IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD

Cr.Appeal No. D- 21 of 2015

PRESENT:

Mr. Justice Abdul Maalik Gaddi.
Mr. Justice Arshad Hussain Khan.

Appellant:	Shabir (present on bail) Through Mr. Kashif Ali Lakho, Advocate, who files power on behalf of the appellant.
Respondent:	The State Through Syed Meeral Shah Bukhari, A.P.G.
Date of hearing :	30.01.2018.
Date of judgment :	30.01.2018.

J U D G M E N T

ABDUL MAALIK GADDI, J:- Appellant Shabir s/o Umed Ali by caste Jamali has assailed the judgment dated 23.02.2015 passed by learned Ist Additional Sessions Judge/Special Judge (Narcotics), Dadu in Special Case No. 297 of 2014 for offence punishable under Section 9(c) Control of Narcotic Substance Act, 1997, whereby the learned trial Judge convicted and sentenced the appellant to suffer R.I for 05 years and to pay fine of Rs.20,000/-. In case of default in payment of fine, he was to undergo S.I for 02 months more. Benefit of Section 382-B Cr.P.C. was extended to the appellant.

2. Brief facts of the prosecution case as per FIR are that on 23.04.2014, complainant ASI Gul Hassan Bhutto alongwith his subordinate staff left P.S. for the purpose of checking vehicles. They started checking of the vehicles on link

road leading from Dadu to Sehwan near Duabo culvert, when one rickshaw was coming from Dadu side which was stopped in which the present appellant who was required in crime No.21/2014 and 23/2014 of PS Khuda Abad was boarded on the back side alongwith other passengers hence he was arrested. From his personal search police recovered one yellow colour shopper from the right side of his shalwar containing two big pieces of charas and another shopper recovered from the left side of the folder of his shalwar containing one big piece of charas, the total became 2400 grams. Such memo of arrest and recovery was prepared in presence of mashirs HC Asghar Ali and PC Roshan Ali. Thereafter, accused and case property were brought at the police station where the complainant lodged FIR No.33 of 2014 at P.S. Khuda Abad.

3. After registration of FIR, the I.O. investigated the case and after completing all the legal formalities submitted challan before the competent court of law.

4. The charge against the accused was framed under Section 9 (c) Control of Narcotic Substance Act, 1997 at Ex.2, to which he pleaded not guilty and claimed to be tried.

5. Prosecution in order to prove its case, examined PW-1 ASI Gul Hassan Bhutto at Ex.4, who produced daily diary entry No.8 at Ex.4/A, memo of arrest and recovery at Ex.4/B, copy of FIR at Ex.4/C, PW-2 IO/SIP Shahnawaz Otho at Ex.5, who produced DD entry No.15 at Ex.5/A, mashirnama of place of incident at Ex.5/B, report of the chemical examiner at Ex.5/C, copy of criminal record of the appellant at Ex.5/D and PW-3/mashir Ali Asghar Jalbani at Ex.6

6. Statement of appellant under Section 342 Cr.P.C. was recorded at Ex.8, in which he claimed false implication in this case and denied the prosecution allegations. He further stated that he is innocent and the police has involved him

in many cases as his brother Muneer Ahmed filed an application u/s 22-A & B Cr.P.C. against the police officials of Dadu. He produced the copy of application at Ex.8/A and the true copy of diary dated 29.04.2014 at Ex.8/B. He however, neither examined himself on oath nor led any evidence in his defence.

7. Learned Special Judge after hearing the learned counsel for the parties and examining the evidence available on record, convicted and sentenced the appellant as stated above, hence this appeal.

8. Brief facts of the prosecution case and the evidence find an elaborate in the judgment of the trial court and need not to repeat the same to avoid unnecessary repetition.

