

ORDER SHEET  
IN THE HIGH COURT OF SINDH,  
CIRCUIT COURT, HYDERABAD.

Criminal Appeal No.D- 64 of 2021

DATE	ORDER WITH SIGNATURE OF JUDGE
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1. For orders on office objection.
2. For hearing of MA 4502/2021.
3. For hearing of main case.

08.06.2022.

Mr. Agha Waqar Ahmed, Advocate for appellant.  
Mr. Shawak Rathore, Deputy Prosecutor General, Sindh.  
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We have heard learned counsel for appellant as well as learned  
D.P.G. Reserved for judgment.

  
JUDGE

**IN THE HIGH COURT OF SINDH,  
CIRCUIT COURT HYDERABAD**

Before:

Mr. Justice Mohammad Karim Khan Agha  
Mr. Justice Muhammad Faisal Kamal Alam

Cr. Appeal No.D-64 of 2021

Muhammad Saleh. . . . . Appellant

Versus

The State. . . . . Respondent

Appellant : Muhammad Saleh	Through Mr. Agha Waqar Ahmed, Advocate
Respondent : The State	Through Mr. Shawak Rathore, D.P.G
Date of hearing	08.06.2022
Date of judgment	16.06.2022

**J U D G M E N T**

**MOHAMMAD KARIM KHAN AGHA, J.**-This appeal is directed against the judgment dated 22.05.2021, passed by the learned Model Criminal Trial Court-I / Special Judge, Control of Narcotic Substances Act, Hyderabad, in Special Case No.251 of 2018, arising out of Crime No.61 of 2018, registered at Police Station Rahoki Hyderabad, under section 9(c) of Control of Narcotic Substances Act, 1997 (CNSA) whereby the appellant Muhammad Saleh has been convicted u/s 9(c)CNSA and sentenced to suffer RI for life and to pay the fine of Rs.1,00,000/-. In case of default in payment of fine he was ordered to suffer simple imprisonment for one year more (the impugned judgment). Benefit of Section 382-B Cr.P.C. was also extended to the accused.

2. The brief facts of the prosecution case as disclosed in the FIR are that complainant SIP Dili Jan Rind of CIA Center, Hyderabad appeared at P.S Rahoki, Hyderabad and lodged present FIR stating therein that on 14.11.2018 at 1900 hours, he along with his subordinate staff namely ASI Ghulam Ali Dal, PC Muhammad Khan Dogar, PC Muhammad Bachal, and PC Muhammad Imran

Waggon left CIA Center for patrolling in Government vehicle/mobile No.SPM-038 vide entry No.16 at about 1600 hours. During patrolling via village Jhando Zounar after about one kilometer away they saw that one person was coming on motorcycle, who on seeing the police mobile from 400 yards, tried to turn his motorcycle and due to such act the motorcycle slipped and he fell down and was apprehended being suspicious at about 1800 hours with the help of staff. On enquiry apprehended person disclosed his name as Muhammad Saleh S/o Gaji Bux Khoso. Due to non-availability of private persons ASI Ghulam Ali Dal and PC Muhammad Khan Dogar were picked up/nominated as mashirs. On personal search of the accused they recovered two packets of red colour from fold of his shalwar. The packets were opened and checked and found containing two pieces of chars in each packet. The recovered chars was weighed which became 2 kilograms. The recovered charas was sealed in white coloured cloth bag for chemical examination. The complainant also recovered one currency note of Rs.1000/- and one currency note of Rs.500/- total Rs.1500/=. The fell down motorcycle was also checked and found one white colour "kata" wrapped with white rope on seat of said motorcycle, which was also found containing 39 packets of red colour and; all packets were checked and found two pieces of chars in each packet total 78 pieces. All 78 pieces were weighed which became 39 kilograms. The total weight of both recovered properties was 41 kilograms. On enquiry about recovered charas the apprehended person disclosed that the recovered charas belonged to him and he used to sell the same. The recovered charas was sealed in same white plastic katta for chemical examination. The documents of motorcycle bearing No.HAJ-0338 black colour, model unknown, maker Unique, Engine No.DSE-775597 and Chassis No.DSP-497449 were asked but apprehended person failed to produce the same. Accordingly, the recovered motorcycle was seized under section 550 Cr.P.C. Then, accused and case property were brought at police station where F.I.R. was lodged by complainant SIP Dili Jan of CIA Centre, Hyderabad, on behalf of the State under section 9(c) CNSA.

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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 04 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 however he did call three DW's 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 there were major contradictions in the evidence of the PW's which rendered it unreliable; that no safe custody of the narcotic had 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 **Abdul Sattar V The State** (SBLR 2019 Sindh 586), **Basharat Hussain Shah V The State** (2020 PCr.LJ Note 39), **Amjad Ali V The State** (2012 SCMR 577), **Mst. Sakina Ramzan V The State** (2021 SCMR 451), **Akhtar Meen V The State** (PLD 2022 Sindh 84), **Ikramullah and others V The State** (2015 SCMR 1002), **Khalil Ahmed V The State** (PLD 2008 Karachi 8), **Maula Jan V The State** (2014 SCMR 862), **Abdul Rehman V The State** (2016 PCr.LJ Note 79), **Haji Zafar Abbas V The State and others** (2016 PCr.LJ 1170), **Hussain Ali V The State** (2020 MLD 70), **Noor Hassan V The State** (2020 YLR 2643) and **Abdul Waqar V The State** (2018 YLR 2358).

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 him and from the bike 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 **Shabbir Hussain V The State** (2021 SCMR 198), **Shafa Ullah Khan V The State and another** (2021 SCMR 2005), **Mushtaq Ahmad V The State and another** (2020 SCMR 474), **Ajab Khan V The State** (2022 SCMR 317), **Muhammad Sarfraz V The State and others** (2017 SCMR 1874) as well as Form No.22.70 (Volume III, Part-I) of Police Rules 1934.

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 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 or proven 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)

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(c) 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).

(d) **Most significantly** the narcotics were recovered from the bike which the appellant was **driving alone** with no other passengers and the narcotics were recovered from the back of the bike. The bike was recovered along with the narcotics as per memo of arrest and recovery and was produced in court along with the recovered narcotics. 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 a car which can also apply to a motor bike driver 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".*

(e) That in this case the appellant was the sole person who was driving the motor bike when it fell over and was driving at the time and the narcotics were recovered from both him and the motor bike and as such he had **actual knowledge** that he was transporting the narcotics.

(f) 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".*

(g) The motorbike which the appellant was driving at the time of his arrest was recovered and produced before the Court in working condition.

(h) That is it extremely difficult and unlikely that such a large amount of narcotics would have been foisted. Furthermore, if the police had wanted to foist the narcotic on the appellant they would have simply foisted one slab on him rather than taking the time consuming and convoluted route of foisting so many smaller packets on him with other packets of narcotics inside

(i) 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 two days 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 4 Ghulam Mustaq 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."*

(j) That the chemical report was positive and all the required protocols were carried out.

(k) That all relevant police entries were exhibited at trial.

(l) That the appellant has a long list of criminal cases against him of a like nature as evidenced by his CRO and as such he is a hardened criminal.

(m) 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.

(n) 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)*

(o) 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 based on enmity. However no enmity has been proven and the DW's were either relatives or friends of the accused and notably only came into the picture as a part of the defence case after 2 PW's had been examined which tends to suggest that the defence case was a complete fabrication and an afterthought which 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.