

IN THE HIGH COURT OF SINDH AT KARACHI.

Criminal Appeal No.340 of 2022

Present:

Mr. Justice Naimatullah Phulpoto
Mr. Justice Amjad Ali Sahito

Appellants

1. Abdul Majeed S/o Ahmed
2. Ghulam Hussain S/o Mahmood
3. Muhammad Karim S/o Lashkari
4. Muhammad Sharif S/o Wahid Bux
5. Muhammad Mustafa S/o Abdul Wahid
6. Ghous Bux S/o Faiz Muhammad
7. Muhammad Hanif S/o Muhammad
8. Sikandar Khan S/o Moula Bux
9. Allah Bux S/o Ghulam Mohammad
10. Faiz Muhammad S/o Noor Muhammad
11. Abdul Sattar S/o Hussain
12. Abdul Aziz S/o Khuda Bux
13. Hafeez S/o Muhammad

through Mr. Muhammad Farooq, Advocate
appearing for Appellants 1 to 8 & 10 to 13

M/s. Abdul Khalique Nawal & Kamran Ali
Abro, Advocates for Appellant No.9 Allah
Bux

Respondent : The State
through Mr. Pir Riaz Muhammad Shah,
Deputy Attorney General for Pakistan

Mr. Khalid Mehmood Siddiqui & Ms.
Firdous Faridi, Special Prosecutors
(Customs)

Date of hearing : **15.11.2023**

Date of decision : **28.11.2023**

J U D G M E N T

AMJAD ALI SAHITO, J:- Through this Criminal Appeal, the appellants have challenged the judgment dated 06.05.2022 passed by learned Judge, Special Court-II (CNS), Karachi in Special Case No.524 of 2018 under FIR No.ASO-102/2018-HQ U/s 9-C read with sections 14/15 of the CNS Act, 1997

registered at PS Customs, Karachi; whereby all the above named appellants were convicted and sentenced for life imprisonment and fine of Rs.300,000/- each and in case of default in payment of fine, they shall further undergo for three years imprisonment. However, the benefit of Section 382-B Cr.P.C. was extended to the appellants.

2. The details and particulars of the case are already available in the memo of appeal and in Judgment passed by the learned trial court, same could be gathered from the same attached with appeal, hence needs not to reproduce the same hereunder.

3. After completion of the usual investigation, the investigating officer submitted a report under section 173 Cr.P.C (Challan) showing the present applicants in custody before the competent court of law.

4. The charge against all the appellants was framed at Ex.4, to which they pleaded not guilty and claimed trial.

5. To prove its case, the prosecution examined PW-1 Complainant IPS Tariq Mahmood at Ex.19, who produced handing/taking over certificate at Ex.19/A, mashirnama at Ex.19/B, inventory of case property at Ex.19/C, mashirnama of examination and seizure at Ex.19/D, notice of arrest at Ex.19/E, FIR at Ex.19/F, letter addressed to chemical examiner at Ex.19/G and detention receipt at Ex.19/H. PW-2 SPO Mohammad Tayyab Khan at Ex.21 and PW-3 I.O. of the case PO Saddam Hussain at Ex.22, who produced letter addressed to Superintendent Customs Gawadar at Ex.22/A, letter addressed to the I.O. by Superintendent Customs House Gawadar at Ex.22/A-1, photocopy of CNIC at Ex.22/A-2, letter of Directorate Fishries at Ex.22/A-3, Inspection report at Ex.22/A-4, letters for cell phone details at Ex.22/B & 22/B-1 and chemical examination report at Ex.22/C. In the meanwhile, during the trial, one of the accused namely Mohammad Ismail son of Mohammad Ali has died during incarceration and statement of Deputy Superintendent Jail namely Azeem Thebo was recorded

in this regard at Ex.23. Thereafter, learned SPP for Customs filed an application U/s 540 Cr.P.C. at Ex.24 for calling Wajid Nawaz of Pakistan Navy. After hearing both sides, the application was allowed vide order dated 17.07.2021 at Ex.24/A. Thereafter, learned SPP for Customs closed the side of prosecution at Ex.25.

6. The statement of the appellants under Section 342 Cr.P.C., was recorded wherein they denied all the allegations of the prosecution levelled against them. However, they did not examine themselves on oath nor examine any witness in their defence.

7. The learned trial Court on evaluation of the evidence and after hearing the parties, convicted and sentenced the appellants/accused vide judgment dated 06.05.2022, which they have impugned before this Court by preferring instant Criminal Appeals.

