

CERTIFICATE OF THE COURT IN REGARD TO REPORTING

Cr. Appeal 274/2014

M. Faisal vs. The State

HIGH COURT OF SINDH

Composition of Bench: S.B./D. B.

Mr. Justice Mohammad Karim Khan Agha,
Mr. Justice Abdul Moheen Lakho

Date(s) of Hearing: 04-02-20 207-02-20

Decide on: 13-02-2019

(a) Judgment approved for reporting:

Yes

Hyl

o/c

CERTIFICATE

Certified that the judgment*/order is based upon or enunciates a principle of law */ decides a question of law which is of first impression / distinguishes / overrules / reverses / explains a previous decision.

* Strike out whichever is not applicable.

NOTE:

- (i) This slip is only to be used when some action is to be taken.
- (ii) If the slip is used, the Reader must attach it to the top of the first page of the judgment.
- (iii) Reader must ask the Judge writing the Judgment whether the Judgment is approved for reporting.
- (iv) Those directions which are not to be used should be deleted.

Handwritten signature and date 17/2/20

Reced
17/2/2020



IN THE HIGH COURT OF SINDH AT KARACHI.

Spl. Crl. CNS APPEAL NO. OF 2014.

274

PRESENTED
25-10-14

Muhammad Faisal
S/o. Abdul Ghani, Muslim, adult,
Presently confined in Judicial Custody at
Central Prison,
Karachi.

Dr. Registrar C

.....Appellant. _____

H.No-150, KMC Street No 3,
Muhammad Nagar Orange
Town Karachi

911

The State.

.....Respondent.

FIR NO. 15/ 2013.

P.S. ANF-, Clifton Karachi.

U/S. 6/9(e) C.N.S. Act-1997.

SPL. CASE NO. 202/ 2013

APPEAL UNDER SECTION 43 C.N.S. ACT-1997 READ WITH SECTION 410 CR.P.C.

Being aggrieved and dis satisfied with Judgment dated 27.09.2014 passed by Mr. Sanaullah Khan Ghory, Judge Special Court C.N.S.H. Karachi in Special Case No.202/2013 Re: State Vs. Muhammad Nacem and others being outcome of F.I.R. No.15/2013 under section 6/9(e) C.N.S. Act-1997, Police Station ANF-Clifton, Karachi, whereby convicting the Appellant under section 6 punishable under section 9(e) C.N.S. Act-1997 and awarding him to suffer R.I. for life imprisonment with fine of Rs.1000,000/- and in default of payment thereof to suffer Further R.I. for five years,

THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No.274 of 2014.

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Abdul Mubeen Lakho,

Appellant: Muhammad Faisal S/o. Abdul Ghani through Ch. Muhammad Saeed-uz-Zaman, Advocate.

For State: Through Ms. Abida Parveen Channar, Special Prosecutor ANF.

Date of hearing: 04.02.2020 and 07.02.2020.

Date of Judgment: 13.02.2020.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J:- Accused Muhammad Faisal S/o. Abdul Ghani was tried by the Special Court-II (C.N.S.) Karachi U/s. 9-C, C.N.S. Act, 1997, P.S. Clifton, Karachi vide judgment dated 07.09.2014 the appellant Muhammad Faisal was convicted for an offence under section 6 punishable under section 9-C CNS Act, 1997 to suffer Life Imprisonment and fine of Rs.1,000,000/- (rupees one million only). In case of default in payment of fine he will suffer further R.I. for five (05) years with benefit of section 382-B Cr.P.C.

2. Being aggrieved and dissatisfied by the judgment passed by learned Special Court-II (C.N.S.) Karachi, the aforesaid appeal has been preferred against the impugned judgment.

3. The brief facts of the case as per FIR in a nutshell are that on 12.03.2013, at 1630 hours Complainant/Inspector Muhammad Afzal of PS ANF-Clifton, Karachi received spy information through his high ups that narcotics provincial smugglers namely (i) Muhammad Naeem, (ii) Muhammad Faisal, (iii) Ghalib Khan and (iv) Saeed Khan would come in front of Habib Metropolitan Bank, near Gul Plaza, M.A. Jinnah Road, Saddar Town, Karachi in a vehicle bearing registration No.AZL-559 for delivering huge quantity of narcotics substance to their special customer. On such information and on direction of high ups a raiding party was constituted headed by Complainant/Inspector Muhammad

