

IN THE HIGH COURT OF SINDH, KARACHI

Present:

*Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Arshad Hussain Khan,*

CRIMINAL APPEAL NO.71 OF 2021

Appellant:	Mst. Sakina @ Sikko wife of Fida Hussain through Mr. Zakir Hussain Bughio, Advocate
Respondent:	The State through Mr. Ali Haider Saleem, Addl. Prosecutor General, Sindh.

CRIMINAL APPEAL NO.72 OF 2021

Appellant:	Mst. Fouzia @ Kanwal wife of Shah Jahans through Mr. Zakir Hussain Bughio, Advocate
Respondent:	The State through Mr. Ali Haider Saleem, Addl. Prosecutor General, Sindh.

CRIMINAL APPEAL NO.81 OF 2021

Appellant:	Moula Bux son of Aandal through Mr. Zakir Hussain Bughio, Advocate
Respondent:	The State through Mr. Ali Haider Saleem, Addl. Prosecutor General, Sindh.
Date of Hearing:	06.12.2021
Date of Announcement:	08.12.2021

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellants namely Sakina @ Sikko, Fouzia @ Kanwal and Moula Bux have assailed the impugned judgment dated 12.01.2021 passed by the Model Criminal Court / Additional District and Sessions Judge, Malir Karachi in Sessions Case No.1813 of 2020 arising out of Crime No.349 of 2020 under Section 6/9-C, C.N.S. Act, 1997 registered at PS Malir City, Karachi whereby the aforesaid appellants were convicted for offences falling under section 9-C

of the CNS Act, 1997 and sentenced to suffer R.I. for ten (10) years and fine of Rs.10,00,000/ (Rupees Ten Lac). In case of default in payment of fine they will suffer further S.I. for six (06) months in addition to main sentence. The benefit of section 382-B Cr.P.C was also extended to the accused persons.

2. The brief facts of the prosecution case are that on 25.09.2020 based on spy information at about 09:15 a.m at Road Naeemia Madarasa near Ghareebabad Goth Katchi Abadi Malir City Karachi a police party headed by SIP Moinullah Hashmi of PS Malir City, apprehended the accused persons namely Moula Bux son of Aandal, Mst. Sakina wife of Fida Hussain and Mst. Fouzia @ Kanwal wife of Shah Jahan. From the possession of the accused Moula Bux police recovered Cannabis (Chars) of 3020 Grams, from the possession of accused Mst.Sakina police recovered Cannabis (Chars) of 3040 Grams and from the possession of accused Mst. Fouzia @ Kanwal police recovered Cannabis (Chars) of 3020 Grams in presence of Mashirs, hence the FIR was lodged.

3. After completing usual investigation formal charge was framed and read over to the accused, to which they pleaded not guilty and claimed to be tried.

4. To prove its case the prosecution examined 03 witnesses and exhibited numerous documents and other items thereafter the side of the prosecution was closed. The statement of each of the accused were recorded u/s 342 Cr.P.C. in which they denied all the allegations leveled against them and claimed that they had been fixed by the police in this false case as the police had enmity with accused Ms. Sakina. None of the accused examined themselves on oath or called any defence witness in support of their case.

5. Learned trial court after hearing the learned counsel for the parties and assessment of evidence available on record, vide judgment dated 12.01.2021, convicted and sentenced the appellants as stated above, hence this appeal has been filed by the appellants against their convictions.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the judgment dated 12.01.2021 passed

by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellants has contended that all the appellants are completely innocent and have been falsely implicated in this case on account of the enmity of the police with Ms Sakina; that the vehicle which the accused were in when they were stopped and searched was not seized; that there are contradictions in the evidence of the PW's, that there is no evidence of safe recovery of the narcotics and for any of the above reasons the appellants should be acquitted of the charge by extending them the benefit of the doubt. In support of his contentions he placed reliance on the cases of **Khair-ul-Bashar v The State** (2019 SCMR 930), **Abdul Ghani v The State** (2019 SCMR 608), **The State through Regional Director ANF v Imam Bakhsh & Ors.** (2018 SCMR 2039), **Nigar Ahmad v The State** (2013 YLR 196) and **Ghous Bux v The State** (2004 Cr.LJ 843).

