

IN THE HIGH COURT OF SINDH, KARACHI

Present:

**Mr. Justice Mohammad Karim Khan Agha J.
Mr. Justice Zulfiqar Ali Sangi J.**

Criminal Appeal No. 500 and 501 of 2021

Appellants: Shakeel Ahmed, Abdul Rasheed, Shaukat Ali and Irfan through Mr. Muhammad Farooq, Advocate.

Respondent: The State through Mr. Habib Ahmed, Special Prosecutor ANF.

Date of Hearing: 08.11.2022

Date of Judgment: 22.11.2022.

J U D G M E N T

ZULFIQAR ALI SANGI-J., Appellants were tried by learned Special Court-II (CNS), Karachi in Spl. Case No.230 and 231 of 2015 bearing Crime No.19 and 20 of 2015 U/s 6,9(C), 14,15 of CNS Act, 1997 of P.S. ANF Clifton, Karachi and were convicted U/s 6, 9(C) r/w section 14, 15 of CNS Act and sentenced to suffer life imprisonment with fine of Rs.500,000/- (Five Lac), in default to suffer imprisonment for 03 years more with benefit u/s 382-B Cr. P.C vide judgment dated 16.08.2021. By means of this appeal, appellants have impugned their conviction and sentence.

2. Brief facts of the prosecution case as per FIR are that on 13.04.2015 complainant SI Attaullah Khan Jadoon of P.S. ANF Clifton along with other staff on a tip-off arrested appellant Shakeel Ahmed having a nylon sack containing 22 Kgs charas while delivering to appellant Abdul Rasheed. Accordingly, FIR No.19/2015 was registered against them. However, during the investigation accused Shakeel Ahmed disclosed that recovered charas was given to him by accused Muhammad Umar (since dead) for delivering to accused Abdul Rasheed and further that accused Muhammad Umar and his companions Shoukat Ali and Irfan were present at his den situated at Mullah Essa Goth, Nawa Lance, Memon Goth, Karachi and a huge quantity of narcotics is available there. On his disclosure and pointation, the complainant party arrested accused Muhammad

Umar (since dead), Shoukat Ali and Irfan and recovered 79.200 Kgs charas from a room of the den and FIR No.20/2015 was registered against them.

3. After the usual investigation challan was submitted before the court having jurisdiction in respect of each FIR and after required legal formalities the charge against the appellants was framed to which they pleaded not guilty and claimed their trial. An application under section 239(A) Cr. P.C was filed by the prosecutor ANF for framing the charge jointly in both cases and the same was allowed by the trial court vide order dated: 15-10-2018 then the joint charge was framed against the appellants to which they again pleaded not guilty and claimed their trial. At the trial, the prosecution examined 06 P.Ws. including the complainant/Investigation Officer, mashir, incharge of the Malkhana and the person who brought the contraband to the chemical laboratory. They produced various documents and items to prove the case of the prosecution and then prosecution closed its side.

4. The statements u/s 342 Cr. P.C of the appellants were recorded wherein they denied the prosecution allegations and pleaded their innocence. They examined themselves on oath and also examined two witnesses each in their defence to disprove the case against them. At the conclusion of the trial, the learned trial Court after hearing the parties convicted and sentenced the appellants through impugned judgment as stated above.

5. Learned counsel for the appellants mainly argued that the appellants are innocent and have been falsely implicated in this case; that despite having advance information the complainant party did not bother to associate any independent mashir; that allegedly appellants were arrested from K & N Academy while coming in rickshaw having a huge quantity of charas but the owner/driver of the rickshaw was not examined; that the appellants were picked up by the Rangers officials and then were handed over to the police, who booked them in false case; that prosecution had failed to prove safe custody and safe transmission of the narcotic to the chemical examiner from the time of recovery; that the prosecution has failed to prove the charge against the appellants beyond a shadow of a doubt,

hence he prayed for setting aside the impugned judgment and acquittal of the appellants. Learned counsel has relied upon cases of ***Muhammad Hashim v. The State (PLD 2004 SC 856)***, ***Ishaque v. The State (2022 SMCR 1422)***, ***Zafar Iqbal v. the State (2022 SCMR 1375)***, ***Faisal Shahzad v. The State (2022 SMR 905)***, ***Qaisar & others v. The State (2022 SCMR 1641)***, ***Akhtar Gul v. The State (2022 SCMR 1627)*** and ***Naveed Akhtar v. The State (2022 SCMR 1784)***.

