IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Before:

Mr. Justice Abdul Maalik Gaddi
Mr. Justice Adnan-ul-Karim Memon

Cr. Jail Appeal No.D- 90 of 2019

Ahsan alias Keso

Versus

The State

Appellant Ahsan alias Keso
S/o Muhammad Hassan
is in custody and since no
notice/P.O for today has been
issued, therefore, he has not
been produced before this Court.

The State	:	Through Ms. Rameshan Oad, A.P.G. Sindh
Date of hearing & judgment	:	06.08.2020

J U D G M E N T

ABDUL MAALIK GADDI, J.- This appeal is directed against the judgment dated 02.02.2019, passed by the learned Ist. Additional Sessions Judge / Special Judge (Narcotic), Dadu, in Special Case No.331 of 2018 (Re: The State V Ahsan @ Keso), emanating from Crime No.73 of 2018, registered at Police Station B-Section Dadu, under section 9(c) Control of Narcotic Substances Act, 1997, whereby appellant Ahsan alias Keso after full dressed trial has been convicted u/s 9(c) CNSA and sentenced to suffer RI for four years and six months and to pay the fine of Rs.20,000/-. In case of default in payment of fine he was ordered to suffer simple imprisonment for five months more. However, since the appellant was a young person of 19 years of age, therefore, looking his young age, the learned trial Court while taking lenient view ordered to release him

on Probation subject to furnishing solvent surety in the sum of Rs.10,000/- and P.R Bond in the like amount as provided under section 5 of Probation of Offenders Ordinance 1960 and his custody was handed over to the Probation Officer for the period of one year in order to his rehabilitation and to make him peace loving and good character citizen. The appellant was also directed to appear once in a month before the Probation Officer and undertake that he will not indulge in any sort of criminal activities and Probation Officer was required to watch, monitor and counsel the accused and submit such report before the trial Court on quarter basis.

2. However, perusal of record reveals that on 18.04.2019, Probation Officer under his letter No.A.D (R&P)/HD/HYD/-DAD/-285/2019 reported that present accused / appellant has again indulged and arrested in Crime No.42/2019, u/s 324, 402, 353, 399 PPC and Crime No.43/2019, u/s 412, 34 PPC of P.S B-Section, therefore, the order passed by the trial Court for his releasing on Probation had become infructuous and the conviction and sentence awarded by the trial Court to the appellant has become operative and he has been sent to jail to serve out said sentence.

3. Brief facts of the prosecution case as disclosed in the FIR lodged by complainant SIP Khalid Hussain Arbab on 09.08.2018 at Police Station B-Section Dadu are that present accused / appellant was arrested on said date at 1830 hours from Shrine of Bukhari, by a police party headed by the aforementioned SIP alongwith his subordinate staff. On personal search, accused Ahsan alias Keso was said to be found possessing 06 big and small pieces of charas weighing 1500 grams. Out of said contraband item 10 grams were sealed separately for chemical examination and report, whereas remaining item was also sealed separately. Thereafter, memo of arrest and recovery was prepared on the spot in presence of mashirs. Then, accused and case property were brought at police station where F.I.R. was lodged as mentioned above.

4. During investigation, Investigating Officer recorded 161 Cr.P.C. statements of the PWs. Sample of the substance / charas was sent to the chemical examiner on 10.08.2018 through HC Ghulam Abbas and positive

chemical report was received. On conclusion of the investigation challan was submitted against the accused.

5. Trial court framed charge against accused at Ex.3 u/s 9(c) CNSA, to which, he pleaded not guilty and claimed to be tried vide his plea at Ex.4. At the trial prosecution examined P.W-1 HC / mashir Ahmed Khan at Ex.5, who produced mashirnama of place of incident at Ex.5/A. PW-2 Complainant / SIP Khalid Hussain Arbab was examined at Ex.6, who produced departure entry No.20, F.I.R, memo of place of incident, Chemical Examiner's report and criminal record of accused at Ex.6/A to Ex.6/E, respectively. Thereafter, prosecution side was closed by learned SPP vide his statement at Ex.7.

6. Statement of accused was recorded u/s 342 Cr.P.C. at Ex.8, in which he denied the prosecution allegations and claimed his false implication in this case; however, he did not examine himself on oath nor led any defence evidence.

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.

8. This is a jail appeal and no notice or P.O of the appellant has been issued, however, since paper book is ready, therefore, we have taken up the matter for hearing on merits with the assistance of learned A.P.G.

9. Learned Assistant Prosecutor General Sindh has supported the impugned judgment by arguing that the impugned judgment is perfect in law and facts; that the learned trial Court while convicting the appellant has addressed all the points involved in this case comprehensively; however, while releasing the accused on bail and handing over his custody to Probation Officer being of young age i.e. 19 years, it has taken lenient view; therefore, the impugned judgment does not require any interference.

10. We have heard the learned A.P.G and considered the evidence on record and the relevant case law.

11. As regard the limitation involved in this matter is concerned, since instant appeal has been filed through Jail Superintendent, and the appellant being a lay man cannot be expected to be well aware of the relevant law hence he might has not filed appeal within time. Further, the Superior Courts in our country have always appreciated the disposal of criminal appeals on merit rather considering the delay in filing such type of criminal appeals. Therefore, with consent of learned A.P.G such delay is condoned.

