

CERTIFICATE OF THE COURT BY RECORDS

Cr. J. Appeal No. 278/16

Zahid Khan vs. The State

SINDH HIGH COURT

Composition of Bench.

Single/D.B.

Mr. Justice Mohammad Karim Khan Ashr
Mr. Justice Mohammad Saleem Jassar

Dates of hearing: 18-02-20

Decided on (i) 26-02-20

(a) Judgment approved for reporting.

Yes
No

K.A.

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.

محمد علی

(1)

THE HIGH COURT OF SINDH AT KARACHI

CR JAIL APLAL NO: 2287/16.

- 1- Zahid Khan s/o Jumma Gull
 - 2- Javaid Khan s/o Shoaib
 - 3- Alam Zaib Khan s/o Shoaib
 - 4- Waris Khan s/o Noor Rehman
- } → abated as per APPEALENTS
Crel. at 12/12/2016

VS

State..... RESPONDENT

Subject: Criminal Appeal US 48 of CNSA 1997

Applicant is aggrieved and dissatisfied with the Judgement passed by learned trial court CNS II Karachi dated 21.06-2016. In which the learned trial judge was pleased to convict and sentenced applicant to life in Prisonment and to pay fine Rs.500,000 and in default to pay the fine all the assets have to suffer further Three Years in Prisonment.

This appeal is preferred against impugned judgment on following facts and grounds.

Facts of the case as per FIR are that complainant Mohammad Afzal of PS ANF Clifton, Karachi lodged fir on 04.03.2013, at about 0145 hours, and alleged therein that on 03.03.2013, applicant present at ps received spy information through high ups that international narcotic smugglers namely (i) Javed Khan; (ii) Alam Zaib; (iii) Zahid Khan and (iv) Waris Khan were present along with huge quantity of narcotic contraband at Rafique Manzil, near Noor Masjid, Clifton Cinema, Karachi and would smuggle narcotic by concealing in onion and if immediate

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Jail Appeal No.278 of 2016

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Muhammad Saleem Jessar.

Appellants by: 1. Zahid Khan S/o. Jumma Gull.
2. Javaid Khan S/o. Shoaib.
3. Waris Khan S/o. Noor Rehman
through Mr. Muhammad Islam Leghari,
Advocate.

For State: Mr. Habib Ahmed, Special Prosecutor ANF.

Date of hearing: 18.02.2020.
Date of announcement: 26.02.2020.

J U D G M E N T

Mohammad Karim Khan Agha, J.- Appellants Zahid Khan S/o. Jumma Gul Khan, Javed Khan S/o. Shoaib Khan and Waris Khan S/o. Noor Rehman have preferred this Criminal Jail Appeal against the impugned judgment dated 21.06.2016 passed by the learned Special Court-II (C.N.S.) Karachi in Special Case No.192 of 2012, F.I.R. No.14 of 2013 U/s. 9-C, C.N.S. Act, 1997, P.S. ANF Clifton, Karachi whereby the appellants have been convicted for offence under section 6 punishable under section 9-C CNS Act, 1997 and sentenced to Life Imprisonment and fine of Rs.500,000/- (Rupees five hundred thousand only) each. In case of default in payment of fine they were ordered to suffer further Rigorous Imprisonment for three years. Benefit of section 382-B Cr.P.C. has also been extended to the appellants.

2. The brief facts of the case as per FIR are that complainant Mohammad Afzal of PS ANF Clifton, Karachi lodged FIR on 04.03.2013 at about 0145 hours and alleged therein that on 03.03.2013 he was present at PS and received spy information through high ups that international narcotic smugglers namely (i) Javed Khan, (ii) Alam Zaib, (iii) Zahid Khan and (iv) Waris Khan were present along with huge quantity of narcotic contraband at Rafique Manzil, near Noor Masjid, Jubilee Cinema, Karachi and would smuggle narcotic by concealing it in onions and if immediate action be taken recovery must be possible. Therefore, on

