

17

HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No. 131 of 2013

Mr. Justice Naimatullah Phulpoto
Mr. Justice Shaukat Ali Memon

JUDGMENT

Date of Hearing : 13.05.2015
Date of Judgment : 26.05.2015
Appellant : Mst. Aasia @ Nafeesa through Mr. Muhammad Akbar Khan Advocate.
Respondent : The State through Mr. Muhammad Iqbal Awan APG.

NAIMATULLAH PHULPOTO, J.- Appellant Mst. Aasia @ Nafeesa wife of Abdul Hameed Baloch was tried by learned Special Judge for CNS, Tanc Allahyar in Special Case No. 26/2012 for offence under section 9(c) of the Control of Narcotic Substances Act, 1997. The learned Special Judge, by judgment dated 20.03.2013, convicted the appellant under Section 9(c) of the Control of Narcotic Substances Act, 1997 and sentenced her to imprisonment for life and to pay fine of Rs.500,000/-, in case of default in payment of fine, she would further undergo imprisonment for six months. Appellant was extended benefit of Section 382 Cr.P.C.

2. Brief facts of the prosecution case, as disclosed in the FIR are that on 26.03.2012, Sher Khan, Excise Inspector on spy information left Excise police station along with his staff and HC Mst. Razia Moharam vide Roznamcha entry No. 449 in the Government vehicle and proceeded to Bhatto Stop. where, he started checking of the vehicles at Bhatto Stop. At 3:30 pm, it alleged in FIR that one air conditioned coach leading from Karachi to Mirpurkhas appeared, it was stopped and checked by excise officials with the help of HC Mst. Razia

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(18)

Moharam. During checking/search a lady was found sitting on a seat behind the driver, she had a plastic bag with her, it was checked by lady head constable Mst. Razia Mohram and she found 10 packets of Charas in it. Excise Inspector in presence of mashirs enquired the name of lady accused, she disclosed her name as Mst. Aasia @ Nafeesa w/o Abdul Hameed Baloch, R/o Miran Naka, Liyari Karachi. Charas was weighed, it became 10 KG and 350 grams. Excise Inspector in presence of mashirs separated/took small quantity of charas from each packet. Total 100 grams of Charas were separated from 10 packets for dispatching to the chemical examiner for analysis. Mashirnama of arrest and recovery was prepared in presence of the mashirs namely E.C Ghulam Rasool and Lady Head Constable Mst. Razia Moharam. Thereafter, accused and case property were brought at Excise P.S, where FIR was lodged on behalf of state. It was recorded vide Crime No. 03/2012 under Section 9(c) of the C.N.S. Act, 1997.

3. During the course of investigation, accused disclosed the name of co-accused as Saleem son of Abdul Ahad. However, said Saleem could not be arrested by the Excise Inspector during investigation. Samples of charas were despatched to the chemical examiner within 02 days for chemical analysis. Positive chemical report was received. After completion of the investigation, challan was submitted against the appellant under section 9(c) of the C.N.S. Act, 1997.

4. A formal charge against Appellant Mst. Aasia @ Nafeesa was framed by the trial Court at Ex. 4. Appellant did not plead guilty and claimed her trial.

5. At trial, prosecution examined P.W-1 EC Ghulam Rasool, mashir of arrest and recovery, who produced such mashirnama at Ex.7. P.W-2 Complainar Excise Inspector Sher Khan, who produced FIR at Ex.9, arrival Roznamcha ent at Ex. 10, and positive chemical report at Ex. 11, P.W-3 Lady Head Constable Mst.

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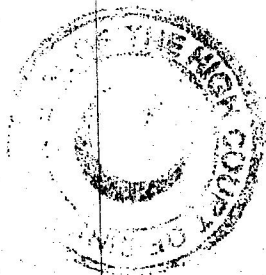
Razia Moharam was examined at Ex. 12. Thereafter, learned DPP closed the prosecution side, vide his statement at Ex. 13.

6. Statement of accused was recorded under Section 342 Cr.P.C at Ex.14. Accused denied the recovery of 10 KG and 350 grams of Charas from her possession. However, it appears that she has admitted her arrest on 26.03.2012 from Mirpurkhas Road. Appellant/accused claimed her innocence and stated that Charas has been foisted upon her. She declined to examine herself on oath. No evidence was adduced in defence.

7. The learned Special Judge for CNS, Tando Allahyar, after hearing parties and assessment of the evidence convicted and sentenced the appellant as stated above.

8. Mr. Muhammad Akbar Khan learned counsel for the appellant/accused mainly contended all the P.Ws are excise officials, no passenger of bus or driver were examined by the Excise Inspector. It is contended that appellant was arrested on 26.03.2012 at 3:30 pm; there was delay of 2½ hours in lodging of the FIR. It is further contended that Charas was recovered on 26.03.2012 but it was despatched to the chemical examiner for analysis on 28.03.2012; delay in dispatching charas has not been explained by the prosecution. It is argued that incriminating material/evidence including arrest of the accused from the bus was not put to the accused, in her statement under section 342 Cr.P.C, which has caused prejudice to the appellant. Lastly argued that prosecution case is a false.

