IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD

Cr.Jail.Appeal No. D- 122 of 2017

Present:-
Mr. Justice Naimatullah Phulpoto.
Mr. Justice Shamsuddin Abbasi.

Appellant	:	Muhammad Yaqoob s/o Muhammad Umar through Mr. Gulzar Ali Soomro, Advocate.
Respondent	:	The State through Syed Meeral Shah, A.P.G. for the State.
Date of hearing	:	26.04.2018
Date of judgment	:	26.04.2018

J U D G M E N T

NAIMATULLAH PHULPOTO, J: Muhammad Yaqoob appellant was tried by learned IIIrd Additional Sessions Judge/Special Judge under Control of Narcotics Substance Act, Hyderabad in Special Case No. 34 of 2016 for offence under Section 9(c) Control of Narcotic Substance Act, 1997. On the conclusion of trial, vide judgment dated 24.10.2017, appellant was convicted u/s 9 (c) of CNS Act, 1997 and sentenced to suffer RI for three years and to pay fine of Rs.20,000/-. In case of default in payment of fine, appellant was ordered to suffer S.I for 15 days more. Appellant was extended benefit of Section 382-B Cr.P.C.

2. Brief facts of the prosecution case are that on 01.03.2016, complainant SIP Rajab Ali Butt left PS alongwith his subordinate staff vide entry No.34 at 2115 hours for patrolling in the area. During patrolling from the different places when they reached at Tikona Park, they

received spy information that the present appellant was selling charas at Kali Mori Chowk Sheedi Para. Police party proceeded to the pointed place and saw accused having one black shopper in his hand. It is alleged that accused while seeing the police party tried to escape but he was apprehended. Due to non-availability of private mashirs PCs Dur Muhammad and Imran were made as mashirs. On inquiry, accused disclosed his name as Muhammad Yaqoob s/o Muhammad Umar r/o Kali Mori Chowk, Hyderabad. Police recovered shopper and checked it contained 08 big and small pieces of charas, weight of pieces of charas became 1250 grams out of which 20 grams were separately sealed for sending to the chemical examiner for analysis. Cash of Rs.100 was also recovered from the possession of accused. Thereafter, accused and case property were brought to P.S. where FIR was lodged by SIP Rajab Ali Butt on behalf of the State. It was recorded vide crime No.29/2016 u/s 9 (c) of CNS Act, 1997.

3. During investigation 161 Cr.P.C. statements of the PWs were recorded, sample was sent to the chemical examiner for report through PC Muneer Ahmed. Positive report of the chemical examiner was received. On the conclusion of usual investigation, challan was submitted against the appellant/accused u/s 9 (c) of CNS Act, 1997.

4. Trial Court framed charge against accused at Ex.2, to which he pleaded not guilty and claimed to be tried.

5. At the trial, prosecution examined PW-1 complainant SIP Rajab Ali at Ex.3, he produced memo of arrest and recovery, FIR, departure and arrival entry at Ex.3/A to 3/C, PW-2 PC Dur Muhammad at Ex.04 and SIP/IO Hadi Bux at Ex.6, he produced the entry by which property was

kept in Malkhana and chemical report. Thereafter, prosecution side was closed at Ex.06.

6. Statement of accused was recorded u/s 342 Cr.P.C. at Ex.7 in which he claimed false implication in this case and denied the prosecution allegations. Accused neither examined himself on Oath nor led any evidence in his defence, in disproof of the prosecution allegations.

7. Learned Special Judge after hearing the learned counsel for the parties and examining the evidence available on record, by judgment dated 24.10.2017 convicted and sentenced the appellant as stated above. Hence, this appeal is filed.

8. Mr. Gulzar Ali Soomro, learned advocate for the appellant mainly contended that prosecution story was un-natural and unbelievable. He contended that the sample was sent to the chemical examiner after a lapse of three days for which no explanation has been furnished by the prosecution. He has further contended that safe custody of charas at Malkhana of the Police Station and its safe transit to the chemical examiner have also not been established. Lastly, it is contended that burden to prove was upon the prosecution but the prosecution failed to prove it. In support of his contentions, learned counsel has placed reliance on the cases reported as Ikramullah and others v. The State (2015 SCMR 1002) and Tarique Parvez v. The State (1995 SCMR 1345).

