

IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Cr. Appeal No.D-38 of 2020

PRESENT:

Mr. Justice Omar Sial,
Mr. Justice Abdul Mubeen Lakho,

Appellants Mst. Hafeezan Brohi & another, through
Mr. Mohammad Afzal Jagirani, Advocate.

Respondent The State through Mr. Mohammad Noonari,
Deputy Prosecutor General.

Date of hearing: 12.8.2021.
Date of Decision: 15.10.2021.

J U D G M E N T

Omar Sial, J.: Hafeezan and Haseena Brohi have been convicted for an offence under section 9(c) of the Control of Narcotics Substances Act, 1997 on 20.10.2020 by the learned 1st Additional Sessions Judge/MCTC, Shikarpur. Both ladies were sentenced to life imprisonment and further directed to pay a fine of Rs.100,000. In the event they failed to pay the fine they would have to spend one more year in prison.

2. A brief background to the case is that on 24.09.2019, A.S.I. Manzoor Ali Khokhar of the New Foujdari police station in Shikarpur received information that two women standing on the highway had charas in their possession. A police party led by A.S.I. Manzoor Ali Khokhar reached the identified location and saw the Appellants holding sacks who upon seeing the police tried to flee. However, with the help of a lady police officer, they were stopped and searched. Upon search, the police recovered fourteen kilos of charas from each sack. The Appellants were therefore, arrested and FIR No. 140 of 2019 was registered against them.

3. The Appellants pleaded 'not guilty' to the charge under section 9(c) of the Act and claimed trial. In order to prove its case, the prosecution

examined five witnesses. The first prosecution witness was A.S.I. Manzoor Ali Khokhar (P.W.1) who was the police officer who had arrested the Appellants and effected recovery from them. He was also the complainant of the case. The second prosecution witness was P.C. Israr Ahmed Detho (PW-2). He was the police officer who had witnessed the arrest and recovery as well as the inspection of the place where the incident had occurred. The third witness was S.I. Muhammad Ali Bhaiyo (PW-3) who was the investigating officer of the case. W.A.S.I. Abdul Qadeer Mahar (PW-4) was the in-charge of the *maalkhana* where the property was kept prior to it being sent for analysis. He recorded his evidence as the fourth prosecution witness. The fifth witness was P.C. Hussain Ahmed Soomro (PW-5); who was assigned the task of transporting the narcotics from the police station to the chemical laboratory.

4. The Appellants recorded their section 342, Cr.P.C statements in which they claimed that they had been falsely implicated in this case due to an enmity their family had with Manzoor Ahmed and Abdul Rasheed Brohi. At the conclusion of the trial, the impugned Judgment was announced convicting and sentencing Appellants as above.

5. Learned counsel for the Appellants has argued that section 103, Cr.P.C was not complied with; Saba Parveen Bhutto, the lady constable, who had searched the two women was not examined at trial; that the number of the Road Certificate on record is different from the number of the Road Certificate on the chemical analysis report; that the narcotics was sent to the chemical laboratory after two days of its seizure; that the arrest of the two ladies was made by an A.S.I; it was incomprehensible that women could commit such a crime and that they had the strength to carry such a substantial quantity of *charas* and lastly that the chain of safe custody of the seized narcotics was not proved at trial. The learned Deputy Prosecutor General, on the other hand, has supported the impugned Judgment and submitted that a watertight case had been established against the Appellants and that none of the arguments made

by the counsel for the Appellants had any weight.

6. We have heard the learned counsel for the Appellants as well as the learned Deputy Prosecutor General. With their able assistance we have also gone through the record and re-appraised the evidence. Our observations and findings are as follows.

7. We will first address the arguments raised by the counsel for the Appellants. As regards the argument regarding violation of section 103, Cr.P.C. is concerned, section 25 of the CNS Act, 1997 has excluded the applicability of section 103 of the Cr.P.C. in narcotic cases. The Hon'ble Supreme Court in **Zafar v. The State** (2008 SCMR 1254) has held that "*applicability of section 103, Cr.P.C. in narcotic cases has been excluded and non-inclusion of any private witness is not a serious defect to vitiate the conviction.*" The same view was taken by the Hon'ble Supreme Court in **Abdul Rasheed v. The State** (2009 SCMR 306) and **Tariq Mehmood v. The State** (PLD 2009 SC 39). We, therefore, do not find any force in this argument of the counsel.

