IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No.194 of 2006

Present : Muhammad Afzal Soomro, and

Rahmat Hussain Jafferi, JJ.

JUDGMENT

Date of hearing : 04.9.2007.

Appellant : Zulfiqar Ali Sher through Mr.M. A. Kazi, Advocate.

Respondent : The State/NAB through Mr.Ainuddin, ADPGA NAB.

Rahmat Hussain Jafferi, J:- **The present appeal is directed against the judgment dated 27.3.2006 passed by the learned Presiding Officer, Special Court (Offences in Banks) Sindh, Karachi by which he convicted the appellant for offence punishable under Section 409, PPC, sentenced him to suffer RI for seven years and fine of Rs.1,52,000/= or in default thereof to suffer SI for twenty one months. The appellant was further convicted for offence punishable under Section 477-A, PPC and sentenced to undergo RI for five years with benefit of section 382-B, Cr.P.C.**

2. Brief facts giving rise to the present Appeal are that on 21.11.2002 Abdul Ghaffar Dall, Regional Controller Audit and Implementation, Allied Bank of Pakistan sent a written complaint to FIA, Circle-II, Karachi for registration of case. The said report reads as under:-

"The Deputy Director,

FIA, CBC-II, Karachi.

Dear Sir,

ANOTHER FRAUD DETECTED AGAINST MR.ZULFIQAR ALI SHAR, CASHIER ABL, KHIPRO BUS STAND BRANCH.

With reference to the above cited subject we wish to inform you that another fraud committed by Mr.Zulfiqar Ali Shar, Cashier of ABL, while posted at Khipro Bus Stand, Mirpurkhas Branch has been detected and it has been found that Mr.Zulfiqar Ali Shar unauthorizedly withdraw an amount of Rs.250,000/=, the detail of which are as under:-

On 15.01.2001 a sum of Rs.250,000/= was unlawfully withdrawn from Running Finance A/Chairman NAB No.-02 of one Mr.Abdul Ghaffar by Mr.Zulfiqar Ali Shar, Cashier by preparing debit cash voucher.

Mr.Abdul Ghaffar an account holder when inquired about the matter, disclosed that he had issued cheque No.248583 and 248584 for Rs.1,50,000/= and 24000/= respectively which preceeds were received by him in the branch from Zulfiqar Ali Shar on 02.5.2001 and 07.5.2001, these cheques were not found posted/recorded in the A/Chairman NAB ledger folio of R/F A/Chairman NAB No.02, if the said two cheques posted in the account against sanctioned limit of Rs.0.250 (M) then there will be a cushion for Rs.76,000/= available in the account. Payment of cheque No.248583 for Rs.150,000/= and cheque No.248584 for Rs.24,000/= was made by Zulfiqar Ali Shar directly to the party without entering the same in R/F A/Chairman NAB No.02 because there was no cushion available therein, if the cheque of Rs.150,000/= posted in the account at this point of time than definitely balance of the R/F A/Chairman NAB exceed the limit amount of Rs.250,000/=. Hence to camouflage the misdeed in the party's account i.e. withdrawal of Rs.250,000/= through debit cash voucher payment of Rs.1,74,000/= (Rs.1,50,000/= + Rs.24000/=) was made directly to the party out of Rs.250,000/= therefore residue balance i.e. Rs.76,000/= is still recoverable from Mr.Zulfiqar Ali Shar, the then Cashier for the credit to party's R/F account.

Thus the act of Mr.Zulfiqar Ali Shar in misappropriating the sum of Rs.76,000/= amount to criminal breach of trust, which is a cognizable offence under offence in Banks.

You are therefore requested to register an FIR against Mr.Zulfiqar Ali Shar who is already in custody as an under trial in case FIR No.12/2002 (FIA/CBC).

Sd/-

Abdul Ghaffar Dall

Regional Controller

Audit & Implementation"

3. The police collected the required record and recorded the statements of witnesses. After completing the investigation the police challaned the appellant in the Court where he was tried, convicted and sentenced as mentioned above under the impugned judgment.

4. We have heard the advocate for the appellant, ADPGA for the State/NAB and perused the record of this case very carefully.

5. The learned advocate for the appellant has argued that the prosecution has not led any evidence to connect the appellant with the commission of the crime; that the PW-2 has improved his statement by stating before the Court that Ex.5-A-3 was signed by the appellant which he did not state before the police as per Investigation Officer, therefore, such statement cannot be considered; that there is no other evidence to show that Ex.5-A-3 was signed by the appellant; and that entire case hinges upon the said document but the involvement of the appellant has not been established through the said document.

6. Conversely, the learned ADPGA has stated that the case of the prosecution has been proved from the evidence of PW-2 and the document Ex.5-A-3; that PW-1 has produced all the relevant documents; that the account holder Abdul Ghaffar has supported the case, therefore, the case has been proved against the appellant.

7. We have given due consideration to the arguments, gone through the evidence with the assistance of learned advocate for the appellant and found that the prosecution examined three witnesses. Court examined two witnesses as Court witnesses. The evidence of PW-1 Iqbaluddin, who was Manager reveals that he took over the charge of the Allied Bank Limited, Khipro Bus Stand Branch on 17.5.2001; that he received a complaint from Abdul Ghaffar alleging that amount of Rs.2,50,000/= was debited from his account and that he withdrew two amounts viz. Rs.1,50,000/= and Rs.74,000/= through two cheques but the remaining amount of Rs.76,000/= should have been in the account but the same was not available. He handed over the relevant document to the Investigation Officer.

8. Court witness Abdul Ghaffar stated that he was allowed overdraft facility and such account was opened in which Rs.2,50,000/= was sanctioned under the overdraft facility. He withdrew two amounts viz. Rs.1,50,000/= and Rs.74,000/= but the remaining amount of Rs.76,000/= was misappropriated as it was not available in the account.

9. The evidence of PW-2 Syed Khawar Abbas shows that Rs.2,50,000/= were withdrawn through debit cash voucher (DCV) by the appellant as the said DCV bore the signature of appellant which was in red ink. In the cross-examination he admitted that he had stated such fact in his police statement. He further admitted that the FIA authorities told him that the said voucher bore the signature of the appellant. Such fact was inquired from the Investigation Officer PW-3 Haji Khan who deposed that PW Khawar Abbas did not state in his 161, Cr.P.C. statement that Ex.5-A-3 bore the signature of the appellant in red ink. Thus, it has been established beyond any shadow of doubt that this witness has improved his evidence in Court by alleging the above fact through which he has tried to involve the appellant, as such, the improvement has been made in order to strengthen the prosecution case. It has been held in the case of Syed Saeed Muhammad Shah v. State (1993 SCMR 550) that improvements in statement made by a witness in the Court to strengthen the prosecution case, such statements are not worthy of reliance. Reliance is also placed on Shahnaz Khan Jakhrani v. Lal Baig Jakhrani

(1984 SCMR 42). It has further been observed in the authority that improved evidence causes serious doubt about the veracity of such witness. Following the rule laid down by the Hon'ble Supreme Court of Pakistan the above improvement made by PW-2 in the evidence is not worthy of reliance and it affects the veracity of the witness. If that piece of evidence is excluded then the remaining evidence of the witness does not show the involvement of the appellant.

10. The evidence of PW-1 reveals that after his posting in the Allied Bank Limited, Khipro Bus Stand Branch on 17.5.2001 he received the complaint of Abdul Ghaffar alleging that Rs.2,50,000/= were debited from his account and he withdrew two amounts viz. Rs.1,50,000/= and Rs.74,000/= and that the remaining amount of Rs.76,000/= should have been in the account but it was not available there. The witness Abdul Ghaffar was examined as a Court witness No.2 but he did not state that he ever stated such facts to the PW-1. Thus the statement of PW-1 to the above extent is a hearsay evidence which is inadmissible.

11. The Court witness Abdul Wahab, who was OG-III/Accountant in ABL, Khipro Bus Stand Branch, after seeing Ex.5-A-3, stated that it was debit cash voucher in the name of Abdul Ghaffar for cash payment of Rs.2,50,000/= to him but did not bear any initial or signature of any bank officer or signature of receipt on its back. Thus this witness has not supported the prosecution case in respect of debit cash voucher Ex.5-A-3.

12. From the above evidence it is manifest that the document Ex.5-A-3 has not been proved in accordance with law. It has also not been established that it was signed by him. On the contrary, PW-2 stated that the document was in the hand of one chowkidar of the bank. He further admitted that FIA authorities informed him that the said document bore the signature of the appellant thus Ex.5-A-3.

13. The prosecution has tried to involve the appellant by alleging that he withdrew the amount of Rs.2,50,000/= through the DCV. Thus entire case of the prosecution rests upon the proof of DCV to the effect that it was either prepared or signed by him. However, the said fact has not been proved from the solitary evidence of PW-2 hence the prosecution has not connected the appellant with the commission of crime. As such, the case of the prosecution is highly doubtful against him. Therefore, he is entitled to the benefit of doubt which is accordingly given to him.

14. In the light of what has been discussed above the conviction and sentences awarded to the appellant under the impugned judgment are set aside. The appellant is acquitted and set at liberty. He is in custody, he should be released forthwith if not required in any other custody case. The appeal is allowed.

JUDGE

JUDGE

Karachi :

Dated: _____

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No.254 of 2006 &

Criminal Revision Application No.75 of 2006

Present : Muhammad Afzal Soomro, and

Rahmat Hussain Jafferi, JJ.

JUDGMENT

Date of hearing : 02.10.2007.

Appellants : Jumoon and others through Mr.A. Q. Halepota, Advocate.

Respondent : The State through Mr.Habib Ahmed, AAG.

Complainant Khuda Dino through Mr.Muhammad Hashim Memon, Advocate.

Rahmat Hussain Jafferi, J:- **This judgment will dispose of Criminal Appeal No.254 of 2006 and Criminal Revision Application No.75 of 2006 as they arise out of common judgment.**

15. The present appeal is directed against the judgment dated 28.2.2006 passed by the learned 1st Additional Sessions Judge, Mirpurkhas by which he convicted the appellants for offence punishable under Section 302(b), PPC and sentenced each of them to suffer imprisonment for life and pay compensation of Rs.50,000/= each to the legal heirs of deceased or in default thereof to suffer SI for six months. The appellants were further convicted for offence punishable under Section 147, PPC and sentenced to suffer RI for two years each. They were further convicted for offence punishable under Section 148, PPC and sentenced to suffer RI for three years each. The trial Court further convicted the appellants for offence punishable under Section 504, PPC and sentenced each of them to suffer RI for two years with benefit of section 382-B, Cr.P.C.

16. Brief facts giving rise to the present Appeal and Revision Application are that on 08.9.1996 at 12.30 midnight the complainant Khuda Dino, his son PW Jumoon Khan and his another son deceased Mir Khan, PWs Bakhsh Ali and Ismail were present in the Otaq of complainant situated in Deh Mubarak Taluka Mirpurkhas. They were playing cards in the courtyard when appellants Umed Ali and Mamu, armed with Kalashnikovs; Jeendo, armed with rifle; Hashim, armed with double barrel gun; and Jumoon, armed with country-made pistol came there. They overpowered them and took deceased Mir Khan to some distance and told him that he was making hindrance in their matrimonial matters, therefore, they would take revenge from him, as such, all the accused started causing butt bellows of their weapons on various parts of deceased Mir Khan's body. Then appellant Umed Ali fired from his Kalashnikov at the deceased which hit him on his right side of abdomen and right thigh and leg. After receiving injuries the deceased fell down on the ground and died there. The appellants ran away after making aerial firing. The complainant left the PWs at the place of incident, went to Police Station and lodged the report.

17. The police arrived at the scene of incident, prepared its mashirnama and secured seven empties and blood from the said place. The police secured a pistol from the appellant Jumo. The articles were not sent to Forensic Science Laboratory for examination and report as the prosecution did not produce such report. The police, after usual investigation, challaned the appellants in the Court where they were tried and convicted as mentioned above under the impugned judgment.

18. The appellants were dissatisfied with the said judgment, therefore, they have filed the Appeal whereas the complainant has filed the Revision for enhancement of sentence.

19. We have heard the advocates for the appellants, complainant, AAG for the State and perused the record of this case very carefully.

20. The learned advocate for the appellants has stated that the night of incident was dark and the identification on lantern light, as alleged by the complainant in the cross-examination, is highly doubtful; that there is conflict between medical and oral evidence; that two eyewitnesses were given up, out of them one was independent witness; that the lantern was not secured by the police nor produced before them, and that there is no Forensic Science Laboratory report as such recoveries have lost their value, therefore, the case of the prosecution is highly doubtful.

21. Conversely, the learned advocate for the complainant has stated that there was no enmity between the parties; that the oral evidence of two witnesses is confidence inspiring; that there is no conflict between medical and oral evidence; that the identification on lantern light is not doubtful; and that the motive alleged in the case has been proved, therefore, the case has been proved against the appellants.

22. The learned AAG has stated that there is conflict between medical and oral evidence; that the ocular testimony requires corroboration which is lacking in the case; that the lantern was not produced before the police; that the identification on lantern light of a large number of accused with specific role is highly doubtful and that the recoveries cannot be used against the appellant in the absence of Forensic Science Laboratory report. He has not supported the impugned judgment.

23. We have given due consideration to the arguments, gone through the evidence with the assistance of learned advocate for the appellants and found that the case of prosecution rests upon ocular testimony only which consists of two PWs viz. complainant Khuda Dino and Bakhsh Ali who is son of the complainant. Recoveries of crime empties and pistol from the appellant Jumon cannot be used as there is no matching report of Forensic Science Laboratory. Both the witnesses gave the same details of the incident as mentioned in the earlier part of the judgment, therefore, need not to be repeated. The complainant in the examination-in-chief did not show the source of light on which they saw and identified the appellants with specific weapons in their hands. In the cross-examination he admitted that night of incident was dark but there was lantern. He also did not specifically stated that they identified on latern light. However, the place of hanging of lantern was not disclosed by the complainant. The Investigation Officer also did not say that any lantern was available at the place of incident when he reached there. He also did not state that the complainant had shown him any lantern or produced it before him. Whereas PW-2 Bakhsh Ali is completely silent about the source of light available at the place of incident. PW-5 mashir Karim Bux also did not support the case of the prosecution about the presence of lantern at the scene of incident, as he did not state such facts in his deposition. Thus the said fact has not been established from the evidence of the Investigation Officer or mashir of the place of incident, as such, the identification of the appellants in the present circumstances of the case is highly doubtful.

24. There were two other eyewitnesses namely Jumoon, who was son of the complainant and Ismail. It is pointed out that in the earlier trial PW Jumoon was examined. The learned advocate for the appellants has stated that as the statement of Jumoon in the earlier trial was full of exaggerations and contradictory statements, therefore, he was not examined by the prosecution in the subsequent trial in order to suppress the real facts. The prosecution did not assign any cogent reason for non-examining the PW Jumoon. The Prosecutor simply stated that his evidence was on the same point on which one eyewitness was examined. The said ground is insufficient. The second eyewitness was Ismail. He has no relationship whatsoever with the complainant. The prosecution gave up the said witness on the ground that he was won over by the accused. If that was so then he should have been produced before the Court so as to give an opportunity to the Court to see whether the witness was actually hostile or otherwise. Even if he was hostile then he could have been cross-examined by the Prosecutor so as to bring the real facts on the record. Non-examination of the important two eyewitnesses in the case adversely affected the prosecution case, story and veracity of the witnesses who were already examined.

25. The PWs alleged that at the time of incident they were playing cards game. The mashir of place of incident or Investigation Officer did not state that they saw cards lying at the place of incident or the PWs showed them the cards. As such, this

aspect of the case has not been proved from the circumstantial evidence, which creates doubt about the presence of the PWs at the scene of incident.

26. According to the witnesses only one accused had fired from his weapon at the deceased which hit him on his right side of abdomen and right side of thigh and leg. The said statement is not supported by the medical officer as according to the medical officer he found firearm injuries which appeared to have been caused by two different types of weapons. The said injuries are as under:-

> **"<u>Injury No.01.</u>**
>
> **An wound of entrance 2.00 c.m. in diameter with blacking and irregular morgin, inverted over the left lumber region on the back side of body at L-3 level.**
>
> **<u>Injury No.02.</u>**
>
> **Wound of exit 1.00 c.m. in diameter with everted morgin over left side of front of abdomen just medical to umelicus (Lumber region).**
>
> **<u>Injury No.03.</u>**
>
> **Five wound of entrance each size of 0.5 c.m. in diameter with enverted morgin and irregular with blacking over latrel and upper side of right leg.**
>
> **<u>Injury No.04.</u>**
>
> **Five wound of exit each size of 2.00 c.m. in diameter with everted morgin over upper part of medial side of right leg."**

27. Furthermore, the injury on the abdomen was an exit wound and so also on the right leg and thigh as the deceased was fired from his back side. Thus the deceased had not received injuries on his front side or by one firearm weapon but the injuries were the result of two firearm weapons caused at the back of the deceased. Thus the ocular testimony is in conflict with medical evidence, therefore, the prosecution has failed to prove this piece of evidence.

28. The prosecution alleged that the appellant had disclosed that the deceased was making hindrance in matrimonial affairs, therefore, the incident took place. Even if the said piece of evidence is held to be proved then this by itself is not sufficient to convict the appellants, because it is not a substantial piece of evidence. Further motive is not a sine qua non for bringing the offence of murder hime to the accused but it is relevant and important on the question of sentence. It has been held in the case of Muhammad Ashraf v. State (1998 SCMR 279) that motive is a double-edged weapon, as while it may be a sufficient reason for commission of offence by the accused, it can equally serve as a reason for the false involvement of the accused in the crime. Hence the said piece of evidence is of no help to the prosecution in the peculiar circumstances of the present case.

29. The evidence of recoveries cannot be used against the appellants in the absence of positive report of Forensic Science Laboratory about the crime empties and pistol allegedly recovered from the possession of appellant Jumu.

30. After considering the material available on the record we are of the considered view that the prosecution has failed to prove the case against the appellants beyond any reasonable doubt, therefore, they are entitled to the benefit of doubt which was accordingly given to them while passing the short order dated 02.10.2007 by which we had allowed the Appeal and dismissed the Revision Application. These are the reasons of the said short order.

JUDGE

JUDGE

Karachi :

Dated: 10.10.2007.

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No.313 of 2006.

Present : Muhammad Afzal Soomro, and

Rahmat Hussain Jafferi, JJ.

JUDGMENT

Date of hearing : 27.8.2007.

Appellant : Shafiullah through Mr.A. Q. Halepota, Advocate.

Respondent : The State through Mr.Habib Ahmed, AAG.

Rahmat Hussain Jafferi, J :- Present appeal is directed against the judgment dated 31.8.2006 passed by the learned Special Judge, CNS, Hyderabad by which the learned Judge convicted the appellant for offence punishable under Section 9(c) of Control of Narcotic Substances Act, 1997, sentenced him to suffer imprisonment for life and fine of Rs.500,000/= or in default thereof to suffer RI for 06 months with benefit of section 382-B, Cr.P.C.

31. Brief facts giving rise to the present Appeal are that the prosecution alleged that 30 kilograms of charas were secured from the possession of the appellant on 07.6.2003 at 11.45 a.m. from Railway Crossing, Hyderabad. At the trial the prosecution examined two witnesses viz. complainant and mashir. They both deposed that on the spy information they reached the place of incident where the appellant was found in

suspicious condition. He was carrying two bags which were secured, from which 30 kilograms of charas were secured. Out of the said property 10 grams were separated as sample for sending them to expert for examination and report. The prosecution produced the said report as Ex.6/E. The report shows that the sample was sent through letter No.Nil dated 12.6.2003 through PC Muhammad Bux. The sample was received by the Chemical Analyzer on 16.6.2003. The expert examined the property and found the contents of the sample as charas. Entire material was consumed in the test. When the statements of PWs were recorded, the wrapper in which the sample was sent to expert was not produced before the Court. The learned advocate for the appellant has challenged the report on the ground that there was delay of four days in between the period of sending the sample and receipt of the same by the expert; and that the prosecution has failed to explain such delay, therefore, the tampering of the property cannot be ruled out. The learned AAG has conceded the delay consumed in between the above mentioned periods and further added that the prosecution has not furnished any explanation, therefore, he can not controvert the above aspect of the case.

32. The entire case hinges upon the Chemical Analyzer's report. The sample was taken from the property which represents the entire property. If the sample is proved to be the same sample which was prepared at the place of incident and the report is positive then the entire property can be taken to be that of charas. The offence involves capital punishment, therefore, the case is to be scrutinized very minutely. As already observed that there is delay of four days in the above mentioned periods. In order to explain such delay the prosecution should have examined PC Muhammad Bux who could have put some light as to where was the sample after he received it till he delivered it to the expert. The expert found the signatures of two witnesses namely SIPs Arshad and Malik Javed Iqbal on the sample. When the entire material was consumed then it was the duty of the prosecution to have received the wrapper in which the sample was sent to Chemical Analyzer thereafter it should have been produced before the Court so as to prove as to whether the wrapper was same in which the sample examined by the Chemical Analyzer was consumed and prepared at the place of incident. Neither the complainant nor the mashir stated in their depositions that the mashirs had put their signatures on the packet of sample. Thus, there is no evidence about the authenticity of the sample nor there is explanation from the side of prosecution about such delay nor the wrapper was identified to be the same in which the property was sent to Chemical Analyzer. All these defects created doubt on the report of the Chemical Analyzer. It cannot be said with authenticity that the sample, examined by the Chemical Analyzer, was the same which was prepared at the place of incident. Thus a doubt has been created with regard to the said report. It is well-settled principle of law that every doubt is required to be resolved in favour of the accused.

33. In the light of what has been discussed above we are of the considered view that the prosecution has failed to prove the case against the appellant beyond any reasonable doubt, therefore, the appellant is entitled to such benefit which was accordingly given to him while passing the short order dated 27.8.2007 by which we had allowed the appeal. These are the reasons of the said short order.

34. It has been observed that the prosecution and the investigating agencies are very negligent in receiving the remaining property or empty wrappers, in case of consumption of property, from the Chemical Analyzer and to produce the same before the trial Court so that the property or the wrappers can be identified through the witnesses to give authenticity of the said piece of evidence. As such, the prosecution is directed to be vigilant and careful in future in receiving the above mentioned articles from the Chemical Analyzer after preparing the report. A copy of order be sent to I.G. Police, Director Anti-Narcotics Force, Karachi and Excise & Taxation Department for issuing required directions so that in future such illegality should be avoided.

JUDGE

JUDGE

Karachi :

Dated: _____

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No.554 of 2005.

Criminal Jail Appeal No.36 of 2006.

Present : Muhammad Afzal Soomro, and

Rahmat Hussain Jafferi, JJ.

JUDGMENT

Date of hearing : 08.8.2007.

Appellants	:	Bilal in Criminal Appeal No.554/2005 and Dost Muhammad in Criminal Jail Appeal No.36/2006 through Mr.Saifullah, Advocate.
Respondent	:	The State through Mr.Mahmood Alam Rizvi, Standing Counsel.

Rahmat Hussain Jafferi, J :- This judgment will dispose of Criminal Appeal No.554 of 2005 and Criminal Jail Appeal No.36 of 2006 as they arise out of a common judgment.

35. Brief facts giving rise to the present Appeals are that on 29.8.1999 Preventive Officer Customs, Special Squad received information that charas would be brought in Bus No.RIB-5999, therefore, the complainant Sultan Mahmood along with his subordinate staff reached PIB Bus Stop where the bus bearing No.RIB-5999 reached at 6.30 a.m. The bus was checked but nothing was found. The appellant Dost Muhammad was driver of the bus whereas the appellant Bilal was cleaner. As the information was positive, therefore, the bus and both the appellants were brought to the customs office where it was thoroughly checked and then it was found that there were secret cavities, made in the body of the bus. From that 340 slabs of charas weighing 372 kilograms were recovered. Four slabs were drawn as sample and then the properties were sealed. The appellants were arrested and such mashirnama was prepared. The complainant lodged the FIR. The police after usual investigation challaned the appellant in the Court.

36. The learned Special Judge, CNS Court-I, Karachi tried the appellants, convicted them for offence punishable under Section 9(c) of Control of Narcotic Substances Act, 1997 and sentenced each of them to suffer imprisonment for life and fine of Rs.1.00 million or in default thereof to suffer RI for three years with benefit of section 382-B, Cr.P.C. under the impugned judgment dated 24.11.2005.

37. We have heard the advocate for the appellant Bilal who also made appearance and argued the case of the appellant Dost Muhammad as he was not represented by an advocate. We have also heard the appellant Dost Muhammad in person, Standing Counsel for the State and perused the record of this case very carefully.

38. The learned advocate for the appellants has argued that the appellant Bilal was cleaner of the bus, therefore, he had no knowledge about the presence of the property; that the appellant Dost Muhammad was driver of the bus, who also did not know about the presence of the property as there was another driver of the bus; that the samples were not produced in the Court; that the case has been filed with mala fide intention; and that the property has been foisted upon the appellants as the real culprits have been let off by the police.

39. Conversely, the learned Standing Counsel has stated that the samples were produced before the Court as per statement of the complainant; that the Chemical Analyzer report is in positive; that both the witnesses have supported the prosecution case; and that the appellants had knowledge of the secret cavities where the charas was lying, therefore, the case has been proved against them.

40. We have given due consideration to the arguments, gone through the evidence with the assistance of learned advocate for the appellants and found that the prosecution examined two witnesses viz. complainant Sultan Mahmood and mashir Azhar Hussain Khan. They stated that when the bus was checked at PIB Bus Stop nothing was secured. The appellant Dost Muhammad was driver of the bus and appellant Bilal was cleaner. They along with the bus were brought to the office. The bus was checked minutely, secret cavities were discovered and from the secret cavities 372 kilograms of charas were secured. The samples were drawn and then the mashirnama was prepared after arresting the appellants. Both the witnesses were subjected to cross-examination but nothing came on record to discard their evidence. The prosecution also examined PW Faridullah Khan who investigated the case. He sent the property to Chemical Analyzer and the remaining property was destroyed under the orders of the Court in presence of the Judge. The samples were prepared before the destruction of the properties, which were produced in the Court. The samples prepared at the place of recovery were sent to the Chemical Analyzer whose report is in positive. Thus from the evidence it has been proved that 372 kilograms of charas were secured from the secret cavities of the bus.

41. The appellant Dost Muhammad was driver of the bus whereas the appellant Bilal was its cleaner. The learned advocate for the appellants has argued that the appellants were not responsible and they had no knowledge of the property lying in the bus on the ground that the

appellant Dost Muhammad was second driver whereas the appellant Bilal was cleaner. Similar point was considered in an unreported Criminal Jail Appeal No.D-27 of 2001 (Nazar Hussain and another v. The State) decided on 12.10.2006 by a Division Bench of this Court in which one of us namely Rahmat Hussain Jafferi, J was one of the members and author of the judgment. In the said case the liability of driver and cleaner was discussed. The relevant portion of the judgment reads as under:-

> "The appellant Nazar Hussain being the Driver of the truck was having its possession. The property was secured from the secret cavity of the truck. The co-accused Zulfiqar Ali was sitting beside the appellant. The prosecution claims that he was Cleaner, therefore, apart from the driver appellant Nazar Hussain, the cleaner appellant Zulfiqar Ali was also in possession of the charas.
>
> Now the question arises whether the property was in joint possession of both the appellants or it was in possession of the driver alone.
>
> Under Section 6 of the Control of Narcotic Substances Act, 1997 possession of narcotic drugs is an offence, which is punishable under Section 9 of the said Act. Section 6 reads as under:-
>
> > "6. Prohibition of possession of narcotic drugs etc. – No one shall produce, manufacture, extract, prepare, possess, offer for sale, purchase, distribute, deliver on any terms whatsoever, transport, dispatch, any narcotic drug, psychotropic substance or controlled substance except for medical, scientific or industrial purposes in the manner and subject to such conditions as may be specified by or under this Act or any other law for the time being in force."
>
> It will be noticed that in this section no condition or qualification has been made that the possession should be an exclusive possession. Therefore, the possession can be joint with two or more persons. The learned counsel for the appellants has argued that the possession simplicitor would not constitute an offence unless it is accompanied by mens rea or knowledge of the person. General rule is that there is presumption that mens rea, an evil intention or a knowledge of wrongfulness of the act is an essential ingredient in every offence. However, such presumption is liable to be displaced either by the words of the Constitution creating the offence or by the subject matter with which it deals. Normally it is true that the plain, ordinary, grammatical meaning of words of enactment affords the best guide but in case of this kind, the question is not what the words mean but where there are sufficient grounds for inferring that Parliament intended to exclude the general rule that mens rea is an essential element in every offence. Various authorities show that it is generally necessary to go behind the words of the enactment and to take other factors into consideration. Thus in the context, it is permissible to look into the object of the legislature and find out whether, as a matter of fact, the Legislature intended anything to be proved except possession of the article as constituting the element of the offence. Even if it is assumed that the offence is absolute, the word "Possess" appearing in the Section 6 connotes some sort of knowledge about the things possessed. So we have to determine what is meant by word "possess" in the section. It is necessary to show that the accused had the article, which turned out to be narcotic drugs. In other words the prosecution must prove that the accused was knowingly in control of something in the circumstances, which showed that he was assenting to being in control of it. It is not necessary to show in fact that he had actual knowledge of that which he had. Reference is invited to (1969)2 A.C. 256(H.L).
>
> In the above authority the house of lords was concerned with a question whether the appellant there was in unauthorized possession of a scheduled drug and it was held that it is not necessary to prove mens rea apart from the knowledge involved in the possession of the article. Lord Reid dissented. The majority decision would show that in a case of this nature. It is not necessary for the prosecution to prove that the accused had consciousness of the guilty or the nature of the thing possessed and that it would be sufficient if it is proved that a person was knowingly in possession of the article. Lord Morris of Borth-Y-Gest said:
>
> > "Must the prosecution prove that an accused had a guilty mind?
> >
> > It is a declared purpose of the Act to prevent the misuse of drugs. If actual possession of particular substances which are regarded as potentially damaging is not controlled there will be danger of the misuse of them by those who possess them. They might be harmfully used: they might be sold in most undesirable ways. Parliament set out therefore to 'penalize' possession. That was a strong thing to do. Parliament proceeded to define and limit the classes and descriptions of people who alone could possess. All the indications are that save in the case of such persons. Parliament decided to forbid possession absolutely."
>
> Section 6 also prescribed certain exceptions under which narcotic substance can be possessed etc. after fulfilling condition mentioned thereunder.
>
> The question for consideration here is whether the appellant Nazar Hussain was in possession of charas being driver of the truck. From the evidence it has been established beyond any shadow of doubt that the appellant Nazar Hussain was driving the truck as such he was incharge of the vehicle, therefore, it was under his control and possession. Hence whatever articles lying in it would be under the control and possession of the appellant.
>
> The next question for consideration is as to how far the prosecution prove the possession of Narcotic Substance by the appellant.

It is pointed out that in most of the cases it will be very difficult for the prosecution to prove that the accused was knowingly in possession of narcotic drugs, therefore, the Legislature have enacted a provision in the shape of section 29 in the Act, 1997 to shift the burden upon the accused to disprove the possession once the prosecution proves that the accused was in possession of narcotic drugs, thus, the prosecution first has to discharge the duties of proving the allegation, once it is proved then the accused is presumed to be guilty of the offence unless he disproves the allegation and charge. The said section reads as under:-

"**29. Presumption from possession of illicit articles** – In trials and until the contrary is proved, that the accused has committed an offence under this Act in respect of--

(a) Any narcotic drug psychotropic substance or controlled substance;

(b) Any cannabis, coca or opium poppy plant growing on any land which he has cultivated;

(c) Any apparatus specially designed or any group of utensils specially adapted for the production or manufacture of any narcotic drug, psychotropic substance or controlled substance; or

(d) Any material which have undergone any process towards the production or manufacture of narcotic drug psychotropic substance or controlled substance or controlled substance or any residue left of the materials from which a narcotic drug, psychotropic substance or controlled substance has been produced or manufactured for the possession of which he fails to account satisfactorily."

The above section expressly cast a duty upon the Court to presume in a trial under this Act that the accused has committed the offence under the Act unless contrary is proved. If the case is of possession of narcotic drugs then first prosecution has to establish the fact that the narcotic drugs were secured from the possession of the accused then the Court is required to presume that the accused is guilty unless the accused proves that he was not in possession of such a drugs. Therefore, it is necessary for the prosecution to establish that the accused has some direct relationship with the narcotic drugs or has otherwise dealt with it. If the prosecution proves the detention of the article or physical custody of it then the burden of proving that the accused was not knowingly in possession of the article is upon him. The practical difficulty of the prosecution to prove something within the exclusive knowledge of the accused must have made the legislature think that if the onus is placed on the prosecution the object of the Act would be frustrated. It does not mean that the word "Possess" appearing in the section 6 of the Act does not connote conscious possession. Knowledge is an essential ingredient of the offence as the word "possess" connotes in the context of section 6, possession with knowledge, the legislature could not have intended to make mere physical custody without knowledge of offence, therefore, the possession must be conscious possession. Nevertheless, it is different thing to say that the prosecution should prove that the accused was knowingly in possession. It seems to us that by virtue of section 29, the prosecution has only to show by evidence that the accused has dealt with the narcotic substance or has physical custody of the same or directly concerned with it, unless the accused proves by preponderance of probability that he did not knowingly or consciously possess the article. Without such proof the accused will be held guilty by virtue of section 29 of the Act, 1997. Reliance is placed on the case Inder Sain v. State of Punjab (AIR 1973 S.C. 2309).

In the case of Sherzada v. The State (1993 SCMR 149), the liability of driver was also considered in view of provisions of section 27, PPC and it was concluded as under:

"The next point raised by the learned counsel was that it is provided in section 27, PPC that when property is in the possession of wife, clerk or servant on account of that person, it is in that person's possession within the meaning of this Code. The learned counsel argued that the appellant was a driver, hence an employee of the owner of the car and even if he is admitted to be in possession of the contraband article on behalf of the owner, he cannot be said to be liable for that possession. But this argument of the learned counsel is without force on the face of it because section 27, PPC is confined to the Pakistan Penal Code only, as the words "within the mean of this Code" appearing in that section clearly indicate. This section has not been made applicable to the Prohibition (Enforcement of Hadd) Order, 1979 as is evident from section 26 of that Order where certain other provisions of the PPC have been made applicable."

In the case of State v. Banda Gul (1993 SCMR 311), the question of burden of proof with reference to section 187 of the Customs Act was also taken into consideration and following conclusion was arrived at:

"As stated above, in the opinion of the High Court, as the driver of the truck slipped away, there was no evidence to attribute knowledge of smuggling of the goods to the two co-accused. It appears to us that these observations have been made in oblivion to the provisions of section 156(90) and 187 of the Customs Act, under which burden of proof lay on the accused. It was, therefore, for the latter to have proved that they were unaware that prohibited goods were being smuggled."

We may also refer case of Adil Ahmed (1991 SCMR 1951), wherein, in view of provisions of the Customs Act, it was observed that drivers and owners were both responsible.

In the case of Rab Nawaz v. The State (PLD 1994 S.C. 858), the liability of driver was again considered and lenient view was taken, as they expressed their ignorance about the contents and claimed to be simple carriers. In the present case the appellant did not claim to carrier.

In the case of Nadir Khan v. State (1988 SCMR 1899) it has been observed that knowledge and awareness would be attributed to the Incharge of the vehicle. The relevant portion reads 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 persons 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 appellant in the statement admitted his presence in the truck at the time of incident but took the plea that he took lift in the truck that was coming from Quetta side, which was driven by a Pathan, the police released the said Pathan and involved him in the case. He produced no evidence to prove such allegation. Further he also did not produce any evidence to disprove the possession as required under Section 29 of the Act, 1997. Therefore, he will be presumed to be guilty of the offence.

From the above facts it is clear that the property was secured from the possession of appellant Nazar Hussain being the driver of the truck. Therefore, he is involved in the case and the prosecution has proved the case against him.

As regards the case of Zulfiqar Ali, the prosecution alleged that he was sitting by the side of the appellant Nazar Hussain at the time when the truck was intercepted. The prosecution did not produce any evidence to show that he was in joint possession or control of the truck or he had any concern or dealt with the property in any manner. But on the contrary the charas was concealed in secret cavity made in the truck that clearly shows that it was hidden from all person. There is no evidence to indicate that appellant knew that charas was concealed in the secret cavity or he had exclusive knowledge of the said place so as to attract the provisions of Article 122 of Qanun-e-Shahadat Order, 1984. If the property was lying open within the view of the appellant or he knew the placement of property then the situation would have been quite different. In such a situation he was required to explain his position, without such explanation his involvement in the case would have proved. However, such facts are not attracted in the present case, therefore, the appellant is not required to explain anything. The prosecution has simply proved his presence in the truck. Therefore, mere presence of the appellant Zulfiqar Ali in the truck would not involve him in the case unless conspiracy or abetment of the offence is shown and proved. Thus the case of appellant Zulfiqar Ali is distinguishable from the case of appellant Nazar Hussain. The prosecution has failed to prove the case against appellant Zulfiqar Ali."

42. Following the above authority we are of the considered view that the case against appellant Dost Muhammad has been proved beyond any shadow of doubt whereas the case against Bilal has not been established, as the prosecution has failed to establish any connection of the appellant Bilal with the property or proved his abetment or conspiracy with the appellant Dost Muhammad.

43. Above are the reasons of our short order dated 08.8.2007 by which we had disposed of the appeal in the following manner:-

"For reasons to be recorded separately the conviction and sentence awarded to the appellant Bilal are set aside and the appellant is acquitted and set at liberty. He is present in custody, he should be released forthwith, if not required in any other custody case. The appeal No.554/2005 is allowed.