8. Learned counsel for the appellants submits that there was a delay in lodging FIR; that alleged recovery was made on 05.04.2018 whereas FIR was lodged on 06.04.2018; that appellants/accused were arrested from the Boat by Pakistan Maritime Security Agency but none of them has been cited as witness and all the PWs cited as witnesses are Customs officials; that there is no direct evidence against the accused persons; that actual place of incident and arrest of the appellants was the open sea and the same is not mentioned anywhere; that the prosecution failed to prove safe custody during trial before the trial Court; that Incharge of Warehouse where the narcotics substance was kept has not been examined by the prosecution; that narcotics was sent to the Chemical Examiner on 10.04.2018 after 5 days of the recovery; that tests conducted by the Chemical Examiner were not in accordance with the guidelines settled by the Hon'ble Supreme Court of Pakistan in its judgment; that the launch/boat was the case property but the same was not produced before the Court; that no direct evidence is available against the accused persons that they are involved in the commission of alleged offence; that Pakistan Maritime

Security Agency has allegedly shown accused persons but prosecution has failed to examine them. Lastly, they pray for the acquittal of the appellants. In support of their contentions, learned counsel has relied upon the case laws: (1) 2023 SCMR 139 (*Javed Iqbal vs. The State*), (2) 2023 SCMR 1144 (*Said Wazir and another vs. The State and other*), (3) 2023 SCMR 1009 (*Lal Jan vs. The State*), (4) 2023 SCMR 781 (*Ahmed Ali and another vs. The State*), (5) 2023 SCMR 986 (*Muhammad Hazir vs. The State*), (6) 2021 SCMR 363 (*Qaiser Khan vs. The State through Advocate-General Khyber Pakhtunkhwa, Peshawar*), (7) 2018 SCMR 2039 (*The State through Regional Director ANF vs. Imam Bakhsh and others*), (8) 2015 SCMR 1002 (*Ikramullah and others vs. The State*), (9) 2009 PCRLJ 1334 (*Agha Qais vs. The State*), (10) 2009 MLD 122 (*Momin Khan vs. The State*) 2006 PCRLJ 1237 (*Dildar Hussain vs. The State*), (11) 2005 PCRLJ 1198 (*Gul Khan vs. The State*) and 2004 PCRLJ 361 (*Riasat Ali vs. The State*).

9. On the other hand, learned DAG duly assisted by Learned Special prosecutor Customs while supporting the impugned judgment have contended that the prosecution has successfully proved its case against the appellants who were arrested at the spot with a huge quantity of heroin; that the Agency had no hostility to foist such a huge quantity of narcotics substance against the appellants of its own, as such, they prayed for dismissal of the instant Criminal Appeal. When we confronted the state officers that not a single eye-witness of the incident had been examined by the prosecution during the trial, they replied that sufficient evidence was available on the record to connect the accused persons with the commission of the offence.

10. We have heard the learned counsel for the parties and have gone through the material available on record.

11. The deeper re-analysis of the material brought on record entails that the case of the prosecution is that on 06.04.2018 Pakistan Maritime Security Agency (**hereinafter referred to as "Agency"**) intimated to the Customs authorities that on 05.04.2018 during patrolling in the open sea, the Agency

had apprehended a wooden dhow/boat 'Insha Allah' bearing Registration No.BFD-12587 loaded a huge quantity of heroin alongwith 14 accused persons. The heroin was concealed in the engine room of the wooden boat. Thereafter, the Agency's Headquarter informed the Customs authorities and Commander Pakistan Navy Wajid Nawaz handed over recovered 185 packets alongwith 14 accused persons to the Customs authorities and thereafter such handing/taking over took place. Such certificate was produced by the complainant Tariq Mehmood as Ex.19/A. We have also perused the handing/taking over certificate wherein the date is overwritten as 05.04.2018. From a perusal of the record, it reflects that nowhere it is mentioned by the prosecution that at the time of patrolling who were boarded in the patrolling ship and no detail has been provided by the Agency as to what time they have arrested the accused persons and recovered alleged narcotics from the boat. However, Commander Pakistan Navy namely Wajid Nawaz handed over the property to the complainant PW-1 Tariq Mehmood under the memo of mashirnama dated 06.04.2018 Ex. 19/B. Learned counsel for the appellants pointed out that the prosecution has failed to examine the material/eye-witnesses of the incident viz Agency officials. The accused persons were arrested by the Agency and subsequently handed over to the Customs. PW-1 Tariq Mahmood admitted in cross-examination that ***"It is fact that there is no witness of MSA officials in this case nor Lt. Commander Majid Nawaz has been made witness....It is fact that neither the accused were arrested in my presence nor recovery effected in my present...It is fact that I had not seen the launch. It is fact that it has not mentioned from which portion of the launch such narcotics were recovered...It is fact that no any documents handed over to the customs by MSA to show that the launch bearing registration NO. BED-12587 was in command and control of the present accused persons."*** The I.O. of the case PW-3 Saddam Hussain admitted in his cross-examination that ***"It is fact that I had not recorded statement of officials of PSMA. I had tried to associate them but could not find the contract number of***

