

IN THE HIGH COURT OF SINDH, KARACHI

Present:

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

Criminal Appeal No. 504 of 2011

Appellant: Abdul Sattar son of Datar Dino
through Mr. Qayyum Nawaz Kundi,
advocate.
Respondent: The State through Mr. Habib
Ahmed, Special Prosecutor ANF.

Criminal Appeal No. 544 of 2017

Appellant: The State through Mr. Habib
Ahmed, Special Prosecutor ANF.
Respondent No. 1: Abdul Sattar Memon through Mr.
Qayyum Nawaz Kundi, advocate.
Respondent No. 2 to 4: Nemo for the respondents No. 2, 3
and 4.

Criminal Appeal No. 545 of 2017

Appellant: The State through Mr. Habib
Ahmed, Special Prosecutor ANF.
Respondent: Abdul Sattar Memon through Mr.
Qayyum Nawaz Kundi, advocate.

Date of hearing: 31.01.2022
Date of announcement: 08.02.2022

JUDGMENT

KHADIM HUSSAIN TUNIO, J- By this common judgment, we intend to dispose of captioned criminal appeals; one filed by the appellant Abdul Sattar whereby he has challenged the judgment dated 28.08.2011 (*impugned judgment*) passed by Special Judge Court-I (CNS) Karachi in Special Case No. 50 of 2009, the other two filed by ANF; one challenging the impugned judgment on the point of

quantum of sentence and the other challenging the de-freezing of the appellant Abdul Sattar's account as they are the outcome of one and same FIR bearing crime No. 11/2009 registered with Police Station ANF-C for the offence punishable u/s 6/9(c) Control of Narcotic Substances Act 1997 (CNS Act 1997). Through the impugned judgment, the appellant Abdul Sattar was convicted and sentenced to suffer rigorous imprisonment for 5 years and to pay fine of Rs. 100,000/-, in default whereof to suffer further imprisonment of 6 months more; although benefit of S. 382(b) was extended to him. Respondent Atta Muhammad in Criminal Appeal No. 544 of 2017 was also convicted and sentenced to suffer rigorous imprisonment for 5 years and to pay fine of Rs. 100,000/-, in default whereof to suffer further imprisonment of 6 months more. Respondents namely Mazhar Hussain, Habib-ur-Rehman and Suraj Chatri however were convicted u/s 15 of the CNS Act 1997 and sentenced to the term already undergone by them as under-trial prisoners.

2. Precisely, facts pertaining to Crime No. 11/2009 are that on 25.02.2009, ANF received information regarding a drug exchange taking place at Jinnah International Airport by the appellant Abdul Sattar and other smugglers who were planning on sending the contraband abroad. The smugglers were said to be using a car bearing registration No. AAJ-546. After receiving information, SI Syed Sher Ali Sherazi devised a plan and constituted a raiding party and apprehended the appellant along with the co-accused/respondent No. 2 to 4 and recovered a total of 20 kilograms of heroin; 10 kilograms from the appellant Abdul Sattar's briefcase and 10 kilograms from the co-accused/respondent Atta Muhammad, all in the shape of 4 packets; 5 kilograms each. From each packet, 10 grams of heroin was separated and sealed for chemical examination. Thereafter, the case property and accused were brought to PS ANF, hence this FIR.

3. After usual investigation, a challan was submitted against all the apprehended accused. A formal charge was framed against them by the trial Court to which they pleaded not guilty and claimed to be tried. In order to substantiate its case, prosecution examined two witnesses namely PW-1 **Syed Sher Ali Shirazi** and PW-2 **Shoukat Iqbal**. Prosecution also produced a number of documents and other items in evidence which were duly exhibited. Statement of accused were recorded under section 342 Cr.P.C. wherein accused Atta Muhammad and Suraj accepted responsibility for the delivery of narcotics and the scheme being a mutually benefiting joint venture. Appellant Abdul Sattar, while giving his statement on oath, examined DW-1 Kalimullah and DW-2 Abdul Rehman. Thereafter, prosecution side was closed vide statement at 31.01.2022.

