

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD.

Criminal Appeal No. D-16 of 2017
Criminal Appeal No. D- 41 of 2017

Present:-

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

Date of hearing: 11.01.2018

Appellant: Mst. Marvi in Cr. Appeal No. D- 16 of 2017
through Mr. Ahsan Gul Dahri, Advocate.

Appellant: Aijaz Ali in Cr. Appeal No. D- 41 of 2017
through Mr. Mian Taj Muhammad Keerio, Advocate

Respondent: The State through Syed Meeral Shah, APG

ABDUL MAALIK GADDI, J:- Through this common judgment, we intend to dispose of the captioned appeals filed by the appellants as these appeals relate to same facts and grounds and also arise out of judgment dated 11.02.2017 passed by the trial court.

2. By means of these appeals, the appellants have assailed the legality and propriety of the judgment dated 11.02.2017 passed by the learned Special Judge (Narcotics) / Sessions Judge, Jamshoro in Special Case No. 76 of 2015 (re-The State v. Aijaz Ali and another) under Crime No. 06 of 2015 registered under Section 9(c) of CNS Act, 1997 at PS Excise Circle Kotri, whereby the learned trial court after full dressed trial convicted and sentenced the appellants in point No.2 of the judgment. For the sake of convenience, it would be advantageous to reproduce the relevant portion of findings in point No.2 which reads as follows:-

Point No.2

As a result of my findings on point No.1, I have come to the conclusion, that offence under Section 9(c) of CNS Act, 1997 is proved against accused persons beyond reasonable doubt. Accordingly, accused Aijaz Ali is convicted for the offence under Section 9(c) of CNS Act, 1997 for keeping 05 KGs of charas and sentenced to suffer R.I for ten years and to pay a fine of Rs.2,00,000/- (two lacs) or in default to suffer R.I for two years.

Accused Mst. Marvi is convicted for the offence under Section 9(c) of CNS Act, 1997 for keeping 15-KGs of charas and sentenced to suffer R.I for life imprisonment and to pay a fine of Rs.5,00,000/- (five lacs) or in default to suffer R.I for five years. The accused are in custody, hence they are allowed benefit of Section 382-B Cr.P.C. The accused are produced in custody and remanded to jail with directions to serve out the sentences.

3. Facts of the prosecution case as unfolded in FIR are that on 01.06.2015 complainant ETO Syed Aijaz Ali Shah along with his subordinate staff left Excise P.S vide entry No. 85 at 06:00 p.m. in Government Vehicle No. GS-4077 for patrolling towards Aamri side. On 02.06.2015 they started checking of the vehicles at Aamri bridge connecting to Aamri and Qazi Ahmed. It was about 5.30 p.m. time, a white colour corolla car came from Qazi Ahmed side and one lady was sitting on back seat of the car. The complainant party signaled it to stop, but the driver on seeing the Excise Police with police mobile, tried to run away. The complainant party took action, encircled the car and apprehended them. On enquiry, the driver disclosed his name as Aijaz Ali s/o Mubarak Ali Solangi and lady disclosed her name as Marvi w/o Ghulam Nabi Chandio. Due to non-availability of private mashirs, EC Zulfiqar Ali and EC Bashir Ahmed were cited as mashirs and search of the apprehended persons and the car was conducted. The complainant party secured five coloured packets under the driving seat of the car and 15 coloured packets behind the back seat of the car. The complainant party opened the packets and found two slabs of charas in each packet wrapped with yellow colour plastic and on the slabs of charas monogram was fixed in golden colour. From personal search of accused Aijaz Ali, two notes of Rs.1000/- in denomination, one note of Rs.500/- in denomination and one note of Rs.100/- in denomination, total Rs.2600/-, copy of CNIC, Registration Book of car and a Nokia Mobile Phone was secured and lady accused also produced herself three notes of Rs.1000/- in denomination and two notes of Rs.100/- denomination, total Rs.3200/-. The charas was weighed and each slab of charas became 1-2 KG, total 20-KGs. Total charas was sealed for chemical analysis. The accused disclosed that they bring the charas from Qazi Ahmed and going to Sehwan for selling purpose. Such memo of arrest and recovery was prepared in presence of mashirs, who admitted the same and put their signatures on it. Thereafter accused and property were brought at Excise Police Station, Kotri where complainant lodged FIR on behalf of the State.

