IN THE HIGH COURT OF SINDH,
CIRCUIT COURT HYDERABAD

Cr. Appeal No. D- 173 of 2019

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

Date of hearing:	09.09.2020
Date of Judgment:	09.09.2020
Appellant:	Asad Ali Khaskheli through Mr. Ishrat Ali Lohar, Advocate.
State:	Through Ms. Rameshan Oad, Asst. Prosecutor General, Sindh.

JUDGMENT

ABDUL MAALIK GADDI, J- Through this Criminal Appeal, appellant Asad Ali Khaskheli s/o Pervez Ali has called in question the judgment dated 30.09.2019 passed by the learned Special Judge for CNS / MCTC, Tando Muhammad Khan, in Special Case No.41 of 2019 (Re: The State v. Asad Ali) arising out of Crime No.03 of 2019, registered at Police Station Excise 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 R.I for nine (09) years & six (06) months and to pay fine of Rs.45,000/- (Rupees Forty Five Thousand), in case of non-payment of fine, he shall suffer S.I for seven (07) 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 22.08.2019 at 05:15 hours, Excise Inspector Abdul Salam arrested the accused from Abri Irrigation Minor in presence of official witnesses and recovered 14 pieces of charas lying in white katta weight 6 kilograms and 840 grams from his possession. Thereafter such mashirnama of arrest and recovery was prepared after sealing the property at the spot and then took the accused and case property to PS where lodged the F.I.R against the accused on behalf of State.

3. The Prosecution in order to substantiate the charge against the appellant, examined the following two (02) witnesses:

P.W No.1: Excise Inspector Abdul Salam was examined at Ex.4, who produced departure entry No.49 at Ex.4/A, mashirnama of arrest and recovery at Ex.4/B, arrival / return back entry No.50 at Ex.4/C, F.I.R at Ex.4/D, copy of letter addressed to chemical examiner at Ex.4/E & report of chemical examiner at Ex.4/F.

P.W No.2 Mashir EC Mir Hassan was examined at Ex.5, who produced departure entry No.53 at Ex.5/A.

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

4. Later on, statement of accused was recorded u/s 342 Cr.P.C at Ex.9, 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 appellant has been arrested at the instance of his father-in-law as he had contracted marriage with her daughter; that no recovery was affected from the possession of appellant and prosecution has miserably failed to establish the guilt of appellant beyond any reasonable shadow of doubt as the evidence of PWs are contradictory to each other on material particular of the case; that no private / independent person has been made as mashir of the alleged recovery nor any efforts were taken by the police party as the incident took place in the 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 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. She has further contended that all the prosecution witnesses have fully supported and corroborated the version of each other and there is no 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. We have perused the evidence of complainant / Excise Inspector Abdul Salam who deposed that on 22.08.2019 he received spy information that one person was going from Tando Muhammad Khan to Abri Irrigation Minor for the purpose of selling charas. On such information complainant along with his sub-ordinate staff left police station towards the pointed place and when they reached at pointed place, they saw one person having same description who on seeing police party in uniform tried to escape away however, police party tactfully apprehended him and on enquiry he disclosed his name as Asad Ali s/o Pervez Ali by caste Khaskheli and from his possession 6 kilo and 840 gram charas was recovered in presence of mashirs namely EC Mir Hassan & EC Harshingo. It is noted that police party though had advanced information about the availability of present appellant along with charas but they did not bother to take with them any private person either from the place of information or from the place of incident to witness the event.

9. It has come in cross examination of complainant that place of incident was a public place therefore, the question arises that when the place of incident was a public place then why complainant did not join any person to witness the recovery proceedings. 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 on perusal of evidence of prosecution witnesses it appears that the same are contradictory to each other on material particular of the case. Apart from that, in this case complainant himself conducted the investigation therefore, evidence of prosecution witnesses could not be safely relied upon. We are conscious of the fact that provisions of Section 103 Cr.P.C are not attracted to the cases of personal search of the accused in such cases. 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 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".*

10. Similarly in a case reported as **Ashiq alias Kaloo** v. **The State** [1989 P.Cr.L.J 601], wherein the Federal Shariat Court has observed that investigation carried by complainant while functioning as I.O is biased investigation. Apart from above, the Indian Supreme Court in Cr. Appeal No.1880 of 2011 [Re: Mohan Lal v. The State of Punjab] has taken almost similar view.

11. Further, in the case in hand, P.W-2 EC Mir Hassan was the subordinate / colleague of the complainant and he took the case property for chemical examiner for its analysis and no third party / independent person was authorized by the complainant to take the case property for chemical examination, 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).

12. It is also noted that as per F.I.R complainant secured 10 gram from each pieces of charas and send the same to chemical examiner for analysis however, perusal of the report of chemical examiner reveals that the gross weight of the each parcel which was received for analysis is 11 gram. Now question arises when complainant secured 10 gram from each pieces of charas then how the same became 11 gram in weight. When this fact was confronted to learned A.P.G for reply, she has no satisfactory answer with her as such this fact gives jolt to the prosecution case.

13. 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 against the appellant could not be ruled out. As stated above, we have also observed contradictions in between the statements of prosecution witnesses. Not only this the other infirmities and lecunas are also

appearing in the case of prosecution as highlighted above. When these contradictions and infirmities were also confronted with learned A.P.G, she has again no satisfactory answer with her. 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.

14. 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.

15. 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."*

16. 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, this Criminal Appeal is allowed. Consequently, the conviction and sentence recorded by the trial Court vide judgment dated 30.09.2019 are set-aside and appellant is acquitted of the charge. He is in custody, he shall be released forthwith if not required in any other custody case.

9.9.20

JUDGE

JUDGE

"Hafiz Fahad"