9. Syed Meeral Shah, A.P.G. appearing for the State argued that evidence of police officials was trustworthy and reliable. However, APG admitted that there was no evidence with regard to safe custody of charas at police station.

10. We have carefully heard learned counsel for the parties and scanned the entire evidence.

11. In our considered view prosecution has failed to prove its' case against the appellant for the reasons that complainant alongwith his subordinate staff left police station on 01.03.2016 on spy information and arrested the present appellant at Kali Mori Chowk Sheedi Para in presence of mashirs PCs Dur Muhammad and Imran and recovered 1250 grams charas from his possession. It is surprising to note that the police party had advance spy information about the presence of accused at pointed place. Inspite of that SIP Rajab Ali did not bother to associate any independent person either from the place where he received spy information or from the place of recovery. It is on record that the place of incident is thickly populated area. No doubt, evidence of police official is as good as that of any other witness but when the whole prosecution case rests upon the police officials and hinges upon their evidence and when the private witnesses were available at the place of incident then non-association of private witnesses in the recovery proceedings create some doubt in the prosecution case. It is settled principle that the judicial approach has to be 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 accused relating to the narcotics. However, when the alleged recovery was made on road side which is meant for heavy traffic and shops and hotels are available there as happened in this case, omission to secure the independent mashirs, particularly, in the case of spy information cannot be brushed aside lightly by the court. Prime object of Section 103 Cr.P.C. is to ensure the

transparency and fairness on the part of the police during course of recovery, curbs false implication and minimize scope of foisting of fake recoveries upon accused. As observed above, at the time of recovery from appellant, complainant/SIP Rajab Ali did not associate any private person to act as recovery witness and only relied upon his subordinates. Hence, as observed above, due to non-association of independent witness as mashir in this case, false implication of the appellant cannot be ruled out.

12. Moreover, justice is not to be done only in courts. Other persons particularly the one who is entrusted with power is responsible to do the justice at his level. A responsible officer of Police, invested with powers of investigation is also obliged in law to do the justice and conduct fair and independent investigation. Complainant SIP Rajab Ali had also failed to arrest the particular customer who had to receive the narcotics from the appellant to find out the truth as held in the case of Nazeer Ahmed v. The State (PLD 2009 Karachi 191) that:-

> ***14. According to para. 3 of rule 25.2 of Police Rules, 1934, it is the duty of an Investigating Officer to find out the truth and his object shall be to discover the actual facts and for the achievement of such object he shall not commit himself prematurely to any view of the facts for or against any person.***
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> ***15. In the case of the State v. Bashir and others, reported in PLD 1997 SC 408, the Supreme Court, referring to the above Police Rule observed.--***
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> ***"It could hardly be expected that a police officer, who is heading a raiding party and is a witness, also becomes the complainant and lodges an F.I.R. against the accused, and then becoming an Investigating Officer of the same case, will comply with the aforesaid Police Rule. In the circumstances, the practice of seizing officer or the head of a police party who is also a witness to .the crime becoming or being nominated as an Investigating Officer of the same case should be avoided and if any other competent officer is available in the police station,***

> ***he may be nominated as the Investigating Officer rather than the head of the police party. As observed 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."***

13. We are clear in our mind that investigation in the case in hand has been carried out in a casual and stereotype manner, without making an effort to discover the actual facts/truth. There were several other circumstances / infirmities in the prosecution case. There was no evidence that after the recovery of charas, the same was safely kept in Malkhana of Police Station. No incharge/Head Moharer of Police Station has been examined before the trial court. Charas was sent to the chemical examiner through PC Muneer Ahmed, who had not been examined by the trial court which clearly shows that safe transit to the chemical examiner has also not been established and the tampering with case property at Police Station could not be ruled out. Apart from that chemical examiner failed to prepare the report as per protocol as provided in the rules. We have no hesitation to hold that the report of the chemical examiner though positive was deficient in the eyes of law as held in the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002),* which has been endorsed by the Honourable Supreme Court in the recent judgment in the case of Nadeem v. The State through Prosecutor General, Sindh, Criminal Appeal No.06-K of 2008 in Criminal Petition No.105-K of 2016, dated 04.04.2018 as follows:-