As regards the case of the appellant Dost Muhammad, the prosecution has proved the case against him, therefore, the conviction and sentence awarded to the appellant Dost Muhammad are maintained. The appeal No.36/2006 is dismissed."

JUDGE

JUDGE

Karachi :

Dated: _____

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No.139 of 2007.

Present : Muhammad Afzal Soomro, and

Rahmat Hussain Jafferi, JJ.

JUDGMENT

Date of hearing : 17.8.2007.

Appellant : Mureed through Mr.Ali Gohar Soomro, Advocate.

Respondent : The State through Mr.Habib Ahmed, AAG.

Rahmat Hussain Jafferi, J :- Brief facts giving rise to the present Appeal are that on 22.9.2005 at 6.45 p.m. the complainant SHO Shabbir Ahmed of Police Station Thatta intercepted the appellant at Shah Yaqeen Road and secured charas weighing 635 grams from his possession. Ten grams were separated as sample for sending the same to Chemical Analyzer's report. The property was sealed. The appellant was arrested and such mashirnama was prepared. The appellant and the property were brought to the Police Station where the complainant lodged the FIR. The police after usual investigation challaned the appellant in the Court.

44. The learned Special Judge, CNS, Thatta tried the appellant, convicted him for offence punishable under Section 9(c) of Control of Narcotic Substances Act, 1997, sentenced him to suffer RI for 03 years and fine of Rs.5000/= or in default thereof to suffer RI for 03 months with benefit of section 382-B, Cr.P.C. under the impugned judgment dated 07.5.2007.

45. We have heard the advocate for the appellant, AAG for the State and perused the record of this case very carefully.

46. At the trial the prosecution examined two witnesses viz. complainant Shabbir Ahmed and mashir Zulfiqar Ali. They gave the same details of the incident as mentioned in the earlier part of the judgment but their statements on material aspects of the case are contradictory to each other. According to PW-1 mashir Zulfiqar Ali the charas was a big piece which was secured from the possession of the appellant whereas PW-2 complainant deposed that the charas was in the shape of one big piece and four small pieces. As regards the preparation of packets the PW-1 deposed that the complainant prepared three packets, out of which one contained 10 grams which was separated as sample then two more packets were prepared but PW-2 deposed that he prepared two packets only at the place of incident. The important aspect of the case is that the complainant deposed that he sealed 10 grams in a white piece of cloth and sealed it which was sent to the Chemical Analyzer. The Chemical Analyzer's report shows that the expert received one sealed pink colour paper parcel. Thus the packet received by the Chemical Analyzer did not tally with the packet prepared by the complainant at the place of incident, as such, a doubt has been created as to whether the Chemical Analyzer received the same property which was sealed by the complainant at the place of incident. Finding these defects in the prosecution case the learned AAG has not supported the case.

47. After considering the material available on the record we are of the considered view that the prosecution has failed to prove the case against the appellant beyond any reasonable doubt, therefore, he is entitled to the benefit of doubt, which was accordingly given to him while passing the short order dated 17.8.2007 by which we had allowed the appeal. These are the reasons of the said short order.

JUDGE

JUDGE

Karachi :

Dated: _____

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No.345 of 2006.

Present : Muhammad Afzal Soomro, and

Rahmat Hussain Jafferi, JJ.

JUDGMENT

Date of hearing : 16.8.2007.

Appellant : Syed Qamar Ali Shah through Mr.Shoukat Yayat, Advocate.

Respondent : The State through Mr.Habib Ahmed, AAG.

Rahmat Hussain Jafferi, J :- The present appeal is directed against the judgment dated 22.7.2006 passed by the learned Special Judge, CNS, Sukkur by which the learned Judge convicted the appellant for offence punishable under Section 9(c) of Control of Narcotic Substances Act, 1997, sentenced him to suffer RI for 14 years and fine of Rs.200,000/= or in default thereof to suffer RI for one year with benefit of section 382-B, Cr.P.C.

48. Brief facts giving rise to the present Appeal are that on 30.9.2003 at 11.45 a.m. the complainant Abdul Hakeem, Excise Inspector along with his subordinate staff stopped the bus bearing No.P-2595 on National Highway near Tando Bhooro, Taluka Rohri, District

Sukkur as the bus was coming from Peshawar side. The police party entered the bus where they found a passenger sitting on Seat No.32 in a suspicious condition who was carrying a bag which was lying in his lap. On inquiries that person disclosed his name as Syed Qamar Ali Shah, the appellant. The appellant was brought out from the bus. The complainant secured the said bag and found 05 packets of charas weighing 1 kg. each total weight 5 kg. The complainant separated 100 grams from each packet and prepared 5 samples and sealed them. The appellant and the property were brought to the Police Station where the complainant lodged the report. The police after usual investigation challaned the appellant in the Court where he was tried and convicted as mentioned above under the impugned judgment.

49. We have heard the advocate for the appellant, AAG for the State and perused the record of this case very carefully.

50. The learned advocate for the appellant has stated that the statement of PWs are contradictory to each other; that the Investigating Officer did not examine the driver, conductor or cleaner of the bus; that when the property was produced in the Court it was in un-sealed condition; that the appellant had challenged that the said property was not heroin but the prosecution did not send the property to Chemical Analyzer for examination and report; and that at the most the appellant would be held responsible for 500 grams.

51. Conversely, the learned AAG has stated that the contradiction pointed out by the learned advocate for the appellant are minor in nature; that the witnesses have fully supported the case; that the Chemical Analyzer report is in positive; and that the complainant has explained about the production of property in Court in non-sealing condition by taking the plea that the property room had collapsed, therefore, a large number of properties were damaged including the property of the present case.

52. At the trial the prosecution examined two witnesses viz. complainant Abdul Hakeem and mashir Zarar Ahmed. They specifically stated that the appellant was sitting in suspicious condition in the bus and a bag was lying in his lap. The appellant came out from the bus along with the bag. After opening the bag it was found to contain 5 packets of heroin powder weighing 1 kg. each. Hundred grams were separated from each packet for sending them to Chemical Analyzer for examination and report. Both the witnesses were subjected to lengthy cross-examination but nothing came on record to discard their evidence. The learned advocate for the appellant has pointed out only three contradictions: (1) about the name of persons who boarded the bus when it was stopped; (2) about the number of adjoining seat; and (3) about the time of departure of the bus. All the three contradictions are minor in nature because through these contradictions basic story of the prosecution has not been changed or through these contradictions improvements have been made so as to strengthen the case of the prosecution, as such, these contradictions do not come within the definition of major contradictions, hence they can be safely ignored. Minor contradiction can appear when the evidence is recorded after lapse of one year. Particularly, when both the witnesses are Excise Officers who must have detected various cases of similar nature. As regards the production of property in un-sealed condition, the complainant has explained the position by stating that the property room had collapsed, therefore, the properties were damaged and the seal might have been removed during that process. The said statement of the complainant went unchallenged as there is no cross-examination to the witness on the said aspect of the case.

53. As regards the sending of property to the Chemical Analyzer on the ground that the appellant had denied the fact that the remaining property was heroin. It is pointed out that at the time of recovery of heroin from the possession of the appellant, the complainant had prepared sample from it. When a sample is prepared from property then it will represent the entire property. Such observation is supported from provisions of section 516-A, Cr.P.C. as under its last proviso, the sample prepared before the destruction of the property is required to be taken to be whole property. Thus the sample prepared in this regard would be deemed to be whole property. The Chemical Analyzer has opined that the contents of the sample were heroin, therefore, the remaining property

would be deemed to be heroin. Thus, the prosecution has proved the said fact.

54. In presence of above proved fact, the appellant has challenged that the property lying in the Court was not heroin, therefore, he was required to prove such fact so as to disprove the fact, which the prosecution has proved. For that purpose he should have moved the trial Court for sending the entire property to Chemical Analyzer for examination and report. He did not do so. He also did not request this Court for sending the property for expert opinion, as such, the appellant has failed to prove his defence. The Hon'ble Supreme Court of Pakistan also took the similar view in a case of Ali Muhammad v. State (2003 SCMR 54), at page 58 it has been observed as under:-

> "In case the appellants' defence would have been that contains of entire case property so recovered was not Charas they could have made an application to the trial Court or before the High Court for re-examination of the entire case property which was also produced in the trial Court as Article 'A' having not done so, such plea cannot be said to have merit and substance considering also that the said plea being plea of the fact, would require detailed enquiry and re-examination of the narcotic substance which cannot be gone into by this Court at this stage."

55. After considering the material available on the record we are of the considered view that the prosecution has proved the case against the appellant beyond any reasonable doubt but the sentence appears to be on higher side, therefore, it was reduced from 14 years to 10 years while passing the short order dated 16.8.2007 by which we had dismissed the appeal with the above modification in the sentence. These are the reasons of the said short order.

JUDGE

JUDGE

Karachi :

Dated: _____

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No.164 of 2007.

Present : Muhammad Afzal Soomro, and

Rahmat Hussain Jafferi, JJ.

JUDGMENT

Date of hearing : 15.8.2007.

Appellant : Ali Murad through Mr.Adnan Karim, Advocate.

Respondent : The State through Mr.Habib Ahmed, AAG.

Rahmat Hussain Jafferi, J :- Brief facts giving rise to the present Appeal are that on 13.9.2004 at 7.30 p.m. during Nakabandi, Excise Circle Officer Nazar Muhammad Siyal apprehended the appellant at Shahbaz Colony, Dadu and secured 2 kg. of charas from his possession. 20 grams of charas were separated as sample and such mashirnama was prepared. The appellant and the property were brought to the Police Station where the complainant lodged the FIR. The police after usual investigation challaned the appellant in the Court.

56. The learned Special Judge, CNS, Dadu tried the appellant, convicted him for offence punishable under Section 9(c) of Control of Narcotic Substances Act, 1997 and sentenced him to suffer RI for 08 years and fine of Rs.100,000/= or in default thereof to suffer RI for one year with benefit of section 382-B, Cr.P.C. under the impugned judgment dated 03.10.2005.

57. We have heard the advocate for the appellant, AAG for the State and perused the record of this case very carefully.

58. At the trial the prosecution examined complainant Nazar Muhammad and mashir PW-2 Dodo. They gave the same details of the incident as mentioned in the earlier part of the judgment. The complainant further admitted that the appellant was challaned on the next day of the incident and that the sample was sent to Chemical Analyzer before that. The prosecution produced the Chemical Analyzer report as Ex.6/C. The learned advocate for the appellant has challenged the said report on the ground that the sample was sent on 14.9.2004 but it was received by the Chemical Analyzer on 12.10.2004 without furnishing any explanation of the delay and that when the property was weighed it did not tally with the weight shown by the complainant. The learned AAG has conceded the above position and further added that the prosecution has not furnished any explanation for such delay consumed between the period of sending the property and receipt of the same by Chemical Analyzer.

59. We have examined the Chemical Analyzer report and found that the property was sent through Excise Constable Abdul Rahman vide letter No.50 of 2004 dated 14.92004 but the sample was received by Chemical Analyzer on 12.10.2004.

60. From the above position it is clear that there is gape of 28 days in between the date of dispatch of the property from Police Station and receipt of the same by the Chemical Analyzer, therefore, the prosecution was required to furnish explanation as to where was the property in between the said period. The prosecution could have examined Excise Constable Abdul Rahman who was assigned the duty of delivering the property to the Chemical Analyzer, because the said witness was important on the above aspect of the case who could have explained the position and the circumstances which led the witness to produce the property before the Chemical Analyzer at Karachi after delay of 28 days. But the prosecution did not examine him for the reasons best known to them. This aspect of the case becomes more important because the gross weight of the property was 25 grams and net weight of the charas was 13 grams as per expert report. According to the witnesses they separated 20 grams from the property as sample, therefore, the net weight of the charas should have been 20 grams but the weight was quite different when it was weighed by the Chemical Analyzer, therefore, the possibility of tampering with the property during the period from 14.9.2004 to 12.10.2004 cannot be ruled out. The learned AAG could not controvert the above factual position, therefore, the Chemical Analyzer report loses its importance. It appears that the sample received by the Chemical Analyzer was not the same which was sent to him for examination and report.

61. The entire case hinges upon the report of Chemical Analyzer but the same has been discarded, as such, the prosecution has failed to prove that the property allegedly secured from the possession of the appellant was charas. Thus, the prosecution has failed to prove the case against the appellant beyond any reasonable doubt.

62. Above are the reasons of our short order dated 15.8.2007 by which we had allowed the appeal.

JUDGE

JUDGE

Karachi :

Dated: _____

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No.231 of 2001.

Present : Muhammad Afzal Soomro, and

Rahmat Hussain Jafferi, JJ.

JUDGMENT

Date of hearing : 15.8.2007.

Appellant : Said Badshah through Mr.Taza Gul Khattak, Advocate.

Respondent : The State through Mr.Syed Ashfaq Hussain Rizvi, Special Prosecutor ANF.

Rahmat Hussain Jafferi, J :- Brief facts giving rise to the present Appeal are that on 16.7.1988 at 10.20 a.m. the complainant Syed Liaquat Ali of Pakistan Narcotics Control Board along with his subordinate staff intercepted a car near Bismillah Hotel, Shah Faisal Colony, on a spy information. Three persons were sitting in the car. Driver of the car ran away from the place of incident whereas remaining two persons namely Shamsheer Khan and Sardar Khan were apprehended. From the car 10 kilograms of heroin powder were secured. Out of which sample was drawn which was sent to Chemical Analyzer for examination and report. The arrested co-accused persons

disclosed the name of the appellant to the police to be the person who ran away. The police, after usual investigation, submitted the challan in Court showing the co-accused in custody whereas the appellant was shown as absconder.

63. The learned trial Judge declared the appellant as proclaimed offender and then ordered for the proceedings under Section 512, Cr.P.C. The case proceeded against the co-accused in which prosecution examined complainant Liaquat Ali, private mashir Muhammad Khalid and Chief Drug Controller Dr.Fazalur Rahman. Thereafter the arrested accused persons absconded as they were on bail.

64. The appellant was arrested and produced before the Court. On 14.3.2000 a charge under Sections 3 & 4 of Prohibition (Enforcement of Hadd) Ordinance, 1979 was framed against the appellant but he plead 'not guilty'. The prosecution examined complainant Syed Liaquat Ali Zubed. The remaining witnesses were not traceable, therefore, the prosecution closed the side. The appellant, in his statement recorded under Section 342, Cr.P.C., denied all the allegations of the prosecution. The learned trial Judge after considering the evidence convicted the appellant for offence punishable under Section 9(c) of Control of Narcotic Substances Act, 1997 and sentenced him to suffer RI for 10 years and fine of Rs.100,000/= or in default thereof to suffer SI for one year with benefit of section 382-B, Cr.P.C. under the impugned judgment dated 07.4.2001.

65. We have heard the advocate for the appellant, Special Prosecutor ANF for the State and perused the record of this case very carefully.

66. The complainant in his deposition gave the same details of the incident as mentioned in the earlier part of the judgment. He further stated that the name of the appellant was disclosed by the co-accused who were arrested from the car. The complainant further stated that accused present in the Court were the same. It is pointed out that the statement of the complainant was recorded on 24.9.2001, after 13 years of the incident. Admittedly, the appellant was not known to the complainant, therefore, after his arrest his identification test should have been held before a Magistrate through the complainant but no such identification test was held, as such, the identity of the appellant has become highly doubtful. It is not appealing to the common sense that the complainant who was a police officer and had conducted investigation of large number of cases and had seen very large number of people would have been able to remember the face of the appellant who ran away from the car immediately after stopping it after 13 years. The statement of mashir Khalid Mahmood was recorded when the appellant was absconder and proceedings under Section 512, Cr.P.C. were ordered. He also did not state that he had identified the culprit who ran away from the car. Thus, his statement recorded earlier is of no help to the prosecution. Dr.Fazal Rahman, Chief Drug Controller, who was examined as expert to prove the report that the property was heroin was not examined in the trial after the charge was framed against the appellant. There is also no evidence that he was not traceable or his presence could not be procured. Therefore, his evidence, earlier recorded, cannot be taken into consideration against the appellant. As such, there is no expert report which can be used against the appellant. Without such report, it cannot be held against the appellant that the alleged property was heroin.

67. After considering the material available on the record we are of the considered view that the prosecution has failed to prove the identity of the appellant at the place of incident. Merely on the statement of co-accused in the present circumstances of the case cannot be safely relied upon for convicting the appellant.

68. Thus, the prosecution has failed to prove the case against the appellant beyond any reasonable doubt, therefore, the appellant is entitled to the benefit of doubt which was according given to him while passing the short order dated 15.8.2007 by which we had allowed the appeal. These are the reasons of the said short order.

JUDGE

JUDGE

Karachi :

Dated: _____

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No.129 of 2006.

Present : Muhammad Afzal Soomro, and

Rahmat Hussain Jafferi, JJ.

JUDGMENT

Date of hearing : 29.5.2007.

Appellant : Wajid Khan through Mr.Ilam Din Khattak, Advocate.

Respondent : The State through Mr.Habib Ahmed, AAG.

Rahmat Hussain Jafferi, J :- **Brief facts giving rise to the present Appeal are that on 26.4.2002 at 12.30 p.m. the complainant Excise Inspector Mumtaz Ali along with his subordinate staff intercepted the appellant near Bhagi Hotel, Katcha Qila, Hyderabad. The complainant searched the appellant and secured one plastic thelli containing 1 kg. opium from the folds of his shalwar. The appellant was in possession of one plastic bag (katta). On opening the bag the complainant found 25 juice packets filled with charas weighing 25 kilograms. The complainant drew 10 grams of charas and opium from the said property and sealed them for sending them to Chemical Analyzer for examination and report. The remaining property was also sealed. Such mashirnama was**

prepared. The appellant and the property were brought to the Police Station where the complainant lodged the FIR. The police, after usual investigation challaned the appellant in the Court.

69. The learned Special Judge, Control of Narcotics Substances, Hyderabad tried the appellant, convicted him for offence punishable under Section 9(c) of Control of Narcotic Substances Act, 1997 and sentenced him to suffer imprisonment for life and fine of Rs.1.00 million or in default thereof to suffer RI for 06 months with benefit of section 382-B, Cr.P.C. under the impugned judgment dated 06.12.2005.

70. We have heard the advocate for the appellant, AAG for the State and perused the record of this case very carefully.

71. At the trial the prosecution examined two witnesses viz. PW-1 mashir Shabbir Ahmed and PW-2 complainant Excise Inspector Mumtaz Ali. They gave the same details of the incident as mentioned in the earlier part of the judgment, therefore, need not to be repeated. However, they specifically stated that from the folds of the shalwar of the appellant 1 kg. of opium and from the bag 25 kg. of charas were secured. Ten grams from each property were separated for Chemical Analyzer's report. The prosecution produced the said report which supports the prosecution case that reveals that the property lying in the samples were opium and charas. Both the PWs were subjected to lengthy cross-examination. They successfully passed the test of cross-examination which is the best mode for assessing the credibility of the witnesses. There are no material contradictions or discrepancies in their evidence. Their evidence is unanimous on all the material aspects of the case. There is no enmity between the appellant and the PWs nor any enmity was suggested. As such, there is no reason with the PWs to falsely implicate the appellant with the commission of this crime. Their evidence is confidence inspiring and we do not find any reason to disbelieve their evidence.

72. The learned advocate for the appellant has stated that the Chemical Analyzer's report shows that the samples were signed by two witnesses namely Excise Inspector Nisar Ahmed Shahwar and Inspector Arsalan Mujeeb but the prosecution witnesses did not state so. It is pointed out that in the mashirnama four witnesses were shown. Out of them one witness PW-1 Shabbir Ahmed has been examined. The remaining two witnesses were the persons who had put signatures on the samples which were found by the Chemical Analyzer when he received the samples. The fourth mashir was not examined by the prosecution. As such, there is no discrepancy in the evidence and the report of Chemical Analyzer. He has further stated that there is delay of 03 days in sending the property to the Chemical Analyzer as the incident took place on 26.4.2002 and the property was received by expert on 29.4.2002. The complainant stated that he had sent the property on the day of the incident. The said stand has been supported from the Chemical Analyzer's report as it shows that the letter dated 26.4.2002 was received through which the property was sent. There is in between gape of three days. The learned AAG has stated that the said time was consumed in sending the property as the incident took place in Hyderabad whereas the laboratory was situated in Karachi. Even otherwise this by itself is no ground to discard the Chemical Analyzer's report without the allegation of tampering with the property which is lacking in the case. As such, the arguments of the learned advocate for the appellant are not sound. He has further stated that only 10 grams from each property were sent to the Chemical Analyzer, therefore, the appellant is required to be convicted and sentenced for the possession of 10 grams. He has relied upon Muhammad Hashim v. State (PLD 2004 S.C. 856) and Waris Khan v. State (2006 SCMR 1051).

73. Conversely, the learned AAG has stated that the Hon'ble Supreme Court of Pakistan in the earlier decision reported in Ali Muhammad v. State (2003 SCMR 54) and relying upon another decision reported in Nadir Khan and another v. The State (1988

SCMR 1899) is in direct conflict with the decisions relied upon by the learned advocate for the appellant; that this Court had examined the said point by holding that the Court should repeal the arguments so that the party might approach the Hon'ble Supreme Court for clarification of both the conflicting decisions; that one of the party has approached the Hon'ble Supreme Court and the Hon'ble Supreme Court has granted leave to consider as to which decision should be followed, therefore, the similar order be passed in this case. It is correct that this Court had passed the order as mentioned by the learned AAG and now the matter is with the Hon'ble Supreme Court of Pakistan. Furthermore, in this case the sample was drawn from the property secured from the possession of the appellant. Following the procedure adopted in the earlier Criminal Appeal No.101 of 2005 case the arguments of the learned advocate for the appellant is repealed so that he may approach the Hon'ble Supreme Court of Pakistan for clarification of the said order. In the said appeal following observation was made:-

> **"There are two conflicting decisions of the Hon'ble Supreme Court of Pakistan. At this stage, we are not going to examine as to which decision is correct or otherwise. It is for the Hon'ble Supreme Court of Pakistan to clarify the said position. However, we are also not going to examine the question of judgment per incuriam as laid down by the Hon'ble Supreme Court of Pakistan in the case of Province of the Punjab v. S. Muhammad Zafar Bukhari (PLD 1997 S.C. 351). Nevertheless, we are of the view that in such a situation, the better and safer course will be to repeal the arguments so that the party may approach the Hon'ble Supreme Court of Pakistan to get the required clarification. Hence the arguments are repeated."**

74. The learned advocate for the appellant has further argued that the appellant was suffering from Harnia, therefore, it was not expected that he would be carrying 25 kg. of charas. In his support he has examined DW-1 Dr.Gulzar Ali who deposed that on 26.4.2004 he examined the appellant who was under trial prisoner and found that he was suffering from Harnia and the appellant complained that he had such disease since last two years. From the evidence produced by the appellant it appears that the appellant was suffering from Harnia problem in the year 2004 but the incident took place in the year 2002. The appellant has not produced any evidence that when the incident took place he was suffering from such disease, as such, the defence taken by the appellant is of no help to him.

75. After considering the material available on the record we are of the considered view that the prosecution has proved the case against the appellant beyond any reasonable doubt, therefore, he was rightly convicted and sentenced under the impugned judgment, which is hereby maintained.

76. **Above are the reasons of our short order dated 29.5.2005 by which we had dismissed the appeal.**

JUDGE

JUDGE

Karachi :

Dated: 04.6.2007.

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No.116 of 2007.

Present : Muhammad Afzal Soomro, and

Rahmat Hussain Jafferi, JJ.

JUDGMENT

Date of hearing : 29.5.2007.

Appellant : Pukar Khan through Mr.Mohammad Waseem Sammo, Advocate.

Respondent : The State through Mr.Habib Ahmed, AAG.

Rahmat Hussain Jafferi, J :- **Brief facts giving rise to the present Appeal are that on 29.3.2005 at 7.00 p.m. the complainant SHO Muhammad Saleem of Police Station Thatta along with his subordinate staff on spy information reached Mango Trees near village Shen Khan Pathan, District Thatta where he found three persons present, out of them two persons ran away whereas the present appellant Pukar Khan was apprehended. A blue-colour thelli which he was holding in his hand was secured which contained rods of charas weighing 1020 grams. Out of which 10 grams were separated and sealed for Chemical Analyzer's report. The complainant also found raw wine matkas and tins of wine lying there. The complainant prepared such mashirnama, brought the**

accused and the property to the Police Station where he lodged the report. The police, after usual investigation challaned the appellant in Court.

77. The learned Special Judge, Control of Narcotics Substances, Thatta tried the appellant, convicted him for offence punishable under Section 9(c) of Control of Narcotic Substances Act, 1997 and sentenced him to suffer RI for 05 years and fine of Rs.50,000/= or in default thereof to suffer RI for 06 months with benefit of section 382-B, Cr.P.C under the impugned judgment dated 26.4.2004.

78. We have heard the advocate for the appellant, AAG for the State and perused the record of this case very carefully.

79. At the trial the prosecution examined 03 witnesses viz. PW-1 SHO Muhammad Saleem, PW-2 mashir ASI Faisal Shafi and PW-3 PC Ghulam Mustafa, who was one of the members of the raiding party. They gave the same details of the incident as mentioned in the earlier part of the judgment, therefore, need not to be repeated. However, they specifically stated that 1020 grams of charas were secured from the thelli which the appellant was holding in his hand, out of which 10 grams were separated for Chemical Analyzer's report. The prosecution produced the Chemical Analyzer's report as Ex.13 which shows that the property lying in the sample packet was charas and was 10 grams. All the prosecution witnesses were cross-examined by the defence counsel but nothing came on record to discredit their evidence. Their evidence is unanimous on all the salient features of the case. There are no material contradictions or discrepancies in the evidence. As such, their evidence is confidence inspiring.

80. The learned advocate for the appellant has stated that the appellant has been acquitted in another case of liquor which was secured by the complainant at the time of recovery of the charas from the appellant. No doubt, the appellant has been acquitted in the case but the evidence of that case cannot be read in the evidence of this case. There were some contradictory statements with regard to the recovery of the said articles, therefore, the Court gave the benefit of doubt to the appellant whereas in the present case there are no material contradictions in the evidence, therefore, the present case would be decided on the evidence available on the record which fully supports the prosecution case. He has further argued that provisions of section 103, Cr.P.C. have been violated but in view of provisions of section 25 of Control of Narcotic Substances Act, 1997 the said provisions are not applicable, however, the provisions of section 103 are applicable if search is made from any place but in the present case there was no search as the property was lying open and was visible to everybody. The place of incident was mango garden, as such, it does not come within the scope of section 103, Cr.P.C. The learned advocate for the appellant has further argued that the case has been filed as there was enmity between PW-2 ASI Faisal and the appellant over a hotel. Such plea was put to the PW-2 but he denied the same. The appellant, in his statement under Section 342, Cr.P.C., stated such facts but no evidence was led to prove such allegation, as such, mere allegation would not be enough to discard the evidence of PW-2 which has been fully supported and corroborated by the complainant and PW-3.

81. After considering the material available on the record we are of the considered view that the prosecution has proved the case against the appellant beyond any reasonable doubt and there is no illegality in the impugned judgment, which is hereby maintained.

82. Above are the reasons of our short order dated 29.5.2005 by which we had dismissed the appeal.

JUDGE

JUDGE

Karachi :

Dated: _____

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No.308 of 2006.

Present : Muhammad Afzal Soomro, and

Rahmat Hussain Jafferi, JJ.

JUDGMENT

Date of hearing : 30.4.2007.

Appellant : Ameer Hamza through Mr.Khizer Asker Zaidi, Advocate.

Respondent : The State through Mr.Habib Ahmed, AAG.

Rahmat Hussain Jafferi, J :- Brief facts giving rise to the present Appeal are that on 15.11.2003 at 8.30 p.m. the appellant was intercepted who was holding a bag in his hand. The complainant Inspector Chand Khan Niazi recovered the said bag which contained 3 kg. of charas. Samples were drawn for expert opinion. The appellant was arrested and such mashirnama was prepared. The complainant party brought the appellant and the property to the Police Station where the complainant lodged the report. After completing usual investigation the police challaned the appellant in Court.

83. The learned Special Judge, CNS Court-I, Karachi tried the appellant, convicted him for offence punishable under Section 9(c) of Control of Narcotic Substances Act, 1997 and sentenced him to suffer RI for 07 years and fine of Rs.50,000/= or in default thereof to suffer RI for 03 months with benefit of section 382-B, Cr.P.C under the impugned judgment dated 18.3.2006.

84. The learned advocate for the appellant has not challenged the merits of the case but simply stated that there is 07 days delay in sending the property to Chemical Analyzer and that the Investigating Officer was not examined, therefore, the case of the prosecution has become doubtful.

85. Conversely, learned AAG has stated that no allegation was made that the property was tampered with, therefore, the delay of 07 days is not sufficient to hold the case doubtful. As regards the non-examination of the Investigating Officer, he has stated that the Investigating Officer had retired, therefore, Court examined witness Nasir Abbas, process server on the said subject. He has supported the impugned judgment.

86. At the trial the prosecution examined PW-1 complainant Chand Khan Niazi and mushir HC Muhammad Zaman. They have fully supported the prosecution case by specifically stating that from the bag which was carrying by the appellant 3 kg. of charas was secured. The samples were drawn which were sent to Chemical Analyzer. The Chemical Analyzer's report Ex.P/3 is in positive. Thus, the case of the prosecution is fully supported from the evidence available on record. The learned advocate for the appellant has not challenged the ocular testimony.

87. As regards the delay in sending the property the Chemical Analyzer's report shows that it was received on 22.11.2003. We have examined the evidence but the appellant did not take the plea that the property was tampered with or it was substituted or its seals were broken. When the Chemical Analyzer received the sample, he found the seals intact. As such, mere delay in sending the property per se would not be enough to doubt the Chemical Analyzer's report. Reference is invited to Sarwar v. The State (PLJ 1987 S.C. 624), Anwarul Hassan v. State (1980 SCMR 649), Allah Rakhio v. State (1977 SCMR 330) and Mian Khan v. The State (PLJ 1982 S.C. 480).

88. As regards the non-examination of the Investigating Officer, the prosecution has furnished sufficient explanation, which shows the Investigating Officer had retired, therefore, he was not examined. As such, no adverse inference can be taken due to non-examination of the Investigating Officer.

89. After considering the material available on the record we are of the considered view that the prosecution has proved the case against the appellant beyond any reasonable doubt, therefore, the impugned judgment does not require any interference. The appeal has no merits and the same is dismissed.

JUDGE

JUDGE

Karachi :

Dated: _____

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No.346 of 2006.

Present : Muhammad Afzal Soomro, and

Rahmat Hussain Jafferi, JJ.

JUDGMENT

Date of hearing : 16.4.2007.

Appellant : Muhammad Shafi through Mr.Muhammad Hanif Samma, Advocate.

Respondent : The State through Mr.Habib Ahmed, AAG.

Rahmat Hussain Jafferi, J :- Brief facts giving rise to the present Appeal are that on 11.3.2004 at 3.15 p.m. the complainant Excise Inspector Sikandar Ali Shah along with his subordinate staff apprehended the appellant near bus stand Sajawal. From his personal search a brown colour theli was secured from the folds of his shalwar. The complainant opened it and found 42 & 1/2 rods of charas weighing 510 grams. Out of which 10 grams were separated for expert report. The appellant and the property were brought to the Excise Office where the complainant lodged the report. The police, after usual investigation, challaned the appellant in the Court.

90. The learned Special Judge CNS, Thatta tried the appellant, convicted him for offence punishable under Section 9(b) of Control of Narcotic Substances Act, 1997 and sentenced him to suffer RI for 02 years and fine of Rs.2000/= or in default thereof to suffer RI for 02 months with benefit of section 382-B, Cr.P.C. under the impugned judgment dated 27.9.2006.

91. We have heard the advocate for the appellant, AAG for the State and perused the record of this case very carefully.

92. At the trial the prosecution examined PW-1 complainant Sikandar Ali Shah, PW-2 mashir Excise Constable Abdul Qadir and produced Chemical Analyzer report which is in positive. Both the witnesses gave the same details of the incident as mentioned in the earlier part of the judgment, therefore, need not to be repeated. Both these witnesses were subjected to cross-examination but nothing came on record to discard their evidence. The evidence is supported and corroborated by Chemical Analyzer report.

93. The learned advocate for the appellant has stated that the private witnesses were available but they were not made mashirs in this case. The defence counsel cross-examined the witnesses. They stated that they asked the private witnesses to act as mashirs but they declined. As such, reasonable explanation has been furnished by the Excise Police for not examining the private witnesses. It is pointed out that the appellant was apprehended from near bus stand which was a public place. Provisions of section 103, Cr.P.C. are applicable when a place is searched. The said provisions are not attracted in the present circumstances of the case. However, in view of section 25 of Control of Narcotic Substances Act, 1997 the provisions of section 103, Cr.P.C. are not applicable in the case.

94. He has further stated that there is difference of weight of rods in between the FIR and evidence as according to the prosecution 42 & 1/2 rods were secured, therefore, their weight should have been 420.500 grams. It appears that proper explanation was not obtained from the PWs with regard to weight of each rod as they did not specifically stated that the complainant weighed each rod separately and then weight of each rod was 10 grams. The main consideration is whether the 42 & 1/2 rods were secured from the possession of the appellant. The property was opened in Court but the number of rods were not found more or short as no objection was raised by the advocate for the appellant in respect of number of rods.

95. He has further argued that only sample was drawn from one rod, therefore, it is not known whether the entire property was charas or otherwise. He has relied upon Muhammad Hashim v. State (PLD 2004 S.C. 856). Conversely, the learned AAG has argued that earlier decision reported as Ali Muhammad v. State (2003 SCMR 54) was contrary to the above decision and this Court had examined both the decisions but repealed the arguments so that the parties may approach Hon'ble Supreme Court of Pakistan for clarification of both the judgments. He has further stated that in one case the decision of this Court was challenged before the Hon'ble Supreme Court of Pakistan where leave has been granted to consider the above aspect of the case, therefore, the same order be passed in this case also.

96. It is correct that this Court considered both the conflicting authorities of the Hon'ble Supreme Court of Pakistan on the said subject and it was observed that the safer and better course for the Court is to repeal the arguments so that the party may approach the Hon'ble Supreme Court of Pakistan to clarify the above two decisions as it was not the function of this Court to go into such aspect of the case. Similar order is passed in this case.

97. After considering the material available on the record we are of the considered view that the prosecution has proved the case against the appellant.

98. Above are the reasons of our short order dated 16.4.2007 by which we had dismissed the appeal.

JUDGE

JUDGE

Karachi :

Dated: _____

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Jail Appeal No.30 of 2005.

Present : Muhammad Afzal Soomro, and

Rahmat Hussain Jafferi, JJ.

JUDGMENT

Date of hearing : 10.4.2007.

Appellant : Shahid Mehmood in person.

Respondent : The State through Mr.Mahmood Alam Rizvi, Standing Counsel.

Rahmat Hussain Jafferi, J :- **The present appeal is directed against the judgment dated 30.7.2001 passed by the Special Judge, STA, Malir under which the appellant was convicted for offence punishable under Section 126(d) of Pakistan Railways Act, 1890 and sentenced to suffer imprisonment for life and fine of Rs.20,000/= or in default thereof to suffer RI for six months with benefit of section 382-B, Cr.P.C.**

99. Brief facts giving rise to the present Appeal are that on 06.11.1996 PW-2 Sukhio, Gang Jamadar of Pakistan Railways was checking the track from 52 km to 57 km in between Gaddar Phatak to Dabheji Railway Station. At about 8.30 or 8.45 a.m. he saw a

person taking out railway clips, who on seeing PW tried to run but with the help of Chungi Naka personnel the PW-2 apprehended the said person near the river and secured 90 nuts, bolts and clips which he had extracted from the main railway line of railway track. The said person was the present appellant. PW-2 took the appellant and the property to the Assistant Way Inspector Mir Muhammad who prepared a memo and then PW-2 took him to Police Station Bin Qasim where he handed over the custody of the appellant to the police. The PW-3, Sub-Inspector Railway Police arrested the appellant and secured the above mentioned property and lodged the report. The police after usual investigation challaned the appellant in the Court where he was tried and convicted as mentioned above.

100. We have heard the appellant in person, Standing Counsel for the State and perused the record of this case very carefully. The latter has not supported the case.

101. At the trial the prosecution examined four witnesses. The statement of PW-2 Sukhio, who is the only eyewitness examined by the prosecution, reveals the same facts as mentioned in the earlier part of the judgment, therefore, need not to be repeated. He specifically stated that he apprehended the appellant with the help of Chungi Naka personnel. The appellant challenged the statement of the PW-2 by denying the facts mentioned by him, as such, the prosecution was required to have examined the Chungi Naka personnel with whose help the appellant was apprehended by the PW-2. It is surprising to note that neither the police during investigation recorded the statement of any of such personnel nor their names were shown in the challan nor they were examined before the Court to support and corroborate the statement of PW-2. The appellant specifically alleged that he had enmity with the PW-2 over monetary transaction, therefore, it was incumbent upon the prosecution to have examined the said witnesses in order to support and corroborate the statement of PW-2.

102. Further, the nuts and bolts could have been removed by some spanner but the PW-2 did not recover any spanner from the appellant or lying at the place of incident. He also did not state that the appellant had thrown spanner to some place. The absence of spanner from the place of incident speaks volumes about the truthfulness of the story. However, the PW-2 stated in the cross-examination that after three days the spanner was secured from the bushes whereas the Investigating Officer stated that spanner was produced by AWI Mir Muhammad. The statement of PW-1, Assistant Way Inspector Mir Muhammad reveals that on 09.11.1996 he secured the spanner from the place of incident. It is not out of place to mention here that after recording the FIR the police visited the place of incident but they could not find the spanner lying at any place near the scene of occurrence. Thus, it appears that the spanner was introduced subsequently to strengthen the prosecution case.