PSMA officials.” We have also noted that no direct evidence is available on record. The law of the land provides the procedure to prove the criminal case, in so many cases the Hon’ble Supreme Court of Pakistan has held that, it is always the direct evidence which is material to decide a fact. The failure of direct evidence is always sufficient to hold a criminal charge as not proved but when the direct evidence remains in the field with a test of its being natural and confidence-inspiring then the requirement of independent corroboration is only a rule of abundant caution and not a mandatory rule to be applied inversely in each case. Needless to mention here that in the absence of direct evidence such a witness would never qualify for the requirement, necessary for direct evidence as required by *Article-71 of Qanun-e-Shahadat Order, 1984*. If any crime/offence is unseen and un-witness or hearsay evidence, for this, strong circumstantial evidence is required. In such like cases, the criterion to see whether circumstantial evidence can hold a conviction or to depend purely on a single principle which stood reiterated in the case of **‘ASEEM KHAN and another v. MUJAHID KHAN and other’ (2016 SCMR 274) as under:-**

“31. As discussed earlier, the entire case of the prosecution is based on circumstantial evidence. The principal of law, consistently laid down by this Court is that different pieces of such evidence has to make on chain, an unbroken on where one end of it touches the dead body and the other the neck of the accused. In case of any missing link in the chain, the whole chain is broken and no conviction can be recorded in crimes entailing capital punishment.”

12. In the instant case, the claim of the prosecution is/was that the Agency has arrested the accused but they failed to examine a single person from the Agency to believe that they were present there and have arrested the accused persons alongwith narcotics. To fill the lacunas the prosecution had moved an application under Section 540 Cr.P.C. with a request to the Court to allow them to call the Commandeer Pakistan Navy Wajid Nawaz as his evidence was very essential. Such application was allowed vide order dated 17.07.2021 but time

and again, the prosecution has failed to produce him as a witness. Resultantly, the learned Special Prosecutor moved another application dated 12.10.2022, and the same was allowed and thereafter the side of the prosecution was closed. It is astonishing to note here that the eye-witnesses of the incident, who *allegedly* witnessed the incident were not examined by the prosecution for no obvious reason, therefore, the presumption will be drawn under illustration (g) of Article 129 of Qanoon-e-Shahadat Order, 1984 that if they have been produced and examined in the case, then the same would have been unfavourable to the prosecution case.

13. In the case of ***Kashif Ameer vs. The State (PLD 2010 SC-1052)***, the Hon'ble Supreme Court of Pakistan has held that the person on a driving seat shall be held responsible for the transportation of a huge quantity of narcotics substance. Reliance is also placed in the case of Hussain Shah wherein the Hon'ble Supreme Court of Pakistan while dismissing the appeal of appellant Hussain Shah by way of the judgment dated 20-09-2019 passed in ***Criminal Appeal No.7-P of 2017***, has held that:-

***“Hussain Shah appellant was driving the relevant vehicle when it was intercepted and from a secret cavity of that vehicle a huge quantity of narcotic substance had been recovered and subsequently a report received from the Chemical Examiner had declared that recovered substance was Charas. The prosecution witnesses deposing about the alleged recovery were public servants who had no ostensible reason to falsely implicate the said appellant in a case of this nature. The said witness had made consistent statements fully incriminating the appellant in the alleged offence. Nothing has been brought to our notice which possibility could be used to doubt the veracity of the said witnesses.*”**

14. The case in hand, it is not clear who was in the driving seat to be said that he was responsible for the transportation of a huge quantity of narcotics in the boat whereas the claim of the appellants while recording their statement under Section 342 Cr.P.C. is/was that they have no

knowledge about the narcotics and they were arrested by the Pakistan Navy when they were crossing international water. PW-2 admitted in his cross-examination that he had not seen the launch from which the alleged stuff was recovered. Even the property viz launch was not handed over to the customs authorities by the Agency.

