

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Khadim Hussain Tunio

CRIMINAL APPEAL NO.342 OF 2019

Appellant: Rehmatullah son of Ramzan through
Mr. Muhammad Farooq, Advocate.

For State: Mr. Habib Ahmed, Special Prosecutor ANF.

Date of hearing: 25.01.2022

Date of announcement: 31.01.2022

J U D G M E N T

Mohammad Karim Khan Agha, J.- Appellant Rehmatullah son of Ramzan has preferred this Criminal Appeal against the impugned judgment dated 29.05.2019 passed by the learned Judge, Special Court No.II (C.N.S) Karachi in Special Case No.598 of 2015, F.I.R. No.43 of 2015 u/s. 6/9-C, CNS Act 1997 of PS ANF Clifton, Karachi whereby the appellant Rehmatullah has been convicted under Section 9-C CNS Act, 1997 and sentenced to life Imprisonment with fine of Rs.10,00,000/- (One Million) and in default of payment of fine he shall further undergo R.I. of 05 years.

2. The brief facts of the prosecution case as per FIR No.43/2015 are that on 12.11.2015 at about 0230 hours at Raees Baba Bolan Hotel, Main Hub River Road, Karachi complainant SI Attaullah Khan Jadoon of PS ANF Clifton, Karachi alongwith other ANF officials arrested accused Rehmatullah along with a truck bearing Registration No.TAB-587 and recovered 1000 packets of charas weighing 1000 Kgs concealed in the secret cavities made in the diesel tanks of the said truck and during the investigation it revealed that the above said accused person in connivance with other co-accused and absconding accused persons namely Karim son

of Haji Mir Mohammad, Mst. Rashida wife of Abdul Karim, Mir Khalid son of Mir Ahmed and Arif Khan son of unknown facilitated and abetted to smuggle such recovered charas from Karachi to Gawadar then Pasni and Pasni to Yemen, Tanzania and Europe and the accused Rehmatullah during the course of investigation admitted that the actual owner of such recovered charas was Abu Bakar @ Dashti, r/o New Town, CCT Colony, Gawadar and such recovered charas was sent to smuggler Mir Khan r/o Defence, Karachi by the absconding accused Arif Khan r/o Ring Road, Peshawar through his different agents and Mir Khan and his manager Asif directed the accused Rehmatullah that such charas including truck be taken from the special agent of Arif from Peepri, District Malir and then it was to be taken to Gawadar and then Pasni and accused Rehmatullah reached at Peepri and obtained such truck from an unknown Pathan against huge remuneration.

3. After usual investigations charge was framed against the accused to which he denied all the allegations leveled against him and claimed trial.

4. The prosecution to prove its case examined 06 PW's who exhibited various documents and other items in support of the prosecution case whereafter the prosecution closed its side. The appellant recorded his statement under section 342 Cr.PC wherein he denied all the allegations and claimed that he has been falsely implicated by the ANF police. He did not give evidence on oath or call any DW in support of his defence case.

5. Learned Judge of the trial court after hearing the learned counsel for the appellant and assessment of evidence available on record, vide judgment dated 29.05.2019, convicted and sentenced the appellant 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, therefore, the same are not reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellant has contended that the appellant is completely innocent and has been falsely implicated in this case by the ANF police; that he was not the driver of the truck and was not present when any recovery of narcotics was made from the truck; that there are material contradictions in the evidence of the PW's which renders such evidence unreliable; that safe custody of the narcotic had not been proven from the time when it was allegedly recovered and sent for chemical examination; that no private mashirs had been associated with the case and that for any or all the above reasons the appellant should be acquitted of the charge by extending him the benefit of the doubt. In the alternative he submitted that since the appellant was a first time offender and a poor person his sentence should be reduced to time already served in jail instead of life imprisonment. In support of his contentions he placed reliance on the cases of **Khuda Bakhsh v The State** (2015 SCMR 735) and **Ameer Zeb v The State** (PLD 2012 SC 380).

8. On the other hand Special Prosecutor, ANF for the State has fully supported the impugned judgment. In particular he has contended that the appellant was caught red handed on the spot with the narcotics in the truck which were recovered on his pointation in hidden cavities near the fuel tank; that safe custody had been proved; that all the prosecution witnesses were reliable and trust worthy and supported the prosecution case and that there were no material contradictions in the prosecution evidence and as such the appeal should be dismissed. In support of his contentions he has placed reliance on the cases of **State through Director ANF Peshawar V Muhammad Ramzan & Ors.** (2019 SCMR 1295), **State through Director ANF Peshawar V & Fakhar Zaman** (2019 SCMR 1122), **State through Director ANF Peshawar V & Sohail Khan** (2019 SCMR 1288), **Mushtaq Ahmed V The State** (2020 SCMR 474), **Hussain Shah v The State** (PLD 2020 SC 132).

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

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assistance and have considered the relevant law including that cited at the bar.

