IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No. 409 of 2023

PRESENT:
Mr. Justice Naimatullah Phulpoto
Mr. Justice Khadim Hussain Tunio

Meer Zaman …*Appellant*

versus

The State …*Respondent*

For the Appellant: Syed Ahmed Ali Shah, Advocate, advocate

For the Respondents: Mr. Khadim Hussain Khuharo, APG Sindh

Date of Hearing: 28.03.2024

JUDGMENT

KHADIM HUSSAIN TUNIO, J- Meer Zaman ("**the appellant**") was charged with possession of narcotic drugs, a breach of section 6 of the Control of Narcotic Substances Act, 1997 ("**CNSA 1997**"), as amended in 2022.[1] He was convicted by the Special Court (CNS), Karachi-Central ("**Trial Court**") and such judgment was passed on 10.08.2023 ("**impugned judgment**") in Special Case No. 52/2023 whereby he was sentenced to ten years of rigorous imprisonment and fined Rs.100,000/- (one hundred thousand) under section 9, sub-section (1)-(c) of the CNSA 1997. He now prefers this appeal against the above ruling.

2. The facts giving rise to the charge of possession of narcotic drugs are as follows. On 29th December, 2022 the appellant was found suspicious by a police contingent headed by ASI Balaj Khan at around 0500 hours. He tried hiding himself on seeing this contingent, but was caught. After disclosing his name as Meer Zaman, he was searched by the police officers who found 1500 grams of chars from the front pocket of his trousers (shalwar) which they weighed on a digital scale. He was brought to the police station where he was detained and then FIR No. 320/2022 was lodged.

3. On a formal charge being framed against the appellant, he pleaded not guilty and sought trial. Prosecution examined four witnesses; (1) ASI Balaj Khan ("**the complainant**"), (2) HC Raja Sheraz ("**the mashir**"), (3) SIP Rasheed Ahmed Arain ("**the investigating officer**") and, lastly (4) ASI Syed Zia Abbas ("**malkhana incharge**"). Then, statement of the appellant was recorded under section 342 of the Code of Criminal Procedure ("**CrPC**") wherein he disputed his presence at the place of incident and claimed that the recovery of narcotic drugs had been fabricated. On conclusion of the arguments, Trial Court passed the judgment impugned herein.

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[1] Act No. XX of 2022

4. Syed Ahmed Ali Shah, counsel for the appellant argued that there exists an inimical relationship between the IO SIP Rasheed Ahmed Arain and the appellant due to which he has been falsely implicated in this FIR; that there are several contradictions in the statements of the PWs which were not considered by the trial court; that there is a delay of one day in sending the case property to the chemical examiner, which puts the safe custody and transaction of the case property in question; that an ASI is not authorized to seizure and arrest, under Section 22 of CNS Act, 2022, without an order from the investigation head, thereby the IO/ASI in this case has violated the rules. To support such assertions, he relied upon the cases of "Qaiser Khan v. The State" (2021 SCMR 363), "Zafar Khan v. The State" (2022 SCMR 864), "Muhammad Shoaib and another v. the State" (2022 SCMR 1006), "Javed Iqbal v. The State" (2023 SCMR 139) and "Muhammad Hazir v. The State" (2023 SCMR 986).

5. Mr. Khadim Hussain Khuharo, APG Sindh stated that the appellant was found in possession of 1500 grams of chars; that the entry of the malkhana register was brought on the record to establish safe transmission of the contraband; that enmity as alleged has not been proved by the appellant even though the onus to do so was on him given his specific plea in defence, as such the prosecution case is established beyond reasonable doubt. In support of the prosecution version, he cited the case of "Raja Ehtisham Kiyani v. The State" (2022 SCMR 1248).

6. The evidence in this case left no room for doubt as to what the appellant intended to do, what he had done and how he had done it. A reappraisal of evidence is due in order to properly assess the contentions raised by the learned counsel for the appellant. We did so by first looking at the evidence of ASI Balaj Khan, the complainant, who started patrolling with his police contingent at 0400 hours. He stated that during patrolling when he reached service road near Soona Chandi Marriage Hall, they found a suspicious person whom they apprehended. The suspicious person disclosed his name to the complainant and *"[...] due to non-availability of private witnesses, in presence of official witnesses, I conducted search of accused and recovered one blue colour plastic shopper from front side of fold of shalwar containing chars wrapped with yellow colour solution tape. On weighing, it became 1500 grams."* On the point of safe custody, he deposed that on reaching the police station he handed over the case property, which he had sealed at the place of incident, to the Head Moharrer who deposited the same in the malkhana. When being cross-examined, this witness was asked of the places he visited along with the police contingent while patrolling and he stated after leaving the police station *"[...] I visited Parking Plaza, Goromander, Lasbeyla, Petrol Pump etc. We reached the place of incident at about 1500 hours."* He was also asked whether the place of

incident was a populated area to which he agreed, but stated that no one was available at the relevant time. In an attempt to diminish the value of recovery and the seal on the parcels, he was asked why there was a difference in the description of the seal. He stated that he had hand-sewn the sealed parcel which, at the time of chemical examination, was de-sealed and then re-sewn with a sewing machine. He lastly deposed that the case property was not separately sealed, rather a single parcel was prepared by him.

