

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

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

CRIMINAL APPEAL NO.41 OF 2012

Appellant:	Sarwar Shah son of Sobar Shah through Mr. Muhammad Farooq and Ms Faryal Alavi advocates.
Respondent / ANF:	The State through Mr. Habib Ahmed, Special Prosecutor, ANF

CRIMINAL REVISION APPLICATION NO.165 OF 2012

Applicant:	The State/ANF through Mr. Habib Ahmed, Special Prosecutor ANF
Respondent No.2:	Sarwar Shah son of Sobar Shah through Mr. Muhammad Farooq and Ms Faryal Alavi Advocates
Respondent No.3:	Tanveer Amjad son of Abdul Rasheed through Mr. Irshad Ali, Jatoi.
Respondent No.4:	None present for Niamat Ali son of Muhammad Azam Khan.
Respondent No.5:	None present for Rustam Zaman son of Muhammad Moosa.
Date of Hearing:	28.02.2022
Date of Announcement:	03.03.2022

JUDGMENT

Mohammad Karim Khan Agha, J. Appellant Sarwar Shah son of Sobar Shah was charge sheeted to face his trial in Special Case No.62 of 2005 arising out of FIR No.19 of 2005 under section 6-9/C, CNS Act 1997

registered at PS ANF-C, Karachi. The appellant along with his co-accused (Tanveer Amjad, Niamat Ali and Rustam Zaman who have not filed appeals against their convictions) was convicted vide impugned judgment dated 12.12.2011 passed by the learned Judge, Special Court No.I (Control of Narcotic Substances) Karachi whereby the appellant Sarwar Shah was convicted of the offence u/s.14 of the CNS Act, 1997 and was convicted and sentenced u/s.15 of the CNS Act, 1997 to suffer the term of R.I. for the time which he had already undergone in jail (which was about 6 years excluding remission). The State has also filed a revision application against the impugned judgment for enhancement of the appellant's sentence.

2. The brief facts of case as per FIR are that on 12.06.2005 at about 2020 hours the ANF police party headed by Sardar Abdul Waheed accompanied by others namely, ASI Nazir Alam, PC Ali Sher, PC Shahid Raza and PC Ghulam Shabir on spy information, reached the place of Habib Bank Chowrangi near Valika Hospital, pinpointed by the spy and apprehended the accused persons after having caused their vehicle to stop and de-boarded them as occupants thereof, and as a result of the recovery of narcotics i.e. charas weighing 94.700 kg was lying in 4 bags in the trunk thereof, effected under memo prepared to such effect there and then before the official mashirs named above, put them to arrest as well. Further proceedings were carried out there under and then the accused were brought to the police station where FIR No.19/2005 was registered against the accused 4 in number namely, Sarwar Shah, Tanveer Amjad, Niamat Ali and Rustam Zaman for the offence of section 6 punishable u/s.9 of the Control of Narcotic Substances Act, 1997. The same was investigated by the same officer and accordingly the charge sheet was submitted in the court for trial.

3. After usual investigations this matter was challaned and the appellant pleaded not guilty to the charge and claimed trial.

4. In order to prove its case the prosecution examined 03 PW's who exhibited various documents and other items in support of its case. The appellant recorded his statement under section 342 Cr.PC wherein he

denied all the allegations which had been made against him and claimed that he had been falsely implicated in this case by the ANF due to an enmity which he had with the ANF officials. He has also recorded his statement on oath as well as produced 02 DWs in support of his defence case.

5. After hearing the parties and appreciating the evidence on record the learned Judge of the trial court convicted and sentenced the appellant as set-out earlier in this judgment. Hence the appellant has filed this appeal 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 on account of enmity; that there is no evidence of safe custody of the narcotic from the time of its recovery until the time it was sent for chemical examination; that the chemical examiner was not qualified; that there was no independent mashir in violation of S.103 Cr PC and as such for any or all of the above reasons the appellant should be acquitted of the charge by being extended the benefit of the doubt. He also argued that it was not a case of enhancement and that in any event the criminal revision application was time barred. Learned counsel for respondent Tanveer Amjad who had not filed an appeal against his conviction also argued that it was not a case of enhancement on the same lines as the appellant. Learned counsel for respondents Niamat Ali and Rustam Zaman were called absent without intimation despite their names appearing in the cause list in connection with the revision application which had been filed against them by the ANF. In support of his contentions learned counsel for the appellant placed reliance on the cases of **State through Deputy Director (Law) Regional Directorate ANF V Mujahid Naseem Lodhi** (PLD SC 617), **State through Regional Directorate ANF V Imam Bakhsh**

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(2018 SCMR 2014) and an unreported Division Bench judgment of this Court dated 14.12.2020 in Criminal Appeal No.445 of 2018.

8. On the other hand learned Special Prosecutor ANF fully supported the impugned judgment and contended that the appeal should be dismissed especially as the appellant was the driver of the car when it was stopped and huge amount of narcotics was recovered from its boot. That the sentence handed down to the appellant should be enhanced as it was not in accordance with the law bearing in mind the amount of charas which had been recovered and that the criminal revision applicable in respect of all the respondents was not time barred and all their sentences be enhanced to a sentence in accordance with the law.

9. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by learned counsel for the appellant, and the impugned judgment with their able assistance and have considered the relevant law including the case law cited at the bar.

