

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

Criminal Appeal No. D-82 of 2017

Present:-

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

Date of hearing: 24.01.2018

Date of Decision: 24.01.2018

Appellant: Chetan through Mr. Syed Zakir Hussain, Advocate.

Respondent: The State through Mr. Muhammad Ayoob Kassar, Special
Prosecutor for ANF

J U D G M E N T

ABDUL MAALIK GADDI, J:- Through this appeal the appellant has assailed the legality and propriety of the judgment dated 13.07.2017, passed by the learned Special Judge Narcotics Substance Act / 1st Additional Sessions Judge, Hyderabad, in Special Case No. 179 of 2015 (re-The State v. Chetan) under F.I.R. No. D040403215 registered under Sections 6-9-C CNS Act, 1997 at PS ANF, Hyderabad, whereby the learned trial court after full dressed trial convicted and sentenced the appellant as stated out in point No.2 of Paragraph-25 of the impugned judgment. For the sake of convenience, it would be proper to reproduce point No.2 of the impugned judgment, which reads asunder:-

Point No.2

In view of the above discussion, I am of the irresistible conclusion that the prosecution has reached home by proving its version beyond any reasonable doubt. I find that the prosecution witnesses have fully supported and corroborated the version of the prosecution and their evidence ring the truth. Hence, I convict accused Chetan s/o Padmo B/c Meghwar U/s 265 H(ii) Cr.P.C for the offence punishable U/s 6, 9(c) CNS Act, 1997, to suffer rigorous imprisonment for the period of Five (05) years and Six (06) months, and to pay fine Rs.25,000/-. In case of default in payment of fine Rs.25,000/- the accused named above shall further suffer simple imprisonment for the period of Five (05) months and Fifteen (15) days. However, benefit of Section 382-B Cr.P.C is also extended to the accused named above. The accused Chetan S/o Padmo B/c Meghwar is produced by Jail Authorities, he is remanded to the jail along with Conviction Warrant to serve out the sentence awarded now.”

2. Facts of the prosecution case as unfolded in FIR are that on 23/11/2015 the Complainant/SIP Syed Salman along with his subordinate staff namely Naib Subedar Muhammad Nawaz, H.C Abdul Hameed, H.C Abdul Razzaque, H.C Muhammad Umar, H.C Raheem Bux, P.C Kashan Ahmed, P.C Imam Bux, P.C Shoukat, Sepoy Irshad, drivers H.C Ghulam Rasool and P.C Safdar left the P.S for patrolling and for prevention of narcotics by two government vehicles vide entry No.08 at 1430 hours under the command of A.D Ghulam Abbass. During patrolling when the Complainant party reached at the area of Auto Bhan road near Majee Hospital at 1445 hours, where spy gave information that a person namely Chetan was standing and waiting at Muhammadi Morr Bus Stop having a huge quantity of narcotics to deliver the same to his specific customer and immediate proceedings would cause definite arrest and recovery. Upon such information when the Complainant party reached at the pointed out place where on the poination of spy they noticed that a person holding black shopping bag in his hand, to whom they apprehended tactfully. The persons available at the place of incident, were requested to be act as witnesses but they refused due to fear. As such ultimately from the raiding party H.C Abdul Razzaque and P.C Kashan Ahmed were nominated as witnesses of the incident. The apprehended person disclosed his name as Chetan S/o Padmo B/c Meghwar Hindu, R/o Malhi Colony Tehseel & District Mirpurkhas. The recovered black shopper was checked, which contained two multi-colour foil pack packets and six small and big pieces of Charas. The packets of Charas were checked in which two slabs in each packet were found. Both the packets were weighed separately which became one kilogram each; while six pieces were also weighed which became 100 grams and the total recovered Charas was became 2100 grams (gross). From each patti 100 grams was kept in a white plastic thaili and sealed the same in cloth thailis (bag) for Chemical Analysis, while six small and big pieces of Charas were sealed separately and were kept in plastic thaili and sealed in the cloth bag; and the parcels were numbered as 01 to 05 and the remaining patties of Charas were numbered as 01 to 04 and the same were kept in their packets which were sealed in cloth bag along with the black shopper. Cash Rs.230/= was also recovered from right side of wearing shirt of the accused. Thereafter the arrested accused and the case property were brought at the P.S., where the instant FIR was registered.