8. Saba Parveen was the lady constable who assisted in the arrest and search of the Appellants. The arrest of the Appellants is not in dispute and an obviously admitted position. As far as the recovery of narcotics from the sacks in the possession of the Appellants is concerned, Saba Parveen did not act as a witness. Instead it was 2 police officers Israr Ahmed and Imran Ali who acted as witnesses. Keeping the foregoing in mind, it is our view that no prejudice was caused to the Appellants nor was the prosecution case adversely impacted in any manner by the non-examination of Saba Parveen.

9. It appears that the learned counsel has erred in his argument that the Road Certificate and its number on the chemical report are different. A perusal of the Road Certificate dated 26.9.2019 as well as the number of the Road Certificate on the Chemical Examiner's Report No. 3802 of 2019 are both written as 148.

10. The next argument raised by the learned counsel was that the samples of narcotics seized were sent for chemical analysis after two days. The record reveals that the seizure was made on 24.09.2019 at 3.00 p.m. and the narcotics were sent to the chemical examiner on 26.09.2019

and were also received by the office of the examiner on the same day. In accordance with section 4(2) of the Control of Narcotic Substances (Government Analysts Rules, 2001) which have been framed by the Federal Government in exercise of its powers conferred by section 77 of the Act, the requirement is that the samples should be dispatched for analysis not later than 72 hours of the seizure. The samples in the present case were dispatched within the stipulated time frame. As such, the argument of the learned counsel holds little weight.

11. Next the learned counsel has argued that A.S.I. Manzoor Ali Khokhar arrested the two accused which was not permissible under the law, therefore, the entire trial is vitiated. While the learned counsel has not specifically pointed out which section of law has been violated perhaps he wanted to refer to section 21 of the Act which provides that only an officer not below the rank of Sub-Inspector is authorized to search, seize and arrest without a warrant. In this regard, the Hon'ble Supreme Court in the case of the **State v. Abdali Shah reported at 2009 SCMR 291** has held as follows.

"Similarly, the second ground which weighed with the learned High Court that the investigation was not carried out by an official authorized to do so, also is devoid of substance, since no prejudice has been caused to the respondent by such investigation. The case of Muhammad Farooq Khan v. The State 2007 PCr.LJ 1103 relied upon in the impugned order is distinguishable from the facts of the present case as therein mala fides were alleged against the investigative agency in which event a learned Division Bench of the Sindh High Court came to the conclusion that the investigation should have been entrusted to another agency. In this regard, the reference can be made to the case of State through Advocate-General v. Bashir (supra), wherein it was held that investigation by an officer not authorized to do so was merely an irregularity which is curable under section 537, Cr.P.C."

12. In the present case, though the arrest was made by an A.S.I., the investigation in the matter was indeed made by an S.I. as required by law, however, the ratio of the aforementioned judgment would, in our view, apply equally to an arrest made by an officer lower in rank than an

S.I.P. This argument of the learned counsel, therefore also holds little weight.

13. The learned counsel has also argued that it makes no rational sense that two women have been accused of and associated with a drug crime. In our opinion, this argument too carries little weight. It is not uncommon that drug barons use women, children, underprivileged and vulnerable segments of our society to act as mules for them. Any leniency shown by the courts on account of gender or privilege may encourage such drug barons to exploit these groups even further. The Hon'ble Supreme Court in the case of **Surraya Bibi v. the State reported at 2008 SCMR 825** has also specifically observed:

"We may point out here that in the cases pertaining to offences of narcotics, it has been seen that the drug peddlers, to achieve their nefarious objects, have adopted obnoxious device by engaging womenfolk and the children and through them crimes is being committed and ultimately mercy is sought against such accused on humanitarian grounds, etc. Therefore, to curb such menace, Courts are required to award adequate punishment instead of showing sympathy on the ground that the accused is woman or a child, otherwise, the actual accused involved in such heinous crime, which is against the society, would be encourage and carriers would also be freely available to promote the crime with the hope that after spending small period in the prison, they would be set at liberty despite of committing heinous crime of drug trafficking."