10. After our reassessment of the evidence we find that the prosecution has NOT proved its case beyond a reasonable doubt against the appellant for the following main reasons:-

- (a) That the appellant has put up a strong defence of false implication on account of enmity with the ANF officials which he stuck to throughout during cross examination of witnesses, during his S.342 Cr.PC statement, whilst giving evidence under oath and by calling two DW's. It was held in the case of **Sabir Ali V State** (2011 SCMR 629) that the court must give due consideration to any defence plea especially raised in the S.342 Cr.PC statement and if the court is satisfied that there is a reasonable possibility of the defence case being true then this would react on the whole of the prosecution case and then accused would be entitled to the benefit of the doubt.
- (b) In this respect it is worth setting out the appellant's additional S.342 Cr.PC Statement in material part which reads as under;

**ADDITIONAL STATEMENT UNDER SECTION
342 CR.P.C. OF APPELLANT SARWAR SHAH.**

Answer to the Question. Do you want to say anything else? ⚡

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Answer:- I am innocent, and have been implicated in this case due to the enmity of the ANF with me, and the S.H.O. Manghopir Police Station Karachi. On 05.03.05, I was on the Special Duty at the Manghopir Police Station, Karachi. There was an emergency call for help as some one had been held up by ANF official and others, I along with other police officials reached at the Nusrat Bhutto road Manghopir Road, Karachi at about 20:45 P.M. Seeing the police mobile the ANF official Captain Haji Gul escaped from the place of the incident, while his two accomplices namely accused person Khalil-ur-Rehman and Abdul Majeed were apprehended. The accused person along with the complainant Murad Jan reached at the police station Manghopir, Karachi where Murad Jan lodged F.I.R. No.18/2005 U/s. 393/171/34 PPC. Since I had arrested the accomplices of ANF Captain Haji Gul. The ANF personnel had a grudge with me and were looking for an opportunity to involve me in some narcotic case. On 12.06.05 at 3:30 PM while I was sitting with my brother Zahoor Shah near garam chasma Manghopir, Karachi at the Al-Sahar Estate Agency. Four armed personnel one of them was ANF Police constable Shahid Raza caught hold of me and took me to the police station ANF Clifton Karachi, where P.C. Shahid Raza threw and locked me at 5.30 pm in a room. As soon as I was thrown in the room lockup, Sardar Abdul Waheed looked at me and laughed and informed his high ups of my detention at the ANF Clifton Police Station.

My brother Zahoor Shah informed the Manghopir Police Station, Karachi of the above facts on 12.06.2005 by filing application of my kidnapping, the Manghopir Police Station made an inquiry to this effect on 12.06.2005.

I say that I do not know driving nor I have driving license.

I say on solemn affirmation that on 12.06.05 at about 2020 hrs, I was not driving while Baleno vehicle bearing No.AGR-882 at the Banarus colony Chowk or any vehicle was stopped before the Habib Bank Chaurangi bridge, I deny that I was sitting on the driving seat and was driving the car bearing No.AGR-882 (bold added)

The appellant's brother gave evidence that the appellant was taken away by armed men from his estate agency and he lodged such a report at PS Manghopir which was duly exhibited. DW 2 Muhammed Waheed of PS Manghopir gave evidence that he received the aforesaid application/report which was entered in the police station register and the application duly received by him was exhibited. The FIR which was lodged by Murad Jan against the accomplices of the ANF officer has also been exhibited which when all taken together reveal that the ANF had a serious enmity with the appellant.

Under such circumstances it is well settled that we cannot take the police evidence at absolute face value but rather with extreme caution and although under the CNS Act there is no obligation to associate a private person with the arrest and recovery of the accused as a mashir in this case when serious enmity has been alleged and proven it was important that an independent mashir was present to support the prosecution case which was absent in

this case. Although legally a complainant can also be the IO of the case in a case such as this where there is proven enmity between the accused and the department of the complainant it again casts some doubt on the fairness of the investigation.

- (c) That no registration book or any other proof was exhibited that the appellant owned or had any connection with the car which he was allegedly driving and the narcotics were recovered from. No driving license was recovered from the appellant and according to his defence he cannot even drive.
- (d) That although it is unusual for such a large amount of narcotics to be foisted a photo of the boot of the car from where the narcotics were recovered on no one's pointation reveals that the boot also contained a CNG bottle which left very little room to stash such a large quantity of narcotics.
- (e) That safe custody of the narcotic from the time of its recovery from the time of it being sent for chemical report is in some doubt as allegedly the narcotic was deposited in the malkhana for two days but no malkhana entry was produced and the person in charge of the malkhana was not examined.

11. There are several circumstances/infirmities in the prosecution case highlighted above which cast doubt on the same. It is settled law that it is not necessary that there should be many circumstances creating doubts. If there is a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit of that doubt not as a matter of grace and concession but as a matter of right. In this respect reliance is placed on the case of **Tariq Pervaiz V State** (1995 SCMR 1345).

12. Thus, for the reasons mentioned above we are of the view that the prosecution has failed to prove its case against the appellant beyond a reasonable doubt and as such the appeal is allowed. The appellant is acquitted of the charge and the impugned judgment is set aside. By implication the criminal revision application for enhancement is also dismissed against the appellant. So far as the other respondents/appellants are concerned who did not appeal against their convictions in the same case (Tanveer Amjad, Niamat Ali and Rustam Zaman) since they were not even alleged to be driving the car from where the narcotics were allegedly recovered their case is on an even better footing than that of the appellant and although they have not appealed

against their convictions we hereby also acquit them (Tanveer Amjad, Niamat Ali and Rustam Zaman) of the charge as well and set aside their convictions and sentences and the impugned judgment with respect to them with the result that the criminal revision application filed against them by the ANF for enhancement of their sentences are also dismissed. In this respect reliance is placed on *Imtiaz Ali alias Taj V State* (2018 SCMR 344).

13. The appeal and criminal revision application are disposed of in the above terms.