

IN THE HIGH COURT OF SINDH
CIRCUIT COURT HYDERABAD

Cr. Jail Appeal No.D-108 of 2015

PRESENT:

Mr. Justice Naimatullah Phulpoto
Mr. Justice Shamsuddin Abbasi

Date of Hearing: 17.04.2018

Date of Judgment: 17.04.2018

Appellant/accused: Akhtar Ali S/o Dad Khan Golo Baloch,
through Mr. Ahmed Ali Jarwar,
Advocate.

The State: Through Syed Meeral Shah Bukhari,
Additional Prosecutor General, Sindh.

J U D G M E N T

SHAMSUDDIN ABBASI, J.- Through instant appeal, appellant Akhtar Ali has assailed the judgment dated 04.11.2015, passed by the learned Special Judge (Narcotics) / Sessions Judge, Badin, in Special Case No.10 of 2015, arising out of Crime No.27 of 2015, registered at P.S Tando Bago, under Section 9(c) of Control of Narcotic Substances Act, 1997, whereby the appellant was convicted under Section 9(c) of CNS Act, 1997 and sentenced to suffer R.I for 14 years and to pay fine of Rs.200,000/-, and in case of non-payment of fine, the appellant was ordered to suffer S.I for one year more. The Benefit of Section 382-B Cr.P.C was extended to the appellant.

2. Concisely the facts of the prosecution case are that, complainant SIP Haji Muhammad Pitafi of P.S Tando Bago was on patrolling duty in the area alongwith his subordinate staff and on receiving spy information, arrested accused Akhtar Ali on 23.02.2015 at 2100 hours from Bachoo Khan Mari Bust Stop on Talhar-Tando Bago Road, who was selling chars available in a plastic shopper. The plastic shopper was also recovered from his possession; it contained chars weighing 5.880 kilograms. On further search, Rs.140/- were also recovered from side pocket of his kameez. Thereafter, SIP Haji Muhammad prepared *mashirnama* of arrest and recovery in presence of Mashirs namely PCs Bermal and Javed Ali and brought the accused and case property at police station, where the case being Crime No.27 of 2015 was lodged.

3. SIP Haji Muhammad Pitafi conducted the investigation of the case and recorded statements of P.Ws / Mashirs under Section 161 Cr.P.C, During the investigation, the Investigating Officer sent the case property to the chemical examiner for analysis and after receiving such positive report and completing all the codal formalities, he submitted challan before the competent Court of Law.

4. The learned trial Court framed the charge against the accused for offence punishable under Section 9(c) of CNS Act, 1997 at Ex-2, wherein the accused did not plead guilty and claimed to be tried.

5. In order to prove its case, the prosecution examined P.W-1 complainant / SIP Haji Muhammad Pitafi at Ex-4, who produced entries of departure from P.S and arrival at P.S, memo of arrest of accused and recovery of chars, FIR and chemical examiner's report at Ex-

5 to 9 respectively. P.W-2 PC Bermal Rebari was examined at Ex-9. Thereafter, the prosecution closed its side.

6. The statement of accused was recorded by the trial Court under Section 342 Cr.P.C at Ex-11, wherein the accused denied all the allegations leveled by the prosecution. Accused neither examined himself on oath nor led any evidence in his defense.

7. The learned trial Court after hearing learned Counsel for the parties and examining the evidence, vide judgment dated 04.11.2015, convicted the accused under Section 9(c) of CNS Act, 1997, and sentenced him as stated above.

8. Being aggrieved and dissatisfied by the said judgment, the appellant / accused has filed the instant appeal before this Court.

9. Learned Counsel for the appellant contended that the judgment passed by the learned trial court is perverse and not sustainable in law. He further contended that there are material contradictions in the evidence of the prosecution witnesses explicitly as the complainant has deposed in his statement that an informer came to him by foot whereas Mashir stated that he had not seen any informer at the place of information. He has pointed out another contradiction in the evidence of the prosecution witnesses regarding the places shown to have been visited during the patrolling. He further contended that the complainant and Investigating Officer of the case is the same. He further contended that the complainant has stated that he sent the case property to the chemical examiner through P.C Ghazi Khan, whereas the report of the chemical examiner shows that they received the case property from P.C

Salahuddin. He has further contended that the complainant has stated that the distance in between place of information and place of recovery was 2.1/2 kilometers, whereas, the Mashir has disclosed the distance between both the places as half kilometer. He further contended that there is delay of 13 days in dispatching the recovered substance to the chemical examiner and the prosecution had failed to establish its case in respect of safe custody of the chars at *malkhana* of the police station. He further contended that the Investigating Officer has stated that he himself had prepared *mashirnama* of arrest and recovery, FIR and statement of the prosecution witnesses under Section 161 Cr.P.C, which is belied by the handwriting as it is clear from the evidence that there appears different handwriting in FIR, *mashirnama* of place of incident and recovery as well as statements of the P.Ws under Section 161 Cr.P.C. He further contended that the complainant has stated in his deposition that stamp of lion was affixed on the slabs of chars, whereas, Mashir has denied this fact and stated that only words "*Jeay Sindh*" were written on the slabs of chars recovered from the possession of the accused and finally he prayed for acquittal of the appellant from the charge.

