

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Jail Appeal No.919 of 2019

Present:

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

Appellant:	Muhammad Shahbaz S/o. Muhammad Riaz through Mr. Muhammad Farooq Advocate.
Respondent:	The State through Mr. Habib Ahmed, Special Prosecutor ANF.
Date of hearing:	11.01.2022.
Date of Announcement:	14.01.2022.

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant Muhammad Shahbaz S/o. Muhammad Riaz has preferred the instant appeal against the judgment dated 03.06.2019 passed by Learned Special Court-II (C.N.S.) Karachi in Special Case No.76 of 2013 arising out of Crime No.05 of 2013 u/s. 6/9-C read with sections 14/15 of the C.N.S. Act, 1997, P.S. ANF-C, Karachi whereby the appellant was awarded life imprisonment along with fine of Rs.1,000,000 (Rupees one million only). In default of payment of fine he has to undergo further R.I. for 05 years. Benefit of section 382-B Cr.P.C. has also been extended to the appellant.

2. The brief facts of the prosecution case are that on 18.01.2013 at about 2100 hours Complainant SI Abid Raza Shah of PS ANF-Clifton, Karachi along with other ANF officials reached at KICT Yard No.E1324AI for checking the "hold" container bearing No.CLHU-8682531 and recovered 58 Kgs. (gross) heroin powder concealed in 10 wooden tables and arrested accused Mohammad Shahbaz on the spot and during investigation it revealed that accused Bilal Qamar son of Qamar Hussain had provided E-Form and export documents of his company M/s. BD Enterprises for export of such furniture in which heroin was concealed in 10 wooden tables as mentioned above. After lodging the FIR

investigation was started by Inspector Mohammad Afzal, who furnished the charge sheet against accused persons on 09.02.2013 and placed accused Mohammad Shahbaz in Column No.3 being arrested, whereas he placed five accused persons in Column No.2 with Red Ink including the accused Bilal Qamar and after accepting the charge sheet the copies were supplied to the accused Mohammad Shahbaz and proceedings initiated against the absconding accused persons and they were declared proclaimed offenders. Later on a formal charge was framed against the accused Mohammad Shahbaz to which he pleaded not guilty and claimed to be tried. After recording the evidence of 3 witnesses co-accused Bilal Qamar was arrested and an amended charge was framed against both the appellant and his co-accused Bilal Qamar who both plead not guilty to the amended charge and claimed trial.

3. The prosecution in order to prove its case examined 08 witnesses and exhibited various documents and other items. The statement of the accused were recorded under Section 342 Cr.P.C in which they both denied all the allegations against them. The appellant gave evidence on oath but his co-accused Bilal Qamar did not. Neither of the accused called any witness in support of their defence case.

4. After appreciating the evidence on record the trial court convicted the appellant and sentenced him to life imprisonment as stated above, hence, the appellant has filed this appeal against conviction. The co-accused Bilal Qamar was acquitted and the State has not filed any appeal against his acquittal.

5. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 03.06.2019 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

6. Learned counsel for the appellant has contended that the appellant is completely innocent and that he has been falsely implicated in this case by the ANF; that nothing was recovered from him; that the so called undertaking given by him was fabricated and his signature had been forged; that there was no evidence that the recovery of the narcotics had been kept in safe custody from

the time of their recovery until they were sent for chemical examination and that for any of the above reasons the appellant should be acquitted of the charge by being extended the benefit of the doubt. In support of his contentions he placed reliance on the case of **The State V Imam Bakhsh** (2018 SCMR 2039).

7. On the other hand Special Prosecutor ANF appearing on behalf of the State has fully supported the impugned judgment and contended that the appeal was without merit and should be dismissed.

8. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by 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.

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

(a) Firstly, it is of no assistance to the appellant that the co-accused was acquitted as the evidence against the co-accused was far lesser than that against the appellant whose case was on a completely different footing.

(b) That the FIR was lodged with promptitude giving no time for concoction and the S.161 Cr.PC statements of the witnesses were also recorded promptly which were not significantly improved upon by any PW at the time of giving evidence.

