

Not For Reporting

Narcotics Case - Appeal partly allowed as
one appellant was found only to be a facilitator.

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IN THE HIGH COURT OF SINDH, KARACHI

Present:

*Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Mubeen Lakho,*

CRIMINAL APPEAL NO. 629 OF 2019

Appellant	Fayyaz Hussain Gilani son of Riaz Hussain through Mr. Asif Ali Pirzada and Syed Zakir Hussain, Advocates
Respondent	The State/ANF through Mr. Habib Ahmed, Special Prosecutor, ANF.

CRIMINAL APPEAL NO. 721 OF 2019

Appellant	(1) Muhammad Naeem son of Sadiq Khan (2) Barkat Ali son of Haq Nawaz through Mr. Abdul Qayoum Khan, Advocate
Respondent	The State/ANF through Mr. Habib Ahmed, Special Prosecutor, ANF.
Dates of Hearing	30.03.2021 and 31.03.2021
Date of Announcement	06.04.2021

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellants namely Fayyaz Hussain Shah son of Syed Riaz Hussian, Mohammad Naeem son of Sadiq Khan and Barkat Ali son of Haq Nawaz have assailed the impugned judgment dated 05.10.2019 passed by Learned Judge, Special Court-II (C.N.S.) Karachi in Special Case No.354 of 2015 arising out of Crime No.27 of 2015 under Section 9-C, read with Section 14/15 of the C.N.S. Act, 1997 (CNSA) registered at PS ANF Clifton, Karachi whereby the aforesaid appellants were convicted for offences falling under section 6 and 14 and sentenced under section 9-C read with section 15 of the CNSA to Life Imprisonment each and fine of Rs.1,000,000/ (Rupees one million only) each. In case of default in payment of fine they will suffer

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further Rigorous Imprisonment for five (05) years each with the benefit of section 382-B Cr.P.C.

2. The brief facts of the prosecution case are that on 17.06.2015 at about 2300 hours in front of Super Waziristan Hotel, Main Hub River Road, Karachi Inspector Khalid Rasheed of PS ANF Clifton, Karachi along with other ANF staff during snap checking stopped a vehicle/bus bearing registration No.TKU-042 and arrested the accused Mohammad Naeem being driver, accused Barkat Ali conductor of the said vehicle whereas accused Fayyaz Hussain Shah from the passenger seat and after some prevarication all the accused persons pointed out the narcotics substance in huge quantity under the floor of the loading portion of the bus and all 03 accused led the pointed place where the narcotics substance concealed and when the such portion was opened found silver foil packets of Charas and counting 2758 foil packets of different color with different trademarks of Charas weighing 2758 KGs and 55 foil packets of maroon color of Opium weighing 55 KG's recovered. After completing required formalities at the spot the accused persons brought at PS ANF, Clifton where FIR was lodged and the investigation was started by Inspector Khalid Rasheed, who furnished the charge sheet against the accused persons while placing the name of six persons in Column No.2 with red ink namely Taj Mohammad, Habib, Haji Lal Mohammad, Sabir Balouch, Haji Mohammad Yar and Agha Jan. During the course of investigation with the accused Fayyaz Hussain Shah it revealed that he was an ASI in Sindh Police but due to a case of Hon'ble Supreme Court of Pakistan he was demoted and he was serving as HC in the office of SSP West and during service he used to introduce himself as SI and he was responsible to clear the bus having the narcotics from Hub Chowki to Karachi against payment.

3. After completing usual investigation charge sheet was submitted against accused persons and the proceedings initiated against the absconding accused persons under section 512 Cr.PC by showing them as absconders. Subsequently they were declared as proclaimed offenders and case against them was kept on dormant file. The charge was framed against the accused persons to which they pleaded not guilty and claimed trial of the case.