3. It appears from the record that after registration of FIR, the investigation was carried by SIP Syed Salman of P.S ANF Hyderabad, who after recording the

statements of P.Ws under Section 161 Cr.P.C., submitted the final report against the appellant in the court of law.

4. After usual investigation, challan was submitted against the appellant. Copies of documents under Section 265-C Cr.P.C. were supplied to the accused vide receipt at Ex.01. Charge was framed against the appellant on 14.03.2016 at Ex.02, to which he pleaded not guilty and claimed to be tried vide his plea at Ex.02/A.

5. In order to substantiate the allegations, prosecution examined mashir HC Abdul Razzaque as P.W-1 at Exh.3 (who produced attested copy of entry No.8 at 1430 hours and entry No.9 at 1620 hours (both on one sheet), memo of arrest and recovery as Exh.3/A and 3/B respectively), and the complainant SIP Syed Salman as P.W-2 at Exh.4 (who produced carbon copy of F.I.R., letter for sending the case property for Chemical Examination, Chemical Examination Report as Exh.4/A to 4/C respectively). Thereafter, the learned SPP for ANF closed the side of the prosecution vide his statement at Exh.5.

6. Statement U/s 342 Cr.P.C. of the accused Chetan was recorded at Exh.06. In his statement he, the accused, denied all the allegations leveled against him by the prosecution and claimed to be innocent. In his statement he, the accused, neither wanted to lead any evidence in his defense nor desired to be examined himself on oath.

7. The trial court after hearing the learned counsel for the parties and assessment of evidence, by judgment dated 13.07.2017, convicted and sentenced the appellant as stated above, hence this appeal has been filed by the appellant.

8. Mr. Syed Zakir Hussain, learned counsel for appellant while arguing has submitted that the accused is innocent and has falsely been implicated in this case. He has further argued that no Charas was recovered from the accused but the accused was booked in the present case with malafide intention due to enmity with one Ghulam Hyder, whose brother is an employee of ANF and a Civil litigation is pending between them over the land. He has further argued that the accused is resident of Mirpurkhas and he never came at Hyderabad, but at the instance of Ghulam Hyder he has been booked in the present case falsely. He has further argued that no private independent witness was associated as mashirs in the present case while the place of incident was situated in thickly populated area. He has further argued that according to the prosecution version the Complainant received spy information about availability of the accused at the

place of incident and it is very surprising that till reaching of the Complainant party the said person was remained available there, however, he has prayed for acquitting the accused in the present case.

9. Conversely, Mr. Muhammad Ayoob Kassar learned Special Prosecutor for ANF has supported the impugned judgment by arguing that a considerable quantity of charas i.e 2.100 kilograms in the shape of slabs as well as pieces was recovered from the accused. He has further argued that cash Rs.230/= was also recovered from the accused. He has further argued that the prosecution witnesses have given corroborative evidence and did not leave any lacuna or contradictions of such type which may shatter the prosecution version. He has further argued that the incident was taken place on 23/11/2015 and the property was sent as soon as possible i.e. on 24/11/2015, i.e. on the very next day of the incident, and on the same day it was received at the laboratory. He has further argued that the samples from the case property, recovered from the accused, was sent for Chemical Examination and according to the Chemical Report, which has been produced as Exh.4/C, the property found to be Charas and the Chemical Report is positive. He has further argued that according to CNS Act, Section 103 Cr.P.C is not applicable in narcotics. He has further argued that the learned counsel for the accused has pointed out some contradictions and lacunas but these are not of material nature. He has further that the accused is habitual criminal and drug seller, as such accused may be convicted. In support of his arguments he relied upon the case law reported as 1. *Ghulam Qadir v. The State* (PLD 2006 Supreme Court 61), 2. *Rahim Dad v. The State* (2002 P.Cr.L.J 1506), 3. *Zafar v. The State* (2008 SCMR 1254) and 4. *Khaliq Jan v. The State* (2005 MLD 966).

10. We have heard the learned counsel for the parties and scanned the entire evidence available on record.

11. 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.

