

HIGH COURT OF SINDH CIRCUIT COURT MIRPURKHAS

Criminal Appeal No.D-24 of 2024

Present:

Mr. Justice Amjad Ali Bohio.

Mr. Justice Dr. Syed Fiaz ul Hasan Shah.

Appellant/accused: Muhmmad Kashif S/o Shahmir
 Through Mr. Mian Taj Muhammad Keerio, Advocate.

Respondent: The State,
 Through, Mr. Shahzado Saleem, Additional
 Prosecutor General Sindh.

Date of hearing: 18.02.2025.
Date of Judgment: 18.02.2025.

J U D G M E N T

Dr. Syed Fiaz ul Hasan Shah, J: The Appellant Muhammad Kashif has filed present Criminal Appeal against the Judgment of conviction dated 29.11.2023 passed by the learned Sessions Judge/Special Judge, Control of Narcotic Substance, Sanghar in Special Case No.99/2023 (Re: The State Vs. Muhammad Kashif) which is arising out of Crime No.170/2023 under sections 9(1)(3)(c) of Amended CNS Act, 2022 registered at PS: Sanghar.

2. As per facts of the F.I.R. lodged by complainant SIP Shakeel Ahmed of CIA Center, Sanghar that on 10.07.2023, at 08:20 hours, SIP Abdul Hakeem Kumbhar, the complainant from Police Station Sanghar, filed an FIR, stating that earlier that day, he and his subordinate staff departed the police station for patrolling vide entry No.30 at 06:00 hours. During patrolling at Mian Stop, they received spy information about an individual standing at Bakhoro Mori with charas intended for sale. The complainant shared this information with his subordinate, and they proceeded to the place of incident at 07:00 hours, where they observed that a person holding a black-colored shopper on the northern side of the road and upon seeing the police vehicle, the accused tried to flee but HC Sardar Ali quickly exited the police mobile, pursued, and apprehended the suspect along with the shopper. Due to non-availability of public witnesses, HC Sardar Ali and PC Ikhlauque Hussain were acted as mashirs. The accused's shopper was taken into police custody for investigation. When questioned, the accused identified himself as Muhammad Kashif, son of Shahmir, from the Jamali caste, and a resident of Bakhoro Mori, Taluka Sanghar. From the body search of the accused, no incriminating article was

found. However, upon inspecting the black-colored shopper, officers discovered three pieces of charas, including one small and two large pieces, wrapped in white-colored pani with the figure "555" marked on it, and the two larger pieces were joined together. Subsequently, PC Ghulam Murtaza retrieved an investigation bag from the police mobile, which contained a white-colored digital weighing scale. The charas was weighed, amounting to 2020 grams. The entire seized charas was sealed in a white cloth parcel for chemical analysis. Upon further questioning, the accused admitted to selling charas for a living and stated that he was carrying it for sale. He was then handcuffed and placed under the supervision of PC Ghulam Murtaza before being seated in the police mobile. While sitting in the front seat beside the driver, the complainant prepared a memo of arrest and recovery, which was signed by the designated mashirs. Thereafter, accused and case property were brought at police station, where complainant lodged the FIR on behalf of the State against the appellant/accused.

3. After completion of the investigation, the Investigation Officer has submitted Police Report/Challan under Section 173 of the Criminal Procedure Code, 1898 and the trial court has framed the charge against the appellant/accused on 25.08.2023 at Ex.3, to which the appellant has pleaded not guilty and claimed for trial vide his plea at Ex.4. During the trial, the prosecution has examined P.W-1 complainant SIP Abdul Hakeem Kumbhar at Ex.5, PW-2 mashir HC Sardar Ali at Ex.6, PW-3 PC Ali Hassan, carrier of case property, at Ex.7, PW-4 Investigating Officer Inspector Wali Muhammad Bhambhro at Ex.8 and PW-5 Malkhana Incharge WHC Ali Akbar at Ex:9. They produced relevant documents which were exhibited during their testimony before the trial Court. After the completion of prosecution's evidence, the statement of appellant was recorded under section 342 of Criminal Procedure Code, 1898, at Ex.11 wherein the Appellant has not opted for his examination on oath under section 340(2) of the Criminal Procedure Code, 1898 or to produce his witness or adduce any evidence in his defense.