6. On the other hand, learned special prosecutor ANF has contended that the prosecution has successfully proved its case by examining the P.Ws, who have no enmity or ill will with the appellants; that the appellants were apprehended at the spot and a huge quantity of narcotics was recovered from them; that proper mashirnama of arrest and recovery was prepared at the spot and the same was exhibited in evidence; that all the P.Ws have supported the prosecution case; that the appellants though examined themselves on oath and examined defence witnesses but failed to prove their innocence, therefore, conviction and sentence awarded by the trial court requires no interference by this court. He has relied upon the case of ***Sharafat Khan v. The State (PLD 2022 SC 281)***.

7. We have heard learned counsel for the appellants as well as learned special prosecutor ANF and perused the material available on record so also the case law cited at the bar with their able assistance.

8. The prosecution in order to prove arrest and the recovery of charas has examined two witnesses namely Attaullah Khan Jadoon the complainant and the investigation officer of the case as PW-1 and Nawab Alam mashir as PW-2 whose evidence is on the same lines and while supporting the case have deposed that on 13.04.2015, they were posted at PS ANF Clifton Karachi when they received spy information through high ups of ANF that the narcotic seller Mohammad Omer through his special agent Shakeel Ahmed would deliver huge quantity of Charas Garda to Abdul Rasheed in between 1900 hours to 2000 hours near K & N Academy Memon Goth Road, Karachi and in case of immediate action recovery and arrest were sure, therefore, on the instruction of high ups a raiding party was constituted and left police station under the Entry No.10 at about

1700 hours and on the pointation of spy informer they reached at about 1830 hours at main gate of K&N Academy Memon Goth where they started secret surveillance. Meanwhile a person came from Mullah Essa Goth and alighted from Chingchi rickshaw who was having a white nylon sack in his right hand and walked to another gate of the K&N Academy and stopped there and informer pointed that he was same Shakeel Ahmed son of Jan Mohammad. Meanwhile another person also came in a Chingchi rickshaw from the Cantt: side and alighted from the rickshaw and met with the Shakeel Ahmed and informer informed that he was Abdul Rasheed and Shakeel Ahmed was handing over the nylon sack to Abdul Rasheed therefore, action was taken and both the persons were apprehended on the spot. They asked the passersby to act as mashir, but they refused, due to fear of the narcotic sellers, therefore, ASI Nawab Alam (PW-2) and PC Asif Channa were nominated as mashir and on inquiry accused persons disclosed their names Shakeel Ahmed son of Jan Mohammad who brought the nylon sack and the other one disclosed his name as Abdul Rasheed son of Mohammad Moosa. When the white nylon sack was checked it was containing 20 foil packets of multicolour, each packet was checked after opening it, containing Charas Garda in the shape of slabs and every packet was having one slab and on weighing each packet was 1100 grams and the total weight was 22 Kgs. From each packet, 20/20 grams samples were withdrawn for sending the same for chemical examination and put in brown envelopes which mentioned the serial numbers 1 to 20 on the packets as well as on the brown envelopes and sealed the brown envelopes for chemical examination in a cloth bag as well as the remaining packets were sealed in same nylon sack. From the personal search of the accused Shakeel Ahmed a black colour wallet containing Rs.300/- was recovered whereas from a personal search of Abdul Rasheed one black wallet containing Rs.600/- and a photocopy of his CNIC were recovered. They deposed that on initial inquiry at the spot accused Shakeel Ahmed disclosed that the actual owner of the narcotic was Muhammad Omar and further disclosed that Muhammad Omar was present at his house/narcotic den situated at Mohalla Essa Got, along with his companions with a heavy quantity of narcotics and Muhammad Shakeel further disclosed that he could point out the same. They

