

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

Criminal Appeal No. D- 22 of 2021

PRESENT:

Mr. Justice Salahuddin Panhwar.
Mr. Justice Zulfiqar Ahmed Khan.

Appellant : Mukhtiar Ali s/o Islam Shah by caste Syed (on bail) through Mrs. Razia Ali Zaman Khan Patoli, Advocate.

Respondent : The State
through Mr. Muhammad Ali Noonari, Deputy
Prosecutor General, Sindh.

Date of hearing : 12.04.2022

Date of judgment : 12.04.2022

J U D G M E N T

ZULFIQAR AHMED KHAN, J: Appellant Mukhtiar Ali was tried by learned Special Judge for CNS/MCTC, Tando Muhammad Khan in Special Case No. 05 of 2020, arising out of Crime No.23/2020 registered at Police Station Tando Ghulam Hyder for offence under Section 9(C) Control of Narcotic Substance Act, 1997. Vide judgment dated 27.01.2021, the appellant / accused was convicted u/s 9(C) of CNS Act 1997 and sentenced to suffer R.I for 04 years and 06 months and to pay the fine of Rs.20,000/-. In case of default in payment of fine, appellant was ordered to suffer SI for 05 months more. Benefit of Section 382-B Cr.P.C. was however extended to the appellant.

2. The relevant facts of the prosecution case as disclosed in the judgment of trial court reads as under:-

“It is alleged that; on 08.03.2020 at about 1500 hours from Mataro Kario Ghangwar main road near Haji Esso Khan Stop, present accused was found in possession of 1170 grams of contraband charas, by police of PS Tando Ghulam Hyder, headed by SIP Adam Khan Khushk, for which present case was registered.”

3. During investigation 161 Cr.P.C. statements of the PWs were recorded, recovered substance was sent to the chemical examiner, positive report was received. On the conclusion of investigation, challan was submitted against accused under the above referred Section of CNS Act, 1997.

4. Trial Court framed charge against accused u/s 9(C) of CNS Act, 1997 at Ex.2, to which, he pleaded not guilty and claimed to be tried.

5. At the trial, prosecution examined PW-1 complainant SIP Adam Khan Khushk at Ex.4, who produced departure entry No.10, mashirnama of arrest and recovery, arrival entry, FIR, property register No.19 bearing serial No.14, entries No.3 and 4 showing departure of HC Imtiaz Ali to the office of chemical examiner and returned to PS, letter addressed to chemical examiner and chemical report at Ex.4/A to 4/I respectively. PW-2 PC Abdul Jabbar (mashir) at Ex.5. PW-3 WHC Altaf Hussain at Ex.06 and PW-4 HC Imtiaz Hussain at Ex.7. Thereafter, prosecution side was closed at Ex.8.

6. Statement of accused was recorded u/s 342 Cr.P.C. at Ex.9, in which accused claimed false implication in this case and denied the prosecution allegations. Appellant however, neither examined himself on Oath nor produced any evidence in his defence to disprove the prosecution allegations

7. Learned Special Judge after hearing the learned counsel for the parties and examining the evidence available on record, through its judgment dated 27.01.2021 convicted and sentenced the appellant as stated supra.

8. Facts of the prosecution case as well as evidence find an elaborate mention in the judgment of the trial court as such there is no need to repeat the same to avoid unnecessary repetitions.

9. We have heard Mrs. Razia Ali Zaman Khan, Advocate for appellant, Mr. Muhammad Ali Noonari, Deputy Prosecutor General for the State and perused the entire evidence minutely with their assistance.

10. Learned advocate for appellant has mainly argued that appellant is innocent and has falsely been implicated in the case in hand. She argued that the prosecution story was un-natural and unbelievable. It is also argued that though the place of incident was a thickly populated

area but police did not associate any private person to act as mashir nor even they made any effort in this regard. Learned counsel argued that alleged recovery of charas was affected from the accused on 08.03.2020 but the sample was received by the office of chemical examiner on 11.03.2020 i.e. after the delay of three days and safe custody of charas at Malkhana and its safe transit during that intervening period has not been established at trial. She next submitted that there are also material contradictions in the evidence of prosecution witnesses which have not been considered by the trial court. On the point of safe custody and safe transit, learned counsel for the appellant has placed reliance on the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)* and *TARIQ PERVEZ V/S. THE STATE (1995 SCMR 1345)*.

11. On the other hand, learned Deputy Prosecutor General opposed the appeal on the ground that appellant has been apprehended by police having been found in possession of 1170 grams charas. He further contended that at hand is a crime against society and is increasing day by day. Lastly, it is argued that though there are minor contradictions in the evidence of prosecution witnesses but the same are not fatal to the case of prosecution. He prayed for dismissal of the appeal.

12. We have carefully heard the learned counsel for the parties and scanned the entire evidence in the light of case law cited by the counsel for the appellant.

