

IN THE HIGH COURT OF SINDH CIRCUIT COURT, HYDERABAD

Criminal Appeal No.D-207 of 2019

PRESENT:

Mr. Justice Abdul Maalik Gaddi.
Mr. Justice Khadim Hussain Tunio.

Date of hearing: 15.01.2020.

Date of decision: 15.01.2020.

Mr. Muhammad Sharif M.Sial, Advocate for appellant.

Mr. Shawak Rathore, D.P.G. for the State.

J U D G M E N T

ABDUL MAALIK GADDI, J – Through this appeal, the appellant has assailed the legality and propriety of judgment dated 01.11.2019 passed by learned 1st Additional Sessions Judge / Model Criminal Trial Court, Shaheed Benazirabad in Special Narcotics Case No.582/2017 (Re: The State V/s Manjhi Khan) arisen out of Crime No.39/2017 registered U/S 9(C) of CNS Act, 1997 at PS Pabjo, whereby the learned trial court after full dressed trial convicted and sentenced the appellant as stated in Point No.2 of the impugned judgment. For the sake of convenience, it would be proper to reproduce Point No.2 of the impugned judgment which reads as under:-

“In view of reasons recorded above in support of my findings at point No.1, I am of the humble view that the prosecution has proved its case against accused beyond reasonable shadow of doubt. Hence, seeking guidance from case law reported as Ghulam Murtaza and another V/s The State PLD 2009 Lahore 362, accused Manjhi Khan son of Muhammad Saleh Rind is convicted U/s 245(II) Cr. P.C for possessing 1200 grams charas and sentenced U/s 9(c) Control of Narcotics Substances Act, 1997, to undergo R.I for four years and six months and pay fine to the tune of Rs.20,000/-. In case of default in payment of fine the accused shall undergo S.I. for six months. Perusal of record shows that accused Manjhi Khan was arrested in this case on 21.07.2017 and remained in custody

in this case till 17.08.2017. It is therefore, ordered under Section 382-B Cr.P.C that the above period of detention shall be counted towards substantive sentence of imprisonment awarded to the accused. Accused Manjhi Khan son of Muhammad Saleh Rind is present on bail. His bail bond stand cancelled and sureties are discharged. He shall be taken into custody and remanded back to prison to serve out sentence as above.”

2. Facts of the case as stated in the FIR are that on 21.07.2017 SIP Syed Parvaiz Ali Shah, PC Khamiso Khan, PC Irshad Ali, PC Dost Ali and DPC Khadim Hussain left P.S. Pabjo vide daily diary entry No.13 at 1500 hours for patrolling on police mobile van. During patrolling spy information was received that a person having black colour plastic bag containing charas has been approaching shrine of Pardesi Pir via Moro Daur road. The police party reached at pointed place at 1600 hours and saw a person on Moro Daur road near Pardesi Pir stop. On approach of police mobile van that person tried to escape but was apprehended and black colour plastic bag was secured from his possession. Due to non-availability of private mashirs PC Khamiso Khan and PC Irshad Ali were appointed as mashirs. The apprehended person disclosed his name as Manjhi Khan son of Muhammad Saleh Rind, resident of village Muhammad Ali Rind, Taluka Sakrand. The black colour plastic bag secured from possession of accused was found containing two large and two small pieces of charas. During personal search of apprehended person two currency notes of Rs.100/- each total Rs.200/- were recovered from side pocket of shirt of accused. The recovered charas were weighed and found to be 1200 grams which were sealed on the spot. Mashirnama of arrest and recovery was prepared with signatures of above named mashirs. The accused and case property were taken to P.S. where P.S. where F.I.R was registered.

3. At trial, the prosecution to prove its case has examined following witnesses:

1. PW-1. Inspector Syed Parvaiz Ali Shah (complainant and investigating officer of the case) was recorded vide Ex.No.3. He produced daily diary entry No.13 at Ex.3/A, mashirnama of arrest and recovery at Ex.3/B, daily diary entry No.15 dated 21.07.2017 at Ex.3/C, daily diary entry

No.16 at Ex.3/D, F.I.R at Ex.3/E, daily diary entry No.29 dated 22.07.2017 at Ex.3/F, mashirnama of place of recovery at Ex.3/G, RC No.89 at Ex.3/H, and report o chemical examiner at Ex.3/I.

2. PW-2. PC Khamiso Khan (mashir) was recorded vide Ex.4. Thereafter, learned ADPP for the State closed the prosecution side at Ex.5.

These witnesses have been cross examined at length by the counsel for appellant.

4. Later on statement of accused was recorded U/S 342 Cr.P.C at Ex.6 in which he denied the prosecution allegation and claimed his innocence and stated that charas has been foisted upon him. However, the accused neither examined himself on oath U/S 340(2) Cr.P.C nor produce any evidence in defense.