4. After hearing, the arguments advanced by the learned counsel for the parties, the trial Court found the Appellant guilty and thereby convicted him and sentenced to suffer imprisonment for 09 (nine) years and to pay fine of Rs.80,000/- (Rupees eighty thousand). However, the benefit of Section 382-B of the Code has been extended to the Appellant while passing impugned Judgment.

5. The Counsel for the Appellant has contended that there are significant contradictions in the evidence adduced by the prosecution witnesses. He has contended that no independent witness was cited in the case despite the fact that alleged place of incident is a main road and thus the case of prosecution is affecting by violation of section 103 of the Code. He further argued that there are several inconsistencies in the testimonies of the prosecution witnesses, which raises Shadows of doubt about the prosecution's case. He further argued that according to the prosecution's own case currency notes of Rs.500/- was not recovered from the appellant. On the contrary, during cross-examination, the Investigating Officer Inspector Wali Muhammad Bhambhro has admitted that Rs.500/- was part of the case property kept at the police station. The learned Counsel for Appellant stressed that this admission has further weakening the prosecution's stance. The Counsel for Appellant has further argued that the Appellant was falsely implicated by the police and that the alleged charas was planted at the behest of Ghulam Rasool Leghari, who harbors hostility towards the accused and his family. Lastly, he has prayed for setting aside the conviction and seeks acquittal of the Appellant.

6. On the other hand, learned Additional Prosecutor General vehemently opposed the contentions while arguing that the prosecution has successfully established its case against the Appellant without any reasonable doubt or contradiction. It was argued that while there may be minor irregularities in the case but the same are insignificant and can be disregarded and ignored. Additionally, there is no claim of personal hostility between the accused and any member of the police patrolling team. The chemical report confirming the presence of charas is positive and remains uncontested. Furthermore, the prosecution has produced material witnesses whose statements clearly indicate that after the recovery of charas, the case property was securely stored, and a sample was safely handed over to the Chemical Examiner. He prayed that accused may be convicted.

7. We have heard learned counsel for the Appellant and learned Additional Prosecutor General for State and record has been perused minutely. On evaluation of the evidence and material record produced in support by the prosecution, the case of the prosecution is squarely depending upon the ocular evidence of the official witnesses and the recovery, seizure of narcotics contraband. In order to prove the case, the prosecution beyond any reasonable doubt, the prosecution has examined complainant SIP Abdul Hakeem Kumbhar, HC Sardar Ali mashir of recovery, PC Ali Akbar Incharge Malkhana,

PC Ali Hassan the witness of safe custody of transmission, SIO Wali Muhammad the investigation officer. The recovery of contraband of 2020 grams charas from the custody of Appellant, its safe custody with police and safe transmission thereof to the chemical laboratory, the prosecution produced 05 witnesses. PW-1 recovery officer who has prepared the memo of arrest and recovery at crime scene at Ex.5/B. He also produced arrival and departure entry at Ex.5/C and Ex.5/D and FIR at Ex.5/E which he had lodged. He was subjected to cross examination. PW-2 HC Sardar Ali is the mashir attesting witness of memo of arrest and recovery. He was also subjected to cross examination. PW-3 PC Ali Hassan who delivered the prepared parcel which was handed over to him by Inspector Wali Muhammad I/O; he has delivered the sealed parcel to the chemical examiner at Karachi. PW-4 Investigation officer of the case who produced the documents at Ex.8/A to Ex.8/F with report of chemical examiner which prove that the case property is charas.

8. Rule exclusion of private witness—Police official are good witness:

It is argued by the learned counsel for the Appellant that the case of prosecution is two-folded violation of section 103 of the Code. He argued that the prosecution case is based on spy information yet the Prosecution has not accompany any independent private person and that the crime scene area is populated and on this point there is admission by the prosecution witnesses that the hotel and shops are situated near the crime scene, therefore the prosecution has again failed to call independent person as witness of the recovery and seizure and according to learned Counsel in the present case all prosecution witnesses are Police Official. We have scanned the evidence on the question which are agitated before us and refer the relevant portion of the Examination in Chief and cross-examination to further responsive assessment. The PW-01 in his Examination-in-Chief has deposed: ***“During patrolling from different places, when we reached at Mian Stop, where we received spy information that a person standing at Bakhoro Mori for selling charas. On receiving such information, I informed my sub-ordinates about information and then reached at the pointed place at about 0700 hours....Due to non-availability of Mashirs, I joined HC Ikhlaque Ali and P.C. Sardar Ali as Mashir, sealed the whole charas in white cotton cloth for chemical analysis.”*** During cross replied the question of non-availability ***“It is correct to suggest that place of spy information is situated on stop where hotels and shops are situated. Voluntarily says hotels and shops were closed in morning time.. I shared spy information with my staff in police mobile in***

