

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

Present:-

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

Cr. Appeal No. D- 185 of 2019

Cr. Appeal No. D- 186 of 2019

Cr. Appeal No. S- 290 of 2019

Date of hearing: 26.08.2020.

Date of Judgment: 26.08.2020.

Appellant: Saddam Hussain @ Shabbir through
Mr. G.M Leghari, Advocate.

State: Through Mr. Shehwak Rathore Deputy
Prosecutor General.

JUDGMENT

ABDUL MAALIK GADDI, J- By this common judgment, we intend to dispose of the above-cited criminal appeals, as they arise out of same incident, involving common question of law and facts as well as judgment (impugned herein) having been delivered by the same trial Court on 28.09.2019.

- i. Through captioned Criminal Appeal No.D-185 of 2019, appellant has called in question the judgment dated 28.09.2019 passed by the learned Special Judge Narcotic Substance / MCTC Tando Muhammad Khan, in Special Case No.49 of 2019 (Re: The State v. Saddam Hussain @ Shabbir) arising out of crime No.180 of 2019, registered at P.S Tando Muhammad Khan, for an offence under Section 9(C) of Control of Narcotic Substances Act, 1997, whereby he was convicted and sentenced to suffer six years & six months and to pay fine of Rs.30,000/- (Rupees Thirty Thousand), in case of non-payment of fine, to suffer S.I for six months more with benefit of Section 382-B Cr.P.C.
- ii. Through Criminal Appeal No.D-186 of 2019, appellant has called in question the judgment dated 28.09.2019 passed by the learned Special Judge Narcotic Substance / MCTC Tando Muhammad Khan, in Special Case No.50 of 2019 (Re: The State v. Saddam Hussain @ Shabbir) arising out of crime No.181 of 2019, registered at P.S Tando Muhammad Khan, for an offence under Section 9(B) of Control of Narcotic Substances Act, 1997, whereby he was convicted and sentenced to suffer one year & four months and to pay fine of Rs.11,000/- (Rupees Eleven Thousand), in case of non-payment of fine, to suffer S.I for four months more with benefit of Section 382-B Cr.P.C.

iii. Through Criminal Appeal No.S-290 of 2019, appellant has called in question the judgment dated 28.09.2019 passed by the learned Sessions Judge, Tando Muhammad Khan, in Sessions Case No.29 of 2019 (Re: The State v. Saddam Hussain @ Shabbir) arising out of crime No.182 of 2019, registered at P.S Tando Muhammad Khan, for an offence under Section 23(i)(a) of Sindh Arms Act, 2013, whereby he was convicted and sentenced to suffer six years and to pay fine of Rs.30,000/- (Rupees Thirty Thousand), in case of non-payment of fine, to suffer S.I for two months more with benefit of Section 382-B Cr.P.C.

2. Brief facts of the prosecution case are that on 18.08.2019 complainant SIP Muhammad Ismail Mashori of PS Tando Muhammad Khan received information on telephone that one male person and one lady have left Hyderabad for Tando Muhammad Khan in car bearing registration No.LPT-3244 along with narcotic articles and therefore, complainant along with his sub-ordinate staff each namely PC Abdul Raheem, PC Shoaib Ali, LPC Sonam, DPC Basheer Ahmed, left PS in Government Vehicle having registration No.SPE-708 vide entry No.21 at 1525 hours for checking of the vehicle on the basis of information received by him. The police party reached pointed place i.e. Main Road near Shaheed Baba Check Post and started checking of the vehicles. During checking, they saw one car coming from Hyderabad side wherein the male person was driving the car while one lady was sitting on front seat behind him, the police party gave signal to said car to stop upon which the car was stopped at the distance of 60 paces and thereafter, the driver and the lady who was sitting at front seat of the car came out having shopper in their hands tried to escape away towards East, however, police party encircled them and PC Abdul Raheem caught hold the male person whereas LPC Sonam caught hold the lady and secured the shopper from the their possession. Thereafter, the male person disclosed his name as Saddam Hussain s/o Allah Bakhsh while lady disclosed her name as Sameena d/o Hussain Bakhsh both by caste Mangsi. The complainant checked the recovered shopper and found three slabs / pieces of charas and three small bags of some other narcotic articles. Thereafter, each slabs of charas was weighed through electronic scale and found 1010 grams, 1005 grams and 1000 grams which became total 3015 grams charas. The complainant then checked other three small bags recovered from the accused Saddam and found that it was Ice Drug which weighed 110 grams. However, while conducting personal search of the accused Saddam, police recovered one note of Rs.1000/- from his right side pocket of shirt and one 30 bore pistol upon which 'A1 International A1' was written along with magazine and two live bullets from left side fold

