case of Zafar vs. The State (supra), wherein it is observed that police officer is not prohibited under the law to be complainant if he is a witness to the commission of an

offence and also to be an investigating officer, so long as it does not in any way prejudice the accused person. There is nothing on record that police officials had enmity against the appellant to plant such a huge quantity of heroin. Accused has failed to produce evidence in defense to establish animosity against the prosecution witnesses. The witnesses have passed the test of lengthy cross-examination, but defense has failed to make any dent in the prosecution story. Trial Court has right appreciated the evidence according to the settled principles of law. Impugned judgment of trial Court dated 17.10.2011 based upon sound reasons require no interference by this Court.

17. As regards to the sentence keeping in view the sentencing policy laid down in the case reported as Ghulam Murtaza and another vs. The State (PLD 2009 Lahore 362), which was endorsed by the Honourable Supreme Court in the case reported as Ameer Zeb vs. The State (PLD 2012 SC 380). The conviction awarded to appellant is hereby maintained, sentence of imprisonment for life awarded by the trial Court is also upheld. However, fine of Rs.1,000,000/- (Rupees One Million) in default, 5 years R.I. is modified to Rs.300,000/- (Rupees Three Lac) or in default SI for 1 year and 6 months.

18. With the above slight modification, the impugned judgment is maintained. Consequently, the appeal is without merit and same is dismissed.

10.11.2016
JUDGE
K.A.J.
JUDGE