

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD
Criminal Appeal No.S-433 of 2019

Appellant : Aijaz Ali son of Muhammad Fazal Mughal,
Through Mr. Rasool Bux Solangi, Advocate

The State : Through Mr. Shahzado Saleem Nahiyoon,
D.P.G.

Date of hearing : 02.11.2020

Date of decision : 02.11.2020.

J U D G M E N T

IRSHAD ALI SHAH-J; The appellant by way of instant appeal has impugned judgment dated 11.12.2019, passed by learned Additional Sessions Judge-1 Tando Muhammad Khan, whereby he has convicted and sentenced the appellant as under;

“Therefore, accused Aijaz Ali s/o Muhammad Fazal is hereby convicted under section 265-H(ii) Cr.P.C. He is given conviction in sections 269, 270, 337-J PPC. He is convicted for one year and fine of Rs.10,000/-, in case of failure of payment of fine, he shall further suffer simple imprisonment for three months more.”.

2. The conviction and sentence is jumble. It ought to have been distinct and different for each and every penal section for which appellant was found to be guilty. Be that as it may, it is case of prosecution that the appellant was found in possession of 10 kg of powder to be used for preparation of *Mainpuri/Gutka* substance likely to cause infection or to be dangerous/poisonous for human lives on consumption, for that he was booked and reported upon by the police.

3. The appellant did not plead guilty to the charge and prosecution to prove it examined, complainant ASI Hazoor Bux, PW/Mashir HC Abdul Khaliq and then closed the side.

4. The appellant in his statement recorded u/s. 342 Cr.PC denied the prosecution allegation by pleading innocence by stating that he has been involved in this case by police on account of his failure to make payment. He did not examine anyone in his defence or himself on oath to disprove the charge against him.

5. On evaluation of evidence, so produced by the prosecution, the appellant has been convicted and sentenced accordingly by learned trial Court by way of impugned judgment.

6. It is contended by learned counsel for the appellant that the appellant being innocent has been involved in this case falsely by the police; there is no independent witness to the incident and the alleged substance has been subjected to chemical examination that too with delay of about five days and the person who has taken the alleged substance to the chemical examiner has not been examined by the prosecution and Section 337-J PPC was misapplied by the police as none was caused hurt by means of poison by the appellant; the evidence of the prosecution being doubtful in its character has been believed by learned trial Court without cogent reasons, therefore, the appellant is entitled to acquittal.

7. Learned D.P.G for the State by supporting the impugned judgment has prayed for dismissal of the instant appeal.

8. I have considered the above arguments and perused the record.

9. Admittedly, there is no independent witness to the incident and the property allegedly secured from the appellant has been subjected to chemical examination with delay of about five days; such delay having not been plausibly could not be overlooked. As per report of chemical examiner, the substance analyzed by him was not found to be recommended for human consumption within meaning of Section (5) of the Pure Food Ordinance, 1960 and it also contravenes the provision of Rule (11) of Sindh Pure Food Rules, 1965. Surprisingly, no such penal section is applied by the police against the appellant while submitting the final charge sheet. No hurt is caused to any one by means of alleged substance by the appellant. Neither, the incharge of "Malkhana" nor the person who has taken the alleged substance to the chemical examiner has been examined by the prosecution to prove its safe custody and transmission.

10. In case of ***Ikramullah and others vs. The State (2015 SCMR-1003)***, it has been held by the Honourable Apex Court that;

"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".

11. The discussion involves the conclusion that the prosecution has not been able to prove its case against the appellant beyond the shadow of doubt and to such benefit he is found entitled.

12. In case of ***Faheem Ahmed Farooqui vs. The State (2008 SCMR-1572)***, it is held that;

“single infirmity creating reasonable doubt regarding truth of the charge makes the whole case doubtful.

13. For what has been discussed above, the impugned judgment is set-aside, the appellant is acquitted of the offence for which he was charged, tried and convicted by learned trial Court. The appellant is present in Court on bail, his bail bond is cancelled and surety is discharged

14. The instant appeal is allowed accordingly.

J U D G E