9. Learned counsel for the appellant submits that the appellant is innocent and has falsely been involved in this case on account of enmity with the police official of Dadu District. He further submits that alleged charas has been foisted upon the appellant. He further submits that there are material contradictions in the evidence of the prosecution witnesses which have not been considered by the trial court. He further contended that alleged charas was recovered from the possession of appellant on 23.04.2014 but it was received by the chemical examiner on 06.05.2014 after the delay of 15 days and there is nothing on record that during this intervening period before whom the property was in possession and in whose custody. According to him if it was lying in Malkhana of the police station then entry of Malkhana has not been produced before the trial court, therefore, on this ground tampering in the case property could not be ruled out. He further contended that HC Ghulam Abbas who had taken sample to the chemical examiner has also not been examined by the prosecution. He lastly concluded that despite of availability of the private mashirs at the place of incident, the complainant did not make any effort to call for any independent

person from the locality to witness the recovery proceedings hence the case is totally doubtful and he prayed for acquittal of the accused.

10. On the other hand, Syed Meeral Shah, learned Additional Prosecutor General Sindh, appearing for the State in view of the arguments advanced by the learned counsel for the appellant and the grounds agitated in this appeal did not oppose this appeal and was of the view that there are number of contradictions/lecunas and infirmities appearing in this case. He however, did not support the impugned judgment in view of the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002).*

11. We have carefully heard the learned counsel for the parties and scanned the entire evidence in the light of case law cited by counsel for the appellant.

12. In our considered view the prosecution has failed to prove its case against the appellant for the reasons that on 23.04.2014, complainant alongwith his subordinate staff left police station for the purpose of checking vehicles in the area and during checking they arrested the present appellant from a rickshaw and recovered 2400 grams charas from him on link road leading from Dadu to Sehwan near Duabo culvert. It is surprising to note that the place of incident is a thickly populated area and meant for heavy truck but despite of this fact the complainant did not bother to associate any independent person from the place of incident. It has also been brought on record that it was day time when the incident is alleged to have been occurred and the general public was available there as well as six other persons were also sitting in the said rickshaw but despite of that, the complainant did not collect any private person from the locality to witness the recovery proceedings. No doubt that the evidence of police official is as good as that of any other witness but when the whole prosecution case rests upon the police officials and hinges upon their evidence and when the

private witnesses were available at the place of incident then non-association of private witness in the recovery proceedings create some doubt in the prosecution case. It is settled principle that the judicial approach has to be conscious in dealing with the cases in which testimony hinges upon the evidence of police officials alone. We are conscious of the fact that provisions of Section 103 Cr.P.C. are not attracted to the cases of personal search of accused relating to the narcotics. However, when the alleged recovery was made on road side which is meant for heavy traffic and general public was available there as happened in this case, omission to secure the independent mashirs, particularly, in the case of snap checking cannot be brushed aside lightly by the court. Prime object of Section 103 Cr.P.C. is to ensure the transparency and fairness on the part of the police during course of recovery, curbs false implication and minimize scope of foisting of fake recoveries upon accused. As observed above, at the time of recovery from appellant, complainant did not associate any private person to act as recovery witness and only relied upon his subordinates. In our view, complainant, investigation officer of police or such other force, under section 25 of Control of Narcotic Substance Act, 1997 was not authorized to exclude the independent witness. It does not do away with the principle of producing the best available evidence. We are supported with the case of Nazir Ahmed v. The State, reported in PLD 2009 Karachi 191 & Muhammad Khalid v. The State, reported in 1998 SD 155. Hence as observed above, due to non-association of independent witness as mashir in this case, false implication of the appellant cannot be ruled out. We have also noted the number of contradictions in the evidence of the prosecution witnesses with the able assistance of learned A.P.G. and when confronted these contradictions to the learned A.P.G, he could not reply satisfactorily. For example PW Shahnawaz who is I.O. of the case deposed in his cross examination that when he proceeded to the place of incident he was