then proceeded towards the pointed place and on the pointation of the accused Shakeel Ahmed knocked on the door of the house of Muhammad Omar. A person opened the door and upon seeing the uniformed officials he tried to close the door, but he was apprehended and then they entered into the house in a courtyard type hall and found two persons in a right side room while they were counting the multicolour foil packets, who were arrested with the help of the staff. The person who opened the door disclosed his name as Muhammad Omar, the other person disclosed his name as Shoukat Ali and the third one disclosed his name as Irfan. The multicolour packets were secured which were 72 in number and on opening Charas Garda was found in each packet. Each packet was found 1100/1100 grams and the total weight was 79.200 Kgs. The samples of 20/20 grams were withdrawn from each packet and put in brown envelopes and mentioned numbers 1 to 72 on the brown envelopes as well as on the packets and sealed for chemical analysis whereas the rest of the packets were sealed in four yellow nylon sacks with the quantity of 18 packets each. Upon personal search of Muhammad Omar Rs.500/- was recovered from the right side pocket, from a personal search of accused Shoukat Rs.400/- was recovered and from a personal search of Irfan Rs.300/- and one telephone diary was recovered from the right side pocket of his trouser. Thereafter, the memo of arrest and recovery was prepared, and signatures of above said mashirs were obtained. On returning an FIR was registered, and the case property was deposited in the Malkhana after mentioning the FIRs number on it. The complainant sent both the case properties to the chemical examiner by the hand of ASI Ali Sher under proper letters and then received the reports from the chemical examiner which are positive. The complainant/investigation officer exhibited relevant entries and the chemical examiner's report in his evidence. Both the witnesses were cross-examined by the defence counsel but we do not find any substance favourable to the appellants. No enmity or ill-will was suggested against them and both have fully supported each other on the material points. We find their evidence to be reliable, trustworthy and confidence-inspiring and we believe the same and place reliance on it.

9. After proving the arrest of the accused and recovery of charas from them the prosecution to prove the safe custody and its safe transmission for chemical analysis examined Muhammad Muzammil Ahmed (PW-6) who deposed that on 14.04.2015, he was posted at P.S ANF Clifton, Karachi being **Malkhana Incharge/SHO** and on the same night investigation officer S.I Attaullah Jadoon of FIR No.19/2015 and 20/2015 handed over the case property and personal search for depositing it in the Malkhana, which he had deposited and made entries in the Register No.19 at Serial No.152 and 153 respectively which he also produced and exhibited in his evidence. He further deposed that on 15.04.2015 as per the letter of SI Attaullah Jadoon handed over the two sealed parcels of FIR No.19 of 2015 containing 20 samples and FIR No.20/2015 containing 72 samples to ASI Ali Sher for depositing it to chemical examiner, which was deposited by the ASI Ali Sher on the same date and entries were also made in the Register No.19, which he produced during his evidence. **PW-5, Ali Sher was examined who took the samples for depositing the same at the chemical laboratory** and deposed that on 15.04.2015, he was posted at P.S ANF Clifton, being ASI, SHO/Inspector Muhammad Muzammil handed over two parcels for depositing at Sindh Chemical Lab after taking out from the Malkhana as he was the Incharge of Malkhana and S.I Attaullah Jadoon handed over him two original letters addressed to the chemical examiner. He had taken such parcels in the official vehicle according to Entry No.6 at about 0915 hours and reached the Chemical lab where he had deposited both the parcels, obtained acknowledgement receipts and then returned to the police station according to Entry No.8. These witnesses were also cross-examined but we could not find any substance favourable to the appellants. No enmity or ill-will was even suggested against them to show false implication. Their evidence is also found to be reliable, trustworthy and confidence-inspiring and we believe the same and place reliance on it.

