IN THE HIGH COURT OF SINDH, AT KARACHI

PRESENT:-
Mr. Justice Naimatullah Phulpoto; and
Mr. Justice Shamsuddin Abbasi.

Crl. Appeal No.80 of 2016

Abdul Waqar son of
Abdul Sattar. ... ... Appellant

Versus

The State. ... ... Respondent

Appellant	Through Mr. Mumtaz Ali Khan Deshmukh Advocate.
Respondent	Through Mr. Muhammad Iqbal Awan, DPG.
Date of hearing	20.02.2018

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JUDGMENT

Shamsuddin Abbasi, J: The captioned appeal arises from the conviction and sentence recorded by learned Special Court No.I (CNS), Karachi, by judgment dated 04.02.2016, whereby the appellant was ordered to undergo rigorous imprisonment of five years and six months for an offence under Section 9(c) of Control of Narcotic Substances Act, 1997 and to pay a fine of Rs.25,000/-, in default whereof, he was ordered to undergo simple imprisonment of five months and fifteen days more, however, appellant was extended benefit of Section 382-B, Cr.P.C.

2. The facts giving rise to this appeal, briefly stated, are that on 26.03.2014 police party of P.S. Preedy, headed by SIP Zulfiqar Ali, was busy in patrolling of the area. During patrolling complainant SIP

Zulfiqar received spy information that one person having charas was standing at Garden Road, near gate of Jehangir Park, Karachi, for the purpose to give the same to any party. On receipt of information, the complainant party reached at the pointed place at about 2300 hours and on the pointation of spy, apprehended him, who on inquiry disclosed his name as Abdul Waqar son of Abdul Sattar. The complainant took his personal search and recovered one white coloured shopper containing two packets/200 rods of charas in two packets weighing 2½ kilograms wrapped with yellow tape solution from his right hand. The complainant arrested the accused and sealed the recovered charas at spot under a mashirnama prepared in presence of mashirs. Police brought accused and case property at P.S. Preedy, Karachi, where recorded FIR No.200 of 2014 under Section 6/9(c) of Control of Narcotic Substances Act, 1997 against accused on behalf of the State under above referred Sections.

3. Pursuant to the registration of FIR, the investigation was followed and in due course the challan was submitted before the Court of competent jurisdiction.

4. Trial Court framed charge against accused. Accused pleaded not guilty and claimed trial.

5. At the trial, the prosecution has examined as many three (03) witnesses namely, SIP Zulfiqar Ali (complainant) at Ex.4, PC Zulfiqar Ali (mashir of arrest and recovery) at Ex.6 and SIP Gulfaraz Khan (investigating officer) at Ex.7 and closed its side.

6. Statement of appellants was recorded under Section 342, Cr.P.C. at Ex.9, wherein he denied the prosecution case and pleaded his innocence. The appellant opted not to make a statement on oath under section 340(2), Cr.P.C. and did not produce any witness in his defence.

7. Having heard the arguments of both the sides, the learned trial Court observed that the prosecution has successfully proved its case against the appellant beyond shadow of doubt and recorded the conviction and sentence as stated above, hence this appeal.

8. Here it would be appropriate to briefly discuss the evidence of the prosecution witnesses as well as the defence taken by the appellant in his statement under Section 342, Cr.P.C.

9. Complainant SIP Zulfiqar Ali has deposed that on 26.03.2014 he alongwith HC Hizbullah, PC Zulfiqar and driver Nisar had left P.S. for patrolling duty and produced Roznamcha entries at Exs.4/A & 4/AA. During patrolling he received spy information that one person is standing near gate of Jehangir Park towards Agha Khan-III Road having charas. He alongwith his staff reached at the pointed place at 2300 hours and apprehended the said person, who disclosed his name as Abdul Waqar son of Abdul Sattar. He was having a shopper of white colour in his right hand, containing two packets of charas consisting of 200 rods weighing 2½ kilograms. He arrested the accused, recovered the charas and sealed the same on the spot in presence of mashirs HC Hizbullah and PC Zulfiqar. He produced memo of arrest and recovery at Ex.4/B. The accused and the case property was brought at P.S. where an entry was made in the Roznamcha and FIR was also lodged. He produced the FIR and Roznamcha entry No.56 at Exs.4/C and 4/D respectively. He further deposed that SIP Gulfaraz, on his pointation, inspected the place of incident at 0050 hours and prepared mashirnama. Complainant implicated accused. In cross-examination denied the suggestion for deposing falsely.

10. P.W.2 PC Zulfiqar Ali was the mashir of arrest of accused and recovery of charas. He has supported the complainant and recorded almost same evidence as deposed by the complainant and also affirmed Ex.4/B.

11. P.W.3 SIP Gulfaraz Khan was the investigating officer of this case. He in his statement has deposed that on 26.03.2014 he received FIR, mashirnama of arrest and recovery and case property for the purposes of investigation. He visited the place of incident and prepared memo of site inspection in presence of complainant and HC Hizbullah and affirmed Ex.4/E. On 27.03.2014 he deposited the sealed parcel of charas in the office of chemical examiner and also received its report. He produced letter and chemical report at Exs.7/A and 7/B respectively. After completing the investigation, he submitted challan in Court.

12. The appellant in his statement under Section 342, Cr.P.C. has denied the prosecution case and pleaded his innocence. The appellant raised defence plea that he was arrested from Nawabshah and brought at P.S. Gizri where during personal search police took his wallet containing cash of Rs.12,000/-, 240 US Dollars, citizen wrist watch, CNIC, different membership and visiting cards and then handed over him to police of P.S. Preedy where present case was foisted on him.