armless while the remaining witnesses were armed with KKs whereas PW Ali Asghar in his cross examination deposed that he was armed with official G-3 rifle. It is the case of appellant that he has been challaned in this case by the local police as according to him his brother Nazeer Ahmed had filed an application u/s 491 Cr.P.C. against the police officials of Dadu District and such raid was conducted by the concerned Magistrate for the release of detenues mentioned in the said application and this case has been registered by the police only just to take revenge from the accused party. It has also been brought on the record that another brother of the appellant namely Munir Ahmed also filed an application u/s 22-A & B Cr.P.C. before the learned Sessions Judge, Dadu against DSP Abdullah Unar hence the enmity of the appellant with the police officials of Dadu cannot be ruled out. The learned trial court has observed that the present appellant is involved in as many as 19 cases including the present case but this fact has been denied by the learned counsel for the appellant by stating that appellant has been acquitted in all those cases. When confronted this fact to the learned A.P.G, he submits that he has not sure whether any criminal acquittal has been filed against such orders or not. It has been brought on record that no entry of arrival has been produced by the prosecution to show that whether the accused was arrested. It is an admitted fact that the appellant was arrested from a rickshaw which was coming from Dadu in which 6/7 other persons were also boarded but none from the said persons have been joined as mashir. There is absolute no reason assigned in the police papers that why the rickshaw has not been confiscated. Furthermore neither the driver of rickshaw has been examined nor the number of rickshaw has been described or mentioned. Hence under these circumstances false implication of the appellant cannot be ruled out.

13. According to the case of prosecution, charas was recovered from the possession of accused on 23.04.2014 and it was received by the chemical

examiner on 06.05.2014 after the delay of 15 days which has not been explained by the prosecution. HC Ghulam Abbas who had taken sample to the chemical examiner has also not been examined before the trial court. It appears that the prosecution has failed to establish the safe custody of charas at Malkhana for 15 days. Safe transit to the chemical examiner has also not been proved. Even otherwise the chemical examiner has not been examined in this case who was the best witness to corroborate the evidence of prosecution in respect of the examination of case property therefore, adverse presumption would be taken. There was nothing on the record that how much grams were taken / drawn from the each piece recovered from the accused for sending the same to the chemical examiner for analysis. In such circumstances, we are unable to rely upon the evidence of the police officials without any independent corroboration which is lacking in this case. WHC of the police station with whom the case property was deposited in Malkhana has also not been examined to satisfy the court that the charas was in safe custody. In this regard reliance is placed upon the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002),* the relevant portion is reproduced hereunder:-

> ***"5. In the case in hand not only the report submitted by the Chemical Examiner was legally laconic but safe custody of the recovered substance as well as safe transmission of the separated samples to the office of the Chemical Examiner had also not been established by the prosecution. It is not disputed that the investigating officer appearing before the learned trial court had failed to even to mention the name of the police official who had taken the samples to the office of the Chemical Examiner and admittedly no such police official had been produced before the learned trial Court to depose about safe custody of the samples entrusted to him for being deposited in the office of the Chemical Examiner. In this view of the matter the prosecution had not been able to establish that after the alleged recovery the substance so recovered was either kept in safe custody or that the samples taken from the recovered substance had safely been transmitted to the office of the Chemical Examiner without the same being tampered with or replaced while in transit."***

14. In our considered view, prosecution has failed to prove that the charas was in safe custody for the aforementioned period. Even positive report of the chemical examiner would not prove the case of prosecution. There are also several circumstances which create doubt in the prosecution case. Under the law if a single doubt is created in the prosecution case, it is sufficient for recording acquittal. In the case of *Tariq Pervez V/s. The State (1995 SCMR 1345),* the Honourable Supreme Court has observed as follows:-

> ***"It is settled law that it is not necessary that there should many circumstances creating doubts. If there is a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."***

15. While relying upon the aforesaid authorities and keeping in view the material contradictions/discrepancies in the prosecution case besides no objection extended by the learned A.P.G, we have no hesitation to hold that the prosecution has failed to prove its case against the accused. Resultantly, the impugned judgment dated 23.02.2015 passed by learned Ist Additional Sessions Judge/Special Judge (Narcotics), Dadu is set aside. The appeal is allowed. Appellant is acquitted of the charge. Appellant is present on bail, his bail bond stands cancelled and surety discharged.

JUDGE

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