10. The samples after taking from the Malkhana were deposited to the chemical examiner and the remaining property was destroyed after taking samples of 100 grams. To prove destruction of the narcotic the prosecution examined PW-3, Anis-ur-Rehman

(Magistrate) who deposed that on 29.10.2016 he received an order from learned District and Sessions Judge, Karachi South for compliance the order of the trial court regarding sampling and destruction of case property related to FIR No.19/2015 and 20/2015 and other cases. In compliance of such order on 29.10.2016 he reached at Malkhana of police station ANF Clifton Karachi where he met with Malkhana Incharge S.I Ali Muhammad, SHO was Aftab Ahmed and asked about the property of Crime No.19 and 20 of 2015 which were produced before him and the net weight of such case property was 21.400 Kgs. He had withdrawn samples of 100 grams from each packet and the rest of the property was re-sealed the samples were sealed in brown envelopes and obtained signatures of the witnesses so also put his signature. He prepared the memo of sampling. Case property of FIR No.20/2015 was produced and the net weight of such case property was 77.760 Kgs from which he had withdrawn samples of 100 grams from each packet and sealed in the brown envelopes, obtained signatures of SI Ali Muhammad, PC Sagram and Nazir of the Court and prepared the memo of sampling. The remaining case property of crime No.20/2015 was re-sealed. He produced the burning memo and certificate in respect of the property of both FIRs. **Sagram Das was examined as PW-4** who deposed that on 29.10.2016, he was posted at police station ANF Clifton, Karachi being PC and learned Judicial Magistrate Mr Anis-ur-Rehman visited the police station, ANF Clifton, for the purpose of sampling the case property and first of all the case property of FIR No.19/2015 was produced before him and the case property was consisting upon 21.600 Kgs and there were 20 packets and from each packet, 100 grams samples were withdrawn with the permission of the learned Judicial Magistrate and the samples were sealed into the brown envelopes and he along learned Judicial Magistrate, SHO Aftab Ahmed, Nazir of the court and S.I Ali Muhammad put respective signatures on the brown envelopes, whereas the rest of case property weighing 19.600 Kgs was sealed in a separate sack. Learned Magistrate prepared the sampling memo, which was read over to them on which he also put his signature. Thereafter, case property of FIR No.20/2015 was produced before the learned Judicial Magistrate consisting of 77.760 Kgs in four nylon sacks of yellow and with the permission of the learned Judicial Magistrate out of 72 packets, 100

grams of samples were withdrawn from each packet and sealed in the brown envelopes and he along with learned Judicial Magistrate, SHO Aftab Ahmed, Nazir of the court and S.I ALI Muhammad put respective signatures on the brown envelopes, whereas the rest of the case property weighing 70.560 Kgs put in the same sacks yellow in colour and sealed. Learned Judicial Magistrate prepared the sampling memo, and obtained his signature. From the evidence of these witnesses, it is established that the property was destroyed and therefore was not produced before the trial court; however, the samples taken from each packet were produced. The destruction of the property has not been challenged by the appellants.

11. We have carefully examined the evidence of the prosecution witnesses and found the same reliable, trustworthy and confidence-inspiring. The recovery of a huge quantity of charas was affected from the possession of the accused and the same was kept in safe custody and within the shortest period, it was sent for chemical examination which produced a positive chemical report. The prosecution also proved the safe custody and its safe transmission by producing the witnesses in whose custody the property was in the Malkhana and through whom it was sent for chemical examination. All the chains from the recovery of the narcotics to sending the same for the chemical examination have been proven by the prosecution beyond a reasonable doubt. The same is also strengthened by the fact that the report of the chemical examiner was exhibited in the evidence which confirms that the parcel was received on the same date it was sent from the person who brought it. Therefore, it can safely be said that the safe chain of custody of the recovered narcotics was not compromised at all. Reliance is placed on the cases of ***Faisal Shahzad v. The State [2022 SCMR 905]*** and ***Ajab Khan v. The State [2022 SCMR 317]***.

