

THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Present:

Ms. Justice Rashida Asad. J

Mr. Justice Khadim Hussain Soomro. J

Criminal Jail Appeal No. D-34 of 2020

Appellant: Naimatullah son of Muhammad Hanif Achkzai.
Through Mr. Abdul Baqi Jan Kakar, Advocate.

The State Through Mr. Aftab Ahmed Shar, Additional Prosecutor
General, Sindh.

Date of Hearing: 13-09-2023.

Date of Judgment: -10-2023.

JUDGMENT

KHADIM HUSSAIN SOOMRO, J. Through this judgment, we intend to dispose of the captioned appeal filed by appellant Naimatullah Achkzai Pathan through Senior Superintendent Central Prison, Sukkur. The above appeal arising out of Crime No.55/2016, for offence, u/s 9(c) CNS Act, 1997, registered at Police Station, Baiji Sharif. The appellant has impugned the judgment dated 22-10-2019 passed by learned I-Additional Sessions Judge/Special Judge Narcotics (MCTC), Sukkur, whereby the appellant has been convicted for the offence punishable u/s 9(c) of CNS Act and was sentenced to suffer “Imprisonment for life” and to pay fine of Rs.100,000/- (one lac) and in default whereof to serve out S.I for One year more with benefit of Section 382-B Cr.P.C.

2. Brief facts of the case are that on 04.11.2016, the complainant, SIP Muhammad Ilyas with his subordinates and staff of CRO while patrolling reached at Pir Jo Wah near Pano Aaqil Bridge and started vehicle checking. At about 5:30 p.m., a white colour Mehran Car bearing registration No. AA-3675, came from the Punjab side. They signaled it to stop, but the driver chose to accelerate in an attempt to evade capture. A police mobile chased

the Mehran Car and intercepted. During checking, all four persons sitting in the car asked to alight from it, being suspects, and due to the non-availability of private persons, SIP Muhammad Ilyas acted as Mushir along with PC Manzoor Ahmed. On inquiry, the driver of the said car disclosed his name as Naimatullah, son of Muhammad Hanif, another accused disclosed his name as Sirajuddin son of Haji Sardar Muhammad. The third accused disclosed his name as Asmat Ali son of Atta Muhammad Shah. The last one disclosed his name as Abdul Qadir son of Abdullah, all resident of Balochistan. On physical search some personal belongings including original CNICs were recovered. Upon inspecting the Trunk (Dikki) of the vehicle mentioned above inside the gas cylinder, they found twenty packets of Charas. In addition, six packets of Charas were found from the driver-side door, while seven packets of Charas were found in the side door behind the driver seat. Furthermore, five packets of Charas were secretly concealed in the front door, and seven packets of Charas were discovered concealed in the back door of the aforementioned vehicle during the police inspection. A total of forty-five (45) packets of Charas were retrieved. Each packet was separately weighed and measured to be 1000 grammes. However, 100 grams of Charas from each packet was segregated for sending to the chemical examiner, and the remaining property was sealed on the spot. Mashirnama was prepared at the spot; then, the accused and recovered property were brought to the Police Station, where the complainant registered the FIR against the accused on behalf of the State. After usual investigation, the case was challaned.

3. After supplying the case papers to the accused, the formal charge was framed against them by the learned trial Court, to which they did not plead guilty and claimed to be tried.

4. In order to establish an accusation against the appellant and other accused, the prosecution examined PW-I/ mashir ASI Ali Hassan. PW-2/I.O SIP Allah Wadhayo, PW-3/complainant SIP Muhammad Ilyas, PW-4/sample bearer Parvez Ali. They produced the relevant documents.

Thereafter, learned ADPP closed the prosecution side of evidence vide statement Ex.16.

5. The appellant-accused, in his statements recorded under section 342 Cr.PC (Ex-17 to 20) has denied the allegations levelled against him by pleading his innocence. However, neither accused examined himself on oath nor led any evidence in his defence.

6. The learned trial Court, on evaluation of the material brought on record and hearing counsels for the parties convicted and sentenced the appellants/accused, whereas rest of the accused were acquitted through the impugned judgment, as discussed above.

