IN THE HIGH COURT OF SINDH, KARACHI

Present:
Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Zulfiqar Ali Sangi

CRIMINAL APPEAL NO.06 OF 2021

Appellant:	**Niaz Muhammad s/o Roshan Khan through Mr. Jamroz Khan Afridi, Advocate.**
Respondent:	**The State through Mr. Ali Haider Saleem, Additional Prosecutor General Sindh.**
Date of Hearing:	**20.10.2022**
Date of Announcement.	**25.10.2022**

JUDGMENT

Mohammad Karim Khan Agha, J:- The appellant Niaz Muhammad son of Roshan Khan was tried in the Court of 1st Additional Sessions Judge / Model Criminal Trial Court (West) Karachi in Session Case No.489 of 2020 under Crime No.145/2020 u/s.6/9(c) of CNS Act, 1997 registered at PS Docks, Karachi and was convicted for an offence punishable u/s.265-H(ii) Cr.P.C and sentenced to suffer life imprisonment with fine of Rs.1,00,000/- and in case of non-payment of fine appellant shall also suffer SI for one year more vide judgment dated 02.12.2020. The appellant was also extended the benefit of Section 382-B.

2. The brief facts of the prosecution case are that on 11.02.2020 at 2020 hours during the course of patrolling SIP Sher Muhammad of Police Station Docks, acting upon tip off of secret informant reached railways yard near Islami Kanta, Karachi and arrested the present accused Niaz Muhammad son of Roshan Khan while he alongwith co-accused was busy in shifting of huge quantity of chars from a big trawler bearing registration No.C-2865 into his Taxi bearing registration No.JN-5779, Karachi and recovered 20 kilograms of Charas from his possession in presence of mashirs namely HC Arif Ali and PC Abdi. However, co-accused whose name was disclosed as Kaleemullah Jan by apprehended accused made his escape good whilst throwing away narcotics in his possession which were also recovered at the scene as such, instant FIR was registered against the appellant.

3. After usual investigation conducted by the Investigating Officer a formal charge was framed against the accused to which he pleaded not guilty and claimed trial of the case.

4. In order to prove its case the prosecution examined 03 witnesses and exhibited numerous documents and other items and thereafter the side of the prosecution was closed. The statement of the accused was recorded u/s. 342 Cr.P.C. in which he denied all the allegations leveled against him and claimed false implication. He did not examine himself on oath but did call his brother as a DW in order to support his defence case.

5. After hearing the learned counsel for the parties and assessment of evidence available on record, vide the impugned judgment the appellant was convicted and sentenced as stated above, hence this appeal has been filed by the appellant against his conviction.

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

7. Learned counsel for the appellant has contended that there are major contradictions in the evidence of the PW's; that the evidence of the police officials who recovered the narcotics from the appellant cannot be safely relied upon as they are interested witnesses; that no independent mashir was associated contrary to S.103 Cr.PC; that safe custody and safe transmission of the narcotic to the chemical examiner has not been proven by the prosecution and as such the chemical report cannot be relied upon and that for any or all of the above reasons the appellant should be acquitted by extending to him the benefit of the doubt. In support of his contentions he placed reliance on the cases of **Mst. Razia Sultana v the State** (2019 SCMR 1300), **Faizan Ali v The State** (2019 SCMR 1649), **Umed Ali v The State** (2018 MLD 1311), **Sarwar alias Ghulam Sarwar v The State** (2018 MLD 193), **Mst. Marvi Bhatti v The State** (2018 MLD 1329), **Mst. Marvi and another v The State**(2019 P Cr. LJ 1133), **Nazar Muhammad v The State** (2018 YLR 1992), **Miandad v The State** (2019 YLR 954), **Munir Hussain alias Munawar alias Muno v The State** (2019 YLR 51) and **Nazeer Ahmed v The State** (PLD 2009 Karachi 191).

