

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No.308 of 2015

Present:

Mr. Justice Naimatullah Phulpoto

Mr. Justice Mohammad Karim Khan Agha

Appellant: Saeedullah S/o. Gul Muhammad, through Mr. Shafiq Ahmed, Advocate.

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

Date of hearing: 13.05.2019.

Date of Judgment: 21.05.2019.

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J.- Appellant Saeedullah S/o. Gul Muhammad was tried by learned Judge Special Court No.I (Control of Narcotic Substances), Karachi in Special Case No.1317/2014 arising out of Crime No.46/2014 U/s. 9(c) of the Control of Narcotics Substances Act 1997 (CNSA), P.S. A.N.F.-II, Karachi and vide judgment dated 26.10.2015, the appellant was convicted sentenced to undergo rigorous imprisonment for three years and to pay fine of Rs.30,000/- (Rupees thirty thousand only), in default of payment of fine he was ordered to further undergo simple imprisonment for one month more. The benefit of section 382-B Cr.P.C. was also extended to the appellant (the impugned judgment).

2. The brief facts of the prosecution case as per F.I.R. are that on 10.11.2014, at 0400 hours, Inspector Tahir Ahmed Bhatti complainant of P.S. ANF-II, Muhammad Ali Society, Gulshan-e-Iqbal, Karachi lodged his report on behalf of the State stating therein that on 10.11.2014, he was present in his P.S., when he received spy information from informer through higher officers that Saeedullah S/o. Gul Muhammad, resident of Karachi will take away heroin from Quaidabad on motorcycle No.KCE-5335, 50 of red colour for handing over the same to Sohail Ahmed S/o. Saleh Muhammad at Shah Faisal Colony via Kala Board, Malir at 2.00/3.00 A.M. and if immediate action will be taken, then arrest and

recovery will be sure. On receipt of said information and direction of his high officers, he constituted a raiding party consisting of himself, Hawaldar Bashir, H.C-Muhammad Ibrahim, P.C-Muhammad Qasim, P.C-Waheed Malik, LNK-Mutahir, Driver Muhammad Haneef and on government vehicle under the supervision of Assistant Director-Manzoor Ahmed Phul along with spy informer at 0130 hours, vide roznamcha entry No.6, left their P.S. and reached at 0155 hours, near Edhi Centre, in front Nihal Hospital, Kala Board, Malir, Karachi and started secret surveillance. At about 0245 hours, they saw motorcycle NO.KCE-5335, 50 red colour coming from Malir-15 side and on the pointation of the spy informer they stopped said motor cycle by giving signal and apprehended the rider of the motor cycle. He asked the passers by to act as witness but they refused, hence he then while citing H.C-Muhammad Ibrahim and P.C-Muhammad Qasim as mashirs inquired name etc. from accused on which he disclosed his name to be Saeedullah S/o. Gul Muhammad, resident of House No.1, Street/Muhallah Cantonment Staff Quarter, Dolly Khatta, near Soldier Bazar, Karachi and permanent resident of House No.665/B, Street/Muhallah Mootia Nianwala, Dera Ismail Khan. He took the search of the motorcycle and from the place of keeping articles in front side, he secured one multi colour shopper, opened the same and recovered one packet wrapped in yellow colour solution tape, hence he opened the same and found that in plastic Theli in double Khaki envelope heroin powder came out. He weighed the packet of heroin powder which came to one Kilogram and 20 grams gross. He kept the secured heroin packed along with multi colour shopper in cloth bag and sealed the same for chemical examination. He took the Sims, one coloured copy of CNIC of the accused, one used Air Ticket from Karachi to Islamabad and cash of Rs.820/- from right side pocket of his Shirt. He then arrested the accused as per law. He made inquiry from the accused on the spot as to who is the original owner of secured heroin powder, on which he disclosed that one Haji Sahib, resident of Peshawar is owner and as per program he was going to deliver the same to Sohail S/o. Saleh Muhammad who used to sell heroin at Shah Faisal Colony. He also recovered motorcycle and then prepared such mashirnama of arrest and recovery, read over its contents to mashirs, who while accepting the same as true and correct put their signatures on it, and

so also on sealed parcel of heroin powder. He arrested accused for an offence punishable U/S-6/9(c), 14 & 15 CNSA, therefore, they brought the accused along with secured property as P.S. where he lodged his report against accused.

