

IN THE HIGH COURT SINDH, CIRCUIT COURT, LARKANA
Criminal Jail Appeal No. D-29 of 2016

Present:

Justice Zafar Ahmed Rajput

Justice Adnan-ul-Karim Memon

Appellant : Azmat Ali s/o. Miskeen Khan Afridi,
through Mr. Rafique Ahmed K. Abro,
advocate

Respondent : The State, through Mr. Ali Anwar Kandhro
Addl. Prosecutor General, Sindh.

Date of Hearing : 08.07.2021
Date of Order : 08.07.2021

JUDGMENT

ZAFAR AHMED RAJPUT, J- Appellant Azmat Ali s/o. Miskeen Khan Afridi was booked in Crime No.32/2013, registered on 29.10.2013 at P.S. Jagan at Humayun, District Shikarpur under section 9(c) of the Control of Narcotic Substances Act, 1997 and after a regular trial under Special Case No.86 of 2014, he was convicted by the Sessions Judge, Shikarpur/ Judge Special Court For Control of Narcotic Substance for the said offence vide judgment, dated 13.05.2016, and sentenced to undergo imprisonment for life and to pay fine of Rupees One Million or, in default thereof, he should further suffer S.I. for one year more. Benefit of Section 382-B, Cr. P.C was however extended to him. Against that judgment, the instant criminal jail appeal has been preferred by the appellant.

2. Learned counsel for the appellant has contended that the impugned judgment is a result of misreading and non reading of the evidence on record; that the learned trial Court has failed to evaluate and assess the evidence and thus miserably failed to give due weight to it; that no recovery of contraband article has been effected from the possession of

the appellant and the alleged charas has been foisted upon him; that the complainant/I.O. SIP Nisar Ahmed of C.I.A. has conducted investigation without any lawful authority; that there are material contradictions in depositions of the P.Ws. which discredit their testimony and benefit thereof should have been given to appellant; that the prosecution has failed to prove the safe custody of the alleged recovered charas at the police station and its safe transmission to Chemical Analyst which fact alone is sufficient to create doubt in prosecution case and thus prosecution has failed to prove its case against the appellant beyond reasonable doubt; hence, the conviction and sentence recorded by the trial Court is liable to be set-aside.

3. On the other hand, learned A.P.G has fully supported the impugned judgment by maintaining that huge quantity of charas has been recovered from the truck, being driven by the appellant, by the C.I.A. police against whom the appellant has not pleaded any malice or enmity for his false implication in the case; that the contradictions in depositions of P.Ws and irregularity in investigation being minor in nature are liable to be ignored.

4. We have heard the learned counsel for the appellant as well as A.P.G. and scanned the material available on record with their assistance.

5. The case of the prosecution against the appellant, as per F.I.R. (*Ex:10/B*) is that, on 29.10.2013, complainant SIP Nisar Ahmed of C.I.A., Shikarpur proceeded from CIA Centre in a Government vehicle along with P.Cs. Bahadur Ali, Muhammad Ali, Abdul Rasheed, Akber Ali, Bashir Ahmed and driver P.C. Deedar Ali under Entry No.05 at 12:00 hrs. (*10/C*) for patrolling duty and reached Khuharo turn at the road leading from Shikarpur to Jacobabad where, at 1400 hrs., he saw a Bedford truck bearing registration No. RIH-5565 coming from Jacobabad. The appellant-truck driver on seeing police checking stopped the truck; three persons

alighted from it and ran away towards railway track, out of them, one was identified to be Sagheer Pathan. On checking, five bags lying in the cabin of the truck were recovered containing slabs of charas weighing total 191 Kilograms; so also, the driving license and C.N.I.C. of the appellant. The recovered charas was sealed and the appellant was arrested under memo of arrest and recovery (*Ex:10/A*) prepared at the spot in presence of mashirs P.Cs. Bashir Ahmed and Bahadur Ali; thereafter, the appellant was brought along with case property at police station Jagan @ Humayun where F.I.R. was lodged.

6. After going through the evidence brought on the record, we have observed that the complainant P.W-1 S.I.P. Nisar Ahmed of C.I.A. Centre, Shikarpur has conducted the investigation of the case illegally. He has deposed that after lodgment of the F.I.R., he pointed out the place of incident to SIO Ghulam Farooq Khuharo. He has further deposed that on 31.10.2013, the investigation was handed over to him by the order of the S.S.P., Shikarpur; P.W-3 Ghulam Farooq has deposed that on 29.10.2013, he was posted as A.S.I. in I.T. at P.S. Jagan at Humayun and A.S.I. Wahid Bux handed over him F.I.R. along with memo of recovery and custody of accused for investigation purpose. He has further deposed that on the same day he visited place of occurrence and prepared such memo of site inspection (*Ex. 11/A*) and, on 31.10.2013, he handed over the case papers to S.I.P. Nisar Ahmed for further investigation on the orders of S.S.P. Shikarpur. However, it is an admitted position that no order/letter of said S.S.P. has been brought on record to establish that the investigation of the case was in fact assigned to S.I.P. Nisar Ahmed of C.I.A. The investigation conducted by the said S.I.P. of C.I.A. was therefore illegal. As observed in the case of *State through Advocate-General, Sindh v. Bashir and others (PLD 1997 Supreme Court 408)*, *Iftikhar Ahmed alias Dani v. The State (PLD 1995 Lahore 606)* and *Wali Muhammad alias Waloo v. The State (1998 P. Cr. L J)*, under the provisions of section 156 of the Cr.P.C., it is

