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IN THE HIGH COURT SINDH, CIRCUIT COURT, LARKANA.

Criminal Appeals No. D- 15 of 2018.

Present:

Mr. Justice Zafar Ahmed Rajput

Mr. Justice Irshad Ali Shah

Appellant : Abdul Rasheed Brohi s/o Mir Mengal,
through Mr. Rafique Ahmed Abro, Advocate.

Respondent : The State,
through Mr. Sharafuddin Kaanhar, A.P.G.

Date of Hearing : 24.09.2018.
Date of Order : 24.09.2018.

J U D G M E N T

ZAFAR AHMED RAJPUT-J:- Through instant Criminal Appeal, under Section 410, Cr. P.C, appellant Abdul Rasheed Brohi has assailed his conviction and sentence recorded vide judgment, dated 09.03.2016, in Special Case No. 310 of 2016, arising out of Crime No.191/2015, registered at P.S New Foujdari under section 9(c) of the Control of Narcotic Substances Act, 1997 (*hereinafter the "Act of 1997"*), whereby the learned Sessions Judge/Special Judge Narcotics, Shikarpur convicted the appellant under section 9(c) (ibid) and awarded him sentence to suffer life imprisonment and to pay a fine of Rupees one million or, in default thereof, to undergo S.I for six months more. The benefit of Section 382(b), Cr. P.C has, however, been extended to the appellant.

2. Precisely, the facts of the prosecution case, as per F.I.R., are that on 28.12.2015, at 1700 hours, the appellant was arrested while driving tractor-trolley at Shikarpur By-pass near Rustam Link Road by the police party headed by SIP Ashique Ali Mahar in presence of mashirs, namely, ASI. Hafeezullah Jafri and HC Zulfiqar Ali on being found in possession of 420 k.gs Charas and 14 k.gs opium. Thereafter, he was brought at P.S. New Foujdari, Shikarpur where aforementioned F.I.R. was recorded against him.

3. After completion of the investigation, police submitted the challan against the appellant. Formal charge was framed by the trial Court against the appellant as Ex.7, to which he pleaded not guilty and claimed to be tried, vide plea recorded at Ex.8. Thereafter, the prosecution, in order to substantiate the charge, examined four witnesses, namely, PW-1- SIP Ashiq Ali, the complainant, at Ex.10; PW-2 ASI Hafeezullah, the mashir, at Ex.11; PW-3 SIO/SHO Gulsher Ahmed, the first investigation officer, at Ex.12 and PW-4 SIP Rafiq Ahmed, the second investigation officer, at Ex.13. They produced relevant documents in their evidence. The statement of appellant under section 342 Cr. P.C was recorded at Ex.15 wherein he while pleading innocence, claimed that he was arrested from a wagon and police released other person by falsely implicating him. He; however, neither opted for examination on oath in term of Section 340 (2) Cr.P.C. nor even led any evidence in his defense. Upon the assessment of the evidence on record, the learned trial Court convicted and sentenced the appellant as mentioned above.

4. Mr. Rafique Ahmed Abro, learned counsel for the appellant has mainly contended that the impugned judgment is bad in law as well as on facts; that no person from public was associated by the police to act as mashir of recovery despite the fact that the recovery was made allegedly from a busy road; that no evidence has been brought on record to prove that the case property before sending for chemical analysis remained in *MALKHANA* in safe custody and even the relevant entry regarding keeping the case property in *MALKHANA* in safe custody has been produced by the prosecution witnesses; that there are material contradictions in depositions of prosecution witnesses in respect of number of pieces of opium, sizes of plastic bags, number of spare wheels lying in tractor-trolley etc. which were fatal to the prosecution case but the learned trial Court failed to consider the same; that the learned trial Court failed to consider the defence plea taken by the appellant and, consequently, committed error in passing impugned judgment. In support of his contentions, learned counsel has placed his

reliance on the case of *Riaz Mian and another vs. The State (2014 SCMR 1165)* and *Shahzada vs. The State (2010 SCMR 841)*

5. Conversely, learned A.P.G. while supporting the impugned judgment, has maintained that the contradictions pointed out by the learned counsel for the appellant are minor in nature otherwise alleged recovery of huge quantity of contraband articles in terms of date, time and place is fully supported by the prosecution witnesses.

6. We have heard the learned counsel for the appellant as well as learned A.P.G for the State and have scanned the material available on record with their assistance.

7. It reflects from the evidence of prosecution witnesses that on 28.12.2015, complainant SIP Ashiq Ali Mahar proceeded from P.S. New Foujdari, Shikarpur, vide Entry No. 27 at 1600 hours (Ex. 10-C) along with ASI Hafeezullah, HC Zulfiqar Ali, PCs Lal Hussain and Sajjad Ahmed and DPC Hazar Khan in official vehicle for patrolling in area; they reached Rustam By-pass link road where at 1700 hours they saw a tractor-trolley, which was being driven by the appellant and one person was sitting on the cover of tyre, who on seeing police party alighted from it and made his escape good. Police party apprehended the appellant and seized from tractor-trolley ten white coloured plastic bags (Bachka) containing Charas and one yellow coloured plastic bag containing opium. Out of them, each of nine bags was found containing 40 slabs and the tenth bag 60 slabs of Charas each weighing 1 kilo gram, all 420 kilo grams of Charas. While the bag containing opium was found containing 14 pieces of opium, each weighing 1 kilo gram. The case property was sealed at the spot and such mashirnama of arrest and recovery (Ex. 10-A) was prepared in presence of mashirs, namely, ASI Hafeezullah Jafri and HC Zulfiqar Ali and; thereafter, appellant along with case property was