13. In our considered view, prosecution has failed to prove its' case against the appellant for the reasons starting that per FIR the complainant party was on patrolling and during patrolling they saw the present appellant standing on the main road leading from Mataro-Kario Ganhwar near Haji Esso Khan stop having black colour shopper in his hand who was apprehended and recovery of 1170 grams of charas was affected from his possession. It has come on record that the accused was arrested from main road leading from Mataro-Kario Ganhwar near Haji Esso Khan stop which is a populated area and the complainant / SIP Adam Khan had sufficient time to call the independent persons of the locality to witness the recovery proceedings but it was not done by him for the reasons best known to him and only the police officials who are subordinates to him were made as mashirs of arrest and recovery proceedings. It is settled principle that judicial approach has to be a conscious in dealing with the cases in which entire testimony hinges upon the evidence of police officials alone. We are conscious of the fact

that provisions of Section 103 Cr.P.C are not attracted to the cases of personal search of accused in narcotic cases but where the alleged recovery was made on a road (as has happened in this case) and the peoples were available there, omission to secure independent mashirs, particularly, in police case cannot be brushed aside lightly by this court. Prime object of Section 103 Cr.P.C is to ensure transparency and fairness on the part of police during course of recovery, curb false implication and minimize the scope of foisting of fake recovery upon accused. There is also no explanation on record why no any independent person from the vicinity has been joined to witness the recovery proceedings. No doubt police witnesses were as good as other independent witnesses and conviction could be recorded on their evidence, but their testimony should be reliable, dependable, trustworthy and confidence worthy and if such qualities were missing in their evidence, no conviction could be passed on the basis of evidence of police witnesses. But here in this case, we have also noted number of contradictions in between the evidence of prosecution witnesses which cannot be easily brushed aside. Above conduct of the police shows that investigation has been carried out in a casual and stereotype manner without making an effort to discover the actual facts/truth.

14. Apart from above, it has also come on record that the Malkhana entry does not have the signature of Malkhana incharge. There are also discrepancies and flaws in the evidence of complainant and mashir of arrest and recovery. The complainant in his cross examination has admitted that **“It is correct to suggest that Exh:4/B does not mention sizes and shapes of the chunks of charas so allegedly recovered from the accused person.”** He further admitted that **“It is correct to suggest that Article-B does not bear any inscription.”**

15. We have also noticed that according to the statement of complainant (PW-1), he recovered the narcotics from appellant on 08.03.2020 and prepared the memo of arrest and recovery and deposited the same in Malkhana. The Report of Director Laboratories & Chemical Examiner (Ex-4/I) reveals that the charas was received by hand in the office on 11.03.2020 through HC Imtiaz Ahmed after the delay of three days but evidence on the record is silent that where the same remained for three days from 08th March 2020 to 11th March 2020. Similarly, evidence regarding safe transmission of alleged recovered narcotics to the laboratory for chemical analysis is also missing. The law

in this regard is settled by now that if safe custody of narcotics and its transmission through safe hands is not established on the record, same cannot be used against the accused. It is also an established position that the chain of custody or safe custody and safe transmission of narcotics begin with seizure of the narcotic by the law enforcement officer, followed by separation of the representative samples of the seized narcotic, storage of the representative samples with the law enforcement agency and then dispatch thereof to the office of the Chemical Examiner for examination and testing. This chain of custody must be safe and secure. Such is because, the Report of Chemical Examiner enjoys very critical and pivotal importance under CNS Act and the chain of custody ensures that correct representative samples reach the office of the Chemical Examiner. Any break or gap in the chain of custody i.e., in the safe custody or safe transmission of the narcotic or its representative samples makes the report of the Chemical Examiner fail to justify conviction of the accused. The prosecution, therefore, is to establish that the chain of custody has remained unbroken, safe, secure and indisputable in order to be able to place reliance on the report of the Chemical Examiner. However, the facts of the present case reveal that the chain of custody has been compromised at more than one occasion, therefore, reliance cannot be placed on the report of the Chemical Examiner to support conviction of the appellant. All such factors suggest the false implication of appellant in this case which cannot be ruled out.

16. It is the matter of record that the charas was recovered from possession of accused on 08.03.2020 and was kept in Malkhana but it has not been proved that it was a safe transit case. On the point of safe custody of charas and its safe transit, the counsel has rightly placed reliance on the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*, the relevant portion thereof is reproduced hereunder:-

“5. In the case in hand not only the report submitted by the Chemical Examiner was legally laconic but safe custody of the recovered substance as well as safe transmission of the separated samples to the office of the Chemical Examiner had also not been established by the prosecution. It is not disputed that the investigating officer appearing before the learned trial court had failed to even to mention the name of the police official who had taken the samples to the office of the Chemical Examiner and admittedly no such police official had been produced before the learned

trial Court to depose about safe custody of the samples entrusted to him for being deposited in the office of the Chemical Examiner. In this view of the matter the prosecution had not been able to establish that after the alleged recovery the substance so recovered was either kept in safe custody or that the samples taken from the recovered substance had safely been transmitted to the office of the Chemical Examiner without the same being tampered with or replaced while in transit."

17. In our considered view, prosecution has failed to prove that the charas was in safe custody for the aforementioned period. Even positive report of the chemical examiner would not prove the case of prosecution. There are also several circumstances which created doubt in the prosecution case. It is settled law that it is not necessary that there should be 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 case of 'Tariq Parvez v. The State' [1995 SCMR 1345] wherein it has been held by Honourable Supreme Court of Pakistan that:

"For giving benefit of doubt to appellant it is not necessary that there should be many circumstances creating doubts. 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 matter of right".

18. For the aforementioned reasons, we have no hesitation to hold that the prosecution has miserably failed to prove its case against the appellant / accused. Resultantly, by our short order dated 12.04.2022, the conviction and sentence recorded by the trial court vide judgment dated 27.01.2021 was set aside and the appeal was allowed. Appellant Mukhtiar Ali was acquitted of the charge. Appellant was on bail, his bail bond was cancelled and surety discharged.

Above are the reasons of said short order.

JUDGE

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