

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

Cr. Jail Appeal No. D- 61 of 2014

PRESENT:

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

Appellant : Shah Nawaz @ Shahoo Khoso (present on bail)
through Mr. Muhammad Hassan Chandio, Advocate.

Respondent : The State
through Syed Meeral Shah Bukhari, A.P.G.

Date of hearing : 11.01.2018.
Date of judgment : 11.01.2018.

J U D G M E N T

ABDUL MAALIK GADDI, J:- Appellant Shah Nawaz @ Shahoo s/o Morio by caste Khoso faced trial before learned Special Judge (Narcotics), Shaheed Benazirabad in Special Case No. 84 of 2013 for offence under Section 9(c) Control of Narcotic Substance Act, 1997. By judgment dated 30.04.2014, the appellant was convicted and sentenced to suffer R.I for three years and to pay fine of Rs.15,000/-. In default of the payment of fine, he was to undergo S.I for two 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 28.01.2013 at 1530 hours at link road leading towards in the end of Mashakh Shakh (minor), Taluka Sakrand, the present appellant was found possessing three big pieces of charas weighing 1840 grams, out of which 50 grams from each piece was separated for the chemical examination, by a police party headed by Inspector /

SHO Zameer Hussain Zardari in presence of mashirs HC Wazir Ali and PC Qurban. The substance was sealed at the spot under a mashirnama whereafter the accused and property were brought at the police station where SHO Zameer Hussain Zardari lodged FIR No.2 of 2013 at P.S. Nasri.

3. After registration of FIR, complainant/I.O. himself investigated the case, examined witnesses u/s 161 Cr.P.C, dispatched substance to the Chemical Examiner, Sukkur at Rohri, collected report in positive and submitted charge sheet in the court of law for offence punishable u/s 9 (c) of CNS, Act, 1997.

4. The charge against the accused was framed under Section 9 (c) Control of Narcotic Substance Act, 1997 at Ex.5, to which he pleaded not guilty and claimed to be tried vide plea at Ex.6.

5. Prosecution in order to prove its case, examined PW-1 complainant Inspector/SHO Zameer Hussain Zardari at Ex.7, who produced the mashirnama of arrest and recovery, FIR, simple attested copy of roznamcha entries of departure and arrival at PS, mashirnama of wardat and chemical report at Ex.7/A to 7/D and P.W-2/mashir Wazir Ali at Ex.8, thereafter learned incharge DDPP closed the prosecution side at Ex.9.

6. Statement of appellant under Section 342 Cr.P.C. was recorded at Ex.10, in which he claimed false implication in this case and denied the prosecution allegations. 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 and the evidence finds an elaborate in the judgment of the trial court and need not to repeat the same to avoid unnecessary repetition.

9. Mr. Muhammad Hassan Chandio, learned advocate for appellant has mainly contended that it was the case of spy information but the complainant failed to associate any person of the locality to witness the recovery proceedings. He further contended that there are material contradictions in the evidence of prosecution. He has further contended that the charas was recovered from the possession of accused on .28.01.2013 but it was sent to the chemical examiner on 06.02.2013. It is contended that there was no evidence that how many grams were taken from the each piece of charas for sending to the chemical examiner. The safe custody during that period has not been established. It is also contended that neither WHC of the police station nor WPC Abdul Wahid who had taken sample to the chemical examiner have been produced before the trial court for recording their evidence. In support of his contentions, learned counsel has placed reliance on the case of *TARIQ PERVEZ V/S. THE STATE (1995 SCMR 1345)* and *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*.

10. Syed Meeral Shah, learned Additional Prosecutor General Sindh, appearing for the State in view of the arguments advanced by learned counsel for the appellant and in view of the grounds as taken in this appeal, has not opposed this appeal. He did not support the judgment of the trial court.

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 28.01.2013, the complainant alongwith his subordinate staff left police station for patrolling in the area. During patrolling

from different places when they reached near commando centre, they received spy information that the present appellant was selling charas on the tail of Mashaikh Shakh (minor), on such information, the police party reached at the pointed place and arrested the present appellant in presence of mashirs HC Wazir and PC Qurban and recovered 1840 grams charas. It is surprising to note that the police party had advance spy information about the availability of present appellant on the pointed place despite of that the complainant who is also I.O. of the case has not bothered to associate any independent person either from the Commando centre or from the place of incident. It has been brought in evidence that the Commando centre was a populated area. It has also been brought on record that place of incident was also surrendered by the shops and it was evening time when the incident is alleged to have been occurred but the complainant did not make any effort to collect any private person from the locality to witness the recovery proceedings. 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, where the 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 the independent mashirs, particularly, in the case of patrolling 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 and furthermore he himself registered the FIR and investigated the

case. In our view, 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. No doubt that no specific bar exists under the law against complainant who is also the investigation officer of the case, but being the complainant it cannot be expected that an investigation 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 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.

13. According to the case of prosecution, charas was recovered from the possession of accused on 28.01.2013 and it was sent to the chemical examiner on 06.02.2013 after the delay of 09 days. It is the contention of the defence counsel that the prosecution failed to establish the safe custody of charas at Malkhana for nine days. Safe transit to the chemical examiner has also not been proved. WPC Abdul Wahid who had taken sample to the chemical examiner has not been produced before the trial court for recording his evidence. Furthermore, WHC Mohib Ali who registered the FIR at the dictation of complainant Zameer Hussain has also not been examined to corroborate the case of the prosecution. 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. Moreover, there was delay of nine days in sending the sample to the chemical examiner. WHC of the police station with whom the case property was deposited in Malkhana has not been examined so also the WPC who had taken the sample to the chemical examiner 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 no objection raised 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 30.04.2014 passed by learned Special Judge (Narcotics) Shaheed Benazirabad is set aside. The appeal is allowed. Appellant is acquitted of the charge. Appellant was present on bail when by our short order dated 11.01.2018, his bail bond was cancelled and surety discharged. These are the reasons of our short order whereby we had allowed this appeal.

JUDGE

JUDGE

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