4. It appears from the record that after registration of FIR, the investigation was carried by Aijaz Ali Shah, AETO, who after recording the statement of P.Ws under Section 161 Cr.P.C., submitted the final report against the appellants in the court of law.

5. After usual investigation, challan was submitted against accused above named. Copies of documents under Section 265-C Cr.P.C. were supplied to the accused vide receipt at Ex.01. Charge under Section 9(c) of CNS Act, 1997 was framed against accused above named at Ex.02, to which they pleaded not guilty and claimed to be tried vide their pleas at Ex.03 & 04 respectively.

6. It also reveals from the record that in order to establish accusation against the appellants / accused, prosecution had examined complainant AETO Syed Aijaz Ali Shah at Ex.05/A, FIR at Ex.05/B, entries at Ex.05/C, letter for sending case property to the Chemical Examiner at Ex.05/D and chemical report at Ex.05/E, mashir EC Zulfiqar Ali Channa at Ex.06. Thereafter learned SPP for the State closed the side of the prosecution through statement at Ex.07.

7. Statement of appellants / accused under Section 342 Cr.P.C. was recorded separately at Ex.08 & 09 respectively in which the appellants / accused have stated that they are innocent and have falsely been involved in this case due to enmity with complainant and EC Zulfiqar. They further stated that the allegations against them are false. Appellant Mst. Marvi has also stated that she had lodged report against complainant AETO Aijaz Ali as well as EC Zulfiqar Ali being Crime No. 166 of 2012 under Section 392, 452, 506/2 PPC on 3.12.2012 at PS Sehwan, therefore, according to her the enmity is apparent and due to this enmity she has been involved in this case falsely. During the course of recording her statement she has produced Photostat copy of said FIR. However, the appellants neither examined themselves on oath nor led any evidence.

8. The trial court after hearing the learned counsel for the parties and assessment of evidence, by judgment dated 11.02.2017, convicted and sentenced the appellants as stated above, hence these appeals have been filed by the appellants.

9. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the judgment dated 11.02.2017 passed by the trial court and therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

10. Mr. Ahsan Gul Dahri, learned counsel for appellant Mst. Marvi while arguing has submitted that Mst. Marvi has been involved falsely in this case and case property has been foisted upon her by the complainant and mashir, due to previous registration of FIR by accused Mst. Marvi against complainant and mashir of this case. During the course of arguments he has taken to us towards the FIR No. 166 of 2012 of PS Sehwan registered under Section 392, 452, 506/2 PPC available on record showing that in the said FIR complainant and mashir of this case are accused therefore, according to him due to this reason false implication of accused could not be ruled out. He further submitted that there is a delay in depositing case property in the office of chemical examiner, hence the property has been managed and tampered. He further submitted that there are material contradictions and inconsistencies in the evidence of prosecution witnesses regarding colour of the packets of the property and each slab of charas has not been sealed separately. He further submitted that neither the owner of the car has been shown witness, nor his statement has been recorded to establish any connection of the accused with the car. He further submitted that the property has not been recovered from the exclusive possession of the accused and the car in question is also not in the name of accused Mst. Marvi which creates doubt but these aspects of the case has not been appreciated by the trial court and convicted and sentenced the appellants in a hasty manner therefore, the impugned judgment is liable to be set-aside and appellant Mst. Marvi be acquitted from the charge. In support of his contention he has relied upon the case of *Desser Mal v. The State* reported in 2007 P.Cr.L.J 462, *Muhammad Sarif Baloch and another v. The State* reported in 2009 SCMR 536, *Muhammad Shafique v. The State* reported in 2010 P.Cr.L.J 458, *Nazeer Ahmed v. The State* reported in PLD 2009 Karachi 191, *Abdul Manan and another v. The State* reported in 2008 P.Cr.L.J 1268 and *Wahib Bux v. The State* reported in 2001 YLR 2958.

