Judgment Sheet

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Cr. Jail Appeal No.D–304 of 2019

Before :
Mr. Justice Muhammad Saleem Jessar
Mr. Justice Khadim Hussain Tunio

Appellant	:	Arz Muhammad Jagirani through Mr. Rukhsar Ahmed M. Junejo, Advocate.
Respondent	:	The State through Mr. Aftab Ahmed Shar, Additional Prosecutor General.
Date of Hearing	:	01.12.2021
Date of Decision	:	01.12.2021

JUDGMENT

KHADIM HUSSAIN TUNIO, J.- By this judgment, we intend todispose of the above captioned criminal jail appeal filed by the above named appellant whereby he has impugned the judgment dated 05.12.2019, passed by the learned Ist Additional Sessions Judge/Special Judge CNS/MCTC, Khairpur, in Special Case No.202/2018 Re- The State Vs. Ariz Muhammad @ Gongo, culminated from Crime No.143/2018, registered at P.S Pirjogoth for an offence punishable U/S 9(c) CNS Act, 1997, whereby appellant has been convicted and sentenced to suffer imprisonment for twelve years and six months and to pay fine of Rs.60,000/, in case of default of payment of fine he shall suffer S.I for six months more. However, benefit of Section 382-B Cr.P.C was extended to the appellant/accused.

2. Precisely the facts of prosecution case as unfolded from the FIR registered on 18.11.2018 are that thepolice party headed by SIP Syed Aftab Hussain Shah, attempted to apprehend the appellant after receiving spy information about him selling charas, however the

appellant allegedly succeeded in escaping while throwing away one white coloured sack which was found containing charas. The charas was weighed and became a total of 10 kilograms. Thereafter, the recovered charas was sealed and brought to the police station where the FIR was lodged against the appellant.

3. After providing necessary documents u/s 265-C Cr.PC, a formal charge was framed against the appellant to whichhe pleaded not guilty and claimed to be tried. At the trial prosecution examined as many as four witnesses namely SIP Syed Aftab Ahmed Shah, HC Munir Ahmed, Inspector Fareed Ahmed Memon and PC Azizullah. They produced numerous documents in their evidence and thereafter prosecution side was closed.

4. Statement of accused u/s 342 Cr.PC was recorded in which he denied the allegations leveled against him and claimed that he has been falsely implicated in the case. However, he neither examined himself on oath nor adduced any evidence in his defence.

5. After hearing learned counsel for the respective parties, learned trial court convicted the appellant as stated supra.

6. Learned counsel for the appellant has mainly argued that there arematerial contradiction in between evidence of the PWs; that the appellant was not arrested from the alleged scene of offence; that the sample of contraband material was sent to Chemical Examiner after ten days delay; that the appellant/accused was not arrested at the spot nor contraband material was recovered from his exclusive possession; that no private mashir/witness has been cited in this case by the prosecution though the complainant had prior spy information; that safe custody of the alleged contraband has not been established as the malkhana in-charge or the WHC through whom the contraband was deposited have

not been examined; that the appellant has been falsely implicated due to enmity with police officials; that the case of prosecution is full of material contradictions, discrepancies and infirmities, therefore, he prayed that the impugned judgment may be set aside and appellant/accused may be acquitted. He has referred case law reported as ***2019 SCMR 1300, 2017 PCrLJ 501, 2011 SCMR 820*** and ***2006 YLR 1834***.

7. Conversely, learned APG for the state has fully supported the impugned judgment while arguing that PWs have fully supported the prosecution case; that the appellant/accused absconded away from the scene of offence; that the complainant and mashir identified the accused at the time of incident; that the report of Chemical Examiner is in positive.

8. We have heard learned counsel for appellant and learned APG for state and perused the record carefully with their able assistance.

9. After a careful perusal of the material available on the record, we have come to the conclusion that the prosecution has failed to establish the guilt of the accused beyond reasonable shadow of doubt. Allegedly, the appellant was seen running away while throwing away the white sack containing the contraband for which spy information was received by the police party that the same was being sold. The sack was searched and from therein, the charas was found. The prosecution case hinges upon the recovery of said charas from the sack that was *allegedly*carried by the present appellant on receiving spy information with regard to the same. Besides the spy information, the prosecution has not been able to establish the presence of the appellant at the pointed out place with the white sack. Not only this, the prosecution has also failed to establish the fact as to whether the appellant, even if found having the sack, was in fact in conscious possession of the allegedly

recovered contraband or not. Although prosecution was duty bound to lead evidence to establish the same, no such evidence has been led by the prosecution to prove the above aspect of the case so as to make the appellant responsible for the commission of the crime. For safe administration of justice, law requires the Courts to be conscious of not the quantity of contraband but the quality of evidence. In cases of like nature, it is necessary that the prosecution attributes and proves special knowledge of the contraband material to the appellant.

