

IN THE HIGH COURT OF SINDH, KARACHI

Present:

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

Criminal Appeal No. 264 of 2020

Appellant(s): Fazal Wahab son of Muhammad Haroon and Fazal Rehman son of Fazal Khaliq through Mr. Muhammad Awais Shaikh, advocate.

Respondent: The State through Mr. Abrar Ali Khichi, Additional Prosecutor General.

Date of hearing: 01.04.2022
Date of announcement: 06.04.2022

JUDGMENT

KHADIM HUSSAIN TUNIO, J- Through captioned criminal appeal, the appellants Fazal Wahab son of Muhammad Haroon and Fazal Rehman son of Fazal Khaliq have challenged the judgment dated 06.03.2020 (*impugned judgment*) passed by 1st Additional Sessions Judge/Model Criminal Trial Court (MCTC)/Special Court (CNS) Karachi Central in Special Case No. 573 of 2019, outcome of FIR bearing crime No. 306/2019 registered with Police Station New Karachi for the offence punishable u/s 6/9(c) Control of Narcotic Substances Act 1997 (*CNSA 1997*). Through the impugned judgment, the appellants were convicted and sentenced to suffer rigorous imprisonment for four years and six months and to pay fine of Rs.20,000/-, in default whereof to suffer further imprisonment for 5 months more; although benefit of S. 382(b) was extended to them.

2. Precisely, facts pertaining to Crime No. 306/2019 are that on 17.10.2019, ASI Muhammad Akram of P.S. New Karachi along with his subordinate staff left P.S. for patrolling when he received spy information regarding the appellants' selling chars near Asad

Clinic Sector 11-I, New Karachi and secured five pieces of charas weighing about two kilograms from each accused total ten pieces of charas weighing four kilograms and also recovered Rs. 200/ from accused Fazal Wahab. The recovered charas was sealed on the spot and such memo of arrest and recovery was prepared. Fazal Wahab and Fazal Rehman were arrested, brought back to the police station where FIR was registered against them.

3. After usual investigation, a challan was submitted against the appellants. A formal charge was framed against them by the trial Court to which they pleaded not guilty and claimed trial. In order to prove its case, prosecution examined four witnesses namely PW-1 H.C Syed Amir Ashraf, PW-2 ASI Muhammad Akram, PW-3 SIP Saleem Siddiqui and PW-4 ASI Shahid Sher Khan. Prosecution also produced a number of documents and other items in evidence which were duly exhibited. Statements of accused were recorded under section 342 Cr.P.C. wherein they have denied the allegations made against them and pleaded their innocence. However, they neither examined themselves on oath nor produced any evidence in their defence to disprove the charge.

4. Trial Court, after considering the material available before it and hearing the counsel for respective parties, passed the impugned judgment and sentenced the appellants as stated supra.

5. Learned counsel for the appellants has 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 material contradictions made in the evidence of the PWs; that no independent witness has been cited by the prosecution at the time of arrest and recovery and all the witnesses are police officials; that the alleged 4000 grams of charas were managed and foisted on the appellants; that there is delay in lodging of FIR; that the appellants were falsely

implicated in the false case; that the safe custody of the narcotics has not been established and proper protocols were not followed by the chemical examiner in conducting the tests. In support of his contentions, he has placed reliance on the case law reported as **2015 SCMR 1002** (*Ikramullah & others v. The State*), **2019 SCMR 1300** (*Mst. Razia Sultana v. The State & another*), **2021 SCMR 363** (*Kausar Khan v. The State*), **2021 SCMR 451** (*Mst. Sakina Ramzan v. The State*), **1995 SCMR 1345** (*Tariq Pervaiz v. The State*), **2022 PCrLJ 279** (*Fahad v. The State*) and **2001 MLD 902** (*Abdul Mannan v. The State*).

6. Conversely, learned Additional Prosecutor General supported the impugned judgment while arguing that the appellants were apprehended after receipt of spy information and from the each appellant 2000 grams of charas were recovered; that the offence committed by the appellants is a heinous one and against the society; that the property was deposited with the office of the Chemical Examiner on next day of the incident; that the burden of proving false implication shifted upon the shoulder of the appellants in view of provisions of Section 29 of CNS Act; 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 prosecution witnesses have fully implicated the present appellants, as such he prays that the instant criminal appeal, being meritless, be dismissed. He has cited reliance on the case law reported as **2020 SCMR 474** (*Mushtaq Ahmed v. The State*), **2020 SCMR 1000** (*Asmat Ali v. The State*) and **2021 SCMR 2005** (*Shafa Ullah Khan v. The State & another*).

7. We have heard the arguments advanced by both the learned counsel for the appellants as well as learned Additional Prosecutor General and have gone through the entire evidence available on the record.

