

IN THE HIGH COURT OF SINDH, KARACHI

Present:

***Mr. Justice Naimatullah Phulpoto,
Mr. Justice Mohammad Karim Khan Agha***

Criminal Appeal No.135 of 2016

Rajab Ali son of Abdul Rehman Soomro

V

The State

Date of hearing	16.10.2018
Date of order	16.10.2018
Appellant	Through Mr. Kanwar Altaf Bhatti, advocate
The State	Through Mr. Habib Ahmed, Spl. Prosecutor ANF

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- By this Judgment, we propose to dispose of this appeal arising out of impugned judgment dated 15.03.2016 passed by the learned 1st Additional Sessions Judge ATC, Karachi whereby the appellant was convicted u/s 9© of the Control of Narcotic Substances Act 1997 and sentenced to undergo imprisonment for life and fine of Rs.100,000/- and in case of non-payment of fine the appellant was ordered to undergo S.I. for one year and 6 months more. Benefit of section 382-B Cr.P.C. was also extended to the appellant.

2. The brief facts of the case according to FIR No.05/2014 are that on 18.03.2014 at 2300 hours, Inspector-Muhammad Muzamil, complainant of P.S. A.N.F. Clifton, Karachi lodged his report on behalf of the State stating therein that on 18.03.2018, he was present at his P.S., when through his higher officer an informer gave him information that to-night

between 2000 hours to 2100 hours narcotic smuggler Rajab Ali, R/o. Nishtar Road, Karachi will transport a huge quantity of heroin on his motorcycle bearing registration No.KGJ-9698 and will hand over the same to his special agent for packing the same at Chand Bibi road, Ahmed Shaheed Chowk, near Civil Hospital, Karachi, for smuggling abroad, and if immediate action will be taken then the recovery of Narcotic and arrest of accused will be sure. Hence on receipt of said information and direction of his higher officers for immediate action, he prepared a raiding party consisting of himself, S.I. Attaullah Khan Jadoon, H.C. Nasir Khan, H.C. Muhammad Akram, P.C. Majid Baloch, P.C. Malik Shahid, P.C. Abdul Hafeez and other A.N.F. staff duly armed with official weapons on official vehicle who along with the informer left their P.S. vide roznamcha entry No.7, at about 1930 hours. On the pointation of the informer they reached at 2000 hours, just opposite to Burn Centre, Chand Bibi Road, Ahmed Shaheed Chowk, near Civil Hospital, Karachi, where they started surveillance. In the meanwhile at 2030 hours, they saw one person having cardboard on his lap at fuel tank of motor cycle coming from Jhuria Bazar, Pan Mandi, and the informer pointed said person to be same Rajab Ali. They encircled said motor cycle bearing registration No.KGJ-9698, stopped the same and apprehended the accused. He asked the people available on the spot to act as mashir, but they refused to act as mashir due to fear of narcotic smugglers. He then cited S.I. Attaullah Jadoon and H.C. Nasir Khan as mashir and inquired name etc. from accused on which he disclosed his name to be Rajab Ali S/o. Abdul Rehman Soomro, resident of House No.G-05, Street No.Q-7/23, Soomro Street, Jameela Street, Nishtar Road, Karachi. On further inquiry the accused disclosed that heroin powder is lying in cardboard carton which is lying on the fuel Tank of his motor cycle. Then in presence of both mashirs he opened said cardboard carton for checking and found that in one white colour big plastic theli

in which 20 white plastic thelies containing heroin powder were lying. He weighed each plastic theli containing heroin powder with electronic scale which weighed one Kilogram each and total weight of heroin powder of twenty plastic thelies amounted to twenty Kilograms of heroin. He separated 20 grams of Heroin powder from each theli of Heroin powder and put in white plastic little thelies and put the same in Khaki envelopes and sealed the same separately. He put serial No.1 to 20 on sealed sample parcels, as well as on remaining heroin powder thelies. He then put the said 20 plastic thelies containing the remaining heroin powder in the same big plastic theli, and kept the same in said cardboard carton and sealed the same in yellow colour nylon bag. He took the personal search of accused and recovered one coloured copy of CNIC of accused, one original registration certificate of said motor cycle in the name of Muhammad Nadeem Qureshi, copy of CNIC of Muhammad Nadeem Qureshi, cash Rs 560, one mobile phone Nokia along with sim card from right side pocket of his shirt. He then arrested the accused and secured the heroin powder, the personal search articles, motor cycle bearing registration No.KGJ-9695 Unique Star 70, its key and prepared such mashirnama of arrest and recovery on the spot, read over its contents to mashirs, who after hearing the same accepted it as true and correct and put their signatures on it, and so also on sample parcels. They then brought the accused and secured property at P.S. where he lodged his report against accused for the commission of offence U/s. 6/9 (c), Control of Narcotic Substances Act.

3. After completion of investigation, police submitted challan against the accused in the Special Court II (CNS) Karachi. The charge was framed against the accused on 23.04.2014 U/S 9 © of the Control of Narcotic Substances Act

1997 to which the accused pleaded not guilty and claimed trial of the case.

4. Prosecution in support of its case examined P.W. 1 Inspector Muhammad Muzamil Ahmed, complainant, P.W. 2 SIP Attaullah Jadoon, exhibited numerous documents and thereafter closed its side. The statement of accused was recorded under Section 342 Cr.P.C whereby he claimed false implication but did not give evidence and did not call any defense witness. After hearing final arguments the trial court convicted the appellant as per the impugned judgment.

