

Narcotics : ~~no~~ Unreliable Pos evidence 773

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

Cr. Jail Appeal No.D-128 of 2020
[Wazir Ali and another versus The State]

Cr. Appeal No.D-02 of 2021
[Shahid Hussain versus The State]

Cr. Appeal No.D-05 of 2021
[Wazir Ali versus The State]

BEFORE:

MR. JUSTICE MOHAMMAD KARIM KHAN AGHA
MR. JUSTICE MUHAMMAD SALEEM JESSAR

Appellants : Through Mian Taj Muhammad Keerio,
Advocate.

The State : Through Mr. Shawak Rathore D.P.G

Date of hearing : 15.06.2023

Date of judgment : 21.06.2023

JUDGMENT

MUHAMMAD KARIM KHAN AGHA, J: This single judgment will decide the fate of captioned appeals, as all have been directed against common judgment passed in same crime. Appellants were charged and tried by the learned Special Judge CNS Hyderabad (**Trial Court**) in Special Case No.282 of 2018 [**Re: The State versus Wazir Ali & another**], outcome of Crime No.151 of 2018 registered at P.S City Hyderabad for offences punishable under Sections 9(c) of Control of Narcotics Substance Act, 1997 and after full dressed trial vide impugned judgment dated 21.12.2020 they, being found guilty of the offence, have been convicted under Section 265-H(ii) Cr.P.C and sentenced to suffer imprisonment for life with fine of Rs.1,00,000/- each and in case of non-payment of fine, they have been directed to further suffer S.I for one year each; they have also been given the benefit of Section 382-B Cr.P.C, hence captioned appeals.

2. The brief facts of the case, per FIR lodged by Complainant SIP Imran Rasheed, are that on 29.11.2018 he alongwith his subordinate staff ASI Nazir, PC Zahid, PC Javed Jaferi and PC Anwar Shah left the Police Station on government mobile under roznamcha entry No. 19 at 1800 hours for patrolling in the area and

during patrolling when they reached near Fazal Petrol Pump, they received spy information that two persons, wearing shalwar and Qameez, are standing near Bukhari Masjid, Khokhar Mohallah on two Cars bearing No.BEK-551 and HEV-643 for selling the Charas to someone; that on receiving such information they proceeded towards the pointed place and when they reached there at 02000 hours, they saw both the cars standing there; that they encircled the said cars and apprehended both the accused persons, on inquiry one of them disclosed his name as Wazir Ali S/o Khuda Bux by caste Samo R/o village Tano Maso Ghotki and from his personal search they recovered four notes of Rs.500/- total Rs.2000/- whereas from the digi of his car bearing No. BEK-551, Engine No.Z-343119 Chasis No. 4050779 white colour Model unknown Toyota Corolla, they recovered 40 (Forty) packets under the cover of red and white plastic shopper on which English words "Seattle's Best Cofee" were written, out of which one packet was opened and checked and the same was found containing Charas, thereafter all the packets were weighed at the spot on electric scale and same became 41 K.Gs; the second accused disclosed his name as Shahid Hussain S/o Muhammad Hassan Khokhar R/o New Stand Tooba Masjid Ghotki and from his personal search cash amount of Rs.2800/- in shape of different notes was recovered, whereas from the digi of his car bearing No. BEV-643, Engine No.Z-379014, Chasis No. 4058878, dark brown colour Model unknown Toyota corolla they recovered 43 (forty three) packets, wrapped in cream colour shopper, and English words " New England Coffee" were written thereon; out of which one packet was opened and the same was found containing Charas, thereafter all the packets of charas were weighed on electronic scale and same became 44 K.Gs; that on further inquiry the accused persons disclosed that the recovered charas belongs to their Seth Haji Abdul Hameed Quetta walla and they were standing here for selling the same to Naseem Pathan S/o Abdul Razzak Pathan R/o Hazara Colony American Quarters Hyderabad and Zarak Pathan S/o Abdul Razzak Pathan R/o Hazara Colony American Quarters Hyderabad; that on inquiry about the documents of the cars the accused persons did not give any satisfactory reply; that thereafter recovered charas was sealed separately in white colour cloth bags and accused persons were arrested and such memo of arrest and recovery was prepared at the spot; then accused persons and recovered case property were brought at police station and FIR was lodged.

3. After registration of FIR investigation was entrusted to SIP Arif Mughal, who on completion of investigation submitted the challan against accused persons before the learned trial Court, where copies were supplied to accused/appellants at Ex.01 and formal charge was framed against them at Ex.02, to which they

pleaded not guilty and claimed trial vide their pleas at **Ex.02/A and B**. In order to prove the charge prosecution examined three (03) witnesses at **Ex.03 to 05**, who exhibited and recognized certain documents at **Ex.03/A to 05/D**, then prosecution closed its side at **Ex.06**. Statement of appellants, as required under Section 342 Cr.P.C were recorded at **Ex.07 and 08**, wherein they denied the allegations of the prosecution witnesses and alleged false implication on account of a political dispute, however, neither they examined themselves on Oath nor produced any defense witness. Finally learned trial Court after hearing the arguments of the learned counsel for the parties and considering the evidence on record convicted and sentenced the appellants, as mentioned supra.