103. Finding the above defects in the prosecution evidence the learned Standing Counsel frankly conceded that the evidence led by the prosecution is insufficient to convict the appellant, therefore, he did not support the prosecution case.

104. After considering the material available on the record we are of the considered view that the prosecution has failed to prove the case against the appellant beyond any reasonable doubt, therefore, he is entitled to the benefit of doubt which was accordingly given to him while passing the short order on 10.4.2007 by which we had allowed the appeal. These are the reasons of the said short order.

JUDGE

JUDGE

Karachi :

Dated: _____

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No.69 of 2004.

Present : Muhammad Afzal Soomro, and

Rahmat Hussain Jafferi, JJ.

JUDGMENT

Date of hearing : 26.3.2007.

Appellant : Abdul Hakim through Mr.A. Q. Halepota, Advocate.

Respondent : The State through Mr.Syed Ashfaq Hussain Rizvi, Special Prosecutor ANF.

Rahmat Hussain Jafferi, J :- **Brief facts giving rise to the present Appeal are that the complainant Ghulam Abbas, Inspector ANF was posted at Police Station ANF, Clifton. On 09.10.2002 the appellant who was already in custody in FIR No.41 of 2002 was interrogated by the complainant. The appellant who was Assistant Chemical Analyzer took the raiding party which included PW-3 Mehmood Baig, Assistant Director ANF went to Laboratory, Chemical Analyzer situated on M. A. Jinnah Road. After reaching the office the complainant met with PW-1 Zahid Hussain who was In charge of the laboratory. The complainant informed him**

the facts which were disclosed by the appellant. The PW-1 also associated with the raiding party. The appellant took the raiding party to Room Excise No.1. The door was locked with two locks duly sealed. The appellant disclosed that he did not know where he kept the keys, therefore, with the permission of PW-1 Dr.Zahid Hussain, In charge of the laboratory, the seals of the locks were broken. The appellant took them to an almirah. From where he took out a blue colour polythene bag and handed over the same to the complainant. The bag was opened. The complainant found two other polythene bags lying in it. One polythene bag was checked. It contained light brown colour heroin powder weighing 600 grams. Out of which 10 grams were taken as sample for expert opinion. In the other polythene bag the complainant found 675 capsules weighing 320 grams. The property was sealed and such mashirnama was prepared in presence of PW-1 Dr.Zahid Hussain and PW-3 Mahmood Baig. The appellant and the property were brought to the Police Station where the complainant lodged the FIR.

105. At the trial the prosecution examined complainant, both the mashirs and produced the Chemical Analyzer report. The appellant, in his statement recorded under Section 342, Cr.P.C., denied all the allegations of the prosecution and further stated as under:-

> **"I am innocent and falsely implicated in this case. No any contraband viz. Heroin Powder was recovered by ANF Officials on my pointation or in my presence. I made complaints against my junior colleagues, therefore, due to this reason, this case is falsely registered against me by foisting Heroin Powder through Dr.Zahid Hussain. I produce the copy of applications addressed to the Incharge Monitory Cell, Health Department, Karachi and copy of application addressed to the Secretary, Government of Sindh, Health Department as Exs.D/1 and D/2 respectively, against Mr.Parkash on Seniority list of Assistant Chemist on forged Educational documents. I also produce the Audio Cassette as Ex.D/3 having conversation between my Wife DW-Mst.Tehseen Shaikh and complainant Inspector Ghulam Abbas. I pray for justice."**

106. The appellant examined three witnesses namely Mahmood Khan, Chowkidar of the flat where he was residing; DW-2 Aftab Ahmed, Laboratory Assistant; and DW-3 Mst.Tehseen, Pharmaclogist in the Chemical Analyzer Laboratory and wife of the appellant. The learned trial Judge, after considering the evidence and hearing the parties' counsel convicted the appellant for offence punishable under Section 9(b) of Control of Narcotic Substances Act, 1997 and sentenced him to suffer RI for 5 years and fine of Rs.100,000/= or in default thereof to suffer RI for one year more with benefit of section 382-B, Cr.P.C. under the impugned judgment dated 17.1.2004.

107. We have heard the advocate for the appellant, Special Prosecutor ANF for the State and perused the record of this case very carefully.

108. At the trial the prosecution examined complainant and both the mashirs. They gave the same details of the incident as mentioned in the earlier part of the judgment, therefore, need not to be repeated. However, all the three witnesses are unanimous that 10 grams of heroin powder were secured from 600 grams of heroin powder which was lying in a polythene bag and that heroin powder was of light brown colour. The complainant further added that he had sent the sample to the Chemical Analyzer for examination and report. The report was produced as Ex.8. The said report was prepared by PW-1 being the In-charge of the laboratory. When he opened the packet after breaking the seals his observation was as under:-

> **"One sealed brown envelop parcel with two seals containing One stappled plastic packet which contains light brown coloured fine powder mixed with white granular powder."**

109. **From the above observation it is clear that when the PW-1 opened the packet it contained light brown coloured fine powder mixed with white granular powder. The Chemical Analyzer was the same person before whom the property was secured and sample was prepared. His observation at the time of securing of property was that the powder was of light brown colour. He did not observe that the said powder was mixed with white granular powder. If the observation would have been of a lay person one could have understand the position but the observation was made by an expert in the field. It is manifest that he did not find the powder mixed with white granular powder at the time when he was testing it but the observation was made at the time when he opened the packet and through his naked eyes he found the light brown coloured fine powder mixed with white granular powder. Thus both the observations are in conflict with each other. Thus, there is major discrepancy in the property received by the Chemical Analyzer for examination and report.**

110. **In these circumstances, the learned advocate for the appellant has stated that the property sent to the Chemical Analyzer was different from the sample prepared at the time of recovery of property, therefore, the report of the Chemical Analyzer would not connect the property secured from the possession of the appellant. The learned Special Prosecutor ANF could not controvert the above factual aspect and has no explanation to offer.**

111. **From the above facts it appears that the property sent to the Chemical Analyzer was different from the property secured at the place of incident thus the expert report would not connect the property of the case, therefore, is of no help to the prosecution.**

112. **In this type of cases entire case hinges upon the report of Chemical Analyzer as through that report the property secured from the possession of accused is connected and if the report is positive then it can be held that the property was heroin otherwise not. As the property received by the Chemical Analyzer appears to be different from the property secured at the place of incident, therefore, the prosecution has failed to connect the report with the property. If the report of Chemical Analyzer is taken out of consideration then there is nothing left with the prosecution to prove the allegation that the property secured from the possession of the appellant was heroin powder.**

113. **In view of above position the case of the prosecution is highly doubtful against the appellant, therefore, the appellant is entitled to the benefit of doubt which was accordingly given to him at the time of passing short order on 26.3.2007 by which we had allowed the appeal. These are the reasons of the said short order.**

JUDGE

Karachi :

Dated: _____ JUDGE

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No.407 of 2006.

Present : Muhammad Afzal Soomro, and

Rahmat Hussain Jafferi, JJ.

JUDGMENT

Date of hearing : 28.2.2007.

Appellant : Amir Ghulam @ Master through Mr.Ilamdin Khattak, Advocate.

Respondent : The State through Mr.Habib Ahmed, AAG.

Rahmat Hussain Jafferi, J :- **Brief facts giving rise to the present Appeal are that on 22.11.2001 at 2.30 p.m. the complainant Excise Inspector Hyderabad Mumtaz Ali Narejo along with his subordinate staff intercepted the co-accused Behram in a street near Katchi Para, Phaleli, Hyderabad. From his search 200 grams of charas were secured. Such mashirnama was prepared in presence of Excise Constables Nisar Ahmed and Qalab Hussain. The said accused and the property were brought to the Excise Office Hyderabad where the complainant lodged the FIR. It was alleged that on interrogation the said accused Behram disclosed that he purchased the charas from appellant Amir Ghulam. Thereafter the complainant started the investigation, went to Karachi from Hyderabad and raided the house at Jamshed Quarters where the appellant was present. From his possession 260 kg. of charas was**

secured. Such mashirnama was prepared in presence of Excise Constables of Hyderabad. The accused and the property were brought to the Excise Office South Karachi where the complainant made such entry and then brought the appellant and the property to Hyderabad where without lodging fresh FIR submitted the challan in which the co-accused Behram and appellant were shown accused.

114. It is pointed out that no fresh FIR for commission of offence punishable under Section 9(c) of Control of Narcotic Substances Act, 1997 in respect of recovery of 260 kg. charas from the possession of appellant was lodged at Karachi or Hyderabad.

115. The learned Judge CNS, Hyderabad tried the appellant and co-accused Behram jointly by framing the charge on 19.8.2003. In the charge date, time and place of commission of offence allegedly committed by Behram were mentioned whereas date, time and place of commission of offence in respect of the appellant were not mentioned. The prosecution examined two witnesses viz. complainant & mashir and produced Chemical Analyzer's report. The learned trial Judge, after considering the evidence and the statement of the appellant and co-accused recorded under Section 342, Cr.P.C., convicted the co-accused Behram for offence punishable under Section 9(b) of Control of Narcotic Substances Act, 1997 and sentenced him to suffer RI for 02 years and fine of Rs.25,000/= or in default thereof to suffer RI for 02 months. Whereas the appellant was convicted for offence punishable under Section 9(c) of Control of Narcotic Substances Act, 1997 and sentenced him to suffer imprisonment for life and fine of Rs.300,000/= or in default thereof to suffer RI for 06 months with benefit of section 382-B, Cr.P.C. under the impugned judgment dated 11.5.2005. The co-accused Behram has not filed appeal to challenge his conviction and sentence. Whereas the appellant has filed the present appeal.

116. The learned advocate for the appellant has argued that the offence in respect of the appellant was committed within the territorial jurisdiction of Karachi for that no FIR was lodged; that the Excise Police of Hyderabad had no jurisdiction to investigate the case being beyond the territorial jurisdiction of Hyderabad District; that the CNS Court at Hyderabad had also no jurisdiction to try the offence as it was committed at Karachi beyond the territorial jurisdiction of Hyderabad. Therefore, the impugned judgment may be set aside.

117. The learned AAG has conceded the above position and has further added that when the property was secured from Karachi, the Excise Police was required to have lodged the FIR at Karachi; that the entry made at the Excise office at Karachi South should have been treated as FIR and the case should have been investigated by the Excise Police Karachi. However, he has stated that if the case is investigated by the officer who is not competent to do so then the proceedings before the Court cannot be vitiated but the same can continue before a Court of competent jurisdiction. He has further stated that the offence of possessing 260 kg. charas was committed within the territorial jurisdiction of Karachi, therefore, the case should have been challaned and tried by Special Judge (CNS), Karachi, as such, the Special Judge (CNS), Hyderabad had no jurisdiction to try the case, therefore, he has requested that the case may be remanded and it may be ordered to be tried at Karachi.

118. We have given due consideration to the arguments, gone through the evidence with the assistance of learned advocate for the appellant and found that the arguments submitted by the learned advocate for the appellant and AAG have great force. The FIR reveals that the appellant was involved as a conspirator in respect of possession of 200 grams with co-accused Behram, therefore, at the most he should have been tried for the said offence at Hyderabad. From the evidence it is clear that the raid was conducted on the house of the appellant on 23.11.2001 situated in Jamshed Quarter, Karachi as per mashirnama Ex.13/B. As such, a different and distinct offence from that of offence committed by co-accused Behram at Hyderabad was committed within the jurisdiction of Karachi,

therefore, a separate FIR should have been lodged at Karachi. However, the Investigating Officer reported such matter and made such entry in the station diary of Excise Police Office South Karachi. That station diary should have been treated as FIR and matter should have been investigated by the Excise Police of Karachi but it appears that the complainant Mumtaz Ali Narejo, Excise Inspector Hyderabad took upon himself and brought the accused and the property to Hyderabad and challaned the appellant along with Behram in the Court at Hyderabad. His action to that extent was not permissible under the law. He committed irregularity and illegality in taking out the property and accused from the jurisdiction of Karachi where offence was committed. In such circumstances, he should have handed over the accused and the property to the Excise Police of Karachi and was not required to bring them to Hyderabad.

119. Nevertheless, when the case was challaned the trial Court at Hyderabad should have examined the same. While framing the charge, the trial Court must have come to know that the property was secured from Karachi beyond the territorial jurisdiction of Hyderabad, as such, a different and distinct offence from that of accused Behram was committed, therefore, the Court should have not tried the appellant at Hyderabad for the possession of property which was secured at Karachi. Thus, the trial of the appellant in respect of above mentioned property was coram-non-judice at Hyderabad. As such, the impugned judgment is set aside. The case is remanded for retrial of the appellant. As the Court at Hyderabad has no jurisdiction to try the same, therefore, we transfer the case from Special Judge (CNS), Hyderabad to Special Judge-I (CNS Act), Karachi for de novo trial in accordance with law from the stage of charge. The appeal is allowed in the above terms.

120. We found that the complainant had exceeded his jurisdiction, therefore, the Secretary, Excise & Taxation Department should look into this matter and take appropriate action against the complainant in accordance with law so that it should be an eye-opener for others as the accused has suffered mentally, physically, financially and agony of trial of six years.

JUDGE

JUDGE

Karachi :

Dated: 28.2.2007.

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No.408 of 2006.

Present : Muhammad Afzal Soomro, and

Rahmat Hussain Jafferi, JJ.

JUDGMENT

Date of hearing : 28.2.2007.

Appellant : Qabil Khan through Mr.Ilamdin Khattak, Advocate.

Respondent : The State through Mr.Habib Ahmed, AAG.

Rahmat Hussain Jafferi, J :- **Brief facts giving rise to the present Appeal are that on 25.8.2004 at 2.00 p.m. the complainant SHO Muhammad Suleman along with his subordinate staff intercepted the appellant at a house near Bachao Band, Unit No.4, Masjid Farooq Azam, Hyderabad and secured 04 kg. of charas and 01 kg. of opium from his possession. Ten grams from each quantity were secured for sending them to Chemical Analyzer for examination and report. The appellant was arrested and such mashirnama was prepared in presence of mashirs. The appellant and the property were brought to the Police Station where the FIR was lodged. The police, after usual investigation, challaned the appellant in the Court.**

121. **The learned Special Judge CNS, Hyderabad tried the appellant and convicted him for offence punishable under Section 9(c) of Control of Narcotic Substances Act, 1997 and sentenced him to suffer RI for 10 years and fine of Rs.50,000/= or in default thereof to suffer RI for 03 months with benefit of section 382-B, Cr.P.C. under the impugned judgment dated 16.7.2005. The sentence was awarded keeping in view the age of the appellant who was about 60 years of age at that time.**

122. **We have heard the advocate for the appellant, AAG for the State and perused the record of this case very carefully.**

123. **At the trial the prosecution examined three witnesses viz. complainant, mashir and Investigating Officer. The complainant and mashir gave the same details of the incident as mentioned in the earlier part of the judgment, therefore, need not to be repeated. The witnesses were unanimous about the recovery of 04 kg. of charas and 01 kg. of opium from the possession of the appellant on the date, time and place of incident. The witnesses were cross-examined at length but nothing came on record to discredit their evidence. There are no material contradictions or discrepancies in the evidence which can suggest that the appellant has been involved falsely in this case. The appellant, in his statement recorded under Section 342, Cr.P.C., after denying the allegation of the prosecution, stated as under:-**

> **"I am innocent. Police had arrested one Saeed Khan. His brother sent me on 24.8.2004 to meet Saeed Khan at PS Hussainabad. SHO Salman Farooqui met me and on my inquiry, SHO called Saeed Khan from lock up and inquired from me the amount brought me for getting Saeed Khan released. I regretted for any payment, on which SHO started misbehaving. I informed that I am ex-police constable, on which he maltreated me and snatched Rs.7000/= (seven thousand) from me along with one wrist watch and then implicated me in this case falsely. I am heart patient and pray for justice."**

124. **In support of his plea he did not examine himself on oath or examine any witness to prove his case or disprove the prosecution case. The solitary statement of complainant in presence of overwhelming evidence of prosecution can be safely relied upon.**

125. **After considering the material available on the record we are of the considered view that the prosecution has proved the case against the appellant beyond any reasonable doubt. Therefore, there is no justification for interfering with the impugned judgment. Consequently, the appeal is dismissed.**

JUDGE

JUDGE

Karachi :

Dated: 28.2.2007.

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No.278 of 2006.

Present : Rahmat Hussain Jafferi, and

Muneeb Ahmed Khan, JJ.

JUDGMENT

Date of hearing : 12.2.2007.

Appellant : Ashiq Hussain in person.

Respondent : The State through Mr.Habib Ahmed, AAG.

Rahmat Hussain Jafferi, J :- Brief facts giving rise to the present Appeal are that on 08.8.2004 at 10.30 p.m. the appellant was intercepted at the bridge of Jalbani Minor, Taluka Bahria, District Nawabshah as he was found coming in a suspicious condition for whom the police had received spy information that he was carrying charas. From the search of the appellant SHO secured polythene bag from the side pocket of his shirt. On opening it, the complainant found 04 pieces of charas. The said pieces were weighed and its weight came to be 500 grams. The complainant SHO Mumtaz Ali separated 100 grams from all the pieces of charas for sending them to Chemical Analyzer for examination and report. The property was sealed, the accused was arrested and such mashirnama was prepared. The accused and the property were brought to the Police Station where the complainant lodged the report.

126. The learned trial Judge, after going through the evidence led by the prosecution and appellant, convicted the appellant for an offence punishable under Section 9(b) of Control of Narcotic Substances Act, 1997 and sentenced him to suffer RI for 03 years and fine of Rs.30,000/= or in default thereof to suffer RI for 03 months more with benefit of section 382-B, Cr.P.C. under the impugned judgment dated 06.6.2005.

127. We have heard the appellant in person, AAG for the State and perused the record of this case very carefully.

128. At the trial the prosecution examined PW-1 mashir HC Muhammad Younus, complainant SHO Mumtaz Ali and produced Chemical Analyzer's report as Ex.11. Both the witnesses, in their statements, specifically stated that when they reached at the place of incident, on spy information the appellant was found coming who was apprehended. From his search 04 pieces of charas were secured from the side pocket of his shirt which were lying in a polythene bag. 100 grams of charas from all the 04 pieces were separated for Chemical Analyzer which were sent to expert for examination and report. The prosecution produced the report which corroborates the statements of the witnesses and reveals that the material contained in the pocket was charas. Both the witnesses were cross-examined by the defence counsel but nothing came on record to discredit their evidence. There is no enmity between the appellant and the police officers. As such, they have no reason to falsely implicate him in the crime.

129. The appellant took the plea that he was involved at the instance of Shakeel Jalbani but no suggestion was given to the witnesses, as such, the stand taken by the appellant in his statement recorded under Section 342, Cr.P.C. appears to be afterthought. To prove such allegation he examined one witness Gul Hassan who stated such fact and gave the detail that because difference arose between the appellant and the second wife, who was relative of Shakeel Jalbani, the appellant was involved. As already pointed out that the defence taken by the appellant is an afterthought which was not put to the witnesses or taken at the earliest stage of the trial, therefore, it cannot be safely relied upon in presence of overwhelming evidence of the prosecution witnesses.

130. After considering the material available on the record we are of the considered view that the prosecution has proved the case against the appellant beyond any reasonable doubt.

131. Above are the reasons of our short order dated 12.2.2007 by which we had dismissed the appeal.

JUDGE

JUDGE

Karachi :

Dated: _____

IN THE HIGH COURT OF SINDH, KARACHI

Present : Rahmat Hussain Jafferi, and

Muneeb Ahmed Khan, JJ.

JUDGMENT

Date of hearing : 02.2.2007.

Criminal Jail Appeal No.258 of 2003

Appellant : Mureed Abbas through Mr.Mehmood A. Qureshi, Advocate.

Respondent : The State through Mr.Habib Ahmed, AAG.

Complainant Ayaz Khan through Mr.Ejaz Khatak, Advocate.

Criminal Revision Application No.87 of 2003

Applicant : Ayaz Khan through Mr.Ejaz Khatak, Advocate.

Respondents : The State through Mr.Habib Ahmed, AAG.

Mureed Abbas through Mr.Mehmood A. Qureshi, Advocate.

Criminal Revision Application No.95 of 2003

Applicant : The State through Mr.Habib Ahmed, AAG.

Respondent : Mureed Abbas through Mr.Mehmood A. Qureshi, Advocate.

Rahmat Hussain Jafferi, J :- This judgment will dispose of Criminal Jail Appeal No.258 of 2003 and Criminal Revision Applications Nos.87 & 95 of 2003 as they arise out of common judgment.

132. Brief facts giving rise to the present Appeal and Revision Applications are that on 27.7.1997 the accused Mureed Abbas and Sahib Dad were found coming out from the house of Mst.Zarina and Mst.Nasreen Bano, relative of the complainant. The deceased Nasir Khan told Mureed Abbas and Sahib Dad that they should not come in the house of the above named ladies on which both the ladies came out from the house, armed with pistols and told Mureed Abbas and Sahib Dad to kill the deceased Nasir Khan on which the deceased was attacked but because of intervention of Fateh Khan, Iqbal, Yasin and other persons they were saved. As such, the appellant Mureed Abbas and Sahib Dad went away issuing threats to the deceased that he was saved on that date but in future they would kill him.

133. With the above background the complainant alleged that on 11.8.1997 at 9.30 p.m. he along with his nephew deceased Nasir Khan, Kashmir Khan and Dalel Khan were taking tea in Al-Fayyaz Parvaiz Hotel/ Restaurant situated in Mianwali. The appellant Mureed Abbas and complainant Abdul Khaliq, who were police constables, were also taking tea on a nearby table. They were in police uniform and were armed with official weapons. The complainant got up and went towards counter for making payment. At the same time appellant Mureed Abbas and acquitted accused Abdul Khaliq also came at the counter for payment. While the payment was going on deceased Nasir Khan and Kashmir Khan inquired from appellant Mureed Abbas as to why they had come that in spite of the fact that they were restrained from coming in the locality, on

which the appellant and co-accused replied that they were posted at Police Station Pak Colony and they had come in connection with their official duty. On hearing the above reply, deceased Nasir Khan asked Wasil Khan, owner of the restaurant to make inquiry from Pak Colony Police Station as to whether the appellants were posted there and were performing their official duty. On hearing the above fact, co-accused Abdul Khaliq instigated the appellant Mureed Abbas to kill the deceased Nasir Khan as he has got the chance to do so. On the said instigation, the appellant Mureed Abbas, after taking few steps back started firing from his weapon at deceased Nasir Khan, Kashmir Khan and Dalel Khan. They received injuries, therefore, they fell down on the ground and died there. Whereas PW Muhammad Amin received injuries. Then the accused ran away leaving behind their motorcycle. The complainant alleged that the incident was witnessed by PWs Muhammad Ashraf, Muhammad Aslam, Bahawal Khan and restaurant owner Wasil Khan. After the incident the deceased and injured were shifted to hospital. The complainant went to Police Station where he lodged the report.

134. The police, after usual investigation, securing crime weapons and empties from the place of incident, which were sent to Ballistic Expert for examination and report, the report was in positive, challaned the accused in the Court.

135. The learned 1st Special Judge, STA Karachi West tried the appellant and co-accused, acquitted the co-accused Abdul Khaliq whereas convicted the appellant for offence punishable under Section 302(b), PPC and sentenced him to suffer imprisonment for life and fine of Rs.200,000/= which was directed to be paid to the legal heirs of the deceased or in default thereof to suffer RI for 5 years under the impugned judgment dated 14.6.2003.

136. We have heard the advocates for the appellant, complainant, AAG for the State and perused the record of this case very carefully.

137. The learned advocate for the appellant has stated that the motive alleged by the prosecution has not been proved; that the trial Court also formed similar view; that the ocular testimony is not worth relying; that the incident took place due to scuffle between the complainant party and the appellant; and that the SMG of the appellant fired accidentally due to the said scuffle. As such, the appellant has not committed any offence. Alternatively, he has argued that if the Court finds that the appellant has committed the offence then due to above circumstances capital punishment may not be awarded.

138. Conversely, the learned AAG has stated that the prosecution witnesses have fully supported the case; that the appellant has admitted that the deceased received injuries from the weapon which he was holding; and that the medical evidence has supported the ocular testimony. As such the case of murder has been made out, therefore, the sentence may be enhanced. The learned advocate for the complainant has adopted the arguments of the learned AAG.

139. In order to prove the case the prosecution relied upon the motive, ocular testimony, recoveries and admission of the appellant.

140. As regards the motive the trial Court, after examining the evidence of complainant and PW-6 formed the opinion that the prosecution was not able to prove the motive. We have examined the evidence and found that on the point of motive the prosecution relied upon the evidence of PW- 1 complainant Ayaz Khan and PW-6 Fateh Khan. The evidence of complainant shows that he was not present when the first incident took place on 27.7.1997 in which it was alleged that the appellant and his companion Sahib Dad had tried to kill the deceased Nasir Khan but he was saved due to intervention of Fateh Khan, Iqbal and Yasin and then he issued the threats. Thus the evidence of the complainant on the said aspect of the case is hearsay evidence. He did not state that such facts were told to him by any particular person or that the said

person was examined by the prosecution. As regards the evidence of PW-6 Fateh Khan he alleged that he was present in the incident and had moved an application to the SHO Pak Colony Police Station which he produced as Ex.34/A. A perusal of the said application reveals that it was filed against unknown persons, therefore, it is not supporting the statement of PW-6 with regard to the nomination of the appellant in respect of said incident. Furthermore, the applicant does not bear the endorsement of Police Station. The police officers of Pak Colony Police Station were examined but they did not state that they received any such application from the PW-6. As such, the prosecution has failed to establish specific motive alleged in the incident. The finding of the trial Court is hereby confirmed.

141. As regards the ocular testimony the prosecution relied upon the statement of PW-1 complainant Ayaz Khan; PW-2 Wasil Khan, owner of the restaurant; PW-3 Muhammad Ashraf; and PW-4 Bahawal. They gave the same details of the incident as mentioned in the earlier part of the judgment, however, they specifically stated that when the deceased Nasir Khan told PW-2 to inquiry from the Pak Colony Police Station about the official duties of the appellant and co-accused on which the appellant, on the instigation of co-accused, fired at the deceased with the result that deceased Nasir Khan @ Muhammad Khan, Dalel Khan and Kashmir Khan received injuries. Their evidence is corroborated by the medical evidence as according to the medical officer all the three deceased received firearm injuries but he did not find any blackening or charring around the wounds of the deceased which clearly establishes the fact that they were fired upon from a distance and that the deceased had received injuries from the back.

142. In the cross-examination to the witnesses the defence took the plea that a scuffle took place between the deceased and the appellant Mureed Abbas, therefore, due to said scuffle the weapon which was in the hands of appellant was fired and the deceased had received injuries but the witnesses had denied the same. The appellant, in his statement recorded under Section 342, Cr.P.C., took the similar plea and stated as under:-

> "I am innocent. I had gone to the hotel and after taking tea I and co-accused Abdul Khaliq were making payment on the counter when all the three deceased and their companions Wasil, Muhammad Ashraf, Bhawal, prosecution witnesses and their companions whose name I do not know asked me as to why I had come to the hotel, and they attacked me as a result my shoulder pips, cap & watch had fell on the ground, and when they tried to snatch my service K.K. trigger was pressed. I did not kill the deceased intentionally."

143. From the above statement it is clear that the accused has admitted all the main aspects of incident. His plea was that due to attack from the side of deceased persons the weapon was fired but this plea is not supported and corroborated by the medical evidence as if during scuffle the weapon was fired then the deceased would have received injuries from a very close range, therefore, blackening and charring would have been present around the wounds but the medical officer did not find blackening around the wounds of any of the deceased persons. Furthermore, the deceased had received injuries on their backs which clearly demonstrates that the deceased were not facing towards the appellant and were at some distance when they were fired upon. As such, the plea taken by the appellant has not been proved from the evidence available on record. Furthermore, the appellant did not examine himself on oath or examined any witness to prove such assertion. As such, the appellant has failed to prove the allegation made by him. From the ocular testimony and admission of the appellant it has been established beyond any shadow of doubt that the deceased had received injuries from the hands of the appellant.

144. As regards the recovery, the appellant has admitted that from the weapon which he was holding at the time of incident the shots were fired and the deceased had received injuries. The said weapon belonged to acquitted accused Abdul Khaliq as it was issued to him. As

such, it was upon the appellant to show as to how he came in possession of the weapon of co-accused. Such fact was within his exclusive knowledge, therefore, he was required to prove the said fact as required under Article 122 of Qanun-e-Shahadat Order, 1984 but he has failed to prove such fact. The weapon and crime empties secured from the place of incident were sent to Ballistic Expert whose report is

in positive, as such, the prosecution has proved the recoveries.

145. As regards the sentence, it is pointed out that the prosecution had specifically alleged that the incident had taken place due to earlier incident, which took place on 27.7.1997 but the prosecution has failed to prove such motive. Furthermore, the incident took place suddenly without pre-planning or premeditation. It is admitted fact that deceased and the appellant were sitting in the restaurant. If they had planned to commit the murder of the deceased they could have done so earlier but after taking tea they were going out of the restaurant and the incident occurred when the deceased Nasir Khan inquired from the appellant about their presence in the restaurant and asked PW-2 to inquire from the Police Station. As such, the incident took place due to the said conversation and at the spur of moment. Hence these are the mitigating circumstances where the lesser sentence can be awarded to the appellant. The Hon'ble Supreme Court of Pakistan in the case of Jehanzeb v. State (2003 SCMR 98) reduced the sentence when the prosecution failed to prove the motive. As such, the case is not such where extreme punishment of death should be awarded to the appellant.

146. As regards the sentence of fine the provisions of section 302(b), PPC do not provide such sentence, therefore, the trial Court was not justified in awarding such sentence or in default thereof to suffer RI for 5 years. As such, the said sentence is set aside. However, we direct that the appellant shall pay Rs.200,000/= as compensation to the legal heirs of the deceased as provided under Section 544-A, Cr.P.C. or in default thereof to suffer RI for 06 months with benefit of section 382-B, Cr.P.C.

147. Above are the reasons of our short order dated 02.2.2007 by which we had dismissed the appeal with the above modification in the sentence and also dismissed the Revision Applications.

JUDGE

JUDGE

Karachi :

Dated: 08.2.2007

IN THE HIGH COURT OF SINDH, KARACHI

Present : Rahmat Hussain Jafferi, and

Muneeb Ahmed Khan, JJ.

JUDGMENT

Date of hearing : 13.12.2006.

Criminal Appeal No.89 of 2005

Appellant : Sher Khan and two others through M/s.A. Q. Halepota and M. R. Syed, Advocates.

Respondent : The State through Mr.Habib Ahmed, AAG.

Criminal Revision Application No.18 of 2005

Applicants : Mst.Hameeda Bibi in person.

Respondents : The State through Mr.Habib Ahmed, AAG.

Sher Khan and two others through M/s.A. Q. Halepota and M. R. Syed, Advocates

Rahmat Hussain Jafferi, J :- This judgment will dispose of Criminal Appeal No.89 of 2005 and Criminal Revision Application No.18 of 2005 as they arise out of common judgment.

148. The present appeal and Revision are directed against the judgment dated 31.12.2004 passed by the learned III-Additional Sessions Judge, Karachi West by which the learned Judge convicted the appellants for offence punishable under Section 302(b), PPC and sentenced each of them to suffer imprisonment for life.

149. The appellants have challenged their conviction and sentence whereas Mst.Hamida Bibi, mother of the deceased persons has challenged the sentence and requested for its enhancement.

150. Brief facts giving rise to the present appeal and revision are that on 12.4.2001 at about 1.00 or 1.30 a.m. in the night the complainant Meharban and his mother Mst.Hamida Bibi were sleeping in a room of the house situated in Katchi abadi, Gulshan Ghazi Colony, Saeedabad, Karachi whereas his two brothers namely deceased Abdul Rahman, Imran and his sister injured Nasreen were sleeping in the courtyard of the house. The complainant woke up on the sound of firearm report, therefore, his mother asked him to see what had happened outside the room. Therefore, he came out from the room and saw the appellants armed with pistols sitting outside the kitchen. On seeing him the appellants ran away from the house. He raised cries on which his father Muhammad Ramzan, who was sleeping in a truck came and knocked the door, therefore, he opened the same. He informed his father that the appellant Sher Khan along with his sons were running away, therefore, his father chased the appellants but they ran away as his father fell down on the ground. In the meanwhile mohallah people came there. Thereafter he went to his brothers Abdul Rahman and Imran and saw them lying in pool of blood. His brother Abdul Rahman had already died, his sister and his brother Imran were lying injured, therefore, he took them to hospital for treatment. The police arrived in the hospital and his statement under Section 154, Cr.P.C. was recorded at about 7.00 a.m. in the morning. Subsequently, the injured Imran also died in the hospital. Mst.Nasreen was unconscious and was sent to operation theatre. At about 8.00 p.m. the police arrested the appellants but nothing was secured from their possession. The police, after usual investigation, challaned the appellants in the Court where they were tried and convicted as mentioned above under the impugned judgment.

151. We have heard the advocates for the appellant, AAG for the State, Mst.Hamida Bibi, applicant in Criminal Revision and perused the record of this case very carefully.

152. The learned advocate for the appellants has stated that the case of the prosecution rests upon ocular testimony only as there is no recovery of pistol or ballistic expert report. He has further stated that the incident took place during night time but the prosecution did not show

the source of light on which the PWs saw the incident though the PW-4 Muhammad Ramzan deposed that he saw the appellant on moonlight from a distance of half furlong, therefore, the case of the prosecution is highly doubtful against the appellants. He has further stated that the complainant lodged the FIR against the appellants after due consultation as initially nobody knew about the names of culprits as clear from the statements of private witnesses and Investigation Officer.

153. Conversely, the learned AAG has stated that the source of light has not been mentioned by the witnesses, however, when they have stated that they saw the appellants and identified them, then their statements should be believed. He has further stated that the case rests upon only ocular testimony which is confidence inspiring, as such, it is sufficient to convict the appellants. Mst.Hamida Bibi has stated that the case has been proved against the appellants, therefore, the sentence may be enhanced.

154. We have given due consideration to the arguments, gone through the evidence with the assistance of learned advocate for the appellants and found that the prosecution case rests upon ocular testimony only, which consists of 04 witnesses viz. PW-1 complainant Meharban, PW-2 injured Mst.Nasreen, PW-3 Mst.Hamida Bibi and PW-4 Muhammad Ramzan. The evidence of complainant reveals that when he came out from the room he saw the appellants armed with pistols sitting outside the kitchen and then they ran away. The evidence of PW-3 Mst.Hamida Bibi shows that when she came out from the room where she was sleeping she saw the appellants armed with pistols running away from the place of incident. The evidence of PW-4 Muhammad Ramzan reveals that when he reached at the place of incident on the firearm reports he found three persons running away at a distance of about half furlong away from him and he identified them on moonlight. Whereas PW-2 Mst.Nasreen, who is injured in the case deposed that when she woke up on noise she woke up his brother Abdul Rahman and then one of the accused fired at him, other accused fired at his brother Imran and appellant Sher Muhammad fired at her and then she became unconscious.

155. From the evidence of all these witnesses it is clear that they did not disclose the source of light on which they identified the appellants except PW-4. Admittedly, the incident took place in a house which was situated in katchi abadi near hills, therefore, the availability of electricity light in the house of the complainant was an essential factor which was required to have been proved by the prosecution through a positive evidence, particularly when the PW-4 stated that he identified the appellants on moonlight from a distance of half furlong. The silence of the witnesses on the point of source of light is very glaring, alarming and without proof of such fact the mistaking of identity of the culprits at the time and place of incident cannot be ruled out. Thus this fact has materially and adversely affected the prosecution case.

156. In the case of Muhammad Arshad v. State (PLD 1995 S.C. 475) at page 480 it was observed as under:-

> "15. The principle to be extracted from the decided case thus is that the evidence of visual identification is one of the categories of 'suspect evidence' and that ordinarily it is not safe to convict on the basis of such evidence without corroboration. Indeed, in exceptional circumstances, that is, where the evidence of visual identification is of exceptionally good quality, such as, where the offender was known to the witness, there was sufficient light, the witness had had an unobstructed view of the offender and there was a dialogue between the witness and the offender, the evidence may be acted upon."

157. A similar view was taken in another case of Sajjad Hussain v. State (1997 SCMR 174). In the present case there are no exceptional circumstances to take out the case from the general rule of suspect evidence of visual identification as the visual identification was not of exceptionally good quality because there was no sufficient light and that there was no dialogue between the witnesses and the offender, therefore, the said evidence cannot be acted upon.

In the case of Bashir v. State (1995 SCMR 276) at page 282 it has been observed as under:-

> "14. Despite these observations we feel that the rule of prudence does require independent corroboration of the statements of the eyewitnesses qua each accused as an abundant caution, because the evidence of identity based on personal impression has to be approached with considerable caution specially when the whole case hinges upon such evidence. The testimony of sense

cannot be implicitly relied upon even when the veracity of the witnesses cannot be challenged. Chances of error in identification become greatly increased when the identification is based on glimpse in the confusion and pandemonium of the moment at the night even though the night is moonlit or the place of occurrence is fitted with electric bulb."

158. Apart from the above facts the complainant disclosed that when he came out from the room he found the appellants sitting outside the kitchen. This fact is not appealing to the common sense as there was no reason with the culprits to sit outside the kitchen after commission of the offence. Their natural conduct would have been to run away from the place of incident. The time of the incident selected by the appellants clearly demonstrates the fact that the culprits did not want their identity to be found hence the stand taken by PW Meharban appears to be highly doubtful. The statement of PW-3 that she saw the appellants running away from the place of incident clearly demonstrates that she had no ample opportunity to see the faces of the culprits as the culprits were not coming towards her side but they were going towards the other side of the witness. In such a situation it was highly improbable for the witness to have seen the faces of the culprits. The evidence of PW-4 Muhammad Ramzan appears to be also

highly doubtful as it was not possible for a witness to identify the culprits from a distance of half furlong on moonlight.

