

IN THE HIGH COURT OF SINDH, KARACHI*Present:**Mr. Justice Naimatullah Phulpoto,**Mr. Justice Mohammad Karim Khan Agha***CRIMINAL APPEAL NO.238 OF 2010**

Appellant in person	Mujeeb-ur-Rehman son of Muhammad Qurban
Respondent	The State through Mrs. Abida Parveen Channar, Special Prosecutor. ANF
Date of hearing	24.05.2019
Date of Announcement	24.05.2019

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant Mujeeb-ur-Rehman through instant appeal has assailed the judgment dated 29.04.2010 passed by Special Court No.I (Control of Narcotic Substances) Karachi in Special Case No.98 of 2009, arising out of FIR No.45 of 2009, registered at PS ANF-II Muhammad Ali Society Karachi, whereby the appellant was convicted under Section 9-C of CNS Act, 1997 and awarded R.I for 05 years. He was also directed to pay a fine of Rs.50,000/- and in default of payment he has to undergo S.I. for three months more. Benefit of Section 382-B Cr. P.C. was also extended to accused (the impugned judgment).

2. The brief facts of the case are that on 15.05.2009 at about 0400 hours Sub Inspector Shakeel Ahmed of PS ANF-II, Karachi alongwith PC Samar Abbas, PC Basit Mehmood, PC Haji Mehar, Constable Jurial, Driver Muhammad Yaqoob, Hawladar Sher Ahmed including dog handler proceeded from PS for routine checking in official vehicle vide Entry No.30 and arrived at International Departure Lounge, Jinnah International Air Port (JIAP), Karachi and met with ANF staff deployed at ANF Counter JIAP, namely HC Sher Muhammad and PC Kamran. They then went to baggage belt of EK-605 and through dog sniffing all baggage was

checked. During such checking the dog sniffed red color bag which was separated from the other bags and a numbered tag was affixed to the said bag. On inquiry staff of the Emirate Airline verified the owner of the said bag as Mujeebur Rehman, who was off loaded from his flight. S.I. Shakeel Ahmed alongwith the said bag brought the Passenger at ANF Counter. Accused Mujeebur Rehman was having boarding card, passport and air ticket which were containing his name. On personal search original NIC, cash Rs.12000/- Malaysian Rangat 2000 and one wrist watch were secured. On checking of the red colored bag they found used cloth and 03 packets of heroin from the secret cavity of the said bag. They weighed the recovered heroin, 01 packet was weighing 200 grams, whereas remaining two packets of heroin weighed 1150 grams each. The total weight of the recovered heroin was 2.5KG's. A sample weighing 05 grams was drawn from each packet separately. The samples were put in a khaki envelope and sealed and had marked numbers from 01 to 03 on the sample and packets. The remaining recovered heroin was sealed and packed in a white cloth bag. Such mashirnama of recovery and arrest was prepared. Accused along with recovered property was brought at PS. Case was registered against the Mujeeb ur Rehman under the sections of the CNS Act 1997 as mentioned above. The recovered samples were sent to the chemical analyzer whose report was positive.

3. After completion of investigation, Investigating Officer submitted challan against the accused Mujeeb ur Rehman before the learned trial Court at Karachi. The charge was framed against the accused to which he pleaded not guilty and claimed trial of the case.

4. The Prosecution in order to prove its case examined 2 witnesses and exhibited numerous documents and other items and thereafter closed its side. The Statement of the accused was recorded under Section 342 Cr.P.C in which he denied all the allegations leveled against him and claimed false implication. He did not examine himself on oath or call any witness in support of his defense case.

5. The trial court after hearing the learned counsel for the parties and assessing the evidence available on record, by the impugned judgment dated 29-04-2010 convicted the accused and sentenced him as earlier set

out in this judgment. Hence, this appeal against conviction has been filed by the appellant.

6. The facts of the case as well as evidence produced before the trial Court find an elaborate mention in the impugned judgment dated 29.04.2010 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

7. It may be pointed out at this stage that the appellant was granted bail by this court vide its order dated 03-09-2010 and is present in court today.

8. The appellant in person has contended that he is completely innocent of the offense and that the prosecution has failed to prove its case against him beyond a reasonable doubt especially as they have failed to establish that the bag which was recovered from the airport and allegedly contained narcotics actually belonged to him and as such he should be acquitted of the charge.

9. On the other hand Learned counsel for the ANF has contended that the impugned judgment does not require interference with as it has been decided correctly in accordance with the law based on the evidence on record and in particular it has been proved that the bag in question from which the recovery was made did belong to the appellant and the narcotics which were recovered from the same proved positive after chemical analysis and as such the appeal should be dismissed and the conviction upheld.

10. We have heard the learned counsel for the parties and perused the evidence so brought on record alongwith the impugned judgment with the able assistance of the parties.

