

Narcotics - ~~seized~~ Recovery from Truck
Huge Quantity

437

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT
HYDERABAD**

Before:

Mr. Justice Mohammad Karim Khan Agha
Justice Mrs. Kausar Sultana Hussain

Cr. Appeal No.D- 210 of 2019

Syed Nawaz Khan and another

Versus

The State

Appellants : Syed Nawaz Khan S/o Moosa Khan and Syed Nawaz S/o Gul Muhammad	through Mr. Agha Kousar Hussain Advocate
Respondent : The State	through Mr. Abdul Waheed Bijarani, Assistant Prosecutor General, Sindh
Date of hearing	14.03.2023
Date of judgment	16.03.2023

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- This criminal appeal is directed against the judgment dated 07.11.2019, passed by the learned Additional Sessions Judge/Special Judge(N) / Model Criminal Trial Court, Jamshoro at Kotri, in Special Case No.54 of 2019, arising out of Crime No.2 of 2019, registered at Police Station D.I.B Hyderabad, under section 9(c) of Control of Narcotic Substances Act, 1997 (CNSA), whereby the appellants Syed Nawaz Khan S/o Moosa Khan and Syed Nawaz S/o Gul Muhammad have been convicted u/s 6, 7 & 8, 9(c) CNSA and sentenced to suffer imprisonment for life and to pay fine of Rs.500,000/-, each. In case of default in payment of fine

they were directed to suffer simple imprisonment for 03 months more (the impugned judgment). Benefit of Section 382-B Cr.P.C. was also extended to the appellants.

2. The facts of the prosecution case as disclosed in the FIR, lodged by the complainant/Excise Inspector Piyaro Khan Rind on 18.04.2019 at 7:00 PM with police station DIB Hyderabad, District Jamshoro are as under:-

*"That he (complainant) along with AETO Altaf Hussain Kalhoro, the incharge Excise Narcotics Division Special Squad, Excise Inspector Mahboob Jessar and other staff EC Allah Bachayo, EC Shahjahan Solangi, EC Anwar Solangi, EC Altaf Solangi, EC Meer Hassan, EC Ghulam Shabbir, EC Shahid Baloch, EC Abdul Sattar Moryo, EC Bakhshal Solangi, EC Haji Khan Keerio on receipt of spy information vide entry No.36 at 03:30 PM in Government mobile No.GS-9100 left P.S and arrived at place informed at Excise and Narcotics Check Post near Toll Plaza super Highway Jamshoro at 4:00 PM and after some time, spy truck No.K-1166 was coming from Hyderabad, which was stopped. They noticed that two persons were boarded in it, who were informed about the complainant party and got alighted them and on inquiry one person **sitting on driver seat disclosed his name as Syed Nawaz Khan** s/o Moosa Khan Murwat Pathan and another person disclosed his name as **Syed Nawaz** s/o Gul Muhammad Murwat Pathan. Due to non-availability of private mashirs, EC Allah Bachayo and EC Shahjahan were appointed as mashir and in their presence, complainant conducted personal search from accused driver Syed Nawaz Khan and recovered cash Rs.2000/ in two currency notes each Rs.1000/ and one original CNIC and from physical search of accused Syed Nawaz complainant recovered cash Rs.1500/ and original CNIC. The complainant party then conducted search of truck and from secret cavity they recovered 140 packets duly wrapped with Yellow color plastic panni and each packet was opened and checked found containing chars and each packet was weighed separately by the complainant party which became 1000-gram (1-kg) total stood to be 140-KG chars. The said chars was sealed in plastic patchkas. In three patchkas, 40/40 KG chars was sealed and in one patchka 20-kg chars was sealed for chemical examination. The complainant further conducted search of truck of switch board etc but nothing was recovered. The truck was also sealed on spot and the complainant prepared such memorandum of arrest and recovery in presence of above named mashirs with their respective signatures. Thereafter, accused and recovered case property were brought at Excise Office Jamshoro at Kotri where complainant lodged the FIR on behalf of State."*

3. During investigation, Investigating Officer recorded 161 Cr.P.C. statements of the PWs. Samples of the substance / narcotic substance were sent to the chemical examiner and positive chemical report was received. On the conclusion of investigation challan was

submitted against the aforementioned accused/appellants for offence u/s 9(c) of CNSA.

