

CERTIFICATE OF THE COURT IN RECORD NO. ---

Cv A. 378 of 2017

M. Yousuf vs. The State

SINDH HIGH COURT

Composition of Bench.

Single/D.B.

Mr Justice Mohammad Kaim Khan Agt

Mr Justice Zulfiqar Ali Sangi

Dates of hearing:

04-20

Decided on

04-20

(a) Judgment approved for reporting.

Yes
No

CERTIFICATE

Certified that the judgment */Order is based upon or enunciates a principle of law */decides a question of law which is of first impression/distinguishes/over-rules/ reverses/explains a previous decision.

*Strike out whichever is not applicable.

NOTE:—(i) This slip is only to be used when some action is to be taken.

(ii) If the slip is used, the Reader must attach it to the top of the first page of the judgment.

(iii) Reader must ask the Judge writing the Judgment whether the Judgment is approved for reporting.

(iv) Those directions which are not to be used should be deleted.

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26/10/16

C.A. Appeal 378/17 Raw. 26.10.2016

IN THE HIGH COURT OF SINDH CIRCUIT COURT HYDERABAD

CR.APPEAL NO.-D. 107 OF 2016

Muhammad Yousif
S/o Muhammad Iqbal,
Adult, Muslim, R/o Khursheed Colony,
Kotri, District Jamshoro
Presently confined at central Prison
Hyderabad

-----Appellant

VERSUS

The State

-----Respondent

CRIMINAL APPEAL UNDER SECTION 410 CR.PC
R/W SECTION 48 CNSA 1997.

Being aggrieved and dissatisfied with the order and Judgment
dated 04.10.2016 passed by Mr. Ghulam Rasool Samoo, The Learned Sessions
Judge Special Judge (N) Jamshoro, whereby he convicted the appellant under
section 9-C CNS Act, 1997, and sentenced him imprisonment for life and to pay
a fine of Rs.10, 00,000/- (Rupees Ten Lac Only) or in default to suffer R.I for two
more. Benefit of section 382 Cr.PC also awarded to the appellant

HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No.378 of 2017.

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Zulfiqar Ali Sangi

Appellant Mohammad Yousif s/o Mohammad Iqbal
 through Mr. Muhammad Farooq, Advocate.

Respondent The State through Habib Ahmed, Special
 Prosecutor ANF.

Date of hearing: 21.04.2020.
Date of Announcement 30.04.2020.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J:- Accused Mohammad Yousif S/o. Mohammad Iqbal was tried by learned Special Judge (N)/Sessions Judge, Jamshoro in Special Case No. 34 of 2012 arising out of Crime No.02/2012 u/s. 9(c) of Control of Narcotic Substances Act, 1997 registered at P.S. ANF, Hyderabad. After trial vide judgment dated 04.10.2016 the appellant Mohammad Yousuf S/o. Mohammad Iqbal was convicted for the offence under section 9(c) of CNS Act, 1997 and sentenced to imprisonment for life and to pay a fine of Rs.10,00,000/- (ten lacs) or in default to suffer R.I. for two years more. Benefit of Section 382-B of Cr.P.C. was also extended to the appellant.

2. Being aggrieved and dissatisfied by the judgment passed by learned Special Judge (N)/Sessions Judge, Jamshoro, the aforesaid appeal has been preferred by the appellant against his conviction.

3. The brief facts of the prosecution case as unfolded in the FIR are that on 19.09.2012 complainant Inspector Syed Sher Ali Shah Sheerazi of ANF-Hyderabad was present at ANF-Station when he received spy information through superiors as well as informer that Provincial Narcotic Smuggler Mohammad Yousif S/o. Muhammad Iqbal Kharal is coming to Khanoth Jamshoro from Karachi in a white colour corolla car with forged number plate GP-7147 of Government and if quick action would be taken,