moving condition". The evidence of PW-02 Sardar Ali who is Mashir of recovery and seizure. His evidence has also straight and trustworthy and the Defence Counsel failed to controvert the point in agitation. He was cross-examined on same point and the reply of PW-02 is firm and consistent with the evidence of recorded by the PW-01. He deposed ***"It is correct to suggest that Mian Stop is thickly populated area and shops are also situated there. Voluntarily says in morning time shops were closed."*** The arguments of the learned counsel for the Appellant, that the police party waited early in the morning on a roadside and that the absence of private witnesses remains unexplained, despite the incident occurring in an area where shops and hotels are usually open in the early morning in rural settings, is not reliable. Furthermore, no such argument was presented by the defense counsel during the cross-examination of any of the five prosecution witnesses in their evidence.

9. Similarly, the counsel for the appellant stated that few words were subsequently added to the memo of recovery Ex.5/B, is no force for the reason that this ought to have been put to the witness while he was in the witness box. The argument of learned counsel is misconceived as on examination of evidence; we have observed that no question was put to the prosecution witnesses during their cross-examination as has now been argued before us in the present appeal which is not safely reliable. On the same strength, the arguments of the appellant's counsel that the entry in Register No. 19 is a computerized entry is of no force. This question was also not put to the witness while he was in the witness box, nor any objection was taken at the time of producing this document. It is a settled law that when a document is exhibited without objection, it becomes admissible evidence and can safely be relied upon. The other objection by the appellant's counsel regarding the failure to consider the original entry pertains to minor discrepancies. It is a settled law that such minor discrepancies can be ignored. Reliance can be placed on the cases of Hon'ble Supreme Court of Pakistan.¹

10. We have further noticed that in the case of Appellant, there was hindered possibility to engage an independent person to witness the search, recovery and seizure and arrest and the prosecution has explained it. The provision of Section 103 of the Code is not rule of evidence but it is rule of prudence. In the cases registered under the Control of Narcotics Substance Act,

¹ "Shafqat Ali and others v. The State" (PLD 2005 SC 288); Zakir Khan V. The State (1995 SCMR 1793)

1997, the rule of exclusion of Section 103 of the Code are envisaged under section 25 of the Act *ibid*, which reads as under:

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

(underlining supplied for emphasis)

A bare perusal of Section 25 of the Control of Narcotics Substance Act, 1997 expound that while making search and arrest, it is not absolute to avoid the provisions of Section 103 of the Code and it is subject to compliance of Section 21 of the CNS Act, 1997 by paving out way under Section 25 of the CNS Act, 1997 or unavoidable circumstances such as possibility of escape or concealment or removal or destroy of case property or evidence which may put the prosecution in trouble to establish during the evidence. Therefore, the august Supreme Court has ruled that the police officials are good witnesses and exclusion of independent witness can be excused while awarding sentence. For any guidance, we may refer the following excerpt:

The Hon'ble Supreme Court ² held that:

“It is not an absolute requirement that in every case witness of the public must necessarily be produced. It depends upon the facts of each case. In the case in hand the Police Officers were in the ordinary course of duty looking for the suspects and errant.”

In another case³, the Supreme Court of Pakistan has observed as under:-

“Absence of a witness from the public, despite possible availability is not a new story; it is reminiscent of a long drawn apathy depicting public reluctance to come forward in assistance of law, exasperating legal procedures and lack of witness protection being the prime reasons. Against the above backdrop, evidence of official witnesses is the only available option to combat the menace of drug trafficking

²² **“Zardar vs. The State” (1991 SCMR 458); “The State vs. Muhammad Amin” (1999 SCMR 1367)**

³ **“Shabbir Hussain v. The State” (2021 SCMR 198)**

with the assistance of functionaries of the State tasked with the responsibility; their evidence, if found confidence inspiring, may implicitly be relied upon without a demur unhesitatingly; without a blemish, they are second to none in status.”

