

JUDGMENT SHEET
**IN THE HIGH COURT OF SINDH, CIRCUIT COURT,
HYDERABAD**

Criminal Jail Appeal No.D-76 of 2019

BEFORE:

Mr. Justice Mehmood Ahmed Khan
Mr. Justice Khadim Hussain Tunio

Appellants: Meharullah and Abdul Hafeez,
through Mr. Mazhar Ali Laghari, Advocate.

The State: Through Mr. Fayaz Ahmed Sabki, Assistant
Prosecutor General Sindh.

Date of hearing: 01.09.2021
Date of decision: 01.09.2021
Date of reasons: 02.09.2021

JUDGMENT

Khadim Hussain Tunio, J.- Through mentioned criminal appeal, appellants Meharullah and Abdul Hafeez have called in question the judgment dated 07.05.2019, passed by the learned Additional Sessions Judge-I/Special Judge (NARCOTICS)/MCTC, Sanghar, in Special Case No.55/2017 (*Re: the State v. Meharullah & another*) being an outcome of Crime No. 60/2017, registered at P.S Sarhari, for offence under Section 9(b) of Control of Narcotic Substances Act, 1997, whereby they were convicted and sentenced to suffer R.I for 1 year and 7 months and to pay fine of Rs.13,000/- each, and in case of default in payment of fine, to suffer S.I for four months and fifteen days more. However, benefit of Section 382-B Cr.P.C was extended to them.

2. It is alleged that appellants/accused were apprehended by the police party of P.S Sarhari headed by SHO Muhammad Ali Zardari after receiving spy information regarding the sale of narcotics near a poultry farm in village Habibullah

Keerio and recovered 600 grams of heroin from the appellant/accused Meharullah along with a total of Rs.30,140/- in different denominations and 430 grams of heroin from the appellant/accused Abdul Hafeez along with a total of Rs.3660/- in different denominations, for which the F.I.R was lodged against them.

3. On completion of investigation, the challan was submitted before the Court against the appellants/accused. After compliance of 265-C Cr.P.C a formal charge was framed against the appellants/accused, to which they pleaded not guilty and claimed to be tried. In order to substantiate the charge, the prosecution examined in all 3 (three) witnesses namely SIP Muhammad Ali, now-retired ASI Nasir Khan and SIP Muhammad Younus, who produced number of documents through their evidence. Thereafter, prosecution side was closed.

4. Statements of the accused under Section 342 Cr.P.C. were recorded in which they denied all the allegations levelled against them by the prosecution and claimed to be innocent. They further stated that they had been falsely implicated in this case by submitting that they were arrested and falsely involved in this case on the pretext of political enmity. The accused did not examine themselves on oath in terms of Section 340(2) Cr.P.C, nor examined any witness in their defence.

5. Learned Counsel for the appellants/accused has argued that the appellants/accused have been involved in this case falsely by the police; that the impugned judgment is opposed to the law and facts and is against the principle of natural justice; that there are material contradictions in the evidence of the prosecution witnesses; that there is delay in sending the case property to the chemical examiner; that the learned trial Court has failed to

appreciate the evidence produced by the prosecution; that the heroin has allegedly been recovered from the appellants on 10.09.2017 but the same has been sent to the chemical examiner for its analysis where it was received on 13.09.2017 from P.C Mir Hassan; that no independent person from the vicinity, wherefrom the alleged recovery was made from the accused, has been examined by the prosecution despite of the fact that the police party had received spy information prior to booking of the appellants, hence, the question of tampering with the alleged heroin cannot be ruled out; that there are contradictions in the evidence of the prosecution witnesses on material points, which create doubt in the prosecution case and the appellants have succeeded to create doubt in the prosecution case.

6. Conversely, learned Assistant Prosecutor General appearing for the State supported the conviction and sentence recorded by the trial Court while submitting that there are some minor contradictions and discrepancies in the evidence of PWs, which can be ignored by the Court while deciding the appeal.

7. We have given due consideration to the arguments made by learned counsel for the parties and have perused the material available on record.

