

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD.

Criminal Appeal No.D-112 of 2022

Present:-

Mr. Justice Muhammad Iqbal Kalhoro.
Mr. Justice Khadim Hussain Soomro.

Date of hearing: 03.05.2023
Date of decision: 17.05.2023
Appellant: Muhammad Hashim,
Through Mr. Muhammad Sachal R. Awan
advocate.
The State: Through Mr. Shahzado Saleem Nahiyoon, APG

JUDGMENT

MUHAMMAD IQBAL KALHORO, J:- Appellant has challenged judgment dated 28.09.2022 rendered by learned Additional Sessions Judge / Model Criminal Trial Court Badin in Special Case No.15/2022 convicting and sentencing him u/s 9(c) of Control of Narcotics Substance Act, 1997 to suffer rigorous imprisonment for life and to pay fine of Rs.1,00,000/-, and in default thereof to suffer one year imprisonment more, with benefit of section 382-B CrPC, notwithstanding, extended to the appellant.

2. As per brief facts, on 04.11.2021 at 1500 hours SIP Bakshal Khan Suhag, posted at CIA Center Badin, was on patrol duty to arrest drug peddlers along with his staff in government vehicle, when he received spy information of presence of accused Niaz Parhiyar unloading huge quantity of charas near his village Haji Adam Parhiyar. Acting on it, he proceeded to the said village and when at about 1600 hours he and his team reached there, he spotted accused Niaz Parhiyar and appellant standing together with two plastic kattas / bags lying nearby / adjacent to them. Seeing the police, the accused tried to run and in fact accused Niaz Parhiyar succeeded in making his escape good. Complainant and his team, however, nabbed appellant from the spot, and in response to a formal inquiry, came to know of his identity. On opening, in one katta / bag 34 packets of charas, weighing 01 kg each, were found available and in the other katta / bag 38 packets of charas, weighing 01 kg each. The total quantity of charas available in both the kattas / bags came to be 72 kg. The recovered charas was sealed separately in both the kattas / bags and appellant was formally

arrested. Necessary documents including memo of arrest were prepared at the spot and thereafter the complainant brought the accused and recovered property at police station Badin where he registered FIR against the appellant and absconding accused Niaz Parhiyar.

3. In due course, investigation was entrusted to Sub-Inspector Muhammad Khan who handed over case property to WHC Ghulam Hussain for keeping in malkhana on the same day viz. 04.11.2021, recorded statements of witnesses u/s 161 CrPC and visited place of incident along with complainant and mashirs. He sent entire case property viz. 72 kg of charas in two kattas / bags to office of chemical analyzer on 10.11.2021 for a report. After receiving positive chemical report there from, he submitted Challan in the court which took cognizance of the offence against appellant and proceeded to record evidence of the witnesses after framing the charge against him: complainant as PW-1 at Ex.6, he has reiterated the said facts in his evidence, Investigating Officer as PW-2 at Ex.7 telling account of investigation and producing necessary memos including Lab. Report, PW-3 mashir of the case at Ex.8. Lastly, PW-4 WHC Ghulam Hussain, malkhana incharge at Ex.09. After prosecution evidence, the trial court recorded statement of appellant u/s 342 CrPC in which appellant has simply denied the prosecution case. By means of impugned judgment the trial court has decided the case convicting and sentencing the appellant in the terms as stated above.

4. Learned defense counsel has argued that appellant is innocent and has been falsely implicated in this case; spy information was against co-accused Niaz Parhiyar who escaped from the place of incident and the narcotics recovered from there belong to him and not to the appellant; in fact police on receiving bribe had let off the real culprit Niaz Parhiyar after arresting him and implicated appellant instead and made him scapegoat; prosecution has failed to establish physical possession of the narcotics / charas from appellant and he is simply shown to be present at the spot where two kattas / bags of charas were available; appellant was simply standing for boarding on some vehicle for proceeding to his village and had nothing to do with the case property; witnesses have contradicted each other on material facts of the case and there is a delay in sending the property to chemical lab; incident took place on 04.11.2021 whereas the property was sent to lab on 10.11.2021 after six days. He has relied upon case

law reported in 2011 SCMR 820, 2018 SCMR 2039 and PLD 2002 Supreme Court 1048 to support his arguments.

5. On the other hand, learned Additional Prosecutor General has supported the impugned judgment.

6. We have considered submissions of the parties and perused material available on record while taking guidance from the case law cited at bar. In this case, prosecution has examined four witnesses to establish recovery of 72 kgs of charas available in two kattas / bags from possession of appellant. Complainant has narrated entire incident in immaculate manners without wavering on any salient features: receiving information about accused and charas, reaching the spot in time, arresting the appellant with the two kattas / bags, sealing the same at the spot and bringing the appellant at police station. The investigating officer too has justified narration rendered by him in his evidence by standing ground on all main features of the investigation in cross examination. Prosecution case has been further supported by PW-3 who is recovery witness as well as PW-4 who has endorsed receiving case property and keeping it in malkhana on the day of incident viz. 04.11.2021.

