

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-202 of 2019

Manzoor Ali. Versus The State

Appellant Manzoor Ali : Through Mr. Waseem Hussain
Jafri, Associate of Mr. Mumtaz
Alam Laghari, Advocate

State : Through Ms. Rameshan Oad,
Asst. Prosecutor General, Sindh

Date of hearing : 10.09.2020

Date of Judgment : 10.09.2020

JUDGMENT

ABDUL MAALIK GADDI, J.- Through this Criminal Jail Appeal, appellant Manzoor Ali S/o Imam Bux Metlo has called in question the judgment dated 18.10.2019 passed by the learned Vth Additional Sessions Judge / MCTC, Shaheed Benazirabad, in Special Narcotic Case No.455 of 2017 (Re: The State v. Manzoor Ali) arising out of Crime No.105 of 2017, registered at Police Station B-Section Nawabshah, 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.15,000/-; and in case of non-payment of such fine, he shall suffer S.I for five months more with benefit of Section 382-B Cr.P.C.

2. Concisely, the facts as portrayed in the F.I.R, are that on 14.05.2017 at 1115 hours, police party heard by SIP Khan Muhammad Jamali during patrolling in their jurisdiction arrested the accused from Open Plot Ramay City Colony, Deh 86 Nusrat Taluka Nawabshah, in presence of official

witnesses and recovered 08 big and small pieces of charas lying in black colour shopper weighing 1500 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 police party 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 three (03) witnesses:

P.W No.1: Complainant / I.O SIP Khan Muhammad examined at Ex.03, who produced memo of arrest and recovery, F.I.R, departure and arrival entries, RC and chemical analyzer report at Exs.03/A to Ex.03/F, respectively.

P.W No.2: PC Nisar Ahmed examined at Ex.04, he is first mashir of the case.

P.W No.3: PC Lutuf Ali examined at Ex.5.

All the above named witnesses have been cross-examined by learned defence counsel at length. Thereafter, prosecution side was closed as per statement of learned ADPP at Ex.6.

4. Later on, statement of accused was recorded u/s 342 Cr.P.C at Ex.7, in which he denied the prosecution allegation and claimed his innocence. However, neither he examined himself on oath nor led any defence evidence.

5. Learned counsel for the appellant has contended that the appellant has been involved in this case malafidely 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 Khan Muhammad 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 receiving spy information as well as that of incident were thickly populated area, as such, false implication of the appellant in this case cannot be ruled out. While arguing the case, he has also pointed out material contradictions in the evidence of prosecution witnesses. 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 although supported the impugned judgment, however, could not controvert the submissions advanced by learned counsel for the appellant.

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 that in this case the allegation against the appellant is that on the fateful day he was apprehended from Open Plot, Ramay City Colony, Deh 86 Nusrat, Taluka Nawabshah and 1500 grams of Charas were recovered from his possession. On perusal of prosecution evidence it reveals that complainant received spy information about alleged presence of appellant at the place of incident alongwith some narcotic substance at Sugar Mill Mor and then they reached at place of incident, which as per evidence of both P.Ws (Complainant and PC Nisar Ahmed) were thickly populated and village of Khaskheli Community was situated at the place of incident, therefore, availability of independent / private persons cannot be ruled out; however, complainant / police party did not bother to pick / associate any independent mashir from both places to witness the event; that there was an unexplained delay of 04 days in between the recovery of the narcotic substance and sending the same for chemical examination on 17.05.2017, which was received in the office of chemical analyzer for testing with further delay of 01 day, as Chemical Examiner's report (Ex.3/F) reflects that case property / alleged charas was received in his office on 18.05.2017 whereas the incident took place on 14.05.2017.

9. Most significantly, we find that although PC Lutuf Ali, who took the narcotic substance for Chemical Examination has been examined by the prosecution but 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 05 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 05 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 05 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. In our view it is / was 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 of Pakistan 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, Mashir of recovery / P.W-2 PC Nisar Ahmed, 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 in his cross-examination (Ex.3) has stated that *"It is incorrect to suggest that village of Khaskheli Community people are situated near by the place of incident."* Whereas P.W-2 PC Nisar Ahmed in his cross-examination (Ex-4) has stated that *"It is correct to suggest that village of*

Khaskheli Community peoples are situated at the place of incident." Complainant SIP Muhammad Khan in his cross-examination (Ex.3) has further stated that *"It is correct to suggest that Security Guard is deployed at the main gate of Habib Sugar Mill."* Whereas P.W-2 PC Nisar Ahmed in his cross-examination (Ex-4) has stated that *"It is incorrect to suggest that security guard is deployed at the main gate of Habib Sugar Mill."* Complainant SIP Muhammad Khan in his cross-examination (Ex.3) has further stated that *"It is incorrect to suggest that alleged place of incident was situated with metaled road, voluntarily says that there was only abandoned katcha path. None private person was gathered at the place of incident at the time of arrest of accused."* Whereas P.W-2 PC Nisar Ahmed in his cross-examination (Ex-4) has stated that *"-----, voluntarily says that some persons were seeing going for away from the place of incident."*

14. Apart from above, we have also noticed so many other contradictions and lacunas in the evidence of prosecution witnesses as well as the case which have caused 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, no person / customer to whom the appellant was allegedly selling narcotic was apprehended or captured. 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 case is full of lacunas and doubts and it is well settled law that the benefit of doubt, whatever 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, while extending the benefit of doubt in favour of the appellant, captioned appeal is allowed, impugned judgment dated 18.10.2019 is set aside and as a result thereof appellant Manzoor Ali is acquitted of the charge. He is in custody; he shall be released forth with if not required in any other custody case.

JUDGE

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