7. Learned counsel for appellant contended that applicant is innocent, and he has falsely been implicated in this case by the Police party in order to show their efficiency; that appellant Naimatullah was Taxi driver, while other acquitted accused boarded in the said Car to attend Tablighi Ijtimat at Raiwind; that the vehicle originally was Corolla; however, police in order to usurp said Corolla Car had replaced Mehran Car by showing huge recovery from their possession; that the FIR and recovery was effected on 04.11.2016 while samples were sent to Chemical Examiner on 07.11.2016 with delay of three days having no explanation about safe custody and safe transmission; that appellant was totally unaware about Charas which was lying in secret cavity of the Car as it was foisted upon appellant; that the Chemical Examiner's report violates test protocol, losing its legal sanctity; that there are significant inconsistencies in the testimony of prosecution witnesses; that safe custody or transmission of Charas to the Chemical Examiner has also not been established; that the testimony of such interested witnesses has no legal standing. In support of his contentions, he relied upon the cases of *Mst. Sakina Vs. The State (2021 SCMR 451)*, *Shafquat Mehmood Vs. The State (2015 YLR 2163)*, and *Hussain Shah and others Vs. The State (PLD 2020 Supreme Court 132)*.

8. On the other hand, learned Additional Prosecutor General Sindh, while supporting the impugned judgment, has submitted that the prosecution has proved its case against the appellant, who, was found transporting a huge

quantity of Charas, which was recovered from the secret cavities of the Mehran Car; that the Police of Baiji Sharif had no reason to foist such a huge quantity of 45 Kilo grams narcotics on the appellant. He prayed for the dismissal of the instant criminal appeal. In support of his contentions, he placed his reliance on cases reported as *Shabbir Hussain Vs. The State (2021 SCMR 198)* as well as unreported cases of *Zain Ali Vs. The State* passed by Apex Court in Crl. Appeal No.208 of 2022 and another unreported case of *Mumraiz Khan and another Vs. The State* passed by this Bench in Crl. Jail Appeal No.D-97 of 2019.

9. We have given anxious consideration to the arguments of both sides and perused the entire material available before the Court with their assistance and the case law cited at the bar.

10. We have examined the evidence of the complainant and P.W.s in-depth. ASI Ali Hassan (PW-01/mashir) disclosed that on 04.11.2016, he, along with SIP Muhammad Ilyas and other staff, left Police Station Baiji Sharif vide entry No.9 at 1600 hours on mobile vehicle for patrolling. While patrolling via Pano Akil bypass NHW, they reached Pir Wah Bridge, where CRO staff H.C. Sheraz Niazi, PC Raees Chachar, PC Parvez Chachar, PC Muhammad Ramzan and DHC Dhani Bux, along with mobile vehicle bearing Registration No.SPV-839 also reached there, and both parties parked their police mobile and started nakabandi to check the vehicles. During checking at approximately 1730 hours, they saw a white colour Mehran Car with Registration No. AA-3675 approaching from Punjab side. They signaled the car to stop, but the driver chose to accelerate in an attempt to evade capture. Subsequently, a police mobile pursued the Mehran Car and strategically obstructed the road to prevent its escape. Subsequently, the police found four persons sitting in the car. All of them got down of the car as suspects, and due to the non-availability of private persons, SIP Muhammad Ilyas acted as Mushir along with P.C. Manzoor Ahmed. On inquiry, the driver of the said car disclosed his name as Naimatullah, son of Muhammad Hanif by caste Achakzai R/o Kala Band, Pasheen, Province Baluchistan and on his personal search single currency notes of Rs.1000/-

