

IN THE HIGH COURT OF SINDH, KARACHI

Present:

*Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Khadim Hussain Tundlo,*

CRIMINAL APPEAL NO.649 OF 2022.

Appellants: Hayatullah S/o Saeed Muhammad
& Ahmedullah S/o Muhammad Lal
through Mr. Shah Imroz Khan,
Advocate

Respondent: The State through Mr. Muhammad
Iqbal Awan, Additional Prosecutor
General, Sindh.

Date of Hearing: 14.04.2023

Date of Announcement: 19.04.2023.

JUDGMENT

Mohammad Karim Khan Agha, J:- Appellants Hayatullah S/o Saeed Muhammad and Ahmedullah S/o Muhammad Lal were tried before the Court of VII Additional District & Sessions Judge/ Additional Model Criminal Trial Court, Karachi West in Sessions Case No.2600/2022 (Old No.03/2016) arising out of Crime No.273 of 2015 U/s. 6/9(c) CNS Act, 1997 registered at PS Gulshan-e-Maymar and vide judgment dated 26.10.2022, the appellants were convicted U/s 265-H(ii) Cr.P.C. for the offence U/s 9-C Control of Narcotics Substance Act and sentenced for life imprisonment and fine of Rs.100,000/- (Rupees One Lac) each and in default of payment of fine, they would suffer further simple imprisonment (S.I.) for six months. However, the benefit of Section 382-B was extended to the appellants.

2. The brief facts of the prosecution case are that the complainant SHO/SIP Abdullah Bhutto of PS Gulshan-e-Maymar alongwith other police officials left for patrolling in the police mobile. When they reached at MDA cut Northern by-pass Gulshan-e-Maymar, they started snap checking of the vehicles. During snap checking, the complainant received spy information that one Hino truck bearing No.TKQ-533 was coming from Hub Chowki by way of Northern by-pass and going towards New Sabzi Mandi in which an apple consignment was loaded and under the consignment of apples, the sacks/boras of narcotics were loaded. On receipt of

such information, the complainant started searching for the said vehicle and in the meantime, signaled one vehicle bearing the said number to stop but the driver accelerated away and did not stop the truck, as such, the complainant and team of ACLC chased the truck. They stopped the truck at Abbas cut Northern by-pass and apprehended two persons therein. On inquiry, the driver of the truck disclosed his name as Hayatullah son of Saeed Muhammad by cast Achakzal, whereas, second person disclosed his name as Ahmadullah son of Muhammad Lal by caste Noor Zai (Afghan national). Thereafter, the police party checked the consignment of apples and under the consignment of apples they also recovered sacks of narcotics. They recovered huge quantity of narcotics, details of which are already mentioned in the FIR and therefore, needs not to be reproduced hereunder. Thereafter, the instant FIR was lodged.

3. After completion of usual investigation, the challan was submitted against the appellants to which they pleaded not guilty and claimed trial.

4. The prosecution in order to prove its case examined 04 witnesses and exhibited various documents and other items. The statements of the appellants were recorded under Section 342 Cr.P.C in which they denied all the allegations leveled against them. They did not give evidence on Oath or produce any witness in support of their defence case.

5. After hearing the parties and appreciating the evidence on record, the trial court convicted the appellants and sentenced them as set out earlier in this judgment; hence, the appellants have filed the instant appeal 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 dated 26.10.2022 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

7. We have heard the arguments of the learned counsel for the appellants and learned Additional Prosecutor General Sindh and gone through the entire evidence which has been read out by the learned counsel for the appellant, and the impugned judgment with their able assistance and have considered the relevant law including the case law cited at the bar.

8. Learned counsel for the appellants has contended that the prosecution case is highly doubtful; that it is lacking in material particulars and same is full of contradictions, inconsistencies and same have caused a serious dent in the prosecution case; that the narcotics were foisted on the appellants; that there was no independent mashir in violation of S.103 Cr.PC; that the appellants had no knowledge of the narcotics in the truck; that the prosecution had failed to produce safe custody and safe transmission of the narcotics to the chemical examiner and as such for any or all of the above reasons the appellants should be acquitted of the charge by extending them the benefit of the doubt. In support of his contentions he placed reliance on the cases of *Gulshan Ara v The State* (2010 SCMR 1162, *Muhammad Hashim v The State* (PLD 2004 SC 856), *Amanat Ali v The State* (2008 SCMR 991), *Ikramullah v The State* (2015 SCMR 1002) and *State v Imam Bakhsh* (2018 SCMR 2039).

9. On the other hand learned A.P.G has fully supported the impugned judgment and contended that the prosecution had fully proved its case against the appellants and that the narcotic was kept in safe custody from the time of its recovery until trial and it would be difficult even not impossible to foist such large amount of charas and opium on the appellants and as such he submitted that the appeal should be dismissed as being without merit. In support of his contentions he placed reliance on the cases of *Ameer Zeb v The State* (PLD 2012 SC 380), *Khuda Bakhsh v The State* (2015 SCMR 735), *Sharafat Khan v The State* (PLD 2022 SC 281), *Faisal Shahzad v The State* (2022 SCMR 905), *Liaquat Ali v The State* (2022 SCMR 1097) and *Hussain Khan v The State* (2022 SCMR 1660).

10. We have carefully considered the arguments of the learned counsel for the parties, scanned the entire evidence and reviewed the relevant case law.