(c) That the appellant was arrested on the spot when the container was opened in his presence and the heroin was found concealed in 10 wooden tables. The appellant had no reason to be in the secured examination area **unless** he was involved in the shipment. Both he and the clearing agent (PW 2 Wajahat Minhas) were both present at which time PW 2 Wajahat Minhas provided the ANF witnesses with the relevant shipping documents. In fact the appellant has admitted his presence at the scene but states that he was a worker at the port and has been falsely implicated by the ANF. The appellant did not cross examine any witness on this line of defence and only raised it at the time of his S.342 Cr.PC statement and his evidence under oath. He did not call any co-worker in his defence or produce any other document to show that he was working at the relevant place at the relevant time and as such we disbelieve his defence which we find to be a complete after thought.

(d) That it has come in evidence that the appellant was the proprietor of two companies involved in the export business and also had bank accounts with the Bank of Punjab in respect of the two companies so it is proven that he was in the export business and was not a lowly laborer at the port as claimed by him.

(e) That PW 2 Wajahat Minhas the clearing agent gave evidence that he had once already arranged such a shipment to Malaysia in 2012 with the appellant and absconder Muhammed Tahir whereby E-Form, invoice and undertaking had been provided to him and that he had once again arranged such a shipment for the appellant which was the shipment in question which had been blocked by the ANF. According to his evidence he was present when the container was opened by the ANF and the appellant pointed out that the narcotics were hidden in ten wooden tables at the back of the container which only the appellant would have known about. His evidence on the recovery of the narcotics on the pointation on the appellant in a hidden place is also corroborated by the ANF witnesses. This witness was an independent witness and no enmity was suggested between him and the appellant and thus had no reason to falsely implicate the appellant in this case, he was not dented during cross examination and he gave his evidence in a straightforward manner and as such we believe his evidence which further confirms that the appellant was in the business of export and was not a lowly port worker.

(f) That the appellant had given a signed undertaking on stamp paper in respect of the consignment in the container from which the narcotics were recovered **which directly connects him with the container and its consignment** in the following terms;

Exh. 5/B/6

Container No.CLHU8682531.

From: **Muhammad Shehbaz S/o. Muhammad Riaz,**
R/o. House No.06, Street No.09, Islam Nagar,
Shahdra, Lahore, CNIC No.35202-2883626-1.

To
The Deputy Collector
Custom East Warf, Karachi.

STATEMENT ON OATH

I the applicant have to export shipment handicrafts wooden furniture to Malaysia which I have assigned to BD Enterprises Karachi and any narcotics or illicit substances have recovered from

inside thereof whose full responsibility shall impose upon me and for which I shall be ready to face all kind of legal proceedings. If any kind of (word ambiguous) found which responsibility shall also shift upon me. I have got prepared the said stuffs/articles under my supervision in my workshop and I have given its custom clearance responsibility to the Kashan Enterprises.

Sd/- Muhammad Shehbaz

Witness: Sd/-

Name: Shehzad Khurram S/o. Hazrat Gul Khan,
R/o. House No.07, Street No.04,
Kot Shahbuddin, Shahdra, Lahore,
Holding CNIC No.35202-7729503-3.

(g) That the amount of 58Kgs of heroin was too large an amount to be foisted especially as it was hidden in wooden tables at the back of the container and that there appears to be no dispute that the narcotic was recovered from the container and that the appellant was present at the time of its recovery.

(h) With regard to safe custody we note that the container was initially desealed by the customs authorities however when it was noted that the container had been blocked by the ANF it was locked and guarded by the ANF until the ANF raiding party arrived. There upon the narcotics were recovered on the pointation of the appellant hidden in the back of the container in 10 wooden tables. The narcotics were weighed and sealed on the spot and then deposited in the Malkhana before being taken in a sealed condition for chemical examination by PW 8 Mazharuddin as confirmed by the chemical report, no allegation of tampering was made in respect of the narcotics during cross examination and thus we find that the prosecution have proven safe custody of the recovered narcotic. In this respect reliance is placed on the 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."

(i) That the chemical report was positive and the relevant protocols for testing were followed.

(j) That the arrest and recovery was made on the spot on the pointation of the appellant 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 proven enmity has come on record against any police officer. Thus we believe the police evidence which is corroborative in all material respects. Reliance in this respect is placed on the case of **Mustaq Ahmed V The State** (2020 SCMR 474)

(k) 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).

(l) That although no independent mashir was associated with the arrest and recovery of the appellant and narcotic 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). Even otherwise as per evidence on record no independent person was prepared to become mashir due to fear of drug smugglers.

(m) 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 **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)

(n) 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 is one of false implication simpliciter which we have already disbelieved in the face of reliable, trust worthy and confidence inspiring prosecution evidence.

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

Muhammad Arif