

CERTIFICATE OF THE COURT IN RECORD NO. \_\_\_\_\_

SINDH HIGH COURT

CO-APPEAL NO. 597/17

Composition of Bench.

Single/D.B.

Mr. Justice Mohammad Nasim Khan  
Mr. Justice Zulfiqar Ali Saigal ASL

Dates of hearing: 8.11.2020

Decided on 21.11.2020

(a) Judgment approved for reporting.

Yes  
~~No~~

KJL

CERTIFICATE

Certified that the judgment \*/Order is based upon or enunciates a principle of law \*/decides a question of law which is of first impression/distinguishes/over-rules/ reverses/explains a previous decision.

\*Strike out whichever is not applicable.

NOTE:—(i) This slip is only to be used when some action is to be taken.

(ii) If the slip is used, the Reader must attach it to the top of the first page of the judgment.

(iii) Reader must ask the Judge writing the Judgment whether the Judgment is approved for reporting.

(iv) Those directions which are not to be used should be deleted.

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**BEFORE THE HON'BLE HIGH COURT OF SINDH**  
**KARACHI**

Cr: Appeal No. 597 /2017.

1. Bakhtiar Ali S/O Hazat Gul Awan  
R/O Village Jogian Tehsil & District Pehsawar,  
Presently confined in Central Jail Karachi.

**PRESENTED**  
**29-11-2017**  
**Dr. Registrar General**  
**4210**

2. Sher Ali S/O Mohabat Shah, by-caste Syed  
Permanent resident of Village Jogian,  
Tehsil & District Pehsawar,  
Presently Resident of Frontier Colony,  
Metrovil, Karachi.

Now, Confined in Central Jail Karachi. .... Appellants

**VERSUS**

Prosecutor General ..... Respondent

**Criminal Appeal Under Section 410 Cr.P.C R/W Section**  
**48 of CNSA 1997**

Being the aggrieved and dis-satisfied with the impugned Judgment passed by  
Learned Special Judge-I (CNC) Karachi, on 30-10-2017 in the Special case  
No 557 / /2014 ( The State V/S Bakhtiyar Ali & Others ), where by Learned  
Special Judge Convicted both Appellants /accused persons and sentenced  
the Appellants under Section 6 Punishable under Section 9/C Control of  
Narcotics Substance Act -1997 to Suffer Life Imprisonment with benefit of  
III-B Cr. PC and fine of Rs.3,00,000/= (Rupees Three Lac) and if Appellant  
accused will not deposit the fine they Shall suffer more one years in simple  
imprisonment.

**Please See Page No.2**

# HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No.597 of 2017

Present:

Mr. Justice Mohammad Karim Khan Agha  
Mr. Justice Zulfiqar Ali Sangi.

Appellants: 1. Bakhtiar Ali s/o Hazrat Gul Awan  
2. Sher Ali s/o Mohabat Shah  
through Mr. Jahangir Rahujo, Advocate.

Respondent/State: through Mr. Muhammed Iqbal Awan, Deputy  
Prosecutor General Sindh.

Date of hearing: 08.04.2020.

Date of Announcement 21.04.2020.

## J U D G M E N T

MUHAMMAD KARIM KHAN AGHA, J:- Accused Bakhtiar Ali s/o Hazrat Gul Awan and Sher Ali s/o Mohabat Shah, were tried by learned Judge, Special Court-I (C.N.S.) Karachi in Special Case No.557 of 2014 (438 of 2012) arising out of Crime No.596 of 2011, u/s. 9 (c) Control of Narcotic Substances Act 1997 registered at PS Jackson, Karachi. After trial vide judgment dated 30.10.2017, the appellants named above were convicted under Section 265-H (2) Cr.P.C. for the commission of offence punishable under Section 9 (c) Control of Narcotics Substance Act, and sentenced them to undergo imprisonment for life each and to pay fine of Rs.3,00,000/- (three lac rupees) each. In default of payment of fine to further undergo simple imprisonment for one year and six months each. Benefit of Section 382-B Cr.P.C. was given to the appellants.