12. As regards the contentions of defence counsel that the complainant and the investigation officer of the case are the same people therefore his evidence cannot be relied upon and its benefit must be given to the appellants. This contention has no force as there is no prohibition in the law for the police officer to investigate the case lodged by him as has been held by the Honourable Supreme Court of Pakistan in the case of ***Zafar v. The State (2008 SCMR***

1254), wherein it is held in Para-11 that “So far as the objection of the learned counsel for the applicant that the Investigation Officer is the complainant and the witness of the occurrence and recovery, the matter has been dealt with by this Court in the case of State through **Advocate-General Sindh v. Bashir and others PLD 1997 SC 408,** wherein it is observed that *a Police Officer is not prohibited under the law to be complainant if he is a witness to the commission of an offence and also to be an Investigating Officer, so long as it does not in any way prejudice the accused person.* Though the Investigation Officer and other prosecution witnesses are employees of A.N.F., they had no animosity or rancor against the appellant to plant such a huge quantity of narcotic material upon him. The defence has not produced any such evidence to establish animosity qua the prosecution witnesses. All the prosecution witnesses have deposed in line to support the prosecution case. The witnesses have passed the test of lengthy cross-examination but the defence failed to make any dent in the prosecution story or to extract any material contradiction fatal to the prosecution case. The prosecution has been successful to bring home the guilt of the appellant to the hilt by placing ocular account, recovery of narcotic material, the Chemical Examiner report G.1, Exh.P.3. The learned counsel for the appellant has not been able to point out any error of law in the impugned judgment and the same is unexceptionable. Even otherwise, the mere status of one as an **official** would not alone prejudice the competence of such witnesses until and unless he is proven to be **interested**, who has a motive, to falsely implicate an accused or has the previous enmity with the person involved. Reliance is placed on the case of ***Farooq v. The State (2008 SCMR 970)***.

13. Learned counsel for the appellants had contended that having prior information no private persons were associated as witnesses/mashir in the recovery proceeding hence the provision of section 103 Cr. P.C was violated by the complainant and the evidence of police officials cannot be relied upon while awarding the conviction in cases of capital punishment. This contention also has no force as the reluctance of the general public to become a witness in such cases has become a judicially recognized fact and there was no way out but to consider the statement of the official witnesses as no legal

bar or restriction has been imposed and even then there was no time to collect independent witnesses. No direct enmity or ill will has been suggested by the appellants against the complainant or any of the officials who participated in recovery proceedings during cross-examination and therefore in the circumstances the police officials were good witnesses and could be relied upon if their testimony remained un-shattered during their cross-examination. Even otherwise, the provision of Section 25 of the CNS Act has provided the exclusion of Section 103 Cr.P.C. during recovery proceedings. Reliance is placed on the cases of ***Salah-uddin v. The State (2010 SCMR 1962)***, ***Shabbir Hussain v. The State (2021 SCMR 198)*** and ***Mushtaq Ahmad v. The State & another (2020 SCMR-474)***. In the case of Mushtaque Ahmed (supra) it was held that the “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”.

14. The defence counsel also emphasized that only samples taken from the slabs were sent for the chemical examination and not the entire property. Therefore, the conviction in respect of the entire recovered charas is not sustainable. We have examined the evidence of prosecution witnesses on the point and found that PW-1 and PW-2 the complainant and the mashir during examination-in-chief deposed that from every packet 20 grams of samples were withdrawn which were put in the brown envelopes and were numbered properly for the identification and were sealed properly for chemical analysis whereas the rest of the narcotics was also sealed and under the order of the trial court after taking samples of 100 grams from each packet through a Judicial Magistrate was destroyed. It has come in evidence that from each packet of charas samples were separated and after sealing the same were sent for chemical examination, therefore it can easily be said that the prosecution has proved each packet to be the charas. The Honourable Supreme Court of Pakistan in the case of