recovery would be effected. On such information and on the directions of high-ups, a raiding party was constituted consisting of complainant, ASI Afzal Nazeer, PC Ayaz Ahmed, PC Ibrahim, PC Mohammad Aslam, Sepoy Tarique, sepoy Qalandar, LNK Latif and drivers Ashique Hussain and Sajjad Hussain and duly equipped along with informer they left the police station in two government vehicles vide entry No.10 at 0400 hours and reached near Mehran Institute of Science and Technology near Toll Plaza Super Highway, Jamshoro at 0430 hours, where they made nakabandi. At about 0515 hours, complainant party saw one white colour corolla car with number plate GP-7147 coming from Karachi side. The complainant party signaled for the car to stop but the driver of the car tried to accelerate and escape. The complainant party with the help of Government vehicles and staff got stopped the car and apprehended one person from the driving seat of the car. Due to early hours of morning, no public person was available, hence ASI Afzal Nazeer and PC Ayaz Ahmed were cited as witnesses/mashirs and enquired from the name of apprehended accused, who disclosed his name as Mohammad Yousif S/o. Mohammad Iqbal Kharal, resident of House No.05, Khursheed Colony, Kotri. On enquiry about the narcotics, accused disclosed that it is available in diggi and rear seats of the car. The complainant party searched the car and secured four filled nylon bags from diggi, as well as two filled nylon bags from rear seat of car. The nylon bags were checked and found 50-foil packets of blue colour in each nylon bag total 300-foil packets from all six nylon bags were recovered. The foil packets were checked and found two slabs of charas wrapped in white shopper in each foil packet and on each slab. The charas was weighed with electronic scale and each foil packet became 1-Kg, total 300-foil packets became 300-Kgs of charas. Five foil packets were separated from each nylon bag for chemical analysis and total 30-foil packets of charas were sealed separately in six cloth parcels and remaining charas were sealed in six nylon bags. The numbers were mentioned on six parcels for chemical analysis from Sr. No.1 to 6, as well as numbers on the nylon bags for identification. From personal search of accused, a brown purse/wallet was secured in which cash Rs.500/-, one CNIC with No.41204-52337087, two driving license cards, two Pakistani cards, one Allied Bank ATM Card No. 476215000103, one NIB Bank ATM Card No.9991000000984491 in the name of Mohammad Yousif, one District Police Hyderabad Service Card in the name of Inspector Abid

Raza Khan, some visiting cards and some receipts were lying. From further search, the registration documents of the car were not secured. On enquiry, accused disclosed that charas and car were given to him by Haji Ishaque Baloch in Lee Market, Karachi to give the same to the person near Shell Pump, Khanoth. The recovered car was checked and found having engine No.0838519 and Chassis No.CEGO-500311. Such memo of arrest and recovery was prepared with signatures of mashirs. Thereafter accused and property were then brought to ANF-station where complainant lodged FIR on behalf of the State against the accused.

4. After usual investigation challan was submitted against accused Mohammad Yousif Kharal, while showing accused Haji Ishaque as absconder. Charge under section 9(c) of CNS Act, 1997 was framed against accused Mohammad Yousif to which he pleaded not guilty and claimed to be tried.

5. To prove its case the prosecution examined 02 witnesses i.e. complainant Inspector Sher Ali Shah Sheerazi and mashir ASI Afzal Nazeer and exhibited numerous documents and other items and thereafter the side of the prosecution was closed. The statement of the accused person was recorded u/s. 342 Cr.P.C in which he denied all the allegations leveled against him however he neither examined himself on oath nor called any witness in support of his defense case.

6. Learned Special Judge (N)/Sessions Judge, Jamshoro after hearing the learned counsel for the parties and assessment of evidence available on record, vide judgment dated 04.10.2016 convicted and sentenced the appellant as stated above, hence this appeal has been filed by the appellant against his conviction.

7. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the judgment dated 04.10.2016 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

8. Learned counsel for the appellant has contended that the prosecution story is not believable as it would have been impossible for the appellant to travel from Karachi to Hyderabad without being checked

by the police and as such this is a false case and the narcotics have been foisted on the appellant, that there is no evidence of safe custody of the narcotics, that a proper examination of the narcotic was not carried out by the chemical analyst, that S.103 Cr.PC was violated and as such for any of the above reasons the appellant should be acquitted of the charge by extending him the benefit of the doubt. In support of his contentions he has placed reliance on *Sherzada v. The State* (1993 SCMR 119), *Muhammad Iqbal v. The State* (2006 YLR 2756), *Ghuncha Gul v. The State* (2007 YLR 373), *Amanullah alias Aman v. The State* (2000 P. Cr.LJ 1536), *Abdul Majeed v. The State* (2014 YLR 2020), *Azizullah Khan and others v. The State and others* (2014 P. Cr.LJ 561), *Mst. Nasreen Bibi v. The State* (2014 SCMR 1603), *Hakam Deen v. The State through Advocate General and 15 others* (PLD 2006 Supreme Court (A)&K) 43), *Ameer Zeb v. The State* (PLD 2012 Supreme Court 380), *Muhammad Shafi Khan v. The State* (2006 MLD 1596), *Rahim Gul v. The State* (2011 P. Cr.LJ 1769), *Abdul Sattar v. The State* (2016 SCMR 909), *Para Din and others v. The State* (2016 SCMR 806), *Waris Khan and 2 others v. The State* (2006 SCMR 1051), *Muhammad Hashim v. The State* (PLD 2004 Supreme Court 856), *Jahangir Muhammad Khan and others v. The State* (2004 P.Cr.LJ 1424), *Fida Muhammad v. The State* (2005 P.Cr.LJ 1278), *Fazal and 2 others v. The State* (2010 P.Cr. LJ 360), *Nazeer Ahmed v. The State* (PLD 2009 Karachi 191), *Agha Qais v. The State* (2009 P. Cr.LJ 1334), *Ali Hassan v. The State* (PLD 2001 Karachi 369), *Munawar Ali Jatui v. The State* (2012 MLD 1763), *Ali Muhammad v. The State* (PLD 2010 Supreme Court 623), *Riasat Ali v. The State* (2004 P. Cr.LJ 361), *Ijaz-ud-Din v. The State* (2005 YLR 16), *The State/Anti-Narcotics Force through Deputy Director (Law), Karachi v. Muhammad Irshad* (PLD 2007 Karachi 238), *The State through Regional Director ANF v. Imam Bakhsh and others in Criminal Appeals Nos. 523, 524, 525, 494, 452, 51 of 2017, 22 of 2018 and Criminal Petition No.94-Q of 2017 decided on 3rd October, 2018*, *Abdul Ghani and others v. The State and others* (2019 SCMR 608), *Taimoor Khan and another v. The State and another* (2016 SCMR 621), *Muhammad Naeem and another v. The State and others* (PLD 2019 Supreme Court 669) and *Minhaj Khan v. The State* (2019 SCMR 326).