159. As regards the PW-2, her presence at the place of incident could not be doubted as she was the injured witness but the fact is whether the witness spoke truth or otherwise. Her evidence shows that first she woke up his brother Imran and then she saw the incident. The sequence given by the witness about the incident is such where the incident must have completed within few seconds in confusion and pandemonium of moment. The nature of the injuries received on the person of the injured and non-disclosing the source of light clearly shows that the witnesses had momentary glimpse of the culprits. Particularly, the PW-2 did not disclose the names of culprits who were responsible for causing injuries to her two brothers, as she stated that one culprit fired at Imran and another culprit fired at Abdul Rahman probably for the reason that she could not identify them. Furthermore, it is surprising to note that the name of this witness was not shown in the list of witnesses as the police did not record her statement though she was discharged from the hospital on 24.4.2001. The Investigation Officer failed to explain the cause for not recording the statement of the witness. The learned advocate for the appellants has taken the plea that she was not in her proper senses, therefore, her statement was not recorded because of her injury on her head and was treated by neuron surgeon. He has further stated that due to such state of mind of the witness her evidence cannot be safely relied upon. It is pointed out that in the cross-examination she admitted that she did not give the names of the culprits because she was unable to speak properly nor she gave the names of the culprits to her brother, father and PW Meharban, the complainant. Nevertheless, she was discharged on 24th, thereafter she could have given the names of culprits but she did not do so nor the police officer recorded her statement for the reasons best known to him.

160. Apart from the above facts it is pointed out that the incident took place at about 1.30 a.m. in the night. The police reached in the hospital immediately after receiving the information where the police prepared inquest report of dead body of Abdul Rahman. One of the signatories of the inquest report was the complainant. Subsequently, deceased Imran died at about 5.00 a.m. The police prepared the inquest report which was also signed by complainant Meharban as one of the witnesses. The defence counsel inquired from the Investigation Officer that at the time of preparation of inquest report of deceased Imran the names of the culprits were unknown to him to which he replied in affirmative. He further made clarification that after recording the FIR he came to know about the names of the culprits. This clearly demonstrates the fact that till recording the statement of the complainant the Investigation Officer was unaware of the names of the culprits though the complainant met with the Investigation Officer in between the said period. It is natural conduct of a police officer and eyewitnesses to have first informed the incident to the police officer by disclosing the names of the culprits if they knew them. Hence non-disclosure of the names of the culprits to the police officer in the hospital further supports the plea of the appellant that the culprits were unknown, incident was unwitnessed by the PWs and the appellants were involved after due consultations and deliberations at 7.00 a.m. in the morning when the statement of complainant was recorded. This fact has further been supported by the witnesses PW-7 Hakim Khan and PW-12 Fazalur Rahman

who were the neighbors of the complainant and reached at the place of incident. They did not state that the complainant or any of the witnesses informed them about the names of the culprits at the place of incident though they had taken the deceased to the hospital. The evidence of PW-8 Muhammad Ashfaq, who is also one of the neighbors is also to the same effect.

161. Apart from PW-8 none of the neighboring witnesses disclosed the presence of the complainant Muhammad Ramzan or Mst.Hamida Bibi at the place of incident. About the presence of the complainant and witnesses the case of the appellants is that they were not present in the house where the incident took place but they were present in the house of aunt of the complainant as she had died few days back. In order to support such plea the defence counsel inquired from the complainant that about 3 or 4 days prior to incident his aunt had died to which he replied in affirmative and then he was inquired that because of the said reason they were present in her house on the night of incident to which he replied in affirmative. Thus the presence of the complainant Mst.Hamida Bibi and Muhammad Ramzan at the place of incident was excluded as per statement of complainant. This has also supported the plea of the appellants that the incident was not witnessed by these witnesses.

162. After considering the material available on the record we are of the considered view that the ocular testimony is not worth relying with regard to identity of the appellants at the time and place of incident. A doubt has been created with regard to the identity of appellant, therefore, mistaken of identity cannot be ruled out, hence the case of the prosecution is highly doubtful against the appellants.

163. Above are the reasons of our short order dated 13.12.2006 by which we had allowed the Appeal and dismissed the Revision Application.

JUDGE

JUDGE

Karachi :

Dated: 27.12.2006

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No.254 of 2004 &

Confirmation Case No.3 of 2004.

Present : Rahmat Hussain Jafferi, and

Muneeb Ahmed Khan, JJ.

JUDGMENT

Date of hearing : 15.12.2006.

Appellant : Muhammad Juman through Mr.M. A. Khan, Advocate.

Respondents : The State through Mr.Habib Ahmed, AAG.

Rahmat Hussain Jafferi, J :- This judgment will dispose of Criminal Appeal No.254 of 2004 and Confirmation Case No.3 of 2004 as they arise out of common judgment.

164. Brief facts giving rise to the present appeal are that on 03.3.1997 the deceased Ishaq, PWs Muhammad Saleem and Ibrahim were present in the Buffalo Bara of complainant Adam where they were serving. At about 4.15 p.m. the PWs Muhammad Saleem and Ibrahim heard cries of the deceased who was present in the Bara and saw the appellant and deceased quarrelling with each other. Thereafter the appellant caused knife below on the person of the deceased and then he ran away. PW Saleem went to complainant Adam to inform him about the incident

whereas PW Ibrahim and others took the deceased to hospital. The complainant after hearing the above facts reached the place of incident, but did not find the deceased, as he was shifted to hospital. He, then went to hospital and after seeing the dead body of his nephew Ishaq went to Police Station and lodged the report. The motive behind the incident was that the appellant was suspecting that deceased was having illicit relationship with the wife of his brother. The police after usual investigation challaned the appellant in the Court.

165. The learned II-Additional Sessions Judge, Karachi West tried the appellant, convicted him for offence punishable under Section 302(b), PPC and sentenced him to death under the impugned judgment dated 09.6.2004. The learned trial Judge has sent Reference under Section 374, Cr.P.C. for confirmation of sentence.

166. We have heard the advocates for the appellant, AAG for the State and perused the record of this case very carefully.

167. The case of prosecution rests upon only ocular testimony of PWs 2 & 3 being the eyewitnesses of the incident. Both the witnesses categorically stated that on the date and time of the incident when they were present in the Buffalo Bara where Ishaq was also present they heard cries, found appellant and deceased quarrelling with each other and then the appellant caused knife below on the person of deceased, thereafter he ran away. Both the witnesses were subjected to cross-examination but nothing came on record to discredit their evidence. The witnesses are natural and independent. They have no enmity with the appellant nor any enmity was suggested between them.

168. The learned advocate for the appellant has pointed out that the PW-2, in the cross-examination, stated that he had not seen the deceased receiving knife injury. In this connection it is pointed out that the defence counsel asked a question about the knife lying in the Court that the accused caused the injuries with that particular knife to which he gave the reply in negative. From the said reply it does not mean that the PW did not witness the incident. He saw the incident but he was not sure whether the appellant caused the injury with the knife which was lying in the Court. Thus it has not affected the veracity of this witness. The learned advocate for the appellant has further pointed out that PW-3 stated in the cross-examination that he had stated before the magistrate that he had not seen the accused causing injuries to the deceased. He further admitted that in the said statement that he went to deceased Ishaq who was bleeding and appellant Jumman was running away from there. Even if we discard the first part of his statement then again his evidence would be that he saw the deceased bleeding and appellant Jumman running away from the place of incident. If his statement and the statement of PW-2 are read together then there will be no hesitation in holding that it was the appellant who caused the injuries to the deceased.

169. The ocular testimony is fully supported and corroborated by the medical evidence as the medical officer found one stab injury on the left side of the chest and the deceased who died on account of the said injury. Thus the ocular testimony is confidence inspiring and we do not find any reason to disbelieve the said evidence.

170. As regards the motive, the prosecution alleged that the appellant was suspecting that the deceased had illicit connection with the wife of his brother. In order to prove the said motive the prosecution examined complainant who stated such facts. The prosecution also examined PW-8 Akhtar Hussain. His evidence reveals that on 01.3.1997 viz. two days prior to the incident he settled a dispute between the appellant and deceased Ishaq over the suspicion of deceased having illicit relationship with the wife of the brother of the appellant. The said statement of the witness went unchallenged. Furthermore, the appellant, in his statement recorded under Section 342, Cr.P.C., admitted such motive by stating that the complainant had involved him as the deceased was keeping bed eye over the wife of his brother. Thus, the appellant had motive to commit the offence.

171. From the facts of the case it has been established beyond any shadow of doubt that the prosecution has proved the case against the appellant.

172. As regards the sentence, we have found that the appellant committed the offence to save the honour of his family and that too by causing a single below, therefore, these are the mitigating circumstances where a lesser sentence can be awarded. Reliance is placed on cases of Ahmad v. State (1982 SCMR 1049), Muhammad Shafi v. Aziz Ahmed (1977 SCMR 518) and Muhammad Younus v. State (1981 SCMR 422).

173. After considering the material available on the record we are of the opinion that the sentence of death can be reduced to imprisonment for life. The learned trial Judge did not pass the order of compensation, therefore, while reducing the sentence of the appellant, we passed the order of compensation while dismissing the appeal by our short order dated 15.12.2006, which reads as under:-

> "For reasons to be recorded separately the conviction for offence punishable under Section 302(b), P.P.C. awarded to the appellant under the impugned judgment is maintained, but we reduce the sentence from death to imprisonment for life with benefit of Section 382(B), Cr.P.C. The appellant is directed to pay Rs.200,000/- as compensation to the legal heirs of the deceased as provided under Section 544-A, Cr.P.C. or in default to suffer R.I. for six months. The appeal with the above modification in sentence is dismissed. The confirmation case is also dismissed."

JUDGE

JUDGE

Karachi :

Dated: _____

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No.272 of 2005.

Present : Rahmat Hussain Jafferi, and

Mrs.Yasmin Abbasey, JJ.

JUDGMENT

Date of hearing : 07.12.2006.

Appellant : Syed Murad Ali Shah through Mr.Deedar Hussain K. Qureshi, Advocate.

Respondent : The State through Mr.Habib Ahmed, AAG.

Rahmat Hussain Jafferi, J :- **Brief facts given rise to the present appeal are that on 14.6.2004, the complainant ASI Qadir Bux of Police Station Garhi, District Thatta along with his subordinate staff, on the spy information, reached Link Road leading to Dargah Shah Murad Shah where he found the appellant standing near a car. The appellant, seeing the police party, tried to run but he was apprehended. From his personal search one theli containing 30 pieces of charas weighing 115 grams were secured. Out of which 10 grams were separated for Chemical Analyzer's report. The car was searched from which some liquor was found. The police arrested the appellant, sealed the property at the place of incident and prepared such mashirnama. The appellant and the property were brought to the Police Station where FIR was lodged. The police, after usual investigation, challaned the appellant in Court.**

174. The learned Special Judge Control of Narcotic Substances, Thatta tried the appellant and convicted him for offence punishable under Section 9(b) of Control of Narcotic Substances Act, 1997 and sentenced him to suffer RI for two years and fine of Rs.500/= or in default thereof to suffer RI for one month more with benefit of section 382-B, Cr.P.C. under the impugned judgment dated 30.6.2005.

175. We have heard the Advocate for the appellant, AAG for the State and perused the record of this case very carefully.

176. The learned advocate for the appellant has pointed out that there is discrepancy in the Chemical Analyzer report and oral testimony on the receipt of packet as according to the complainant the sample was wrapped in a cloth, mashir stated that sample was wrapped in khaki paper whereas the Chemical Analyzer received the packet in white paper, therefore, the property was not same which was recovered from the appellant, hence the case has become doubtful. The learned AAG has stated that he has no explanation to offer with regard to the said discrepancy.

177. We have given due consideration to the arguments, gone through the material available on the record and found that the prosecution examined two witnesses viz. complainant PW-1 Qadir Bux, mashir PW ASI Tahir Ayub and produced Chemical Analyzer report. Both the witnesses gave the same details of incident. They specifically stated that 30 pieces of charas lying in a theli were secured from the possession of the appellant, out of which one piece of charas weighing 10 grams was separated for Chemical Analyzer's report. The property was opened in Court which contained 29 pieces of charas. The sample received by the Chemical Analyzer also shows that it was one piece of charas. The weight of the charas was 10 grams, as such, there is no discrepancy with regard to the number of pieces of charas and weight.

178. The discrepancy pointed out by the learned advocate for the appellant appears on the record. It is pointed out that the incident took place on 14.6.2004. The statement of complainant was recorded after one year i.e. 02.5.2005 and statement of mashir was recorded on 08.6.2005. Both the witnesses are police officials. During their service they must have conducted various investigations of similar type of cases. They might have been confused with regard to preparation of packet at the place of incident. This fact can very well be judged from the fact that the complainant deposed that the sample was sealed in a cloth whereas mashir deposed that the sample was sealed in a khaki paper. Thus, this is a human error appearing on the record which has developed due to the fact that the evidence was recorded after lapse of 12 months of the incident and particularly both the police officers must have conducted various investigations. Because of the said facts the discrepancy might have occurred in the packet received by the Chemical Analyzer. The said discrepancy is not such where the entire case of the prosecution can be discarded. The evidence of both the witnesses is unanimous on each and every aspect of the case. There are no contradictions in their evidence, as such, we do not find any reason to disbelieve their evidence.

179. After considering the material available on the record we are of the considered view that the prosecution has proved the case against the appellant beyond any reasonable doubt, therefore, the appellant was rightly convicted by the trial Court.

180. above are the reasons of our short order dated 07.12.2006 by which we had dismissed the appeal and remanded the appellant to judicial custody to serve out the sentence.

JUDGE

JUDGE

Karachi :

Dated: 08.12.2006

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No.245 of 2006.

Present : Rahmat Hussain Jafferi, and

Mrs.Yasmin Abbasey, JJ.

JUDGMENT

Date of hearing : 14.11.2006.

Appellant : Rehman Ali @ Manay through Mr.Falak Sher Khan, Advocate.

Respondent : The State through Mr.Habib Ahmed, AAG.

Rahmat Hussain Jafferi, J :- Brief facts given rise to the present appeal are that on 22.1.2003 at 12.10 midnight the complainant ASI Shah Faisal along with his subordinate staff reached street near Madina Masjid, Sherkhanabad on spy information, where they found a person standing in suspicious condition. The said person was apprehended. On inquiry the person disclosed his name as Rehman Ali, the present appellant. During search of the appellant the police recovered 15 rods of charas and cash of Rs.35/= from the right side pocket of his shirt. The property was weighed which came to be 150 grams. The complainant took out one rod and separated it for sending the same to Chemical Analyzer. The weight of the said rod was 10 grams. The property was sealed, the appellant was arrested and such mashirnama was prepared. The appellant and the property were brought to the Police Station where the FIR was lodged. The case was investigated by PW-3 SI Dillip Kumar. The Chemical Analyzer reported that the sample was heroin. The police, after usual investigation, challaned the appellant in Court.

181. The learned Special Judge, Court No.II, CNS Karachi tried the appellant and convicted him for the offence punishable under Section 9(b) of Control of Narcotic Substances Act, 1997 and sentenced him to suffer RI for two years and two months and fine of Rs.20,000/= or in default thereof to suffer RI for two months more with benefit of section 382-B, Cr.P.C. under the impugned judgment dated 27.4.2006.

182. We have heard the Advocate for the appellant, AAG for the State and perused the record of this case very carefully.

183. At the trial the prosecution examined 03 witnesses, out of them one was complainant, second was mashir of the recovery of arrest and the third was Investigation Officer. The complainant and mashir gave the same details of the incident. They specifically stated that 15 rods of charas were recovered from the pocket of the appellant weighing 150 grams out of which 10 grams were separated for Chemical Examination and report. The appellant and the property were brought to the Police Station. The case was investigated by PW-3 SI Dillip Kumar. He stated that the complainant did not handed over the entire property as he received only a pocket which was sample and he sent the same to the Chemical Analyzer. At the trial the prosecution produced the charas in brown envelope. The Chemical Analyzer consumed the entire property which he had received for examination as is clear from the Chemical Analyzer's report Ex.P/4. The allegation of the prosecution is that 15 rods of chars were secured from the possession of the appellant and the accused and the property were brought to the Police Station where the FIR was lodged. The case was investigated by PW-3 but he did not state that he received the 15 rods from the complainant during the investigation. As such, the prosecution story on the said aspect of the case has been belied by the Investigation Officer. In such a situation it is not known from where the charas was produced before the Court. There is no authenticity that the charas produced in the Court was same which was secured from the possession of the appellant. The said charas was also not shown to the Investigation Officer. As such, a doubt has been created in the prosecution story. Thus it is very unsafe to rely upon the evidence of the prosecution witnesses and the same is discarded.

184. However, the appellant, in his plea recorded in pursuance to the charge, admitted his guilt but took the plea that only 5 or 6 grams of charas were recovered and not more than that. It is well-settled principle of law that when the conviction is solely based on the admission/confession of the accused then the confession of the accused is to be accepted as a whole and it cannot be accepted in piecemeal. We accept the plea of the guilt as it is, therefore, the prosecution has proved the case to the extent that 5 or 6 grams of charas were recovered from the appellant. Hence the appellant has committed an offence punishable under Section 9(a) of Control of Narcotic Substances Act, 1997. Hence he is convicted for the said offence. The learned advocate for the appellant has stated that the appellant has remained in jail for a period of about 7 to 8 months. We find that the said period of imprisonment will be sufficient to meet the ends of justice, therefore, the appellant is sentenced to imprisonment already undergone. The appellant is in custody. He should be released forthwith if not required in any other custody case. With the above modification in the conviction and sentence, the appeal is dismissed.

JUDGE

JUDGE

Karachi :

Dated: _____

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No.303 of 2005.

Present : Rahmat Hussain Jafferi, and

Ali Sain Dino Metlo, JJ.

JUDGMENT

Date of hearing : 29.3.2006.

Appellant	:	The State/ANF Sindh through Mr.Sibtain Mehmood, Special Prosecutor ANF.
Respondent	:	M/s.Naushad Ali & Saleem Associates Builders and Developers through Miss Wajida Maryam Mehdi, Advocate.

Rahmat Hussain Jafferi, J :- Brief facts given rise to the present appeal are that Ghulam Abbas Memon, Inspector Anti-Narcotic Force, Karachi, during investigation of Crime No.83/2001 of Police Station Main ANF, Karachi, vide order dated 11.4.2002, froze the Flat No.202, Marine Heights-III, G-3, Block-2, Clifton, Karachi in the name of Giraan Bibi, mother of the accused Abdul Qudoos involved in the above mentioned crime. The said order reads as under:-

"M/s.Naushad & Salim Associates,

Builders and Developers

G-3, Block-2, Clifton,

Karachi.

Subject: ORDER U/S 6(5) OF ANF ACT 1997 FOR FREEZING OF ASSETS/PROPERTIES OF ACCUSED ABDUL QUDDUS S/O ABDUL RASHEED (CASE NO.38/2001 OF PS MAIN ANF KARACHI.

Ref:- your office letter dated 20th Mar 2002 refers.

1. I, Ghulam Abbas Memon, Inspector, Anti Narcotics Force, Karachi am conducting an enquiry u/s 6(5) of Anti Narcotics force Act 1997 into the assets/properties of drug baron Abdul Quddus s/o Abdul Rasheed and his relatives/ associates.

2. During the course of the above said enquiry the assets/properties detailed below have been traced. In my opinion there is reasonable suspicion that this property has been acquired through illicit involvement in narcotics by the above said drug baron and being held by him and his family members.

Details of assets/properties.

Flat No.202, Marine Heights-III, G-3, Block-2, Clifton, Karachi in the name of Giran Bibi mother of accused Abdul Quddus.

3. Whereas in my opinion the above mentioned assets is likely to be transferred or otherwise disposed of, therefore, in pursuance of authorization by the Director General, Anti Narcotics force and in exercise of power u/s 6(5) of ANF Act 1997, I, the enquiry officer, hereby order that you being in possession of office of Regional Directorate, Anti Narcotics Force, Karachi and this order shall be subject to any order made by the Court having jurisdiction in the matter.

4. Please also note that any contravention of the above order is punishable with rigorous imprisonment for a term which may extend to three years or with fine or with both as

provided u/s 6(6) of the ANF Act 1997.

Sd/-

(GHULAM ABBAS MEMON)

INSPECTOR

ANTI NARCOTICS FORCE

KARACHI"

185. The order was communicated to the respondent. On 13.11.2004 the respondent moved an application before the trial Court with a prayer to set aside the above mentioned order. The learned trial Judge, after hearing the parties' counsel set aside the said order and further ordered that the property should be reverted to the respondent, hence the present appeal.

186. We have heard the Special Prosecutor for ANF, advocate for the respondent and perused the record of this case very carefully.

187. From the record it appears that the Inspector ANF froze the property in exercise of powers under Section 6(5) of Anti-Narcotic Force Act, 1997 (herein after referred to as 'Act'). Before exercising such powers the officers of the Narcotic Force are required to comply with the provisions of subsection (4) of Section 6 of the Act. The said provisions are as under:-

> "6(4) Notwithstanding anything contained in any other law for the time being in force, a member of the Force not below the rank of Inspector authorized by the Director-General, may inquire, investigate and trace the assets of a person who has committed an offence referred to in clause (a) of section 5 or when in his opinion, there is a reasonable suspicion that the said assets were acquired through illicit involvement in narcotics; and may, for this purpose, require a bank or other financial institution or departments, whether under the control of Government or otherwise to furnish such information as he may specify.
>
> 6(5) If in the opinion of a member of the Force, conducting an inquiry investigating or tracing any assets under sub-section (4), which is likely to be removed, transferred or otherwise disposed of, such member may, notwithstanding anything contained in any other law for the time being in force, by order in writing direct the owner or any person who is for the time being in possession thereof, not to remove, transfer, or otherwise dispose of such property in any manner except with the previous permission of that member and such order shall be subject to any order made by the court having jurisdiction in the matter."

188. Before passing an order under subsection (5) the officer is first required to form an opinion that there was reasonable suspicion that the said assets were acquired through involvement in narcotics. The learned Special Prosecutor was inquired to show us any material on which the Inspector formed opinion of required reasonable suspicion but he was unable to point out any such material from the record except the order of the Inspector and the letter dated 20.3.2002 of the respondent addressed to the Inspector of ANF informing him that Abdul Qudoos approached them for booking the said flat in the name of his mother Mst.Giraan Bibi and had paid Rs.23,70,000/= and still a balance of amount of Rs.16,30,000/= was to be paid.

189. The entire case hinges upon the forming of opinion of required reasonable suspicion. The word 'reasonable' has been derived from word 'reason' which has been interpreted in the case of Gurdial Singh v. State of Punjab (1979) 2 SCC 368 at page 377 as under:-

"Reasons are the links between the materials on which certain conclusions are based and the actual conclusions."

190. The word 'reasonable' has been defined in Chambers 21st Century Dictionary as under:-

"Reasonable: 1. sensible; rational; showing reason or good judgment. 2. willing to listen to reason or arguments. 3. in accordance with

reason. 4. fair or just moderate; not extreme or excessive."

191. In Raghbir Singh v. CIT (AIR 1958 Punjab 250) the word 'reasonable' has been interpreted as rational ─ according to the dictates of reason and not excessive or immoderate and an act is reasonable when it is conformable or agreeable to reason, having regard to the facts of the particular controversy. The Supreme Court of India in the case of Rena Drago v. Lalchand Soni (1998) 3 SCC 341 observed that it is difficult to give an exact definition of the word 'reasonable'. Reason varies in its conclusions according to the idiosyncrasy of the individual and the times and the circumstances in which he thinks. The word 'reasonable' has in law prima facie meaning of reasonable in regard to those circumstances of which the actor, called upon to act reasonably, knows or ought to know. In the case of R K Garg v. Union of India 1982 SCC (Tax) 30 at page 64 it has been observed that terms like 'reasonable', 'fair', 'just' derive their significance from existing social conditions. That action is called reasonable which an informed, intelligent, just minded, civilized man could rationally favour. The concept or reasonableness does not exclude notions of morality and ethics.

192. The words 'reasonable suspicion' has been defined in Judicial Dictionary 13th Edition, K J Aiyar as under:-

"What is a reasonable complaint or reasonable suspicion, no doubt depends upon the facts of each case, but it should be at least founded upon some definite feelings tending to throw suspicion on the person arrested and the proceedings.

> Suspicion and credible information. What is a reasonable suspicion or credible information must depend on the circumstances of each particular case, but it must be based on some definite facts tending to throw suspicion on a person arrested and not on mere vague surmises or information."

193. The same words have been defined in Black's Law Dictionary 17th Edition as under:-

"reasonable suspicion. A particularized and objective basis, supported by specific and articulable facts, for suspecting a person of criminal activity. A police officer must have a reasonable suspicion to stop a person in a public place."

194. It will be noticed by reading the subsection (4) that the word 'suspicion' has been qualified with the word 'reasonable', therefore, while forming the opinion, as required under subsection (4), the opinion must be based on some reasons which shall serve as links between the material on which the suspicion is based and the opinion. Thus, the reasonableness of the suspicion has to be shown by the prosecution by displaying its cards to the Court, as it may possess or is expected to possess as demonstrating evidence available in the case, both direct or circumstantial. If such reasons existed tending to connect the assets and that too were acquired through the illicit involvement in the narcotics by the accused involved in the case then the officer may obtain the required information. If the above conditions are fulfilled then under subsection

(5) the officer is further required to form opinion that the said property is being removed, transferred or otherwise disposed of then the property can be frozen. However, if it is found that there are no reasons assigned by the authority of the required suspicion or for transferring etc. the property then the absurdity stand exposed on a plain view, therefore, the freezing order would become nullity.

195. Further, in the present case, there is nothing on record which can suggest that it was founded upon some definite feelings and facts tending to show the required suspicion or forming opinion of the transfer etc. of the property. Thus the link between the opinion and suspicion is missing.

196. A perusal of order of Inspector dated 11.4.2002 shows that the Inspector did not assign any reason for forming his opinion on the points mentioned in subsections (4) & (5) of Section 6 of the Act. It is pointed out that under the newly added Section 24-A in the General Clauses Act, 1897 even an administrative authority, office or person making an order or issuing a direction under the powers conferred by or under any enactment, is now obligated, so far as necessary or appropriate, to give reasons for making the order or, as the case may be, for issuing the direction. Thus, the Inspector was required to mention the reasons in his order but he failed to do so. However, the learned Special Prosecutor was asked to show us from the record that the Inspector had assigned such reasons so as to upheld the findings of Inspector but he could not do so.

197. The Hon'ble Supreme Court of Pakistan in the case of Zain Yar Khan v. Chief Engineer, C.R.B.C. WAPDA (1999 S.C. 1105) at page 1113 observed as under:-

> "This throws up the questions, as finding mention in the leave granting order, whether the appellate order suffered from an incurable infirmity, bereft, as it was, of reasons resulting in the remand. There can be no gain-saying the fact that quasi judicial order should, in principle, carry due reasons. Indeed, as has lately been recognized, in virtue of the newly added Section 24-A in the General Clauses Act, 1897, even an administrative authority, office or person, making an order or issuing a direction under the powers conferred by or under any enactment, is now obligated, so far as necessary or appropriate, to give reasons for making the order or, as the case may be, for issuing the direction. In eventualities where due reasons are missing from such an order, an affectee stands armed with a right to require the authority, office or person concerned, to furnish due reasons and an obligation attaches in response to furnish such to the aggrieved party. In departmental appeals, equally covered by Section 24-A ibid. but belonging to a higher genus, as the same attract quasi judicial functions, necessary treatment of reasons therein, cannot but be a sine qua non for orders issuing therefrom. Even so, the for a, in which such orders are questioned, in the instant case the Service Tribunal and ultimately this Court, have a discretion either to simply set aside the departmental appellate orders for want of necessary reasons or, where the justice of a case so demands, to discover the reasons, if discernable from the record, to uphold the finding, if the finding appears to be otherwise just, convenient and purposeful."

198. Thus, the order dated 11.4.2002 passed by the Inspector Ghulam Abbas Memon is not sustainable under the law.

199. The learned trial Judge under the impugned order directed that the property should be reverted to the applicant who is the builder though the property was booked in the name of Mst.Giraan Bibi. The trial Court, in the present proceedings and being Criminal Court, cannot decide the question of title of property that is for the Civil Court to decide the said question. In the circumstances, the property is required to be reverted to its original position as stood on the date on which the Inspector passed the order dated 11.4.2002, that is accordingly done.

200. Above are the reasons of our short order dated 29.3.2006, by which we had dismissed the appeal.

JUDGE

Karachi : JUDGE

Dated: _____

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No.361 of 2004 &

Criminal Appeal No.382 of 2004.

Present : Muhammad Afzal Soomro, and

Rahmat Hussain Jafferi, JJ.

JUDGMENT

Date of hearing : 20.12.2005.

Appellants : Kamran through Mr.Sarfraz Khan Tanoli, Advocate.

Shafique Ahmad @ Shahjee through Mr.Khadim Hussain, Advocate.

Respondent : State through Mr.Habib Ahmed, AAG.

Rahmat Hussain Jafferi, J :- This judgment will dispose of Criminal Appeals Nos.361/2004 and 382/2004 as they arise out of a common judgment.

201. Brief facts given rise to the present appeals are that on 22.4.1996 in between 6.00 p.m. to 7.30 p.m. the appellants along with three unknown persons armed with deadly weapons, in front of house of Usman Ali situated at Defence Housing Society, Phase-V, Karachi,

intercepted the car of complainant Kunwar Idrees who was travelling along with his daughter-in-law Dr.Sabahat. Two culprits abducted the above persons in the car and took them to Sunset Boulevard. During the journey the culprits robbed the jewelry and watch from Dr.Sabahat on pistol point and thereafter the culprits went away leaving behind the complainant and PWs in the car. The complainant lodged such FIR. The police, after usual investigation, challaned the appellants along with minor accused Jehanzeb in the Court of Special Judge, STA Karachi. The trial Court separated the case of Jehanzeb, tried and convicted the appellants under the impugned judgment dated 24.8.2004.

202. The learned advocates for the appellants have raised a preliminary point that the appellants were not properly defended before the trial Court because the charge and evidence was recorded in the absence of their advocates, therefore, the trial has been vitiated as the case involves capital punishment. On the above point Mr.Azizullah Shaikh, Senior Counsel, was appointed as Amicus Curiae to assist the Court.

203. We have heard Mr.Azizullah Shaikh, Amicus Curiae, advocates for the appellants, AAG and perused the record of this case very carefully.

204. Mr.Azizullah Shaikh has argued that offence punishable under Section 365-A, PPC involves capital punishment, therefore, the appellants were required to be defended by a counsel and the trial is required to be conducted in presence of their advocate; that if the appellants were not able to engage an advocate then the trial Court was required to provide the assistance of a counsel on State expense; that the charge and the evidence was recorded in the absence of the advocates of the appellants; that the trial in absence of the advocates for the appellants is an illegal trial which cannot be cured under Section 537, Cr.P.C. He has relied upon State v. Zulfiqar Ali Bhutto (PLD 1978 Lahore 523) and Baz Muhammad v. State (PLD 2003 Quetta 73). He has also referred to Circular 6 of Federal Capital and Sindh Courts Criminal Circulars and Rule 35 of Sindh Chief Court Rules (Appellate Side) on the said subject. Learned advocates for the appellants and AAG for the State have adopted the arguments of Mr.Azizullah Shaikh. Learned AAG has further stated that the case may be remanded to the trial Court for proceeding in accordance with law.

205. We have given due consideration to the arguments, gone through the R&Ps and found that the case involves capital punishment.

206. The record reveals that on 08.11.2000 the charge was framed against appellants Shafique, Jahanzeb and Kamran. At that time they had not engaged any advocate. On 06.12.2000 Mr.Yousuf Iqbal, Advocate filed power on behalf of minor co-accused Jehanzeb (whose case has been separated). Mr.Iftikhar Ahmed, Advocate filed power on behalf of appellant Shafique Ahmed on 10.1.2001. On the same date Mr.Gul Zaman Khan and Mr.Ilyas Irfan, Advocates filed power on behalf of appellant Kamran. On 24.1.2001 the trial Court examined PWs 1 & 2. On that date the advocate for the appellants Jehanzeb and Kamran cross-examined both the witnesses but the advocate for the appellant Shafique was not present, therefore, the trial Court asked the appellant to cross-examine the witnesses but he did not put any question to them. On 03.10.2001 the trial Court examined two more witnesses. The remaining witnesses were examined on 23.10.2002, 22.4.2002 and 20.1.2004. On the said dates none of the advocates for the appellants was present, therefore, the trial Court asked the appellants to cross-examine the witnesses but they did not put any question to them. Thereafter the trial Court recorded the statements of the appellants under Section 342, Cr.P.C. and then after hearing the SPP passed the impugned judgment.

207. From the above proceedings it is clear that when the charge was framed at that time the appellants were unrepresented by any advocate. Only PWs 1 & 2 were cross-examined by the advocate for the appellant Kamran. The advocate for the appellant Shafique was absent

on that date and thereafter the evidence was recorded in the absence of the advocates for the appellants. Thus, it has been established beyond any shadow of doubt that the trial Court proceeded with the case in the absence of advocates for the appellant whereas only two witnesses were examined in the presence of advocate for the appellant Kamran. It is also an admitted position that offences punishable under Section 365-A, PPC involves capital punishment.

208. Now it is to be seen whether the trial conducted in the above manner has been vitiated or otherwise.

209. Article 10 of Constitution of Islamic Republic of Pakistan, 1973 provides that the accused shall not be denied the right to consult and be defended by a legal practitioner of his choice. Under Section 340(1), Cr.P.C. accused is entitled, as a matter of right, to be defended by a pleader. The said provision reads as under:-

> "**340. Right of person against whom proceedings are instituted to be defended and his competency to be a witness.** (1) Any person accused of an offence before a Criminal Court or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleaded."

210. Circular 6 of Chapter VII of Federal Capital and Sindh Courts Criminal Circulars provides that on the committal of the case the Magistrate is required to ascertain from the accused as to whether he intends to engage a legal representative at his own expense otherwise the Sessions Court would provide an advocate on State expense to defend him. The said Circular reads as under:-

"6. In all cases in a Court of Sessions in which any person is liable to be sentenced to death, the accused shall be informed by the Committing Magistrate at the time of committal, or if the case has already been committed, by the Sessions Court that, unless he intends to make his own arrangements for legal assistance, the Sessions Court will engage a Legal practitioner at Government expense to appear before it on his behalf. If it is ascertained that he does not intend to engage a legal representative at his own opense, a qualified Legal Practitioner shall be engaged by the Sessions Court concerned to undertake the defence and his remuneration, as well the copying expenses incurred by him, shall be paid by Government.

> The appointment of an advocate or pleader for defence should not be deferred until the accused has been called upon to plead. The advocate or pleader should always be appointed in sufficient time to enable him to take copies of the deposition and other necessary papers which should be furnished free of cost before the commencement of the trial. If after the appointment of such legal representative the accused appoints another advocate or pleader, the advocate or pleader appointed by the Court may still in its discretion be allowed his fee for the case."

211. Rule 35 of Sindh Chief Court Rules (Appellate Side) also deals with the same subject which reads as under:-

> "**35. In what matters advocate appointed at Government cost.** – When on a submission for confirmation under Section 374 of the Code of Criminal Procedure, 1898, or on an appeal from an acquittal or on an application for revision by enhancement of sentence the accused is undefended, an advocate shall be appointed by the Division Court to undertake the

defence at the cost of Government in accordance with the Government notification or rules relating thereto. Such advocate shall be supplied a copy of the paper-book free of cost."

212. From the above position it follows that an accused is required to be defended by a counsel of his choice as a matter of right. If an advocate appears on behalf of the accused then he is required to be allowed to defend the accused. In an offence involves capital punishment, the law protects the rights of the accused as a duty has been cast upon the State to bear the expense of the advocate if the accused is unable to engage an advocate. When the committal proceedings were being conducted then at the time of committing the accused to the Court of Sessions the Magistrate was required to inquire from the accused as to whether he would like to engage advocate of his choice and in case he was unable to do so then the accused was required to be informed that the Sessions Court would provide him an advocate on State expense to defend his case. The committal proceedings have been abolished. Therefore, now the Magistrate, before the case is sent up to the Court of Sessions, shall inquire from the accused about the requirement of Circular 6 of the Federal Capital and Sindh Courts Criminal Circulars. Such facts should be mentioned in the diary to facilitate the Court of Sessions to decide in which cases a counsel on State expense is required to be appointed. In other cases or in which the Magistrate has not obtained the required information, as soon as the accused appears before the Court of Sessions, it is the duty of the said Court to ascertain whether the accused is represented by an advocate or otherwise. If he is not being represented by an advocate then the Sessions Court is bound to engage a legal practitioner on Government expense to defend the accused. It is one of the duties of the Court of Sessions to see that the accused is represented by a qualified legal practitioner in the cases involving capital punishment. Thus, it is the mandate of the law that cases involving capital punishment shall not be tried in the absence of advocate for the accused or proceeded with, without first appointing an advocate for the accused to defend him if he is unable to do so.