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direction of high ups a raiding party was constituted headed by him along with ASI Muhammad Ali, ASI Umair Fahim, HC Nasir Khan, PC Mazharuddin, PC Zafar Iqbal, PC Zeeshan, PC Rizwan and other ANF staff who duly armed left PS in two official vehicles along with spy informer vide Roznamcha entry No.3 at 1500 hours on 03.03.2013 and on pointation of spy informer at about 1600 hours reached at Flat Nos.1 and 2, ground floor, Rafique Manzil, Shami Road, near Noor Masjid, Jubilee Cinema, Karachi where people were available on the spot and they asked to act as witnesses but they refused due to fear of the narcotic smugglers, therefore, from the raiding party ASI Umair Fahim and HC Nasir Khan were nominated as witnesses and knocked the door of Flat No.1 and 2 standing on the ground floor of the said Rafique Manzil. One person opened the door and on seeing the ANF party tried to close the door who was apprehended with the help of ANF staff who entered the flat where they found three person in a room who were concealing heroin capsules with the help of tools in onions, who were also apprehended and on inquiry they disclosed their names as (i) Zahid Khan son of Juma Gul, (ii) Javed Khan son of Shoaib Khan, (iii) Alam Zaib son of Shoaib Khan and (iv) Waris Khan son of Noor Rehman. On inquiry all the four said persons stated that in two katas heroin capsules and in the stock of onions they stated in which heroin capsules were concealed and further stated that 50 capsules of heroin were lying in a plastic theli. Both the said katas were opened and found in each kata 850/850 heroin capsules shape wrapped with white transparent tape, total 1700 heroin capsules and 50 heroin capsules recovered from plastic theli while the stock of onions cut with the help of cutter and recovered 84 capsules making a total of 1834 heroin capsules which were secured and cut with the help of a cutter from which recovered heroin powder which were weighed on the spot with the help of electronic weight scale and the heroin powder recovered from both the katas were found 23,150/23.150 Kgs (gross), total 46.300 Kgs (gross) from the capsules recovered from plastic thelli and onions capsules total 134 heroin capsules upon weighment found 3.700 Kgs (gross). The heroin 23.150/23.150 from two katas while the capsules from the plastic thelli and onions weighing 3.700 Kgs heroin (gross) were sealed in one kata for the purposes of sending the three katas for chemical analysis. On personal search from accused (i) Zahid Khan recovered cash amount of Rs.800/- from search accused (ii) Javed Khan recovered 'Q' Cell Phone, original CNIC and cash amount of Rs.1000/- from accused (iii) Alam Zaib recovered original CNIC,

driving license, cash amount of Rs.1000/- (iv) while from accused Waris Khan recovered one Cell Phone Nokia-1616 and original CNIC. They also secured about 1000 Kgs. fresh onions from the floor of the said flat and secured four cutters and four packets of glue were sealed in white cloth bags. The recovered heroin powder, tools, fresh onions, articles of personal search and concealed onions were taken into custody and after observing required formalities at the spot present FIR was lodged at PS ANF Clifton, Karachi against the accused persons.

3. After conducting usual investigation a challon was submitted against the accused before the concerned trial court and thereafter a charge was framed against the accused shown in custody whereas one person namely Noman was shown as an absconder. All the accused plead not guilty and claimed trial.

4. The prosecution to prove the charge examined 04 PW's who exhibited various documents and other items in support of the prosecution case where after the prosecution closed its side. The statements under section 342 Cr.P.C. of the accused were recorded in which they denied the allegations leveled against them and claimed false implication. All the accused persons examined themselves under oath and again claimed false implication. They called 2 DW's in support of their defense of false implication.

5. Learned Special Court-II (C.N.S.) Karachi after hearing the learned counsel for the parties and assessment of evidence available on record, vide judgment dated 21.06.2016, convicted and sentenced the appellants as stated above, hence these appeals has been filed against their convictions.

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 duplication and unnecessary repetition.