two currency notes of Rs.500/- original CNIC, touch mobile phone of Samsung Company were recovered from the front pocket of his shirt. On inquiry, another accused disclosed his name as Sirajuddin, son of Haji Sardar Muhammad by caste Achakzai Pathan R/o Umar Zai Pasheen, Province Baluchistan, on his personal search for a purse containing two currency notes of Rs.500/ denominations, original CNIC, a Nokia Mobile Phone X-2 were also recovered from his possession. Another accused disclosed his name as Asmat Ali, son of Atta Muhammad Shah by caste Syed R/o Shekhal Zai Pasheen, Province Baluchistan and on his personal search, twelve currency notes of Rs.100/- his original CNIC, and an old Nokia Phone were recovered. The last one disclosed his name as Abdul Qadir, son of Abdullah by caste Mosa kheal Pathan R/o Double Road Quetta, and on his personal search, two currency notes of Rs.500/- denomination, a touch mobile phone of Samsung Company were recovered, subsequently, upon inspecting the Trunk (Dikki) of the aforementioned vehicle, A gas cylinder in which a window was found during inspection. When they opened the window, they found twenty packets of Charas concealed in it. In addition, six packets of Charas were hidden within the driver-side door, while seven packets of Charas were found hidden within the door situated behind the driver's seat. Furthermore, five packets of Charas were secretly concealed within the front door, and an additional seven packets of Charas were discovered concealed within the back door of the aforementioned vehicle during the police inspection. A total of forty-five (45) packets of Charas were retrieved. Each packet was separately weighed and measured to be 1000 grammes. However, 100 grams of Charas from each packet was segregated for sending to the chemical examiner, and the remaining property was sealed on the spot. The prosecution examined PW/2 SIP Muhammad Ilyas (Complainant), who almost supported the case of the prosecution, and corroborated the version of PW/1 mashir Ali Hassan and PW-2/I.O SIP Allah Wadhayo. Lengthy cross-examination was conducted but neither the arrest of appellant nor recovery was made doubtful. There is no suggestion available on the record that the witnesses testified against the accused/appellant with ill intent or malicious motives. It is admitted that the

appellant was the driver of the vehicle, holding control over it; whatever was lying in the vehicle was under his control and possession.

11. The complainant produced all relevant documents pertaining to the case; as such, the appellant, being its driver having prior knowledge, has been found responsible for the transportation of a huge quantity of Charas in his vehicle. It is a well-settled principle of law, as held by the Apex Court that a person in a driving seat shall be held responsible for transportation of such huge quantity of narcotics substance. The reliance in this context is placed upon case of Kashif Ameer Vs. The State (PLD 2010 SC1052), wherein the Hon'ble Supreme Court of Pakistan has held that;

It is well-settled principle that a person who is on driving seat of the vehicle, shall be held responsible for transportation of the narcotics having knowledge of the same as no condition or qualification has been made in section 9(b) of CNSA that the possession should be an exclusive one and can be joint one with two or more persons. Further, when a person is driving the vehicle, he is incharge of the same and it would be under his control and possession, hence, whatever articles lying in it would be under his control and possession. Reference in this behalf may be made to the case of Muhammad Noor Vs. The State(2010 SCMR-927). Similarly, in the case of Nadir Khan Vs. The State (1988 SCMR-1899). This Court has observed that knowledge and awareness would be attributed to the incharge of the vehicle. Another aspect of the case is that once the prosecution has prima facie established its case then under section 29 of the CNSA burden shifted upon the accused to prove contrary to the plea of the prosecution. Reliance in this behalf may be made to the case of Ismaeel Vs. The State(2010 SCMR-27). Wherein, this Court while relying upon the cases of Muhammad Arshad Vs. The State(2007 SCMR-1378) and Mst.Taj Bibi Vs. The State(2007 SCMR-1591) has held that chemical examiner's report regarding Charas and Opium were sufficient to prove that the substance recovered from the accused was Charas which can be used to cause intoxication; the prosecution had discharged its initial onus while proving that substance was recovered from him whereas the petitioner had failed to discharge its burden in terms, of Section 29 (d) of CNSA.