4. Learned counsel for the appellants, inter-alia, contended that impugned judgment is entirely against the norms of law; that the impugned judgment is based on surmises and conjecture and is result of misreading and non-reading of evidence; that there are material contradictions in the evidence of prosecution witnesses; that both the appellants were falsely implicated in this case at the instigation of Ali Muhammad Mahar due to political differences during General Election-2018; that though the place of alleged incident is thickly populated area, yet no private mashir has been associated; that all the witnesses are unaware about the description of alleged case property; that recovery was not effected from exclusive possession of appellants; that standard protocols have not been adopted for chemical examination of the case property; that safe custody and safe transmission of alleged chars was doubtful; that Mohrar of Malkhana has not been examined; that vehicles from which the alleged chars was recovered were not produced, but learned trial Court has completely ignored all these important aspects of the case while passing the impugned judgment. He lastly prayed for that the appellants be acquitted by being extended the benefit of the doubt. In support of his arguments he has relied upon the reported cases of (i) QAISER and another versus The STATE [2022 SCMR 1641], (ii) JAVED IQBAL versus The STATE [2023 SCMR 139], (iii) MUHAMMAD SHOAIIB and another versus The STATE [2022 SCMR 1006], (iv) SUBHANULLAH versus The STATE [2022 SCMR 1052] and (v) ISHAQ versus The STATE [2022 SMCR 1422].

5. On the other hand learned D.P.G submits that prosecution has fully prove the case against the appellants and there is no contradiction in their evidence; that appellants have failed to prove any enmity and/or malafide on part of Complainant; that appellants were arrested at the spot with huge quantity of contraband, hence they have rightly been convicted and sentenced by the learned trial Court. He prayed for dismissal of the appeals.

6. We have heard the learned counsel for the appellants as well as learned D. P.G and have also perused the material available on record.

7. Based on our reassessment of evidence on record we find that based on the particular facts and circumstances of the case the prosecution has **NOT** proved the case against the appellants beyond a reasonable doubt for the following reasons:

(a) That we find the entire prosecution case does not ring true for the following reasons;

(i) That according to the FIR the appellants were coming to sell the drugs in the American quarters yet they were arrested in near Khokhar Mohalla in parked vehicles awaiting to sell the narcotics which was no where near the American quarters and at the time of the incident was an extremely busy area so that it was almost impossible to park two cars there at that time without causing huge interruption to the traffic and other passers by.

(ii) That the appellants had managed to drive from Ghotki to Hyderabad completely undetected and did not have any toll receipts with them.

(iii) That it does not appeal to logic, commonsense or reason that the appellants would each drive a separate car and keep the narcotics in the boot of each car. Natural human conduct would have dictated that the appellants travelled in the same car and kept all the narcotics in the boot of that one car. Why double the risk of being caught by using two separate cars headed for the same destination each with narcotics in the boot?

(iv) That there is nothing on record to show that either of the cars belonged to either of the appellants.

(v) That no narcotics were personally recovered from the appellants but only from the car boots.

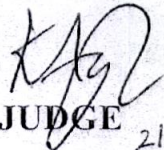
(vi) **Most significantly** the malkhana entry which was exhibited shows that one of the appellants Shahid was arrested 28.11.2018 in another case so how was it possible for him to be arrested on 29.11.2018 in this case. The malkhana entry in respect of this narcotics case only shows the arrest and recovery from the appellant Wazir on the relevant date and does **not** mention appellant Shahid. **Significantly** again, the Malkhana in charge was not examined in order to explain this discrepancy. As such we cannot rule out the fact that the entire prosecution case has been fabricated against the appellants which is the plea which the appellants took.

(vii) Like wise without examining the malkhana incharge doubts surrounding the safe custody of the narcotics arises especially as they were kept in the malkhana for an unexplained period of 6 days before being taken for chemical analysis which renders the chemical report doubtful.

(b) It is well settled by now that the appellants are entitled to the benefit of the doubt as a matter of right as opposed to concession and in this

case for the reasons mentioned above we find doubt in the prosecution case and as such by extending the benefit of the doubt to the appellants they are acquitted of the charge, their appeals are allowed, the impugned Judgment is set aside and both the appellants shall be released unless wanted in any other custody case.

8. Accordingly the appeals are allowed.


JUDGE 21/06/23

~~JUDGE~~

Sajjad Ali Jessar