7. As against this, the mashir of arrest and recovery HC Raja Sheraz was examined whose depositions we also went through. It would be a futile exercise to reproduce the entirety of his deposition, as such only the contradictory elements will be noted. He stated while being cross-examined that they left the police station at 0200 hours and that he did not remember the time at which they arrived at the place of incident. He also stated that one or two private witnesses were available at the place of incident. Another contradiction that the learned counsel for the appellant stressed on was the places visited by the police contingent during patrolling as this witness deposed that they visited Garden, Lyari Expressway, Civic Centre and Nazimabad. Besides these contradictions, he deposed in the same line as the complainant ASI Balaj Khan with respect to the recovery, the way it was placed in a shopper, the fact that the case property was sewn by hand, the three seals placed thereon.

8. The investigation officer supported the other witnesses to the extent of the proceedings they had accompanied him in, however, the only contradiction was that he stated that there were three sealed parcels with three seals. He stated that he received the case property from the Head Moharrer. The Head Moharrer who was also examined namely ASI Zia Abbas deposed that he received a single parcel from the complainant which he placed in the malkhana and then he handed over that single parcel to the investigating officer.

9. We note that the contradictions with respect to the places visited prior to the apprehension of the appellant are irrelevant as long as there are no contradictions with respect to the place of incident itself; which there are none. The contradiction between the time at which the police contingent left for patrolling is also immaterial and the complainant's version is otherwise proven by the roznamcha entry No. 101 (Exhibit 3-A) showing the time to be 0400 hours. Now, the one contradiction that can have some weight to it is the investigating officer stating that the case property was three sealed parcels. However, there can be a very good explanation for this. The only possibility is that of a typographical error which is blatant across all depositions with how poorly the same have been taken down. A reproduction of the relevant portion may assist one further.

> "When I received case property from H.M. I found **three seals** affixed on **it** and **it** was sewed with hand. The case property was **three sealed** parcels. It is correct to suggest that **three seals** upon case property is not…"

10. The above indicates the continuous use of the word "three". The use of the term "it" also indicates the case property being singular, whereas the subsequent use of "three sealed parcels" instead of "one sealed parcel" can be justified by a common effect known as priming. This psychological phenomenon is where exposure to one stimulus (in this case, the phrase "three seals") influences response to a subsequent stimulus. The brain is primed to think in terms of "three seals", making the substitution more likely. The depositions are prone to typographical errors because taking down evidence is a mentally intensive skill, requiring intense focus and rapid translation. There seems no other plausible explanation because a subsequent document in the shape of a letter to the chemical examiner produced by the same witness, the investigating officer, shows that the parcel was single; *see exhibit 5-D*. Another possible explanation, though a stretch, would be questioning the integrity of the witnesses who so callously depose falsely, however we wish to not tread that line and choose to chalk these as typographical ones rather than any malicious ones. Nonetheless, given that this contradiction has an explanation in the shape of the letter that went to the chemical examiner, the deposition of two other witnesses in favour against one, and the chemical examiner's own report (Exhibit 5/F) showing a single parcel with three seals and the parcel's description being readily admitted by every witness as a hand-sewn parcel proves beyond reasonable doubt that the narcotic drugs so recovered from the appellant remained the same until their ultimate destination. The chain of custody of the narcotics could not have been any more stronger because the prosecution examined the complainant and mashir who both deposed in line with each other regarding the recovery, then the malkhana incharge was examined who deposited the recovered contraband in the malkhana under entry No. 216/2022 (Exhibit 6-A) and then the investigation officer was examined who took it to the chemical examiner himself (receipt at Exhibit 5-E). From the hand of the complainant to the chemical examiner, and everyone in between, has been examined. A contention was raised regarding the delay of a day in sending the property to the chemical examiner. As per Control of Narcotic Substances (Government Analysis) Rules 2001, narcotic drugs have to be delivered to the chemical examiner in no later than 72 hours of the recovery, the present case falls within this period. Even then, during the intervening period, narcotics were kept in the malkhana, ruling out any tampering. This is further proven by the fact that in both, the receipt and the chemical report, the chemical examiner noted the condition of the seals as satisfactory and all the witnesses admitted that the parcel had remained sewn by the complainant.