15. The next contention of learned counsel for the appellants is/was that the prosecution has failed to prove the safe custody/safe transmission of narcotics to the office of the Chemical Examiner and failed to examine the persons, who had kept the recovered narcotics in the State Warehouse. We have noted that in the instant case, the Agency arrested the accused persons on 05.04.2018 and handed over them alongwith narcotics on 06.04.2018 with a delay of near about 20 hours but nowhere it is mentioned that the property/alleged narcotics was sealed by the Agency and in a sealed condition, the same was handed over to the Customs authorities. Even it is not clear at what time the accused persons were arrested and thereafter they were handed over to the Customs authorities. The investigating officer of the case also failed to record the statement of the Incharge State Warehouse to believe that the property was handed over to him. The prosecution also failed to produce him as a witness to support the contention of the complainant so also safe custody and safe transmission of the alleged recovered narcotics to the laboratory. PW-1 Tariq Mahmood/complainant admitted in his cross-examination that ***“After 2 or 3 days I had deposited two samples cartons and rest of heroin in the warehouse and entry was made for deposition in the warehouse and prepared a CGO No.06/2018..No any entry was made as per CGO when the case property was lying at ASO HQ Vol. says DR was lodged.”***

16. We have also seen the chemical examiner report which shows that the samples of alleged narcotics were sent to the office of the chemical examiner on 10.04.2023 with a delay of 05 days. It has been observed by us that recovery was effected on 05.04.2018 whereas sample parcels were received in the office of

the chemical examiner on 10.04.2018 without any plausible explanation as to where these sample parcels remained from 05.04.2018 to 10.04.2018. No documentary evidence was produced by the complainant under what letter or entry he handed over the property to the incharge State Warehouse. PW-3/ I.O of the case admitted in his cross-examination that **“It is fact that I had not recorded the statement u/s 161 Cr. P.C of the incharge of Warehouse where the case property was lying.”** From perusal of Chemical Examiner reports it reflects that PW-2 Muhammad Tayyab delivered the sample parcel to the office of Chemical Examiner. We have scanned his evidence in his examination-in-chief nowhere he has stated that the parcel was delivered to him and he went to the office of the chemical examiner and deposited the sample in the laboratory, hence safe transmission of alleged recovered narcotics to the laboratory for chemical analysis is also missing. The law in this regard is settled by now that if safe custody of narcotics and its transmission through safe hands is not established on the record, the same cannot be used against the accused. Reliance in this regard can well be placed on the cases of **Mst. Razia Sultana v. The State and another (2019 SCMR 1300), The State through Regional Director, ANF v. Imam Bakhsh and others (2018 SCMR 2039), Qasier Khan v. The State through Advocate General, Khyber Pakhtunkhwa, Peshawar (2021 SCMR 363), Mst. Razia Sultana v. The State and another (2019 SCMR 1300), Ikramullah and others v. The State (2015 SCMR 1002) and Amjad Ali v. The State (2012 SCMR 577).**

17. On re-assessment of evidence of the prosecution witnesses, it reflects that the entire case of the prosecution is based on the hearsay evidence. The prosecution failed to examine a single eye witness of the incident to believe the prosecution version. The safe custody and safe transmission were compromised. The sample of the recovered narcotics was sent to the office of the chemical examiner after a delay of 05 days. No plausible explanation has been furnished by the prosecution. Further, the investigating officer has also failed to inspect the

secret cavities/engine room of the wooden dhow/boat from which the alleged contraband substance was recovered. It was the prime duty of the prosecution to establish that the alleged narcotics were recovered from the engine room. PW-3/I.O. of the case Saddam Hussain admitted in his cross-examination that ***“It is fact that I had not seen the boat till to date.”*** PW-2 Muhammad Tayyab Khan admitted in his cross-examination that ***“It is fact that no any article recovered from the launch in my presence.”***

18. The upshot of the above discussion is that the prosecution has miserably failed to bring home the guilt of the appellants/accused beyond reasonable doubt and it is a settled proposition of law that for giving benefit of doubt to an accused there doesn't need to be many circumstances creating doubts. If a single circumstance creates reasonable doubt in the prudent mind, then its benefit is to be extended in favour of the accused not as a matter of grace or concession, but as a matter of right. In this respect, reliance is placed on the case of **MUHAMMAD MANSHA v. THE STATE** reported in **2018 SCMR 772**, wherein the Hon'ble Supreme Court of Pakistan has held that:

“4. Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to be benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, “it is better than one innocent person be convicted”. Reliance in this behalf can be made upon the cases of Tarique Parvez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Mohammad Akram v. The State (2009 SCMR 230) and Mohammad Zaman v. The State (2014 SCMR 749).

19. It is a well-settled principle of criminal administration of justice that no conviction can be awarded to an accused until and unless reliable, trustworthy and unimpeachable evidence containing no discrepancy casting some cloud over the veracity of

the prosecution story is adduced by the prosecution. We are of the view that in the present case, the prosecution story engulfed under the thick clouds of doubt and the learned trial Court has not evaluated the evidence in its true perspective and thus arrived at an erroneous conclusion by holding the appellants guilty of the offence. Resultantly, instant appeal is **allowed**. The conviction and sentence awarded to the appellants named above are **set aside** and they are **acquitted** of the charge by extending them the benefit of the doubt. The appellants shall be released forthwith if not required in any other custody case.

JUDGE

JUDGE

Hyder/PA