Yet in another case⁴ the Supreme Court of Pakistan has also held as under:-

“Prosecution case is hinged upon the statements of Aamir Masood, TSI (PW-2) and Abid Hussain, 336-C (PW3); 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 reason; while furnishing evidence, both the witnesses remained throughout consistent and confidence inspiring”.

In the case⁵ of identical nature, the Supreme Court of Pakistan held:

"All these witnesses have narrated the prosecution story in natural manner and remained consistent throughout and their testimony could not be shattered by the defence despite lengthy cross examination. The said witnesses had no enmity with the petitioner to falsely implicate him in the present case."

In another case⁶ the august Court observed:

"This Court in a number of judgments has held that testimony of police officials is as good as any other private witness unless it is proved that they have animus against the accused. However, no such thing could be brought on record by the petitioners in this case. This Court has time and again held that reluctance of general public to become witnesses in such like case has become judicially recognized fact and there is no way out to consider

⁴“Mushtaq Ahmad v. The State & another” (2020 SCMR-474),

⁵ “Faisal Shahzad vs. The State” (2022 SCMR 905); “Ijaz Ahmed v. The State” (2009 SCMR 99)

⁶ “Liaquat Ali and another vs. The State” (2022 SCMR 1097)

statement of official as good witnesses, as no legal bar or restriction has been imposed in such regard. Police officials are as good witnesses and could be relied upon, if their testimony remains un-shattered during cross-examination,”

Similarly, the Peshawar High Court⁷ was of the view that:

"No doubt, the PWs are police officials but nothing in black & white is available on file to show their ill-will or enmity with the appellant to falsely implicate him in case.

11. Therefore, it is now well-settled principle that the evidence of a police witness is as reliable as any other witness provided that no enmity exists between them. Thus, we believe the police evidence which is corroborative in all material aspects and reject the argument of the learned counsel for the Appellant. The prosecution has successfully proved the Memo of Recovery and its seizure. The evidence of the PW-01 & PW-02 has not broken down by the Appellant/Defence Counsel. We are satisfied that the evidence is trustworthy and the plausible explanation has been given by the prosecution for non-availability of private person or independent person not joined at the crime scene which was admittedly a populated place.

12. The second compulsorily stage in the narcotics case is safe transmission of the case property and production before the trial Court during evidence. In this connection, the prosecution has produced PW-5 PC Ali Akbar to whom the case property was handed over by the PW-04 /Investigation Officer for the safe custody with entrustment to keep in Malkhana/official storeroom. The evidence of said PW-5 Ali Akbar has also not shaken by the defence and his evidence remains firm and trustworthy. For the convenience, his cross examination is produced: -

“I am custodian of register No.19 whereas, register No.2 remains under custody with duty officer. It is correct to suggest that entry No.150 of register No.19 produced by me is a computerized copy wherein entry number is mentioned with pen. I came to know about the case

⁷ “Rehmat Gul vs. The State” (2022 P.Cr.L.J 10 Peshawar)

***property as per description mentioned over cloth parcel.
It is incorrect to suggest that I am deposing falsely”***

13. The evidence of the PW-05 was not shaken and no question about the safe custody and safe transmission of case property or register No.19 was put by the Defence Counsel/Appellant. Even no question has been put with regard to the chemical analysis and its report prepared by the laboratory produced at Ex.8/F which clearly **proved** that case property is charas and nothing else. The accuracy, description and flow of the documents as well as oral evidence and documentary evidence are consistent with each other. The Appellant has failed to point any illegality or material irregularity in the case of prosecution. On the other hand, the evidence of the PW-01 & PW-02 has not broken down by the Appellant/Defence Counsel. We are satisfied that the evidence is trustworthy and the plausible explanation has been given by the prosecution for non-availability of private person or independent person not joined at the crime scene which was admittedly a populated place. On the other hand, the evidence of the prosecution witnesses is firm, cogent without any contradiction. Even, the Appellant has failed to challenge the points during cross examination of prosecution witnesses which points are now being urged before us.

14. The last point which has been urged by the Counsel for Appellant that only one Mashir is examined. The PW-1 Seizure Officer has well explained that due to early hours in morning, the private witnesses were not available and the shops and hotels at near distance were also closed PW-1 deposed:

“we conducted his personal search but nothing was recovered from his possession. I checked the recovered black shopper and found containing two big pieces of charas, which were wrapped with white transparent pani and a small piece of charas. P.C Ghulam Murtaza brought the investigation bag from which I took out one white colour scale and the charas was weighing which became 2020 grams. Due to non-availability of private mashirs, I joined H.C Ikhlauque Ali and P.C Sardar Ali as mashir, sealed the whole charas in white colour cloth for chemical analysis”.