11. Mr. Mian Taj Muhammad Keerio, learned counsel for accused Aijaz Ali while arguing has submitted that accused Aijaz Ali is innocent and has

been falsely involved and case property has been foisted upon him due to his dispute with mashir EC Zulfiqar Ali over the fight of children and even accused Aijaz Ali has no concern with co-accused Mst. Marvi who is by caste Chandio. He further submits that no private mashir has been cited as witness in this case and alleged incident took place on the road side where the shops were available. He further submits that both the mashirs are Excise Officials and subordinate of the complainant. He further submitted that there are material contradictions and inconsistencies in the evidence of prosecution witnesses in respect of date of departure from their station, time of alleged incident, number of alleged recovered car and crime number etc, which creates doubt and benefit of which be extended to the accused / appellant and he may be acquitted.

12. Conversely, Syed Meeral Shah, learned APG while arguing the case has supported the impugned judgment and has submitted that the prosecution has brought on record sufficient oral as well as documentary evidence which proves the charge against the appellants beyond any reasonable doubt and chemical report in respect of recovered narcotic substance from accused is in positive. He further submits that there is no material contradiction in between the evidence of the prosecution witnesses or material facts of the case. He further submits that the contradictions if any pointed out in the evidence of the prosecution witnesses by the learned counsel for the appellants are minor in nature and do not affect the merit of the case, hence he prayed that accused are not entitled for any relief. In support of his arguments he has relied upon the case of **Ghulam Qadir v. The State** reported in **PLD 2006 S.C. 61** and **Tariq Mehmood v. The State** reported in **PLJ 2009 SC 113**.

13. We have heard the learned counsel for the parties at a considerable length and perused the evidence and documents on record.

14. After careful consideration and meticulous examination of the available record, suffice to say that mere heinous nature of the offence is not sufficient to convict the accused because the accused continues with presumption of innocence until found otherwise at the end of the trial. It is the settled principle of law that burden is always upon the prosecution to prove the case beyond shadow of doubt. Keeping in view of the basic touch stone of criminal administration of justice, we have examined the ocular evidence as well as circumstantial and documentary evidence

along with impugned judgment and have come to the conclusion that the prosecution has failed to prove its case against the appellants for the reasons that it appears from the record that the alleged incident took place on the relevant date and time at Indus Highway Road, near Aamri Qazi Ahmed Bridge and it has also been brought in evidence that the said road is a busy road for traffic and traffic were available at the time of incident. It has also been brought in evidence of prosecution witnesses that there were also shops over there and it was evening time but despite of this fact complainant who himself is I.O of the case did not bother to associate any independent person from the locality to witness the arrest and recovery proceedings. It is settled principle that judicial approach has to be conscious in dealing with the cases in which testimony hinges upon the evidence of Excise 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. However, where alleged recovery was made on road side which is meant for heavy traffic and shops were available there as happened in this case, omission to secure independent mashirs, particularly, in case of a snap checking cannot be brushed aside lightly by the court. Prime object of Section 103 Cr.P.C. is to ensure transparency and fairness on the part of the police during course of recovery, curb false implication and minimize scope of foisting of fake recoveries upon accused. As observed above at the time of recovery from appellants, complainant did not associate private person as recovery witnesses and only relied upon his subordinates and further more he himself registered the complaint and investigated the case. In our view investigating officer of police or such other force, under Section 25 of Control of Narcotic Substance Act, 1997, was not authorized to exclude independent witnesses. It does not do away with principle of producing the best available evidence. No doubt that no specific bar exists under the law against complainant who is also investigating officer of the case, but being the complainant it cannot be expected that as an investigating officer he will collect any material which goes against the prosecution or gives any benefit to the accused. Evidence of such officer therefore, is a weak piece of evidence and for sustaining a conviction it would require independent corroboration which is lacking in this case. We are supported with case of Nazir Ahmed v. The State reported in PLD 2009 Karachi 191 & Muhammad Khalid v. The State reported in 1998 SD 155.

As observed above non-association of independent witness as mashir in this case false implication of the appellants could not be ruled out.