3. The complainant after registration of case started investigation and recorded 161 Cr.P.C. statements of P.Ws. He wrote letter to the Excise & Taxation Officer for detail of ownership of motorcycle. On same date he sent sealed parcel of heroin powder through P.C-Muhammad Qasim to the office of Chemical Examiner for examination and report. After completion of usual investigation he submitted challan against the accused in the court.

4. The charge was framed against the accused to which he pled not guilty and claimed to be tried. The prosecution in order to prove its case examined two prosecution witnesses. The statement of accused U/s. 342 Cr.P.C. was recorded in which he claimed false implication by the ANF at the behest of the CID police. He did not examine himself on oath or produce any defense witnesses in support of his defense. After a full dressed trial the accused was convicted and sentenced by the impugned judgment as mentioned earlier in this judgment hence the appellant has filed this appeal against his conviction.

5. On 20-09-2016 the sentence of the accused was suspended and he was released on bail subject to him furnishing solvent surety in the sum of Rs 100,000 (one lac only) and PR bond in the like amount to the satisfaction of the Nazir of this court largely on account of him having already served 2 years and six months of a 3 year jail sentence.

6. The facts of the case as well as evidence produced before the trial Court find an elaborate mention in the impugned judgment dated 26.10.2015 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 contended that the appellant was completely innocent and he had been falsely implicated in the case at the behest of the CID; that the IO took no steps to arrest Sohail who the

appellant was allegedly delivering the narcotic to; that the Roznamcha departure entry did not give a full account of the spy information and as such it was falsified; that no arrival entry has been produced in evidence; that at the time of the arrest and recovery there were no independent mushirs; that there was no evidence of safe custody and transmission of the narcotic to the chemical examiner; that the chemical examiners report was defective; that the ownership of the motor bike which the appellant was allegedly driving at the time of his arrest was not established and thus for one/or any of the above reasons the appellant should be given the benefit of the doubt and acquitted.

8. On the other hand learned Prosecutor for the ANF has contended that the appellant was caught red handed with the heroin on him which was recovered from the motor bike which he was riding based on spy information; that the police had no reason to falsely implicate the appellant as they had no enmity with him; that the police asked private persons to be mushirs but none were willing and even otherwise this is not a requirement under the CNSA; that there is evidence of safe custody of the narcotic and safe transmission of the narcotic to the chemical laboratory which test was positive and as such taking all these factors into account the prosecution had proved its case beyond a reasonable doubt and as such the impugned judgment did not require interference and the appeal should 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 appellant, and the impugned judgment with their able assistance and have considered the relevant law.

10. It was a case concerning receipt of spy information and as such Inspector Tahir Ahmed Bhatti of ANF had sufficient time to call private persons for making them as mashirs in this case but he failed to do so which creates a slight dent in the prosecution case. According to the prosecution case, after recovery of the heroin, the accused was brought to the ANF Police Station where a case was registered and case property was sent to the chemical examiner. There is however no evidence with regard

to the safe custody of the heroin powder whilst it was kept at the Malkhana of the Police station prior to it being sent to the chemical examiner. Even the prosecution failed to examine the Head Mohrar, the Incharge of Malkhana of Police station to prove its safe custody which is potentially fatal to the prosecution case. In this respect reliance is place on **Ikramullah and others v. The state** (2015 SCMR 1002). We have also seen one ambiguity with regard to the packets of the heroin powder sent to the chemical examiner. The letter of the I.O. in this respect shows that two packets were sent to the chemical examiner, whereas in the evidence of the Inspector and mashir, it has come on record that there was only one packet which was sent and the Special Prosecutor ANF could not resolve this ambiguity and only stated that it was a typographical error. In our considered view the prosecution has no explanation for such ambiguity, which has come on record which further weakens its case.

