

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha

Mr. Justice Khadim Hussain Tunio

CRIMINAL APPEAL NO.414 OF 2021

Appellant:	Syed Samiullah son of Syed Abdul Wadood through Mr. Salahud Din Khan Gandapur, Advocate.
Respondent:	The State through Mr. Mohammad Iqbal Awan, Addl. Prosecutor General Sindh.
Date of hearing:	11.02.2022
Date of announcement:	21.02.2022

J U D G M E N T

Mohammad Karim Khan Agha, J.- Appellant Syed Samiullah was convicted by the learned VIII Additional District & Sessions Judge/ Addl. Model Criminal Trial Court, (West) Karachi in Session Case No.295 of 2021 arising out of F.I.R. No.77 of 20219 u/s. 6/9-C, CNS Act 1997 of PS Docks, Karachi vide judgment dated 15.07.2021 and was sentenced u/s. 6/9-C CNS Act, 1997 to 05 years and 06 months R.I. and to pay fine Rs.30,000/- and in default of payment he shall further undergo S.I. of 06 months.

2. The brief facts of the prosecution case are that on 24.01.2021 PC Muhammad Saleem of PS Docks was patrolling with a police party when on receipt of spy information he was informed that one person was coming in a car for supplying charas at Mohammadi Colony and on receipt of such spy information the police party reached at Nala stop near Lakri Tall Mohammadi Colony Karachi and started searching vehicles. The police party at 0120 hours stopped a car on the intimation of spy informer and asked the driver, who was the appellant Syed Samiullah, to get out of the car and on searching of the car hidden under the driver seat in a plastic shopper three packets of charas were recovered which in total

weighed 3020 grams. The appellant was arrested and taken to PS Docks where FIR was lodged against him under CNS Act, 1997.

3. After usual investigations this case was challaned and the appellant pleaded not guilty to the charge and claimed trial.

4. In order to prove its case the prosecution examined 03 PW's who exhibited various documents and other items in support of its case. The appellant recorded his statement under section 342 Cr.PC wherein he denied all the allegations which had been made against him and claimed false implication. He did not give evidence on oath or call any DW in support of his defence case.

5. After hearing the parties and appreciating the evidence on record the learned Judge of the trial court convicted and sentenced the appellant as set-out earlier in this judgment. Hence the appellant has filed this appeal against his conviction.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment, therefore, the same are not reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellant submitted that the appellant was completely innocent and that the narcotics had been foisted upon him by the police, that the vehicle from which the narcotics were recovered was not produced in court, that the safe custody of the narcotics had not been proven and as such based on any or of all the above factors the appellant by extending him the benefit of the doubt be acquitted. In support of his contentions he has placed reliance on the cases of **Muhammad Mansha v the State** (2018 SCMR 772), **Muhammad Wali v The State** (2020 P. Cr.L J 1442), **Ikramullah v The State** (2015 SCMR 1002), **Sajid Khan v The State** (2021 YLR 296) and **Bahar Begum v The State** (2019 YLR 1585).

8. On the other hand, learned Additional Prosecutor General Sindh has fully supported the impugned judgment. In particular he has contended that the appellant was arrested on the spot, that narcotic was

recovered from the vehicle which he was driving, that the PWs evidence can be safely relied upon and safe custody of the narcotic has been proven which produced a positive chemical report and thus the appeal be dismissed. In support of his contention he has placed reliance on the cases of **Ibrar Ullah v The State** (2021 SCMR 128), **Sabir Hussain v The State** (2021 SCMR 198), **Mushtaq Ahmad v The State** (2020 SCMR 474), **Asmat Ali v The State** (2020 SCMR 1000) and **Abdul Wahab v The State** (2019 SCMR 2061).

9. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the learned counsel for the appellant, the impugned judgment with their able assistance and have considered the relevant law including that cited at the bar.

10. After reassessment of the evidence we find that the prosecution has proved its case against the appellant beyond any reasonable doubt for the following reasons:-

(a) That the FIR was registered with promptitude giving no time for concoction and the S.161 statements of the PW's were recorded promptly which were not significantly improved upon by any PW at the time of giving evidence.

(b) That the prosecution witnesses proceeded to the pointed place based on spy information to check a particular car which was being driven by the appellant which contained narcotics which car was stopped at the particular place where the appellant was arrested whilst being in the particular car as per spy information and from where the recovery was made.

(c) **That the arrest and recovery was made on the spot and the appellant was caught red handed with the narcotics by the police** whose evidence fully corroborates each other in all material respects as well as the prosecution case. It is well settled by now that the evidence of a police witness is as reliable as any other witness provided that no enmity exists between them and the accused and in this case no enmity has been suggested against any of the police PW's and as such the police had no reason to falsely implicate the appellant in a false case. Thus we believe the police evidence which is corroborative in all material respects. In this respect reliance is placed on the case of **Mustaq Ahmed V The State** (2020 SCMR 474)

(d) That there are no major contradictions in the evidence of the PW's and it is well settled by now that minor contradictions which do not effect the materiality of the evidence can be ignored. In this respect reliance is placed on **Zakir Khan V State** (1995 SCMR 1793).