10. The learned Additional Prosecutor General though admitted the fact that there is not proof of safe custody of the chars but the learned Counsel for the appellant / accused during examination of the evidence did not ask any question from the witnesses with regard to safe custody of the chars shown to have been recovered from the possession of the accused. He further admitted that it is a matter of record that there is delay in dispatching the chars to the chemical examiner. He further admitted that the complainant has stated that he has prepared the *mashirnama* of place of incident and recovery on torch light and the said

torch light was not produced by the prosecution during trial, however, he halfheartedly supported the judgment passed by the learned trial Court.

11. Heard the learned Counsel for the appellant and learned A.P.G appearing for the State and perused the material whatever available before us.

12. The prosecution, in order to substantiate the charge against the accused, examined two witnesses only. P.W No.1 SIP Haji Muhammad Pitafi has stated in his deposition before the trial Court that on 23.02.2015, he was posted at P.S Tando Bago and on the same day at 1830 hours vide entry No.21 he left P.S alongwith PCs Barmal and Javed Ali in a police mobile for patrolling in the area. While patrolling from the different places, he reached at Memon Petrol Pump, where he received spy information that at Bachoo Khan Mari Bus Stop at Talhar Road, accused Akhtar Ali Golo, who was involved in several cases of different police stations, was available holding a black plastic shopper in his hand and waiting for some vehicle. Thereafter, he proceeded towards the pointed place and at about 09:00 p.m. he reached there. It is a case of the prosecution that SIP has stated that accused gave signal to their mobile to stop and they alighted from their mobile and caught-hold the accused. On inquiry, the accused disclosed his name as Akhtar Ali and from his possession a plastic shopper was recovered and after having checked SIP found 10 pieces of charas from it. Out of 10 pieces, words "*Jeay Sindh*" were written on 06 pieces, whereas on 02 pieces words "*Sher-e-Sindh*" were written, while rest of the two pieces were simple and nothing was written on those pieces. SIP weighed the charas which became 5.880 kilograms. He conducted further search of accused and recovered Rs.140

from side pocket of his kameez, containing two notes of Rs.20/- and one note of Rs.100/-. Thereafter, SIP sealed the case property on the spot in presence of Mashirs PCs Barmal and Javed Ali and prepared such *mashirnama* of arrest and recovery. Thereafter, he brought the accused and case property at police station and lodged the FIR against him under Section 9(c) of CNS Act, 1997.

13. We have traced out the contradiction in between the complainant and Mashir of recovery and arrest. In cross-examination, the complainant / I.O of the case stated that he patrolled in Tando Bago town and then reached at the place of information (Memon Petrol Pump), where informer came there by foot, whereas Mashir of recovery PC Bermal has stated in his cross-examination that after leaving police station they went to Old Ghar Bus Stop, New Ghar and then reached at Memon Petrol Pump. Another contradiction made by both the P.Ws is that, the complainant states that the informer came to the place of incident by foot, whereas Mashir states that complainant / SIP received spy information on phone and he did not see any person informing the complainant / SIP. There appears another contradiction that the complainant / SIP has stated that accused could hardly cover distance of about 6 / 7 paces when he apprehended him and put handcuffs to accused and thereafter he brought the accused to their police mobile, while Mashir PC Bermal has stated that they collectively caught-hold the accused and the accused did not try to escape when he was apprehended. He further contradicted the complainant on the point of distance in between the place of information and place of recovery. He has given the distance of both the places viz. information and recovery as about half kilometer, whereas the complainant has stated that there was distance in between both the

places as about 2.1/2 kilometers. These aspects of the case have created serious doubt in our mind that no such incident had taken place but the Police had completed all the formalities at police station, therefore, the element of managing the case after due consultation cannot be ruled out as the evidence of such a nature cannot be relied upon to make a person guilty of an offence. There appears another contradiction regarding the time consumed by the complainant party at the place of incident. The complainant has stated that they took 30 minutes for completing all the formalities at the place of incident, whereas the Mashir has stated that they consumed 10 to 15 minutes in completing the formalities of the incident. We have also noticed that it is a matter of record that the alleged chars was shown to be recovered on 23.02.2015 but the same was received to the chemical examiner on 06.03.2015. This inordinate delay of 12 days was not explained by the prosecution before the learned trial Court. Neither the prosecution had placed any copy of register of *malkhana*, nor examined P.C Salahuddin who had brought the chars to the chemical examiner. Another aspect of very important nature is that the complainant in his statement has stated that he sent the chars to the chemical examiner through P.C Ghazi Khan but we have gone through the report of the chemical examiner, which transpires that the chemical examiner had received the case property through PC Salahuddin but neither PC Ghazi Khan, nor PC Salahuddin were examined by the prosecution, which is against the rules framed in the narcotics law. Prosecution has not determined the point that chars was handed over to P.C Ghazi Khan for dispatching the same to the chemical examiner but the said chars was dispatched to the chemical examiner by P.C Salahuddin. Another contradiction which cannot be ignored is that,