of shalwar. Thereafter, complainant sealed the recovered property separately and prepared mashirnama of arrest and recovery on the spot in presence of mashirs Abdul Raheem and PC Shoaib Ali and then property and accused were brought at PS where F.I.Rs were lodged against both accused.

3. The Prosecution in order to substantiate the charge against the appellant, examined the following four (04) witnesses. It is noted that only complainant has produced F.I.Rs, entries, memo of arrest and recovery as well as chemical report.

P.W No.1: Complainant SIP Muhammad Ismail Mashori.

P.W No.2. Mashir PC Abdul Raheem.

P.W No.3. Mashir HC Muhammad Ismail Abro.

P.W No.4. Mashir PC Junaid.

All above named witnesses have been cross-examined by learned State Counsel.

4. The statement of accused was recorded U/S 342 Cr.P.C, 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 trial Court after hearing the respective parties convicted and sentenced the appellant as stated in the preceding paragraph; hence, this appeal.

6. Mr. G.M Leghari, learned counsel for appellant submits that the appellant is innocent and has falsely been implicated in these cases; that appellant was not present at the alleged place of incident and the alleged case property has been foisted upon him; that it was the case of spy information but the complainant failed to associate any private person of the locality to witness the recovery proceedings. Learned counsel while reading the prosecution evidence pointed out that charge against appellant was not framed in accordance with law as no description of vehicle bearing No.LPT-3244 wherein the appellant and co-accused were coming is mentioned and same has also not been confronted to accused in his statement u/s 342 Cr.P.C. and accused has not been awarded fair opportunity of being heard on material points of the case. During the course of arguments, he has also



pointed out number of contradictions in between the evidence of prosecution witnesses as highlighted in the memo of appeal and was of the view that on the basis of contradictory evidence no conviction could be maintained; therefore, he prays that captioned appeals may be allowed and the impugned judgments may be set aside.

7. On the other hand, learned Deputy Prosecutor General contended that prosecution has proved its case beyond any shadow of doubt and the appellant was arrested along with 3015 grams of charas, 110 grams of Ice Drug and 30 bore Pistol in presence of mashirs therefore, he requests for dismissal of captioned appeals.

8. We have heard the learned counsel for the parties and have perused the documents and evidence so brought on record.

9. It is noted that charge has not been framed in accordance with law as the name of co-accused namely Mst. Sameena has been mentioned in the charge nor the question with regard to the said co-accused has been confronted to the appellant in his statement u/s 342 Cr.P.C. It is also noted that allegedly the appellant along with co-accused was coming from Hyderabad to Tando Muhammad Khan having possession of contraband items in the vehicle having registration No.LPT-3244 however, no description of the said vehicle has also been mentioned in the charge nor the question with regard to the said vehicle has been confronted to the appellant in his statement u/s 342 Cr.P.C.