15. We have also gone through the evidence available on record and found that the evidence of the prosecution witnesses is contradictory to each other on material particular of the case. For example, P.W complainant stated in his examination in chief that on 1.6.2015 he was posted as Incharge Excise Circle Kotri, on that day he along with EC Zulfiqar and others Excise Police officials left police station for road checking and patrolling and proceeded towards Aamri whereas P.W mashir namely EC Zulfiqar stated in his examination in chief that on 2.6.2015 he was posted at Excise Circle Kotri and he along with AETO Syed Aijaz Shah and others Excise Police Officials left police station and proceeded towards Aamri which appears to main contradiction with regard to date of leaving of police station. Not only this complainant has stated in his examination in chief that they started road checking at 5:30 p.m. on the relevant date and he saw white colour corolla car was coming and its registration number was AXV-808 whereas P.W mashir while contradicting this fact stated that time was 5:00 p.m. and car registration number was EXV-808. It appears that both the prosecution witnesses have given different time of incident and different car registration number. When this fact was confronted to learned APG, he has not replied satisfactorily. We have also noted other material contradictions in the case of prosecution witnesses which goes to the root of the case i.e. complainant stated in his examination in chief that he lodged FIR on behalf of the State against accused being Crime No. 05 of 2015 for offence under Section 9(c) CNS Act, whereas Crime number mentioned in FIR is 06/ 2015. We have seen Ex.5/C which is entry number No. 85 dated 1.6.2015 showing that complainant left police station along with his subordinate staff in official vehicle No. GS-7044 for patrolling in the area whereas in mashirnama official vehicle number has been described as GS-4077. We have seen the report of chemical examiner to the government of Sindh Karachi available on record at Ex.5/E showing description of articles contained in the parcel which reads as under:-

“Parcel containing twenty foil packets out of which 6 brown and remaining fourteen green colour foil packets each packet contains two greenish brown semi soft slabs with smell of charas each covered with yellow colour plastic panni, three brown colour foil packets golden dye imprint sababa on each slab. Three brown foil

packets and three green colour foil packets Golden dye imprint not readable and eleven green colour foil packets Golden imprint gumnam 2012-2015 on each slab.”

16. Perusal of above description it reveals that the said description of case property has not been mentioned in the memo of arrest and recovery, therefore, tampering in the case property under the circumstances of the case could not be ruled out. We have noted that memo of arrest and recovery was prepared on 2.6.2015 whereas case property received by Director Laboratories and Chemical Examiner on 4.6.2015 for examination after the delay of 02 days. Moreover, the property was retained by whom during this intervening period has also not been explained by the prosecution that after its recovery under whose custody it was lying. No official from Director Laboratories and Chemical Examiner has been examined in this case to corroborate the case of prosecution, therefore, under the circumstances no reliance can safely be placed on chemical report for conviction of the appellants on the basis of contradictory evidence.

17. It is the case of the appellants that appellant Mst. Marvi had lodged FIR with Crime No. 166 of 2012 under Section 392, 452 and 506/2 PPC at police station Sehwan against complainant as well as mashir of this case namely EC Zulfiqar. Appellant Aijaz Ali also claims enmity against complainant party on quarrel of children, therefore, according to them enmity has been established between them as such complainant has falsely involved the appellants in this case. Keeping in view of the above facts and circumstances of the case it appears that the plea raised by the appellants in these appeals appears to be more plausible and convincing whereas the stand of the prosecution appears to be doubtful.

18. For the above stated reasons, there are several circumstances / infirmities in the prosecution case, which have created reasonable doubts about the guilt of the appellants.

19. In case of Tariq Pervaiz v. The State reported as 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 single circumstance, which creates reasonable doubt in the prudent mind about the guilt of the accused, then accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right”.

Similar view has also been taken in the case of Muhammad Akram v. The State reported as 2009 SCMR 230.

20. While respectfully relying upon the case laws referred to above, we have no hesitation to hold that prosecution has failed to establish its case against the appellants beyond reasonable doubt. Therefore, by extending the benefit of doubt, these appeals are allowed. The conviction and sentences recorded by the learned Special Judge (Narcotics) / Sessions Judge, Jamshoro vide judgment dated 11.2.2017 is set-aside. Appellants are acquitted of the charge. Appellants are in custody. They shall be released forthwith if not required in any other case.

JUDGE

JUDGE