In his cross examination, he deposed that

“I secured the shopper from accused. I conducted body search of accused at the place where he was standing. I weighed the pieces of charas. I prepared memo of arrest and recovery while sitting on front seat of police mobile at that time ignition of police mobile was off”.

15. After careful reading of the evidence of PW-1, it demonstrates that evidence remained unshaken and un-controverted. The Appellant has not challenged the Memorandum of Recovery and seizure nor any question was put regarding any illegality or mis-description or inaccuracy in respect the case property comprises contraband or its preparation. A party has a responsibility to effectively cross-examine a witness to challenge their testimony, and failing to ask a crucial question can be seen as an acceptance of the witness's statement on that point. The law is clear where the Appellant or Accused has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is a rule of essential justice. If Appellant asks no question with regard to this, then he must be taken to accept the State's account regarding Memorandum of Recovery and Seizure in its entirety.⁸

16. The complainant who wrote the mashirnama and signed the same being the author and the attesting witness of the said document were examined before the trial court and document was exhibited without objections. During cross-examination, neither signature of ascribe was challenged nor the writing on document (Memorandum of Recovery) was controverted and the document of recovery was not disputed at all. Even, the veracity of Memorandum of Recovery & Seizure was not denied. Thus, the argument has no force at this belated stage. The Court are conscious that even a natural witness would not necessarily stand to be the witness of truth and for this reason the satisfaction of the Court is a rule for appreciation of evidence that the evidence of witness to consider and evaluate in a manner that is believable to a prudent mind. Reliance in this regard is placed on the dictum of Hon'ble Supreme Court of Pakistan⁹ which held that:

“21. To believe or disbelieve a witness all depends upon intrinsic value of the statement made by him. Even otherwise, there cannot be a universal principle that in

⁸ Muhammad Aslam V. The State And Others - 2017 P Cr. L J 1264

⁹ Abid Ali and 02 others v. The State (2011 SCMR 208)

every case interested witness shall be disbelieved or disinterested witness shall be believed. It all depends upon the rule of prudence and reasonableness to hold that a particular witness was present on the scene of crime and that he is making true statement. A person who is reported otherwise to be very honest, above board and very respectable in society if gives a statement, which I illogical and unbelievable, no prudent man despite his nobility would accept such statement”.

17. **Conviction can be given** on the sole evidence of a material witness. Conversely, the failure of direct evidence is always sufficient to hold a criminal charge as ‘not proved’ and requirement of independent corroboration is only a rule of abundant caution and it is not a mandatory rule to be followed invariably in each case. Therefore, an eyewitness is always sufficient to establish the guilt if his evidence is confidence, inspiring and trustworthy and corroborated by another independent source of evidence because the law considers the quality of evidence and not its quantity to prove the charge. The accused can be convicted if the Court finds direct oral evidence of one eye-witness to be reliable, trustworthy and confidence-inspiring. Reliance can be placed on rule laid down the Supreme Court of Pakistan. ¹⁰

18. Accordingly, the present criminal Appeal is dismissed while maintaining Judgment dated 29.11.2023 passed by the learned Sessions Judge/Special Judge Control of Narcotics Substance Act, 1997, Sanghar in Special Case No.99 of 2022 (The State vs. Muhammad Kashif) in Crime No.170/2023 registered at Police Station Sanghar.

19. These are the reasons of our short order dated 18.02.2025.

JUDGE

JUDGE

Faisal

¹⁰ “Muhammad Ismail v. The State” (2017 SCMR 713); “Niaz-Ud-Din v. The State” (2011 SCMR 725); “Muhammad Ilyas Vs. The State” (2011 SCMR 460); “Faisal Mehmood Vs. The State” (2010 SCMR 1025); “Muhammad Ehsan v. The State” (2006 SCMR 1857); “Naeem Akhtar Vs. The State” (PLD 2003 SC 396) ; “Muhammad Ali and others v. The State” (1999 SCMR 1957); and “Muhammad Iqbal Vs. The State” (1996 SCMR 908).