IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Before:

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

Cr. Appeal No. D-13 of 2020

Fahad. . . . Versus . . . The State

Appellant Fahad	:	Through Mr. Faisal Ali Raza Bhatti, Advocate
State	:	Through Ms. Rameshan Oad, Asst. Prosecutor General, Sindh
Date of hearing	:	02.09.2020
Date of Judgment	:	02.09.2020

JUDGMENT

ABDUL MAALIK GADDI, J.- Through this Criminal Appeal, appellant Fahad s/o Hadi Bux Mallah has called in question the judgment dated 29.01.2020 passed by the learned 3rd Additional Sessions Judge / Special Judge (CNS), Hyderabad, in Special Case No.269 of 2019 (Re: The State v. Fahad) arising out of Crime No.83 of 2019, registered at Police Station Hali Road, Hyderabad, for an offence under Section 9(C) of Control of Narcotic Substances Act, 1997, whereby he was convicted and sentenced to suffer R.I for four (04) years and to pay fine of Rs.10,000/- (Rupees Ten Thousand), in case of non-payment of fine, he shall suffer S.I for one (01) month more with benefit of Section 382-B Cr.P.C.

2. Concisely, the facts as portrayed in the F.I.R are that on 27.08.2019 at 2230 hours, police party heard by SIP Muhammad Khan Panhwar during patrolling in their jurisdiction arrested the accused from near Lal Tanki, Railway Patri, in presence of official witnesses and recovered six big pieces and one small piece of charas lying in black colour shopper weight 3400

grams from his possession. Thereafter such mashirnama of arrest and recovery was prepared after sealing the property by said SIP at the spot and then took the accused and property to PS where he lodged the F.I.R against the accused on behalf of State.

3. At trial, trial Court framed charge against the accused at Ex.02, to which he pleaded not guilty and claimed to be tried vide his plea at Ex.2/A. Thereafter, prosecution in order to substantiate the charge against the appellant, examined the following two (02) witnesses:

> P.W No.1: Complainant / I.O SIP Muhammad Khan examined at Ex.03, who produced memo of arrest and recovery, F.I.R, departure and arrival entries, malkhana entry, permission letter, police letter, chemical analyzer report and criminal record of accused at Ex.03/A to Ex.03/L, respectively.
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> P.W No.2: ASI Shahbaz Khan examined at Ex.04, he is first mashir of the case.

Both the above named witnesses have been cross-examined by learned defence counsel. Thereafter, prosecution side was closed as per statement of learned ADPP at Ex.5.

4. Later on, statement of accused was recorded u/s 342 Cr.P.C at Ex.6, in which he denied the prosecution allegation and claimed his innocence. However, he did not examine himself on oath nor give any evidence in his defence.

5. Learned counsel for the appellant has contended that the appellant has been involved in this case malafdely by the police; that the impugned judgment passed by the learned trial Court is opposed to law and facts and is also against the principles of natural justice; that SIP Muhammad Khan who is complainant in the case has also acted as Investigating Officer, therefore, entire prosecution story is unbelievable; that no recovery was affected from the possession of appellant and the alleged charas has been foisted upon him; that prosecution has miserably failed to establish the guilt of appellant beyond any reasonable shadow of doubt; that there is violation of Section 103 Cr.P.C as no private / independent person has been made as mashir of the alleged recovery nor any efforts were taken by the police party despite of the fact that alleged place of incident was thickly populated area, as such, false

implication of the appellant in this case cannot be ruled out. Lastly he prayed that instant appeal may be allowed and appellant may be acquitted of the charge.

6. Conversely, learned Asst. Prosecutor General Sindh appearing on behalf of State has fully supported the impugned judgment by submitting that prosecution has fully established the guilt of appellant beyond any reasonable shadow of doubt; that both above named witnesses have fully supported the case of prosecution and there is no major contradiction in their version on material particulars of the case hence, the impugned judgment does not call for any interference.

7. We have heard the learned counsel for the parties at a considerable length and have gone through the documents and evidence so brought on record.