8. On the other hand learned APG has fully supported the impugned judgment. He contended that the prosecution had proved its case against the appellant beyond a reasonable doubt and had in particular contended that the appellant was arrested on the spot when the recovery of the narcotics was made, that safe custody and transmission of the narcotic had been proven which lead to a positive chemical report; that there are only minor contradictions in the case of the prosecution which can be ignored and thus the appeal should be dismissed. In support of his contentions, he placed reliance on the cases of **Sikanadar Hayat v The State** (2022 SCMR 198), **Dad Muhammad v The State** (2020 SCMR 128), **Mushtaq Ahmad v The State** (2020 SCMR 474), **Saeed Yousaf v The State** (2021 SCMR 1295), **Asafandyar v The State** (2021 SCMR 2009), **The State v Fakhar Zaman** (2019 SCMR 1122) and **State through Regional Director ANF Peshawar v Sohail Khan** (2019 SCMR 1288).

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 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 find that the prosecution has proved its case beyond a reasonable doubt against the appellant for the following reasons:-

> (a) The FIR was 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. The complainant and the IO were also separate police officers with no conflict of interest.
>
> (b) 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 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 case of **Mustaq Ahmed V 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 there are no **major** 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 **Zakir Khan V State** (1995 SCMR 1793).

(d) With regard to safe custody of the narcotic from the time it was recovered to the time it reached the chemical laboratory we find that safe custody and safe transmission has been proven. PW 1 Sher Muhammed who was the complainant in the case recovered 10 Kgs from the appellant and 10 kgs from the taxi which he was the driver of and which belonged to him as admitted in his S.342 Cr.PC statement or his brother who was DW 1 and admitted that the car belonged to him and that he had lent it to the accused who was his brother. According to the evidence of PW 1 Sher Muhammed he sealed the narcotics on the spot and straight away on his return to the PS deposited the narcotics in the Malkhana of the PS at about 10.30pm on the same day. PW 3 MukhtarAli Tanoli who was the IO in the case gave evidence that on the next morning at 8am he saw the narcotics in the malkhana which he took personally to the chemical examiner in a sealed condition as confirmed by the chemical report. No suggestion of tampering with the narcotic was put to any PW and the police had no enmity or ill will with the appellant which would lead them to tampering with the narcotic.

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 Supreme Court case of **Zahid and Riaz Ali V State** (2020 SCMR 590). Although this case concerned rape since it concerned the safe custody of certain swabs being sent to the chemical examiner we consider its findings by way of analogy 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."

(e) The narcotic produced a positive chemical report and all relevant protocols were complied with in conducting the test.

(f) 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).

(g) That most of the relevant police entries were exhibited which support the prosecution case.

(h) That the car/taxi which was recovered at the scene admittedly either belonged to the appellant or had been lent to him by his brother. The trawler used in the drug smuggling which was also taken into possession containing narcotics was registered in the name of the absconding co-accused. Both of the taxi and trawler were also produced before the trial court at the time of recording evidence

(i) 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 appellant has not been able to do so in this case as the evidence shows that **the narcotics were recovered from him on the spot and as such he was caught red handed and arrested on the spot along with the narcotics which were recovered from him.**

(j) That although no independent mashir was associated with the arrest and recovery of the appellant this is not surprising because the arrest and recovery was made at night by the docks when people are not likely to be about. Even otherwise S.103 Cr.P.C is excluded for offences 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).

(k) 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 **Ghulam 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)

(l) No doubt it is for the prosecution to prove its case against the accused beyond a reasonable doubt but we have also considered the defence case which in essence as per the

> appellant's S.342 Cr.PC statement was just a basic plea of false implication. The appellant did not give evidence on oath and even the DW who was his brother confirmed that the seized car belonged to him and that he had lent it to the appellant. He did not give any alibi evidence in respect of the appellant and as discussed above the police had no enmity with the appellant and had no reason to implicate him in a false case and as such we disbelieve the defence plea of the appellant.

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.

MAK/PS