7. Learned counsel for the appellants has contended that the appellants are innocent and have been falsely implicated in the case, that the heroin was foisted on the appellants, that no heroin powder was actually recovered, that weight of the recovered hereon was in doubt, that there was no evidence of safe custody and as such for any of the above reasons the appellants be acquitted by

extending to them the benefit of the doubt. In support of his contentions he placed reliance on **Ikramullah V The State** (2015 SCMR 1002) and **Syed Karim V ANF** (PLD 2003 Kar 606)

8. On the other hand Learned Special Prosecutor ANF has fully supported the impugned judgment and has contended that the accused had been caught red handed in a flat which they had rented, that there was no doubt as to the weight of the recovered heroin powder as proved by the chemical report which was positive and as such the prosecution had proved its case beyond a reasonable doubt and the appeals should be dismissed.

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 appellants, the impugned judgment with their able assistance and have considered the relevant law.

10. In our view after our reassessment of the evidence we are of the view that the prosecution has proved its case beyond a reasonable doubt against the appellants for the following reasons:-

(a) That the FIR was registered with promptitude giving no time for concoction keeping in view that as per the prosecution evidence it took about eight to nine hours to count and weigh the large amount of capsules and count the onions and the S.161 statements were recorded promptly which were not significantly improved upon by any PW at the time of giving evidence.

(b) That the arrest and recovery was made on the spot in a flat on the pointation of a spy informer and the appellants were caught red handed with the narcotics by the police/ANF 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/ANF witness is as reliable as any other witness provided that no enmity exists between them and the accused and in this case the police/ANF PW's have no enmity with the appellants and the appellants have admitted in their evidence that the police/ANF had no enmity with them and in fact were disinterested witnesses

who had no reason to falsely implicate the appellants. In this respect reliance is placed on **Ijaz Ahmed V The State** (2009 SCMR 99).

(c) That the flat had been rented by the appellants in which the arrest and recovery was made and according to PW 3 Muhammed Iqbal who had rented the flat to one of the appellants (which belonged to PW 4 Ali Raj) the appellants had told him that they wanted to use a part of the flat as a go down for storing onions and potatoes and a few days before the raid he saw onions being dropped at the flats which he had rented where one of the appellants was present. The lease agreement was exhibited at trial. Neither PW's 3 and 4 who were involved in the leasing of the flat had any enmity with the appellants and had no reason to falsely implicate them in this case.

(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) That we do not find any deficiencies in the weighing of the narcotics and that the correct weight has been recorded as per memo of recovery and chemical report.

(f) That the recovered narcotics were kept in safe custody at the Malkana and were sent for chemical analysis without any delay and such chemical report was positive and complied with all relevant legal requirements.

(g) That is extremely difficult for such a large amount of heroin to be foisted on the appellants which is usually not readily available with the police/ANF and if the police/ANF had wanted to falsely implicate the appellants they would not have wasted their time making up an ingenious story of the narcotic capsules being hidden in onions and even recovering 1,000 KG of onions, glue and cutting equipment for the purpose from the flat. They would have simply

foisted the appellants with a plastic shopper full of narcotics. Instead all the aforesaid onions, cutters, glue etc were recovered along with the heroin and even 84 preserved onion samples were exhibited at trial where some of the narcotics had been hidden.

(h) That since onions are perishable goods most of the recovered 1,000 KG of onions (less the 84 which were exhibited) were auctioned off and even the auction receipt and receipt of payment was exhibited and as such they were undoubtedly in the flat and were recovered along with the narcotics at the time of the raid.

(i) That although no independent mashir was associated with the arrest and recovery of the appellants it has come in evidence that the PW's asked independent persons to become mashers but they refused and the police /ANF in any event had to move quickly to ensure that the accused did not leave the flat with the narcotics. 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.

(j) There is no legal bar for the complainant also being the IO of the case as in this case.

11. Thus, for the reasons mentioned above, we find that the prosecution has proved its case beyond a reasonable doubt against the appellants and the impugned judgment is upheld and the appeals are dismissed.

12. The appeals are disposed on in the above terms.