8. 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. In this case the allegation against the appellant is that on the fateful day he was apprehended from near Lal Tanki, Railway Patri and 3400 grams of Charas was recovered from his possession. On perusal of prosecution evidence it reveals complainant received spy information about alleged presence of the appellant at the place of incident alongwith some narcotic substance at Ghousia Chowk and then they reached at place of incident which as per evidence of both P.Ws though was not a thickly populated area but since they have advance information received at Ghousia Chowk and as per admission by P.W-2 ASI Shahbaz Khan it was a thickly populated area, 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; that there was an unexplained delay of 06 days in between the recovery of the charas and receiving the same in the office of chemical analyzer for testing, as Chemical Examiner's report (Ex.3/L) reflects that case property / alleged charas was received in his office on 02.09.2019 whereas the incident took place on 27.08.2019.

9. 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 06 days; that it is the case of prosecution that during intervening period when the alleged narcotic substance was recovered and sent to Chemical Examiner for report it was kept in Malkhana; however, the Incharge of the Malkhana has not been examined to substantiate such contention. There is nothing on record 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 06 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. Under these circumstances, there is, in our view, every possibility that the alleged recovered narcotic during the said 06 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."

10. It is also pertinent to mention here that in this case complainant/ SIP Muhammad Khan had not only lodged F.I.R. but also conducted investigation of the case himself as well as he himself took the case property for Chemical Examination. In our view it is / was not appropriate that the person who is complainant of a case could investigate the same case and took the narcotic item for report 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".

11. 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.

12. Further, in the case in hand, P.W-2 ASI Shahbaz 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).

13. Apart from above, we have noticed number of contradictions in the evidence of prosecution witnesses. For example, complainant SIP Muhammad Khan Panhwar in his evidence (Ex.3) has deposed that on 27.08.2019, he along with his sub-ordinate staff left police station Hali Road for patrolling and during patrolling when they reached Ghousia Chow, they received spy information that one person was standing near Lal Tanki, American Quarter and was selling charas. On receiving such information, they reached at the pointed place and apprehended the accused / appellant

and on enquiry he disclosed his name as Fahad S/o Haji Bux Mallah R/o Kirar Khan Shoro, Qasimabad, Hyderabad. Due to non-availability of private person, police party took personal search of the appellant and recovered 3400 grams charas which was lying in black colour shopper in six big and one small pieces. The said charas was weighed on electronic scale at spot. Thereafter, mashirnama of arrest and recovery was prepared and case was challaned under the aforementioned crime. We have scrutinized the entire evidence of both P.Ws and found following contradictions in their evidence:

i. Both P.Ws in their evidence have stated that alleged narcotic substance was wrapped in a black colour shopper and it was sealed in a white colour cloth whereas Chemical Examiner's report (Ex.3/L) shows that it was only wrapped in black colour shopper.

ii. As per evidence of P.Ws, two seals were affixed on the parcel, whereas Chemical Examiner's report reveals that it was having three seals / stamps.

iii. Chemical Examiner's report is silent about letter as well as the date under which the Sealed Parcel was sent for report.

iv. Complainant / Investigating Officer, as well as the official who took the parcel for Chemical examination is same.

v. Complainant in the F.I.R, mashirnama of arrest and recovery as well as his evidence has stated that custody of the accused / appellant was with ASI and PC who were sitting inside the police mobile whereas P.W-2 / mashir in his evidence has stated that at that time the accused was not available in police mobile.

14. We have also noticed that there are so many contradictions and lacunas in the evidence of prosecution witnesses as well as the case which have cause serious dent in the prosecution case. The contention of the learned counsel for the appellant that the evidence of the PWs is not reliable as the same suffers from the material contradictions and inconsistencies has force, as stated supra.

15. It is also case of the prosecution that accused / appellant at the time of incident was selling Charas; however, neither any customer to whom the appellant was allegedly selling narcotic was apprehended or captured nor any amount / money towards sale price of said narcotic, was recovered from the possession of the appellant. This aspect of the case also gives serious jolt to the prosecution case.

16. 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."

17. For the above stated reasons, we hold that prosecution has failed to prove its case against the appellant, therefore, by short order dated 02.09.2020 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 as a result thereof the appellant was acquitted of the charge.

18. Above are the reasons of our short order dated 02.09.2020.

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