4. The prosecution in order to prove its case examined 05 witnesses and exhibited various documents and other items. The statements of accused persons were recorded under Section 342 Cr.P.C in which they denied all the allegations leveled against them and claimed false implication by the police. They did not examine themselves on oath or call any evidence in support of their defence case.
5. After 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 this appeal against 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 05.10.2019 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 appearing on behalf of the appellant Fayyaz Hussain Shah has contended that he was innocent of any wrong doing and had been falsely implicated in this case because he had damaged the ANF Major Wajid's car; that the whole incident was concocted and never took place and even otherwise at best he was a facilitator; that he had nothing to do with the bus and the other co-accused; that he had no knowledge that there were any narcotics on the bus, that the PW's were contradictory in their evidence; that there was no safe custody of the narcotics; that no narcotics were destroyed as alleged by the prosecution as there were no narcotics to destroy and that for any of the above reasons he should be acquitted of the charge by being extended the benefit of the doubt. In support of his contentions, he placed reliance on **Barkat and another V The State** (2014 P Cr.LJ 1295), **Haji Nawaz V The State** (2020 SCMR 687), **Mst. Jameela V The State** (PLD 2012 SC 369), **Allah Wadhayo V The State** (2001 SCMR 25), **Waqar Nazir V The State** (2007 SCMR 661), **Mehboob ur Rehman V The State** (2013 SCMR 106), **Sabir Ali V The State** (2011 SCMR 629), **Syed Karim V Anti Narcotics Force** (PLD 2003 Karachi 606), **Sabir Shah alias Saloo V The State** (2011 YLR 3096), **Asfandiyar and another V Kamran and another** (2016 SCMR 2084), **Jahanzaib Khan V Special Judge CNS Court, Lahore** (2018 P Cr.LJ 354), **Nazir, Mashooque Ali V The State** (SBLR 2017 Sindh 516), **Mushtaq V The State** (2002 P Cr. LJ 1312), **Inzar V The State** (2013 P Cr.LJ 843), **Rafiq**

and another V The State (2010 P Cr. LJ 567), **Amanat Ali V The State** (2008 SCMR 991), **Nazar Hussain V The State** (2007 YLR 1601), **Taj Akbar V The State** (2011 P Cr. LJ 90), **Gulab Din V The State** (2013 P Cr. LJ 1160), **Riaz Mian V The State** (2014 SCMR 1165), **The State through Regional Director ANF V Imam Bakhsh and others** (2018 SCMR 2039), **Hazar Gul V The State** (2007 YLR 713) and **Jahazaib Khan V Special Judge CNS Court, Lahore** (2018 P Cr. LJ 354).

8. Learned counsel appearing on behalf of the appellants Mohammad Naeem and Barkat Ali has adopted the arguments of learned counsel for Fayyaz Hussain Shah except in terms of facilitation. In support of their contentions, he placed reliance on an unreported judgment in Cr. Acquittal Appeal No.164 of 2012 **State V Abdul Kareem** dated 22.10.2020 .

9. On the other hand Mr. Habib Ahmed, Special Prosecutor, ANF appearing on behalf of the State has fully supported the impugned judgment to the extent of Mohammad Naeem and Barkat Ali although he was of the view that based on the evidence of the IO the prosecution had only been able to prove beyond a reasonable doubt that appellant Fayyaz Hussain Shah was a facilitator within the meaning of S.14 CNSA punishable under S.15 CNSA. He contended that the evidence of the PW's was trust worthy, reliable and confidence inspiring and was to be believed; that all the appellants were in the bus when it was stopped; that the narcotics were recovered from secret cavities on their pointation; that safe custody of the narcotics had been proved; that the narcotics were sent to the chemical analysis which produced a positive chemical report and that for all the above reasons the appeals should be dismissed.

10. We have heard the arguments of the learned counsel for the appellants as well as learned Special Prosecutor, ANF, gone through the entire evidence which has been read out by the counsel for the appellants, and the impugned judgment with their able assistance and have considered the relevant law including the case law cited at the bar.

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:-

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(a) The FIR was registered with promptitude giving no time for concoction and the S.161 Cr.PC statements of the PW's 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 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 appellants 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 Supreme Court case of **Mushtaq Ahmed V The State** dated 09-01-2020 in Criminal Petition No.370 of 2019 where it was held 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 spy information about the bus, its number plate, the names of the persons who would be on board the bus one of whom was a policemen whose role it was to clear the bus from Hub Chowki to Karachi and that huge quantity of narcotics would be on the bus and as pointed out by the spy informer fully corroborates the prosecution case since this is the bus (same plate) which the appellant Naeem was driving, appellant Barkat Ali was the conductor and appellant Fayyaz were on who was a policemen whose role was to get the bus past the various check points whilst carrying huge amounts of narcotics which was stopped and the appellants were all arrested whilst proceeding in the bus along

the informed route with large amounts of narcotics which were recovered by the police from secret cavities within the bus.