(e) **Most significantly** the narcotics were recovered from the car which the appellant was **driving alone** with no other passengers and the narcotics were recovered **hidden under the drivers seat of the car**. The car was recovered along the narcotics as per memo of arrest and recovery and the fact that it was not produced in court based on the other evidence in this case and the particular facts and circumstances of this case we find to be inconsequential. In this respect in the similar case of **Hussain Shah v The State** (PLD 2020 SC 132) it was held as under with respect to the driver of the car at P.134 para 3;

"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 the 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 witnesses had made consistent statements fully incriminating the appellant in the alleged offence. Nothing has been brought to our notice which could possibly be used to doubt the veracity of the said witnesses. Both the courts below had undertaken an exhaustive analysis of the evidence available on the record and had then concurred in their conclusion regarding guilt of the said appellant having been proved beyond reasonable doubt and upon our own independent evaluation of the evidence we have not been able to take a view of the matter different from that concurrently taken by the courts below vis-à-vis the said appellant".

Likewise in the case of **Nadir Khan V State** (1998 SCMR 1899) it was held as under,

*"We have gone through the evidence on record and find that the petitioners had the charge of vehicle for a long journey starting from Peshawar and terminating at Karachi. They had the driving licences also. As being person incharge of the vehicle for such a long journey, they must be saddled with the **necessary knowledge** with regard to the vehicle and its contents. The probabilities or the presumptions are all dependents on the circumstances of each case and in the present case the circumstances **fully establish their knowledge and awareness** of the contents and their explanation showing the ignorance actually strengthens that conclusion rather than weakening it".*

(f) That in this case the appellant was the sole person in the car and was driving at the time when it was stopped and the narcotics were recovered from underneath the driver's seat and as such he had **actual knowledge** that he was transporting the narcotics.

(g) Under S.29 CNSA once the recovery has been proven as in this case the onus shifts to the accused to show his innocence in that at least he had no knowledge of the narcotics. The appellant has not been able to do so in this case. In the case of **Mehboob-Ur-Rehman V State** (2010 MLD 481) it was held as under in this respect at P485 Para 14

"Under the provisions of section 29 of the C.N.S. Act once the recovery of contrabands was made from a private car which was by then in control of the two appellants, the burden to explain the possession whether actual or constructive was on the appellants to discharge but neither they have led any evidence in defence nor have appeared in disproof of the prosecution evidence under section 340(2), Cr.P.C. thus the charge laid upon them has remained unrebutted".

(h) That the recovered narcotics were sealed on the spot and kept in safe custody at the malkana from the time of their recovery to the time when they were taken for chemical analysis one day later in sealed condition as confirmed by the chemical report and no suggestion of tampering with the same has been made. The recovered narcotics were kept in the malkana and then the next day taken for chemical examination by PW 3 Raja Ghanzaffar in sealed condition. **In the supreme court case of Zahid and Riaz Ali V State** (2020 SCMR 590) although this case concerned rape since it concerned the safe custody of certain swabs being sent to the chemical examiner we consider its findings to be equally applicable to the safe custody of narcotics being sent to the chemical examiner which held as under at para 5 in material part;

"The chemical examiner's report produced by the lady doctor states that the seals of specimens sent for chemical examination were received intact and it was the chemical examiner who had broken open the seals, therefore, the contention of the petitioners' learned counsel regarding the safe transmission of the specimens is discounted both by this fact as well as by the fact that no question was put regarding tampering of the said seals."

(i) That the chemical report was positive and all the required protocols were carried out. We find the typo of the date as 23rd to 24th of January in the chemical report as being inconsequential.

(j) That although no independent mashir was associated with the arrest and recovery of the appellant and narcotic S.103 Cr.P.C is excluded for offenses falling under the Control of Narcotic Substances Act 1997 by virtue of Section 25 of that Act. In this respect reliance is placed on the case of **Muhammad Hanif V The State** (2003 SCMR 1237). Even otherwise it was held in **Shabbir Hussain's case** (2021 SCMR 198) that due to public apathy most citizens are not prepared to act as independent mashirs in such like cases. Furthermore, in this case it was night time and no body was available to act as an independent mashir

(k) That in dealing with narcotics cases the courts are expected to adopt a dynamic approach and not acquit the accused on technicalities. In this respect reliance is placed on the case of **Ghualm Qadir V The State** (PLD 2006 SC 61) which held as under at para 8 P.66.

"We are not agreeable with the contention of the learned counsel because fact remains that "Poppy Flowers" were found lying on the roof of the vehicle therefore, the technicality, which is being pointed out by the learned counsel, would not be sufficient to acquit him. In addition to it in such-like cases Courts are supposed to dispose of the matter with dynamic approach, instead of acquitting the drug paddlers on technicalities, as it has been held in (1993 SCMR 785) and (PLD 1996 SC 305)". (bold added)

(l) No doubt it is for the prosecution to prove its case against the accused beyond a reasonable doubt but we have also considered the defense case which is one of false implication simpliciter which we disbelieve in the face of reliable, trust worthy and confidence inspiring prosecution evidence especially as no witness had any reason to falsely implicate the appellant.

11. Thus, for the reasons mentioned above, we find that the prosecution has proved its case beyond a reasonable doubt against the appellant and the impugned judgment is upheld and the appeal is dismissed.

12. The appeal is disposed of in the above terms.