

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

Cr.Appeal.No.D- 88 of 2015

PRESENT:

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

Appellant Nadeem present on bail.
Syed Meeral Shah, Additional Prosecutor General Sindh.

Date of hearing : 17.01.2018.
Date of judgment : 17.01.2018.

J U D G M E N T

ABDUL MAALIK GADDI, J:- Appellant Nadeem s/o Natho by caste Nahiyoon faced trial before learned Sessions Judge/Special Judge for CNS, Tando Allahyar in Special Case No. 52 of 2012 for offence under Section 9(c) Control of Narcotic Substance Act, 1997. By judgment dated 16.09.2015, the appellant was convicted and sentenced to suffer R.I for 04 years and 06 months and to pay fine of Rs.20,000/-. In default of the payment of fine, he was to undergo S.I for 05 months more. Benefit of Section 382-B Cr.P.C. was extended to the appellant.

2. Precisely relevant facts are that on 02.09.2012, complainant SIP Ghulam Hussain Mirani, incharge CIA Centre, Tando Allahyar alongwith his subordinate staff left police station for patrolling and after patrolling at the different places when they reached at Yousufani Farm, Dhingano Bozdar link road, they noticed on the head light of the vehicle that one person (present appellant) having black colour plastic theli was going on and when they stopped vehicle near to him, he

tried to slip away, however, the present appellant was apprehended and during search two big pieces of charas which became 1020 grams were recovered from his possession. Out of which 10 grams were sealed separately for sending the same to the chemical examiner. Such memo of arrest and recovery was prepared in presence of mashirs PC Muhammad Shahid and PC Ghulam Mustafa. Thereafter, the accused and case property were brought at Police Station Tando Allahyar where the FIR was registered against the present appellant.

3. After registration of FIR, police conducted the investigation and after completing all the legal formalities, submitted challan in the competent court of law.

4. The charge against the accused was framed under Section 9 (c) Control of Narcotic Substance Act, 1997 at Ex.2, to which he pleaded not guilty and claimed to be tried vide plea at Ex.2/A.

5. Prosecution in order to prove its case, examined PW-1 complainant/SIP Ghulam Hussain Mirani at Ex.3, who produced memo of arrest and recovery, attested copy of departure entry, copy of arrival entry and copy of FIR at Ex.3/A to 3/D, respectively and P.W-2/mashir HC Ghulam Mustafa at Ex.4 and I.O/SIP Zulfiqar Ali Leghari at Ex.5, who produced the original chemical report at Ex.5/A, thereafter learned I/C DPP closed the prosecution side vide his statement at Ex.7.

6. Statement of appellant under Section 342 Cr.P.C. was recorded at Ex.8, in which he claimed false implication in this case and denied the prosecution allegations. He examined himself on Oath and also examined one Rajib Ali in his defence at Ex.9.

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 case and the evidence find an elaborate in the judgment of the trial court and need not to repeat the same to avoid unnecessary repetition.

9. Appellant present in person submits that his counsel could not reach today on account of some personal affairs, therefore he may be heard in person. He submits that he is innocent and the alleged charas has been foisted upon him. He further submits that place of incident was a populated area 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 witnesses. He has further contended that the charas was recovered from him on 02.09.2012 but it was sent to the chemical examiner on 10.09.2012 after the delay of eight days for which no explanation has been furnished by the prosecution. 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 HC Bashir who had taken sample to the chemical examiner have been produced before the trial court for recording their evidence.

10. On the hand, learned D.P.G. appearing for the State has supported the impugned judgment by arguing that the judgment passed by the learned trial court is perfect under the law and facts. He further submits that the prosecution witnesses have supported the case and during cross examination they have not been shaken. He further submits that there is no material contradiction in the

evidence of prosecution witnesses. He lastly concluded that evidence of the police officials is as good as that of other witnesses.

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 02.09.2012, the complainant alongwith his subordinate staff left police station for patrolling in the area. During patrolling they found the present appellant in suspicious manner and arrested him at Yousufani Farm, Dhingano Bozdar link road and recovered 1020 grams charas in presence of mashirs PC Muhammad Shahid and PC Ghulam Mustafa. It has been brought in evidence by the complainant that the place of incident is surrounded by the shops as well as petrol pumps and it was a main road. On perusal of the record, it appears that the private witnesses were available over there but despite of this fact complainant did not bother to associate any independent person from the locality to witness the event. It is surprising to note that PC Shahid in his examination in chief has denied that the place of incident was surrounded by the shops. It appears that either the complainant is telling lie or the incident has not been taken place in a fashion as alleged by the complainant. Moreover it was a day 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, when the alleged recovery was made on road side which is meant for heavy traffic and shops and petrol pumps 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. In our view, the complainant, 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. 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 and Muhammad Altaf v. The State (1996 P.Cr.L.J 440). 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. Moreover, the accused is facing protract trial since last 06 years and there is nothing on the record that he is previously involved in such type of activities. This fact has also been confirmed by the learned D.P.G. as per record available with him. We have noted number of contradictions in the evidence of the prosecution witnesses on material particulars which goes to the root of the case. When these contradictions were confronted with learned D.P.G, he was unable to reply satisfactorily. Furthermore, the appellant in his statement recorded u/s 342 Cr.P.C. at Ex.10 has stated that nothing was recovered from his possession and the case is false. In support of his case he also examined one defence witness. During the course of arguments we have asked the learned D.P.G. that when the alleged recovery was affected from the appellant on 02.09.2012 but the property was sent to the chemical examiner after nine days, he has not been able to reply the court satisfactorily.

13. As observed above, according to the case of prosecution, charas was recovered from the possession of accused on 02.09.2012 and it was sent to the chemical examiner on 10.09.2012 after the delay of 09 days for which no explanation has been furnished by the prosecution. It is the contention of defence counsel that the prosecution failed to establish the safe custody of charas at Malkhana for this intervening period. Safe transit to the chemical examiner has also not been proved. PC Bashir who had taken sample to the chemical examiner has not been produced before the trial court for recording his evidence. Furthermore, 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 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, WHC of the police station with whom the case property was deposited in Malkhana has not been examined nor such entry has been produced before the trial court. 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 the material contradictions occurred in the evidence of prosecution, we have no hesitation to hold that the prosecution has failed to prove its case against the accused. Resultantly, the impugned judgment dated 16.09.2015 passed by learned Sessions Judge/Special Judge, for CNS, Tando Allahyar is set aside. The appeal is allowed. Appellant is acquitted of the charge. Appellant is present on bail, his bail bond stands cancelled and surety discharged.

JUDGE

JUDGE