2. Being aggrieved and dissatisfied by the judgment passed by learned Judge, Special Court-I (C.N.S.) Karachi, the aforesaid appeals have been preferred by the appellants against their convictions.

3. The brief facts of the prosecution case, are that on 01.07.2012, at about 2130 hours, SIP Muhammad Tufail, complainant, In-charge Police post, Gulshan-e-Sikanderabad of PS Jackson, lodged his report on behalf of the State stating therein that he along with his staff ASI-Ahmed Khan, ASI-Wali Khan, PC-7074 Daraiz Khan and PC-12320 Mir Azam Khan, on government mobile were busy in patrolling and detection of crime duty. During such patrolling



they reached at Massan railway crossing, main road Massan, where they were busy in Nakabandi. During Nakabandi at about 2000 hours they saw two persons coming by foot having black colour cloth bag in their right hands acting suspiciously and stopped them. On enquiry they disclosed their names to be Bakhtiar Ali s/o Hazrat Gul and Sher Ali s/o Mohabat Shah. Then due to none co-operation of private witnesses he cited ASI-Ahmed Khan and ASI-Wali Khan as mashirs and took the personal search of accused Bakhtiar Ali and recovered bag from his right hand and checked the same and found that 12 packets of Heroin Crystal, weighing 13 ½ Kilograms were recovered. He took further personal search of accused Bakhtiar Ali and recovered used Mobile Phone Nokia-1616 and cash of Rs.2200/-. He then recovered black colour bag from the right hand of accused Sher Ali, checked the same and recovered 11 packets of Heroin Crystal, weighing 12 Kilograms and on his further search he recovered one used mobile phone Nokia-503 and cash Rs.1200/-. He then sealed the secured 12 packets heroin and 11 packets heroin separately on the spot. The accused committed the offence punishable U/S-6/9 (c) of Control of Narcotic Substance Act, therefore he arrested the accused and prepared such mashirnama of arrest and recovery on the spot. They then returned back to PS where he lodged his report for offence U/S-6/9 (c) Control of Narcotic Substances Act against the accused. The investigation of the case was conducted by SIP-Abdul Ghafar Niazi.

4. SIP Abdul Ghaffar Niazi, Investigation Officer, after receipt of FIR mashirnama of arrest and recovery, secured property and accused and started investigation. He along with complainant and both mashirs went to the place of incident and saw the same on the same date on the pointation of complainant and both mashirs and prepared such memo. They then returned back to PS, where he recorded 161 Cr.P.C. statements of PWs. On 02.07.2012, he deposited the sealed parcels of case property in the office of the chemical examiner under his letter for examination and report. On 12.07.2012, he received back case property from the office of chemical examiner and then deposited the same in Police Malkhana City Court, Karachi. After completion of his investigation and after obtaining permission he submitted challan against the accused before the trial court.

5. Thereafter formal charge was framed and read over to the accused, to which they both pleaded not guilty and claimed to be tried.

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6. To prove its case the prosecution examined 03 prosecution witnesses and exhibited numerous documents and other items and thereafter the side of the prosecution was closed. Then, DDPP for the state filed an application under Section 540 Cr.P.C. for calling PW Sajid, Nazir of Special Court No.II (CNS) Karachi which was allowed on 25.02.2015. The prosecution then examined PW-04 Sajid Mehmood Nazir. Learned counsel for accused again filed an application under Section 540 Cr.P.C. for calling Dr. Fazal Illahi, retired chemical examiner for the purpose of evidence as Court Witness which was allowed on 04.06.2016 and CW-01 Dr. Fazal Illahi retired chemical examiner was examined.

7. The statement of the accused were recorded u/s 342 Cr.P.C. in which they denied all the allegations leveled against them and pleaded false implication. They did not examine themselves on oath or call any witness in support of their defense case.

8. Learned Special Court-I (C.N.S.) Karachi after hearing the learned counsel for the parties and assessment of evidence available on record, vide judgment dated 30.10.2017 convicted and sentenced the appellants as stated above, hence these appeals has been filed by the appellants against their convictions.

9. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the judgment dated 30.10.2017 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

10. Learned counsel for the appellants has contended that there are major contradictions in the evidence of the PW's especially concerning the colour of the recovered narcotics and thus the appellants should be acquitted by extending to them the benefit of the doubt. In support of his contentions he has placed reliance on **Muhammad Qasim v. The State** (2018 P. Cr.LJ Note 67), **Director ANF v. Imam Bakhsh and others** (in Criminal Appeals No.523, 524, 525, 494, 452, 51 of 2017, 22 of 2018 and Criminal Petition No.94-Q of 2017 decided on 3<sup>rd</sup> October, 2018), and **Abdul Waqar v. The State** (2018 YLR 2358).

11. On the other hand learned DPG has fully supported the impugned judgment. He contended that the prosecution had proved its case against the appellants beyond a reasonable doubt and had in particular contended that the appellants were arrested on the spot when the recovery of the narcotics was



made, that the chemical report is positive and that there are only minor contradictions in the case of the prosecution which can be ignored and thus the appeals should be dismissed. In support of his contentions, he placed reliance on **State through Regional Director ANF Peshawar v. Sohail Khan** (2019 SCMR 1288), **Muhammad Kamran v. The State** (2019 SCMR 1314), **Hussain Shah and others v. The State** (PLD 2020 Supreme Court 132) and **Mehboob-ur-Rehman v. The State** (2010 MLD 481).

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

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

(a) The FIR was registered with promptitude giving no time for concoction and the S.161 statements 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 **appellants were 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 implicate the appellants in a false case. Thus we believe the police evidence which is corroborative in all material respects. Reliance in this respect is placed on the unreported recent Supreme Court case of **Mushtaq Ahmed V The State** dated 09-01-2020 in Criminal Petition No.370 of 2019 where it was held in material part as under at para 3;

*"Prosecution case is hinged upon the statements of Aamir Masood, TSI (PW-2) and Abid Hussain, 336-C (PW-3); 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 inspiring and as such can be relied upon without a demur."*

(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) Furthermore, under Section 29 CNSA 1997 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 appellants have not been able to do so in this case as the evidence shows that the narcotics were recovered from them on the spot and as such they were caught red handed and arrested on the spot along with the narcotics which were recovered from them

(e) That there was no delay in sending the first chemical report for analysis which turned out to be positive.

(f) That even a second chemical analysis was carried out which again proved positive and even the chemical examiner was called as CW-01 Dr. Fazal Illahi who was examined at length and fully supported the prosecution case that the narcotics recovered were heroin and that all necessary protocols were carried out in connection with the chemical analysis of the narcotics. He was cross examined at length but the defense were not able to put a single dent in his evidence.

(g) That it would be extremely difficult to foist such a large amount of heroin being 13.5 Kgs and 12 Kgs on each appellant respectively making a grand total of 25.5 Kgs of heroin as mentioned in **Mustaq Ahmed's case** (Supra) and **The State V Abdali Shah** (2009 SCMR 291).

(h) That the recovered narcotics were kept in safe custody from the time of their recovery to the time when they were taken for chemical analysis and no suggestion of tampering with the same has even been made. The narcotics were sealed on the spot, remained sealed in the malkhana before being transported to the chemical examiner in a sealed condition as per the chemical report. In this respect reliance is placed on the recent Supreme Court case of **Zahid and Riaz Ali V State** dated 03-03-2020 (unreported) in Jail Appeal No.172 of 2018. 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 although no independent mashir was associated with the arrest and recovery of the appellants it has come in evidence that no private person was willing to become an independent mashir at the time of arrest and recovery. Even otherwise 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).



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(j) That in dealing with narcotics cases the courts are supposed to adopt a dynamic approach and not acquit the accused on technicalities. In this respect reliance is placed on **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)*

(k) 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 in essence as per their S.342 statements was just a basic plea of false implication. They did not give evidence on oath and did not call any witness in support of their defense cases and as discussed above the police had no enmity with them and had no reason to implicate them in a false case and as such we disbelieve the defense of the appellants.

14. Thus, for the reasons mentioned above, we find that the prosecution has proved its case beyond a reasonable doubt against the appellants and the impugned judgment is upheld and the appeals are dismissed.

15. The appeals are disposed of in the above terms.