213. In the present case both the appellants had engaged their advocates, therefore, they had exercised their right granted to them under the Constitution and Criminal Procedure Code but at the time of framing the charge the appellants were un-represented as they subsequently engaged their advocates before recording the evidence of witnesses. However, on the date when the statements of PWs 1 & 2 were recorded the advocate for one of the appellants viz. Shafique was absent. The advocate did not send any application to the Court for adjourning the case nor the accused requested the Court for adjourning the matter. Subsequently, the trial Court examined the remaining witnesses in the

absence of both the advocates. The position was same as neither the advocates sent any adjournment application nor the appellants requested the Court to adjourn the matter. Nevertheless, it was one of the duties of the trial Court in trying the case of capital sentence to be more cautious and careful in examining the witnesses, as such, the trial Court should have inquired from the accused about the non-attendance of their advocates before examining the witness. From the record it appears that the trial Court did not perform its function diligently so as to protect the rights of the appellants in the case involving capital punishment when their advocates were absent. We are conscious of the fact that the accused persons are trying various methods to protract the trial on various grounds and one of the grounds of such tactics is not engaging advocates or directing their advocates not to appear before the Court so that the case may not proceed. The trial Court has to keep a balance between the complainant party and accused so that nobody should feel prejudice or neglected. The Court may take appropriate steps to frustrate the design of the accused to delay the matter either of non-engaging the advocate or the advocate remaining absent without sufficient cause on the dates of hearings particularly, when the witnesses attend the Court. In such a situation the trial Court may postpone the hearing of case for a certain period facilitating the accused to make his representation through his counsel. However, the trial Court shall not give undue latitude to the accused and allow the case to be adjourned for an unreasonable period. In order to meet with the situation the legislature has taken the matter in hand by

providing a provision in Anti Terrorism Act, 1979, under which Section 8 thereof has been substituted by Act No.II of 2005 on 10.1.2005 by which the Anti Terrorism Court has been allowed to adjourn cases if the advocate of the accused does not appear before the Court for two consecutive hearings and the Court has been authorized to appoint a Counsel to defend the accused on State expense and proceed with the matter. The said provision reads as under:-

> "(8) An anti-terrorism Court shall not give more than two consecutive adjournments during the trial of the case. If the defence counsel does not appear after two consecutive adjournments, the Court may appoint a State Counsel with at least seven years standing in criminal matters for the defence of the accused from the panel of advocates maintained by the Court for the purpose in consultation with the Government and shall proceed with the trial of the case."

214. Thus, the legislature was conscious of the fact that the accused persons were trying to adopt delaying tactics on the above ground so that the cases before Anti Terrorism might not proceed, therefore, they have provided a method to frustrate such tactics of the accused. The said method/procedure can be adopted by the Sessions Court to frustrate the delaying tactics on the above ground. As such, if on two consecutive dates the advocate for the accused does not appear then a Counsel on State expense can be appointed and then the case can be proceeded with. If subsequently the advocate for the accused of his choice appears then preference shall be given to that advocate to defend the accused and the State Counsel may be retained to frustrate the future design of delaying the case by the accused.

215. It has also been observed that in some cases if the advocate is appointed on State expense in the cases in which the accused refuses to engage an advocate of his choice or unable to engage an advocate, the accused refuses to recognize and accept such advocate to defend him. In such eventuality it is the right of the accused to be defended by an advocate of his choice. The Court cannot impose an advocate upon the accused, if he does not accept the legal assistance provided by the Court then the case cannot be allowed to remain pending. In such a situation the accused shall be asked to defend the case himself and then the case can be proceeded with in his presence. Reliance is placed on Iftikharuddin v. Crown (PLD 1954 Lahore 547), State v. Zulfiqar Ali Bhutto (PLD 1978 Lahore 523) and Baz Muhammad v. State (PLD 2003 Quetta 73).

216. We are shocked to see the conduct of the advocates in this case. It is not expected from advocates that they should remain absent without informing the Court or showing sufficient or reasonable cause. It is one of the duties of the advocate to appear before the Court when he takes up a case of an accused person that is pending before such Court. It is also one of their professional duties to assist the Court because basically the advocates are officers of the Court and their first duty and responsibility is towards the Court and then to their clients. Therefore, the advocates who remain absent without any intimation or sufficient cause, are exposing themselves to be tackled by appropriate Bar Council because such conduct of the advocates amounts to misconduct on their part which may entail cancellation of their licence to practice in the Courts. The trial Courts shall refer the cases of such advocates to the appropriate forum for taking action in accordance with law so that the administration of justice should not be hampered with. We hope and expect that appropriate Bar Council, on receipt of such reports from the Courts, shall take appropriate and immediate steps to punish the delinquent advocates, if found guilty to save the administration of criminal justice and to play its due role to curb the delay in the disposal of cases, which will be a service to the cause of justice.

217. In the present case the trial Court did not perform its function diligently as in the beginning trial commenced in the absence of advocates for both the appellants. Only two witnesses were examined in the presence of advocate for the appellant Shafique. The remaining witnesses were also examined in the absence of advocates for the appellants. As such, the appellants were prejudice in their trial and defence, therefore, a miscarriage of justice has occurred in the case. The procedure adopted by the trial Court is an illegal procedure, that cannot be cured under Section 537, Cr.P.C. Thus, it has vitiated the trial. Hence the impugned judgment is required to be set aside.

218. The impugned judgment reveals that on 20.1.2004, the appellants made a statement in writing informing the Court that their case might be proceeded with in the absence of their advocates. The learned AAG could not find such application in paper book or in R&Ps of the case. Be it as it may, such application, if any, was made after conclusion of the recording of the evidence. By that time the trial had already vitiated.

219. In the light of what has been discussed above the conviction and sentence awarded to the appellants under the impugned judgment are set aside. The case is remanded to the trial Court for retrial from the stage of framing fresh charge and that too in presence of the advocates of the appellants. If the appellants engage their advocates then they may be allowed to do so. If anyone of them or both do not engage advocate then advocate

on State expense be provided to defend the said appellant or appellants. If they refused to accept such advocate then the case be proceeded in their presence. The appeals are allowed in the above terms.

JUDGE

JUDGE

Karachi :

Dated: _____

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No.101 of 2005.

Present : Muhammad Afzal Soomro, and

Rahmat Hussain Jafferi, JJ.

JUDGMENT

Date of hearing : 06.3.2006.

Appellant : Shabir Ahmad through Mr.Salahuddin Khan Gandapur, Advocate.

Respondent : State through Mr.Habib Ahmed, AAG.

Rahmat Hussain Jafferi, J :- Brief facts given rise to the present appeal are that on 26.12.2003 the complainant Sher Khan, Excise Inspector, Special Squad Hyderabad received spy information that a person with narcotic substance was present near the petrol pump. On the said information the complainant along with his Excise Police Party reached the pointed place at 9.00 p.m. where he found a person standing having a basket in his hand. The said person was apprehended. On inquiries he disclosed his name as Shabbir Ahmed, the present appellant. The complainant secured a basket from his hand. On opening the basket, it contained 08 pieces of charas weighing 08 kg. Out of them 10 grams of charas were drawn as sample for the purpose of sending it to the Chemical Analyzer for examination and report. The property was sealed at the place of incident and such mashirnama was prepared. The Excise Police brought the accused and the property to the Police Station where the complainant lodged report at 10.00 p.m.

220. The police, after usual investigation, challaned the appellant in the Court where he was tried and convicted for offence punishable under Section 9(c) of the Control of Narcotic Substances Act, 1997 and sentenced to suffer imprisonment for 14 years and fine of Rs.300,000/= or in default thereof to suffer RI for 01 year more with benefit of Section 382-B, Cr.P.C. under the impugned judgment dated 22.11.2004.

221. We have heard the advocate for the appellant, AAG for the State and perused the record of this case very carefully.

222. The learned advocate for the appellant has stated that the entire property was not sent to the Chemical Analyzer but only 10 grams were sent. Therefore, the appellant is liable to be convicted for 10 grams only. He has relied upon Muhammad Hashim v. State (PLD 2004 S.C. 856). He has further stated that there is delay of 03 days in sending the property to Chemical Analyzer, which has materially affected the Chemical Analyzer's report; that the private mashirs were available at the scene of incident but they were not taken as mashirs, therefore, the case of prosecution is highly doubtful.

223. Conversely, the learned AAG has stated that the sample of only 10 grams were sent to the Chemical Analyzer which represented the entire property. Therefore, there is no defect in sending the property to Chemical Analyzer. He has relied upon Ali Muhammad v. State (2003 SCMR 54) and Nadir Khan v. State (1988 SCMR 1899). He has further stated that in the authority reported in Muhammad Hashim v. State (PLD 2004 S.C. 856) the earlier authorities of Hon'ble Supreme Court of Pakistan were not considered, which were of equal Benches, therefore, the subsequent authority would come within the ambit of judgment per incuriam as held in Province of the Punjab v. S. Muhammad Zafar Bukhari (PLD 1997 S.C. 351), therefore, it is to be ignored. He has further stated that delay of 03 days in sending the property to the Chemical Analyzer is not fatal to the prosecution case as the delay was consumed in obtaining sanction from the higher officer. He has also stated that the provisions of section 103, Cr.P.C. are not applicable in view of Section 25 of the Control of Narcotic Substances Act, 1997. Therefore, the prosecution case has been proved in accordance with law.

224. We have given due consideration to the arguments, gone through the material available on the record and found that the prosecution, in order to prove the case, examined two witnesses viz. complainant Sher Khan and PW-2 mashir Excise Constable Sikandar Ali. Both the witnesses gave same details of the incident as mentioned in the earlier part of the judgment. From the statements of both these witnesses it is clear that the appellant was caught having a basket in his hand. On opening the basket it contained 08 pieces of charas weighing 08 kg., out of which 10 grams were drawn as sample for sending it to the Chemical Analyzer. The Chemical Analyzer's report has been produced in the evidence as Ex.6/C which shows that the property was charas. As such, it has been established beyond any shadow of doubt that the property secured from the possession of the appellant was charas.

225. The learned advocate for the appellant has mainly argued that only 10 grams were sent to Chemical Analyzer, therefore, the appellant will be responsible for 10 grams only and has relied upon Muhammad Hashim v. State (PLD 2004 S.C. 856). In the above case out of 288 rods, sample was drawn from one rod, therefore, it was held that only one rod was proved to be charas and remaining rods were not held to be charas without the examination of Chemical Analyzer. Nevertheless, the earlier view of the Hon'ble Supreme Court of Pakistan as reported in Nadir Khan v. State (1988 SCMR 1899) and Ali Muhammad v. State (2003 SCMR 54) of equal Benches is that the sample drawn from one slab of charas or bag of charas out of several slabs and bags recovered from the possession of the accused would represent the entire property. Therefore, the report of Chemical Analyzer with regard to the sample would also represent the entire property and the same was not found to be illegal.

226. There are two conflicting decisions of the Hon'ble Supreme Court of Pakistan. At this stage, we are not going to examine as to which decision is correct or otherwise. It is for the Hon'ble Supreme Court of Pakistan to clarify the said position. However, we are also not going to examine the question of judgment per incuriam as laid down by the Hon'ble Supreme Court of Pakistan in the case of Province of the Punjab v. S. Muhammad Zafar Bukhari (PLD 1997 S.C. 351). Nevertheless, we are of the view that in such a situation, the better and safer course will be to repeal the arguments so that the party may approach the Hon'ble Supreme Court of Pakistan to get the required clarification. Hence the arguments are repeated. In the present case the witnesses did not specifically state that 10 grams of charas were drawn from one packet only, but they stated that 10 grams of charas were drawn from the property. In these circumstances, the fact remains that the 10 grams drawn as sample from the entire property has been opined to be charas.

227. As regards the delay in sending the property, the property was secured on 26.12.2003. The same was dispatched on the next day viz. 27.12.2003 but it was received by the Chemical Analyzer on 30.12.2003. There is no allegation of the appellant that the property was tampered with during the process of transit or the remaining property was not charas. It was for the appellant to have taken such plea before the trial Court but the appellant did not do so. However, we have examined the Chemical Analyzer's report and found that the sealed packet was received by him which contained the signatures of both the mashirs. In the absence of any allegation of tampering with the property the arguments of the learned advocate for the appellant are not sound.

228. As regards the association of private witnesses, suffice it to say that provisions of Section 103, Cr.P.C. are not applicable to the facts and circumstances of the case in view of the provisions of Section 25 of the CNS Act. Reliance is placed on State v. Muhammad Amin (1999 SCMR 1367).

229. As regards the non-association of private witness it has been brought on record through the cross-examination that the private witnesses were available and they were asked to act as mashirs but the declined as they ran away. The tendency of private persons to avoid to become witnesses in such type of cases has also been examined in the case State v. Muhammad Amin (1999 SCMR 1367) and it has been observed that for various reasons the private persons do not come forward to become witnesses in this type of cases to avoid enimosity with the drug smugglers or fear of reprisals in view of the present deteriorating law and order situation of the country.

230. As regards the defence, the appellant did not examine himself on oath or to lead any evidence to prove the allegation of his false involvement.

231. After considering the material available on the record we are of the considered view that the prosecution has proved the case against the appellant beyond any shadow of doubt, therefore, the appeal is dismissed.

JUDGE

JUDGE

Karachi :

Dated: _____

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No.366 of 2004.

Present : Muhammad Afzal Soomro, and

Rahmat Hussain Jafferi, JJ.

JUDGMENT

Date of hearing : 31.1.2006.

Appellant : Zulfiqar Ali alias Billa through Mr.A. Q. Halepota, Advocate.

Respondent : State through Mr.Habib Ahmed, AAG.

Rahmat Hussain Jafferi, J :- **Brief facts of the prosecution case are that on 05.11.2000 the complainant Inspector Muhammad Anwar Durrani of CIA Police along with his subordinate staff was on patrol duty. During patrolling at 9.00 p.m. he received spy information about two persons standing near Allied Bank having charas in their possession. On the said information he reached the place of incident at about 12.10 a.m. in the night of 06.11.2000 where he saw a person sitting on a Gatta Carton and another person was standing there. On seeing the police party the person who was sitting on Gatta ran away whereas the person who was standing near the Gatta who also tried to escape from there but was apprehended. On inquiries, that person disclosed his name as Zulfiqar alias Billa, the appellant. He was interrogated. On which he disclosed that the carton contained charas, therefore, the complainant opened the Gatta Carton and found 42 packets of charas lying there. He weighed each packet which came to be of 01 kg. and total weight of the charas was 42 kg. Eight packets of 08 kg. were separated for Chemical Analyzer report. The property was**

sealed. The appellant was arrested and then he was brought to the CIA Centre where he lodged the FIR. The copy of which was sent to Police Station for incorporating it in 154, Cr.P.C. Book. After completing the usual investigation the appellant was challaned in the Court.

232. The learned Special Judge CNS, Hyderabad tried the appellant and convicted him for offence punishable under Section 9(c) of the Control of Narcotic Substances Act, 1997 and sentenced him to suffer imprisonment for life and fine of Rs.300,000/= or in default thereof to suffer RI for 02 years more with benefit of Section 382-B, Cr.P.C. under the impugned judgment dated 20.9.2004.

233. We have heard the advocates for the appellant, AAG for the State and perused the record of this case very carefully.

234. The learned advocate for the appellant has stated that the CIA Police had no power to investigate the case, therefore, the investigation was illegal. He has relied upon Zeeshan Kazmi v. State (PLD 1997 S.C. 406). He has further stated the CIA Police never leave the Police Station for patrolling duty but they leave the Police Station to investigate a crime, therefore, the story furnished by the CIA Police is highly improbable. He has further stated that there is conflict between the property sealed at the place of incident and the property received by Chemical Analyzer as only one slab in each packet was sealed by the CIA Inspector but the Chemical Analyzer found two slabs in each packet. Therefore, the case of the prosecution is highly doubtful. He relied upon Jeejal v. State (2005 MLD 1261) and Zareef Khan v. State (2005 MLD 501). He has further stated that there was enmity between the accused and the complainant, therefore, he has been falsely involved in the case.

235. Conversely, the learned AAG has stated that even if the CIA Police investigated the case then it will not vitiate the trial and had also relied upon the same authority on which the learned advocate for the appellant has relied. He has further stated that it is not necessary that the CIA Police can leave the Centre only for the purpose of investigation of crime but they can also leave the Centre for the purpose of patrolling to check the crime. He has further stated that there is no difference between the property sealed at the place of incident and property received by Chemical Analyzer as the evidence has come on the record that the property was found in packets and 08 packets were sent to Chemical Analyzer; that the witnesses did not state the number of slabs found in the packets. As regards the defence of the appellant he has stated that the documents produced by the appellant in his evidence were not shown to the complainant at the time of his evidence; that the documents are forged documents which have been prepared to create a defence, therefore, he has supported the impugned judgment.

236. We have given due consideration to the arguments, gone through the evidence with the help of learned advocate for the appellant and found that the prosecution examined two witnesses to prove the case and produced Chemical Analyzer report. The two witnesses examined by the prosecution are complainant Inspector Muhammad Anwar of CIA Police and mashir SIP Qamar Zaman. Both the witnesses gave the same details of the incident as disclosed in the earlier part of the judgment. Both the witnesses specifically stated that on the information supplied to them by the appellant after his apprehension, the Gatta Carton was opened which contained 42 packets containing charas. Both the witnesses did not state the number of slabs lying in each packet. They disclosed that the total weight of 42 packets was 42 kg. The complainant specifically stated that each packet was weighed and its weight came to be 01 kg. The mashir PW-2 stated that 42 packets were secured from the carton and weight of one slab was 01 kg. In the cross-examination a question was put to the mashir that entire property was weighed at one time which he denied but further added that each packet was weighed separately. Taking the advantage of the above statement of the witness the learned advocate for the appellant based his

arguments that each packet contained one slab. It is well settled that one sentence of a evidence cannot be read in isolation. The entire evidence of a witness is to be taken into consideration and total effect of the said statement is to be given. In the statement the PW-2 mashir did not disclose that each packet contained two slabs or one slab but he was silent with regard to the number of slabs in each packet. The earlier part of his statement he clearly stated that there were 42 packets in the carton and total weight of the packets was 42 kg. No doubt, the witness stated in a single sentence that each slab weighed 01 kg. but the said fact has been clarified by him in the cross-examination where he categorically stated that each packet was weighed separately. Thus, this discrepancy would not be fatal to the case of the prosecution to hold that the packet contained one or two slabs at the time of sealing the same. The total effect of the evidence of both the witnesses is that each packet was weighed at the time of recovery and the weight of each packet was 01 kg. and that the slabs lying in each packet were not counted. If there would have been discrepancy between the evidence and the mashirnama of recovery then the said discrepancy could have been brought on record by the defence counsel in the cross-examination but no question with regard to such discrepancy has been brought on record. As such, it can fairly be presumed that in the mashirnama there was no mention of number of slabs in each packets. PW-2 further stated that 08 packets were sealed separately for sending the same to the Chemical Analyzer for examination and report. Even then he did not state that each packet contained one or two slabs. From the evidence of both the witnesses it is established beyond any shadow of doubt that only 08 packets secured from the property were sent to Chemical Analyzer for examination and report. The Chemical Analyzer report has been produced in evidence as Ex.14/C. This shows that the Chemical Analyzer had received 08 packets. After opening packets he found each packet contained two slabs. The total weight of the 08 packets was 8020 grams and the net weight of the slabs was 7900 grams. Thus there is no discrepancy in the property sealed at the place of incident and the property received by the Chemical Analyzer.

237. As regards the investigation conducted by the CIA Police, no doubt, CIA Police has no authority to investigate the case unless the same is entrusted to them under the orders of superior officer. The complainant, in his statement, stated that he had received permission for investigating the case through DSP, CIA. This statement of the witness was not challenged by the defence in the cross-examination. However, even if the investigation is conducted by an officer who is not authorized by law to do so then under Section 156(2), Cr.P.C. the investigation cannot be questioned. After investigation the Court took cognizance, as such, if any illegality was committed during investigation the same was cured. However, the same illegality had not vitiated the trial as held in the case of State v. Bashir (PLD 1997 SCMR 408).

238. The appellant took the defence that he was a builder. The complainant booked a flat in a scheme but he did not pay the installments and wanted to sell the flat to some one else which was objected, therefore, a dispute arose between them, hence this case has been filed to pressurize him to surrender before the complainant's terms. Such defence was put to the complainant but he specifically denied the same. The appellant, in his statement under Section 342, Cr.P.C. and his statement on oath stated such facts. He also produced an application for allotment of flat in the scheme known as 'Khursheed Town' and some payment receipts. He also produced a telegram sent by Mubashir Ali, brother of the appellant on 06.11.2000 complaining the arrest of the appellant.

239. As regards the application for allotment of flat which has been produced as Ex.19/B, the same was not shown to the complainant at the time of cross-examination, as such, the said piece of evidence was not confronted to the complainant to have obtained some explanation or to see the signatures available on the application. However, we have gone through the signatures allegedly signed by

the complainant and compared the same with the signatures available on record. After examining the same we found firstly, that there are two signatures on the application appearing at page No.4 but both the signatures are not tallying with each other. Furthermore, both the signatures were compared with the admitted signatures of the complainant but we found that the signatures were also not tallying with each other as there was slow drawn movement, hesitation, tremor, pen lift and stop etc. in the signatures found on Ex.19/B. Furthermore, the original application form was not produced in evidence but only a photostat copy was produced. This also adversely affect the defence of the appellant. As such, the said application cannot be safely relied upon. The other documents viz. receipts and statement do not bear the signature of the complainant. Even the originals of these documents were not produced but photostat copies of the same were produced which has also materially affected the said documents.

240. As regards the telegram Ex.19/A, the author of the document viz. brother of the appellant has not been produced in evidence. No evidence has been led to prove the telegram. Thus, the defence taken by the appellant appears to be afterthought and has been prepared to save the appellant from the case.

241. The appellant has also examined Iqbal Hussain on the point that the appellant was arrested on 02.11.2000 by the complainant. As against this evidence there is overwhelming evidence led by the prosecution to support their case and which has been proved in accordance with law. As such, the said evidence cannot be safely relied upon.

242. After considering the material available on the record we are of the considered view that the prosecution has proved the case against the appellant beyond any reasonable doubt.

243. Above are the reasons of our short order dated 31.1.2006, by which we had dismissed the appeal.

JUDGE

JUDGE

Karachi :

Dated: _____

IN THE HIGH COURT OF SINDH, KARACHI

Cr. Appeal No.459 of 2004.

Present : Muhammad Afzal Soomro, and

Rahmat Hussain Jafferi, JJ.

JUDGMENT

Date of hearing : 16.12.2005.

Appellant : Khan Saeed through Mr.Mir Nawaz Khan Marwat, Advocate.

Respondent : The State through Mr.Habib Ahmed, AAG.

Rahmat Hussain Jafferi, J :- **The present appeal is directed against the judgment dated 02.11.2004 passed by the Special Judge, CNS Court, Hyderabad in Special Case No.81/1999 by which the learned Judge convicted the appellant under Section 9(c) of Control of Narcotic Substances Act, 1997 (herein after referred to as 'the Act, 1997') and sentenced them to suffer RI for 14 years and fine of Rs.300,000/= or in default thereof to suffer RI for one year with benefit of Section 382-B, Cr.P.C.**

2. Brief facts of the prosecution case are that on 31.10.1999 the complainant Inspector Munawwar Hussain of CIA was on patrol duty along with his subordinate staff. On the spy information the police party reached in front of tiles factory near Badin Chali situated at Tando Yousuf Road. A person was found standing in suspicious condition. On inquires he disclosed his name as Khan Saeed, the present appellant. The appellant was having a blue colour polethen bag which was secured. On opening it 08 slabs of charas weighing 8 kg. were secured. The police separated two slabs weighing 2 kg. from the property for examination by Chemical Analyzer. Both the properties were sealed separately. The appellant and the properties were brought to the Police Station where the

complainant made entry in the station diary, which was sent to Police Station Tando Yousuf for registration of case by incorporating it in the 154, Cr.P.C. book. The police after usual investigation challaned the appellant in the Court, where he was tried and convicted as mentioned above.

3. We have heard the advocate for the appellant, AAG for the State and perused the record of this case very carefully.

4. The learned advocate for the appellant has mainly argued that the property sent to the Chemical Analyzer was different as it is not tallying with the property which was produced in Court and as stated by the witnesses. Therefore, without the Chemical Analyzer report the case has not proved. He has relied up on the cases Taj Wali v. State (PLD 2004 Karachi 128), Asghar Ali v. State (1996 SCMR 1541) and an unreported judgment dated 30.9.2005 passed in Criminal Jail Appeal No.103/2004 (Umer Haleem v. State). Conversely, the learned AAG has stated that no doubt there is a difference between the evidence and Chemical Analyzer report about the property but the same can be termed as carelessness of the complainant which has not materially affected the prosecution story, therefore, he has supported the impugned judgment.

5. We have given due consideration to the arguments, gone through the material available on the record and found that the prosecution examined two witnesses namely complainant Munawwar Hussain and mashir PW SIP Lutfullah. Both the witnesses gave the same details of the incident as mentioned in the earlier part of the judgment. The dispute is with regard to the property sent to the Chemical Analyzer. According to the witnesses 2 kilograms of charas were sent to the Chemical Analyzer in a white cloth packet which was sealed at the place of incident. The Chemical Analyzer's report has been produced in evidence as Ex.6/C which shows that he received a packed of off-white cloth. On opening the packet the Chemical Analyzer found two packets containing two greenish-brown seeming slab in each packet. The total slabs were four. He examined each slab and found all the four slabs to be charas.

6. It is the case of the prosecution that two slabs in a white cloth bag were sent to the Chemical Analyzer but the said stand has not been supported and corroborated by the Chemical Analyzer as the cloth in which the packets were found and received by the Chemical Analyzer was off-white and not white cloth. Furthermore, it is the case of the prosecution that two slabs were sent to the Chemical Analyzer but the Chemical Analyzer found four slabs in the packet. As such, it appears that a different property was sent to the Chemical Analyzer for examination and report.

7. However, this fact has been supported from the fact that at the time of examination of the complainant the property sent to the Chemical Analyzer was not in the Court. Therefore, the learned DDA moved an adjournment application for calling the said property. The property was called which was produced in Court. The trial Court de-sealed said property which contained two slabs of charas. The complainant, after seeing the said two slabs, stated that it was the same property which was sent to Chemical Analyzer. In the cross-examination he admitted that the said property did not have the seal and stamp or any endorsement of Chemical Analyzer Office which was lying in a packet. It appears that the property which was produced before the trial Court was never sent to Chemical Analyzer. Had the said property been sent to the Chemical Analyzer, it would have been having seal of the Chemical Analyzer and not that of the Police Station. The Chemical Analyzer's report categorically stated that the property was desealed and then it was examined. Furthermore, the property received by the Chemical Analyzer was having four slabs but the packet produced in the Court was having two slabs which also does not tally with the property received by the Chemical Analyzer. As such, it has been established beyond any shadow of doubt that the Chemical Analyzer's report, produced in the Court, does not pertain to the case property which

was sealed at the place of incident and sent to the Chemical Analyzer for examination and report. Therefore, it cannot be used against the appellant to be the valid report in respect of property allegedly secured from him. if the report of Chemical Analyzer is taken out of consideration then there is nothing on record which can show that the property, allegedly secured from the possession of the appellant, was charas. It only shows that 08 slabs of brown material were secured from the possession of the appellant, without its proof being charas.

8. After considering the material available on the record we are of the considered view that the prosecution has failed to prove the case against the appellant beyond any reasonable doubt. Therefore, the conviction and sentence awarded under the impugned judgment were set aside while passing the short order.

9. Above are the reasons of our short order dated 16.12.2005, by which we had allowed the appeal.

JUDGE

JUDGE

Karachi :

Dated: 16.12.2005.

IN THE HIGH COURT OF SINDH, KARACHI

Cr. Appeal No.288 of 2005.

Present : Muhammad Afzal Soomro, and

Rahmat Hussain Jafferi, JJ.

JUDGMENT

Date of hearing : 13.12.2005.

Appellants : Mazar and another through Mr.Kumail Ahmed Shirazee, Advocate.

Respondent : The State through Mr.Habib Ahmed, AAG.

Rahmat Hussain Jafferi, J :- **The present appeal is directed against the judgment dated 07.7.2005 passed by the CNS Court, Thatta in Special Case No.250/2001 by which the learned Judge convicted the appellants under Section 9(c) of Control of Narcotic Substances Act, 1997 and sentenced each of them to suffer RI for 07 years and fine of Rs.10,000/= or in default thereof to suffer RI for 06 months with benefit of Section 382-B, Cr.P.C.**

10. Brief facts of the prosecution case are that on 03.5.2001 the complainant Inspector Khalid Hussain Shah, Incharge CIA Centre, Thatta along with his subordinate staff was on patrol duty. During patrolling he received information that Imran and Mirjat were running a Bhatti of Katcha liquor in the Jangle near village Kabul Mirjat. On the said information the police party reached at the said place at 6.30 p.m. but the culprits ran away and the police secured incriminating articles from there. After completing the formalities over there, while they were returned to Police Station reached near village where the complainant received another information that appellants Mazar and Baradio were selling charas in the street near their house situated in Kabul Mir Jat Village. On

the said information the police party reached at the pointed place at 7.45 p.m. and saw the appellants present there who, seeing the police party leaving a wooden box, ran away from there. The police reached there and found slabs of charas lying in the wooden box. The charas was weighed which came to 7500 grams. The police drawn one slab of 1000 grams from the said property for chemical examination. Both the properties were separately sealed. The same were brought to the Police Station where the FIR was lodged. The appellants obtained bail before arrest from the Court. The police, after usual investigation, challaned the appellants in the Court where they were tried and convicted as mentioned above under the impugned judgment.

11. We have heard the advocate for the appellants, AAG for the State and perused the record of this case very carefully.

12. The learned advocate for the appellants has stated that the evidence of witnesses is contradictory to each other; that there is delay in sending the property to the Chemical Analyzer; that the identity of the appellants from a distance of one furlong is highly doubtful; that the PWs did not state that they already knew the appellants. Therefore, the case of the prosecution is highly doubtful. The learned AAG has stated that no doubt, there are material contradiction in the evidence of PWs but the PWs have involved the appellants in the case and the recovery was made from the wooden box which has been found to be charas as per Chemical Analyzer report, therefore, he has supported the impugned judgment.

13. We have given due consideration to the arguments, gone through the material available on the record and found that the prosecution examined complainant Inspector Khalid Shah and SIP Ghulam Farid, mashir of recovery. Both the witnesses gave more or less similar facts as mentioned in the earlier part of the judgment but on some material points their statements are contradictory to each other. The complainant disclosed that first they received the information about the presence of Bhatti of Katcha liquor near village Kabul Mirjat. They were then after completing the formalities, while returning to the Police Station received the information of present case. This statement of the complainant has not been supported or corroborated by PW-3 Ghulam Farid as he deposed that first they received spy information about the first incident and while they were proceeding there they received the information about the second incident. Both the witnesses have stated that they saw two persons standing near a wooden box from a distance of one furlong. The time has been shown as 7.45 p.m., which was sunset time. Therefore, in such a situation and from a long distance of one furlong it could not have been possible by the witnesses to have identified the appellants. Furthermore, they did not disclose in the evidence that they already knew the appellants before this incident, therefore, they identified him. But the information was that two persons by the names of Mazar and Baradio were selling charas. It is pertinent to point out that the complainant disclosed that he had secured the wooden box but he has not been corroborated by the PW-3 who disclosed that he did not remember whether wooden box was secured from the place of incident or was left there. However, the said wooden box was not produced before the Court, as such, the article from which the charas was secured, was not available in the Court. This point was further clarified by PW-2 Walidino Jatoi, Investigating Officer who disclosed that when he reached the Police Station the complainant handed him over two parcels of charas as case property. It is further pointed out that the property was sent to Chemical Analyzer on 13.7.2001 after more than two months of the recovery. No explanation has been furnished for such delay in sending the property to Chemical Analyzer. Because of the above discrepancies in the evidence the delay in sending the property has created further doubt in the prosecution case. The appellant took the defence in his 342, Cr.P.C. statement, which reads as under:-

"I am Zamindar. In the year 1998 I had exchanged hot words with the then CIA Inspector Abdul Latif Pirzada who at present is serving as DSP due to enmity with Abdul Latif I and my other family members have been involved falsely in several cases. In the present case I and co-accused who is my real brother have been involved in this case. My son Indar and 2 relatives Majeed and Fareed were shown as manufacturing Katcha wine both PWs deposed against my son and relative in the Court of IInd CJ & JM, Thatta in which they had given contradictory statements. I produce such copies of deposition of PW Talib and PW Ghulam Fareed at E 11 & 12. The said case was acquitted. I produce acquittal judgment as Ex.13. I am innocent."

14. **The defence taken by the appellants has been supported and corroborated by the certified true copies of the statements of the witnesses examined in the said case and judgment of the trial Court delivered in Crime No.51/2001.**

15. **After considering the material available on the record we are of the considered view that the case of the prosecution is highly doubtful, therefore, the appellants are entitled to the benefit of doubt which was, accordingly, given to them at the time of passing short order.**

16. **Above are the reasons of our short order dated 13.12.2005, by which we had allowed the appeal.**

JUDGE

JUDGE

Karachi :

Dated: _____

IN THE HIGH COURT OF SINDH, KARACHI

Cr. Appeal No.82 of 1992.

JUDGMENT

Date of hearing: 07.9.2005.

Appellant	:	**Syed Shaukat Ali through Mr.Kh.Naveed Ahmed, Advocate**
Respondent	:	The State through Mr.Syed Ziauddin Nasir, Standing Counsel.

Rahmat Hussain Jafferi, J :- **On 01.2.1988 the Assistant Director FIA, Crime Circle-II, Karachi received a written complaint from Imran Chughtai for offences punishable under Sections 420, 408, 468, 471 & 34, PPC read with Section 83 of Banking Companies Ordinance 1962. The FIR reads as under:-**

"To, The Asstt. Director/FIA, Karachi, Sir, My father is running an Advertising Co. in the name of Adko Private Ltd. having its office at 10 Rasool Building office I. I. Chundrigar road Karachi. One Mr.Sheikh used to meet me and my father in our office for the last Nov.87. He used to visit our office for the publication of an advertisement in the name of HUMA INDUSTRIES, Allied Group of Industries in daily 'JANG'. He was regularly making the payment after every three days. The advertisements were very attractive for

the purpose of investment, on a very exorbitant profits. He induced me to invest an amount in the business of Textile which is being run by their firm on a monthly profit of 6%. I delivered him Rs.50,000/- on 16.11.87, Rs.50,000/- on 3.1.88 and one lac on 31.12.87 for investment in so called HUMA TEXTILE INDUSTRIES. He paid Rs.3,000/- as profit on the said amount. I learnt that these investors in fact has no such textile industries and I came to know further that they have also no permission of the State Bank of Pakistan to accept investment in some business. Knowing that these people have no income from any source, therefore, I did try to get my money back but with one pretext or the other, the money received by the so called investment Co. by inducing me through deceitful means, have not been returned.

Mr.Naqvi and his associates have induced me through deceitful means to invest Rs.2 lacs in my name and have thus cheated me. I produce the receipt and also the agreement of investment on a stamp papers of Rs.10/-. I, therefore, request that a case against these people may be registered, for cheating and receiving investment without the permission of State Bank of Pakistan."

244. The police, after usual investigation, submitted challan against the appellant and acquitted accused Imran whereas accused Mohsin Ali Naqvi, Hafiz-zada, Zoulfiqar Ali, Muhammad Ali and Hidayatullah were shown as absconders. On 20.7.1989 the trial Court framed the charge against the appellant and co-accused. The prosecution examined 22 witnesses and 03 Court witnesses. After considering the evidence and hearing the parties' counsel the learned trial Judge acquitted co-accused Inamullah but convicted appellant under Section 409, 420 & 468, PPC and sentenced him to suffer RI for 05 years and fine of Rs.5000/- under each Section and/or in default thereof to suffer RI for 06 months. All the sentences were ordered to run concurrently under the impugned judgment.

245. I have heard the advocate for the appellant, Standing Counsel and perused the record of this case very carefully.

246. The learned advocate for the appellant has stated that the witnesses have not supported the prosecution case except few witnesses and from that evidence the involvement of the appellant has not been established beyond reasonable doubt; that no common intention to commit the offence has been made out amongst all the accused persons; that there was no conspiracy between the accused persons. As such, the impugned judgment is illegal. Conversely, the learned Standing Counsel has stated that out of 22 PWs 05 PWs have implicated the appellant with the commission of the crime; that there is direct evidence against the appellant, as such, the case has been proved against him, hence they have supported the impugned judgment.

247. I have given due consideration to the arguments, gone through the material available on the record with the assistance of learned advocate for the appellant and found that out of 22 prosecution witnesses PWs 1 to 7, 9 to 13, 15, 16 & 20 deposed that they saw the advertisement in the newspaper about the investment in Huma Textile Industries. They went to the office and paid the amount after obtaining receipts from them. PW-6 Raees Aghmed deposed that he was attracted by the advertisement in the newspaper published by Huma Groups, therefore, he went to the office and paid the amount where present accused was sitting in the office. PW-8 Ziauddin Ahmed also gave same details but further added in the cross-examination as under:-

"It is correct that the amount was received by Shaukat himself."