5. Learned counsel for the appellant has read the entire evidence and has mainly argued that the appellant had been falsely implicated in this case by the police; that there were no independent mushirs as was required under S.103 Cr.PC that the complainant and the IO were the same which was against natural justice; that the prosecution had not been able to prove safe custody of the narcotic from the time of its recovery until it was sent to the chemical examiner.

6. During the course of his arguments we drew the appellant's attention to the examination-in-chief of PW-2 Attaullah Khan where at the end of the same the judge had recorded;

"The advocate for the accused remained absent till the end of court hour, therefore cross examination of Advocate for the accused is reserved in the interests of justice"

and asked him what was the legal effect of the advocate of the accused being absent during the examination-in-chief of a PW during the trial of an offense which carried the capital sentence. To which he responded that it would amount to the case having to be remanded. Special Prosecutor for the ANF very fairly conceded that the case would have to be remanded under such circumstances and indicated that in such a case

the prosecution would also call PC Majid Baloch as a PW as his evidence would be material for a just decision of the case.

7. We are also of the view that the trial courts failure to ensure that the accused was represented by his or a counsel at the time when a PW was examined in chief should lead to the case being remanded. This is because Article 10 (A) of the Constitution provides the right to a fair trial and due process to an accused which would include in our view his right to be represented by a counsel of his choice or at least a counsel in order to protect his rights especially when the offense was of a capital nature. This is but logical as most accused are laymen who would have little, if any, knowledge of the law and in the absence of defense counsel would be unable to adequately defend themselves. For example during the examination-in-chief of a prosecution witness the accused would not know which questions he could object to and which documents he could oppose being exhibited. Such inability on his part in our view would lead to an unfair trial.

8. We are fortified in our view by the following authorities which in essence have put the onus on the trial court to ensure that an accused in a trial of an offense carrying capital sentence is represented by defense counsel throughout even if it is pauper counsel appointed by the court at state expense in order to protect his rights and ensure that he receives a fair trial.

9. In the case of **Shafique Ahmed V The State** (PLD 2006 Kar 337) it was held as under in this respect at P.383

"It is one of the duties of the Court of Session to see that the accused is represented by a qualified legal practitioner in the cases involving capital punishment. Thus, it is the mandate of the law that cases involving capital punishment shall not be tried in the absence of Advocate for the accused or proceeded without first appointing an Advocate for the accused to defend him if he is unable to do so"

10. Likewise in the case of **Abdul Ghaffar V State** (2011 SCMR 23) at P.26 Para it was held as under in this respect.

“ With immense respect to the learned Judges of the High Court, we are persuaded to hold that it is the primary responsibility of the court seized of a matter to ensure that the truth is discovered and the accused are brought to justice. If the learned trial Court found that the counsel engaged by the appellant had sought too many adjournments, even then he was not appearing, the court could either have directed that a defence counsel be provided to the appellant at State expense or could have given last opportunity to the appellant to make alternate arrangements failing which the court would proceed to decide the matter. This course was not adopted by the learned trial Court and instead on 2-12-1999 gave a total surprise to the appellant by asking him to cross-examine those witnesses for which obviously neither the appellant had the requisite expertise nor he was prepared to do so. In these circumstances and in view of the fair concession given by the State, we find that the procedure adopted by the learned trial Court is reflective of miscarriage of justice and the appellant be allowed one opportunity to have the afore-referred witnesses cross-examined. Consequently, this appeal succeeds on this short ground. The impugned judgment of the learned High Court dated 19-3-2000 and that of the learned trial court dated 30-5-2000 are set aside. The case is remitted to District and Sessions Judge, Rawalpindi who shall either proceed with the matter himself or entrust the same to Additional District and Sessions Judge. The appellant shall be treated as under trial prisoner. He shall be given one opportunity to cross-examine the two witnesses referred to in paragraph 6 above and thereafter the court shall decide the matter within 15 days of the said opportunity given. The parties are directed to appear or arrange representation before the District Judge for 20-5-2010 who shall proceed with the matter in terms of this order”

11. Thus, under the above circumstances we set aside the judgment dated 15.03.2016 and remand the case back to the concerned trial court which shall proceed from the same position after the evidence of PW 1 was completed and thereafter shall record afresh the evidence of the remaining PW's, record the statement of the accused and his evidence (if any) and DW's (if any) and after hearing final arguments from both sides decide the case afresh. The trial court shall ensure

that when further evidence of any PW is recorded the accused is represented by a defense counsel either of his choosing or appointed at state expense. The ANF if it wishes to call any particular witness not already on its calendar of witnesses may, if it so desires, make an appropriate application to the trial court which, if so made, will be decided on merit in accordance with the law.

12. Above are the reasons for our short order which was announced in open court today and which reads as under;-

"Heard the arguments of learned counsel for the parties. By consent, for the reasons to be recorded later on, the impugned judgment is set-aside and case is remanded to the trial court for retrial from the stage of recording evidence of PW-2 (examination-in-chief and cross-examination) and that too in presence of advocate for the accused and further proceedings strictly in accordance with law.

*The appeal is allowed in above terms. The trial court shall issue P.O. for the accused for **30.10.2018** for proceeding with the case".*