> ***“According to the FIR the petitioner and his co-convict had tried to escape "with" the motorcycle when they were intercepted by the police party but before the trial court Muhammad Ayub, S.I.P (PW1) had stated that upon seeing the police party the petitioner and his co-convict had started running away while leaving the motorcycle***

on the road and the engine of that motorcycle had gone off. Muhammad Jaffar, PC (PW2) had also deposed about running away of the petitioner and his co-convict but had kept quiet regarding leaving of the motorcycle by the petitioner and his co-convict while running away. Both the above mentioned witnesses produced by the prosecution, however, unanimously stated that while running away upon seeing the police party the petitioner and his co-convict had kept the relevant bag containing narcotic substance in their hands and it was in that condition that the petitioner and his co-convict had been apprehended by the police party. It is quite obvious that the initial story contained in the FIR had been changed during the trial and the changed story was too unreasonable to be accepted at its face value. Muhammad Ayub, S.I.P. (PW1) had stated before the trial court that after recovering the narcotic substance he had brought the same to the Police Station and it was he who had kept the recovered substance in safe custody whereas he had never claimed to be the Moharrir of the relevant Police Station. The record of the case shows that it was Ghulam Ali, P.C. who had taken the recovered substance to the office of the Chemical Examiner for analysis but it is not denied that the said Ghulam Ali, P.C. had not been produced before the trial court by the prosecution. It is, thus, evident that safe transmission of the recovered substance from the local Police Station to the office of the Chemical Examiner had not been established by the prosecution. The record further shows that the Chemical Examiner's report adduced in evidence was a deficient report as it did not contain any detail whatsoever of any protocol adopted at the time of chemical analysis of the recovered substance. This Court has already held in the case of fkramullah and others v. The State (2015 SCMR 1002) that such a report of the Chemical Examiner cannot be used for recording conviction of an accused person in a case of this nature. For all these reasons we find that the prosecution had not been able to prove its case against Nadeem petitioner beyond reasonable doubt."

14. We have already held that the safe custody of the recovered substances as well as safe transmission of the samples to chemical examiner had not been established by the prosecution. We add that report of the chemical examiner was also legally laconic and deficient as such tampering or replacement while in transit of the narcotics cannot be ruled out. A bare look at the report submitted by the Chemical Examiner

in the present case shows that the entire page which was to refer to the relevant protocols and tests was not only substantially kept blank but the same had also been scored off by crossing it from top to bottom. This surely was a complete failure of compliance of the relevant rule and such failure reacted against reliability of the report produced by the prosecution before the learned trial Court. Section 36 of the Control of Narcotic Substances Act, 1997 requires a Government Analyst to whom a sample of the recovered substance is sent for examination to deliver to the person submitting the sample a signed report in quadruplicate in "the prescribed form" and, thus, if the report prepared by him is not prepared in the prescribed manner then it may not qualify to be called a report in the context of section 36 of the Control of Narcotic Substances Act, 1997 so as to be treated as a "conclusive" proof of recovery of narcotic substance from an accused person.

15. In our considered view, prosecution has failed to prove that the charas was in safe custody for the aforementioned period. Even positive report of the chemical examiner would not prove the case of prosecution. Above mentioned circumstances have created reasonable doubt in the prosecution case. 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. In this regard reliance can be placed upon the case of *Tariq Pervez V/s. The State (1995 SCMR 1345),* 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. We have no hesitation to hold that the prosecution has failed to prove its' case against the accused. Resultantly, by order short order dated 26.04.2018 instant appeal was allowed. Conviction and sentence recorded by the trial court vide judgment dated 24.10.2017 were set aside and appellant was acquitted of the charge. He was ordered to be released forthwith if he is not required in some other case. These are the reasons of our said short order dated 26.04.2018.

JUDGE

JUDGE

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