248. **PW-14 stated that he was also attracted on the advertisement for investment in Huma Group Industries and went to their office where the appellant was present with whom the said dealing was made. In the cross-examination he stated that the agreements, after signature, were given to him by the appellant. PW-17 Mian Muhammad Salik, after giving the same details, further added that the appellant paid him the total profit of 2-1/2 months amounting to Rs.812/- only on 13.12.1987. In the cross-examination he admitted that the amount received was in the name of the company and not in the name of appellant. From the evidence of PW-19 Rahoo Ayub it reveals that after seeing the advertisement he went to the office where he met with the appellant who called one person namely Farooq. He paid Rs.9000/- and receipt was issued to him. he further deposed that he knew only appellant who used to give him his profit in the office and he had dealings and good terms with him. In the cross-examination he further admitted that he used to get profits from the appellant only every month. PW-21 is complainant Imran Chughtai. He also supported the contents of his FIR. He further stated that he paid the amount to the appellant who issued receipts to him on all the three occasions of the payments of amount. He further stated that the appellant used to sit on a table and used to receive documents and used to issue receipts. He further added that appellant was having dealing with him with regard to the transaction. In the cross-examination he denied the suggestion of the appellant that the appellant was not sitting in the office or was not issuing the receipts of the payment on behalf of the company.**

249. **From the evidence of above witnesses it is clear that the involvement of the appellant has been establishment beyond any reasonable doubt. Further more, the appellant, in his statement recorded under Section 342, Cr.P.C., stated that he met with the other accused as investors and paid Rs.10,000/-. He further added that they wanted to open their export & import business and he offered himself for services. Therefore, he got the formalities done but he has no concern with ETCO. He denied the other allegations of the prosecution.**

250. **From this statement it appears that he had some connection with the co-accused persons to the extent of opening a business of export and import and he had also offered his services to them.**

251. **However, in order to disprove the evidence led by the prosecution the appellant did not lead any evidence. He also did not examined himself on oath. As such, the plea, taken by the appellant, has not been proved.**

252. **After considering the material available on the record I am of the considered view that the prosecution has proved the case against the appellant beyond any reasonable doubt, therefore, the impugned judgment does not require any interference.**

253. **Above are the reasons of my short order dated 07.9.2005 by which I had dismissed the appeal.**

Judge

Karachi :

Dated: 17.9.2005.

IN THE HIGH COURT OF SINDH, KARACHI

Cr. Appeal No.159 of 2003.

Date of hearing : 26.1.2005.

Appellant	:	Sikandar through Mr.Abdul Mujeeb Pirzada, Advocate.
Respondent	:	The State through Mr.Suhail Jabbar, State Counsel.
Complainant	:	Sijawal through Mr.Nooruddin Sarki, Advocate.

O R D E R

WAHID BUX BROHI, J: Appellant Sikandar has impugned the judgment dated 22.5.2003 passed by learned 3rd Additional Sessions Judge, Sukkur whereby he was convicted for an offence punishable under Section 302(b), PPC and sentenced to imprisonment for life as Ta'zir. He was also directed to pay Rs.50,000/= as compensation under Section 544-A, Cr.P.C. to the heirs of deceased Muhammad Zakaria and in case of non-payment of the amount he was to suffer S.I. for 6 months more.

2. The case of prosecution, briefly stated, is that complainant Sijawal, father of deceased Muhammad Zakaria lodged FIR at P.S. Kandhra on 06.6.2000 at 1.30 a.m. disclosing therein existence of dispute with Malook Shambani over agricultural land on which they had filed cases against each other. He also alleged that his rivals used to press him to leave the land else it would not be good for him. Regarding the incident he stated that on 05.6.2000 in the evening complainant and his sons Peeral and deceased Muhammad Zakaria were working in their land when accused Malook left his cows in the cotton crop of complainant. Muhammad Zakaria drove the cattle towards cattle pound on which Malook and others instigated his companions to finish Muhammad Zakaria. As a result, accused Sikandar, Riaz Ali, Punhal Chatriho and Muhammad Ismail came over there and all of them attacked Muhammad Zakaria. Malook and others abused him and declared that he will not be spared as he was taking their cattle to cattle pound. On the instigation of Malook the accused persons inflicted Lathi blows upon Muhammad Zakaria, who raised cries which attracted Muhammad Ibrahim also who too give hakals to the accused persons. It was further alleged that within the sight of complainant party Sikandar fired from his gun at Muhammad Zakaria which hit him and he fell down. Complainant party entreated the accused persons in the name of Allah and Holy Prophet where after they went away along with their cattle. The complainant party saw that Muhammad Zakaria was bleeding from the firearm injury on his leg. Complainant took the injured to police station where he lodged FIR.

3. ASI Muhammad Nawaz of P.S. Kandhra recorded the FIR and took up the investigation. After preparing the memo of injuries he referred the injured to Civil Hospital Rohri. He inspected the site on the following day and noted the hoof marks of cattle. He also recorded the statement of injured under Section 161, Cr.P.C. He recorded the statement of PW

Peeral and another. The investigation was then transferred to SHO Abdul Hameed. During the period of investigation Muhammad Zakaria was shifted to Civil Hospital Rohri where he succumbed to injuries on 13.6.2000. The investigation the Investigating Officer was of the view that it was a self-suffered injury, he, therefore, submitted summary for disposal of the case as 'B' Class, however, the case was challaned in the Court.

4. At the trial, learned 3rd Additional Sessions Judge, Sukkur framed a charge against all the six accused persons including appellant Sikandar for an offence punishable under Sections 148, 302/149 and 302/114, PPC to which the accused persons pleaded not guilty. He examined 10 witnesses namely: PW-1 Sijawal, the complainant; PW-2 Peeral son of complainant; PW-3 Muhammad Ibrahim; PW-4 ASI Muhammad Nawaz; PW-5 Imdad Ali, one of the mashirs; PW-6 Dr.Abdul Aziz; PW-7 Dr.Iqbal Ahmed, who conducted postmortem examination; PW-8 Insp. Abdul Hameed; PW-9 Abdul Rahman, the Tapedar; and PW-10 HC Abdul Aziz, one of the mashirs. Statement of accused persons were recorded under Section 342, Cr.P.C. wherein they denied the allegations of prosecution. Accused Malook, however, produced a copy of judgment passed by V-Additional Sessions Judge, Sukkur in which one Noor Khan son of complainant Sijawal was the complainant and appellant Sikandar was one of the 4 accused persons and all of them were acquitted. The case was for an offence punishable under Section 17(3) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979. The accused persons did not lead defence.

5. Learned Additional Sessions Judge, on assessment of evidence, acquitted 5 accused persons and convicted the appellant and sentenced him as mentioned above.

6. I have heard Mr.Abdul Mujeeb Pirzada, learned counsel for appellant, Mr.Suhail Jabbar, learned State Counsel and Mr.Nooruddin Sarki, learned counsel for the complainant.

7. It was mainly contended on behalf of the appellant that -

i. Admittedly there was previous enmity in between the parties arising out of a dispute over agricultural land,

ii. Copy of judgment in Sessions Case No.65 of 1997 shows criminal litigation between complainant's son Noor Khan and appellant Sikandar wherein the offence alleged was under Section 17(3) of the of the Offences Against Property (EOH) Ordinance, 1979 and the sessions case had failed resulting in acquittal,

iii. The parties were inimical yet no independent corroboration could come on record,

iv. The medical evidence suggested that the fatal injury was a self-suffered one caused by friendly hands,

v. No bloodstained earth was collected from the place of incident,

vi. It is alleged that Lathi blows were inflicted upon the deceased, but medical evidence is totally silent about lathi injuries,

vii. No recovery of crime weapon such as gun or lathi, was made during investigation,

viii. No empty cartridge was found at the place of incident,

ix. Pellets in the injury are said to be muscle deep which could hardly be the cause of death,

x. The prosecution depended on oral evidence of complainant Sijawal, his son Peeral and their close relative Muhammad Ibrahim, but there are contradictions in their evidence as to how the matter was reported to police suggesting that they were not present at the time of incident and they could not be eyewitnesses,

xi. The first Investigating Officer said that he had recorded the statement of deceased, but the same was not produced at the trial,

xii. The Investigating Officer had clearly opined that the only injury was self-suffered one and the case was false,

xiii. There was also delay in lodging of FIR,

xiv. Same set of witnesses was disbelieved as regards the other accused persons, therefore, they could not be believed as against appellant Sikandar, and

xv. The case was wholly doubtful and the appellant deserved benefit of doubt,

8. Learned State Counsel did not support the case of prosecution and supported the appeal saying that the case was doubtful.

9. Mr. Nooruddin Sarki, learned counsel for complainant was of the view that -

i. There was dishonesty in the investigation,

ii. The prosecution failed to perform its job properly as they did not place the statement of deceased on record during the trial,

iii. The trial Court also failed to take note of lapse on the part of the prosecution,

iv. Delay in lodging of FIR stood explained in view of the long distance between the place of incident and the police station,

v. The enmity between the parties has been established which serves as motive,

vi. The Medical Officer has opined that the injury was sufficient to cause death,

vii. The absence of Lathi injury has been dealt with by the trial Court treating it as an exaggeration,

viii. The contradictions in evidence of PWs were minor in nature.

10. In view of above submissions it is needless to emphasize that enmity between the parties is an admitted position. The complainant has admitted that litigation is pending in High Court. The copy of judgment in criminal case filed by complainant's son namely Noor Muhammad against 4 persons including appellant Sikandar Ali has also not been controverted, wherein the Court has acquitted the accused persons in a case for an offence punishable under Section 17(3) of the Offences Against Property (EOH) Ordinance, 1979. It is also a matter of

record that the eyewitnesses are father of the deceased, brother of the deceased and their close relative Muhammad Ibrahim. There is plethora of law on the point that in such a situation the evidence of witnesses, who are interested because of previous animosity and are also closely related, their evidence if is intrinsically true and supported by independent corroboration, can be relied upon for the purpose of conviction. The authorities Dosa v. The State (2002 SCMR 1578) and Sahib Masih v. The State (1982 SCMR 178) provide sufficient guidance in this regard. The case law was elaborately examined by this Court in Muhammad Yousuf v. State (2000 PLD 94) with regard to appreciation of evidence of related and inimical witness wherein the interested witnesses, although related and inimical, were believed. Mr.Abdul Mujeeb Pirzada, however, relied on a judgment of this Court reported as Shah Muhammad v. State (2000 P.Cr.L.J. 390) wherein interested and related witnesses were not believed for want of independent corroborative evidence and absence of motive etc. He further relied on Manzoor Ullah v. State (2002 MLD 85) and Asghar v. State (1999 P.Cr.L.J. 20) wherein, too the related eyewitnesses were not believed.

11. In the instant case it goes without saying that independent corroboration is wholly lacking that is to say neither the gun was recovered nor any empty from the place of incident. Assuming that it was one shot and empty was not removed from the barrel then too absence of recovery of crime weapon cannot be ignored. On the other hand, there are damaging factors against the prosecution case. For instance, the version that other accused gave Lathi blows to deceased has wholly been falsified by medical evidence, since none of the doctors has spoken about presence of Lathi a single injury. It has also come on record that blood was oozing from the injury, but no bloodstained earth was found at the place of incident nor was any secured. The Investigating Officer Muhammad Nawaz clearly stated that he could not note any

bloodstain marks around the place of incident. In the provisional certificate the first Medical Officer had opined, vide Ex.17-B, that the possibility of self-suffered injury could not be excluded. Dr.Tanvir, who had recorded this opinion, had expired and these documents were produced by PW-6 Dr.Abdul Aziz (Ex.17).

12. Even the doctor who conducted the postmortem examination was of the view that the bullet injury was muscle deep. The injured died on 13.6.2000 and the only injury on his leg was found to be a partially healed wound with discharge of pus and foul smell. The deceased had remained in two hospitals for 8 days and this injury has been opined to be sufficient to cause death. These circumstances indicate that negligence of doctors led to a deteriorating situation and the injury started discharging pus with foul smell. Moreover, the Medical Officer who conducted postmortem examination opined that it was possible that the injury could be self-suffered one, bearing in mind the fact that there was only one aperture and there was no blackenin**g** or charring.

13. Indeed, the above stated pieces of evidence run in an opposite direction and do not provide the requisite corroboration. Instantly, the evidence has come in inverse order damaging the case of prosecution. The medical evidence discussed above and absence of other incriminating pieces of evidence cast a doubt on the case of prosecution. The Investigating Officer has also opined that it was a false case as a result of self-suffered injury. Although the opinion of Investigating Officer is not binding on the Court, but when dishonesty in investigation is alleged the prosecution would be left with no evidence of investigation.

14. The eyewitnesses have also contradicted each other as to how the matter was reported to police. PW Muhammad Ibrahim, claiming to be an eyewitness, said that they entreated the accused in the name of Allah, who went away along with their cattle, whereafter

Sijawal and Peeral took away the injured and then he himself went away towards his house on his tractor. As against this, PW-2 Peeral says that the matter was reported to police post 86 and Sobedar Nawaz came at the place of incident, who took the injured to P.S. Kandhra. ASI Muhammad Nawaz has, however, given a different version saying that the injured was brought by complainant in a private vehicle at the police station. In cross-examination Peeral asserted that ASI Muhammad Nawaz along with one constable had come to the place of incident, this but fact stood wholly belied. Complainant stated that he reported the matter first to P.S. Kandhra from where police accompanied them to place of incident, but ASI Muhammad Nawaz has clearly stated that he inspected the site on the following day in the morning. The evidence of witnesses further suffers a setback on account of absence of Lathi injuries. Consequently, the only logical conclusion that can be drawn is that presence of witnesses at the site is not established beyond doubt. In the circumstances, the appellant deserved benefit of doubt which should have been extended to him by the trial Court.

15. In view of the foregoing discussion, I am convinced that the ocular testimonies of interested and hostile persons being discrepant in many respects needed independent corroboration which was totally lacking and on the contrary, the medical evidence has damaged the case of prosecution. The prosecution was required to prove the case beyond shadow of doubt, but

instantly the element of doubt is very much existing in this case. Thus, extending the benefit of doubt to the appellant the finding of conviction is set aside. The appeal is allowed and the appellant is acquitted of the charge. He may be released forthwith if not required in any other case.

JUDGE

Karachi :

Dated:

IN THE HIGH COURT OF SINDH, KARACHI

Cr. Appeal No.192 of 2004.

Present : Wahid Bux Brohi, and

Azizullah M. Memon, JJ.

Appellant	:	Saleem @ Rasheed through Mr.A. Iqbal Qadri, Advocate.
Respondent	:	The State through Mr.Habib Ahmed, Asst. Advocate General.

O R D E R

WAHID BUX BROHI, J: Appellant Saleem @ Rasheed has impugned the judgment dated 19.4.2004 passed by the Court of 1st Special Judge (STA), Karachi West convicting him for an offence under section 302(b), PPC and sentencing him to imprisonment for life

16. The case of prosecution, briefly stated, is that on 24.1.1995 a dead body was found in dicky of an abandoned Taxi bearing No.JL-5772 standing near Awami Chowk, Millat Colony, Karachi. Mashawarti Councilor Karim Bux informed the duty officer namely Inspector Mukhtar Ahmed of P.S. Orangi Extension, who went to the given place and secured the dead body from the taxi. He completed the formalities under Section 174, Cr.P.C. and took the dead body to Abbasi Shaheed Hospital for post mortem examination. He lodged FIR and conducted investigation. The dead body was identified by Shahid, brother of deceased, to be that of one Sajid Ali. The appellant was arrested by Mominabad Police in FIR No.119/96 for an offence punishable under Section 17(3) of the Offences Against Property (EOH) Ordinance, 1979 wherein he confessed his guilt, inter alia, for the instant offence also. The investigation of the other case was being conducted by CIA. The Investigating Officer of the instant case took the custody of appellant from lock up of Mominabad police. On pointation of appellant a 30 bore

pistol loaded with three rounds was secured which he dug out from the ground near Alamgir Kiryana Store. On completion of remaining formalities the case was challaned.

17. At the trial formal charge was framed against the appellant to which he pleaded not guilty. The prosecution, in order to establish their case, examined their witnesses namely: PW-1 Mukhtar Ahmed; PW-2 Saleem Akhtar; PW-3 Dilbar Khan; PW-4 Jamila Begum; PW-5 Tariq Hayat; PW-6 Karim Bux; PW-7 Hanif; PW-8 Manzoor Ahmed; and PW-9 Dr.Jaleel Qadir. Statement of accused was recorded under Section 342, Cr.P.C. wherein he denied the allegations of prosecution and pleaded that he was involved due to his political affiliation. On assessment of evidence, the learned trial Court convicted him and passed the above mentioned sentence.

18. We have heard Mr.Iqbal Qadri, learned counsel for appellant and Mr.Habib Ahmed, learned Asst. Advocate General for State and perused the relevant material on record.

19. It is of much significance to mention at the out set, that there is no ocular evidence against the appellant about the commission of actual act of Qatl-e-Amd of Sajid Ali. Evidence of PW-1 Mukhtar Ahmed, the duty officer of P.S. Orangi Extension shows that he had received telephonic message from the concerned Councilor that the dead body was lying in a dicky of Taxi bearing No.JL-5772. He secured the dead body and noted the injuries thereon. He took a successful step by getting the dead body identified through Shahid, the brother of deceased, and thereby he came to know that deceased was Sajid Ali, a constable in police. He examined witnesses out of whom, wife of the deceased showed suspicion against one Jamal. In any case, he did not collect such evidence as to involve the appellant directly.

20. The second witness PC Saleem Akhtar is attesting witness to the transaction of arrest of appellant by the second Investigating Officer Dilbar Khan. He is also attesting witness to the

transaction of pointation of the place of occurrence by the appellant, while in police custody. As already pointed out, Dilbar Khan, the second Investigating Officer, had taken the custody of appellant from CIA police wherein he had confessed the guilt of the present offence. The evidence of PW-2 Saleem Akhtar is, at the best, to the effect that in his presence the appellant pointed out the place of incident, but it does not furnish a direct ocular evidence as to the killing of deceased.

21. PW-3 Dilbar Khan is the second Investigating Officer, who, after taking custody of the appellant from the CIA Police on 21.1.1996, had taken the appellant to the place of incident as per pointation of the appellant. He had also secured a 30 bore pistol loaded with three rounds which the appellant dug out from the ground near Alamgir Kiryana Store. This could be treated as corroborative evidence, but to the misfortune of prosecution the required evidence of securing crime empties could not be furnished under the Rules of Evidence.

22. PW-4 Jamila Begum, wife of the deceased, deposed that on 25.1.1991 one Taj knocked the door of her house and on being questioned asked her to send her husband as there was a small work and her husband would return soon. It was 7.00 a.m. she awakened her husband, who changed clothes and went away, but did not turn up till evening. She stated that her husband used to ply a yellow cab taxi. Later on, she came to know about death of her husband. She did not implicate the present appellant.

23. PW-5 ASI Tariq Hayat is the witness of arrest of the appellant. He was, at that time, posted at Mominabad Police Station. According to him, a 7 mm rifle loaded with 6 rounds was secured from the possession of the appellant at the time of his arrest.

24. PW-6 Karim Bux is the Councilor, who was informed by the Mohallah people about the dead body, and in turn he informed the police. He is not an eyewitness of the

occurrence. He was informed by PW-7 Hanif, but the latter is also not an eyewitness of the incident.

25. PW-8 ASI Manzoor Ahmed was Roznamcha Muharrir at P.S. Mominabad in whose presence custody of appellant was delivered to the Investigating Officer of this case namely Dilbar Khan.

26. PW-9 Dr.Jalil Qadir is the Medical Officer who conducted postmortem examination of the deceased.

27. In this way, there is no ocular evidence against the appellant and the prosecution depended on the appellant's confession, said to have been recorded on 21.6.1996 by ACM Karachi West. The photocopy of confession was produced by the second Investigating Officer Inspector Dilbar Khan PW-3 during his re-examination. The most serious drawback in the mode of production of this document is that it is not the original confession, but a photocopy thereof attested by some one, whose name, designation and identity is not mentioned therein. The other damaging flaw in this regard is the absence of name of the Magistrate in the confessional statement. But, in any case, the said Magistrate has not been examined at the trial. There is yet another infirmity that the photocopy of the confessional statement was produced by second Investigating Officer Dilbar Khan, who was neither the police officer who had taken the accused to the Magistrate for recording his confession nor he was posted at Mominabad Police Station at that time and he did not produce the copy of confessional statement in his examination-in-chief, but he produced the same only during re-examination. He was not at all concerned with the recording of this confessional statement. On the whole, we are constrained to observe that the so-called document Exhibit 8C treated as copy of confession was not admissible in evidence and

ought to have been excluded from consideration, but amazingly, the learned trial Court has placed complete reliance on it and founded the conviction on this document.

28. Notwithstanding all these infirmities/drawbacks it is relevant to point out that in the said confessional statement the accused had spoken of several incidents and regarding the instant case he gave a general version and did not give an incriminating version against himself that he committed the Qatl-e-Amd. Accordingly, we have reached a definite conclusion that this piece of evidence was to be excluded from consideration and finding of conviction could not be based solely on this documents purporting to be the confession.

29. Additionally, in this context it may be observed that despite all these drawbacks, the contents of confession were not put to the appellant when his statement was recorded under Section 342, Cr.P.C. This infirmity adds to the miserable state of case of prosecution. Certainly, the finding of conviction could not be sustained if the incriminating version attributed to the accused, whatsoever in nature, is not put to him under Section 342, Cr.P.C.

30. Again, the prosecution proposed to rely on the evidence of recovery of alleged crime weapon from the appellant, on his pointation. This could, at the most, be a circumstantial evidence to be read in corroboration of direct evidence, but there is no evidence on record to suggest how the empties, sent to the Ballistic Expert, were recovered, because according to Medical Officer a bullet was secured from the dead body whereas the Ballistic Expert has received two crime empties for which the prosecution witnesses are silent as to how and when those empties were secured. Nevertheless, the facts of recovery of crime weapon or even an empty or the matching report issued by the Ballistic Expert were not put to the appellant, while his statement was recorded under Section 342, Cr.P.C. This is yet another serious lacuna in the trial.

31. On discreet assessment of the whole evidence on record, it is concluded that there was no material sufficient to base conviction thereon. The alleged confession was not proved. The evidence of recovery of crime empties and weapons was faulty and no incriminating evidence was put to the accused, while his statement under Section 342, Cr.P.C. was being recorded, the finding of conviction, therefore, cannot be sustained. The accused has already remained in jail for a period of 7 years and 9 months and in such a poor state of evidence it would be of no use to remand the case for retrial. The decision in RAM SHANKAR V. STATE OF U.P. (AIR 1956 S.C. 441) may beneficially be relied in this regard. In result of such conclusion we allow this appeal and set aside the conviction and sentence.

32. These are the reasons for the short order announced in Court on 10.9.2004.

JUDGE

JUDGE

Karachi :
Dated: 11.9.2004.

IN THE HIGH COURT OF SINDH, KARACHI

Cr. Appeal No.170 of 2003.

Present : Wahid Bux Brohi, and

Rahmat Hussain Jafferi, JJ.

Appellant : **Pervaiz @ Puttar and another through Mr.Ilamdin Khattak, Advocate.**

Respondent : **The State through Mr.Habib Ahmed, Asst. Advocate General.**

O R D E R

WAHID BUX BROHI, J: **Appellant Pervaiz and Abdul Mannan have impugned the judgment dated 30.4.2003 of the learned Special Judge, CNS Court, Karachi whereby they have been convicted for an offence under section 9(c) of the Control of Narcotic Substances Ordinance, 1996 (CNS Ordinance, 1996) and sentenced to imprisonment for life and fine of Rs.100,000/= each or in default of payment of fine to suffer imprisonment for 6 months more.**

33. **The case of prosecution is founded on the FIR lodged by complainant SIP Malik Abdul Haq of P.S. Quaidabad, Karachi. According to FIR, on 10.2.1997 appellant Pervaiz @ Puttar was in police custody in two cases, FIR No.31/97 and 32/97 of P.S. Quaidabad and during investigation he disclosed that charas was available in a house which he can point out. He led the police to house of co-accused Mannan situated near Tahir Provision Store, Muslimabad Colony, Landhi, Karachi from where the complainant recovered a bundle of plastic containing 70 strips of charas weighing 33 kg, in presence of witnesses Soomar and PC Ashfaq Hussain. Co-accused Mannan, however, managed his escape good on seeing the police taking advantage of narrow and dark lanes. The charas was sealed and the appellant Puttar was taken to police station where the FIR was recorded and the case was investigated and challaned showing appellant Abdul Mannan as absconder. Mannan was later on arrested and sent up for trial.**

34. **At the trial, initially the charge was framed for an offence punishable under Control of Narcotic Substances Act, 1997, but on 04.2.2002 it was amended and offence was shown to be punishable under the Control of Narcotic Substances Ordinance, 1996. The appellants pleaded 'not guilty' to the charge on both occasions and claimed trial. The prosecution examined two witnesses namely PW-1 Muhammad Soomar, one of the mashirs and complainant SIP Malik Abdul Haq. Learned trial Court, on perusal of evidence, found them guilty for an offence under section 9(c) of the CNS Ordinance, 1996 and convicted them accordingly.**

35. **We have heard Mr.Ilamdin Khattak, learned counsel for appellants and Mr.Habib Ahmed, learned Asst. Advocate General for the State and perused the evidence with their assistance.**

36. **Learned counsel for appellants contended that the prosecution evidence is wholly stiffed with inconsistencies and drawbacks on which conviction could not be sustained. He pointed out that the prosecution failed to give a consistent version about the quantity of narcotics. Besides, the property was also sent to Chemical Examiner with a delay of about 12 days, which too was a damaging factor.**

37. **In this context perusal of evidence would show that according to complainant Malik Abdul Haq, the duty officer in whose custody appellant Pervaiz was, he entered the house on pointation of appellant Pervaiz and from eastern room of the house under a sleeping cot a plastic bag was pulled out by the appellant, which, on opening, was found to contain 70 pieces of charas. The charas weighted 33 kg, and he prepared such mashirnama (Ex.5A) on the spot after sealing the charas. When the property was shown to the complainant in the trial Court, an anomalous situation cropped up, the trial Court was, therefore, constrained to record the following note in the deposition:-**

"At this stage the witness says that the case property is smaller in quantity than quantity recovered from the accused, the witness states that point out at the nine heavy piece 70 such pieces were recovered the witness states, that the smaller pieces were not part of the recovery made in this case. The witness states that the case property was handed over to the head moharer of P.S. and he is unable to inform the Court regarding where about of total quantity of recovery made in this case.

At this stage the learned prosecutor request for reserving further examination in chief for want of produce of whole case property this request is turned down firstly for the reason that the accused are in custody since 10.2.1997 and the trial has not concluded and secondly the investigating officer himself is unable to provide information regarding where-abouts of the whole of case property so also the learned prosecutor has not specified from where the case property is to be produced."

38. It is important to note that the report of Chemical Analyzer was produced by this witness as Exhibit 6-B, which showed that the net weight of charas without any wrapper was 35.350 kg. in the form of 140 greenish and black semi soft slabs. However, the report further mentions that initially there were 70 sleepers each made of two thin slabs wrapped in red punny. This inconsistency was pointed out to the complainant in cross-examination, but he adhered to his earlier version saying that the recovery was of only 33 kg. charas and not of 35.350 kg. He also denied that 140 slabs were sent to the Chemical Examiner for analysis. The trial Court put a specific question to him in this behalf. Even then he said that he had sent 70 pieces and not 140 pieces of charas and then in cross-examination he asserted that the 70 pieces were single unit pieces that is to say one slab each. Regarding broken pieces produced in Court he said that the same were not the pieces recovered by him on pointation of the appellant.

39. With regard to the case property the witness Muhammad Soomar PW-1 (Ex.5) stated that the plastic bag contained 70 pieces of charas which weighed 33 kg. This was the first witness examined at the trial and since the property produced in the Court differed from what was being spoken of the trial Court recorded the following note in the deposition:-

"(The case property is inspected it consist of, one plastic bag from which nine large single pieces individually wrapped these single pieces are wrapped in red plastic covered by white plastic nine thin slabs which would be half the size of the above nine larger and heavy slabs out of these nine thin slabs there are broken and 8 smaller slabs being the size of half of the thin slab, the total of the slab would be 26 pieces)

NOTE.

At the insistence of learned defence counsel it is noted that the nine thinner slabs are not wrap in any paper or covering but the same were recovered/produced from the sealed plastic bag."

40. In view of above situation the witness stated that 26 pieces were not recovered in his presence and further regarding the fact how he joined the police he stated that he was resident of district Thatta and was standing at Hospital Chowrangi when the police officer namely Malik Abdul Haq asked him to accompany them as they had to make recovery from the house of the person who was in handcuffs namely the appellant. In this regard, an inconsistent position appears from the mashirnama wherein it was recorded that mashir Soomar was present at the police station and accompanied the police from there. The complainant was confronted with this position and in cross-examination he came out with a clear reply that PW Soomar had accompanied the police party from the police station where he was present. Obviously, these conflicting versions cannot be accepted as a believable account of a single set of facts as to from where this chance witness namely Soomar accompanied the police.

41. Mr.Habib Ahmed, learned Asst. Advocate General was not able to controvert the factual position obtaining from the evidence of the complainant himself, who happened to be the police officer, who allegedly made the recovery of 70 slabs of charas. As already pointed out, when the complainant was questioned by the Court pointedly, stated that 140 slabs of charas, as shown in the report of Chemical Examiner (Ex.6-B), was not the case property in this case. Assuming that the case property was not the bulk of charas received by the Chemical Analyzer then the actual property/charas should have been produced at the trial, but as is evident from the afore-quoted notes of the trial Court, there were only 26 pieces and neither 70 nor 140 when the same were produced at the trial.

42. It is worth mentioning here that since the confusion in the form and weight of property was manifest the trial Court passed an order on 28.1.2003, calling upon the Chemical Examiner to clarify the position. One Muhammad Zahid, the Chemical Examiner appeared as Court witness, who stated that the case property was received by his predecessor Dr.Shahid

Iqbal Danish on 24.2.1997 and the slabs of charas were counted and found to 140 in number and that each slab of charas was separately sealed. According to him, the weight of charas was 35.350 kg. No question was put to him in cross-examination by the DDA or the defence counsel. It may be noted that according to this witness weight of each piece of charas was different, therefore, they made a complete inventory of the weight of each piece, copy of which was produced at the trial as Exhibit C-1 showing the weight of each piece separately. The evidence of this witness stood un-rebutted, as such, an inference can safely be drawn that the prosecution accepted the version that the property received by the Chemical Examiner was in the shape of 140 pieces of charas of different weight.

43. Thus, the situation emanating from the evidence on record would be that, according to complainant, the case property was nothing but 70 pieces of charas weighing 33 kg., which he forwarded to the Chemical Examiner, but according to Chemical Examiner the property was in 140 pieces of different weight totally weighing 35.350 kg., while at the trial only 26 pieces of different size were produced in Court which again demonstrated a total different and inconsistent property as regards the number of pieces and the weight thereof.

44. Indeed, the story has emerged with three different facets and prosecution has totally failed to account for this huge drawback. In particular, regarding the conduct of Malik Abdul Haq the police officer who effected recovery, the trial Court, while passing the property order, has observed that the copy of the judgment be forwarded to the Inspector General of Police for taking disciplinary action against SIP Malik Abdul Haq.

45. It is worth mentioning that the trial Court noted another infirmity in the transaction of alleged recovery which was mentioned in the judgment pointing out that in the application under section 161, Cr.P.C. it was mentioned that 7 kuppies of country-made liquor were also recovered at that time. The trial Court, in its judgment, took a serious note of such omission in the mashirnama, but it is surprising that despite all the above mentioned weaknesses, drawbacks and infirmities in the case the Court could not realize that the case of prosecution was shadowed with thick clouds of doubt right from beginning and the benefit of doubt was but to be extended to the appellants.

46. It may be added that in the circumstances mentioned above the learned counsel for appellants was justified in relying on the principles laid down in TILA MUHAMMAD V. STATE (2003 P.Cr.L.J. 1379) on the point of exorbitant delay in sending the charas to Chemical Examiner. This factor also detracted from the genuineness of the case of the prosecution. Mr.Habib Ahmed, learned Asst. Advocate General frankly admitted that when Mannan was arrested no identification test was conducted. The case of prosecution had also sustained a below on this count. However, he was of the view that since appellant Pervaiz had led to discovery following a recovery of charas, the finding of conviction was justified as against him. In view of the elaborate discussion on the serious shortcoming in the case we are of the considered view that the entire case was doubtful, the trial Court had erroneously recorded finding of conviction.

47. For the foregoing reasons the appeal is allowed and the conviction is set aside giving the benefit of doubt to the appellants.

48. These are the reasons for the short order announced in Court on 15.4.2004.

JUDGE

JUDGE

Karachi :

Dated: 21.4.2004.

IN THE HIGH COURT OF SINDH, KARACHI

Cr. Appeals No.101 of 2000.

Cr. Appeals No.103 of 2000.

Cr. Appeals No. 94 of 2000.

Date of hearing 09.9.2002

Appellants Shabbir Hussain, Zafran (Cr. Appeal No.101/2000) through Mr.Salahuddin Khan Gandapur) advocate, Muhammad Asif (Cr. Appeal No.103/2000) through Mr.S.M. Iqbal advocate and Muhammad Shahid (Cr. Appeal No.94/2000) through Mr.Ashraf Ali Butt advocate.

Mr.Mahmood A. Qureshi, Amicus Curiae

Respondent State through Mr.Javed Akhtar, State Counsel

O R D E R

WAHID BUX BROHI, J: This order shall dispose of Cr. Appeals No.101, 103 and 94 of 2000 which arise out of one and the same judgment delivered by learned 1st Additional District and Sessions Judge, Karachi whereby he convicted the appellants Asif, Shabbir Hussain, Zafran and Muhammad Shahid for an offence under section 395, PPC and sentenced each of them to rigorous imprisonment for 5 years and fine of Rs.5,000/=. In default of payment of fine they were ordered to undergo R.I for 6 months more. Appellant, Muhammad Shahid was further convicted and sentenced to imprisonment for 4 years for an offence punishable under section 324, PPC, and to rigorous imprisonment for 6 months for the offence punishable under section 353, PPC.

49. The case of prosecution, briefly stated, is that on 26.7.1998 at about 1745 hours complainant Shahid Khan was present in his house when five decoits armed with TT Pistol barged into his house and confined all the inmates in one room. In the meantime, some neighbours informed the police on telephone, in response whereof SHO P.S. Gulbahar rushed to the place of occurrence. On seeing the police party the decoits started firing and the police also returned fire. Ultimately, police succeeded in apprehending Asif, Shabbir Hussain and Zafran. During the encounter one of the culprits namely, Rahimullah died on the spot, while 5th one namely, Shahid managed to escape taking some cash and gold ornaments with him. Police secured one pistol, 3 live bullets, a wrist watch and cash of Rs.516/= from Asif, a TT Pistol, 3 rounds and a wrist watch from Sabir Hussain and one pistol, 4 rounds and a gold ring from appellant Zafran. A pistol, three live bullets loaded in the magazine and one wrist watch were recovered from the person of deceased culprit Rahimullah. Appellant Shahid was apprehended during the investigation. On completing investigation challan was submitted in the Court.

50. At the trial, appellant pleaded not guilty to the charge. The prosecution examined their witnesses namely, PW-1 Shahid Khan, PW-2 Sahibullah, PW-3 Rashid, PW-4 Rahim Shah, PW-5 Alamgir, PW-6 Raees, PW-7 Saeed Zada, PW-8 A. Rais, PW-9 Muhammad Yousuf and PW-10 Din Muhammad. Statements of the appellants were recorded, they denied the case of prosecution, but did not examine themselves on oath nor did they lead evidence in defence.

51. I have perused the evidence on record and heard the learned counsel for appellants and learned State counsel.

52. At the outset it is relevant to mention that learned counsel for the appellants pointed out that the appellants are no more in custody as they have been released from jail on serving out their sentences. A report was called for from jail. The superintendent Central Prison, Karachi informed through two letters that appellant Asif was released on 6.10.2000, Sabir on 19.12.2000, zafran on 20.10.2000 and Shahid on 11.9.2001. It is also pertinent to mention that learned counsel were called upon at one stage, to satisfy the Court about maintainability of appeal before this Court but since the appeals had already been admitted by another Bench the matter was posted for regular hearing. Since much before hearing of the appeals the appellants had already been released, learned counsel for the appellants chose to address the Court only on the legal point concerning jurisdiction of this Court.

53. The offence committed during this incident was result of a dacoity committed by 5 culprits who entered the house of complainant and confined the inmates of the house in a room and on this point sufficient evidence was led by prosecution at the trial. While passing the judgment the trial Court framed the point for determination with respect to the acts of dacoity in following terms:

1) Whether on 26.3.1996 at about 1745 hours the above named accused along with deceased accused Rahimullah committed dacoity in the house of complainant bearing No.112, Orangi Nala Jahangirabad, Gulbahar and during encounter between police and accused party accused Rahimullah died at the spot?

2) Whether on the above date, time and place the accused above named along with deceased accused took away forcibly cash Rs.2,60,000/= Gold ornaments, 9 wrist watches?

3) What offence if any the above named accused have committed?

54. On assessment of the evidence on record the learned trial Court answered both the points in the affirmative and in conclusion thereof recorded the following observations:

"POINT NO:3:

In view of my findings on the point No.1 & 2, I have come to the conclusion that the prosecution has established its case against the present accused beyond the shadow of any reasonable doubt. I, therefore, hold that the accused are guilty of commission of dacoity. No doubt accused were challaned under section 17(3) Offence Against Property (Enforcement of Huddood) Ordinance, 1979, but in the present case Hadd shall not be imposed upon the accused as in this case two male Muslim, adult, witnesses other than the victim are missing, therefore, accused will be convicted under Tazeer viz. under section 395, PPC I, therefore, convict the accused under section 395, PPC. ……"

55. In consequence of the above finding the learned trial Court convicted the accused for offence under section 395, PPC and passed sentence of rigorous imprisonment for 5 years as already stated. It follows that the trial Court was conscious of the fact that in conclusion of his findings he found the accused persons guilty of an offence punishable as Haraba liable to Ta'zir within the meaning of section 20 of the Offence Against Property (EOH) Ordinance, 1979. The learned trial Court has in clear words stated that as Ta'zir the punishment is to be awarded under section 395, PPC. In such an eventuality the provisions of section 24 of the aforesaid Ordinance are attracted and the appeal should lie to Federal Shariat Court.

