IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Crl. Appeal No. D – 07 of 2018

Before;
Mr. Justice Irshad Ali Shah
Mr. Justice Amjad Ali Sahito

Appellant: Muhammad Ismail son of Mataro Khan Mari, through Ms. Shazia Paras Kandhro, Advocate.

Respondent: The State, through Ms. Rameshan Oad, A.P.G.

Date of hearing: 11-12-2019.
Date of decision: 11-12-2019.

J U D G M E N T

IRSHAD ALI SHAH, J. The facts in brief necessary for disposal of instant appeal are that as per prosecution on arrest from the appellant was secured 10000 grams of charas by police party of PS Bandhi led by complainant SIP/SHO Syed Aun Ali Shah, for that he was booked and reported upon.

2. At trial, appellant did not plead guilty to the charge and prosecution to prove it, examined PW-1 complainant SIP Aun Ali Shah, he produced memo of arrest and recovery, copies of roznamcha entries, copy of RC, report of chemical examiner; chemical report; PW-2 ASI Zafar Ali; PW.3 PC Muhammad Sulleman Lashari, he produced copy of receipt and RC and then learned DPP closed the side of prosecution by filing such statement.

3. The appellant in his statement recorded u/s 342 Cr.P.C denied the prosecution allegation by pleading innocence by stating that he has been involved in this case falsely by the police at the instance of Wadero Muhammad Hussain with whom he is disputed over demarcation of the

lands. He did not examine anyone in his defence or himself on oath to disprove the prosecution allegation against him.

4. On conclusion of the trial, learned Special Judge (Narcotics), Shaheed Benazirabad found the appellant to be guilty for offence punishable u/s 9(c)of CNS Act, and then convicted and sentenced the appellant to undergo Rigorous Imprisonment for ten years with fine of Rs.100,000/=and in case of his failure, to make payment of fine to undergo Simple Imprisonment for ten months with benefit of section 382-B Cr.P.C vide his judgment dated 08.01.2018, which is impugned by the appellant before this Court by way of instant appeal.

5. It is contended by learned counsel for the appellant that the appellant being innocent has been involved in this case falsely by the police at the instance of his rival; there is no independent witness to the incident; the charas has been subjected to chemical examination with un-plausible delay of 14 days to its recovery; the incharge of malkhana has not been examined by the prosecution to prove the safe custody of charas and evidence produced by the prosecution being inconsistent and unreliable has been believed by learned trial Court without lawful justification. By contending so, she sought for acquittal of the appellant.

6. Learned A.P.G for the State has recorded no objection to the acquittal of the appellant by considering to the infirmities which are pointed out by learned counsel for the appellant.

7. We have considered the above arguments and perused the record.

8. Admittedly, the complainant went at the place of incident on information, yet he failed to pick-up with him any independent person to

witness the possible arrest and recovery, such omission on his part could not be lost sight of. The charas as per report of chemical examiner was delivered in his office on 04.10.2016. On asking, it was stated by the complainant that he could not know where the charas was lying for intervening period. PW PC Muhammad Sulleman who allegedly taken the charas to the chemical examiner was fair enough to admit that his statement was not recorded by the police. If it is so, then he in absence of 161 Cr.P.C statement could hardly be said to be witness of the case. The incharge of "malkhana" with who the charas allegedly was kept has not been examined by the prosecution. In that situation, it is rightly being contended by the learned counsel for the appellant that the prosecution has not been able to prove safe custody and transmission of the charas beyond shadow of doubt.

9. In case of **Ikramullah & ors vs. the State (2015 SCMR-1002)**, it has been observed by Hon'ble apex court that;

> *"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 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. The discussion involved a conclusion that the case of the prosecution is not free from doubt and appellant is appearing to be entitled to such benefit.

11. In case of ***Muhammad Masha vs The State (2018 SCMR 772),*** it was observed by the Hon'ble Supreme Court of Pakistan that;

> ***"4….Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of Tariq Pervez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Muhammad Akram v. The State (2009 SCMR 230) and Muhammad Zaman v. The State (2014 SCMR 749)."***

12. In view of the facts and reasons discussed above, the conviction and sentence awarded to the appellant together with the impugned judgment are set-aside, consequently, the appellant is acquitted of the offence, for which he has been charged, tried and convicted by the learned trial court, he is in custody and to be released forthwith in the present case, if is not required in any other custody case.

13. The instant appeal is disposed of accordingly.

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Ahmed/Pa