

CERTIFICATE OF THE COURT IN RECORD NO. _____

SINDH HIGH COURT

Co. Tail Appeal No. 476/2017

Composition of Bench.

Single/D.B.

Mr. Justice Mohammad Raza Khan
Mr. Justice Mohammad Saleem Agre
Jesser

Dates of hearing: 16-3-2020

Decided on 27-3-2020

(a) Judgment approved for reporting.

Yes
~~No~~

[Signature]

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/over-rules/ 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.

IN THE HONORABLE HIGH COURT OF SINDH AT KARACHI
CR.APPEAL No. _____/2017

PRESENTED

25-10-2017

SHAHID KHAN S/o ALAM ZAIB

PRESENTLY CONFINED IN

CENTRAL PRISON, KARACHI

House No. D-21, Sultan Abad Mohallah West
Haji Camp, M.T.Khon Road Karachi West

APPLICANT/ ACCUSED

VERSUS

THE STATE

COMPLAINANT/
RESPONDENT

F.I.R No.08/2014

U/S 6 & 9(C) C.N.S.A

PS:ANF (GULSHAN-E-IQBAL) KARACHI

APPEAL FROM SENTENCE
OF COURT OF SESSION U/S 410 CR.P.C

Being aggrieved and dis-satisfied with the judgment dated:
26-09-2017 passed by the learned Session Judge (WEST) at
Karachi, in Session Case No.411/2016 F.I.R No.08/2014 U/S
6 & 9(C) C.N.S.A, PS:ANF (GULSHAN-E-IQBAL) KARACHI
(Certified copy Of judgment Dated:26-09-2017 is filed
herewith and marked as Annexure "A") whereby the learned
trial court convict appellant/ (Accused was juvenile at the time of
commission of alleged offence) above named under section 265-
H(2) Cr.P.C to suffer Rigorous Imprisonment for Life and pay
fine of Rs.1,00,000/-, in default of payment of fine, the accused
shall suffer simple imprisonment of Six months more. The
appellant prefer this appeal as well as suspension of sentence

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Jail Appeal No.476 of 2017

Present:

Mr. Justice Mohammad Karim Khan Agha

Mr. Justice Muhammad Saleem Jessar.

Appellant: Shahid Khan s/o. Alam Zaib through Mr. Shamsul Hadi, Advocate.

The State: Through Mrs. Abida Parveen Channar, Special Prosecutor ANF.

Date of hearing: 16.03.2020.

Date of announcement: 27.03.2020.

J U D G M E N T

Mohammad Karim Khan Agha, J.- Appellant Shahid Khan son of Alam Zab has preferred this Criminal Appeal against the impugned judgment dated 26.09.2017 passed by the learned Sessions Judge (West) Karachi in Session Case No.411 of 2016, F.I.R. No.08 of 2014 U/s. 6 & 9(c), of the C.N.S. Act, 1997, registered at P.S. ANF Gulshan-e-Iqbal, Karachi whereby the appellant has been convicted for an offence under section 9-C CNS Act, 1997 and sentenced under Section 265-H(2) Cr.P.C. to suffer Rigorous Imprisonment for Life and pay fine of Rs.1,00,000/-. In case of default in payment of fine he was ordered to suffer further Simple Imprisonment for six months more. Benefit of section 382-B Cr.P.C. has also been extended to the appellant.

2. The brief facts of the case as per FIR lodged by one Inspector Shiraz of ANF (Gulshan-e-Iqbal), Karachi on 28th November, 2014 are that on the eventful day, on spy tip, he along with subordinates, intercepted the accused while he was going to supply consignment of Charas in a Rickshaw bearing registration No.D-09458 at Ittehad Town near Ilyas Coach Stand, Karachi and recovered 20 packets of Charas weighing one kilogram each, total weight 20 kilograms. Consequent upon instant case was registered inter alia on above facts.

3. After usual investigation report was submitted against the accused before the trial court for trial, but after examination of accused a Medical Board on 24.2.2016 determined his age between 16 to 19 years, therefore

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vide order dated 14.3.2016 learned Special Judge returned the charge sheet to submit the same before the court having jurisdiction. Thereafter a formal charge was framed against the appellant by the concerned court to which he plead not guilty and claimed to be tried.

4. The prosecution in order to prove its case examined two prosecution witnesses who exhibited numerous documents and other items and thereafter closed its side. The statement under section 342 Cr.P.C. of the accused was recorded in which he denied the allegations against him and claimed false implication. He examined himself on Oath but did not call any DW's in support of his defense.

5. Learned Sessions Judge (West) Karachi after hearing the learned counsel for the parties and assessment of evidence available on record, vide judgment dated 26.09.2017, convicted and sentenced the appellant as stated above, hence this appeal has been filed.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment, therefore, the same are not reproduced here so as to avoid unnecessary repetition.

7. Learned counsel for the appellant has contended that the appellant was falsely implicated in this case at the behest of the Pakistan Rangers, and that the narcotics were foisted on him by the ANF police, that he was only 17 years of age, that the Rickshaw in which he was stopped did not belong to him, the complainant was also the IO, that there were contradictions in the evidence of the PW's, that there was no evidence of safe custody of the narcotic and as such the chemical report could not be safely relied upon and that there had been a violation of S.103 Cr.PC and that for any of the above reasons the appellant should be acquitted by extending to him the benefit of the doubt. In support of his contentions he has placed reliance on **The State through Regional Director ANF V Imam Bakhsh and others** (2018 SCMR 2039), **Muhammad Boota V The State** (2020 SCMR 196), **Khair-ul-Bashar V The State** (2019 SCMR 930), **Qaiser Javed Khan V The State** (PLD 2020 SC 57), **Ali Hassan V The State** (PLD 2001 Karachi 369) and **Agha Qais V The State** (PLJ 2010 Cr.C (Lahore) 511 (DB)).

