

IN THE HIGH COURT OF SINDH, KARACHI

Present:

*Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Arshad Hussain Khan,*

CRIMINAL APPEAL NO.368 OF 2021.

Appellant: Inamullah S/o. Ghulam Mustafa
through Mr. Rasool Bux Solangi,
Advocate.

Respondent: The State through Mr. Habib Ahmed,
Special Prosecutor ANF.

Date of hearing: 24.11.2022.

Date of Announcement: 01.12.2022.

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant Inamullah S/o. Ghulam Mustafa has preferred this appeal against the judgment dated 07.06.2021 passed by the Special Court No.II (Control of Narcotic Substances) Karachi in Special Case No.605 of 2015 arising out of Crime No.45 of 2015 U/s. 6/9-C of Control of Narcotic Substance Act, 1997 registered at P.S. ANF Clifton, Karachi whereby the appellant was convicted and sentenced to Life Imprisonment with fine of Rs.500,000/-. In the event of failure to pay the fine he was ordered to undergo imprisonment for one year more. Benefit of section 382-B Cr.P.C. was extended to the appellant.

2. The facts of the prosecution case are that on or about 20.11.2015 at about 1730 hours in front of Babo Bolan Hotel, Main Hub River Raod, Karachi Complainant SI Mohammad Hasan Khoharo of PS ANF-Clifton, Karachi along with other ANF officials arrested accused Inamullah from a car having a number of plate of green in color mentioning Advocate High Court and AFR-2015, maker Cultus white in color and recovered 83 foil packets of Charas weighing 83 Kgs from the secret cavities of petrol tank and two doors (driver and front side) of the car which lead to the arrest of the appellant and lodging of an FIR against him.

3. After completion of investigation I.O. submitted charge sheet against the accused Inamullah to which he pleaded not guilty and claimed trial.

4. The prosecution in order to prove its case examined 06 witnesses and exhibited various documents and other items. The appellant in his section 342 Cr.PC statement claimed false implication by the police however he did not give evidence on oath or call any DW in support of his defence case.

5. After hearing the parties and appreciating the evidence on record the trial court convicted the appellant and sentenced him as set out earlier in this judgment, hence, the appellant has filed this appeal 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 dated 07.06.2021 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 the appellant is innocent and has been falsely implicated in this case by the police on account of an old enmity; that the narcotics were foisted on the appellant; that the car which the appellant was allegedly driving at the time when he was stopped had no connection with the appellant; that there are material contradictions in the evidence of the PW's which renders it unreliable; that it was not possible to put 70Kgs of narcotics in the fuel tank of a car; that mashirnama of arrest and recovery does not state which packets were recovered from which door of the car and as such is defective; that the prosecution failed to prove safe custody of the narcotic; that the balance of the recovered narcotic which had not been sent for chemical analysis was not produced before the trial court; that the complainant was also the IO which is unlawful; that there was no independent mashir in violation of S.103 Cr.PC and that for any or all of the above reasons the appellant be acquitted of the charge by being extended the benefit of the doubt. In support of his contentions he placed reliance on the cases of **Ali Akber v. The State** (2020 YLR 503), **Zafar Iqbal v. The State and another** (2019 YLR 1916), **Ghulam Qambar and another v. The State** (2015 P Cr.LJ 213), **Shoaib Ali v. The State** (2018 MLD 1835), **Muhammad Yaqoob v. The State** (2018 P Cr.LJ 1476), **Haji Zafar Abbas v. The State and others** (2016 P Cr.LJ 1170), **Khair-ul-Bashar v. The State** (2019 SCMR 930), **Abdul Khalique Shah v. The State** (SBLR 2019 Sindh 197), **Ikramullah and others v. The State** (2015 SCMR 1002), **The State through Advocate-General, NWFP v. Sarfraz and 3 others** (2011 SCMR 641), **Abdul Ahad v. The State** (2019 P Cr.LJ 1355), **Nazeer & another v. The State** (SBLR 2019 Sindh 119), **Abdul Qadir v. The State** (2015

P Cr.LJ 235), **Aslam Khan v. The State** (2021 P Cr.LJ 1018) and **Mureed Majeedano v. The State** (2022 P Cr.LJ 961).