56. A similar point was examined by this Court in the case GHULAM MUHAMMAD V. STATE (2000 P.Cr.L.J. 1155) (judgement authored by me) and the relevant case law FALAK SHER V. STATE (1996 P.Cr.L.J. 804) and PIRAK V. STATE (1997 P.Cr.L.J. 1900) was examined and it was held that the High Court was not competent to hear the appeal. There can be no other reasonable view in the instant case too, since the main offence fell within the purview of section 20 of the Offence Against Property (EOH) Ordinance, as may be gathered from the impugned judgment. The sentence awarded was RI for 5 years, the case would, therefore, fall within the appellate jurisdiction of Federal Shariat Court and the appeal before this Court is not competent.

57. Mr.Mahmood A. Qureshi, learned amicus curiae relied on SAKHI DOST JAN V. PAKISTAN NARCOTICS CONTROL BOARD (1998 SCMR 1798 = 1998 SD 605), ALLAH DITTO V. ISHTIAQUE AHMED SOOMRO (1999 P.Cr.L.J. 1996), SARDARULLAH V. STATE (1998 P.Cr.L.J. 2001) and KHURSHEED V. STATE (1990 P.Cr.L.J. 409) wherein the revisional jurisdiction of High Court has been

dilated upon viz-a-viz jurisdiction of Federal Shariat Court conferred by article 203-DD of the Constitution. The Hon'ble Supreme Court has interpreted the term case decided in Sakhi Dost Jan's case (supra) in following words:

> "It is well-settled that the term, "case decided" can be construed as a decision given in respect of any state of facts after judicially considering the same, which need not necessarily dispose of the whole matter in a cause pending before a Court subordinate to the High Court. Reference may be made to Umar Dad Khan v. Tila Muhammad Khan (PLD 1970 SC 288), wherein this Court approved the statement of law in Bibi Gurdevi v. Muhammad Bakhsh (AIR 1943 Lah. 65), ..."

58. He also relied on RASOOL BAKHSH V. STATE (1998 SD 177) on the point that appeal from judgment made without jurisdiction would lie in same manner as would an appeal lie against judgment made with jurisdiction. He further submitted that the Federal Shariat Court has not been conferred power akin to that which have been conferred on a High Court, under section 561-A, Cr.P.C. the High Court would, as such, possess jurisdiction to entertain a petition under section 561-A, Cr.P.C.

59. Keeping in mind the principles laid down in the above cited authorities it may be observed that this is not a case of exercise of revisional jurisdiction nor of powers under inherent jurisdiction within the meaning of section 561-A, Cr.P.C. Presently, three appeals are in hand which arise out of a judgment whereby the appellants have been convicted for an offence under section 395, PPC as Ta'zir and awarded punishment of rigorous imprisonment for 5 years. Certainly, the appeal would lie to Federal Shariat Court particularly when it has been observed by the trial Court that it could not convict the appellants for the offence of Haraba liable to Hadd, therefore, he was imposing punishment as Ta'zir. Ostensibly, this was done within the scope of section 20 of the Offences Against Property (E.O.H.) Ordinance, 1979 and on that score the appellate forum was the Federal Shariat Court as contemplated under section 24 of the aforesaid Ordinance.

60. As already pointed out the appellants have already served out their sentences and they were no more interested in pursuing the appeal. Consequently, the appeals are dismissed for want of jurisdiction. Nevertheless, if the appellants desire adjudication on merits they may approach the Federal Shariat Court. However, while parting with the judgment I would record my note of appreciation for Mr.Mahmood A. Qureshi, who was associated as amicus curie on the request of the Court, for his valuable assistance rendered in the matter.

JUDGE

Karachi :

Dated: 18.10.2003.

IN THE HIGH COURT OF SINDH, KARACHI

Cr. Appeal No.294 of 2002.

Appellant : **Mst.Rabia @ Rabic through Mr.Fazalur Rahman Awan, Advocate.**

Respondent : **The State through Mr.Habib Ahmed, Asst. Advocate General.**

WAHID BUX BROHI, J: **The appellant, Mst.Rabia @ Rabic has impugned the judgment dated 15th August 2002 passed by learned Special Court, Control of Narcotics Substances, Karachi Division whereby she was convicted for an offence punishable under section 9(c) of the Control of Narcotic Substances Act, 1997 (herein below to be referred to as 'CNS Act') and sentenced to imprisonment for 7 years and fine of Rs.100,000/=; in case of default in payment of fine to suffer rigorous imprisonment for 6 months more.**

2. **It is the case of prosecution that on 22.5.2001 Inspector Syed Shaukat Ali of Kala Kot Police Station, on receiving spy information, raided the house of appellant in Raxer Lane, Street No.3 and in presence of private witnesses Muhammad Haroon and Sikandar along with a lady constable entered the hosue where the appellant was found in possession of 3 packets containing heroin powder weighing 1.75 kg. The person of the accused was searched through the lady constable, but nothing else was secured from her. She was put under arrest and such mashirnama was prepared. The accused and the material secured were taken to police station Kala Kot where FIR was lodged and investigation conducted.**

3. **At the trial, the accused pleaded 'not guilty' to the charge whereafter the prosecution examined their witnesses namely PW-1 ASI Sarfraz Aliani, PW-2 SIP Khan Muhammad Zardari and PW-3 Shoukat Ali. They produced the relevant documents. The appellant, in her statement under section 342, Cr.P.C., denied the allegations and took the plea that she had complained against the police officials of PS Kala Kot to I.G. Police, therefore, she was involved falsely. She produced copies of the complaints made by her and her daughter. On assessment of the evidence the learned trial Court convicted the appellant and passed the sentence as above.**

4. We have heard Mr.Fazalur Rahman Awan, learned counsel for appellant and Mr.Habib Ahmed, Asst. Advocate General and perused the record.

5. Almost all the witnesses, who of course belong to police, have given common evidence on the point of recovery of 3 packets from the possession of the appellant when her house was raided. The only drawback is that the private witnesses namely Muhammad Haroon and Sikandar were not examined in the Court. PW-1 Sarfraz Aliana giving the details of the incident deposed that the SHO, Shoukat Hussain took him and other police officials along with lady constable Hanifa Baloch in police mobile and proceeded for the purpose of raid after making entries in the station diary. On the way, they also took two private mashirs Sikandar and Haroon and at 0015 hours on 22.5.2001 raided the house of appellant Mst.Rabia on pointation of PC Tufail Ahmed. According to him, the appellant Mst.Rabia was present and 3 polythene bags were lying there which were secured and weighed. The packets contained heroin powder and their gross weight was 1.75 kg.

6. The other witness examined on this point is the SHO, Shoukat Ali, who led the police party. He has also given the same details and stated that he raided the house and found 3 packets containing heroin lying in front of the appellant in the house. The packets weighed 1.75 kg. The third witness Khan Muhammad Zardari is the Investigating Officer who had examined the witnesses and also forwarded the material to laboratory for chemical examination. He produced the report of laboratory (Ex.P/2), which is in the affirmative showing that all the 3 packets contained heroin.

7. From the above evidence, it would be seen that a consistent evidence has been given on the point of recovery of 3 plastic packets containing heroin which at that time weighed 1.75 kg. and on chemical examination was found to he heroin.

8. Learned counsel for appellant, however, disputed the genuineness of recovery on the ground that two mashirs were taken from public, but none of them was produced by the prosecution at the trial; actually no person from the locality was joined during the raid within the meaning of section 103, Cr.P.C., the names of constables were not stated in the FIR; there were a number of contradictions between the statements of the witnesses; and lastly, the heroin powder was forwarded for chemical examination after 3 months. In support of his contentions he relied on MUHAMMAD ALTAF V. THE STATE (1996 P.Cr.L.J. 440), MUHAMMAD ARIF V. THE STATE (1993 P.Cr.L.J. 1953), TARIQ PERVEZ V. THE STATE (1995 SCMR 1345), NAWAB ALI V. THE STATE (NLR 1995 SD 374) and ALI HASSAN V. THE STATE (PLD 2001 Karachi 369).

9. Learned Asst. Advocate General submitted that Roznamcha entry was duly made at the police station before setting out for the raid; a lady searcher was also arranged whose name is duly stated in the FIR; the police have no animosity which is evident from the fact that the other inmates of the house were not involved; the contradictions are minor in nature; and the offence is under special law where the application of section 103, Cr.P.C. has been excluded by virtue of section 25 of the CNS Act. In this regard, he relied on FIDA JAN V. THE STATE (2001 SCMR 36).

10. We have carefully considered these contentions. As far the application of section 103, Cr.P.C. is concerned, the observations made by the Hon'ble Supreme Court in Fida Jan's case (2001 SCMR 36) fully support the contention of learned Asst. Advocate General that arrangement of two persons from the locality for the purpose of search in cases of narcotics was not an essential requirement. Even then the police had arranged two mashires from the public namely Haroon and Sikandar. It is a question apart that

those witnesses could not be produced at the trial. Nevertheless, the principle laid down by the Hon'ble Supreme Court supports the point raised by learned Asst. Advocate General.

11. As regards the case law cited by the learned counsel for the appellant it may, at the outset, be observed that each case has its own features and the decision therein does not always carry sweeping effect on every other criminal case relating to the same offence. In Muhammad Altaf's case (supra) the complainant was a police official who had also acted as the Investigating Officer; besides, there was delay in dispatch of heroin to the Chemical Examiner for analysis and the date of receipt of the parcel was also not mentioned in the Chemical Examiner's report. Further, sealing of the recovered heroin was not proved and there was discrepancy about its weight. In Muhammad Arif's case (1993 P.Cr.L.J. 1953) prosecution had not at all been able to explain as to where the contraband material remained for the period between recovery and its dispatch to Chemical Examiner. In Tariq Pervez's case (1995 SCMR 1345) the accused was apprehended, while selling one gram of heroin to a fake customer. Regarding other material recovered from the accused two separate parcels were drawn, but only one parcel was sent to Chemical Examiner. The accused was acquitted by learned Federal Shariat Court, in the case of selling one gram heroin to fake customer; consequently, benefit of doubt was given to him in the other case also. In Nawab Ali's case (supra) there was delay in dispatch of the material to Chemical Examiner for analysis which remained absolutely unexplained. In Ali Hassan's case (PLD 2001 Karachi 369) the significant factor was that there were material contradictions in the evidence of prosecution witnesses; and there were eight other officials present at the time of occurrence, but the Investigating Officer had mentioned only two of them in the charge sheet.

12. It would be seen from the above, that there is divergence of facts and circumstances in each case. The facts of the instant case are much different from those appearing in the cited cases. In essence, the intrinsic worth of the evidence is to be scrutinized, of course, keeping in view the golden principle that every element leading to benefit of doubt should be resolved in favour of the accused.

13. In the instant case there is, no doubt, delay in dispatch of the material for the purpose of chemical examination, but it has been explained by the prosecution that the same was duly sealed and the Chemical Examiner has found the seals in tact. Nevertheless, we would agree with the learned counsel for appellant that in the light of the principles laid down in the cited precedents this drawback cannot be ignored. However, the delay in dispatch of sample for laboratory test alone is not always the sole deciding factor. On the other hand, there is sufficient evidence on record reliable in nature which too cannot be discarded. The policemen are good witnesses like any other person, therefore, their evidence cannot be brushed aside simply for the reason that the private witnesses were not produced. In fact, PW-1 Sarfraz Aliana is one of the mashirs who had attested the mashirnama of recovery at the time of occurrence, his evidence is, therefore, to be treated as that of a mashir. Moreover, the contradictions pointed out by learned counsel for appellant were minor in nature. For instance, PW-1 said that the house was a double-storied building, but PW-3 said that it was a single-storied building. About the family members PW-1 stated that their family comprised the accused, her sons and daughters whereas PW-3 stated that he did not know about the total number of family members. PW-3 stated that at the time of occurrence 10 to 15 persons collected there, but the other witness said that nobody came there at that time. Similarly, both of the witnesses claimed to have prepared the mashirnama. It may be pointed out that they were examined after about one year of the occurrence and slight mistakes are bound to occur, after such lapse of time because in the meantime they might have dealt with a large number of other

incidents. As far the defence plea that the appellant had made complaints to the high police officers against Kala Kot Police Station, it is significant to note that copies of those complaints have been produced at the trial and the appellant claims to have paid Rs.150,000/= to police as alleged in her application (Ex.23). Similarly, appellant's daughter has also alleged in another application that earlier her brothers Rasheed and Hameed were taken by police and Rs.150,000/= were paid to police where-after they were released. These documents indicate that the appellant or her sons have been making payment to police of huge amounts as bribe to police much earlier to this incident that is to say in the years 1996 and 1997. It, however, cannot be said that the same police officers who conducted the raid in this case were posted three years prior to this occurrence at police station Kala Kot. On the contrary, payment of huge money as bribe, reflects adversely on the defence plea.

14. On a thorough examination of the evidence on record we are of the considered view that notwithstanding few minor contradictions in the evidence or the delay in dispatch of the heroin powder for chemical examination the case of prosecution is believable and the genuineness of recovery of heroin weighing 1.75 kg from the possession of appellant cannot be doubted. The trial Court has correctly assessed the evidence and the finding of conviction is maintained so also the sentence. The appeal is without merits and is hence dismissed.

15. These are the reasons for the short order pronounced in Court on 14.1.2003.

JUDGE

JUDGE

Karachi :

Dated: 16.1.2003.

IN THE HIGH COURT OF SINDH, KARACHI

Cr. Appeal No.106 of 2001.

Appellant : **Muhammad Yousuf through Mr.Jawaid Haider Kazmi, Advocate.**

Respondent : **The State through Mr.Fazalur Rahman Awan, State Counsel.**

WAHID BUX BROHI, J: **The appellant, Muhammad Yousuf has been convicted for an offence under Section 302 (b) PPC and sentenced to imprisonment for life and fine of Rs.25,000/-, in case of default in payment of fine to undergo imprisonment for three years more. He has been directed to pay an additional amount of Rs.25,000/- as compensation under Section 544-A, Cr.P.C to be paid to the heirs of the deceased/victim.**

16. The case of prosecution is based on the statement of Mst.Khadija wife of Muhammad Ibrahim recorded under Section 154, Cr.P.C on 30.10.1993 at 8.00 p.m. which was later on incorporated in the FIR book. It was disclosed in the said statement that deceased Mst.Maryam was daughter of complainant Khadija's elder sister Mst. Hawa Bai wife of Babu Ismail. Deceased Mst.Maryam was married to Ramzan about six years back. Prior to marriage, Mst. Fatima, mother of appellant/accused Muhammad Yousuf had demanded the hand of Mst.Maryam from her brother Babu Ismail, but the latter had declined. After marriage, Mst.Maryam used to live with her husband at Kalri, but her husband was bullied by Yousuf, therefore, he fled away from there and then Muhammad Yousuf brought Mst.Maryam to his house at Kalri. About two months back, complainant Khadija and her sister went to Kalri to bring Mst.Maryam back but, appellant Muhammad Yousuf gave a beating to complainant's sister and the incident was reported to Police Station Kalri. Later on, Ramzan brought his wife Mst.Maryam to his house and both of them started living at Kemari. About 6/7 days back Mst.Maryam came to the house of her mother. On the day of incident i.e. 30.10.1993 at about 3.30 p.m. complainant Khadija, her husband Ibrahim and Mst.Maryam's husband were sitting in the house and chatting, Mst.Maryam was in the kitchen, while Hawa Bai

was serving meals to the children, when Muhammad Yousuf came there and after shaking hands with Ibrahim and Mst.Maryam's husband went to the kitchen and asked Maryam why she had come from Kemari. Mst.Maryam replied that she had come with her husband. On this appellant Muhammad Yousuf drew the pistol from the fold of his Shalwar and fired at Mst.Maryam, which hit her on forehead and she fell down. The complainant's husband Ibrahim caught hold of appellant Muhammad Yousuf, while the complainant herself snatched the pistol from the appellant and went upstairs where she raised cries. Appellant Muhammad Yousuf got himself released and ran away but, the people of Mohalla stoned him on which he fell down. Complainant's husband and Mst.Maryam's husband Ramzan took Mst.Maryam to the hospital in injured condition where she died. While making the above statement Khadija pointed out that appellant Muhammad Yousuf was the same who had come along with police in the hospital and that he had in her presence fired and killed Mst.Maryam. She also disclosed that she had left the pistol in the house and would produce it afterwards. She stated further that her husband Ibrahim, Mst.Maryam's husband Ramzan and her sister Hawa Bai had also seen the incident. The above statement was incorporated in the FIR and investigation was taken up. After completing the investigation, the case was challaned in the Court.

17. At the trial, the appellant pleaded not guilty to the charge. The prosecution, in order to prove the case, examined their witnesses namely PW-1 Khadija, PW-2 Hawa Bai, PW-3 Muhammad Ibrahim, PW-4 Ramzan, PW-5 Ahmed, PW-6 Qasim, PW-7 Abdul, PW-8 Zulfiqar and PW-9 Dr.Hamid Gillani. The statement of accused was recorded under section 342, Cr.P.C. wherein he denied the case of prosecution. He examined himself on oath under section 340(2), Cr.P.C. and examined defence witnesses namely Ibrahim, Rasheed and Muhammad Irfan. The learned IVth Additional District & Sessions Judge, on assessment of the evidence on record convicted the appellant and sentenced him, as above.

18. I have heard Mr. Javed Haider Kazmi, learned counsel for the appellant and Mr. Fazlur Rahman, learned counsel appearing on behalf of the State.

19. Mr. Kazmi, learned counsel for the appellant mainly contended that no independent witness was cited in the case and the previous FIR lodged against the appellant had proved false. He pointed out that the case property such as clothes etc., were not produced at the trial and only a pistol was produced which contained five bullets, whereas the memo of recovery showed that it was empty and the same was never sent to the Ballistic Expert. He also contended that two witnesses, Khadija and the medical officer Dr.Hamid Jaillani were first examined in chief, in absence of advocate for appellant, which violates the Rules. He contended that there was delay of 4½ hours in lodging of the FIR. He pointed out that no finding was given in the judgment about the offence under section 337-F(i), Cr.P.C.

20. Mr. Fazlur Rahman, learned counsel appearing on behalf of the State argued that the witnesses are natural, therefore, they may be believed. He submitted that the prosecution had produced reliable ocular evidence supported by the medical evidence, recovery of pistol and the evidence of motive, which was rightly assessed and accepted by the trial Court. Regarding the chemical examiner's report he submitted that it was a simple irregularity.

21. I have carefully considered all these contentions. As far the ocular evidence is concerned, it comprises testimonies of the family members who were present in the house where the incident took place. The house was of PW-3 Muhammad Ibrahim and his wife

PW-2 Hawa Bai, mother of deceased Maryam, they were, as such, natural witnesses. PW-1 Khadija is sister of Hawa Bai and PW-4 Ramzan is husband of deceased Maryam.

22. **The first witness P.W Khadija has deposed that at the time of occurrence she was present in the house. Appellant/accused Muhammad Yousuf was in the kitchen with Mst.Maryam, while Hawa Bai was serving meals to the children. When Muhammad Yousuf asked Mst.Maryam why had she come to her mother, she replied that she was brought by her mother. Immediately then, the accused took out pistol from the fold of his Shalwar and fired a shot at the forehead of Mst.Maryam. He wanted to fire second shot, but the magazine fell down. She snatched pistol from accused and ran away to the top of the house and raised cries. The accused gave a bite at the cheek of her husband and ran away, but the people of Mohallah caught hold of him. They took Mst.Maryam to the Abbasi Shaheed Hospital where she died and then her statement was recorded under section 154, Cr.P.C. Regarding the motive she stated that about 15 years back parents of Muhammad Yousuf had demanded hand of Mst.Maryam for her marriage with accused Muhammad Yousuf, but it was refused, that was the motive for the incident. It was suggested to her that in fact Ibrahim attacked accused Muhammad Yousuf with revolver and fired at him but the bullet hit Mst.Maryam. She denied this suggestion.**

23. The other eyewitness P.W-2, Hawa Bai deposed that the incident took place at 3.30 p.m. and she was present in the house where Khadija was also present. She stated that PWs Ramzan and Ibrahim were also present. Her daughter Mst.Maryam was in the kitchen. She stated that accused Muhammad Yousuf came there and after shaking hands with Ramzan and Ibrahim went in the kitchen and asked Mst.Maryam to accompany her, but she refused saying that her husband was also sitting in the house. On this reply, Muhammad Yousuf fired at her forehead, from his pistol and again started loading the pistol, but Ibrahim and Khadija caught hold of him. Accused also bit Ibrahim on his cheek, but Ibrahim and Khadija succeeded in snatching the pistol from him. The accused then got himself released and ran away but the people of Mohallah hurled stones at him and apprehended him. Regarding the motive she stated that they had refused to give the hand of Mst.Maryam to the accused and her father had got Mst.Maryam married to Ramzan.

24. **The third eye witness is Muhammad Ibrahim. He is husband of the complainant Mst.Khadija. He was present in the house along with Muhammad Ramzan when Yousuf came there and shook hands with them. Mst.Maryam was cooking meals in the kitchen. Yousuf went to kitchen and asked Mst.Maryam why had she come to that house. This witness deposed that he did not hear the reply given by Mst.Maryam, but all of a sudden Yousuf took out his pistol from the fold of his *Shalwar (Naifa)* and fired upon Mst.Maryam, the bullet hit her on her head. He immediately got out and saw that Yousuf was again trying to press the trigger of pistol, but he caught hold of him and asked his wife to snatch the pistol from him. In this scuffle Yousuf bit him on his cheek. Khadija succeeded in snatching the pistol and then she went upstairs and shouted from the rooftop of the house. He further deposed that accused Yousuf escaped from his hands and fled away, but the people of Mohallah collected there and apprehended him. He gave the details of the background giving almost the same account about the motive as stated by the other witnesses.**

25. **The fourth eyewitness PW-4 Ramzan, husband of the deceased Mst.Maryam, deposed that on 30th October, 1993 he went to the house of his mother-in-law and accused Yousuf also came there and shook hands with him and PW Ibrahim. Mst.Maryam was cooking meals. The accused talked to Mst.Maryam and all of a sudden, took out a revolver from the fold of his trouser and fired at her. He wanted to reload the pistol on which Ibrahim tried to snatch it from him, but the accused scratched him on his cheek, however, the pistol was snatched by Mst.Khadija, wife of Ibrahim. The accused then escaped away, but he was apprehended by the people of**

Mohallah who had also beaten him and he had gone unconscious. A suggestion was given to him that during the period of five months, while Mst.Maryam remained in the house of accused Yousuf, the latter did not touch her. In this manner it was admitted that the deceased remained in the house of accused for five months. At the most it was suggested that the accused did not commit any unlawful act, but on this fact this witness showed lack of his knowledge.

26. **PW-5 Ahmed is a neighbour. He had found the ambulance in front of the house in which Mst.Maryam was being taken to hospital. He also sat in the ambulance and went to hospital where Mst.Maryam died after 15 minutes. Similarly, PW-6 Qasim was going to his house when he saw the people - men and women, beating accused Yousuf who fell down and became unconscious. Police came there and took away the accused. The NIC of accused and Rs.89/= cash were also recovered from the accused in his presence. He runs a donkey-cart. In the cross-examination he admitted that Yousuf was lying injured at the place of incident.**

27. **The investigation was conducted by the then SHO Muhammad Sadiq, but evidence was placed on record through CW-1 PC Azmat Shah to the effect that Muhammad Sadiq had been murdered by the terrorists. PW-8 SI Zulfiqar was formerly *Roznamcha Moharrir* and conversant with the handwriting and signature of SHO Muhammad Sadiq. He saw the document such as FIR and other papers and confirmed the signature of SHO Muhammad Sadiq.**

28. **On the point of Qatl-i-Amd of Mst.Maryam Dr.Hamid Jillani, who had conducted autopsy deposed that he found the following surface injuries on the dead body of Mst.Maryam:-**

1. **Entry wound 1 c.m. x 0.7 c.m. at the middle of the forehead with blackned inverted morgines.**
2. **Exit wound 1.2 c.m. x 1 c.m. from the right car just along the posterior morgine of the external additory metuous.**
3. **Bruce 3 c.m. x 2 c.m. redish on the supero lateral aspect of the right shoulder.**

29. **On internal examination he found fracture of frontal bone and a hole in it, which was a firearm injury and was also the cause of death of Mst.Maryam. His evidence fully supports the case of prosecution on the point of death of Mst.Maryam by causing firearm injuries to her.**

30. **As against the prosecution evidence the accused, in his statement on Oath, explained that Mst.Maryam was his maternal cousin and after the death of her father she, along with her husband resided at the back street of their house, but since Ibrahim, the second husband of Khadija used to harass Mst.Maryam and her husband they shifted to another house. There was a quarrel between them on which husband of the deceased left the house and went to the house of his sister. After some time her mother, aunt and husband went to take her, but she refused. Report was lodged with police against the accused, but no action was taken. He sent Mst.Maryam to the house of her husband. Thereafter, he received telephone of Ibrahim that his aunt was sick, on this he went there. Ibrahim, on seeing him, abused him and took out pistol and fired upon him. He saved himself, but the bullet hit at the head of Mst.Maryam who was in the kitchen. He ran away, but the people of neighbour chased him and beat him. He went unconscious. He regained his senses in the hospital. The case was registered against him, but nothing was secured from his possession. He produced the certified copy of the judgment for the offence under section 13(d) of the Arms Ordinance.**

31. **He led evidence and examined witnesses Ibrahim, Rasheed and Muhammad Irfan. Ibrahim stated that the accused was a man of good character. He wanted to say something about the earlier incident and not this occurrence, which was not relevant for the purpose of defence. The other defence witness namely Rasheed also spoke about the other case and clearly stated that he had no concern with the present case. Irfan has also given evidence about the previous occurrence and not the instant matter. In this way, no defence worth mentioning was led by the accused.**

32. **A thorough examination of the evidence of eyewitnesses would show that accused Yousuf was present at the place of incident and this fact has not been questioned. On the contrary, the trend of cross-examination as also the statement of accused on oath straightaway admit his presence. It also stands admitted that the injury was caused to Mst.Maryam by a firearm which the witnesses often called pistol and revolver. The medical evidence has also supported their version that the fatal injury was caused by a firearm and the wound of entry was at the forehead of deceased Mst.Maryam. There are four eyewitnesses of the occurrence and they have by and large given a common version that appellant Yousuf made the fire and he wanted to repeat the same, but he was overpowered by PW Ibrahim and the pistol was snatched from him by complainant Khadija.**

33. **Learned counsel for appellant assailed the veracity of the witnesses on the ground that they belong to one and the same family and in order to save Ibrahim who, according to him, was the actual culprit, they involved Yousuf. As regards the relationship of the witnesses, the admitted position as already stated, is that complainant Khadija PW-1 is wife of Ibrahim PW-3, while Mst.Hawa Bai PW-2 is sister of Khadija and mother of deceased Mst.Maryam. Appellant Yousuf's mother Fatima is sister of late Baboo Ismail, husband of Hawa Bai PW-2. It has also come in evidence that earlier the hand of Mst.Maryam was demanded for Yousuf, but her parents declined. After marriage Mst.Maryam and Ramzan lived together, but after some time Ramzan left the house. It is said that he did so because he was frightened by Yousuf. No doubt, Ramzan has admitted that for some time he left the house as he was beaten by his wife Mst.Maryam, but the facts remains that accused Yousuf had been instrumental in holding control over Mst.Maryam although she was married to Ramzan and he kept her with him for a pretty long time. In his statement on oath the appellant has explained that she was kept in the house in the back lane, but in cross-examination question put to witness Ramzan gives out the actual picture wherein a suggestion was put to the effect that Yousuf did not touch Mst.Maryam as long she was with him. This is sufficient to support the motive as stated by the prosecution witnesses.**

34. **It would be significant to note that the entire prosecution story has, otherwise, been admitted by the appellant in one way or the other excepting the plea taken by the appellant that it was Ibrahim who fired from his pistol at the appellant which incidentally hit Mst.Maryam who was sitting in the kitchen preparing food. A contention was, however, raised by the learned counsel for the appellant that the examination-in-chief of complainant and the Medical Officer was recorded in absence of the accused, therefore, in view of the law laid down in MUHAMMAD WAQAR V. THE STATE (1991 P.Cr.L.J. 197) evidence of these witnesses should be taken out of consideration. In this context it may be observed that the proceedings had wholly gone in presence of the advocate of the accused and even in case of those two witnesses, further proceedings were adjourned and subsequently the entire evidence of these witnesses was recalled and reaffirmed in presence of the counsel and thereafter the counsel for the accused started the cross-examination. This irregularity was by itself slight in nature, but the trial Court had wisely taken steps to rectify the same. The evidence, therefore, cannot be brushed aside on this technical ground alone.**

35. **A contention was also raised about the crime weapon namely the pistol on the ground that the Investigating Officer who had recovered the same was not examined in the Court. Reliance was placed on AFZAL HUSSAIN V. THE STATE (1989 P.Cr.L.J. 471) wherein the evidence of the person who produced the Mashirnama being other than the Investigating Officer who had drawn the same, was not accepted. The facts in the instant case are altogether different. In the cited case no Mashir was examined by the prosecution, but instantly, both the witnesses of recovery namely: Ibrahim and Ramzan have been examined in the Court, therefore, the above-cited authority is not applicable to the instant case. It is a question apart that no material significance, as no crime empty has been secured from the place of incident. Instantly, even chemical examiner's report has not come on record, but it was rightly argued by Mr.Fazalur Rahman Awan, learned counsel for State that loss of one corroborative piece of evidence was not sufficient to dislodge the entire case of prosecution which was otherwise, in substance, proved through reliable evidence. I agree with him that this irregularity is negligible.**

36. **Learned counsel for appellant also contended that the case property viz. Bloodstained earth etc. has not been produced in Court, but the evidence of PW Ramzan shows that the same were produced in Court. This contention, therefore, looses its force.**

37. **It was also argued that the FIR was lodged with delay of about 4 and 1/2 hours. The Court may take notice of the events stated by the witnesses that in the first instance there was scuffle and the firearm was snatched from Yousuf and then on commotion Yousuf started running, but people of Mohallah stoned him and caused injuries to him. He was captured by the people of Mohallah and on the other hand ambulance was arranged and the deceased was rushed to hospital in injured state where the statement of Khadija was recorded under section 154, Cr.P.C. and only then the FIR was drawn. It is very difficult to expect that every event should proceed in mechanical order and a common man, who would definitely be in a plight of confusion and distress, should think of nothing else, but lodging of FIR. Efforts to save the life of an injured as also to capture the culprit are inevitably the most logical and legitimate acts to be performed first by the relatives of a deceased. It would be in accord with normal human behaviour and conduct. Delay in lodging of FIR is not always fatal to a case, but the prevalent circumstances are to be kept in mind and then its effect is to be assessed. In the instant case, in view of the circumstances discussed above, the testimonies cannot be disbelieved simply because of delay of few hours in lodging the FIR.**

38. **Two important facts viz. biting by the accused on the cheek of Ibrahim and injuries caused to accused by Mohallah people have come on record through ocular evidence as also admission of the accused about the last mentioned fact, but the prosecution has failed to corroborate the same through medical evidence and only at late stage the Prosecutor through an application under section 540, Cr.P.C. placed the documents on record. I agree with the learned counsel for appellant that this mode of proving documentary evidence was not legally acceptable. The Medical Officer should have been examined in Court and the documents ought to have been produced through him. Nevertheless, it has been unanimously spoken by the witnesses that Ibrahim was bitten on his cheek by Yousuf. All the same, appellant himself admitted that people of Mohallah beat him and caught hold of him. Basically, the direct evidence on this point coupled with the evidence of accused is sufficient to lend support to the case of prosecution.**

39. **Now, turning to the contention that the eyewitnesses belong to one family and their testimonies may not be accepted, it may be noted that their evidence smoothly lays down the account of the occurrence and no reliable evidence has come on record to support the plea of appellant that on the request of Ibrahim he had gone to the house of Hawa Bai, mother of the deceased. The appellant is also equally related to the complainant party. Indeed, the admitted facts that the people of Mohallah reacted very sharply, and with**

immediate response stoned the accused and overpowered him lend enormous support to their versions. The motive is fully described by the eyewitnesses and the same can be spelt out even from the statement of accused made on Oath. The credibility of ocular testimonies is, therefore, not open to exception the trial Court has rightly accepted the same, consequently, the conclusion that the appellant has caused the firearm injury to Mst.Maryam is upheld.

40. **In view of the evidence on record, as discussed above, the guilt of appellant for the offence of Qatl-i-Amd has been proved. However, no opinion has been recorded for the offence under section 337-F(1), PPC and since the medical evidence could not come on record on this point in accordance with law it would not be appropriate to record conviction for this offence at this stage.**

41. **As far the conviction for Qatl-i-Amd is concerned, the charge is wholly silent if it was for an offence under section 302(a), PPC. It has time and again been insisted by the Hon'ble Supreme Court as also this Court that a trial Court should invariably mention in the charge in explicit terms if the alleged Qatl-i-Amd is punishable under section 302(a), (b) or (c), PPC. Reference may be made to ABDUL HAQ V. THE STATE (PLD 1996 S.C. 1) and MUHAMMAD YOUSUF V. STATE (PLD 2000 Karachi 94). In the instant case the evidence on record shows that the accused had first met the witnesses and shaken hands with them without showing any sign of fury or anger. What infuriated him all of a sudden is an important question for this purpose. One of the witnesses namely Ibrahim stated that he did not hear what was the conversation between Yousuf and Mst.Maryam. The admission on the part of Ramzan, husband of deceased Mst.Maryam that he was beaten by Mst.Maryam reflects the harsh attitude of Mst.Maryam in dealings. Perhaps, there could be some irritating words of Mst.Maryam which led to such a situation. In these circumstances the trial Court has rightly recorded conviction under section 302(b), PPC instead of 302(a), PPC. The conviction and sentence of imprisonment for life are accordingly maintained, but the sentence of fine, which is not provided in the said section, is set aside. However, the amount of Rs.25,000/= awarded as compensation under section 544, PPC is maintained. Benefit of section 382-B, Cr.P.C., extended by the trial Court, is also maintained. With the above modification in the sentence the appeal stands dismissed.**

JUDGE

Karachi :

Dated: _____

IN THE HIGH COURT OF SINDH, KARACHI

Cr. Appeal No.81 of 1998.

Date of hearing	**:**	**09.8.2001**
Appellant	**:**	**Shabbir Ahmed through Mr.Umer Farooq Khan, Advocate.**
Respondent	**:**	**The State through Mr.Habibur Rashid, Assistant Advocate General.**

WAHID BUX BROHI, J:- **Appellant Shabbir Ahmed has been convicted by learned III-Additional Sessions Judge, Karachi Central, vide judgment dated 30.5.1998, for an offence punishable under section 302/34, PPC and sentenced to**

imprisonment for life and fine of Rs.5000/= or in default in payment of fine to suffer further simple imprisonment for a term of one year; he has called in question the aforesaid conviction and sentence through this appeal.

42. The incident in this case occurred on 09.11.1990 at about 12.30 noon in the house of deceased Allah Rakha situated in Katchi Abadi, Nusrat Bhutto Colony, Karachi. FIR was lodged at PS Temoria by a neighbour Akhtar Gul who was residing with his family adjacent to the house of the deceased but on upper side of the hill. He stated in the FIR that he was present in his house when at about 12.30 noon he heard cries from the house of deceased and got out. The people of Muhallah including Waheed Zaman had also collected. By scaling over the walls they saw that inside the house two persons, who, by appearance looked Punjabi, were inflicting Chhurri blows on the deceased. He added that the deceased succumbed to injuries and was lying in a pool of blood inside the room. While lodging the report with police he specifically stated that both the culprits were present in the house and their names were Abdul Qayyum son of Rasheed Ahmed and Shabbir Ahmed son of Allah Divaya. The FIR was recorded at 1.00 p.m. by Sub Inspector Zafar Iqbal who inspected the site and arrested the accused persons and seized the crime weapons. Further investigation was conducted by SHO Ainuddin. After completing the investigation the case was challaned in the Court.

43. Initially, the charge was framed against accused Abdul Qayyum and appellant Shabbir Ahmed by learned III-Additional Sessions Judge, Karachi Central on 02.2.1991 without mentioning the name of deceased. The prosecution then examined their witnesses and by judgment dated 13.2.1993 both the accused were convicted and sentenced to imprisonment for life, but on appeal this Court remanded the case for retrial on the ground that the charge was defective and the main witness PW-1 Akhtar Gul was examined in absence of accused Abdul Qayyum. After remand, fresh charge was framed on 30.5.1997 to which the accused persons pleaded not guilty and claimed trial, but during the trial accused Abdul Qayyum absconded away and could not be arrested. The case proceeded against appellant Shabbir Ahmed alone. The prosecution examined the witnesses again namely: PW-1 Akhtar Gul; PW-2 Waheed Zaman; PW-3 Suhail; PW-4 Ainuddin; PW-5 Dr.Jalil Qadir and PW-6 Zafar Iqbal. All the witnesses were cross-examined by the advocate for appellant Shabbir Ahmed, but they could not be cross-examined by accused Abdul Qayyum as he had already absconded away. Statement of appellant was recorded under section 342, Cr.P.C., he denied the case of prosecution in simple words and did not examine himself on Oath nor did he lead defence.

44. Learned III-Additional Sessions Judge, Karachi Central, by the impugned judgment convicted the appellant and passed sentence as mentioned in the opening para of this judgment.