9. Mr. Muhammad Iqbal Awan learned APG has argued that FIR was promptly lodged; passengers of the bus had refused to act as mashir in this case; charas was despatched to chemical examiner within 02 days. He has also argued that all the incriminating circumstances/material have been put to the accused in her statement under section 342 Cr.P.C. Lastly he has argued that trial court has



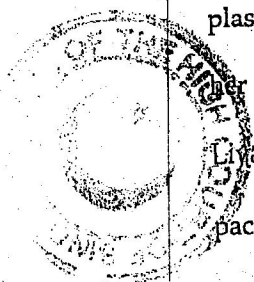
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rightly appreciated the prosecution evidence and convicted the appellant. He has supported the impugned judgment.

10. After hearing the learned counsel for the parties, we have scanned the entire evidence.

11. Excise Inspector Sher Khan has deposed that on 26.03.2012, on spy information, he along with his subordinate staff left office vide Roznamcha entry No. 449 at 12:30 pm for checking in area in Government vehicle. He received such secret information through ETO that a lady was travelling in a coach from Karachi having narcotics with her. Upon such information, Excise Inspector along with his staff and HC Mst. Razia Moharam, started checking at Batho Stop Mirpur Road. During checking one air conditioned coach appeared and it was stopped. Excise officials and HC Mst. Razia Moharam found a lady sitting in the bus in a suspicious manner. HC Mst. Razia Moharam searched and found a plastic bag in her possession. It was opened in presence of the mashirs. Such plastic bag contained 10 packets of the charas. On enquiry lady accused disclosed her name as Aasia @ Nafeesa w/o Abdul Hameed Baloch, R/O Miran Naka, Lyari Karachi. Excise Inspector separated small quantity of Charas from each packet, total 100 grams of charas for dispatching to the chemical examiner for analysis. Remaining charas 10 KG and 250 grams were separately sealed. Accused was arrested, mashirnama of arrest and recovery was prepared in presence of mashirs EC Ghulam Rasool and LHC Mst. Razia Moharam. Thereafter, accused and case property were brought at Police station; FIR was lodged by Excise Inspector which he has produced at Ex.9. He also produced departure entry at Ex.10 and positive chemical report at Ex.11. Excise Inspector has stated that during interrogation, lady disclosed name of co-accused, as Saleem son Abdul Ahad Kashineeri but he could not arrest him during investigation. Excise Inspector was cross-examined at length by the defence

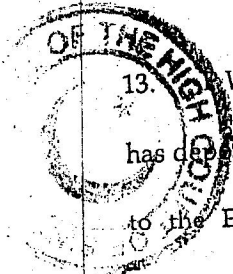


13

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counsel. He has denied the suggestion that Charas has been foisted upon the appellant/accused.

12. P.W Ghulam Rasool Excise Constable, who was accompanied by the Excise Inspector during recovery proceedings acted as mashir of arrest and recovery has supported the version of the complainant and stated that appellant was arrested from the bus; LHC Mst. Razia Moharam conducted her personal search; recovered from her possession a plastic bag which contained 10 packets of the Charas. Small quantity of Charas was separated by Excise Inspector from each packet; total 100 grams were separated for chemical examination; remaining 10 KG and 250 grams were separately sealed; accused was arrested; mashirnama of arrest and recovery was prepared in his presence and in presence of lady constable. In the cross examination he has denied the suggestion that nothing was recovered from the possession of the accused.



13. W/mahsir Razia Moharam Lady Head Constable at P.S Tando Allahyar has deposed that on 26.03.2012, WPC Munwar of PS Tando Allahyar brought her to the Excise office for performing duty where Excise officials headed by Inspector Sher Khan were present. She has stated that she came with excise officials at Bhatto Stop, Mirpurkhas Tando Allahyar Road, where Excise Inspector started checking of the vehicles. At 3:30 pm, a coach appeared from Karachi side, it was stopped, searched by her and other excise officials. She found a lady sitting behind the seat of driver. She had a plastic shopping bag in her hands. She checked the plastic bag and found 10 packets of charas in it. On enquiry, accused disclosed her name as Mst. Aasia @ Nafeesa w/o Abdul Hameed Baloch. Accused got down from the bus; charas was weighed, it was 10 KG and 350 grams. Small quantity of the Charas was separated from each packet, remaining charas of 10 KG and 250 grams were separately sealed. Excise Inspector prepared mashirnama of arrest and recovery, she acted as mashir of

arrest and recovery and co-mashir was EC Ghulam Rasool. She was cross-examined at length. She has denied the suggestion that nothing was recovered from the possession of the accused. She has also denied the suggestion that she was deposing falsely.