8. On the other hand learned APG has fully supported the impugned judgment. In particular he has contended that one of the appellant's was the driver of the car whilst the other two appellants were passengers in the car; that they were all caught red handed on the spot with a huge quantity of narcotics; that the narcotics were kept in safe custody from the time of their recovery to the time when they were sent to chemical examination which lead to a positive chemical report and as such their appeal should be dismissed however he very fairly brought to this court's attention the fact that the appellant's had been sentenced for longer than the guidelines laid down in **Ghulam Murtaza V State** (PLD 2009 Lah 362). In support of his contentions he has placed reliance on the cases of **Ibrar Ullah v The State** (2021 SCMR 128), **DS Pakistan Railway, Quetta v Abdul Sattar** (2020 SCMR 1001), **Mushtaq Ahmad v The State** (2020 SCMR 474) and **Ghulam Murtaza and another v The State** (PLD 2009 Lahore 362).

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 appellants, the impugned judgment with their able assistance and have considered the relevant law including that cited at the bar.

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

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

(b) That the vehicle in which the appellants were traveling in and where it would be based on spy information which clearly mentioned that women would be in the car which lead to the calling of lady police officers in order to search the ladies. This spy information was borne out by the presence of the ladies with the narcotics in the car when it was stopped by the police which corroborates the prosecution case in terms of its reliability

(c) That the arrest and recovery was made from each of the appellants on the spot and the **appellants were all 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 **proven** enmity has come on record against any police officer. Although the complainant admitted that a complainant had been made against him no such complaint was exhibited or any other document produced to support such enmity or the nature of the complainant. Even otherwise if the complainant only had an enmity with appellant Ms Sakina why would he fix two other innocent persons in a false case and why would he foist such large amounts of narcotics on them which are usually not readily available which does not appeal to logic, reason or commonsense and as such the police had no reason to implicate the appellant 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 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).

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(e) Most significantly the narcotics were recovered from appellants whilst sitting in the car and which was being driven by one of the appellants and the narcotics were found on all the appellants when the car was stopped and thus there is *no doubt that the appellants had actual knowledge* of the narcotics which were being transported. In this respect in the similar 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 licenses 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".

In this regard reliance is also placed on **Hussain Shah and others V The State** (PLD 2020 SC 132) which is similar to the facts and circumstances of this case.

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. None of the appellants have 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 un rebutted".

(f) That it would be extremely difficult to foist such a large amount of charas being in total 9 KG's (around 3 KG recovered from each appellant) as mentioned in **Mustaq Ahmed's case** (Supra) and **The State V Abdali Shah** (2009 SCMR 291).

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

(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 by PW 3 Malook Channa with the required protocols being carried out. In this respect reliance is placed on the Supreme Court cases of **Asmat Ali** (supra) and **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 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 **Ibrarullah's case** (Supra) that due to public apathy most citizens are not prepared to act as independent mashirs in such like cases.

(j) 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 and note from the FIR that Ms Sakina has previously been arrested in various similar cases, that none of the appellants gave evidence or oath or called any DW to rebut the prosecution case in the face of overwhelming prosecution evidence as discussed above we disbelieve the defence case of false implication.

11. Thus, for the reasons mentioned above, we find that the prosecution has proved its case beyond a reasonable doubt against the appellants and as such their convictions in the impugned judgment are upheld and the appeal is dismissed in this respect.

12. We note however that each of the appellants was found to be in possession of a little over 3 KG's of Charas and were each sentenced to 10 years RI with fine however as per sentencing guidelines in **Ghulam Murtaza's case** (supra) the appropriate sentence was RI for 6 years and six months along with a fine of RS 30,000 or in default thereof further SI for 6 months more as such we hereby reduce the sentences handed down to each of the appellants from that mentioned in the impugned judgment to RI for 6 years and six months each along with a fine of RS 30,000 each or in default thereof further SI for 6 months more. The appellants shall have the benefit of S.382 (B) Cr.PC and any remissions available to them under the law.

13. The appeals are dismissed except in terms of modification in sentence as mentioned above.