4. Trial Court, after considering the material available before it and hearing the counsel for respective parties, passed the impugned judgment and sentenced the appellant Abdul Sattar and respondents Atta Muhammad, Habib-ur-Rehman, Mazhar Hussain and Suraj Chatri as stated supra.

5. Learned counsel for the appellant Abdul Sattar contended that the judgment passed by trial court is perverse and shocking and against the criminal administration of justice; that the trial Judge while awarding the conviction has not considered the contradictions made in the evidence of the PWs; that no independent witness has been cited by the prosecution and all the PWs are ANF officials; that safe custody of the allegedly recovered contraband has not been established; that no independent mashir was made a party to the various mashirnamas despite the place of incident being an airport; that the appellant Abdul Sattar was picked up by the police on the 24th, a day prior, from his flat in Crescent Complex, Gulshan-e-Iqbal Block 11; that the complainant himself conducted the investigation of

the case. In support of their contentions, learned counsel has cited the case law reported as *State through AG v. Bashir and others* (PLD 1997 SC 408), *Nazeem Ahmed v. The State* (PLD 2009 Karachi 191), *Shera Masih and another v. The State* (PLD 2002 SC 643), *Bahadur Khan v. The State* (PLD 1995 SC 336), *Sultan Khan v. Sher Khan and others* (PLD 1991 SC 520), *Allah Wadhayo and another v. The State* (2001 SCMR 25), *Faiz and others v. The State* (1983 SCMR 76), *The State v. Muhammad Hanif* (1992 SCMR 2047), *Waqar Ahmed v. Shoukat Ali and others* (2006 SCMR 1139), *Azhar Iqbal v. The State* (2013 SCMR 383), *The State v. Waris Khan* (2016 MLD 920), *Agha Qais v. The State* (2009 PCrLJ 1334), *Muhammad Asif Khan v. Ehtisab Bureau through Chairman and another* (2005 YLR 382) and *Gul Sher v. The State* (1998 PCrLJ 1274).

6. Conversely, learned Special Prosecutor ANF supported the impugned judgment while contending that the appellant and co-accused/respondent No. 2 to 4 were apprehended after receipt of spy information and from their possession, huge quantities of narcotic substance were recovered; that the offence committed by the appellant and co-accused/respondent No. 2 to 4 is a heinous one and against the society; that contradictions, if any in the evidence of the PWs, are minor in nature; that safe custody of the narcotic substance from recovery to dispatch for chemical examination has been proved by the prosecution; that the sentence awarded to the appellant and co-accused/respondent No. 2 to 4 was very short and the learned trial Court failed to consider the proper sentencing guidelines when awarding the sentence. In support of his contentions, he has placed reliance on the case law reported as *State through Director ANF Peshawar v. Fakhar Zaman* (2019 SCMR 1122), *State through Regional Director ANF Peshawar v. Sohail Khan* (2019 SCMR 1288), *State through Director ANF Peshawar v. Muhammad Ramzan and others* (2019 SCMR 1295), *Mushtaq Ahmad v. The State and another*

(2020 SCMR 474) and *Hussain Shah and others v. The State* (PLD 2020 SC 132).

7. We have heard the arguments advanced by the learned counsel for the appellant as well as learned Special Prosecutor ANF and have gone through the entire evidence available on the record.