10. After our reassessment of the evidence we are of the view that the prosecution has proved its case beyond a reasonable doubt against the appellant for the following reasons:-

(a) That the FIR was registered with promptitude giving no time for concoction and the S.161 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 prosecution witnesses proceeded to the pointed place based on spy information to check a particular truck which was being driven by the named appellant which contained huge quantities of narcotics which truck was stopped at the particular place where the named appellant was arrested whilst being in the particular truck as per spy information and from where the recovery was made.

(c) 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 falsely implicate the appellant in a false case. Thus we believe the police evidence which is corroborative in all material respects. In this respect reliance is placed on the case of **Mustaq Ahmed V The State** (2020 SCMR 474)

(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) **Most significantly** the narcotics were recovered from the truck which the appellant was **driving alone** with no other passengers and the narcotics were recovered **on his pointation from secret sealed cavities near/under the diesel tank** of the truck which only he could have known about. The truck was recovered along with its key and the narcotics. In this respect in the similar case of **Hussain Shah** (Supra) it was held as under with respect to the driver of the truck at P.134 para 3;

"Hussain Shah appellant was driving the relevant vehicle when it was intercepted and from a secret cavity of that vehicle a huge quantity of narcotic substance had been recovered and subsequently a report received from the

Chemical Examiner had declared that the recovered substance was Charas. The prosecution witnesses deposing about the alleged recovery were public servants who had no ostensible reason to falsely implicate the said appellant in a case of this nature. The said witnesses had made consistent statements fully incriminating the appellant in the alleged offence. Nothing has been brought to our notice which could possibly be used to doubt the veracity of the said witnesses. Both the courts below had undertaken an exhaustive analysis of the evidence available on the record and had then concurred in their conclusion regarding guilt of the said appellant having been proved beyond reasonable doubt and upon our own independent evaluation of the evidence we have not been able to take a view of the matter different from that concurrently taken by the courts below vis-à-vis the said appellant".

Likewise in the 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 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".*

(f) That in this case the appellant was the sole person in the truck and was driving at the time when it was stopped and the appellant himself pointed out the secret cavities where the narcotic was hidden and as such he had **actual knowledge** that he was transporting the narcotics.

(g) Under S.29 CNSA 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. In the case of **Mehboob-Ur-Rehman V State** (2010 MLD 481) it was held as under in this respect at P485 Para 14

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"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".

(h) That the Chemical report was positive.

(i) The fact that a sample was taken for chemical analysis from each recovered packet of narcotic, as in this case, which each turned out to be positive would render all the material in each recovered packet as a narcotic. In this respect reliance is placed on Amir Zeb's case (Supra) which held as under at P.399 para 8;

"For the purposes of clarity and removal of confusion it is declared that where any narcotic substance is allegedly recovered while contained in different packets, wrappers or containers of any kind or in the shape of separate cakes, slabs or any other individual and separate physical form it is necessary that a separate sample is to be taken from every separate packet, wrapper or container and from every separate cake, slab or other form for chemical analysis and if that is not done then only that quantity or narcotic substance is to be considered against the accused person from which a sample was taken and tested with a positive result." (bold added)

(j) That it would be extremely difficult to foist such a large amount of charas being in total 1000 KGs on the appellant. In this respect reliance is placed on **The State V Abdali Shah** (2009 SCMR 291).

(k) That the recovered narcotics were sealed on the spot and kept in safe custody at the malkana 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 been made. The recovered narcotics were kept in the malkana and then the next day taken for chemical examination by PW 5 Mansheer Ahmed in sealed condition. **In the 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

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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."

(l) That although no independent mashir was associated with the arrest and recovery of the appellant and narcotic 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). Even otherwise it was held in **Shabbir Hussain's case** (2021 SCMR 198) that due to public apathy most citizens are not prepared to act as independent mashirs in such like cases. Furthermore, in this case it was night time and no body was available to be an independent mashir

(m) That the co-accused of the appellant were acquitted is of no assistance to the appellant as only the appellant was caught red handed in the truck with the narcotics. The co-accused were allegedly a part of an international drug smuggling ring which the appellant was also a part of but the prosecution were unable to bring sufficient evidence on record against the co-accused to link them to the instant case where as the case of the appellant is on an entirely different footing.

(n) That in dealing with narcotics cases the courts are expected 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) That since the appellant has been sentenced correctly in accordance with the guidelines set down in **Ghulam Murtaza's**

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case (2009 PLD Lahore 362) and the amount of narcotic recovered was huge we see no special features which might warrant a reduction in sentence for the accused especially in light of the Supreme Court cases of **State through Director ANF Peshawar V Muhammad Ramzan & Ors.** (2019 SCMR 1295), **State through Director ANF Peshawar V & Fakhar Zaman** (2019 SCMR 1122), **State through Director ANF Peshawar V & Sohail Khan** which have made it clear that if narcotics weighing over 10kg's are recovered, as in this case, the **mandatory** sentence is one of life imprisonment.

(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 is one of false implication simpliciter which we disbelieve in the face of reliable, trust worthy and confidence inspiring prosecution evidence especially as no witness had any reason to falsely implicate 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 on in the above terms.