IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD

Cr.Appeal.No.D- 297 of 2006
Cr.Jail.Appeal No. D- 278 of 2006

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

Appellant	:	Shoukat Ali through Mian Taj Muhammad Keerio, Advocate.
Respondent	:	The State through Mr. Shahzado Saleem Nahiyoon, D.P.G.
Date of hearing	:	30.04.2018
Date of judgment	:	03.05.2018

J U D G M E N T

NAIMATULLAH PHULPOTO, J: By this common judgment, we intend to dispose of both the aforesaid appeals as these appeals arise out of one and same judgment. Appellant was tried by learned Special Judge Control of Narcotics Substances Hyderabad/Ist Additional Sessions Judge, Hyderabad in Special Case No. 71 of 2005 for offence under Section 9(c) Control of Narcotic Substance Act, 1997. On the conclusion of trial, vide judgment dated 10.11.2006, appellant was convicted u/s 9 (c) of CNS Act, 1997 and sentenced to suffer RI for 07 years and to pay fine of Rs.70,000/-. In case of default in payment of fine, appellant was ordered to suffer S.I for 06 months more. Appellant was extended benefit of Section 382-B Cr.P.C.

2. The prosecution case as emerged from the recitals contained in first information report and the evidence adduced during the trial is as under:-

3. Brief facts of the prosecution case are that Muhammad Aqif Khan Excise Inspector was directed by ETO, Hyderabad to proceed to Liaquat Colony where according to spy information conveyed to ETO, the present accused was selling Dodi. Excise Inspector alongwith AETO Abdul Waheed Mughal, EI Mir Muhammad Abbasi, EI Abdul Jabbar, EI Pir Bukhsh Soomro and other staff left to the pointed place in the official vehicle and they reached at the pointed place at 11-30 a.m, where they found the present accused standing infront of his house and he was carrying a bag in his hand. It is alleged that accused tried to run away but he was surrounded and caught hold. On inquiry, he disclosed his name as Shoukat Ali s/o Imam Ali Qureshi. Excise officials checked the bag in presence of mashirs ED Allah Bachayo and ED Abdul Jabbar Otho and found big pieces of Dodi. The same were weighed. Its weight became 10 kilograms. Cash of Rs.30/- was also recovered from his possession. Out of 10 kilograms Dodi, 10 grams were separated and sealed for the chemical analysis. Remaining case property was sealed separately. Thereafter, accused and case property were brought to P.S. where FIR was lodged by Inspector Muhammad Aqif Khan on behalf of the State. It was recorded vide crime No.18/2005 u/s 9 (c) of CNS Act, 1997.

4. During investigation 161 Cr.P.C. statements of the PWs were recorded, 10 grams of Dodi was sent to the chemical examiner for report. 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.

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

6. At the trial, prosecution examined PW-1 complainant/Excise Inspector Muhammad Aqif at Ex.3, he produced mashirnama, FIR, roznamcha entry and report of the chemical examiner at Ex.3/A to 3/D and PW-2/mashir Allah Bachayo at Ex.4. Thereafter, prosecution side was closed at Ex.05.

7. Statement of accused was recorded u/s 342 Cr.P.C. at Ex.6 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.

8. Learned Special Judge after hearing the learned counsel for the parties and examining the evidence available on record, by judgment dated 10.11.2006 convicted and sentenced the appellant as stated above. Hence, this appeal is filed.

9. Mr. Mian Taj Muhammad Keerio, learned advocate for the appellant mainly contended that there was business transaction in between Excise Inspector/complainant and the appellant. He further contended that Excise Inspector issued two cheques in favour of the appellant which were dishonoured by Habib Bank Limited. Statements were produced by the accused in statement recorded u/s 342 Cr.P.C. It is submitted that due to business dispute the Excise Inspector exceeded his

powers and foisted lodged false case against the accused. It is further contended that despite spy information no private person was associated for making him as mashir in this case. Learned advocate for the appellant submitted that there are material contradictions in the prosecution case which were ignored by the trial court. Lastly, it is submitted that there was no evidence with regard to the safe custody of charas and safe transmission to the chemical examiner. 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).

10. Mr. Shahzado Saleem Nahiyoon, learned D.P.G, appearing for the State argued that evidence of excise officials was trustworthy and reliable. However, he admits that two cheques produced by the accused in his statement recorded u/s 342 Cr.P.C. were issued by the Excise Inspector/complainant. However, he supported the case of prosecution and conceded that there was no evidence with regard to the safe custody of charas to the chemical examiner and its' safe transit.

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

12. We have come to the conclusion that the prosecution has failed to prove its' case against the appellant for the reasons that spy information was received by the ETO in his office but no such entry was made at Excise Police Station by the Excise Inspector/complainant of the case. Despite spy information, Excise Inspector failed to associate with him any independent person of the locality to witness the recovery proceedings. It is the case of prosecution that accused was apprehended from the street

infront of his house and it was day time. No efforts were made by the Excise officials to collect any independent person from the street to witness the recovery proceedings. It is alleged that 10 kilograms Dodi was recovered from the possession of accused and it was in shape of pieces. Only 10 grams were taken as sample for sending the same to the chemical examiner. There was no entry that the recovered narcotics was safely kept in Malkhana of the Excise Police Station. Head Mohrer of Malkhana was also not produced before the court. It is reflected from the report of chemical examiner that the case property was despatched by Excise Constable namely Gulab but he has not been examined by the prosecution to prove the safe transit from P.S. to the office of the chemical examiner. Accused in his statement recorded u/s 342 Cr.P.C. has produced two cheques of Habib Bank Limited issued by the complainant/Excise Inspector Muhammad Akif in the name of appellant Shoukat Ali. Both cheques were dishonoured. Defence plea has been raised that there was business transaction between the parties. Unfortunately, this aspect of the case has not been considered by the trial court in its true perspective. Defence theory appears to be plausible.

13. Moreover, justice is not to be done only in courts. Other persons particularly, one who is entrusted with powers is also 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. We are clear in our mind that investigation in the case in hand has been carried out malafidely and in stereotype manner, without making an effort to discover the actual facts/truth. There was no evidence that after the recovery of Dodi, the same was safely kept in Malkhana of Police Station. Sample was sent to

the chemical examiner through Excise Constable namely Gulab, 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 which reads 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 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 on account of business dispute 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 Dodi was in safe custody for the aforementioned period. Even positive report of the chemical examiner would not improve 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),* wherein 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. In view of the above, we have no hesitation to hold that the prosecution has failed to prove its' case against the accused. Resultantly, both the instant appeals are allowed. Conviction and sentence recorded by the trial court vide judgment dated 10.11.2006 are set aside and appellant is acquitted of the charge. Appellant is on bail, his bail bond stands cancelled and surety discharged.

JUDGE

JUDGE

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