8. A perusal of record shows that the raiding party, headed by SI Syed Sher Ali, apprehended the appellant and co-accused/respondent No. 2 to 4 who had arrived at the airport in a Margala having registration No. AAJ-546 on 25.02.2009 after receiving spy information regarding the smuggling and transport of heroin by international smuggles through an international passenger. The spy had simultaneously accompanied the ANF officials and subsequently pointed out each of the co-accused/respondent No. 2 to 4 and the appellant. Appellant Abdul Sattar stepped out of the car with a briefcase that he handed over to co-accused/respondent Mazhar Hussain whereas co-accused/respondent Atta Muhammad also stepped out of the car and handed his briefcase to co-accused/respondent Habib-ur-Rehman. Co-accused/respondent Suraj Chatri was admittedly the smuggler responsible for flying the heroin out of the country. From the briefcases, ANF officials recovered a total of 20 kilograms of heroin, each briefcase containing two packets weighing 5 kilograms each, therefore the possession of a total of 10 kilograms of heroin is being considered against each of the co-accused and appellant Abdul Sattar. The recovered heroin was weighed and 10 grams of heroin from each packet was separated from the total quantity and sealed on the spot for chemical examination with seals affixed on the same whereas the rest was deposited in the malkhana by the complainant. The FIR was lodged with due promptitude, giving no time for concoction and the S. 161 Cr.P.C statements of the prosecution witnesses were also recorded

promptly and information with regard to the same remained consistent till the end. We have found that the prosecution witnesses have provided an uninterrupted chain of facts ranging from arrest and seizure to forensic analysis of the contraband. They are in comfortable unison on all the salient features regarding interception of the heroin as well as all the steps taken thereafter. All the witnesses have unanimously deposed that the case property in Court is the same and they were at no point cross-examined on the same point by the defence counsel alleging tampering with the same. Contraband so recovered from the appellant has been proved by examining the complainant (PW-1) and mashir of the arrest and recovery (PW-2). The recovered heroin was kept in safe custody from the time of its recovery to the time when it was taken to the chemical examiner. Furthermore, narcotics were sealed on the spot, had remained sealed in the malkhana before being transported to the chemical examiner. Seals on the same parcels delivered were found intact by the chemical examiner, further proving safe custody and transmission of the same. Reliance, in this respect, is placed on the recent Judgment dated 03.03.2020 in **Jail Petition No.712 of 2018 (Re: Zahid and Riaz Ali Vs. The State)**. The narcotics were sent to the chemical examiner within the 72 hours stipulated time as well. The narcotics were deposited in the malkhana by the complainant who was also the malkhana incharge. We have also examined the report of chemical examiner available on record and found that it fully corroborates the evidence of all the prosecution witnesses. All necessary protocols were followed in the chemical report which further supports the prosecution case. Learned counsel for the appellant contended that evidence of the police officials is not trustworthy and that no independent or private person had been cited as a witness, as such the prosecution case is doubtful. This contention however has very little merit to it. There is no universal

rule that evidence of an interested witness per se must be invariably corroborated by independent evidence. Police officials are as good witnesses as any other private witness and their evidence is subject to same standard of proof and the principles of the scrutiny as applicable to any other category of witnesses; in absence of any animus, infirmity or flaw in their evidence, their testimony can be relied upon without demur. Reliance is placed on the case of *Hussain Shah and others v. The State* (PLD 2020 Supreme Court 132). Moreover, 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 which principle was enunciated by the Hon'ble Apex Court in the case of *Muhammad Hanif v. The State* (2003 SCMR 1237). Even otherwise, it also appears rather unbelievable that such a huge quantity of heroin could be foisted on the appellant and co-accused/respondent No. 2 to 4 without any reason to falsely implicate them. Reliance in this respect is placed on the case of *The State v. Abdali Shah* (2009 SCMR 291) and *Mushtaq Ahmed v. The State* (2020 SCMR 474).

9. Coming to the defence plea raised by the appellant, it appears to be an afterthought, which has rightly been disbelieved by the learned trial Court. The appellant failed to provide any valid proof that he was in fact picked up by the police from his flat where his household articles were also shattered. Although several TCS receipts along with affidavits of neighbours of appellant were produced, the same were post-FIR registration. The appellant was allegedly taken away on 24.02.2009, whereas the complaints were all dated 03.04.2009, which is roughly a month and few days delayed. Moreover, the appellant examined two defence witnesses, one related to the appellant being his brother and the other his neighbour. Both of these defence witnesses, while asserting that the appellant was arrested by ANF officials on the 24th failed to depose