5. It is inter alia contended by learned counsel for the appellant that appellant is innocent and has been involved in this case falsely and the prosecution has not been able to prove its case beyond any reasonable doubt; that police has foisted charas against appellant and evidence adduced by PWs is contradictory with each other on material particulars of the case and that recovered charas was received by chemical examiner for its examination and report on 26.07.2017 i.e with delay of five (05) days of alleged recovery, therefore, according to him during this intervening period before whom the case property was lying and if it was lying in police malkana, no entry of police malkana has been produced, therefore, question of tampering in the case property cannot be ruled out. 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; that the appellant is of young age and no criminal history is against him. Lastly, he contended that prosecution has failed to prove its case against appellant, therefore, prays that this appeal may be allowed by setting aside the impugned judgment and appellant may be acquitted of the charge. In support of his contentions, learned counsel has placed reliance on the cases reported as Munir Hussain alias Munawar alias Muno v. The State (2019 YLR 51), Ikramullah and others v. The State (2015 SCMR

1002), Abdul Majeed v. The State (2014 YLR 2050), Sadam Hussain v. The State (2018 MLD 1025) and Ameer Hamza alias Hamza v. The State (2015 P.Cr.L.J 1402).

6. On the other hand, learned D.P.G contended that prosecution has proved its case beyond any shadow of doubt and the appellant was arrested along with 1200 grams of charas in presence of mashirs and it has also come on record that recovered property was Charas as per the report of Chemical Examiner, therefore, he requests for dismissal of this appeal. In support of his contention, learned D.P.G has placed reliance on the cases reported as Abdul Wahab & another v. The State (2019 SCMR 2061) and Muhammad Sarfaraz v. The State & others (2017 SCMR 1874).

7. We have heard the learned counsel for appellant, learned D.P.G for the State and perused the material available on record.

8. We have perused the evidence of complainant Inspector Syed Parvaiz Ali Shah who deposed that on 21.07.2017 he along with his sub-ordinate staff left police station for patrolling in the area vide Roznamcha entry No.13 at 1500 hours in government mobile van and during patrolling they received spy information that present appellant was approaching towards Moro Daur near Pardesi Shrine for the purpose of selling charas and when they reached at the pointed place, the present appellant was apprehended and they recovered 1200 grams charas in presence of mashirs namely PC Khamiso Khan and PC Irshad Ali. This fact has been denied by appellant in his statement recorded u/s 342 Cr.P.C. It is noted that police party though had advanced information about the availability of present appellant alongwith 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 people were passing by place of incident during arrest and recovery proceedings. The question arises when the private person were available at the spot why they did not join them as recovery witness. It is settled principle that judicial approach has to be a conscious in dealing with the cases in which testimony hinges upon the evidence of

police officials alone. 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. 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.

10. No doubt police witnesses were 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 were 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, mashir Khamiso Khan in his cross examination stated that recovered pieces of charas were of black colour whereas chemical report available on record at Ex.3/I showing the colour of pieces of charas as black brown coloured. Moreover, complainant has stated in his cross examination that during patrolling he was armed with SMG rifle and other members of police party were also armed with SMG rifle but daily diary entry of departure on record at Ex.3/A do not contain particulars of equipments, arms and ammunitions whereas, mashir Khamiso Khan while contradicting this fact has deposed that at the time of leaving police station they were armed with K.K rifles. It is also noted that when the complainant and mashir were available at the spot but according to the complainant the digital scale was lying in the mobile van and PC Irshad had brought the same whereas Mashir PC Khamiso Khan while contradicting this fact has stated that he does not remember who brought the scale. All these contradictions in the case of prosecution lead to us that perhaps the incident has not taken place in a fashion as stated in the FIR.

11. It reveals from the record that alleged recovery was made from the appellant on 21.07.2017 but the property allegedly recovered from the appellant was received by chemical examiner, chemical laboratory Sukkur Rohri on 26.07.2017 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 property was lying, he had no satisfactory answer with him.

12. It is stated by learned counsel for the appellant that appellant is of young age and no past criminal history is against him and in view of the contradictory evidence on record, foistation of charas against the appellant could not be ruled out. Learned D.P.G. also did not place on record any criminal history of the appellant. 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. 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.

13. 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 a 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).

14. For what has been discussed herein above, we are of the considered view that the prosecution has failed to discharge its liability of proving the guilt of appellant beyond shadow of doubt. Therefore, while extending the benefit of doubt in favour of appellant, we hereby set-aside the conviction and sentence recorded

by the learned trial court by impugned judgment dated 01.11.2019, acquit the appellant of the charge and allow this appeal. The appellant is in custody. He shall be released forthwith if he is not required in any other custody case.

JUDGE

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