8. On the other hand Special Prosecutor ANF appearing on behalf of the State has fully supported the impugned judgment. In particular he has contended that the evidence of the prosecution witnesses who made the arrest and recovery could be safely relied upon; that the appellant had been caught driving alone in a car which was filled with narcotics hidden in safe cavities; that the prosecution had proven safe custody of the narcotics which resulted in a positive chemical report; that the balance of the recovered narcotics had been destroyed on court orders and as such the prosecution had proved its case beyond a reasonable doubt against the appellant and the appeal 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 appellant, 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) The FIR was registered 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 **appellant was caught red handed with the narcotics** in the car which he was driving 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 appellant was unable to prove through evidence any enmity. In fact any enmity which he suggested to PW 1 was ably rebutted by him and he did not even bring any DW to support his alleged case of enmity between him and PW1 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 **Mushtaq Ahmad v The State** (2020 SCMR 474) where it was held by the Supreme Court in material part as under at para 3;

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"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 accused was the driver of the car which was stopped after specifically being pointed out by a spy informer and the narcotics were recovered from secret cavities in the doors of the car and attached to the fuel tank (not inside the fuel tank) which was pointed out by the accused which was secured and sealed on the spot. There were no other passengers in the car which was recovered from the accused and as per the record of the court was produced before the court and inspected along with the accused driving licence. The appellant is further linked to the car by a sales receipt which was recovered from the car at the time of the recovery of the narcotics along with his CNIC and driving license. The car had been sold to the appellant by PW 6 Yasir Ali who gave evidence to this effect. He was an independent witness and was not damaged during cross examination and no enmity was suggested against him and thus he had no reason to falsely implicate the appellant and as such we believe his evidence

(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 **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 contentions of defence counsel that the complainant and the investigation officer of the case are the same people therefore his evidence cannot be relied upon and its benefit must be given to the appellant. This contention has no force as there is no prohibition in the law for the police officer to investigate the case lodged by him provided that there is no proven enmity or ill will between the police officer and the accused which as already mentioned has not been proven in this case. In this respect reliance is placed on the case of **Zafar v. The State** (2008 SCMR 1254) wherein it is held in Para-11 as under;

"So far as the objection of the learned counsel for the applicant that the Investigation Officer is the complainant and the witness of the occurrence and recovery, the matter has been dealt with by this Court in the case of State through **Advocate-General Sindh v. Bashir and others** PLD 1997 SC 408, wherein it is observed that a Police Office is not prohibited under the law to be complainant if he is a witness to the commission of an offence and also to be an Investigating Officer, so long as it does not in any way prejudice the accused person. Though the Investigation Officer and other prosecution witnesses are employees of A.N.F., they had no animosity or rancor against the appellant to plant such a huge quantity of narcotic material upon him. The defence has not produced any such evidence to establish animosity qua the prosecution witnesses. All the prosecution witnesses have deposed in line to support the prosecution case. The witnesses have passed the test of lengthy cross-examination but the defence failed to make any dent in the prosecution story or to extract any material contradiction fatal to the prosecution case. The prosecution has been successful to bring home the guilt of the appellant to the hilt by placing ocular account, recovery of narcotic material, the Chemical Examiner report G.1, Exh.P.3. The learned counsel for the appellant has not been able to point out any error of law in the impugned judgment and the same is unexceptionable. Even otherwise, mere status of one as an **official** would not alone prejudice the competence of such witnesses until and unless he is proved to be **interested**, who has a motive, to falsely implicate an accused or has previous enmity with the person involved. Reliance is placed on the case of **Farooq v. The State** (2008 SCMR 970)".

(g) 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, the person who took the narcotic to the chemical examiner three days later has been examined and all the relevant malkhana entries have been exhibited and thus safe custody 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.

(h) The chemical report proved to be positive and all relevant protocols were followed.

(i) The balance of the recovered narcotics which were not sent for chemical analysis apart from a representative sample was burnt on the orders of the court as per evidence of PW 3 Anis Rehman who produced both the memo and certificate of sampling and burning respectively 5

and this is why the whole case property was not available before the court.

(j) That is extremely difficult for such a large amount of narcotics to be foisted on the appellant which is not readily available with the ANF. In this respect reliance is placed on the cases of **Mustaq Ahmed's case** (Supra) and **The State V Abdali Shah** (2009 SCMR 291).

(k) Being the driver of the car which was linked to the appellant through the sales receipt recovered from it actual **knowledge** of the narcotics can be found especially as the appellant was able to point out where a huge amount of narcotics (83KG) was hidden in doors of the car and attached to the petrol tank. 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)

(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 appellant who was the driver of the car has not been able to do so in this case as the evidence shows that **the narcotics were recovered from a car which he was the driver and sole occupant after he pointed out to the police where the narcotics were hidden in the car and as such he was caught red handed and arrested on the spot along with the narcotics which were recovered from secret cavities in the car which he was 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 unrebutted".

(m) That although no independent mashir was associated with the arrest and recovery of the appellant 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 we do not find it to be of much significance that the narcotics recovered from both doors being 6 and 7 KG's and 13 KG's in total were sealed together. Even otherwise, 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 which in essence as per the appellants cross examination and S.342 Cr.PC Statement was a plea of false implication on the basis of enmity with the arresting officer which he has not been able to prove. He did not give evidence on oath and did not call any DW in support of this defence case of enmity between PW 1 and his family or vice versa and thus we disbelieve the defence case in the face of trustworthy, reliable 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, the impugned judgment is upheld and the appeal is dismissed.

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