Afzal along with ASI Umair Fahim, PC Zeeshan, PC Adil, PC Farhan, PC Akhtar, PC Mazharuddin, Sepoy Muqeeb, Sepoy Akhtar and other ANF staff left PS in two officials vehicles duly armed along with spy informer vide Roznamcha entry No.7 at 1530 hours on 12.03.2013 and at about 1600 hours reached at MA Jinnah Road in front of Habib Metropolitan Bank near Gul Plaza, Saddar Town, Karachi and started secret surveillance. At about 1630 hours on 12.03.2013 the said vehicle/car bearing No.AZL-559 golden color make Nissan was seen coming from Merewether Tower, Karachi which was stopped on the pointation of spy informer and the ANF officers encircled the said car where four persons were found sitting who were apprehended. Complainant Muhammad Afzal asked the passers by to act as witnesses but they refused due to fear of narcotic-sellers therefore, from the raiding party ASI Umair Fahim and PC Mazharuddin were nominated as mashirs and inquired about their parentage. The person sitting on driving seat disclosed his name as (i) Muhammad Naeem son of Muhammad Aleem; the person sitting adjacent the driving seat disclosed his name as (ii) Muhammad Faisal son of Abdul Ghani; the persons sitting behind the driver seat disclosed their name as (iii) Ghalib Khan son of Sardar Khan and (iv) Saeed Khan son of Willayat Khan. On inquiry about the narcotics of the said four persons they one by one disclosed that narcotics were available in the boot of the said car. All the four said persons one by one took out one/one kata/sacks which were handed over to the Complainant.

4. The kata/polypropylene bag produced by accused (i) Muhammad Naeem was opened and found 30 packets, then kata/sack produced by accused (ii) Muhammad Faisal found 25 packets, thereafter kata/sack produced by accused (iii) Ghalib Khan containing 30 packets while the kata/sack produced by accused (iv) Saeed Khan found 25 packets. Total 110 packets were recovered and every packet were cut and checked and in these packets was found heroin powder. On weighing of every packet each packet was found containing heroin powder weighing /1 Kg. (gross), total 110 Kgs. (gross) heroin powder was recovered from all the 110 packets. All the recovered packets were sealed in the same kata/polypropylene bag for chemical analysis.

5. It is averred in the FIR that thereafter Complainant Muhammad Afzal took their personal search and recovered from accused (i) Muhammad Naeem photocopy CNIC in the name of Muhammad Faisal, Pak Rs.56,000/-, one HBL deposit slip in name of Muhammad Faisal and bunch of keys of the car; on

search of accused (ii) Muhammad Faisal, cash of Rs.1800/-, one leaf of registration of motorcycle bearing No.KEL-1999 in the name of one Ghulam Farooq, one HBL Visa Card, color copy of CNIC in the name of Faisal and original CNIC in the name of Mahvish Faisal were secured while from personal search of accused (iii) Ghalib Khan driving license, original CNIC, cash amount of Rs.11,000/- were secured and from fourth accused (iv) Saeed Khan cash amount of Rs.8,200/-, driving license, CNIC, one blank check of Alfalah and Visa Card of Alfalah Bank and one Arms license were recovered. On the search of the car one leaf Page No.1 of the car No.AZL-559 in the name of co-accused Muhammad Faisal who is otherwise owner of the said car and one leaf of Gate Pass of Al-Hamad International Terminal Container. All the said four arrested persons disclosed that they purchased the recovered narcotics from one Ismail Kochi, resident of Peshawar. The recovered heroin powder, car No.AZL-559 with keys, the recovered documents, articles of personal search and accused persons were arrested and taken into custody. Complainant/Inspector Muhammad Afzal had written the memo of arrest and recovery on the spot in presence of mashirs namely ASI Muhammad Fahim and PC Mazharuddin which were read over to the said witnesses were found correct and they put their signatures thereon as with the 4 parcels of recovered heroin. Thereafter FIR bearing Crime No.15/2013 was lodged at PS ANF-Clifton, Karachi at 2100 hours on 12.03.2013. Complainant/Inspector Muhammad Afzal conducted investigation of the case and during investigation he had recorded S.161 Cr.PC statements of PWs. On the same day after lodging the FIR he interrogated the accused persons separately. On 13.03.2013 he had sent the narcotic substances for chemical analysis, government of Sindh, Karachi. After completion of investigation I/O Inspector Muhammad Afzal had filed the final report on 26.03.2013 under section 173 Cr.P.C. against all the above named accused persons in the relevant court while absconding accused Muhammad Azam Khan son of Qamar Khan was shown in column No.2 in red ink as absconding accused in the said final report under section 173 Cr.P.C.

