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## IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha

Mr. Justice Khadim Hussain Tunio

### CRIMINAL APPEAL NO.210 OF 2020

Appellant: Irfan @ Lamba son of Abdul, through Mr. Tariq  
Mehmood A. Khan, Advocate.

For State: Mr. Abrar Ali Khichi, Addl. Prosecutor  
General Sindh.

Date of hearing: 24.01.2022

Date of announcement: 24.01.2022

### J U D G M E N T

**Mohammad Karim Khan Agha, J.-** Appellant Irfan @ Lamba has preferred this Criminal Appeal against the impugned judgment dated 21.02.2020 passed by the learned 1<sup>st</sup> Additional Sessions Judge, Central, Karachi in Session Case No.548 of 2019, F.I.R. No.295 of 2019 u/s. 6/9-C, CNS Act 1997 of PS Nazimabad Karachi whereby the appellant has been convicted under section 265-H(ii) Cr.PC for offence u/s. 9-C CNS Act, 1997 and sentenced to suffer R.I. 04 years 04 months and to pay fine of Rs.20000/- and in default of payment he shall further undergo S.I. of 06 months.

2. The brief facts of the prosecution case as per FIR No.548/2019 are that complainant ASI Fasihullah of PS Nazimabad Karachi has arrested accused Irfan @ Lamba on 12.10.2019 at 0700 hours at KMC School near Kathiwari Mohalla, Nazimabad No.3, Karachi and recovered Chars weighing about 1120 grams and cash amount as drug proceed of Rs.430/- cash Rs.200/- only and lodged such FIR u/s.6, 9(c) CNS Act, 1997.

3. After usual investigations a formal charge was framed against the accused to which he denied all the allegations leveled against him. He claimed to be an innocent and prayed for trial.

4. The prosecution to prove its case 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 appellant recorded his statement under section 342 Cr.PC wherein he denied all the allegations against him. He did not examine himself on oath or call any DW in support of his defence case.

5. Learned Judge of the trial court after hearing the learned counsel for the appellant and assessment of evidence available on record, vide judgment dated 21.02.2020, convicted and sentenced the appellant as stated above, hence this appeal has been filed by the appellant against his conviction. It is noted that the appellant was released on bail by this court pending the decision on his appeal by this court.

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 appellant has contended that the appellant is completely innocent and has been falsely implicated in this case; that S.21 of the CNS Act had been violated as an unauthorized officer had investigated his case; that there was a delay of 2 to 3 days in sending the recovered narcotic for chemical examination and that the prosecution had failed to prove safe custody of the narcotic from the time of its recovery to the time it was sent for chemical examination; that there was no independent mashir in violation of S.103 Cr.PC and as such for any or all 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 has placed reliance on the cases of **Qaiser Khan v The State** (2021 SCMR 363), **Abdul Ghafoor v The State** (2013 C Cr. L J 1185), **Multan Jan v The State** (2020 P Cr. L J 88), **Khalid Nawaz v The State** (1998 P Cr. L J 2008), **Najam Khan v The State** (2006 P Cr. L J 1664) and **Imdad Ali Junejo v The State** (2002 P Cr. L J 1086).



8. On the other hand learned Additional Prosecutor General Sindh for the State has fully supported the impugned judgment and in particular has contended that it is well settled by now that an unauthorised investigating officer who investigates a narcotics case will not lead to an acquittal as this is a curable defect; that there was only a delay of 3 days in sending the narcotic to the chemical examiner which delay has been fully explained; that during this time the narcotic was kept in safe custody and all the PW's corroborate each other in all material respects and can be fully relied upon and as such the appeal should be dismissed. In support of his contentions he has placed reliance on the cases of **Muhammad Hanif v The State** (2003 SCMR 1237), **Muhammad Younas v Mst. Perveen alias Mano** (2007 SCMR 393) and **Gul Alam v The State** (2011 SCMR 624).

9. 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.

10. 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) 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.

(b) That the appellant was arrested on the spot with the narcotics in his possession and was thus caught red handed.

(c) It is not relevant that an unauthorized investigating officer carried out the investigation when the raid had to be made on short notice and there was no time to seek the required permissions under S.21 CNS Act 1997. In this respect reliance is placed on the case of **Muhammed Hanif** (Supra)

(d) That the arrest and recovery was made on the spot 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 suggestion of enmity has been made against any PW. Thus we believe the police evidence and rely upon the same 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)

(e) With regard to safe custody we note that the narcotic after its recovery was taken straight to the Malkana and a Malkana entry was duly exhibited. The narcotic was released to PW Sakhi Muhammed who attempted to take it to the chemical lab for testing on the same day however the lab was closed so he returned the narcotic to the Malkana for safe keeping. The next day was a holiday so he took the duly sealed sample to the chemical examiner the next day. It is noted that the rules which set down the time in which the narcotic is to be taken after recovery to the chemical examiner are only directory in nature and not mandatory and that the narcotics should be delivered for chemical examination within 72 hours of their recovery which has been done in this case with the delay explained. We also find that the narcotics were kept in safe custody from the time of their recovery until they were taken for a chemical test especially as no allegation of tampering has even been made in respect of the recovered narcotics. 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."*

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

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(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) 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** (Supra). Even otherwise as per evidence on record no independent person was prepared to become mashir due to fear of drug dealers.

(i) 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)*

(j) That about 10 FIR's have been exhibited by the prosecution where the appellant has been booked in similar type cases which tends to show that he is a narcotics dealer of a small nature which is corroborated by the fact that he was arrested near a school at 07am in the morning just before school opening hours which gives a strong indication that he might have been dealing his drugs to school children which is a particularly reprehensible and heinous act.

(k) 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 disbelieve in the face of reliable, trust worthy and confidence inspiring prosecution evidence.

11. 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.

12. These are the reasons for our short order of even date which for ease of reference is set out below:-

*"We have heard learned counsel for the appellant and learned Additional Prosecutor General Sindh. For the reasons to be recorded later, we hereby dismiss his appeal. The appellant, present on bail, shall be taken into custody in order to serve out the remaining sentence".*