12. We have come to the conclusion that the prosecution has failed to prove its case against the appellant for the reason that in this case all the pieces of

evidence produced by the prosecution are weak in nature. It appears from the record that the alleged incident took place on 23.11.2015 at 03:00 p.m in the day time. It reveals from the record that on the relevant date and time when the complainant alongwith his subordinate staff was on patrolling duty and during patrolling when they reached at the area of Auto Bhan Road near Maji Hospital it was 02:45 p.m and they received spy information about the availability of the present appellant at Muhammadi More Bus Stop to deliver the charas to his specific customers. It has been brought in evidence of P.Ws Abdul Razzak and Syed Salman that the place from where they received spy information was surrounded by shops and hospital but surprisingly no private person was associated by them to witness the recovery proceedings. It has also been brought in evidence that since the place of incident was also surrounded by shops and hospital, yet the complainant who is also I.O of the case did not bother to call any independent witness from the locality to witness the 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 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 traffic, or from where shops and hospital were available there as happened in this case, omission to secure independent witnesses, particularly, in case of a 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 appellant, 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 for sustaining 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 appellant could not be ruled out.

13. We have gone through the evidence and documents available on record with the able assistance of the parties counsel and found that the evidence of the prosecution witnesses are contrary on material particular of the case. We have also noted that incident took place on 23.11.2015 whereas the sample parcel were sent to the office of chemical examiner on 24.11.2015 after a delay of 01 day through P.C Imam Bux but said PC Imam Bux has not been examined in this case to corroborate the version of prosecution. Admittedly there is a delay of one day in sending the sample parcels of the charas and nothing on record that during this intervening period before whom the case property was in custody and in case if the property was lying at police Malkhana its entry has also not been produced before the trial court, therefore, on this aspect tampering in the case property could not be ruled out. It appears from the record that the appellant is facing protracted trial since 2015 and is behind the bars for the last more than two years and nothing on record to show that the present appellant is previously convicted in any other case of like nature, therefore, the plea of the appellant as stated in his statement under section 342, Cr.P.C that he has been involved falsely in this case, has some weight.

14. During course of arguments learned counsel for the appellant has pointed out number of contradictions in between the evidence of the prosecution witnesses and was of the view that in view of the contradictory evidence, no conviction could be sustainable in law. He has pointed out the contradictions to the effect that the description of case property as mentioned in the mashirnama of recovery and arrest as well as in the F.I.R. has not been described in the evidence of complainant SIP Syed Salman of P.S ANF Hyderabad. It is relevant to reproduce the relevant portion of the cross examination of complainant SIP Syed Salman, which reads as under:-

“It is correct to suggest that upon the wrapper of one packet in golden colour a picture of lion is found appeared with wording as “SUMATARA”, which has not been given in the F.I.R. or in the memo of the arrest and recovery. It is correct to suggest that the wrapper of another packet contained the wording as “KENYAN”, the packet of coffi bean has neither been mentioned in the F.I.R. nor in the memo of arrest and recovery. It is correct to suggest that I have not disclosed about the envelope in the mashirnama, in which I kept the recovered amount. The envelopes are available in the investigation box”.

Complainant SIP Syed Salman has also admitted in his cross examination as under:-

“on one sample and the sealed parcel the whitto is used. Voluntarily says, there was some mistakes while writing.

From the above pieces of evidence, it appears that the evidence of complainant is not in line with the description of the case property as disclosed in the F.I.R. and memo of arrest and recovery, therefore, the same could not be safely relied upon to maintain the conviction of the appellant.

15. In view of the above contradictions in the evidence of prosecution witnesses false implication of the appellant in this case could not be ruled out but the learned trial court has utterly failed to appreciate this aspect of the case.

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

17. 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.

18. For what has been discussed above, we have no hesitation to hold that prosecution has failed to establish its case against the appellant beyond reasonable doubt. Therefore, by extending the benefit of doubt, this appeal is allowed. The conviction and sentence recorded by the learned Special Judge Control of Narcotics Substances / 1st Additional Sessions Judge, Hyderabad vide judgment dated 13.07.2017 is set-aside. Appellant is acquitted of the charge. The appellant is produced in custody. He is remanded back to the custody with direction to release him forthwith if he is not required in any other custody case.

19. The case law relied upon by the learned Special Prosecutor for ANF is distinguishable to the facts of the present case, therefore, the same are not helpful to the prosecution.

JUDGE

JUDGE

A.H.