14. Finally, learned counsel has argued that the chain of safe custody was broken and thus a conviction cannot safely be made. In this regard, the Honorable Supreme Court in the case of **Sakina Ramzan v. the State, reported at 2021 SCMR 451** has held as that:

In the absence of the statement of the warehouse in-charge and the statement on behalf of Muhammed Younas Sabir (PW-1) regarding the delivery of the samples of the narcotic drugs to the office of the chemical examiner, it cannot be ascertained whether the narcotic drugs and the representative samples were deposited in the warehouse by PW-1; when and who collected the representative samples from the warehouse; and who delivered them by hand to the office of the Chemical Examiner. The chain of custody or safe custody and safe transmission of narcotic drug begins with seizure of the narcotic drug by the law enforcement officer, followed by separation of the representative samples of the seized narcotic

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drug, storage of the representative samples and the narcotic drug with the law enforcement agency and then dispatch of the representative samples of the narcotic drugs to the office of the chemical examiner for examination and testing. This chain of custody must be safe and secure. This is because, the Report of the Chemical Examiner enjoys critical importance under CNSA and the chain of custody ensures that correct representative samples reach the office of the Chemical Examiner. Any break or gap in the chain of custody i.e., in the safe custody or safe transmission of the narcotic drug or its representative samples makes the Report of the Chemical Examiner unsafe and unreliable for justifying conviction of the accused. The prosecution, therefore, has to establish that the chain of custody has been unbroken and is safe, secure and indisputable in order to be able to place reliance on the Report of the Chemical Examiner."

Reference can also be made to Imam Baksh's case (2018 SCMR 2039) and Ikramullah's case (2015 SCMR 1002).


15. We have re-assessed the evidence in light of the above principles enunciated by the apex court. In the present case, the prosecution did record evidence of the seizure of the drugs on 24.09.2019 at 3 p.m. The FIR in the case was lodged at 4.00 p.m. on the same date. A.S.I. Manzoor Ali Khokhar (PW-1) who was the officer who arrested the Appellants and effected the recovery stated in his examination-in-chief that after having recovered the narcotics he returned to the police station and *"handed over the copy of FIR, mushirnama, recovered case property and custody of accused to SI Muhammad Ali Bhaiyo for further investigation purpose."* S.I. Muhammad Ali Bhaiyo (PW-3) testified that he received the property from Khokhar; deposited the same in the malkhana of the police station with the help of WASI Abdul Qadir Mahar (PW-4); made the relevant entry in the register No.19 of the malkhana and recorded Mahar's statement under section 161, Cr.PC. He also produced the original register along with the relevant entry at trial. WASI Abdul Qadir Mahar (PW 4) confirmed that he had received the case property in the instant crime from S.I. Muhammad Ali Bhaiyo (PW-3); it was entered in the register No.19 and that on 26.09.2019 S.I. Bhaiyo took the property from him to send it to the chemical examiner. Finally, P.C. Hussain Ahmed Soomro (PW-5) testified that he was given the property by Bhaiyo on 26.09.2019 under a road certificate

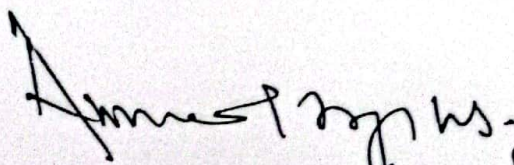
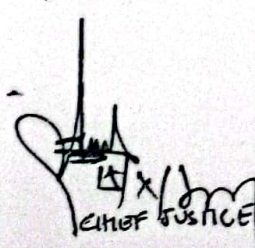
to deposit it at the chemical laboratory. He had left the police station at 9.50 a.m., deposited the property at the chemical laboratory and then returned to the police station. The chemical examiner's report shows the property having been deposited on 26.09.2019 by PC Hussain Ahmed (PW-5). Nothing of substance came on record during the cross-examination of the prosecution witnesses to show that the chain of safe custody was broken at any time. In view of the foregoing, the safe custody of the property was proved from the time it was seized to the time it was deposited with the chemical analyst.

16. To summarise: a substantially heavy quantity of narcotics was recovered from the possession of the Appellants; they were apprehended red-handed; no animosity was claimed against the police party officials who had arrested the Appellants and effected recovery; no nexus between the officials of the police party and the Brohis' with whom the Appellants claimed they had an enmity and on the behest of whom the police party had foisted the narcotics on them was proved nor, as a matter of fact, even one witness called by the defence to corroborate the assertion of the Appellants; prosecution witnesses have corroborated each other on all material aspects; the entire case property was sent to the chemical analyst; the chain of safe and secure custody of the narcotics was proved at trial; the report of the chemical analyst reflects that the substance in the sacks recovered was charas.

17. In view of the above, we are of the view that the prosecution was successful in proving its case beyond a reasonable doubt. The impugned judgment does not merit any interference. Accordingly, the appeal stands dismissed.


15/10/21
JUDGE


JUDGE



JUDGE
CHIEF JUSTICE