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IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Khadim Hussain Tunio

CRIMINAL APPEAL NO.438 OF 2020

Appellants 1. Sajid Rehman son of Sardar Khan
 2. Shahid Habib son of Syed Habib
 through Mr. Mamoon A. K. Sherwani,
 Advocate.

For State: Mr. Abrar Ali Khichi, Addl. Prosecutor
 General Sindh.

Date of hearing: 17.01.2022

Date of announcement: 21.01.2022

J U D G M E N T

Mohammad Karim Khan Agha, J.- Appellants Sajid Rehman and Shahid Habib have preferred this Criminal Appeal against the impugned judgment dated 12.10.2020 passed by the learned 1st Additional Sessions Judge, Malir Karachi in Session Case No.1959 of 2019, F.I.R. No.138 of 2019 u/s. 6/9-C, CNS Act 1997 of PS Airport Karachi whereby the appellants Sajid Rehman and Shahid Habib have been convicted under Section 9-C CNS Act, 1997 and each sentenced to life Imprisonment and each fined Rs.5,00,000/- (Five Lac) and in default of payment of fine they shall further undergo S.I. of 04 months.

2. The brief facts of the prosecution case as per FIR No.138/2019, under Section 6/9-C CNS Act 1997 registered at PS Airport, Karachi are that on 06-11-2019 at about 0330 hours, at main National Highway, Malir Halt, Karachi a police party headed by SIP Muhammad Husain of PS Airport police apprehended the accused persons namely Sajid Rehman son of Sardar Khan and Shahid Habib son of Syed Habib and recovered a Carton containing 20 packets of Gardha Chars weighing 23 Kilograms from cabin of Oil Tanker bearing registration No.TTB-813 in presence of

mashirs which accused Sajid Rehman was driving, while accused Shahid Habib was sitting beside him, thus the instant FIR was registered.

3. After usual investigation the case was challoned and charge was framed against both the accused to which they both denied all the allegations leveled against them and claimed trial.

4. The prosecution to prove its case examined 03 PW's who exhibited various documents and other items in support of its case. The appellants recorded there statements under section 342 Cr.PC wherein they both claimed false implication at the hands of the police. Neither the appellants examined themselves on oath nor called any witness in support of his defence case.

5. Learned Judge of the trial court after hearing the learned counsel for the appellants and assessment of evidence available on record, vide judgment dated 12.10.2020, convicted and sentenced the appellants as stated above, hence these appeals have 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 impugned judgment, therefore, the same are not reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellants has contended that the appellants are completely innocent and have been falsely implicated in this case as they refused to pay a bribe to the police; that there are contradictions in the evidence of the PW's and as such there evidence cannot be safely relied upon; that the truck from which the narcotics were recovered was not seized; that the narcotics were not kept in safe custody from the time of their recovery to the time when they were sent for chemical examination and that for any or all of the above reasons the appellants 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 **Abdul Ghani v The State** (2019 SCMR 608), **Amjad Ali v The State** (2012 SCMR 577), **Abrar Hussain v The State** (2017 P Cr.L J 14), **Mst. Sakina Ramzan v The State** (2021 SCMR 451) and **Asad v The State** (2021 YLR 254).

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 appellant was sitting in the front passenger seat; that they were both 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 the narcotics were sent to chemical examination which lead to a positive chemical report and as such their appeals should be dismissed. In support of his contentions he placed reliance on the cases of **Ibrar Ullah v The State** (2021 SCMR 128), **Ali Akbar v The State** (2020 SCMR 1225) and **Ghulam Qadir v The State** (PLD 2006 SC 61).

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.

10. After our reassessment of the evidence we find that the prosecution has proved its case beyond a reasonable doubt against 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 when it was stopped was based on spy information which turned out to be correct.

(c) That the arrest and recovery was made from the vehicle in which the appellants were travelling hidden under the drivers seat and as such the **appellants were both caught red handed with the narcotics** on the spot 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 was even suggested by the accused against any of the PW's. 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).

(e) **Most significantly** the narcotics were recovered from appellants whilst sitting in the truck which was being driven by one of the appellants from whom a valid drivers license was recovered along with the narcotics when the truck 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".

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 unrebutted".

(f) That it would be extremely difficult to foist such a large amount of charas being in total 23KG's 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 Muhammed Iqbal with the required protocols being carried out. In this respect reliance is placed on the 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 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) 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 for the accused that "During

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 is one of false implication simpliciter and have only belatedly claimed that the police falsely implicated them as they would not pay a bribe. That neither of the appellants gave evidence on 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 and sentences in the impugned judgment are upheld and their appeals are dismissed.