10. There are also material contradictions in the evidence adduced by the prosecution in support of its case, more particularly the complainant SIP Syed Aftab Hussain Shahdeposed in his examination-in-chief that when they opened the sack, they found ten big pieces of charas and one small piece of charas, however in his cross-examination, he deposed that *"I see the case property and on counting there are 10 big pieces while three other pieces which are little."* This alone disproves any and all claims regarding the safe custody of the contraband as the one before the Court was in a greater number than that was allegedly recovered on the day of the incident. Furthermore, with regard to the description of the pieces of charas, HC Muneer Ahmed deposed that nothing was written on the pieces of charas, however when he was cross-examined, he deposed that *"I see the slabs of charas and it is written on the slabs as Afghanistan Cannt in golden words like monogram."*The complainant has stated during his examination in chief that he has tried to associate private person but they were not available although during his cross examination he deposed that people were present but no one was willing to act as mashir which is contradictory.

11. On close scrutiny of the testimonies of the aforesaid witnesses, it is revealed that not only have they made several improvements but have also contradicted themselves on material points

time and again. Moreover, it is also established and admitted by the prosecution itself that theyhad received spy information regarding the presence of the appellant. At this point, it is pertinent to note here that the raiding party had prior information of the incident however failed to join a private person to have him act as an independent witness of the recovery. The argument that the people of the vicinity refused to join in the recovery as witness appears to be unreasonable and does not appear to be reasonable. Even otherwise, the prosecution failed to explain as to why no private witness was joined prior to the incident. Section 103 Cr.P.C enjoins the officer or any other person who wants to make search of a place, to call upon, before making the search, two or more respectable inhabitants of the locality to attend and witness the search. The purpose of the same is to prevent chicaneries of the police. No doubt section 25 of the C.N.S.A. 1997 is an exception to the general rule under extra ordinary circumstances, yet necessity of employing private persons as mashirs cannot be overlooked wherever same is possible. This aspect of the case creates doubt in the prosecution case.

12. After going through the entire evidence, we have not been able to discover any connection of the appellant with the contraband in question as the prosecution has even failed to provide valid proof which would suggest that it was in fact in the appellant's possession. Even if the appellant is said to have been present at the place of incident, the brief presence of the appellant in the case could not be held to be enough to convict him where it was not proved through reliable evidence that the appellant was selling the contraband. Besides the above, nothing was recovered from the exclusive possession of the appellant which also raises further doubt regarding the guilt of the appellant. It is also pertinent to note here that the alleged recovered charas was sent to the chemical examiner on 28.11.2018 whereas the

recovery was made on 18.11.2018, establishing a considerable amount of delay in the transmission of the same. Moreover, nothing has been brought on record to establish the safe custody of the contraband, even the incharge of *malkhana* has not been examined to support and prove the safe custody during the intervening period and transmission of the same to the chemical examiner. According to the facts of the present case, it reveals that the chain of safe custody has been compromised and is no more safe and secure, thus, reliance cannot be placed on the report of chemical examiner to support conviction awarded to the appellant. In this respect, reliance may respectfully be placed on order dated; 06.01.2021 passed by the Honourable Apex Court in the case of Mst. Sakina Ramzan Vs. The State while deciding **Cr. Appeal No.184/2020**, placing reliance on the cases reported as **the State V. Imam Bux (2018 SCMR 2039)** and **Ikramullah and others V. The State 2015 SCMR 1002**. It also appears to be unreasonable to believe the fact that an accused who was empty handed succeeded in fleeing away from highly trained police officials who were also well armed and equippedwith official weapons. This casts further doubt on the prosecution case and is, on the face of it, repellant to the common sense.

13. The concept of benefit of doubt to an accused person is deep rooted in our country. For giving benefit of doubt, 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 will be entitled to the benefit not as a matter of grace and concession but as a matter of right. Such was the observation in the landmark judgment of the Hon'ble Apex Court reported as ***1995 SCMR 1345(Tariq Pervez v. The State)*** and has been time and again reiterated in numerous judgments.

Moreover, the Hon'ble Apex Court in the case reported as ***2008 SCMR 1527*** has been pleased to observe that:-

> '*It needs no reiteration that for the purpose of benefit of doubt to an accused person, more than one infirmity is not required,* ***a single infirmity creating reasonable doubt in the mind of a reasonable and prudent mind regarding the truth of the charge makes the whole case doubtful.*** *Merely, because the burden is on the accused to prove his innocence does not absolve the prosecution from its duty to prove its case against the accused beyond any shadow of doubt."*
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> ***(emphasis supplied)***

14. After going through the evidence of this case on the record, we have found that not even a sufficient iota of evidence had been produced by the prosecution to establish conscious possession of the recovered charas on the part of the present appellant.

15. For what has been discussed above, we are of the considered opinion that the prosecution has failed to establish the guilt of the appellant beyond reasonable shadow of doubt. Therefore, vide short order dated 01.12.2021, the impugned judgment dated 05.12.2019 was set aside; the appellant was acquitted of the charge and was ordered to be released forthwith if not required in any other custody case.

These are the reasons for the said short order even dated.

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