6. Formal charge under section 6/9-C CNS Act, 1997 was framed against the said accused persons on 21.06.2013 to which the accused have pleaded not guilty and claimed to be tried.

7. In order to prove its case against the accused persons, the prosecution examined 02 witnesses and thereafter Dr. Fazal Ellahi Memon, Chemical

Examiner was examined as CW-1. Statements of the accused persons were recorded u/s. 342 Cr.P.C. whereby the accused claimed false implication in the case. None of the accused examined themselves on oath or called any DW in support of their defense case.

8. After hearing the arguments of the parties and appreciating the evidence on record the trial court vide the impugned judgment dated 07.09.2014 acquitted all the accused **except** the appellant and hence the appellant has filed this appeal against his conviction

9. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 07.09.2014 passed by the concerned trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

10. Learned counsel for the appellant has contended that there was a delay in filing of the FIR, there was a violation of S.22 and 23 of the CNSA, that certain aspects of the mashirnama of arrest and recovery were in conflict with the chemical report, that the appellant was not the driver of the car but was a passenger in it and as such he had no control over the car and would have no knowledge about the presence of the narcotics in the car, that there were contradictions in the evidence of the PW's and that for any of the above reasons the appellant should be acquitted of the charge by extending him the benefit of the doubt. In support of his contentions he has placed reliance on **Sayyar V The State** (PLD 2015 Peshawar 157), **Shafquat Mehmood V The State** (2015 YLR 2163), **Khan Bux V The State** (2016 YLR 85), **Syed Karim V Anti Narcotics Force** (PLD 2003 Karachi 606), **Ahmed Gul V The State** (2015 MLD 507), **Taj Muhammad V The State** (2016 MLD 1825), **Hussain Bux alias Kabacho Channa V The State** (2017 P Cr. LJ 501), **Bashir V The State** (2017 P Cr. L J 1298) and **Qaisarullah and others V The State** (2009 SCMR 579).

11. On the other hand Special Prosecutor ANF has fully supported the impugned judgment. She has contended that there was no delay in the lodging of the FIR, that the recovery of a huge quantity of heroin was made from the car which was under the control of the appellant which belonged to him, that the appellant himself admitted ownership of the car in his S.342 statement, that the chemical report had been sent promptly, that the chemical report was

positive and no witness had any reason to falsely implicate the appellant and as such the prosecution had proved its case against the appellant beyond a reasonable doubt and the appeal be dismissed. In support of her contentions, she placed reliance on **Gul Badshah V The State** (2011 SCMR 984), **Muhammad Kamran V The State** (2019 SCMR 1314), **Muhammad Noor and others V The State** (2010 SCMR 927), **Inayatullah and another V The State** (2011 P Cr. L J 398), **Zafar V The State** (2008 SCMR 1254), **Ikramullah and others V The State** (2015 SCMR 1002), **The State V Sohail Khan** (2019 SCMR 1288) and **The State V Muhammad Ramzan and others** (2019 SCMR 1295).

12. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the learned counsel for the appellants, the impugned judgment with their able assistance and have considered the relevant law including that cited at the bar.

13. After our reassessment of the evidence we are of the view that the prosecution has proved its case beyond a reasonable doubt against the appellant for the following reasons:-

(a) That the arrest and recovery was made on the spot and the appellant was caught red handed with the narcotics by the police whose evidence fully corroborates each other in all material respects as well as the prosecution case. It is well settled by now that the evidence of a police witness is as reliable as any other witness provided that no enmity exists between them and the accused and in this case no enmity has been suggested against any of the police PW's and as such the police had no reason to falsely implicate the appellant in a false case. Thus we believe the police evidence which is corroborative in all material respects. In this respect reliance is placed on **Ijaz Ahmed V The State** (2009 SCMR 99).

(b) That the departure entry No.2 at the PS clearly shows that the raiding party was going to M.A Jinnah road on the basis of spy information which corroborates the prosecution case since this is the area where the appellant was arrested whilst sitting in the car.

