

HIGH COURT OF SINDH, KARACHI

Present:

*Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Arshad Hussain Khan,*

CRIMINAL APPEAL NO.172 OF 2022

Appellant: Muhammad Hanif @ Pankha s/o
Ali Muhammad through Mr.
Muhammad Hanif Qureshi,
Advocate.

Respondent: The State through Mr.
Muhammad Iqbal Awan,
Additional Prosecutor General
Sindh.

Date of Hearing: 09.12.2022

Date of Announcement. 14.12.2022

JUDGMENT

Mohammad Karim Khan Agha, J:- Appellant Muhammad Hanif @ Pankha son of Ali Muhammad was tried in the Court of VIIth Additional Sessions Judge / Model Criminal Trial Court (Central) Karachi in Session Case No.602 of 2021 under Crime No.383/2021 u/s.6/9(c) of CNS Act, 1997 registered at PS Nazimabad, Karachi and vide judgment dated 21.02.2022 was convicted for an offence punishable u/s.265-H(ii) Cr.P.C and sentenced to suffer Imprisonment for One (01) year and seven (07) months with fine of Rs.13,000/- (Thirteen Thousand Only). The appellant was also extended the benefit of Section 382-B Cr.PC.

2. The brief facts of the prosecution case are that on 21.05.2021 at about 1715 hours accused Muhammad Hanif @ Pankha s/o Ali Muhammad was arrested from KMC School, Kathiawari Muhallah, Nazimabad No.03, Karachi, by police party led by complainant SIP Muhammad Arshad during patrolling on spy information who recovered 350 grams Heroin (797 token of Heroin) with selling amount of Rs.880/- from the possession of the accused in presence of police mashirs. Hence, FIR of this case was lodged accordingly.

3. After usual investigation charge was framed against the appellant to which the appellant pleaded not guilty and claimed trial.

4. The prosecution in order to prove its case examined 03 witnesses and exhibited various documents and other items. The statement of accused was recorded under Section 342 Cr.P.C in which he denied the allegations leveled against him. The appellant did not examine himself on oath or produce any DW in his defence.

5. After hearing the parties and appreciating the evidence on record, the trial court convicted the appellant and sentenced him 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 dated 21.02.2022 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 the appellant is innocent and has been falsely implicated in this case by the police in order to show their efficiency; that the narcotics were foisted on the appellant; that the narcotics were not in the possession of the appellant; that the sampling of the narcotics which were sent to the chemical examiner had not been carried out in accordance with the law; that there are material contradictions in the evidence of the PW's which renders their evidence unreliable; that there was no independent mashir to the arrest and recovery of the narcotics in violation of S.103 Cr.PC; that the prosecution failed to prove safe custody of the narcotics and that for any or all of the above reasons the appellant be acquitted of the charge by being extended the benefit of the doubt. In support of his contentions he placed reliance on the cases of **The State v Imam Bakhsh** (2018 SCMR 2039), **Bashir Ahmad v The State** (2005 UC 895), **Tariq Pervez v The State** (1995 SCMR 1345) and **Minhaj Khan v The State** (2019 SCMR 326).

8. On the other hand learned APG appearing on behalf of the State has fully supported the impugned judgment. In particular, he has contended that the evidence of the prosecution witnesses who made the arrest and recovery could be safely relied upon; that the appellant had been caught red handed on the spot with the narcotics recovered from his possession; that the prosecution had proven safe custody of the narcotics which resulted in a positive chemical

report; that the appellant was a habitual offender with a positive CRO which had been exhibited in evidence and as such the prosecution had proved its case beyond a reasonable doubt against the appellant and the appeal be dismissed. In support of his contentions he placed reliance on the cases of **Mushtaq Ahmad v The State** (2020 SCMR 474), **Asmat Ali v The State** (2020 SCMR 1000), **James L. Kisor v Robert Wikie, Secretary of Veterans Affairs** (2019 SCMR 1229) and **Liaquat Ali v The State** (2022 SCMR 1097).