Sharafat Khan v. The State (PLD 2022 SC 281), has observed that “The underlining principle that emerges from the reading of the Act, Rules and Ameer Zeb’s case is that before an accused is burdened with a criminal liability under the Act of possessing the alleged narcotic drug, a representative sample of that alleged narcotic drug must be drawn and dispatched to be tested and analyzed by the Government Analyst. Testing and analysis of the alleged narcotic drug is a sine qua non for holding the accused liable under the Act, and the accused cannot be saddled with any liability under the Act unless the report of the Government Analyst is in the affirmative. As the severity of the punishment under the Act varies with the quantity of the narcotic drug recovered, it is therefore essential for the prosecution to establish that the entire alleged narcotic drug stood tested and analyzed by the Government Analyst by drawing representative sample(s) of the alleged narcotic drug. The test and analysis of the representative sample of an alleged narcotic drug amounts to test and analysis of the entire quantity of that narcotic drug. The acts of taking and testing of the representative sample become critical as they feed the assumption that the entire quantity from which the sample was drawn stands tested and analyzed. Therefore, the sample to be representative must be drawn for each and every physically independent and separate unit of the alleged narcotic drug recovered from the accused. A separate and independent unit of the alleged narcotic drug cannot be left out from test and analysis on the assumption that a representative sample has been drawn from other similar physically independent and separate units of the alleged narcotic drug. Any such assumption would offend the fundamental right to fair trial and due process of the accused guaranteed under Article 10A of the Constitution, besides militating against the safe administration of justice. Right to fair trial of the accused under Article 10A of the Constitution requires that the sample drawn from the alleged narcotic drug must be truly representative of the alleged narcotic drug recovered and therefore must be drawn from all the physically separate and independent units of the alleged narcotic drug. In this regard, the mode of packaging of the alleged narcotic drug by the accused is totally inconsequential; for example, in this case each of the 25 packets have 14 slabs of the alleged narcotic”

drug, which could have easily been re-packaged as separate 350 packets with one slab each of the alleged narcotic drug or one big packet of 350 slabs of the alleged narcotic drug. The representative sample can only retain its representative character and be also constitutional compliant, if it is drawn from every physically separate and independent unit of the alleged narcotic drug.”

15. We have also gone through the statements of the appellants recorded under the oath and the evidence of their defence witnesses and found that the appellants Shoukat Ali and his defence witnesses Liaqat Ali and Ghulam Akbar, appellant Irfan and his defence witnesses Niaz Ali and Ghulam Rasool, appellant Shakeel Ahmed and his witnesses Rashid Ali and Shakeel Ahmed are on one line that these three appellants were arrested by the rangers officials from their houses on 04-04-2015 and after confinement for about 12 to 14 days were handed over to ANF officials who produced them before the court. The appellant Abdul Rasheed and his defence witnesses stated that the appellant was arrested on 05-04-2015 by the ranger officials from his house and then was handed over to ANF and booked in this case. During the cross-examination, all the appellants and their defence witnesses admitted that they have not made any complaint about the arrest of appellants or filed any petition etc. It is simply not believable that four persons were arrested and were kept in wrongful confinement but no one from their relatives had made any complaint nor tried to rescue them or tried to get them released. As such we disbelieve the defence case and find that the prosecution has successfully proved the case against the appellants beyond a reasonable doubt therefore the defence evidence as discussed above is not helpful for the appellants. It is a settled proposition of law that by the flux of time in the cases of transportation or possession of narcotics, technicalities of procedural nature or otherwise should be overlooked in the larger interest of the country, if the case stands otherwise proved, the approach of the Court should be dynamic and pragmatic in approaching facts of the case and drawing correct and rational inferences and conclusions while deciding such type of cases. **“No drug peddler can be acquitted in**

the narcotics case on technicalities.” Reliance is placed on the case of ***Ghulam Qadir v. The State (PLD 2006 SC 61)***.

16. Thus based on the particular facts and the circumstances of the case in hand as discussed above, we have found that the prosecution has proven its case against the appellants beyond a reasonable doubt by producing reliable, trustworthy and confidence-inspiring evidence in the shape of oral/direct and documentary evidence corroborated by the report of the chemical examiner. The impugned Judgment passed by the learned trial court does not suffer from any illegality, gross irregularities or infirmities to call for interference by this court. Resultantly, the appeals in hand are dismissed.

17. The appeals are disposed of in the above terms.

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