7. All the four witnesses have been subjected to reasonably lengthy cross examination, but we have not seen any material contradiction or discrepancy to have come out of it which may put smoke on authenticity of the prosecution case. They have supported each other on the relevant facts of the case and have successfully stood the test of cross examination. They have made consistent statements about the incident sustaining entire chain of events culminating at arrest of accused and recovery of narcotics from him. In fact, learned defense counsel in his arguments did not point out to any contradiction in the evidence of the witnesses, and only insisted that the property was sent to chemical lab after a delay of six days and that prosecution has failed to establish physical possession of narcotics from the appellant.

8. We have seen that in this case the entire property viz. 34 kg and 38 kg of charas, sealed separately in two kattas / bags, was sent to the lab for examination, and it was dispatched so during investigation. The requirement of law that the property or its sample shall be sent to lab. within 72 hours of its recovery has been settled in a number of case law to be directory and not mandatory. Therefore, the property consigned to lab. for report during investigation before submission of the Challan

would not be considered illegal, or as sent with a shocking delay, impairing intrinsic value of the case. Further, in this case the entire case property and not any sample thereof was transmitted to the chemical lab. for examination to give rise to a question of manipulation or tampering in the samples at police station. The entire property as recovered was sent for examination and report, and the report thereof in positive when produced in the trial was not challenged by the defense, nor it made any request to the trial court for dispatching the property again for its crosschecking to verify its nature. So, seen in this context also, the delay of six days in sending the case property to lab. does not appear to be fatal for prosecution.

9. Next, the safe custody of charas in the malkhana of PS Badin has been convincingly proved from evidence of PW-4 who has stated that on 04.11.2021 the property in two katas in sealed condition was entrusted to him for keeping in malkhana and which he obliged accordingly. Its safe conveyance to the office of chemical analyzer on 10.11.2021 by the Investigating Officer, PW-2, has been brought on record persuasively by his evidence at Ex.7. Nothing in cross examination has come on record undermining either authenticity of safe custody of the property at malkhana or its uninterrupted communication to the lab.

10. Learned counsel while emphasizing point of physical possession of charas by the appellant has relied upon a case law reported in 2011 SCMR 820 in which the Honourable Supreme Court considering various factors including the fact that the narcotics recovered was found lying adjacent to the appellant had acquitted him. We have with respect gone through the case law and are of the view that facts of that law are different and distinguishable than the facts obtaining in this case. In the reported case, the accused had not denied his presence at the spot and had taken a plea throughout the trial including in his statement u/s 342 CrPC that he had no knowledge of the narcotics available nearby him and he was present at the spot, a common street, by a chance. Whereas in the present case, throughout the trial, appellant has denied his presence at the spot or the fact that recovery of the narcotics was effected from there in his presence and that the narcotics actually was owned by absconding accused Niaz Parhiyar. The plea which the appellant has taken in the trial including in his statement u/s 342 CrPC is that he has been implicated in this case falsely and the property has been foisted upon him which in absence of any proof of his enmity with the raiding party appears to be a far-fetched idea, inconceivable at best.

11. There appears to be no ill will or motive on the part of raiding party to implicate the appellant in a case of recovery of huge narcotics i.e. 72 kgs. of charas. Appellant's presence and recovery of two kattas / bags of narcotics available nearby him has been established from evidence of the witnesses. Appellant has failed to justify his presence along with the case property in a village which is far away from his original residence, as revealed by learned defense counsel in his arguments. His arrest and recovery of narcotic from the spot has been further confirmed by investigating officer who is posted at police station Badin, and not at the CIA Center whose party had originally arrested the appellant. At the spot, apart from appellant and absconding accused Niaz Parhiyar, no one was present. Arrest of the appellant and recovery of the charas from him materialized only after receipt of spy information, when raiding team arrived at the spot and spotted both appellant and absconding accused Niaz Parhiyar available with the two kattas / bags. Presence of two bags of charas weighing 72 kgs nearby an accused or two, without any other cogent explanation, would be a sufficient proof of their connection with them. Physical possession does not mean the narcotics should be either in laps of the accused or on his shoulder. Accused's presence at some spot with some bags full of narcotics available with or before or adjacent or nearby him, in absence of any compelling justification otherwise, would definitely imply his control over them. To infer lack of possession by the accused, found not carrying one or two bags of narcotics in their laps or on shoulders, but which are otherwise available nearby them, at a spot where no one else is present, is absurd and antithetical to the common sense. The appellant and absconder accused, otherwise present with narcotics, and yet not seen keeping two bags weighing 72 kgs in their laps or on shoulders would not therefore signify lack of control or possession on their part of the narcotics, but would be considered in full control of it. The possession of charas by the appellant, thus, is undisputed and beyond any reasonable doubt.

12. We, therefore, are of the view that learned trial court has not committed any error in convicting and sentencing the appellant in the terms as stated above. We, therefore, finding no merit in the appeal dismiss it and uphold the impugned judgment.

The appeal is accordingly disposed of in above terms.

JUDGE

JUDGE

Ali Haider