as to why they had, at no point, considered filing a motion before a Court of law for the appellant Abdul Sattar's recovery from the alleged "illegal confinement" by ANF Officials nor had any of them approached any higher-ups of the ANF Police Officials in a timely fashion to ensure the safe return of the appellant. Therefore, belated arrangements made by the appellant of well-wishers to testify in his favour fails to override positive evidence pointing towards his culpability. In this respect, reliance is placed on the case of *Ibrarullah v. The State (2021 SCMR 128)*. It is significant to note that the appellant had arrived alongside the co-accused/respondent No. 2 to 4 in his own car and had then handed his briefcase to co-accused/respondent Mazhar Hussain from whom arresting officers (ANF Officials) recovered it which contained 10 kilograms of heroin. The car was also recovered along with its key and the heroin within the briefcases. Therefore, prosecution has successfully discharged its burden in proving the recovery of the narcotics from the appellant Abdul Sattar and co-accused/respondent No. 2 to 4 and nothing was brought on record by the appellant to controvert the presumption that he was in fact in possession of a huge quantity of narcotic substances. As such, appeal filed by the appellant Abdul Sattar, being merit-less is dismissed.

10. Now coming to the criminal appeal No. 544 of 2017, through the same, the State is seeking an enhancement in sentence awarded to the respondents. All the respondents were in joint possession of two different briefcases, each containing 10 kilograms of heroin. Same were passed on between them upon their apprehension. The landmark case of *Ghulam Murtaza and another v. The State (PLD 2009 Lahore 362)* laid down the foundations for the sentencing principles involving narcotic offences. According to *Ghulam Murtaza's* case (supra), for 10 kilograms of heroin, a sentence of 14 years and a fine of Rs. 190,000/- (*one lac, ninety*

thousand) is provided. Learned trial Court failed to consider the said sentencing guideline, therefore failed in its duty in determining the proper quantum of sentence for the heinous offence committed by the respondents. Its approach was not pragmatic and went against the command of law. A huge quantity of heroin was recovered from the respondents and the leniency shown by the trial Court was uncalled and unwarranted for by law, as such the sentence awarded to the respondents, in the light of the above cited case of *Ghulam Murtaza*, is enhanced to 14 years of rigorous imprisonment and the fine amount is also enhanced to Rs.190,000/- (*one lac ninety thousand only*) default in payment whereof, they shall suffer a further simple imprisonment for 1 year and 2 months. Benefit of S. 382(b) Cr.P.C is, however, maintained. We are aware that the respondents namely Atta Muhammad, Habib-ur-Rehman, Syed Mazhar Hussain and Suraj Bohra are absent and have not been heard by this Court before the enhancement of their sentences, however consequent to their release upon completion of their earlier sentence; they conveniently distanced themselves from the proceedings despite repeated process. While it is undeniably true that a party to a *lis* cannot be left unheard, fugitives from the law lose such a right to audience of the Court and cannot choose to avail such audience at their own whims, an exercise which is never favoured by law, as held in the cases of *State through Director ANF Peshawar v. Fakhar Zaman* (2019 SCMR 1122), *State through Regional Director ANF Peshawar v. Sohail Khan* (2019 SCMR 1288), *State through Director ANF Peshawar v. Muhammad Ramzan and others* (2019 SCMR 1295). As such, perpetual warrants of arrest shall be issued against the respondents to bring them before the law for them to serve out their remaining sentence consequent to the convictions.

11. As far as the criminal appeal No. 545 of 2017 against the order dated 10.07.2012 passed by the learned trial Court for de-

freezing of account of appellant Abdul Sattar is concerned, the same is set aside and the matter is remanded back to the trial Court which shall decide the same anew after hearing all the parties concerned, within 30 days, fully in accordance with law.

12. Captioned Criminal Appeal No. 504 of 2011, 544 of 2017 and 545 of 2017 stand disposed of in the above terms.

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