brought at police station where F.I.R. (Ex.10-B) was recorded against the appellant by SIP Ashiq Ali on behalf of the State who, subsequently, handed over the memo of arrest and recovery, F.I.R. and case property to SIO/SHO Gulsher Ahmed for investigation purpose, who during investigation, visited place of recovery, under Entry No. 34 at 1900 hrs. (Ex. 12-A) and prepared memo of site inspection (Ex.11-A) in presence of mashirs ASI Hafeezullah Jafri and HC Zulfiqar Ali. On 28.12.2015, he recorded the statements of witnesses under section 161 Cr. P.C. On 29.12.2015, he on pointation of appellant, during interrogations, recovered driving license of appellant and papers of tractor from toll box. On 31.12.2015, he sent the case property to chemical examiner for analysis, which was received to his office on the same day. As per report of chemical examiner (Ex. 12-E), each of ten sealed white plastic bags and one sealed yellow plastic bag were found bearing four perfect seals, containing total 420 black brown colored slabs of Charas having total 420 kilo grams net weight, out of which 23 packets were burnt from the mid, 94 from the side and 4 were burnt pieces. While one sealed yellow plastic bag was found containing 14 cloth parcels each containing one blackish brown coloured piece of opium having total 14 kilo grams net weight. The case property was produced before the trial Court during evidence of P.Ws 1, 2 and 3 i.e. SIP Ashiq Ali, ASI Hafeezullah and SIO/SHO Gulsher Ahmed, respectively in sealed condition, which was de-sealed and after showing to said P.Ws., it was re-sealed in presence of parties.

8. All four P.Ws have implicated the appellant to have been apprehended on/at aforementioned day, time and place on being in possession of 420 k.gs Charas and 14 Kilo grams opium. The evidence of PWs. in respect of arrest and recovery of charas is consistent and confidence inspiring. There appears no material contradiction in the depositions of P.Ws rendering the prosecution case as doubtful. Admittedly none of the prosecution witnesses had any enmity with the appellant nor was it was ever suggested.

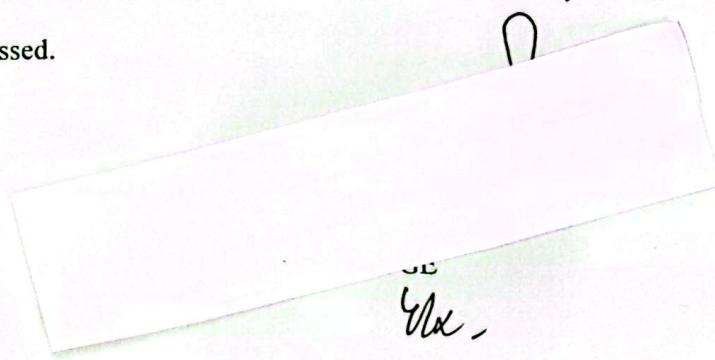
9. So far arguments of the learned counsel for the appellant regarding not associating any private person as mashir is concerned, it may be observed that Section 25 of the Act of 1997 specifically excludes application of Section 103, Cr.P.C in narcotic cases. The case property was sent to Chemical Examiner on the third day of the alleged recovery without any inordinate delay and it was not the case of the appellant before the trial Court that the case property was tampered with while lying in the *MALKHANA*. As regard defense plea, the appellant has failed to bring on record any substance in support of it, which appears to be after thought. It goes without saying that in narcotic cases the Courts should have a dynamic approach in appreciating the evidence and the discrepancies, which may occur in the statements of prosecution witnesses due to lapse of time or those having no impact on the material aspects of the case, have to be ignored. Once the prosecution *prima facie* establishes its case, then under Section 29 of the Act of 1997 burden shifts upon the accused to prove contrary to the case of the prosecution, and in the instant case, the appellant has failed to do so.

10. The case-law cited by the learned counsel for the appellant being on distinguishable facts does not advance the case of appellant, as in the case of *Riaz Mian and another* (supra), the Apex Court acquitted the bus driver, co-driver and conductor of the charge of possessing 420 kilograms Charas and 17 kilograms opium by observing that owner of the bus (principal accused) was present in the bus who provided police with the keys to the luggage comprised of four iron boxes, two gunny bags and one nylon bag lying on the roof of the bus wherein narcotics had been hidden, and there was no material on record to show that the luggage was kept on the roof of the bus by any of the driver or conductor to attribute knowledge of transportation of narcotics so recovered. And in the case of *Shahzada* (supra) the accused was simply sitting in the car while the driver of the car had escaped and police recovered huge quantity from the car, the Apex Court while observing that the prosecution led no evidence to show that the accused had

knowledge of the narcotics lying in the car or they abated or conspired with the driver in the commission of crime, extended benefit of doubt in favour of accused. While in the instant case huge quantity of the narcotics has been recovered from the tractor-trolley, which was being driving by the appellant. It may be observed that the alleged tractor-trolley was under the control and possession of appellants being driver, hence whatever articles lying in it would be under his control and possession.

11. For the foregoing facts and reasons, we have not found any misreading or non-appreciation of evidence and any illegality or legal or factual infirmity in the impugned judgment so as to justify interference by this Court in recording sentence and conviction to appellant by the trial Court. Hence, instant criminal appeal is dismissed.

Above are the reasons of our short order, dated 24.09.2018, whereby instant criminal appeal was dismissed.



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