10. It has also come on record that vehicles were passing at place of incident during arrest and recovery proceedings; therefore, the question arises when the vehicles were available at the spot then why complainant did not join / ask any private person to act as mashir. It is noted that whole case of the prosecution hinges upon the evidence of police officials. No doubt police witnesses are as good as other independent witnesses and conviction could be recorded on their evidence, but their testimony should be reliable, dependable, trustworthy and confidence worthy and if such qualities are missing in their evidence, no conviction could be passed on the basis of evidence of police witnesses. But here in this case, we have also noted number of contradictions in between the evidence of prosecution witnesses. For example, the complainant states that he and PC Abdul Raheem were standing on eastern side road and LPC Sonam and PC Shoaib were standing on other side of road while PW states that SIP, DPS Basheer

and LPC Sonam were standing on side of Shaheed Baba and PC Shoaib and one constable performing duties at check post were standing on other side of road. It is also noted that complainant deposed in his evidence that they conducted snap checking on one side of the road i.e. Hyderabad to Tando Muhammad Khan while PW-2 states that they conducted snap checking on both sides of road. It is also noted that complainant states that accused escaped upto 8/10 paces from their car towards eastern side while PW-2 states that they followed the accused upto distance of about 20 to 25 paces.

11. We are conscious of the fact that provision of Section 103 Cr.P.C is not attracted to the cases of narcotics. However, where alleged recovery was made on a road and the peoples were available there, omission to secure independent mashirs, particularly, in the case of spy information cannot be brushed aside lightly by this court. The prime object of Section 103 Cr.P.C is to ensure transparency and fairness on the part of police during course of recovery, curb false implication and minimize the scope of foisting of fake recovery upon accused. There is also no explanation on record why the independent witness has not been associated in the recovery proceedings as the whole F.I.R is silent in this regard.

12. It reveals from the record that alleged recovery was made from the appellatant on 18.08.2019 but the alleged contraband items recovered from the appellatant was received by chemical examiner on 21.08.2019 however, the pistol allegedly recovered from the appellatant was received by chemical examiner on 23.08.2019, after the delay of five (05) days for which no satisfactory explanation has been furnished. During the course of arguments, we have specifically asked the question from learned D.P.G to explain the delay and also to explain that during this intervening period before whom the case property was lying, he had no satisfactory answer with him.

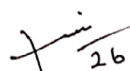
13. It is also noted that in the F.I.R the description of allegedly recovered pistol of 30 bore has been written as 'A1 Inter National A1' though no description of the said pistol has been mentioned in the charge nor the same has been property confronted to the appellatant in his statement u/s 342 Cr.P.C. Moreover, the chemical analysis report is silent that the alleged pistol of 30 bore was same as stated in the F.I.R. It is also noted that two live bullets were recovered at the place of incident whereas chemical report is stated otherwise. However,

when these aspects of the case was confronted to D.P.G, he has no satisfactory answer with him. We have noticed that in this case complainant himself conducting investigation of the case therefore, his investigation cannot be safely relied upon for maintaining the conviction.

14. It is stated by learned counsel for the appellant that no past criminal history is against the appellant and in view of the contradictory evidence on record, foistation of charas as well as pistol against the appellant could not be ruled out. As stated above, we have also observed contradictions in between the statements of prosecution witnesses as stated Supra. Not only this the other infirmities and lecnas are also appearing in the case of prosecution as highlighted above. When these contradictions and infirmities were also confronted with learned D.P.G, he has again no satisfactory answer with him. Therefore, plea of innocence raised by appellant in this case cannot be ignored and the appellant appears to be entitled for benefit of such contradictory evidence.

15. The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving benefit of doubt to an accused, it is not necessary that there should be many circumstances creating doubts. If there is single circumstance which creates reasonable doubt in a prudent mind about the guilt of accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right. Reliance is placed on the case of **Tariq Pervez v. The State** (1995 SCMR 1345).

16. In the light of what has been discussed above and case law we are of the considered view that the prosecution has failed to prove all above cases against the appellant beyond any reasonable doubt, therefore, all three captioned appeals are hereby allowed, impugned judgments dated 28.09.2019 passed in all three cases are set-aside. Consequently, appellant is acquitted of the charge; he is in custody, he shall be released forthwith if not required any other custody case.


26.8.2020
JUDGE


JUDGE