11. It has also come on record that accused was found in the possession of motorcycle at the time of his arrest however the I.O. failed to ascertain the ownership of the motorcycle. Further, the recovered bike was hardly in working order and no key was recovered from accused which gives weight to the contention that bike was foisted on the accused. The I.O. has deposed that accused disclosed that heroin in fact belonged to one Haji Sahib but the I.O. made no attempt to interrogate/investigate Haji Sahib. Furthermore, in the departure entry, it is not mentioned that the Inspector had left the Police station after receipt of the spy information stating where the accused could be apprehended. The prosecution has also failed to produce any evidence that firstly spy informer gave information to high police officials as per their version of events. In short, the prosecution story appears to us to be unnatural and unbelievable.

12. There are several circumstances/infirmities in the prosecution case highlighted above which caste doubt on the same. It is settled law that it is not necessary that there should many circumstances creating doubts. If there is a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit of that doubt not as a matter of grace and concession

but as a matter of right. Reliance is placed on the case of **Tariq Pervaiz V State** (1995 SCMR 1345).

13. We have also closely examined the chemical report. It appears from a reading of the chemical report that it has not set out all the protocols of testing and what was the result in respect of each individual protocol test. Namely, whether it was positive or negative. Rather one consolidated report has been prepared. Setting out each protocol test and its result is a mandatory requirement under the law the absence of which will render the chemical report unsafe and unreliable especially as the report goes to the heart of the case against the appellant and as such we cannot safely rely on the same. In this respect reliance is placed on the recent supreme court case of **Khair-ul-Bashar son of Sajawal Khan V The State** (unreported) dated 08-04-2019 in Criminal Appeal No.94/2019 where it was held as under at Para's 2 and 10;

"2. At the very outset we have noticed that the Report of the Punjab Forensic Agency dated 18.02.2016 is deficient in material particulars i.e. while it mentions the names of the three tests performed, it does not provide results of these tests (except a consolidated result) and there is no mention of the test protocols applied in carrying out the said tests. In State v. Imam Bakhsh (2018 SCMR 2039) while discussing Rule 6 of the Control of Narcotic Substances (Government Analysts) Rules, 2001 ("Rules") this Court held that the information required under the said Rule is mandatory. Hence, the Report of the Government Analyst, prepared in consequence of Rule 6, must provide for (i) tests and analysis of the alleged drug (ii) the result of the test(s) carried out and (iii) the test protocols applied to carry out these tests. These three elements form the fundamental and the core elements of a valid Report prepared by a Government Analyst. Non-compliance of Rule 6 and absence of any of these mandatory elements/requirements frustrates the purpose and object of the Act thereby diminishing the reliability and evidentiary value of the Report. Rule 6, inter alia, requires that the Government Analysts must specify the test protocols applied and, therefore, the Report must signify (by name) the protocols applied to carry out the test(s)/analysis, which would certify that full protocols have been followed while conducting the test/analysis. In case the veracity of the Report is challenged by the accused or is being examined by the Court, compliance of full protocols can be called for from the Government Analyst and verified"

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"10. In the present case examination of the report of the Government Analyst mentions the tests applied but does not provide their results except a concluding result, presumably of all the tests, which is not sufficient. The Report also does not signify the test protocols that were applied to carry out these tests. Hence the mandatory requirement of law provided under Rule 6 has not been complied with and, thus, it is not safe to rely on the Report of the Government Analyst dated 18.02.2016. As a conclusion, it is reiterated, that the Report of the Government Analyst must mention (i) all the tests and analysis of the alleged drug (ii) the result of the each test(s) carried out along with the consolidated result and (iii) the name of all the protocols applied to carry out these tests".

14. Thus, for the reasons mentioned above we are of the view that the prosecution has failed to prove its case against the appellant beyond a reasonable doubt and as such the appeal is allowed. The appellant is acquitted of the charge. The appellant who is present on bail, his bail bonds stand cancelled and his surety discharged.

15. The appeal is disposed of in the above terms