13. Learned counsel for the appellant has argued that prosecution story was unbelievable, learned trial Court recorded conviction without assigning valid and sound reasons. It is next submitted that the appellant was arrested from Punjab from where he was brought at Karachi and the present case has been foisted upon him. The police usurped the precious personal belongings of the appellant including cash and U.S. Dollars etc. recovered during

his personal search. Nothing incriminating was recovered from the possession of appellant and the alleged recovery of charas has been foisted one. He also argued that charas was recovered on 26.03.2017, but the same was sent to the chemical examiner for its analysis on 27.03.2014 without furnishing any plausible explanation. It is also argued that all the PWs were police officials and no private person was associated to witness the recovery proceedings, despite the incident has taken place at a busy place, without assigning valid and strong cause, which made the case of the prosecution highly doubtful. The witnesses have contradicted each other on material points, but such contradictions were not taken into consideration by the learned trial Judge. The prosecution story was based on malafides and no iota of evidence or any other material was available on record to establish the guilt of the appellant. He further submits that the prosecution has failed to discharge its liability of proving its case against the appellant beyond shadow of reasonable doubt, there were so many circumstances creating doubt, which ought to have been extended in favour of the appellant, but the learned trial Judge recorded conviction and sentence without applying judicial mind and considering the material contradictions in the statements of the witnesses. Finally, prayed that the conviction and sentence awarded to the appellant may be set-aside.

14. Counsel for the State, on the other hand, refuted the arguments advanced by the counsel for the appellant and submits that it was a case of huge recovery of charas and the witnesses in their respective statements have supported the case of the prosecution without major contradictions or discrepancies and the minor contradictions, if any, are of no significance in view of the facts and circumstances of the case. Finally, he prays that the appeal may

be dismissed and conviction and sentence awarded by the learned trial Court may be upheld.

15. We have given anxious considerations to the arguments of both the sides and perused the entire record available before us. It is a matter of record that all the PWs are police officials and no private person was associated to witness recovery proceedings, despite place of incident was a busy place, without assigning valid reasons except that it was night time and private persons were not present there, which is not a valid excuse. Even otherwise, record did not reveal that as to whether any efforts were made to persuade any person from the locality or for that matter the public to act as witness of incident, We have noticed material discrepancies in the documents produced by the prosecution at trial and the deposition of PWs in respect of timings. It is the case of the prosecution that complainant alongwith his subordinate staff left P.S. on 26.03.2014 at 10.00 pm. After receiving spy information about presence of accused at the place of incident, they reached there at 2300 hours, arrested accused and after completing formalities reached at P.S. at 2350 hours and at the same time complainant registered FIR at 2350 hours and made entry No.56 in Roznamcha at 2350 hours. It was impossible that FIR was lodged at the same time when entry was made. Further, entry No.56 reveals that complainant first lodged FIR and then made entry in Roznamcha. Now he could have taken time for registration of FIR. It has also been noticed that investigating officer has deposed that after registration of FIR, he received FIR and case property, but he deposed that he left P.S. alongwith complainant for site inspection at 2350 hours, which was not understandable that all the events happened at the same time. Even mashir PC Zulfiqar has deposed that his statement under Section 161, Cr.P.C. was recorded by I.O. at

2350 hours (26.03.2014) whereas I.O. has deposed that first he visited place of incident at 0050 hours (27.03.2014), prepared mashirnama of site inspection and returned back at P.S. and thereafter he recorded statements under Section 161, Cr.P.C.

16. Another important aspect of the matter is that as per FIR and mashirnama of recovery, the weight of recovered charas was 2500 grams, but as per report of chemical examiner the gross weight of charas was 2554 kilograms. At this juncture, the prosecution has failed to justify how the weight of charas was increased by 54 grams, either it was weight of plastic shopper or weight of something else. This ambiguity too made the case of the prosecution highly doubtful.

17. Prosecution has also failed to satisfy on the point of safe custody of property at police station and its' transit to chemical examiner. I.O. failed to produce entry of Register 19 of Malkhana, which shows that the property was kept in Malkhana for transit period, he only deposed that after receiving case property for chemical examiner, he kept property in Malkhana keeping entry in Register 19, but he did not speak about the transit period from 26.03.2014 to 27.03.2014. Reliance is placed on the case of *Ikramullah & others v The State* reported in 2015 SCMR 1002, wherein Hon'ble Apex Court has settled principle for keeping recovered narcotic substance in safe custody and proving its safe transit to the chemical examiner was emphasized in the following terms:-

> *"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 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 admitted 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 substances had safely been transmitted to the office of the Chemical Examiner without the same being tampered with or replaced while in transit".*

18. On the point of safe custody of charas at police station and for transit period of case property, the prosecution has not examined Head Muharrir and the police official, who deposited the charas to the office of Chemical Examiner. The Hon'ble apex Court has settled the principle in a case of *Tariq Pervez v The State* reported in 1995 SCMR 1345 on the point of benefit of doubt which is reproduced as under:-

> *"The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving benefit of doubt to an accused, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right".*

19. Taking into consideration the facts and circumstances, explained herein above, we are of the considered view that the prosecution has failed to discharge its liability of proving the guilt of the appellant beyond shadow of doubt. Therefore, while extending the benefit of doubt in favour of the appellant, we hereby set-aside the conviction and sentence recorded by the learned trial Judge by impugned judgment dated 04.02.2016, acquit the appellant of the charge and allow this appeal. The appellant shall be released forthwith if not required to be detained in any other case.

20. Vide short order dated 20.02.2018 we have allowed this appeal and these are the reasons thereof.

JUDGE

JUDGE

Naeem