

Judgment Sheet

**IN THE HIGH COURT OF SINDH BENCH AT SUKKUR**

Special Criminal Appeal No. D – 35 of 2021

**Before:**

Mr. Justice Khadim Hussain Tunio  
Mr. Justice Omar Sial

**Appellant:** Qadir Bux Tanwri, through Mr. Abdul Waheed Bhanbhro, Advocate.

**Respondent:** The State, through Ms. Shabana Naheed, Assistant Prosecutor General.

**Date of hearing:** 09-06-2021

**Date of decision:** 09-06-2021

**J U D G M E N T**

**Khadim Hussain Tunio, J.** – Appellant Qadir Bux alias Qadroo son of Abdul Rehman Tanwri has impugned the judgment dated 25-03-2021, passed by the learned Additional Sessions Judge / Special Judge (CNS), Mirwah, in Sessions Case No.200 of 2020 (*Re. The State v. Qadir Bux*), arising out of FIR No.179 of 2020, registered at Police Station Mirwah, for offence punishable under Section 9(c) of Control of Narcotic Substances Act, 1997, whereby he was convicted and sentenced to suffer R.I for four years and four months and to pay fine of Rs.20,000/- or in case of default in payment of fine, to suffer S.I for three months more, however, with benefit of Section 382-B, Cr.P.C.

2. It is alleged that on 07-10-2020 at about 1130 hours, the appellant / accused was apprehended by the police party of Police Station Mirwah, which was headed by SIP Ahmed Khan and from possession of the appellant / accused, 1100 grams of *charas* and cash amount of Rs.100/- were secured, thus, the present FIR was registered.

3. After usual investigation, charge was framed against the appellant / accused, to which he pleaded not guilty and claimed to be tried.

4. The prosecution in order to substantiate the charge against the appellant / accused, examined in all three witnesses namely SIP Ahmed Khan Dasti (complainant), ASI Ali Hassan Mangrio (*mashir*) and SIP Ghulam Mustafa Jalbani (I.O), who produced numerous documents in their evidence. Subsequently, the prosecution side was closed.

5. Statement of the accused under Section 342, Cr.P.C, was recorded in which he denied all the allegations made against him by the prosecution and claimed to be innocent and false implication at the hands of police. The appellant / accused did not examine himself on oath in terms of Section 340(2), Cr.P.C to disprove the charge nor examined any witness in his defence.

6. Learned counsel for the appellant has contended that the appellant has been involved in this case malafidely by the police; that the impugned judgment is contrary to the law and facts, more so it is against the principle of natural justice; that the learned trial Court has failed to appreciate the evidence adduced by the prosecution; that no independent person from the locality, wherefrom the alleged recovery was made from the appellant, has been examined by the prosecution; that entries in the *roznamcha* with regard to depositing the sample in *malkhana* and taking out the same from there have not been produced; that the incharge of *malkhana* and PC who deposited the sample in the office of chemical examiner have not been examined; that there are many contradictions in the evidence of the prosecution witnesses on material points, which create doubt in the prosecution case and the appellant has succeeded to create doubt in the prosecution case.

7. On the other hand learned Assistant Prosecutor General appearing for the State has half-heartedly supported the conviction and sentence recorded by the learned trial Court while submitting that there are some minor contradictions and discrepancies, but the same can be ignored by this Court while deciding the Appeal against the conviction.

8. We have given due consideration to the arguments advanced by learned counsel for the respective parties and have perused the material brought on record.

9. We have scanned the evidence adduced by the prosecution and have reached the conclusion that prosecution has failed to establish the charge against the appellant in the light of infirmities and discrepancies. More particularly, complainant-SIP Ahmed Khan Dasti secured the narcotic substance from the possession of the appellant on 07-10-2020 under memo of recovery and handed over the same to I.O of the case. I.O-SIP Ghulam Mustafa Jalbani, during his cross-examination, has deposed that he handed over the case property to WHC, but he has admitted that no receipt in this regard has been produced by him in his evidence. Moreover, the I.O has failed to disclose the name of that WHC. Besides that WHC / incharge of *malkhana* was not examined by the prosecution in order to establish the safe custody of narcotic substance after its recovery. The report of chemical examiner contemplates that the narcotic substance was received by hand in the office on 12-10-2020 through PC Abid Hussain, whereas, the examination-in-chief of I.O of the case reveals that case property was sent by him to the chemical examiner so also received back through PC Shamsul Haq Jalalani, for which he has produced entries No.3 and 12 as Exhibit No.7/C. Even otherwise, PC Abid Hussain through whom the sample was transmitted to the chemical examiner has not been examined by the prosecution and the evidence of other PWs is silent that case property was lying at which place during intervening period of its recovery and transmitting to the chemical examiner through PC Abid Hussain. Moreover, neither the entry regarding depositing the property in the *malkhana* is produced nor has incharge of *malkhana* been examined by the prosecution. There is five days' unexplained delay in sending the sample to the chemical examiner and no plausible explanation has been furnished by the prosecution for such delay. 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 the order dated 06-01-2021 passed by the Hon'ble Supreme Court in the case of Mst. Sakina Ramzan v. The State while deciding **Criminal Appeal No.184 of 2020**, placing reliance on the cases reported as The State v. Imam Bakhsh (2018 SCMR 2039) and Ikramullah and others v. The State (2015 SCMR 1002).

10. Apart from the above infirmities in the prosecution case, we have carefully evaluated the evidence of the prosecution witnesses in which they have made so many contradictions in their evidence, which create 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 Control of Narcotic Substances Act, 1997, is an exception to the general rule under extraordinary circumstances, yet necessity of implying private persons as mashirs cannot be overlooked wherever same is possible. It is well 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 Tariq Pervez v. The State (1995 SCMR 1345).

11. In the light of the above discussion, reasons and circumstances, we are of the considered opinion that the prosecution has miserably failed to prove its case against the appellant beyond reasonable shadow of doubt, therefore, the benefit of such doubt in view of the above observations of the Hon'ble Apex Court is to be extended to the appellant / accused as a matter of right. Accordingly, by our short order dated 09-06-2021 the appeal was **allowed**; conviction and sentence recorded by the learned trial Court against the appellant, vide judgment dated 25-03-2021, were

set aside and the appellant was acquitted of the charge with direction to release him forthwith, if not detained in any other custody case. Above are the reasons of short order of even date.

J U D G E

J U D G E

Suleman Khan/PA