12. After meticulous examination of the record we have reached the conclusion that the prosecution has failed to prove its case against the appellant to the required criminal standard for the reasons that despite the place of incident i.e. Shrine of Bukhari where, as per evidence of both P.Ws a police picket of Railway Police Station and one residential colony were established / situated and the recovery being made in daylight hours i.e. at 1830 hours, no attempt was made to associate an independent witness / mashir to attest the arrest and recovery which was important in this case since the appellant has shown enmity with the police, as such the evidence of the police personnel cannot be safely relied upon without independent corroboration, which is lacking in this case; that there was an unexplained delay of 04 days in between the recovery of the charas and sending it to the chemical analyzer for testing, as Chemical Examiner's report (Ex.6/D) reflects that case property / alleged charas was received in his office on 13.08.2018 whereas the incident took place on 09.08.2018.

13. Most significantly, we find that there is absolutely no evidence on record to show that the charas was kept in safe custody from the time of its recovery until it was sent to and received in the office of Chemical Examiner, which was an unexplained delay of 04 days; that there is no evidence that the recovered narcotic substance was kept in the Malkhana of the police station; that no Malkhana entry to this effect has been produced on record; that the Incharge of the Malkhana has not been examined and HC Ghulam Abbas, who has taken the sample to the chemical examiner for testing the same was also not examined to testify as to the safe-custody and safe transit of the narcotic to the chemical examiner. During the course of arguments, we have specifically asked the question from learned A.P.G to explain that during such intervening period of 04 days before and with whom the case property

was lying and in case it was lying in Malkhana whether any evidence with regard to safe custody has been brought on record to corroborate this fact, she has no satisfactory answer with her. More particularly, the alleged incident took place on 09.08.2018; however, the case property was handed over to HC Ghulam Abbas under letter dated 10.08.2018 with a delay of 01 day, whereas, as per Chemical Examiner's report (Ex-6/D), the same was received in his office with further delay of 03 days i.e. on 13.08.2018 and nothing has been brought on record with regard to safe custody as well as transit of case property. Under these circumstances, there is, in our view, every possibility that the sample of the narcotic during the said 04 days' delay in sending it to the chemical examiner may have been interfered with / tampered with, as it was not kept in safe custody and as such even a positive chemical report is of no assistance to the prosecution. The significance of keeping safe custody of the narcotic in a case under the CNSA has been emphasized in the case of **Ikramullah & others v/s. the State** (2015 SCMR 1002), the relevant portion of which 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 this case the allegation against the appellant is that on the fateful day he was apprehended from Shrine of Bukhari and 1500 grams of Charas alongwith cash of Rs.150/- with different denomination were recovered from his possession. On perusal of prosecution evidence it reveals that the place of incident was a Shrine / Dergah of Bukhari and one Police Picket of Railway Police and a residential colony were situated there, therefore, availability of

independent / private persons cannot be ruled out but complainant / police party did not bother to pick / associate any independent mashir from that place to witness the event. So also no explanation is available on record that why police party did not obtain the services of private persons though available. No doubt the evidence of police official is good as that of any other witness but when the whole prosecution case rests upon the police officials and hinges upon their evidence and when the private witnesses were available at the place of incident then non-association of private witness in the recovery and arrest proceedings create serious doubt in the prosecution case. 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.

15. 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 narcotics. However, when the alleged recovery was made on busy place and admittedly one residential colony and a police picket 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 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 in this case, complainant did not bother to associate any private person to act as recovery mashir / witness and only relied upon his subordinates / colleagues and furthermore he himself registered the FIR. It does not do away with the principle of producing the best available evidence. In this regard we are fortified with the cases of **Nazir Ahmed v. The State** reported in PLD 2009 Karachi 191 and **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.

16. It is also pertinent to mention here that in this case complainant/ SIP Khalid Hussain Arbab had not only lodged F.I.R. but also conducted investigation of the case himself. In our view it is not appropriate that the person who is complainant of a case could investigate the same case because

in order to keep all fairness of thing the rule of propriety demands that it must be investigated by an independent officer but not by the complainant himself. The Hon'ble Supreme Court has observed similar view with a different angle in a case reported as **State through Advocate General, Sindh v. Bashir and others** (PLD 1997 Supreme Court 408), wherein it is held as under:

> " As observed above, Investigating Officer is as important witness for the defence also and in case the head of the police party also becomes the Investigating Officer, he may not be able to discharge his duties as required of him under the Police Rules".

17. Similarly, in a case reported as **Ashiq alias Kaloo v. The State** (1989 PCr.LJ 601), the Federal Shariat Court has observed that investigation by complainant while functioning as Investigating Officer is a biased investigation.

18. Further, in the case in hand, P.W-1 HC Ahmed Khan was the subordinate / colleague of the complainant and no third party/independent person from the place of incident was picked up to act as mashir of arrest and recovery; therefore, this is a case of insufficient evidence. In this context we are fortified by the cases of **Muhammad Altaf v. The State** (1996 PCr.LJ 440), (2) **Qaloo v. The State** (1996 PCr.LJ 496), (3) **Muhammad Khalid v. The State** (1998 SD 155) and (4) **Nazeer Ahmed v. The State** (PLD 2009 Karachi 191).

19. Under these circumstances and for the other reasons mentioned above we are of the considered view that the prosecution has not been able to prove its case against the appellant beyond a reasonable doubt. It is well settled law that the benefit of doubt occurred in prosecution case must go to the accused by way of right as opposed to concession. In this respect reliance is placed on the case of **Tariq Pervez V/s. The State** (1995 SCMR 1345), wherein 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."

20. For the above stated reasons, we hold that prosecution has failed to prove its case against the appellant, therefore, by short order dated 06.08.2020 while extending the benefit of doubt in favour of the appellant, captioned appeal was allowed and the conviction and sentence recorded by the trial Court were set aside and appellant was acquitted of the charge.

21. Above are the detailed reasons for our short order of even date.

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