4. The Trial Court framed charge against accused to which they pleaded not guilty and claimed to be tried. At trial, the prosecution examined 03 PWs and exhibited numerous documents and other items. The Statements of the accused were recorded u/s 342 Cr.P.C. wherein they denied the prosecution allegations leveled against them and claimed their false implication in this case; however, they did not examine themselves on oath nor lead any evidence in their defense.
5. Learned trial Judge after hearing the learned counsel for the respective parties and evaluating the evidence available on record, convicted and sentenced the appellants as set out earlier in this judgment.
6. Learned trial Court in the impugned judgment has already mentioned/discussed the evidence of the prosecution witnesses in detail and there is no need to repeat the same here, so as to avoid duplication and unnecessary repetition.
7. Learned counsel for the appellants has contended that the prosecution case is highly doubtful; that it is lacking in material particulars and same is full of contradictions, inconsistencies and same have caused a serious dent in the prosecution case; that the narcotics were foisted on the appellants; that it was not possible for the truck to have come from Peshawar and not been stopped at any check post before reaching Hyderabad; that there was no independent mashir in violation of S.103 Cr.PC; that the appellants had no knowledge of the narcotics in the truck; that the appellants had been fixed by the police as one of them had entered into a love marriage which had annoyed his father in law; that the complainant was also the IO and as such for any or all of the above reasons the appellants should be acquitted of the charge by extending them the benefit of the doubt.
8. On the other hand learned A.P.G has fully supported the impugned judgment and contended that the prosecution had fully proved its case against the appellants and that the narcotic was kept

in safe custody from the time of its recovery until trial and it would be difficult even not impossible to foist such large amount of charas on the appellants and as such he submitted that the appeal should be dismissed as being without merit. In support of his contentions he placed reliance on the case of **Liaquat Ali and another V The State** (2022 SCMR 1097).

9. We have carefully considered the arguments of the learned counsel for the parties, scanned the entire evidence and reviewed the relevant case law.

10. 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:-

- (a) That the FIR was lodged 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 **appellants were caught red handed with the narcotics** in the truck which one of the appellants was driving whilst the other was his passenger 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 appellants were unable to prove through evidence any enmity between the police witnesses and the appellants. 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;

"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."

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- (c) That the appellants were the driver and passenger of the truck respectively which was stopped after specifically being pointed out by a spy informer and the narcotics were recovered from secret cavities in truck which were secured and sealed on the spot. The secret cavities in the truck would explain how the truck was able to pass from Peshawar to Hyderabad without the narcotics being discovered but for the spy information the truck would probably also passed through Hyderabad.
- (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 Officer 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 who was also the complainant has been examined, the person who took the narcotic to the chemical examiner one day later has been examined and all the relevant malkhana entries have been exhibited and thus safe custody and safe transmission 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) That is extremely difficult for such a large amount of narcotics to be foisted on the appellants which is not readily available with the Excise Police. In this respect reliance is placed on the cases of **Mustaq Ahmed's case** (Supra) and **The State V Abdali Shah** (2009 SCMR 291).
- (j) Being the driver and passenger of the truck which was linked actual knowledge of the narcotics can be found especially as the the amount of recovered narcotics was massive (140 KG) which was hidden in secret cavities of the truck. 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) }

- (k) 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 who were the driver and passenger in the truck have not been able to do so in this case as the evidence shows that the narcotics were recovered from a truck which was being driven by the appellants in which a huge quantity of narcotics had been secretly hidden and as such as such they were caught red handed and arrested on the spot along with the narcotics which were recovered from secret cavities in the truck which they were 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".

- (l) That although no independent mashir was associated with the arrest and recovery of the appellants 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).
- (m) 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 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)

- (n) 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 of the appellants is in essence that they were both picked up at a road side restaurant and fixed in this case as one of the appellants had entered into a

love marriage with had annoyed his father in law. However neither of the appellants gave evidence on oath and neither of the evidence called any DW in support of their defence. For example, they could have called some one who saw them being picked up from the restaurant or even more conveniently the wife of one of the appellants to depose about the love marriage and annoyance of her father however this was not done. Furthermore, it is extremely difficult to see how a love marriage which annoyed a father in law in Peshawar can be linked to police officers in Hyderabad. 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 appellants, the impugned judgment is upheld and the appeal is dismissed.
12. The appeal is disposed of in the above terms.