(c) The FIR was also registered with promptitude giving no time for concoction and the S.161 statements were recorded promptly which

were not significantly improved upon by any PW at the time of giving evidence

(d) That there are no major contradictions in the evidence of the PW's and it is well settled by now that minor contradictions which do not effect the materiality of the evidence can be ignored. In this respect reliance is placed on **Zakir Khan V State** (1995 SCMR 1793).

(e) **Most significantly** the narcotics were recovered from the boot of the car which the appellant was a passenger in at the time of the recovery of the narcotics **and the car was owned by him which he has admitted in his S.342 statement**. The car was recovered along with its key and the narcotics. In this respect in the similar case of **Nadir Khan V State** (1998 SCMR 1899) it was held as under,

"We have gone through the evidence on record and find that the petitioners had the charge of vehicle for a long journey starting from Peshawar and terminating at Karachi. They had the driving licences also. As being person incharge of the vehicle for such a long journey, they must be saddled with the necessary knowledge with regard to the vehicle and its contents. The probabilities or the presumptions are all dependents on the circumstances of each case and in the present case the circumstances fully establish their knowledge and awareness of the contents and their explanation showing the ignorance actually strengthens that conclusion rather than weakening it".

(f) That it would be extremely difficult to foist such a large amount of heroin being in total 110 KGs with the appellants share being 25 KG's. The car belonged to the appellant, he was sitting in the passenger seat and the narcotics were in the boot of the car (there were no hidden secret cavities where the narcotics were hidden), handed over his share of the narcotics from the boot at the time of arrest and thus in our view the appellant had actual knowledge of the presence of the narcotics in the boot of the car which he was in possession of and was supplying to someone else. Such a conclusion is based on this being the only reasonable inference based on the particular facts and circumstances of this case which also appeals to reason, logic and common sense.

(g) That the recovered narcotics were kept in safe custody from the time of their recovery to the time when they were taken for chemical analysis and no suggestion of tampering with the same has even been

made. The recovered narcotics were sent for chemical analysis without any delay and such chemical report was positive and complied with all relevant legal requirements as is apparent from the report itself and the evidence of CW 1 Dr. Fazal Ellahi Memon who was also the chemical examiner who prepared the chemical report.

(h) That although no Independent mashir was associated with the arrest and recovery of the appellant it has come in evidence that no private person was prepared to become an independent mushir at the time of arrest and recovery despite being asked. Even otherwise S.103 Cr.PC is excluded for offenses falling under the Control of Narcotic Substances Act 1997 by virtue of S.25 of that Act. In this respect reliance is placed on the case of **Muhammad Hanif V The State** (2003 SCMR 1237)

(i) That S.20, 21 and 22 of the CNSA are directory in nature only and non compliance with the same would not be fatal to the prosecution case. In this respect reliance is placed on **Inayatuulah's case** (Supra)

(j) No doubt it is for the prosecution to prove its case against the accused beyond a reasonable doubt but we have also considered the defense case which we disbelieve. This is because the appellant simply raised the defense that he was arrested from his house along with his father in law. He did not give evidence on oath so that his contention could be tested through cross examination and he did not call a single DW in support of this contention and thus in the face of the over whelming prosecution evidence against him we disbelieve his defense that he was at his house at the time when the offense was committed and it is a false case against him. The entire case of the prosecution as seen from its evidence tends to ring true. For example, if the appellant was not a narcotics dealer how come he was able to have over RS one crore in his bank account when he gave no evidence of any job or financial wealth.

(k) Under S.29 CNSA once the recovery has been proven as in this case the onus shifts to the accused to show his innocence in that at least he had no knowledge of the narcotics. The appellant has not been able to

do so in this case. In the case of **Mehboob-Ur-Rehman V State** (2010 MLD 481) it was held as under in this respect at P485 Para 14

"Under the provisions of section 29 of the C.N.S. Act once the recovery of contrabands was made from a private car which was by then in control of the two appellants, the burden to explain the possession whether actual or constructive was on the appellants to discharge but neither they have led any evidence in defence nor have appeared in disproof of the prosecution evidence under section 340(2), Cr.P.C. thus the charge laid upon them has remained unrebutted".

14. Thus, for the reasons mentioned above, we find that the prosecution has proved its case beyond a reasonable doubt against the appellant and the impugned judgment is upheld and the appeal is dismissed.

15. The appeal is disposed on in the above terms.