11. We are of the view that the prosecution has failed to prove its case against the appellant beyond a reasonable doubt for, amongst others, the following reasons; that no witness gave evidence that the appellant checked in the bag from which the narcotics were allegedly recovered; that no CCTV footage has been produced to show that the appellant actually checked in the bag from which the narcotics were allegedly recovered despite such camera's being readily available throughout the

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airport; that there is over writing in the mashirnama of recovery concerning the documents relied upon to show that the bag belonged to the appellant and prosecution has failed to clarify it; that despite the airport being a busy place no independent mushir was associated; that the substance was recovered and sent for testing within a day however most importantly the safe custody of the narcotic from the time of its recovery to the time it was sent to the chemical examiner has not been proved as neither the person who kept the narcotic in the malkhana or a malkhana entry has been produced and nor has PC Majid Ali who took the narcotic from the PS to the laboratory for testing been examined which is fatal to the prosecution case as this allowed an opportunity for the recovered narcotic to be interfered with. In this respect reliance is placed on the case of **Ikramullah & others v/s. the State** (2015 SCMR 1002) which held as under;

"In the case in hand not only the report submitted by the Chemical Examiner was legally laconic but safe custody of the recovered substance as well as safe transmission of the separated samples to the office of the Chemical Examiner had also not been established by the prosecution. It is not disputed that the investigating officer appearing before the learned trial court had failed to even to mention the name of the police official who had taken the samples to the office of the Chemical Examiner and admittedly no such police official had been produced before the learned trial Court to depose about safe custody of the samples entrusted to him for being deposited in the office of the Chemical Examiner. In this view of the matter the prosecution had not been able to establish that after the alleged recovery the substance so recovered was either kept in safe custody or that the samples taken from the recovered substance had safely been transmitted to the office of the Chemical Examiner without the same being tampered with or replaced while in transit."
(bold added)

12. In addition, we have also closely examined the chemical report. It appears from a reading of the chemical report that it has not set out all the protocols of testing and what was the result in respect of each individual protocol test. Namely, whether it was positive or negative. Rather one consolidated report has been prepared. Setting out each protocol test and its result is a mandatory requirement under the law the absence of which will render the chemical report unsafe and unreliable especially as the report goes to the heart of the case against the appellant and as such we cannot safely rely on the same. In this respect reliance is placed on the

recent supreme court case of **Khair-ul-Bashar son of Sajawal Khan V The State** (unreported) dated 08-04-2019 in Criminal Appeal No.94/2019 where it was held as under at Para's 2 and 10;

"2. At the very outset we have noticed that the Report of the Punjab Forensic Agency dated 18.02.2016 is deficient in material particulars i.e. while it mentions the names of the three tests performed, it does not provide results of these tests (except a consolidated result) and there is no mention of the test protocols applied in carrying out the said tests. In *State v. Imam Bakhsh* (2018 SCMR 2039) while discussing Rule 6 of the Control of Narcotic Substances (Government Analysts) Rules, 2001 ("Rules") this Court held that the information required under the said Rule is mandatory. Hence, the Report of the Government Analyst, prepared in consequence of Rule 6, must provide for (i) tests and analysis of the alleged drug (ii) the result of the test(s) carried out and (iii) the test protocols applied to carry out these tests. These three elements form the fundamental and the core elements of a valid Report prepared by a Government Analyst. Non-compliance of Rule 6 and absence of any of these mandatory elements/requirements frustrates the purpose and object of the Act thereby diminishing the reliability and evidentiary value of the Report. Rule 6, inter alia, requires that the Government Analysts must specify the test protocols applied and, therefore, the Report must signify (by name) the protocols applied to carry out the test(s)/analysis, which would certify that full protocols have been followed while conducting the test/analysis. In case the veracity of the Report is challenged by the accused or is being examined by the Court, compliance of full protocols can be called for from the Government Analyst and verified"

"10. In the present case examination of the report of the Government Analyst mentions the tests applied but does not provide their results except a concluding result, presumably of all the tests, which is not sufficient. The Report also does not signify the test protocols that were applied to carry out these tests. Hence the mandatory requirement of law provided under Rule 6 has not been complied with and, thus, it is not safe to rely on the Report of the Government Analyst dated 18.02.2016. As a conclusion, it is reiterated, that the Report of the Government Analyst must mention (i) all the tests and analysis of the alleged drug (ii) the result of the each test(s) carried out along with the consolidated result and (iii) the name of all the protocols applied to carry out these tests".

13. There are several circumstances/infirmities in the prosecution case highlighted above which cast doubt on the same. It is settled law that it is

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not necessary that there should many circumstances creating doubts. If there is a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit of that doubt not as a matter of grace and concession but as a matter of right. Reliance is placed on the case of **Tariq Pervaiz V State** (1995 SCMR 1345).

14. Thus, for the reasons mentioned above we are of the view that the prosecution has failed to prove its case against the appellant beyond a reasonable doubt and as such the appeal is allowed. The appellant is acquitted of the charge. The appellant who is present on bail, his bail bonds stand cancelled and his surety discharged.

15. These are the reasons for our short order of even date which reads as under;

“Heard the appellant and Ms. Abida Parveen Channar, Special Prosecution ANF. For the reasons to be recorded later on, Criminal Appeal No.238/2010 filed by appellant Mujeeb-ur-Rehman is allowed. Conviction and sentence recorded by the trial court vide judgment dated 29.04.2010 are set-aside. Appellant is present on bail. His bail bond is cancelled and surety is hereby discharged.”