14. After perusal of above evidence, we have come to the conclusion that prosecution has proved its case against the appellant and Trial Court has rightly appreciated the evidence in accordance with the settled principles of law. As regards to the contention of defence counsel that accused was arrested on 26.03.2012 at 3:30 pm and FIR was lodged with delay of 2½ hours. Delay of 2½ hours in lodging of the FIR is no delay. Even otherwise, it would not be fatal to the prosecution case. As regards to the evidence of excise officials, we have no reason to disbelieve their evidence for the reasons that evidence of excise officials is trustworthy and straightforward. Excise Inspector has clearly stated that passengers of the bus refused to act as mashirs in this case. The contention concerning violation of section 103 Cr.P.C. seems to be fallacious when examined in the light of provisions as contained in section 29 of the Act, which provides exclusion of section 103 Cr.P.C. Reluctance of general public to become witness in such like case has by now become a judicially recognized fact and there is no option for us but to rely the evidence of excise officials and lady Head Constable as evidence of excise officials is legally as good as that of private witnesses for the reasons that evidence of Excise officials remained unshattered in cross examination. Evidence of prosecution witnesses is corroborated by positive report of chemical examiner. Excise officials had no enmity or motive to falsely implicate the appellant in this heinous offence. Reliance is placed upon the case of *Muhammad Hanif vs. the State* (2003 SCMR 1237), the Honourable Supreme Court has held as under:

"4. It is worth mentioning that raid was conducted as a result of tip-off by Said Khan (A.S.I/complainant) when he was patrolling at the railway

(23)

station and it was not possible for him to have completed the time consuming formalities at the cost of the disappearance of the petitioner. The contention concerning violation of section 103 Cr.P.C. seems to be fallacious when examined in the light of provisions as contained in section 29 of the Act which provides exclusion of section 103 Cr.P.C. Even otherwise the reluctance of general public to become witness in such like cases has by now become a judicially recognized fact and there is no option left but to consider the statement of an official witness as no legal bar has been imposed in this regard. If any authority is needed reference can be made to Hayat Bibi v. Muhammad Khan (1976 SCMR 128), Yaqoob Shah v. The State (PLD 1976 SC 53). The police officials are equally good witnesses and could be relied if their testimony remains unshattered during cross-examination. In this regard reference can be made to Muhammad Naeem v. State (1992 SCMR 1617), Muhammad v. State PLD 1981 SC 635."

15. As regards to the contention of the defence counsel regarding delay in dispatching charas to the chemical examiner, it may be mentioned here that charas was recovered from the lady accused on 26.03.2012 and it was despatched to the chemical examiner on 28.03.2012. Control of Narcotic Substances (Government Analysts) Rules, 2001 which regulate dispatching of the samples to the chemical examiner provide that samples of the narcotics shall be despatched within seventy two hours of the seizure, in this case, samples have been despatched for analysis within 72 hours, as such there was no delay in dispatching samples to the chemical examiner. Contention of defence counsel merits no consideration.

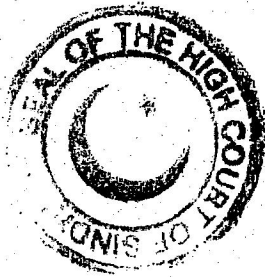
16. Contention of the defence counsel that all the incriminating pieces of evidence were not put to accused in her statement under Section 342 Cr.P.C is devoid of any legal force for the reason that question has been put to the accused that on 26.03.2012 at 3:30 pm, she was found in possession 10 KG and 350 grams of Charas and in her statement Appellant/lady accused admitted her arrest on 26.03.2012 at 3:30 pm from Mirpurkhas road leading to Tando Allahyar. Even otherwise, learned defence counsel could not point out any prejudice caused to accused regarding her statement recorded under section 342 Cr.P.C. It is now settled proposition of law by flex of time that in the case of transportation or

16
24

possession of narcotics, technicalities of procedural nature or otherwise should be overlooked in the larger interest of the country, if the case stands otherwise proved the approach of the Court should be dynamic and pragmatic, in approaching true facts of the case and drawing correct and rational inferences and conclusions while deciding such type of the cases. The Court should consider the entire material as a whole and if it is convinced that the case is proved then conviction should be recorded notwithstanding procedural defects as held by Honourable Supreme Court in the case of *Ismaeel vs. The State* (2010 SCMR 27).

17. In the light of the foregoing discussion, it can be concluded safely that prosecution has proved its case that appellant Mst. Aasia @ Nafeesa was apprehended from a coach by Excise Inspector in presence of the mashirs; 10 KG and 350 grams Charas were received from her possession; chemical report was positive and thus prosecution has succeeded in establishing guilt of the appellant. The conclusion arrived at by learned trial court is based upon sound reasons and hardly calls for any interference. The Appeal being meritless is

DISMISSED.



Sd-*Muhammadullah Jhul/pt/c*

26.5.2015
JUDGE

Sd-*Shahidul H. Memon*

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