45. I have heard Mr.Umer Farooq Khan, learned counsel for appellant and Mr.Habibur Rashid, learned AAG for State.

46. Learned counsel for appellant contended that there is no eyewitness of the actual act of inflicting injuries on the deceased; no specific injury has been attributed to the appellant; the alleged recovery of Chhurri from the appellant has not been put to him in his statement under section 342, Cr.P.C. as an incriminating piece of evidence; both the witnesses are not competent within the meaning of Article 17 of Qanun-e-Shahadat; the eyewitnesses have made improvements in their evidence at the trial giving a different shape to the story from what was stated in the FIR and the evidence suffers from improbability as it would not be expected that the culprits having been asked by the complainant to stay in the house would wait for the complainant and police to go to the place of incident and arrest them with bloodstained Chhurri. Lastly, he pointed out that the appellant is in jail for a period of about 11 years.

47. Learned AAG Mr.Habibur Rashid submitted that presence of the appellant is proved and bloodstained Chhurri has been secured from him besides his own bloodstained clothes and the witnesses being disinterested persons their testimony is worth reliance.

48. This case has some unusual and peculiar features. The incident had taken place during daytime and witnesses were attracted on the cries coming from inside the house but the door was closed, therefore, they could not enter. The place of incident is situated on a hilly incline having tin-sheeted roof. The house of complainant Akhtar Gul was situated adjacent to the place of incident but on upper side. He deposed that during the days of incident he being jobless was present in his house. It was noontime when he heard cries from the place of incident and rushed to the scene along with witnesses Muhammad Afzal and Waheeduzzaman. They knocked at the door and they were informed that the voice was that of a weeping child. The door was, however, not opened, the complainant, therefore, got up to the roof of the house and removed the iron-sheets. It was found that deceased Allah Rakha was lying on the floor in a pool of blood. Waheeduzzaman and Afzal also climbed over the wall and saw the scene. They also saw appellant Shabbir and co-accused Qayyum standing there and holding Chhurris in their hands. Complainant Akhtar Gul lodged report with police.

49. Waheeduzzaman (PW-2) also narrated a similar story in the trial Court. His house is situated near the place of incident and according to him the house, where the incident took place, was taken on rent by accused Qayyum and appellant Shabbir. He deposed that when he heard cries he rushed to the place of occurrence along with complainant Akhtar Gul and others and they knocked at the door. They were told by appellant Shabbir that a child was weeping. However, they climbed on the rooftop and removed the iron-sheet whereafter they saw the dead body of a person whom he did not know. Accused Qayyum and appellant Shabbir were found holding Ghhurris in their hands and standing near the dead body.

50. Complainant Akhtar Gul and PW Waheeduzzaman both are independent persons and they have stated that police arrested the appellant and co-accused in their presence and Chhurris were taken into custody. They were cross-examined at length but nothing could come on record to indicate that they had an interest to give false evidence and implicate the appellant. No doubt the motive for commission of murder is not mentioned in the FIR but Akhtar Gul, the complainant had added the same in his deposition saying that the deceased had to pay money to the accused which he refused and on his refusal they committed murder. Learned counsel, therefore, took an opportunity to argue that the improvement in the story are fatal to the case. It is significant to note, in the first instance, that the trial Court has recorded finding of conviction irrespective of motive for commission of the offence and has observed that in fact no motive was forthcoming in the case, nevertheless, no importance could be assigned to absence of motive. The improvement in the evidence made by complainant as regards motive is not a factor which, by itself, has laid foundation for conviction of the appellant. It cannot be overlooked that incident had taken place in November 1990 and the witness was examined in March 1998. After the occurrence many factors might have come to the knowledge of the complainant being a neighbour and he being a layman might have no idea as to what was to be stated at the trial and what was to be withheld being beyond the scope of FIR. At least the Court cannot ignore the fact that the complainant was an unconcerned persons and had given almost the same story as given by the other witness Waheeduzzaman. If he had a motive to exaggerate the occurrence he could have stretched the story to any other direction. His evidence could not be rejected on account of this drawback alone.

51. The complainant, during cross-examination, admitted that after lodging the FIR he came to know about the name of accused persons. It was, as such, contended that when he knew the names afterwards, how the names of accused persons were recorded in the FIR. This is, no doubt, a contradiction but one contradiction is not to be considered in exclusion of the entire independent evidence which undoubtedly conforms to the prosecution story, wholly.

52. The evidence of Waheeduzzaman is also on the same lines and nothing in particular has been gained by cross-examining him. His evidence is equally trustworthy despite few minor contradictions which do not by themselves damage his entire testimony.

53. It was argued that no fatal injury is attributed to the appellant and it could not be said if it was the absconding co-accused or the appellant who might be held guilty for the fatal injury. It may be noted that there were as many as 11 stab wounds and 6 incised wounds, as certified by the Medical Officer but the witnesses did not state in the Court if any of these injuries was inflicted in their presence, Merely because one of the assailants is absconding the other one shall not derive any benefit when his presence with Chhurri at the place of incident immediately after the occurrence is proved beyond doubt. True that there is no allegation that a particular assailant caused any number of injuries, but then this should not lead to an inference that the appellant should stand absolved and the murder be credited to the account of absconding accused. The argument in this behalf, therefore, does not carry weight.

54. Arrest of appellant from the place of incident where dead body was lying is adequately proved through the evidence of both the independent witnesses. Yet formally the Investigating Officer SIP Zafar Iqbal has also confirmed this fact. He had recovered the dead body from the place of incident and the crime weapons namely Chhurris. The medical evidence also confirms causing of injuries through such crime weapons. All these pieces of evidence put together fully make out the guilt of appellant.

55. An argument was, however, advanced on the ground of improbability as according to learned counsel it was not possible that the assailants would wait at the place of incident under the advice of complainant till arrival of police. It may, in this respect, be observed that the incident had taken place in Katchiabadi and admittedly a large number of people from Mohallah had collected, therefore, the mere fact that the complainant left the place of incident was not sufficient to enable the assailants to run away from the place of occurrence in presence of the crowd. This was a daylight incident and in any areas like Katchiabadi Mohallah people often show their maximum concern and reaction against an offence. It was, therefore, not possible for the assailants to flee away from the place of incident. The contention from this point of view is, as such, misdirected.

56. A plea was raised that no question was put to appellant regarding recovery of Chhurri. It is true that while examining the appellant under section 342, Cr.P.C. no question was put to him about the bloodstained Chhurri secured during investigation, but this omission would not remove the effect of remaining questions put to appellant. This omission would not vitiate the trial as the evidence otherwise is strong enough to implicate the appellant with the commission of Qatl-i-Amd.

57. As regards the competence of witnesses to depose it may be observed that proviso to Article 3 of Qanun-e-Shahadat enlarges the scope of competence of a witness, which runs as under:-

"Provided further that the Court shall determine the competence of a witness in accordance with the qualifications prescribed by the Injunctions of Islam as laid down in the Holy Quran and Sunnah for a witness, and, where such witness is not forthcoming, the Court may take the evidence of a witness who may be available."

58. **A plain reading of the above provision would show that when a witness, in accordance with qualifications prescribed by the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah, is not available, the Court is permitted to take evidence of a witness who may be available. In the instant case, no doubt there is nothing on record to suggest that the eyewitnesses Akhtar Gul and Waheeduzzaman did not fulfil the qualifications prescribed by the Injunctions of Islam, but at the same time, within the meaning of aforesaid proviso their competence could not be questioned. The contention of learned counsel for appellant that the competence of a witness shall only be determined within the meaning of Article 17 of Qanun-e-Shahadat has no force, as it has to be read with Article 3 thereof.**

59. **On a thorough appraisal of the evidence it appears that the trial Court had properly appreciated the same and came to reasonable conclusion about the guilt of present appellant. It was also observed by the trial Court that the motive was shrouded with mystery and it was for this reason that death sentence was not awarded which too appears to be a reasonable decision.**

60. **On the whole, the finding of trial Court does not call for interference. The appeal is without merits and is dismissed. The jail appeal/application also stands disposed of in above terms.**

JUDGE

Karachi :

Dated: _____

IN THE HIGH COURT OF SINDH, KARACHI

Cr. Appeal No.44 of 2000.

Present : GHULAM RABBANI, &

WAHID BUX BROHI, JJ :

Date of hearing : 19.10.2001

Appellant : **Mst.Hasina through Mrs.Perveen Pervez, Advocate.**

Respondent : **The State through Mr.Habib Ahmed, AAG.**

GHULAM RABBANI, J:- **Through this appeal, the appellant has challenged the judgment dated 07.12.1999 whereby she was convicted under section 9(c) of the Control of Narcotic Substances Act, 1997 and sentenced to undergo rigorous imprisonment for a period of eight years and also to pay a fine of one million rupees; in case of default in payment of fine to suffer RI for a period of one year more. The benefit of section 382-B, Cr.P.C. was also extended to the appellant. The co-accused Muhammad Imran, who was tried jointly with the appellant was acquitted by the impugned judgment.**

61. Precisely stated the case of prosecution is that the appellant Mst.Hasina Bibi is mother of co-accused Muhammad Imran and on 23.11.1998 both of them were apprehended by a police party headed by Sub Inspector Ashraf Jan of Anti Dacoity and Robbery Cell, near a petrol pump area 48-B, Korangi, Karachi East. Five kilograms of heroin powder and one kilogram of Charas kept in a plastic

Theli being carried by appellant were recovered from them; as a result whereof crime No.169/98 was registered at Police Station Zaman Town, Karachi East under sections 6/9 of Control of Narcotics Substance Act, 1997. It was also alleged in the FIR that the narcotic substance recovered, belonged to one Habibullah, an absconding accused.

62. After completion of investigation both the above named accused were forwarded to the Court of Special Judge for Narcotics, Karachi East to stand their trial.

63. A formal charge was framed against the appellant and co-accused Muhammad Imran on 22.2.1999 to which both the accused pleaded not guilty and claimed to be tried.

64. The prosecution examined PW-1 Aftab Ahmed, who produced Mashirnama of arrest, recovery and search of the accused persons, statement under section 154, Cr.P.C. and FIR No.169/98; and PW-2 Ashraf Jan - the complainant and the Investigating Officer, who produced report of the Chemical Examiner whereafter the prosecution closed its side of evidence.

65. Statements of the appellant and co-accused Muhammad Imran were recorded under section 342, Cr.P.C.. Both the appellant and co-accused examined themselves on oath under section 340(2), Cr.P.C. and also examined defence witnesses Muhammad Rizwan and Mst.Asma. On assessment of material on record the appellant was convicted as stated above.

66. When the case was called up for hearing learned counsel for appellant remained absent despite repeated calls. She had also remained absent on last so many dates. In this situation, the arguments of learned AAG were heard, and with his assistance, we have examined the evidence on record. On examination of the R&Ps, we find that the allegations, as per FIR and the Mashirnama of recovery against the appellant and co-accused, are that they were apprehended at one and the same time and at the time of their arrest the appellant was found holding a plastic bag in her hand which contained five kilograms of heroin powder contained in five packets each of them containing one kilogram and one kilogram of Charas in a packet. It is the case of prosecution that the entire property was sent to the Chemical Examiner for examination. PW-2 Ashraf Jan, the complainant and Investigating Officer in this case, in his cross-examination, has stated that at the time of recovery, he weighed the recovered narcotics substance. In his evidence, he admitted that the heroin powder was found in 5 packets whereas at the trial eight packets of brown colour heroin were produced in the Court. The report of Chemical Examiner shows that he had received two parcels, one of which contained eight brown paper Thelis each containing light brown colour fine powder and the other parcel contained six greenish black semi soft slabs with smell like Charas and each slab was wrapped in plastic. Chemical Examiner has shown the gross weight of brown paper theli as 3917 grams and the powder without wrapper to be 3821 grams. As far the other parcel is concerned the gross weight of the parcel with contents has been shown to be 960 grams and net weight of the contents is shown to be 920 grams. On assessment of the evidence produced at the trial we find great difference in between the property allegedly recovered by the police party and the one sent to the Chemical Examiner. This discrepancy was brought to the notice of Investigating Officer in his evidence but he had to furnish any explanation. It also appears from the evidence of the mashir that on a suggestion from the defence he confirmed that the heroin powder produced in the Court was in eight envelopes of Khaki colour. Faced with this situation, learned AAG, during the course of his arguments, did not support the conviction of

the appellant in view of the above glaring discrepancy in the prosecution case. He very frankly expressed that the prosecution has failed to prove guilt against appellant beyond shadow of doubt.

67. The entire case is centered around recovery of narcotics, but the description of the material recovered as deposed to by the witnesses, who are no other than excise police officials, is wholly inconsistent and irreconcilable with the Chemical Analyzer's report as regards the quantum.

68. We have also noticed that the accused persons had led defence at the trial and although learned trial Judge has elaborately discussed the evidence of prosecution witnesses but only passing reference has been made to the evidence of defence witnesses in a halfhearted manner. The defence witnesses have put up a clear version that, in fact, their house was raided and nothing was secured and that an amount of Rs.1,00,000/= was accepted as bribe for release of an other accused, who happened to be son of the appellant. Whether this was a credible version or not is not being commented upon here but there is absolutely no discussion thereon by the trial Court. The safest course of dispensation of justice requires that the prosecution as well as defence version both should be put in juxta position and then conclusions/ inferences can be drawn. In this case, both the prosecution witnesses belong to police. No doubt the superior Courts have consistently observed that police witnesses are as good as those belonging to public but then the Courts must not loose sight of the fact that converse of these observations is equally true. The persons belonging to public are also competent witnesses as those belonging to police. If the version of police witnesses is assigned unrestricted significance, the defence version shall not be thrown overboard without assigning reasons as to why it is not believable. Anyhow, in the instant case the prosecution evidence itself suffers from serious drawbacks and infirmities. It is, therefore, needless to discuss the defence version at this stage.

69. In this view of the matter, we are also in full accord with learned AAG that the prosecution has failed to prove the guilt of the appellant beyond shadow of doubt. As a result, we set aside the conviction and sentence and allow the appeal. The appellant shall be released forthwith by the jail authorities if not required in any other crime.

70. Announced in open Court.

Appeal allowed.

Judge

Judge

Karachi :

Dated: 19.10.2001.

IN THE HIGH COURT OF SINDH, KARACHI

Cr. Appeal No.101 of 1999.

Date of hearing : 19.9.2001

Appellant : Ghulam Hussain through Mr.Mahbub Ally Jawahery, Advocate.

Respondent : The State through Mr._____.

WAHID BUX BROHI, J:- **Appellant Ghulam Hussain has been convicted by learned Sessions Judge, Thatta for an offence punishable under section 320, PPC awarding him sentence in following terms:-**

> **"He is, therefore, convicted under section 320 PPC and sentenced to suffer rigorous imprisonment for six (6) years and to pay Diyat amount worth Rs.2,51,625.04 (Rs.Two lacs,fifty one thousand, six hundred twenty five and paisas fourt) only to the legal heirs of deceased Mushtaque Mudharo. He is further convicted u/s 337/G, PPC and sentenced to suffer rigorous imprisonment for three (3) years with Rs.5000.00 to each injured as Daman for causing injuries to each injured namely Muharram, Ghulam Mustafa, Iqbal and Mst.Taj. The sentences of imprisonment to run concurrently. The accused be detained in jail till he pays the Diyat and Daman amount or furnishes surety as required under the law. accused is present on bail, he is taken into custody and remanded to Central prison, Hyderabad with warrant to serve out the sentence awarded to him."**

71. The case of prosecution, as disclosed in the FIR lodged by ASI Nooruddin Brohi of PS Makli on 26.7.1999 at 2245 hours, is that the said ASI received information at police station that an accident has taken place at Ghulamullah Road near Technical College, Makli (Thatta) and one person has lost his life while others sustained injuries and have been shifted to Civil Hospital Makli. He left the police station after making entry at serial No.14 of the station diary and reached Civil Hospital, Makli where he found dead body of a boy lying in Emergency Ward and injured persons namely Muharram, Iqbal, Ghulam Mustafa and Mst.Taj. Name of the deceased was disclosed to be Mushtaq Hussain. He held inquest on the dead body and also prepared Mashirnama of injuries of injured persons and issued a letter to Medical Officer for postmortem examination of dead body and examination, treatment and certificate in respect of injured persons. On inquiry injurred Muharram disclosed to him that they were travelling in rickshaw No.D-0585 driven by PW Ghulam Mustafa when a tractor coming from Ghulamullah side rashly and negligently appeared from wrong side and dashed against the rickshaw causing injuries to them and death of the boy. The tractor driver stopped the tractor at a short distance. He disclosed his name Ghulam Hussain. The registration number of tractor was T-1279. The Sub Inspector proceeded to the place of incident and prepared site memo whereafter he lodged report at police station.

72. Formal charge was framed against the appellant at the trial, to which he pleaded not guilty. The prosecution examined seven witnesses in support of the case namely; PW-1 Muharram (injured); PW-2 Ghulam Mustafa (injured rickshaw driver); PW-3 Ali Nawaz,

one of the Mashirs; PW-4 Allah Bux; PW-5 ASI Nooruddin, the complainant; PW-6 Dr.Inayat Rasool and PW-7 Nisar Ahmed, the Mechanic. The appellant, in his deposition under section 342, Cr.P.C. denied the allegations and pleaded innocence. He did not examine himself on oath nor did he lead defence. The learned trial Court, on assessment of the evidence on record, found the appellant guilty and convicted him accordingly.

73. I have heard learned counsel for appellant and learned State Counsel.

74. There is authentic evidence on record establishing the fact that the boy Mushtaq died as a result of injuries sustained by him in the accident and the time of occurrence tallies with the duration of injuries. The Medical Officer also furnished evidence in respect of injured persons Muharram, Iqbal, Ghulam Mustafa and Mst.Taj. Out of them Muharram and Ghulam Mustafa were examined as witnesses. Both of them have received five injuries each. The relevant documentary evidence viz. postmortem notes and the medical certificates were placed on record. In the cross-examination the trial the Medical Officer was simply put a question that the injuries could be caused by fall on ground from the vehicle which he denied. On the whole medical evidence furnished adequate proof of the injuries sustained by the above injured persons as also the deceased.

75. The main contention raised on behalf of the appellant was that identity of the appellant as driver of the tractor was not proved beyond doubt. He contended that admittedly the incident had taken place in the darkness of night and the police had not arrested the appellant on the spot but he was arrested after 08 days. Learned counsel pointed out that PW Ghulam Mustafa had admitted that he had gone unconscious at the place of incident and regained his senses in the hospital, therefore, he was not able to identify the tractor driver in the darkness of night. Referring to the version of PW Muharram given in cross-examination that it was dark at the time of incident and that he had not seen the tractor at the moment when he hit the rickshaw, he argued that this witness could not say if the appellant was the tractor driver. This contention does not find much support from the evidence. Muharram has stated in clear terms that when the tractor hit their rickshaw, the rickshaw overturned and all of them received injuries. The appellant did not stop the tractor at the Wardat but proceeded little ahead and he was captured at some distance from the scene by himself and police constable and few other persons available at Chungi. Although he has stated that the appellant did not disclose his name right at that moment but at the trial he has stated that appellant was the same person. He is one of the injured persons and he has identified the appellant in Court. He had, in the first instance, caught hold of the appellant as the driver but since due to injuries he was removed to hospital and it is not explained how the appellant escaped. He was in the impression that the accused was taken by police but, in fact, the appellant was put under arrest after eight days i.e. on 03.8.1998. PW Ghulam Mustafa had also identified him in the Court to be the same person who was driving the tractor. Both of them are material witnesses and there is no reason with them to involve the appellant falsely, therefore, their testimony cannot be doubted. Although a plea is taken that the accused has been falsely implicated at the instance of father of deceased Mushtaq who was serving in the office of Deputy Commissioner but no such suggestion was given to Muharram, the main witness. It has been suggested to Ghulam Mustafa, the rickshaw driver, that actually he was at fault but no evidence was led in defence to substantiate this plea when it was denied by the witness himself.

76. **The Mechanic Nisar Ahmed had examined the triactor and found its break defective and out of order. His evidence has gone unchallenged, but there are no details whether such a defect had occurred due to accident or it did exist previously. If such defect existed earlier even then the appellant would be responsible for driving such a vehicle. On the whole there is adequate ocular evidence establishing the guilt of appellant coupled with medical evidence and, prima facie, there is no material on record to disbelieve these testimonies, the findings of trial Court believing their version cannot, therefore, be interfered with. The appeal is without merits and, as such, dismissed. These are the reasons for the short order announced on 19.9.2001.**

Appeal dismissed.

Judge

Karachi :

Dated: 24.9.2001.

IN THE HIGH COURT OF SINDH, KARACHI

Cr. Appeal No.67 of 2000.

Date of hearing : 18.9.2001

Appellant	**:**	**Khurram-ur-Rehman and another through Mr.Muhammad Rafi Shafqat, Advocate.**
Respondent	**:**	**The State through Mr.Arshad Lodhi, Assistant Advocate General.**

WAHID BUX BROHI, J:- **Appellants Khurram-ur-Rehman and Malik Bashir Ahmed were convicted by VII-Additional Sessions Judge, Karachi East for an offence punishable under section 353, PPC and sentenced to Rigorous Imprisonment for two years and fine of Rs.2000/= and in default of payment of fine to suffer further Rigorous Imprisonment for three months. They were also convicted for an offence punishable under section 392, PPC and sentenced to Rigorous Imprisonment for three years and fine of Rs.5000/= or in default of payment of fine to suffer further Rigorous Imprisonment for six months. They have challenged their conviction and sentence by way of this appeal.**

77. The prosecution case, briefly stated, is that on 25.8.1998 complainant Babar Iqbal resident of first floor, Bungalow No.6, Block-III, Delhi Cooperative Housing Society, Bahadur Shah Zafar Road, Karachi accompanied by his two children was standing outside his bungalow and waiting for his wife to come when two persons on point of pistol snatched keys of his car and in the meantime four more culprits armed with pistols joined them. Complainant's wife came down stairs BUT all of them were pushed back into the house where on the point of pistols they culprits robbed valuables viz. case 34 to 40 thousand rupees from the house of Zafar and 42 to 44 thousand from the house of Anwar besides ornaments, wrist watches and mobile phones. SHO, PS Ferozabad, on receiving information, reached there on which the culprits tried to flee making fires at the police personnel but Bashir Ahmed and Khurram-ur-Rehman, the appellants were overpowered by police and the pistols were secured from them. The other four namely Raja, Nasir, Kashif and Ismail managed to escape. Some of the articles were taken away by the fleeing culprits. The appellants were taken to police station where FIR

was recorded for offence under section 395/353/307/ 412, PPC and separate cases were registered for offence under section 13(d), Arms Ordinance. Muhammad Nasir and Kashif Baig were arrested later on. After usual investigation they were challaned.

78. At the trial, formal charge was framed to which the appellants pleaded not guilty. The prosecution examined the material witnesses namely PW-1 Ali Sher; PW-2 Babar Iqbal, the complainant; PW-3 Masood Naqi; PW-4 Orangzeb and PW-5 S.Badar Ali Shah, SHO, PS Bin Qasim. Statements of appellants were recorded under section 342, Cr.P.C. They denied the case of prosecution but did not examine themselves on Oath and also did not lead defence. Learned trial Court, on the assessment of above evidence, convicted them and passed sentence as above.

79. Khurram-ur-Rehman and Malik Bashir Ahmed, the appellants herein, after completing their sentences, were released from jail and notices were issued to them to appear for the purpose of this appeal but they were not traceable. Their advocate has also not appeared to conduct the case. Learned Assistant Advocate General Mr.Arshad Lodhi was heard on behalf of the State.

80. The prosecution case depends upon the ocular testimony and the recovery of crime weapons from them besides their arrest on the spot. Babar Iqbal, the complainant fully supported the case of prosecution and deposed that he was waiting outside his house when two person armed with pistols at the point of firearms took keys of the car from him and his household articles were also robbed. However, he stated that there was load-shading and when police overpowered two accused persons he did not see their faces properly as they were taken by police to mobile. He confirmed the fact of police encounter. Second witness Masood Naqi residing in neighbour has supported the point of arrest of two accused persons namely appellants. SIP Orangzeb PW-4 has received information about the dacoity and communicated the same to SHO Babar Ali Shah, PW-5. Both of them reached there where the police encounter took place. Both of them, in their evidence, stated that they succeeded in capturing appellants Malik Bashir Ahmed and Khurram-ur-Rehman on the spot. Both these witnesses were cross-examined but no damaging version could be obtained from them. No doubt, the complainant has, perhaps, out of immense fear of dacoits and retaliation, given some obliging versions but the remaining witnesses gave complete support to the case of prosecution. Learned trial Court was, therefore, justified in giving finding of conviction for offence under sections 392 and 353, PPC. The appellants seem to have lost interest in the matter because of the evidence available against them. Besides, they have also served out the sentence.

81. On the whole, the evidence on record establishes that there was spontaneous response by appellants at the time of occurrence and an encounter had taken place wherein the appellants were arrested. The appeal is without merits and accordingly dismissed.

82. These are the reasons for the short order announced on 18.9.2001.

Appeal dismissed.

Karachi : Judge

Dated: 22.9.2001.

IN THE HIGH COURT OF SINDH, KARACHI

Cr. Appeal No.15 of 2000.

Appellant : Abdul Wahab through Mr.Mehmood A. Qureshi,

Advocate.

Respondent : State through Mr.Muhammad Ismail Memon,

Assistant Advocate General.

1. **WAHID BUX BROHI, J:-** **Learned Additional Sessions Judge, Karachi South (Court No.IX) by judgment dated 06.1.2000 convicted the appellant for an offence punishable under section 412, PPC and sentenced him to rigorous imprisonment for five years and fine of Rs.15,000/- or in default in payment of fine to suffer simple imprisonment for two months. The appellant has impugned his conviction and sentence by way of this appeal.**

83. The case proceeded on the basis of FIR in Crime No.20/99 of PS Nabi Bux registered on 04.3.1999 at 21.30 hours in which Aftab Ahmed Khan is the complainant. It is stated in this FIR that the appellant Abdul Wahab, was arrested for an offence under section 13(d), Arms Ordinance under FIR No.19/99 of the same police station and a car bearing No.ABJ 120 Suzuki Khyber Grey Colour Engine No.137933 Chassis No.450211 was secured from his possession and he disclosed during interrogation that he had snatched the car about 9/10 days back on point of weapon at Tariq Road.

84. Since the FIR in case No.19/99 (not of this case) has been placed on record it would be convenient to lay down the facts stated therein. That FIR has been lodged by Inspector Khalid Mehmood, SHO PS Nabi Bux on 04.3.1999 at 20.45 hours disclosing therein that he was busy in snap checking when he noticed car No.ABA 628 Suzuki and signalled the driver to stop who tried to speed away but he was followed and stopped. The appellant who was driving the car was asked to produce the documents of the vehicle but he failed to

furnish such. On his personal search a 30 bore pistol and 5 cartridges and cash Rs.2000/- were secured from his possession. It was also noticed that number plate on front was ABJ 120 and on back side, ABA 628. After preparing the seizure memo the appellant was taken to police station where the FIR was lodged.

85. The investigation was entrusted to ASI Aftab Ahmed who came to know that FIR was registered at Bahadurabad PS relating to snatching of car. The appellant and the vehicle were lastly handed over to Bahadurabad police.

86. At the trial the appellant was charged with an offence punishable under section 412, PPC to which he pleaded not guilty and claimed trial.

87. The prosecution in order to prove the charge examined three witnesses namely PW-1 ASI Muhammad Farid, one of the Mushirs of recovery; PW-2 SI Muhammad Aftab, the Investigating Officer; and PW-3 Muhammad Khalid Mehmood, the then SHO Nabi Bux PS who effected the recovery. The relevant documents were produced by the witnesses. The statement of appellant was recorded under section 342, Cr.P.C. wherein his case was of bare denial. After hearing arguments the learned Trial Court convicted the appellant as stated above.

88. Learned counsel for appellant assailed the finding of conviction mainly on three grounds: (i) that the charge under section 412, PPC could not be sustained as the essential ingredients of the aforesaid offence are totally lacking in the instant case; (ii) that there was absolutely no evidence on record to establish beyond doubt that the property was snatched/stolen or retained by the appellant after the commission of offence of dacoity/robbery in respect of this vehicle or that there was proof to show that the vehicle belonged to a particular person; and (iii) that the vehicle was never produced in the Trial Court. Mr.Mehmood A. Qureshi, learned counsel for appellant, in support of his contentions, relied on the authorities reported as Bhudho v. State (1973 P.Cr.L.J. 395), Khairuddin v. State (1974 P.Cr.L.J. 219), Muhammad Asghar v. State (1999 P.Cr.L.J. 1575), and Muhammad Shafi v. State (1993 P.Cr.L.J. 142).

89. Mr.Muhammad Ismail Memon learned Assistant Advocate General submitted that the basic evidence required to prove the fact that the property was stolen is practically not forthcoming and the property was also not produced at the trial and in view of the law laid down in the aforesaid cases, he would not support the finding of conviction.

90. I have perused the evidence on record and gone through the case law cited by the learned counsel. It appears that the learned Trial Court while framing the points for determination has erred in combining the two essential points, in point No1 alone. The fact of recovery of the vehicle should have been considered for determination under a distinct point. Then, the fact that it was stolem property and was dishonestly received/retained by the appellant knowing or having reason to believe that possession thereof was transferred by the commission of dacoity was to be considered under a separate point. As for the second protion of section 412, PPC it could be considered, if the fact so warranted, as an alternative point. This would facilitate the Trial Court in dilating upon each essential ingredient of the offence under section 412, PPC in the light of evidence required for establishing each point and rendering a finding thereon. However, it is significant to mention that an irregularity arising in consequence of an error in formulating points for

determination shall not by itself vitiate the trial if all the ingredients of the offence are otherwise thoroughly taken into account and evidence discussed and appraised considering different aspects.

91. Incidentally, in this case, the evidence on record and confined to the point of recovery of the vehicle from the appellant. As already mentioned, learned counsel for appellant while commenting upon the genuineness of the recovery argued that the pre-requisite that the vehicle was dishonestly received and retained as stolen property and the appellant knew or had reason to believe that the possession thereof had been transferred by commission of dacoity is absolutely lacking. In such a case, I agree with the learned counsel that the prosecution was preliminarily bound to furnish positive evidence to show that the property was stolen or that its possession was transferred by commission of dacoity etc. The FIR in the instant case indicates that the appellant had disclosed that he had snatched the car at Tariq Road. Initially the FIR of that case was to be proved in accordance with rules of evidence and then evidence was to be led to show that as a result of dacoity the car was snatched from a particular person or that in any manner it was a stolen property. Evidence on this point is wholly lacking. The version of accused before police was not enough in this behalf. The appellant has denied all the allegations. The Investigating Officer Aftab Ahmed has stated that he had contacted Bahadurabad Police Station on telephone and the car was handed over to Bahadurabad police along with the accused. No such entry was produced at the trial to substantiate the above fact. In this regard the authority cited by the learned counsel for appellant Muhammad Shafi v. the State (1993 P.Cr.L.J. 142) supports his contention that basically the prosecution failed to adduce direct evidence to prove the fact that the car was stolen or snatched.

92. Secondly, it was contended that the car was never produced at the trial. The evidence of Muhammad Aftab is to the effect that vehicle was taken by Bahadurabad Police Station and then he was not aware where the vehicle was. The defence has thus challenged the existence of the vehicle and it was an obligation cast on the prosecution to meet this challenge but no efforts were made to produce the property or justify its non-production. All the witnesses, who were examined in the Court were never shown the vehicle as case property as such nothing could come on record to establish that the case property was at any time produced at the trial. The learned counsel for appellant, therefore, was justified in relying on the principles laid down in Budho v. State (1973 P.Cr.L.J. 395), Khairuddin & 2 others v. State (1974 P.Cr.L.J. 219) and Muhammad Asghar v. State (1999 P.Cr.L.J. 1575) that when the case property or the property in crime is not produced at the trial the benefit of doubt shall go to the accused.

93. As discussed above no legal evidence was placed on record at the trial to establish that offence of car snatching in respect of this vehicle had taken place; and further the property was never produced in the Trial Court, therefore, benefit arising out of these material deficiencies shall go to the accused.

94. For the foregoing reasons it is concluded that this is a case where the appellant deserves benefit of doubt. Consequently, the appeal is allowed and the conviction and sentence are set aside.

Appeal is allowed.

Judge

Karachi :

Dated: _____

IN THE HIGH COURT OF SINDH, KARACHI

Cr. Appeal No.136 of 1998.

Date of hearing: 12.3.2001.

Appellants : Ghulam Abbas & another through Mr.Shaikh Muhammad Mushtaq, Advocate.

Respondent : State through Mr.Habib Ahmed, A.A.G.

MUHAMMAD ROSHAN ESSANI, A. C. J:- **By this appeal the appellants Ghulam Abbas and Muhammad Rafique have assailed the judgment dated 12.9.1998 passed by the learned II-Additional Sessions Judge, Karachi-South convincting and sentencing the appellants under section 324, PPC to suffer R.I. for two years each.**

2. The brief facts of the prosecution case are that the complainant Muhammad Salim lodged a report on 5.3.1995 at Police Station, Bughdadi wherein it was stated that he was informed by his sister that her children were quarreling with the neighbours. On hearing this, the complainant alongwith Abdul Razzaq went to the Dossa Compound near Gulzar Mosque. At about 9 p.m. he saw that appellants/accused Ghulam Abbas, Muhammad Rafique and Muhammad Yaqoob armed with lathi and churri respectively attacked upon the complainant party. Appellant/accused Ghulam Abbas and his companions caused lathi and churri blows to the complainant who received lathi blows on various parts of his body and churri blows on his belly. Due to these injuries the complainant was taken to Civil Hospital by P.W. Abdul Ghani. The incident was allegedly witnessed by P.W. Abdul Razzaq, Abdul Ghani and other persons.

3. After usual investigation, the appellants/ accused as well as co-accused Muhammad Yaqoob were sent up to stand trial. During the course of trial, co-accused Muhammad Yaqoob, however, expired.

4. After completing all the formalities the trial Court framed formal charge against the accused under section 324/34 PPC on 19.7.1995. Appellants/accused pleaded not guilty to the said charge.

5. In support of its case the prosecution examined P.W-1 Muhammad Salim Exh.6, who produced FIR Exh.7, P.W-2 Muhammad Hassan Exh.8, P.W-3 Usman Ghani Exh.9, who produced mashirnama of vardat Exh.10, mashirnama of arrest Exh.11, P.W-4 Dr. P.S. Dolatani Exh.12, who produced medico legal certificate of injured Muhammad Salim Exh.13 and final report Exh.14, P.W-5 Haq Nawaz Exh.14-A, who produced entry No.44 of Police Station, Bughdadi with regard to the admission of injured in the hospital Exh.15, letter of Investigating Officer Exh.16, FIR Exh.17 and P.W-6 Abdul Razzaq Exh.19. Thereafter, the prosecution closed its side vide statement dated 16.5.1998 as Exh.20. Trial Court examined the appellants/accused under section 342 Cr.P.C. wherein they denied the prosecution case and stated that they have been falsely implicated in this case and that the prosecution witnesses were interested. The appellants/accused did not examine themselves on oath under section 340(2) Cr.P.C.

6. The trial Court convicted and sentenced the appellants/accused as stated herein above.

7. I have heard Mr.Shaikh Muhammad Mushtaq on behalf of the appellants/accused and Mr.Habib Ahmed, learned Assistant Advocate General Sindh on behalf of the State. The latter supports the impugned judgment. This matter was previously heard on 24.4.2000 when Mr.Habibur Rasheed, learned advocate appeared on behalf of A.G. for the State but he did not

support the impugned judgment. Besides, the State Counsel named herein Mr.Muhammad Ismail privately engaged as counsel by the complainant had also appeared on that date.

8. The perusal of the material placed on record shows that all the prosecution witnesses were interested. The incident occurred in a thickly populated area and admittedly many other independent private persons were available but they were not examined. The name of the P.W. Muhammad Hassan does not transpire in the FIR. The alleged incident occurred in front of the house of the said Muhammad Hassan. P.W. Muhammad Salim stated that he took Abdul Razzaq to the scene of the offence whereas P.W. Muhammad Hassan stated that Muhammad Salim was at his house at the time of incident whereas Abdul Razzaq stated that he was present at the Shrine. The police reached at the scene of offence short time after the incident but no blood was found at the scene of offence.

9. Investigating Officer Haq Nawaz was examined as Exh.14-A. He stated that the statement of complainant was recorded under section 154 Cr.P.C. in hospital. The name of witnesses Abdul Razzaq and Usman Ghani did not transpire in the said statement. The Investigating Officer further stated that the said witnesses were not seen by him when he visited the place of incident. The record shows that the investigation commenced before lodging of the FIR. The enmity is admitted and the witnesses were hostile to accused party. In such situation, the evidence of interested witnesses requires independent corroboration, which is lacking in the instant case. The witnesses even do not belong to the place where incident took place.

10. There is gross conflict and inconsistency between the ocular and medical evidence as injured stated that two accused inflicted ‘danda’ blows on his head whereas according to doctor, he found only one lacerated wound on his head. The complainant has stated in his statement before the Court that appellant Muhammad Rafique inflicted churri blows on his chest and on his abdomen whereas doctor found only two incised wounds on his person. The ocular evidence is thus materially contradicted by the medical evidence.

11. No source of light was disclosed in the mashirnama of the scene of offence. Moreover, the weapons used in the commission of offence were not recovered from any of the appellant/accused. The ocular evidence is not corroborated by any material evidence. It is well settled that it is not necessary that there should be many reasons for creating doubt but a single infirmity which creates reasonable doubt is sufficient to discredit the prosecution story and benefit thereof is to be extended to accused. The reliance can be placed upon the case of TARIQ PERVEZ v. THE STATE (1995 SCMR 1345).

12. Consequently, in view of the above facts and circumstances, benefit of doubt is extended to the appellants/accused and the impugned judgment of conviction and sentence is set aside. The appellants/accused are consequently acquitted. They are on bail, their bail bonds stand discharged.

ACTING CHIEF JUSTICE

Karachi :

Dated: _____