

IN THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha

Justice Mrs. Kausar Sultana Hussain.

CRIMINAL APPEAL NO.417 OF 2020

Appellant	Qasim Khan s/o Feroz Khan through Mr. Abdul Jalil Marwat, Advocate
Respondent	The State through Mr. Abrar Ali Khichi, Addl. Prosecutor General.
Date of Hearing	11.11.2020
Date of Announcement	13.11.2020

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant Qasim Khan son of Feroz Khan has assailed the impugned judgment dated 06.10.2020 passed by Ist Additional Sessions Judge / Model Criminal Trial Court (MCTC-I)/Special Court (CNS) Karachi Central in a Special Case No.108 of 2020 arising out of Crime No.39 of 2020 u/s. 6, 9(b) of CNS Act, 1997 registered at PS Super Market, Karachi whereby the appellant was convicted u/s.265-H (ii) Cr.P.C. and sentenced to undergo Rigorous Imprisonment for one year and three months (01 year and 03 months) and to pay a fine of Rs.9,000/- and in default of payment of fine he has to further undergo Simple Imprisonment for 03 months 15 days.

2. The brief facts of the prosecution case as per the FIR are that the complainant ASI Ali Rizwan of PS Super Market Karachi has arrested accused Qasim Khan and recovered four pieces of Charas weighing 300 grams and cash amount Rs.1400/- from Kachra Kundi opposite Ilyas Goth, C-1 Area, Liaquatabad, Karachi on 05.02.2020 at 0200 hours, under memo and lodged such FIR u/s.6,9(b) CNS Act, 1997.

3. After usual investigation conducted by the Investigating Officer a formal charge was framed against the accused to which he pleaded not guilty and claimed trial of the case.

4. In order to prove its case the prosecution examined 04 prosecution witnesses and exhibited numerous documents and other items and thereafter the side of the prosecution was closed. The statement of the accused was recorded u/s. 342 Cr.P.C. in which he denied all the allegations leveled against him. He did not examine himself on oath or call any witness in support of his defense case.

5. Learned 1st Additional Sessions Judge/ (MCTC-1)/Special Court (C.N.S.) Karachi Central after hearing the learned counsel for the parties and assessment of evidence available on record, vide judgment dated 06.10.2020 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 judgment dated 06.10.2020 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 has contended that there are major contradictions in the evidence of the PW's especially concerning the memo of arrest and recovery especially as the timings did not tie in, that 4 pieces of charas were recovered however at trial only 3 pieces and broken pieces were produced, that the weighing of the narcotics had not been carried out properly as the narcotics had been weighed with the shopper from which they were allegedly recovered; that it was a case of remand or else the appellant should be acquitted by extending to him the benefit of the doubt.

8. On the other hand learned APG has fully supported the impugned judgment. He contended that the prosecution had proved its case against the appellant beyond a reasonable doubt and had in particular contended that the appellant was arrested on the spot when the recovery of the narcotics was made, that the chemical report was positive and that there are only minor contradictions in the case of the prosecution which can be ignored and thus the appeal should be dismissed. In support of his contentions, he placed reliance on **Mustaq Ahmed V State** (2020 SCMR 474) and **Shazia Bibi V State** (2020 SCMR 460).

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

10. At the outset we would like to make it clear that there is no legal justification for the remand of this case back to the trial court for re hearing which submission we find to be without merit.

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

(a) The FIR was registered 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. The complainant and the IO were also separate police officers with no conflict of interest.

(b) 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 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 case of **Mushtaq Ahmed** (supra) 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."

(c) That there are no **major** 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).

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(d) That all the relevant police entries have been exhibited including those relating to departure and safe custody of the narcotic.

(e) That the evidence of the PW's reveals that the narcotics were weighed on the spot with electronic scales and there is no evidence to suggest that they were weighed along with the shopper.

(f) It is correct that during the recovery and weighing 4 pieces of charas were found and that at trial 3 pieces and some smaller broken pieces were produced however PW 1 Ali Rizwan has explained in his evidence that this occurred because in effect one of the 4 pieces broke into smaller pieces. His evidence in this respect is corroborated by the report of the chemical examiner which reveals that he received 4 pieces of charas for chemical examination as such one of the pieces must have broken into smaller pieces while being returned from the chemical examiner in its cloth.

(g) The narcotics were sealed at the time of recovery and kept in the malkhana until PW 4 Karim Dad took the narcotics to the chemical examiner the next day as such the narcotics were kept in safe custody and there was no delay in sending them 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) A CRO has been exhibited which shows that the appellant had been tried for a similar offense under CNSA and the appellant produced absolutely no evidence to cast any doubt on the prosecution case except for a bare denial of the offense. For example, he did not claim that he had been falsely implicated by the police because he had any enmity with them, he did not give evidence on oath, he did not call any DW in support of his defense case.

(j) 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 appellant has not been able to do so in this case as the evidence shows that the narcotics were recovered from him on the spot and as such he was caught red handed and arrested on the spot along with the narcotics which were recovered from him.

(k) That although no independent mashir was associated with the arrest and recovery of the appellant this is not surprising because the arrest and recovery was made in the early hours of the morning when people were not likely to be about and according to PW 1 Ali Rizwan "no one came near". 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).

(l) 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)

(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 in essence as per his S.342 statement was just a basic plea of false implication. The appellant did not give evidence on oath and did not call any witness in support of his defense cases and as discussed above the police had no enmity with him and had no reason to implicate him in a false case and as such we disbelieve the defense of the appellant.

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.