12. Furthermore, the 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”.

13. With respect to the arguments advanced by learned counsel for the appellant that the prosecution has not adequately demonstrated the safe custody and transportation of Charas from the point of recovery to the office of the Chemical Examiner. It is noteworthy that the defence did not suggest the potential tampering with the case property either at the police station office or during its transmission to the Chemical Laboratory while cross-examining the Prosecution Witnesses (PWs). On 04-11-2016, Charas was recovered from Mehran Car and subsequently transported to the Chemical Laboratory on 07.11.2016 within 72 hours. The prosecution has produced the chemical report at Ex. 12/E, so the safe chain of custody of the recovered narcotics can be safely stated to be unbroken. The reliance can be made in the most recent unreported case law of the Apex Court of Pakistan passed in Criminal Appeal No. 208/2022, Zain Ali V/S The State. Further Reliance is placed on the case of Faisal Shahzad Vs. The State [2022 SCMR 905] and Ajab Khan Vs.The State [2022 SCMR 317).

14. The requirement of Rule 4 of Control of Narcotic Substance (Government Analysis) Rules, 2001 is that the reasonable quantity of samples from the entire narcotic drug, psychotropic substance or the controlled substances seized Shall be drawn on the site of recovery and sent by the insured post or special messenger to the office in charge of the closest

Narcotic Testing Laboratory for testing. No question was put by the defence counsel that there was tempering with the case property, and it is also confirmed by the Chemical Examiner that the sample white cloth parcel No 1, to 45 received in his office on 08.11.2016 in a sealed condition by the hand of WP.C Parwaiz. Furthermore, Rule 5 of the Control of Narcotic Substances (Government Analysis) Rules, 2001 states that it must be received in the Laboratory in a sealed condition. The incharge officer must follow full protocol by properly opening and labelling the Laboratory. A separate register must be kept for this purpose. All samples must be given to the analyzer on the same day and maintained in safe custody while being examined and recorded in the test memorandum. He will match the markings on the test Memorandums to the marks on the package envelopes and make certain that the relevant sample is tested. Rule 6 of C.N.S (Government Analysts) Rules, 2001 further provides that on analysis, the result thereof, together with full protocols the test applied, shall be signed in quadruplicate and supplied forthwith to the sender as specified in Form-11. Now the question is here whether the report received from the office of the Chemical Examiner is according to Rules 4,5 & 6 of C.N.S (Government Analysts) Rules, 2001 or not. The requirement of R.4 is only that the parcel should be received in the office of the Chemical Examiner in a sealed condition. We reviewed the Chemical Examiner's report, which is accessible as Exh.12/E, and in our humble opinion, it is in accordance with its Rules and the whole process was followed by the Chemical Examiner's office.

15. The procedural detail is mentioned in the Chemical Examiner's report Ex.12/E about the tests applied do not fall short of "protocol". In an unreported case of Mushtaq Ahmed Vs. The State & others (Criminal Petition No.370 of 2019) the Hon'ble Supreme Court of Pakistan has held that;

3... Argument that Forensic report sans protocols as mandatorily required in the case of State Vs. Imam Bakhsh(2018 SCMR 2039),is beside the point and so is a reference to Rule 6 of the Control of Narcotic Substance

(Govt. Analysis) Rules, 2001, for the convenience of reference reproduced below:-

“Report of the result of test analysis:--After test or analysis the result thereof together with full protocols of the test applied, shall be signed in quadruplicate and supplied forthwith to the sender as specified in Form-II”.

The above requires reference to the test applied for analysis, specifically mentioned in Form-II thereof. We have perused the forensic report, relied upon the prosecution, which substantially meets the legal requirements in the following terms:-

“Test Performed on Received Item(s) of Evidence

1. Analytical Balance was used for weighing.
2. Chemical spot Tests were used for Presumptive Testing.
3. Case Chromatography-Mass Spectrometry was used for confirmation.

Results and conclusions

“Item # 01 72.87 gram(s) of blackish brown resinous material in sealed parcel contains Charas”

Details mentioned in the Forensic report procedure/test applied do not short of ‘protocol’ as insisted by this court in the supra case. According to the Oxford English Dictionary, 6th Edition, the expression “protocol’ in relation to a forensic test means.

“ A formal or official statement of a transaction or proceedings; spec, a record of (esp. scientific) experimental observations”.