(d) 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).

(e) That it was not a bus in the true sense in that no passengers were on it except the driver, the conductor and the police officer to assist in getting the bus through the various checkpoints as it was filled with narcotics. The rear portion of the bus had no seats and it was more like a loading vehicle than a bus and in the place where the seats should have been was a wooden floor under which the narcotics were hidden in secret cavities which were pointed out by all three appellants. It is clear from the evidence that on the night in question the bus was not being used as a passenger bus but by all three of the appellants for transporting huge amounts of narcotics.

(f) **Most significantly** the narcotics were recovered from the bus which was being driven by the appellant Naeem and when it was stopped all three appellants showed the police where the narcotics were hidden in secret cavities under wooden floor boards and as such all three of the appellants *had actual knowledge* of the narcotics which were being transported. The bus was recovered along with the narcotics. In this respect in the similar case of **Nadir Khan V State** (1998 SCMR 1899) 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 licenses 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".

In this regard reliance is also placed on **Hussain Shah and others V The State** (PLD 2020 SC 132) which is similar to the

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facts and circumstances of this case.

(g) 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 have not been able to do so in this case and in fact the narcotics were recovered by the police on the pointation of the appellants. In the case of **Mehboob-Ur-Rehman V State** (2010 MLD 481) 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".

That the appellant's defense in essence was that they had all been arrested by the police prior to the incident and had been falsely implicated in the case. However they did not give evidence on oath or produce a single DW in support of their defence or any other material to dislodge the above presumption which remained unrebutted.

(h) That it would be extremely difficult to foist such a large amount of charas being in total 2758 KG's as well as 55 KG's of opium as mentioned in **Mustaq Ahmed's case** (Supra) and **The State V Abdali Shah** (2009 SCMR 291).

(i) That there was no delay in sending the chemical report for analysis which turned out to be positive.

(j) That the recovered narcotics were kept in safe custody from the time of their recovery to the time when they were taken for chemical analysis and no suggestion of tampering with the same has even been made. The narcotics were sealed on the spot, remained sealed in the malkhana before being transported to the chemical examiner in a sealed condition as per the chemical report. In this case the PW who recovered the narcotics was examined, the guardian of the Malkana where the drugs were kept was also examined and the PW who took the sealed narcotics to the chemical examiner was also examined who proved safe custody. Even other wise reliance is placed on the recent 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."

(k) All relevant police entries were duly exhibited.

(l) That although no independent mashir was associated with the arrest and recovery of the appellant it has come in evidence that no private person was willing to become an independent mashir at the time of arrest and recovery. 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).

(m) That there is no absolute legal bar on the complainant also being the IO. In this respect reliance is placed on **Zafar V State** (2008 SCMR 1254)

(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 **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) That even in the best case scenario where it can be concluded that the charas was not burnt (to which view we do not subscribe to) as we believe the PW's the appellants were still guilty of transporting 55 KG's of

Opium which was weighed, tested (found to be positive) and produced at trial which would justify the conviction and sentences handed down to the appellants.

(p) 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 we disbelieve for the reasons we have already discussed above. Namely, there is not a shred of evidence to support their defense case which is not believable in the face of such overwhelming 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 Naeem and Barkat Ali and the impugned judgment is upheld and their sentences maintained and their appeal is dismissed. However with respect to accused Fayyaz we find that the prosecution has only proved the case against him as a facilitator under S.14 CNSA. This is because the IO in his own evidence stated that,

"According to my investigation accused Fayyaz is not the owner of the narcotics, or its supplier or its possessor. Vol. says that according to my investigation he was only facilitator"

13. It would also be logical that Fayyaz was a facilitator since as he was a policemen he would have ensured safe passage of the bus at any police check post by producing his police ID which was recovered from him at the time of his arrest as well as his influence. Thus, by extending the benefit of the doubt to the appellant Fayyaz we acquit him of the charge in the impugned judgment under S.9© but convict him under S.14 CNSA and sentence him under S.15 CNSA to under go RI for 10 years and fine of RS1,000,000 and in default in payment of fine shall suffer RI for a further two years and as such his appeal is partly allowed. The benefit of S.382 B Cr.PC shall be extended to all the appellants as well as any legally permissible remissions.

14. The appeals are disposed of in the above terms.

Fayyaz
JUDGE

Fayyaz
JUDGE 06/01/21.