8. A perusal of the record suggests that police party, during patrolling on 17.10.2019, at about 2200 hours reached service road near Asad Clinic, Sector 11-I, New Karachi and found two suspicious accused persons on a motorcycle. Both were stopped, one disclosed his name to be Fazal Wahab and another Fazal Rehman. They were apprehended and police secured one red colour shopper from fuel tank of motorcycle wherein five slabs of charas were lying, which became two kilograms on electric scale. On further search of accused Fazal Rahmn, complainant recovered amount of Rs.200/=. On search of accused Fazal Rehman, they have recovered one green colour shopper in his right hand wherein five slabs of charas were recovered. On weighing it become two kilograms as well. From the fold of accused Fazal Rehman's shalwar, they also recovered a T.T. pistol loaded with four live rounds. He was asked for documents of motorcycle, but he could not produce the same. The total quantity of charas was sealed on the spot for chemical examination. Having perused the record, 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 charas as well as all the steps taken thereafter. All the witnesses have unanimously deposed that the case property in Court is the same and were never cross-examined on this point by the appellants or the defence counsel at the time of trial. Contraband so recovered from the appellants Fazal Wahab and Fazal Rehman has been proved by examining the complainant PW-2 ASI Muhammad Akram, mashir PW-1 Syed Amir Ashraf, PW-3 I.O/SIP Saleem Siddiqui and PW-4 ASI/H.M Shahid Sher Khan, In-charge Malkhana. The recovered charas was kept in safe custody from the time of its recovery to the time when it was taken to the Chemical Examiner which is proved by examining the I.O/SI Saleem Siddiqui. More so, narcotics were sealed on the spot, had remained sealed in

the malkhana before being transported to the chemical examiner on 18.10.2019 which is admitted by PW-4 ASI/H.M Shahid Sher Khan, the Malkhana In-charge, who also admitted that he had “*received the case property in sealed condition*”. Seals on the same parcels delivered were found intact by the chemical examiner too, further proving safe custody and transmission of the same. Reliance, in this respect, is placed on the case of ***Zahid and another v. The State (2020 SCMR 590)***. The narcotics were sent to the Chemical Examiner on next day i.e. 18.10.2019, whereas the recovery was effected on 17.10.2019 at about 2200 hours. The narcotics were deposited in the malkhana by the Investigating Officer, who took the same out to deliver them to the Chemical Examiner himself. 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 Examiner’s Report which further supports the prosecution case. Learned counsel for the appellants contended that not all protocols were followed by the Chemical Examiner which is incorrect as a perusal of the Chemical Examiner’s Report shows all the tests that were carried out, the manner in which they were carried out and how 10 grams of sample was consumed from each packet which also debunks the argument of the counsel for the appellants regarding the chemical examiner only taking sample for testing from one packet. In this respect, reliance is placed on the unreported judgment dated 01.03.2022 passed by the Hon’ble Supreme Court in ***Criminal Petition No. 762 of 2018 (Abdul Rasool v. The State)***, wherein it was observed that:-

“3.We have examined the forensic report that contains a detailed description of analysis undertaken by the chemical examiner by mentioned each test, carried out to confirm the narcotic character of the samples. Relevant witnesses appeared to establish safe custody of the contraband as well as transmission of samples to the laboratory; the argument does not hold water.”

9. Learned counsel for the appellant also 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 principles of 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).

10. So far as the defence plea raised by the appellants is concerned, appellants have given stereotypical answers in their statements of accused and have raised no specific plea besides false implication after their arrest by the police for which no animus has been alleged or proved against the prosecution. Suffice it to say that nothing was brought on record to suggest that the appellants were not arrested by the police as per the evidence of the police nor was any complaint made by any of the relatives or neighbours of the appellants to any higher authorities regarding the appellants' arrest by the police in some other manners or some other place other than alleged by the prosecution nor did the appellants present any evidence to justify their claim. Mere assertion of appellants that they had been involved falsely in the narcotics case, in absence of any tangible evidence, was of no consequence nor did it create any doubt about the recovery of narcotics. The appellants were bound to

establish the defence plea agitated by them by adducing tangible evidence and such allegation in absence of sound evidence, could not be considered in view of Article 121 of Qanun-e- Shahadat, 1984. It was observed by the Hon'ble Apex Court in the case of *Anwar Shamim and another v. The State (2010 SCMR1791)* that it is duty and obligation of an accused person to prove the plea taken by him in his defence in terms of Article 121 of Qanun-e-Shahadat, 1984. More so, S. 29 of CNSA, 1997, casts burden upon an accused to establish their innocence and absolve themselves from the allegations of the recovered substance. Prosecution only has to show, by tangible evidence, that accused have dealt with narcotics substance or have had physical custody of it or were directly concerned with it, unless accused prove by preponderance of probability that they did not knowingly or consciously possess the articles; without such proof, accused can be held guilty by virtue of S. 29 of the CNSA, 1997. Thus, prosecution has successfully discharged its burden in proving the recovery of the narcotics from the appellants Fazal Wahab and Fazal Rehman.

11. For what has been discussed above, we find that the prosecution has undoubtedly proven the guilt of the appellants beyond reasonable shadow of doubt. Therefore, conviction and sentence awarded to the appellants, vide impugned judgment, are upheld. Accordingly, instant criminal appeal, being devoid of any merit, is dismissed. The appellants be taken into custody and remanded to Central Prison Karachi to serve out their sentences, if any remains to be served.

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