the complainant / SIP states in his evidence that stamp of lion was affixed on the slabs of chars but irrespectively the Mashir states that only words “*Jeay Sindh*” were written on the slabs of chars recovered from the possession of the accused.

14. We have carefully examined the evidence of the prosecution witnesses and have gone through the material available on the record and have come to a conclusion that the prosecution had failed to prove safe custody of chars as neither any entry of *malkhana* had been produced by the prosecution nor the prosecution examined the Incharge of *malkhana*. Delay of 12 days in sending chars to the chemical examiner has created doubt in the prosecution case. At this juncture, we have relied upon the latest views taken in an unreported case of NADEEM V/S. THE STATE through Prosecutor General, Sindh, Criminal Appeal No.06-K of 2008 in Criminal Petition No.105-K of 2016, wherein the august Supreme Court by order dated 04.04.2018 has observed as under:-

“According to the FIR the petitioner and his co-convict had tried to escape "with" the motorcycle when they were intercepted by the police party but before the trial court Muhammad Ayub, S.I.P (PW1) had stated that upon seeing the police party the petitioner and his co-convict had started running away while leaving the motorcycle on the road and the engine of that motorcycle had gone off. Muhammad Jaffar, PC (PW2) had also deposed about running away of the petitioner and his co-convict but had kept quiet regarding leaving of the motorcycle by the petitioner and his co-convict while running away. Both the above mentioned witnesses produced by the prosecution, however, unanimously stated that while running away upon seeing the police party the petitioner and his co-convict had kept the relevant bag containing narcotic substance in their hands and it was in that condition that the petitioner and his co-convict had been apprehended by the police party. It is quite obvious that the initial story contained in the FIR had been changed during the trial and the changed story was too unreasonable to be accepted at its face value. Muhammad Ayub, S.I.P. (PW1) had stated before the trial court that after recovering the narcotic substance he had brought the same to the Police Station and it was he who had kept

the recovered substance in safe custody whereas he had never claimed to be the Moharrir of the relevant Police Station. The record of the case shows that it was Ghulam Ali, P.C. who had taken the recovered substance to the office of the Chemical Examiner for analysis but it is not denied that the said Ghulam Ali, P.C. had not been produced before the trial court by the prosecution. It is, thus, evident that safe transmission of the recovered substance from the local Police Station to the office of the Chemical Examiner had not been established by the prosecution. The record further shows that the Chemical Examiner's report adduced in evidence was a deficient report as it did not contain any detail whatsoever of any protocol adopted at the time of chemical analysis of the recovered substance. This Court has already held in the case of Ikramullah and others v. The State (2015 SCMR 1002) that such a report of the Chemical Examiner cannot be used for recording conviction of an accused person in a case of this nature. For all these reasons we find that the prosecution had not been able to prove its case against Nadeem petitioner beyond reasonable doubt."

15. Report of chemical examiner was also deficient as it was not prepared as per rules. As such, positive report of chemical examiner would not be helpful to the prosecution.

16. We are of the opinion that the evidence of the police officials is as good as that of private witnesses but we cannot trust on the version of the prosecution without independent corroboration, which is lacking in this case and in this case we have gone through the evidence of the prosecution witnesses and came to a considerable view that there are material contradictions in the evidence of the complainant and mashirs and such type of evidence could not be relied upon for recording conviction in a case. It is not necessary that there should be many circumstances creating doubts. If there is a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of any accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right as observed in the case of *TARIQ PERVEZ V/S. THE STATE*, reported as 1995 SCMR 1345.

17. In view of what has been discussed herein above, we have no hesitation to say that the prosecution has failed to prove its case against the appellant / accused beyond reasonable shadow of doubt, therefore, vide short order dated 17.04.2018, the present criminal appeal was allowed, whereby the appellant / accused was released, the contents of the said short order are reproduced hereunder:-

“Heard arguments. For the reasons to be recorded later on, criminal jail appeal No.D-108 / 2015 is allowed. Conviction and sentence recorded by the trial Court vide judgment dated 04.11.2015 are set aside. Appellant Akhtar Ali shall be released from the jail forthwith if he is not required in some other case.”

18. These are the reasons for the aforesaid short order.

JUDGE

JUDGE

Shahid