8. On the other hand learned Special Prosecutor ANF has fully supported the impugned judgment and has contended that the appellant was arrested on the spot where the recovery was made from him whilst he was driving a Rickshaw, that there was no delay in sending the chemical report for analysis which report was positive and thus the prosecution had proved its case beyond a reasonable doubt and as such the appeal should be dismissed. In support of her contentions she placed reliance on **State through Regional Director ANF Peshawar V Sohail Khan** (2019 SCMR 1288), **Muhammad Kamran V The State** (2019 SCMR 1314) and **Hussain Shah and others V The State** (PLD 2020 SC 132).

9. 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 appellant, the impugned judgment with their able assistance and have considered the relevant law including that cited at the bar.

10. 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 fact that the appellant was 17 years of age in our view is not relevant as the impugned judgment reveals that the appellant was tried before the relevant trial court keeping in view his age.

(b) 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.

(c) The FIR is not a substantive piece of evidence so we do not consider it is fatal to the prosecution case that the person who transcribed the FIR was not examined especially as it was exhibited in evidence. In this respect reliance is placed on **Muhammed Akram V State** (2006 SCMR 1567)

(d) It is settled by now that there is no restriction on the complainant being the IO provided that no animosity or enmity is alleged against him by the accused and none has been alleged in this case. In this respect reliance is placed on **Zafar V State** (2008 SCMR 1254)

(e) 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. Reliance in this respect is placed on the unreported recent supreme court case of **Mushtaq Ahmed V The State** dated 09-01-2020 in Criminal Petition No.370 of 2019 where it was held in material part as under at para 3;

"Prosecution case is hinged upon the statements of Aamir Masood, TSI (PW-2) and Abid Hussain, 336-C (PW-3); being officials of the Republic, they do not seem to have an axe to grind against the petitioner, intercepted at a public place during routine search. Contraband, considerable in quantity, cannot be possibly foisted to fabricate a fake charge, that too, without any apparent reason; while furnishing evidence, both the witnesses remained throughout consistent and confidence inspiring and as such can be relied upon without a demur."

(f) That the spy information about the rickshaw including its registration number and the route it would take fully corroborates the prosecution case since this is the rickshaw in which the appellant was driving, stopped and arrested whilst proceeding along the informed route and the narcotics discovered which was recovered along with the rickshaw.

(g) 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).

(h) The slight difference in description/weight of the narcotic in the evidence of the PW's is not of any relevance at this stage as this was not raised before the trial court. In this respect reliance is placed on **Muhammed Kamran's case** (Supra)

(i) **Most significantly** the narcotics were recovered from a *concealed place in the rickshaw which the appellant revealed to the police and he was the only*

person in the rickshaw and as such there is no doubt that the accused had actual knowledge of the narcotics which were being transported. The rickshaw was recovered along with the narcotics and despite the police using their best efforts to track down the owner they were unable to succeed. 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 licenses 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".

In this regard reliance is also placed on **Hussain Shah's case** (Supra) which is similar to the facts and circumstances of this case.

Furthermore, 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".

(j) That it would be extremely difficult to foist such a large amount of charas being in total 20 KG's as mentioned in **Mustaq Ahmed's case** (Supra) and **The State V Abdali Shah** (2009 SCMR 291).

(k) That there was no delay in sending the chemical report for analysis which turned out to be positive.

(L) 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 narcotics were sealed on the spot, remained sealed in the malkhana before being transported to the chemical examiner and reached the chemical examiner in a sealed condition as per the chemical report. In this respect reliance is placed on the recent Supreme Court case of **Zahid and Riaz Ali V State** dated 03-03-2020 (unreported) in Jail Appeal No.172 of 2018. Although this case concerned rape since it concerned the safe custody of certain swabs being sent to the chemical examiner we consider its findings to be equally applicable to the safe custody of narcotics being sent to the chemical examiner which held as under at para 5 in material part;

"The chemical examiner's report produced by the lady doctor states that the seals of specimens sent for chemical examination were received intact and it was the chemical examiner who had broken open the seals, therefore, the contention of the petitioners' learned counsel regarding the safe transmission of the specimens is discounted both by this fact as well as by the fact that no question was put regarding tampering of the said seals."

(m) All relevant police entries were duly exhibited.

(n) 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 mashir at the time of arrest and recovery despite being asked. Even otherwise S.103 Cr.P.C 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).

(o) 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 of false implication at the behest of the Pakistan Rangers who he alleged had kept him for 5 days in illegal custody before handing him over to the police to fix him in a false case. The appellant however did not call any witness in support of his defense neither did he produce any application to any court or other concerned official that the Rangers had taken him into illegal custody and nor did he mention this to the remand judge. In his S.342 Cr.PC statement he states that "he only has an old mother and two sisters and they were too not available and they are in village situated in Bunair KPK". However during his evidence under Oath the appellant states that he

"had gone to meet my sister in Ittehad Town Karachi". These statements are contradictory and in our view lead to the conclusion that the appellant's defense cannot be believed and that it is a cooked up defense in order to save his skin.

11. 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.

12. The appeal is disposed of in the above terms.