11. After our reassessment of the evidence we find that the prosecution has proved its case beyond a reasonable doubt against the appellants for the following reasons:-

- (a) That the FIR was lodged with promptitude giving no time for concoction and the S.161 Cr.PC 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 and the appellants were caught red handed with the narcotics in the truck which one of the appellants was driving whilst the other was his passenger by the police whose evidence fully corroborates each other in all material respects as well as the prosecution case. There evidence was not dented despite a lengthy cross examination. 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 the appellants were unable to prove through evidence any enmity between the police witnesses and the appellants. Thus we believe the police evidence which is corroborative in all material respects. Reliance in this respect is placed on the case of **Mushtaq Ahmad v The State** (2020 SCMR 474) where it was held by the Supreme Court 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."

- (c) That the appellants were the driver and passenger of the truck respectively which was stopped after specifically being pointed out by a spy informer and the narcotics were recovered hidden under apples in the truck which were secured and sealed on the spot but for the spy information the truck would probably not been stopped and even if stopped the narcotics not found as they were well hidden under the apple bags.
- (d) That there are no material contradictions in the evidence of the PW's and exhibits 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 the case of **Zakir Khan V State** (1995 SCMR 1793).
- (e) That most of the relevant police entries have been exhibited including those relating to departure, arrival and safe custody of the narcotic and mashirnama of arrest and recovery which was prepared on the spot which all support/corroborate the prosecution case.
- (f) The narcotics were sealed at the time of recovery and kept in the malkhana for which the person who recovered the narcotic was examined, the person who deposited the narcotics in the malkhana has been examined, the head of the malkhana has been examined and the malkhana entry

exhibited, the person who took the narcotic to the chemical examiner one day later has also been examined and all the relevant malkhana entries have been exhibited and thus safe custody and safe transmission of the narcotic has been proven from the time it was recovered until the time it was sent to the chemical examiner. Even no suggestion of tampering with the narcotics was made by the appellant during cross examination.

- (g) The chemical report proved to be positive and all relevant protocols were followed.
- (h) That is extremely difficult for such a large amount of narcotics to be foisted on the appellants which is not readily available with the police. In this respect reliance is placed on the cases of *Mustaq Ahmed's case* (Supra) and *The State V Abdali Shah* (2009 SCMR 291).
- (i) At this stage we would like to observe that only 11 packets were taken as a sample from each category of narcotic recovered and not a sample from every packet within that category and as such the prosecution has only been able to prove the packet of one KG narcotic from which a sample was drawn and as such the prosecution through the positive chemical report has only proven 11 KG's of the recovered narcotics. In this respect reliance is placed on the case of *Ameer Zeb v The State* (PLD 2012 SC 380).
- (j) Being the driver and passenger of the truck which contained the narcotics in a hidden place actual knowledge of the narcotics can be found especially as the amount of recovered narcotics was massive which was hidden under the apples in the truck. In this respect reliance is placed on the case of *Nadir Khan V State* (1998 SCMR 1899) where 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". (bold added)

- (k) The truck containing the narcotics was seized on the spot and an inspection report in respect of the same was produced in court which went unchallenged.

- (l) Furthermore, under Section 29 CNSA 1997 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 appellants who were the driver and passenger in the truck have not been able to do so in this case as the evidence shows that the narcotics were recovered from a truck which was being driven by the appellants in which a huge quantity of narcotics had been secretly hidden and as such they were caught red handed and arrested on the spot along with the narcotics which were hidden under the apples in the back of the truck which they were driving and connected to. In this respect reliance is placed on the case of *Mehboob-Ur-Rehman V State* (2010 MLD 481) where 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 un rebutted".

- (m) That although no independent mashir was associated with the arrest and recovery of the appellants and the narcotic this is not surprising because people despite being asked, as in this case, are reluctant to be involved in cases concerning narcotic dealers. Even otherwise, S.103 Cr.P.C is excluded for offenses falling under the Control of Narcotic Substances Act 1997 by virtue of Section 25 of that Act. In this respect reliance is placed on the case of *Muhammad Hanif V The State* (2003 SCMR 1237).
- (n) That in dealing with narcotics cases the courts are supposed to adopt a dynamic approach and not acquit the accused on technicalities. In this respect reliance is placed on the case of *Ghualm Qadir V The State* (PLD 2006 SC 61) which held as under at para 8 P.66.

"We are not agreeable with the contention of the learned counsel because fact remains that "Poppy Flowers" were found lying on the roof of the vehicle therefore, the technicality, which is being pointed out by the learned counsel, would not be sufficient to acquit him. In addition to it in such-like cases Courts are supposed to dispose of the matter with dynamic approach, instead of acquitting the drug paddlers on technicalities, as it has been held in (1993 SCMR 785) and (PLD 1996 SC 305)". (bold added)

(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 of the appellants which is that of false implication simplicitor. They did not give evidence on oath or call any witness in support of their defence case nor present a shred of evidence in respect of it. Thus we disbelieve the defence case in the face of trustworthy, reliable and confidence inspiring prosecution evidence.

12. Thus, for the reasons mentioned above, we find that the prosecution has proved its case beyond a reasonable doubt against the appellants in respect of the recovery of 11 KG's of narcotics which also leads to the sentence of life imprisonment and thus the impugned judgment is upheld and the appeal is dismissed.

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