8. We have scanned the evidence adduced by the prosecution and have come to the conclusion that the prosecution has failed to bring at home the charge against the appellants in view of the infirmities and discrepancies in the case. PW SIP Muhammad Ali Zardari in his examination in chief deposed that the spy informed them that "*two persons near poultry farm at village Habibullah Keerio*" were selling heroin. PW-2 Nasir Khan in this regard also deposed that the spy had merely informed them about the presence of two persons. Nowhere is it deposed whether the

spy had informed them of the names or even description of the alleged narcotics dealers and such fact is backed up by the concurrent statements of the above two PWs. PW SIP Muhammad Ali Zardari in his cross-examination has deposed that *"It may be correct that the village Habibullah Keerio is consisting of 100/150 houses. It is correct that the road Habibullah Keerio leads to other villagers and the same is used by the villagers. The place of information Sarhari Chowdagi is a busy place, where shops and hotels are situated."* The above statements show that the complainant had not one but two chances to incorporate independent witnesses, however both times he failed in doing so for which he was unable to provide any justification. PW SIP Muhammad Ali Zardari further deposed in his cross-examination that *"It is correct that the case property viz heroin is of white colour."* In this regard, the chemical examiner's report has stated that the contents received were a brown powdered substance rather than a white coloured one. Said PW also failed to produce the logbook before the Court wherein his patrol routine was noted for the day of arrest of the appellants/accused and the said fact was admitted by him in his cross-examination where he stated that *"It is correct to suggest that I have not produced the log book before the court."* PW SIP Muhammad Ali Zardari also deposed that the *"accused ran 10/15 paces after seeing us and we apprehended them."* In this regard, PW Nasir Khan deposed that *"they on seeing us ran about 30 paces."* Apart from the above infirmities and discrepancies in the prosecution case, we have carefully examined the evidence of the prosecution witnesses in which they have made so many contradictions in their statements, which create serious doubt in the prosecution story. No private person was asked to act as mashir of arrest and recovery. Non-association of the private mashir is a gross violation of the provision of Section 103 Cr.P.C. which is meant for maintaining transparency and sanctity to the process of investigation. No doubt Section 25 of the CNS Act, 1997 is an

exception to the general rule under extraordinary circumstances, yet necessity of implying private persons as mashirs cannot be overlooked wherever the same is possible. A major overhaul to the prosecution story is that the recovery of heroin was made on 10.09.2017, whereas it was received by the chemical examiner on 13.09.2017. We have observed that there is 3 days delay in sending the sample to the Chemical Examiner. The heroin has not been sent to the Chemical Examiner within the stipulated period of time as provided by Rule 4(2) of the Control of Narcotic Substances (Government Analysts) Rules, 2001, which clearly shows that such exercise was required to be completed within 72 hours of the recovery and for this purpose even there is no plausible explanation brought on record by the prosecution as to why such delay was caused in completion of the exercise of sending heroin within stipulated period by the Investigating Officer, which is also fatal to the case of prosecution. To this effect, reliance may be placed upon the case of *MUHAMMAD ASLAM v. THE STATE (2011 SCMR 820)*. PC Mir Hassan who allegedly took the case property to the chemical examiner has not been examined by the prosecution either. Even otherwise, the in-charge of the malkhana has not been named by any prosecution witnesses nor examined in order to establish the safe custody of the recovered contraband. The entire chain of custody stands compromised; as a consequence, reliance cannot be placed on the report of the Chemical Examiner to support conviction of the appellants. Further reliance in this regard is sought from the case of *IKRAMULLAH and others v. THE STATE (2015 SCMR 1002)*.

9. Besides the above, the defence plea raised in the case was that the appellants were arrested on the basis of political enmity. The complainant in the case holds the same surname as the person with whom the enmity has been alleged and has admitted

to being of the same community in his cross-examination. Said fact coupled with the irregularities committed and the contradictions made cannot be lost sight of and strikes the prosecution case at its roots and casts shadow of doubt on the same. Moreso, no other similar type of nature case is pending against the appellants per C.R.O. Needless to add that it is a settled principle regarding dispensation of criminal justice that for extending benefit of doubt, it is not necessary that there should be many circumstances creating doubt, 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 of doubt not as a matter of grace or concession but as a matter of right. Reliance may also be placed upon the case of *TARIQUE PERVEZ v. THE STATE (1995 SCMR 1345)*.

10. For the foregoing reasons and discussion, we are of the considered opinion that the prosecution has miserably failed to prove the charge against the appellants beyond reasonable shadow of doubt, therefore, the benefit of such doubt is to be extended to the accused as a matter of right. Accordingly, by our short order dated 01.09.2021, the conviction and sentence recorded by the trial Court against the appellants, vide judgment dated 07.05.2019, was set aside and the appellants/accused were acquitted of the charge with direction to release them forthwith, if not required in any other custody case. These are the reasons for the said short order of even date.

JUDGE

JUDGE