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 learned counsel for the appellant, 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 proved its case beyond a reasonable doubt against the appellant based on the particular facts and circumstances of the case and the evidence on record for the following reasons:-

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

(b) That the arrest and recovery was made on the spot and the **appellant was caught red handed with the narcotics** in his possession by two police officials. No enmity has been proven against any police official and as such they had no reason to implicate the appellant in a false 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. Thus we believe the police evidence which is corroborative in all material respects. Reliance in this respect is placed on the case of **Mushtaq Ahmad v The State** (2020 SCMR 474) 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."

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(c) That there are no **material** 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 the case of **Zakir Khan V State** (1995 SCMR 1793).

(d) That most of the relevant police entries have been exhibited including those relating to departure, arrival and safe custody of the narcotic and mashirnama of arrest and recovery which was prepared on the spot which all support/corroborate the prosecution case.

(e) That all the recovered narcotics were sent for chemical examination and as such the issue of sampling does not arise.

(f) The narcotics were sealed at the time of recovery and kept in the malkhana as proven by a duly exhibited malkhana entry. The police official who took the recovered narcotics for chemical examination was examined and the delay of two days in taking the narcotics has been fully explained as out of the three day delay two of the days fell over the weekend. Even otherwise this is within time as per the relevant rules on this issue which in any event are directory and not mandatory in nature. Even no suggestion of tampering with the narcotics was made by the appellant during cross examination. Thus we find that safe custody of the narcotics has been proven from the time it was recovered until the time it was sent to the chemical examiner.

(g) The chemical report proved to be positive and all relevant protocols were followed.

(h) The fact that the recovered narcotics had been split into 797 small tokens coupled with the facts that the appellant was arrested outside a school with persons queuing up to buy narcotics from him at about 5.30pm who ran away when the police arrived, that cash from proceeds of sale was recovered from him at the time of his arrest and that he had a positive CRO for a similar offence are all facts supportive of the prosecution case.

(i) That although no independent mashir was associated with the arrest and recovery of the appellant and the narcotics this is not surprising because people despite being asked, as in this case, are reluctant to be involved in cases concerning narcotic dealers. 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).

(j) 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 the case of **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)

This position was reiterated in the following terms in the case of **Faisal Shahzad v. The State** (2022 SCMR 905) where it was held that unnecessary technicalities were not to hamper the purpose of law in narcotics related cases;

"9. This Court has time and again held that the menace of drugs is increasing day by day to various reasons. It is very disheartening to observe that every day there are many reports of drug peddlers being caught with drugs. This menace is great threat to a peaceful society and is affecting many lives especially the youngsters, therefore, immediate steps are required to be taken to curb these nefarious activities. The proceeds of narcotics are largely utilized in anti-state / terrorist activities, which this country is facing since decades. When the prosecution is able to prove its case on its salient features then unnecessary technicalities should not be allowed to hamper the very purpose of the law on the subject. The close analysis of the whole prosecution evidence i.e. the recovery of huge quantity of narcotics, the happening of the occurrence in broad daylight, separating the samples from each packet in a prescribed manner and sending them to the Chemical Examiner, report of the Chemical Examiner and the statements of the prosecution witnesses when evaluated conjointly leaves no room to come to a different conclusion than what has been arrived at by the learned courts below." (bold added)

(k) 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 the appellant is false implication simplicitor by the police. However no enmity has been suggested against any police official to suggest that he had any reason to falsely implicate the appellant. The appellant did not give evidence on oath and did not call any DW in support of his defence case of false implication by the police and thus we disbelieve the defence case in the face of trustworthy, reliable and confidence inspiring prosecution evidence.

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11. Thus, for the reasons discussed above, we find that the prosecution has proved its case beyond a reasonable doubt against the appellant, the impugned judgment is upheld and the appeal is dismissed.

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