11. Another contradiction specifically pointed out was the alleged thoroughfare according to the recovery mashir. The complainant and the investigating officer both stated that despite the place of incident being in a populous area, no one was available at the relevant times i.e. at the time of arrest being 0500 hours and at the time of site inspection being 0630 hours onwards. Their evidence appears plausible as it is highly unlikely that anyone would be seen awake in the early hours of the day. The mashir, however, stated that both times there were two or three private witnesses, but they were not approached by the complainant or the investigating officer. He deposed of nothing as to why he did not choose to approach them himself given he was the only one to have seen them. Nonetheless, the lack of private witnesses is no irregularity. Police officers, when acting as witnesses, are credible and often essential for securing convictions in narcotics cases – their role as state functionaries supports their trustworthiness and their testimonies are time and again relied to uphold convictions despite of the fact that they are often the only witnesses available.[2] They are also held to the same standard as normal witnesses, are just as credible; *see Hussain Shah v. The State (PLD 2020 Supreme Court 132), see also Qari Muhammad Ishaq Ghazi v. The State (2019 SCMR 1646)*. Courts should recognize that public reluctance to act as witnesses in narcotics cases is a well-documented phenomenon and the fear of reprisal from criminal elements discourages involvement.[3] The legislature, recognizing this issue, enacted section 25 of the Act; exempting narcotics cases from the requirements outlined in section 103 CrPC.

12. The appellant did not raise a specific defence plea during trial and in his statement under section 342 CrPC besides that he was arrested from his house, though he did not provide any reason. His counsel, however, argued that he had enmity with the investigation officer – a contention that lacks merit in the absence of such plea being raised at an earlier time during trial, the lack of any confrontation regarding such aspect at the stage of cross-examination of the witnesses and the lack of any evidence to support such a stance. Under section 29 of the CNSA 1997, the manner and standard of proof in cases registered herein is different in that here the accused is presumed to be guilty until the contrary is proved, suggesting that the burden is on the accused to prove the specific plea taken; *see Faisal Shahzad v. The State (2022 SCMR 905), see also Naveed Akhtar v. The State (2022 SCMR 1784).* As far as the cases cited on behalf of the counsel for the appellant are concerned, they all involve questions of fact for establishing safe custody of the contraband which, beyond doubt, has been proved in the case in hand, leaving the cited cases at variance on facts. Every criminal case is decided on the basis of own facts and circumstances.

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[2] See Naveed Akhtar v. The State, 2022 SCMR 1784
[3] See Abdul Wahab v. The State, 2019 SCMR 2061

13. Failing on merits, we now consider the case for a possible reduction in the sentence awarded to the appellant. There is no cavil to the proposition that in special circumstances, the Court at its discretion can divert from the norms and standards prescribed in terms of sentencing after assigning cogent reasons; *see State through Deputy Director Law, Regional Directorate ANF v. Mujahid Lodhi (PLD 2017 Supreme Court 671)*. The special circumstances in the present case are multifaceted; firstly the typographical errors which, on their own, are not sufficient to warrant an acquittal, but cause a good case for reduction in sentence. And secondly, his potential for reformation and rehabilitation and absence of a criminal past; he is a first time offender with no previous criminal convictions, the quantity recovered is relatively less and we find that even a lesser punishment would be sufficient to dissuade the appellant from ever offending again. A longer sentence would not do him any good.[4] At the same time, however, we recognize the growing menace drugs have become, damaging not only the youth of this country, but also its reputation on an international level. The reduction must not be at the cost of frustration of the ends of justice.

14. Given these observations, the conviction awarded to the appellant for the offence punishable under section 9, sub-section (1), (3)(c) of the CNS Amendment Act 2022 is based upon sound reasons. We agree with the Trial Court's finding which requires no interference to the extent of conviction, however, we modify the term of sentence, reducing the same from 10 years to 09 years of rigorous imprisonment, leaving the fine and sentence in default of such fine unaltered. Subject to the above modifications, the captioned appeal is dismissed. Appellant shall be entitled to the benefit of section 382-B Cr.P.C.

Judge

Judge

KARACHI
19th April, 2024

[4] What can largely be achieved by punishment, in man or beast, is the increase of fear, the intensification of intelligence, the mastering of desires: punishment tames man in this way but does not make him "better"—we would be more justified in asserting the opposite. Genealogy of Morals essay 2, aphorism 15 (1887)