16. With respect to the contentions raise by the appellant's counsel regarding the alleged violation of Section 103 of the Criminal Procedure Code (Cr.PC), it is pertinent to cite Section 25 of the Control of Narcotics Substance Act 1997, which states as follows:-

“25. Mode of making searches and arrest.--- The provisions of the Code of Criminal Procedure, 1898, except those of section 103 Cr.P.C shall mutatis mutandis, apply to all searches and arrests in so far as they are not inconsistent with the provisions of section 20, 21, 22 and 23 to all warrants issued and arrest searches made under these sections”.

17. It indicates that the applicability of Section 103 of the Criminal Procedure Code (Cr.P.C.) in drug cases has been excluded, and the absence of any private witness does not constitute a significant fault that would render the conviction illegal. Individuals naturally hesitate to give testimony against those involved in drug trafficking due to the fear of potential threats.

18. When considering the evidentiary value of police officers, it is important to acknowledge their competence, and testimony should not be sacked only on the basis of their professional affiliation. It is well settled that evidence of the police personnel is required to be treated in the same manner as the testimony of any other witness, and there is no principle of law that without corroboration by the independent witnesses, their testimonies cannot be relied upon. The reliance can be made in the most recent judgment of the Supreme Court of Pakistan in the case of Zain Ali V/S The State, Criminal Appeal No. 208/2022.

19. The evidence adduced by the prosecution is clear and confidence inspiring, and there is no suggestion that the witnesses testified against the accused/appellants with ill intent or malicious motives. It is highly improbable that the police officials would fabricate or falsely implicate the appellants by foisting such a substantial amount of narcotics substance (45 K.G).

20. In the present case, no evidence was presented to establish animosity between the complainant, the other witnesses, and the accused. Consequently, in the absence of such evidence, it is reasonable to consider the credibility and reliability of the prosecution witnesses. Moreover, prioritizing procedural formalities over the successful prosecution of a crime is not justifiable. Additionally, if an accused individual is found to have a connection to the crime, a mere procedural oversight or an allegation of improper investigative practices would not provide any assistance to the accused. The Supreme Court of Pakistan in the case of Ghulam Qadir Vs. The State reported in (PLD 2006 SC-61) has held that:-

“S.9(c)---Appreciation of evidence.---No acquittal on technicalities---Court in such like cases are supposed

dispose of the matter with dynamic approach, instead of acquitting the drug paddlers on technicalities.”

21. It is also settled that slight contradictions, inconsistencies, embellishments, or enhancements on trivial matters, which do not affect the fundamental aspects of the prosecution's case, should not be made a ground on which the evidence can be rejected in its entirety. The court is required to establish its assessment regarding the reliability of the witness and record a finding as to whether his deposition is trustworthy. Minor discrepancies in the testimonies of witnesses should not be classified as enhancements, as they may simply represent elaborations on the witness's previous statement.

22. Despite the fact that the investigation officer and other prosecution witnesses are Police Officials, they have no animus or rancour against the appellants to foist such a large quantity of narcotics substance against him. The defence has not shown any proof of hatred towards the prosecution witnesses. Although the investigating officer and other prosecution witnesses are Police Officials, there is no evidence to suggest that they harbour any personal bias or ill will towards the appellants, leading them to falsely implicate them in the significant quantity of narcotics. The defence has failed to provide any substantiation of animosity against the witnesses produced by the prosecution. In cases involving large amounts of drugs, the absence of hostility or other justifiable basis for fake involvement would also be factors weighing against the accused. The reliance is made in case of Salah-ud-Din vs. The State, reported in (2010 SCMR1962), wherein the Hon'ble Supreme Court of Pakistan has held that;-

“....No enmity whatsoever has been alleged against the prosecution witnesses and there is hardly any possibility for false implication without having any ulterior motives which was never alleged. In view of overwhelming prosecution evidence the defense version has rightly been discarded which otherwise is denial simpliciter and does not appeal to logic and reasons...”