only an Officer-in-charge of a police station as defined under clause (p) of section 4 (*ibid*) is authorized to investigate a cognizable offence. The provisions of section 157 of the said Code, however, permit him to depute one of his subordinates to conduct an investigation which he is authorized to hold. It will, therefore, be noticed that the investigations of cognizable cases can be conducted, either by the S.H.Os. themselves or by only those subordinates police officials who are so deputed for the purpose by the concerned S.H.Os. No other police officer or official, irrespective of his rank and capacity, has any power to investigate a cognizable case. Various C.I.A. Staff established in the Province do not stand notified as police stations and consequently, no in-charge of the said Staff could come within the purview of an Officer in-charge of a police station as envisaged by the provisions of the Code of Criminal Procedure. The members of the C.I.A. Staff are subordinates of the Senior Superintendents of Police (S.S.P.) and Superintendents of Police (S.P.) of the District which S.S.P. or S.P. has the powers of an Officer-in-charge of a police station in view of the provisions of section 551 of the Cr.P.C. Therefore, the members of the C.I.A. Staff, irrespective of their rank and status, can investigate cases only when they have been entrusted to them by an Officer-in-charge of the police station to whom they are subordinate i.e. in case of C.I.A. Staff, the S.S.P. or S.P. of the District. Therefore, no member of the C.I.A. Staff has any authority or power to investigate a case of their own motion in the absence of such an investigation having been entrusted to him by the said superior officers the District, as abovementioned. Hence, in the instant case complainant S.I.P. Nisar Ahmed of C.I.A. has illegally conducted the investigation of the case of his own motion causing serious prejudice to the appellant. Such illegal act of said official has vitiated trial.

7. We have also observed that in case in hand the prosecution has failed to prove the safe custody of the recovered charas and its safe transmission to Chemical Examiner. In this regard, P.W-3 S.I.O Ghulam

Farooq of P.S. Jagan in his cross-examination has admitted that the case property was not handed over to him, which fact leads to inference that when the P.W-1 S.I.P. Nisar Ahmed of C.I.A brought the accused at P.S. Jagan, the case property was not available with him. Besides, the recovery of charas was allegedly effected on 29.10.2013 and the case property was sent for chemical analysis on 31.10.2013. In this regard, P.W-1 S.I.P. Nisar Ahmed of C.I.A. has also deposed that he sent the case property to Chemical Examiner through H.C. Mehar Ali. Such assertion of the said P.W. does not find support from the report of chemical examiner (*Ex. 10/E*) which reflects that the case property was in fact sent to the office of Chemical Examiner by the S.H.O., P.S. Jagan through RC No. 91, dated 31.10.2013, by the hand of P.C. Mehar Ali. It is not known as to where and in whose possession the alleged case property was kept during intervening period. Neither PW-1 SIP Nisar Ahmed of C.I.A. nor P.W-3 S.I.O Ghulam Farooq of P.S. Jagan has furnished in his evidence any detail regarding safe custody of the case property. No evidence is available on record to prove the safe custody of the case property either at the C.I.A. Centre, Shikarpur or at P.S. Jagan and its safe transmission from such place to the office of Chemical Examiner. Even it is not known in whose custody the case property was lying. Prosecution has neither examined the in-charge *Malkhana*, if the case property was lying at P.S., nor P.C. Mehar Ali who took the case property to chemical examiner to establish the fact that the case property from the day of its recovery to the day of its deposition with the chemical examiner was lying in safe custody. It has been held by the Apex Court in the cases of *Abdul Ghani and others v. The State and others* (2019 SCMR 608), *Faizan Ali v. The State* (2019 SCMR 1649), *The State through Regional Director ANF v. Imam Bukhsh and others* (2018 SCMR 2039), *Ikramullah and others v. The State* (2015 SCMR 1002) and *Amjad Ali v. The State* (2012 SCMR 577) that in a case where safe custody of the recovered substance or safe transmission of sample of

the recovered substance is not proved by the prosecution through any independent evidence, it cannot be said with any degree of confidence that the prosecution had succeeded in proving its case against an accused beyond reasonable doubt.

8. In view of above facts and reasons, we are of the considered view that the prosecution has in fact failed to prove its case against the appellant beyond reasonable doubt. It is settled principle of law that for basing conviction against the accused there should be strong evidence before the Court and if doubt even slightest arises in the prudent mind as to the guilt of the accused, benefit of the same has to be extended in favour of the accused. This appeal is, therefore, allowed. Consequently the conviction and sentence of the appellant Azmat Ali s/o. Miskeen Khan Afridi are set aside and he is acquitted of the charge by extending benefit of doubt to him. He shall be released from the jail forthwith, if not required to be detained in connection with any other case.

9. Above are the reasons of our short order dated 08.07.2021.

Judge

Judge