IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD
Criminal Appeal No.D- 153 of 2019

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

Appellant: Shafique Ahmed son of Umar Din Bhatti
Through Mr. Agha Waqar Ahmed, advocate.

State: Ms. Rameshan Oad, A.P.G.

Date of hearing: **24.12.2019**
Date of decision: **24.12.2019**

J U D G M E N T

IRSHAD ALI SHAH, J. The appellant by way of instant appeal has impugned judgment dated 27.08.2019 passed by learned Ist Additional Sessions Judge/MCTC Shaheed Benazir, whereby the appellant for offence punishable u/s 9(c) of CNS Act, 1997 has been convicted and sentenced to undergo Rigorous Imprisonment for six years and six months and to pay fine of Rs.30,000/= and in case of his failure, to make payment of fine to undergo Simple Imprisonment for six months with benefit of section 382-B Cr.P.C.

2. The facts in brief necessary for disposal of instant appeal as per prosecution are that on arrest from the appellant was secured 4000 grams of charas by police party of PS Punhal Khan Chandio led by complainant SIP Ghulam Mustafa, for that he was booked and reported upon.

3. At trial, appellant did not plead guilty to the charge and prosecution to prove it, examined Complainant SIP Ghulam Mustafa and his witnesses and then closed the side.

4. The appellant in his statement recorded u/s 342 Cr.P.C denied the prosecution allegation by pleading innocence by stating that the charas

has been foisted upon him. He examined himself on oath, wherein he again pleaded innocence by stating that he is driver by profession. In order to prove his innocence he produced certain documents. He, however examined none in his defence.

5. On evaluation of evidence so produced by the prosecution learned trial Court found the appellant to be guilty for the above said offence and then convicted and sentenced him 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 samples of the charas have been sent to chemical examination with un-plausible delay of six days and none has been examined by the prosecution to prove safe custody of the charas and transmission of the samples whereof to the Chemical Examiner. By contending so, he prayed for acquittal of the appellant. In support of his contention he has relied upon case of ***Abdul Ghani and others vs The State and others (2019 SCMR 608).***

7. Learned A.P.G for the State has recorded no objection to the acquittal of the appellant.

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

9. Admittedly, the complainant went at the place of incident on spy information, in that situation he was under obligation to have associated with him independent person to witness the possible arrest and recovery, which he has failed to associate, for no obvious reason, such omission on his part cannot be overlooked. As per PW Mashir ASI Ghulam Qadir, the mashrinama of arrest and recovery was prepared by PC Mir Khan. If, it

was so, then PC Mir Khan was to have been examined by the prosecution being author of such mashirnama. His non-examination for no obvious reason could not be ignored. The complainant was fair enough to admit that 161 CrPC statements of the PWs were recorded by WHC. If, it is believed to be so, then the said WHC being investigating officer of the case was to have been examined by the prosecution. His non-examination could not be lost sight of. The 1000 grams of charas taken out as a sample and sent to the chemical examiner for chemical analysis admittedly was not produced at trial at the time of examination of the complainant, such omission on the part of prosecution could not be lost sight of. As per report of chemical examiner, samples of charas were delivered in his office on 21.04.2016. If, it was so, then it was with delay of six days to its recovery. No explanation to such delay is offered by the prosecution. The incharge of "malkhana" and the person (PC Sajid Hussain Shah) who took the charas to the Chemical Examiner has been examined by the prosecution. Their non-examination without any justification is enough to conclude that the prosecution has not been able to prove the safe custody of the charas and transmission of the samples whereof to the chemical examiner.

10. 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".***

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

12. In case of ***Tariq Pervaiz vs the State (1995 SCMR 1345)***. It has been held by the Hon'ble Supreme Court that:-

> ***"For giving benefit of doubt to an accused, it is not necessary that there should be many circumstances creating reasonable doubt in a prudent mind about the guilt of accused, then he would be entitled to such benefit not as a matter of grace and concession but of right."***

13. 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).”

14. 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. The appellant is in custody, he shall be released forthwith in the present case.

15. The instant appeal is disposed of accordingly.

J U D G E

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Ahmed/Pa