23. On re-appraisal of the evidence of the prosecution witnesses, we find it confidence-inspiring and trustworthy; appellant Naimatullah being the driver of the car bearing registration No.AA-3675 was transporting (45 kilograms) a huge quantity of Charas. They were arrested on 04-11-2016 at about 1730 hours during snap checking near the bridge of Pirwah Taluka Pano Akil situated at National Highway road leading from Punjab to Karachi. The version of the complainant has been fully corroborated by mashir Ali Hassan, who is also one of the eyewitnesses of the incident, which is substantiated by the memo of arrest and recovery. The case property was handed over to WPC Parvez Ali, who delivered the same to the Chemical Laboratory on 08.11.2016. The complainant himself recorded the statements of witnesses u/s 161 Cr.PC. The report of Chemical Analyzer was submitted at Ex. 12/E, which received positive.

24. The appellant has not produced any solid evidence contradicting the fact that he had no awareness of the Charas being in the Mehran Car in which he was boarded as its driver. He was caught red-handed by the Police, and a huge quantity of 45 kilograms of contraband Charas was recovered from the secreted cavities of the Car, which was being driven by the appellant Naimatullah, whereas other acquitted accused were passengers; furthermore, there was no evidence against them. In the entire case of the prosecution, no relationship could be established between the appellant and the acquitted accused and the conscious knowledge about the contraband material. The appellant was driving the Car, being its driver, is solely responsible for the contraband material lying in the secret cavity of the Car. All the witnesses narrated the prosecution story in a natural manner and remained consistent throughout, and the defence could not shatter their testimony despite lengthy cross-examination. The said witnesses had no enmity with the appellant to falsely implicate him in the presence case. Even otherwise, a huge quantity of 45 kilograms of Charas in no circumstances can be planted by the Investigating Officer of his own. It cannot be believed that the driver was unaware of the contents and goods being conveyed by him or present inside the Car in which they were boarded from Punjab. The

close examination of the entire prosecution evidence, namely the recovery of a large quantity of narcotics, recovered in broad daylight, sealed at the spot and sent to the Chemical Examiner, the report of the Chemical Examiner, and the evidence of the prosecution witnesses, leaves no room to conclude that the appellant is a true perpetrator. In this respect, we would like to place in the case of. Muhammad Noor Vs. The State reported in 2010 SCMR 927, wherein the Hon'ble Court observed as under:

8. As regards Driver of the vehicle, it is important to note that when he is driving the vehicle, he is Incharge of the same; therefore, it would be under his control and possession. Hence, whatever articles lying in it; would be under his control and possession. The liability of the driver, in view of provisions of section 27 of P.P.C., has been considered by this Court in the case of Sherzada v. State 1993 SCMR 149, wherein it was observed as under:--

The next point raised by the learned Counsel was that it is provided in section 27, P.P.C. that when property is in the possession of wife, clerk or servant on account of that person, it is in that person's possession within the meaning of this Code. The learned Counsel argued that the appellant was a driver, hence an employee of the owner of the car and even if he is admitted to be in possession of the contraband article on behalf of the owner, he cannot be said to be liable for that possession. But this argument of the learned Counsel is without force on the fact of it because section 27, P.P.C. is confined to the Pakistan Penal Code only, as the words "within the mean of this Code" appearing in that section clearly indicates. This section has not been made applicable to the Prohibition (Enforcement of Hadd) Order, 1979 as is evident from Article 26 of that Order where certain other provisions of the P.P.C. have been made applicable. Another reference can be made Adil Ahmed v. Deputy Collector, C & CE 1991 SCMR 1951. Rab Nawaz v. The State PLD 1984 SC 858. of Nadir Khan v. State 1988 SCMR 1899

25. Based upon the above discussion and while relying upon the Apex Court case laws, we are of the unanimous view that the prosecution has successfully established its case against appellant Naimatullah Pathan

beyond the shadow of any reasonable doubt. Consequently, the instant criminal appeal merits no consideration, which is dismissed and the impugned judgment dated 22.10.2019 passed by the learned trial Court is hereby maintained.

JUDGE

JUDGE

Ihsan/PA.