9. On the other hand learned Special Prosecutor ANF has fully supported the impugned judgment. He has contended that the appellant was caught red handed and arrested on the spot driving the vehicle in which the narcotics were found, that the narcotic was kept in safe custody, that the chemical report was positive and the appellants case at best is that only 30KG's of the narcotic were properly tested and as such for all the above reasons the prosecution had proved its case beyond a reasonable doubt and the appeal should be dismissed.

10. 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, the impugned judgment with their able assistance and have considered the relevant law including that cited at the bar.

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

(a) The FIR was lodged with promptitude giving no time for concoction and the S.161 statements were recorded promptly which were not significantly improved upon by any PW at the time of giving evidence.

(b) It is settled by now that there is no legal restriction on the complainant being the IO provided that no animosity or enmity is alleged against him by the accused and none has been alleged in this case. In this respect reliance is placed on **Zafar V State** (2008 SCMR 1254)

(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. Reliance in this respect is placed on the unreported recent 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."

(d) That the spy information about the car including its registration number and the route it would take and even the name of the appellant as the driver of the car which was also recovered with fake number plates fully corroborates the prosecution case since this is the car in which the appellant was driving, stopped and arrested whilst proceeding along the informed route and the narcotics discovered which was recovered along with the car

(e) 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).

(f) **Most significantly** the narcotics were recovered from the car *which the appellant revealed to the police and he was the only person in the car and as such there is no doubt that the accused had actual knowledge* of the narcotics which were being transported. The car 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". (bold added)

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

(g) Furthermore, 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:

"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 it would be extremely difficult to foist such a large amount of charas being in total 300 KG's 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. Even if at best it is accepted that only 30KG's charas of the chemical test could be safely relied upon this would still lead to a life sentence.

(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 and reached the chemical examiner in a sealed condition as per the chemical report. In this respect 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) 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 prepared to become an independent mashir at the time of arrest and recovery despite being asked. Even otherwise S.103 Cr.P.C is excluded for offenses falling under the Control of Narcotic Substances Act 1997 by virtue of S.25 of that Act. In this respect reliance is placed on the case of **Muhammad Hanif V. The State** (2003 SCMR 1237).

(l) If the appellant was innocent then why was he driving a car with false plates? This has not been explained. Furthermore, if the ANF had wanted to fix the appellant in a false case why would they bother foisting 300 KG's of charas on him when a much lesser amount would have served the purpose. Likewise, if the ANF wanted to fix the appellant in a false case why did they bother attempting to trace out Muhammed Ishaque who allegedly gave him the narcotics for delivery in the car who was declared as an absconder in the case and proceed to the petrol pump where the delivery was to be made to try and trace out the person who was to receive the delivery. Such actions by the ANF police do not appeal to logic, reason or commonsense if they only wanted to fix the appellant.

(m) 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. This is because the appellant simply raised the defense that he had been falsely implicated by one Haji Abdullah who he had a dispute with over a lease of a petrol pump. He did not put this reason for false implication to any PW and nor has his defense got anything to do with the ANF police who he did not allege had colluded with the said Haji Abdullah in order to file a false case against him

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during their cross examination. He did not give evidence on oath or call a single defense witness in support of his case.

12. 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.

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

Amf