

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

Criminal Appeal No. D- 150 of 2021

PRESENT:

Mr. Justice Salahuddin Panhwar.

Mr. Justice Zulfiqar Ahmed Khan.

Appellant : Muhammad Uris s/o Wahid Bux by caste Mari through Mr. Mian Taj Muhammad Keerio, Advocate.

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

Date of hearing : 19.04.2022

Date of judgment : 19.04.2022

J U D G M E N T

ZULFIQAR AHMED KHAN, J: Appellant Muhammad Uris alongwith co-accused Aijaz @ Fouji (since acquitted) was tried by learned Judge Special Court for Narcotics, Umerkot in Special Case No. 26 of 2021, arising out of Crime No.30/2021 registered at Police Station Samaro for offence under Section 9(C) Control of Narcotic Substance Act, 1997. Vide judgment dated 17.11.2021, the appellant / accused was convicted u/s 9(C) of CNS Act 1997 and sentenced to suffer R.I for 07 years and to pay the fine of Rs.5,00,000/- (Five lac). In case of default in payment of fine, appellant was ordered to suffer SI for 02 years more. Benefit of Section 382-B Cr.P.C. was however extended to the appellant. While accused Aijaz @ Fouji was acquitted by the same judgment while extending him benefit of doubt.

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

“Concisely the facts of the prosecution case as per FIR are that on 26.03.2021 at 2345 hours, complainant ASI Fateh Ali Khaskheli, of P.S Samaro lodged FIR at P.S Samaro, wherein he has alleged that on the day of incident, he alongwith his subordinate staff left P.S in police mobile vide entry NO.22 at 2200 hours for patrolling in the area. After patrolling at different places they reached at Rajwah Mori situated on Samaro-Bachaband road at 2300 hours, where they saw on head light of vehicle two persons were standing on the Mori, who seeing police party tried to escape towards

western side but one of them was apprehended by PC Omperkash while other succeeded in escaping by taking advantage of darkness. On inquiry apprehended person disclosed his name as Muhammad Uris son of Khuda Bux Mari, resident of village Sarhil Mori near Khahi Taluka Khipro District Sanghar. Being suspected they conducted personal search and from the right side fold of shalwar recovered a black colour shopper containing one big piece of charas. Due to non availability of private persons complainant appointed PC Omperkash and PC Ali Hassan as mashirs and conducted weight of charas which become 1010 grams. Accused Muhammad Uris further disclosed that escaped accused was Aijaz @ Fouji Mari resident of Sarhil Mori near Khahi Taluka Khipro District Sanghar. Complainant sealed charas for chemical analysis and also conducted further search of accused and recovered 16 currency notes of Rs.50/- each total Rs.800/-, such memo of arrest and recovery was prepared, thereafter accused and case property were brought at P.S, where complainant lodged the FIR on behalf of the state.”

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, they pleaded not guilty and claimed to be tried.

5. At the trial, prosecution examined PW-1 complainant ASI Fateh Ali at Exh.3, he has produced departure, memo of arrest and recovery and FIR at Exh.3-A to 3-C respectively, PW-2 PC Omperkash was examined at Exh.4, he produced memo of inspection at Exh.4-A, PW-3 SIP Ranchho Mal was examined at Exh.5, he produced entry of Malkhana Register-19, departure and arrival entries, receipt and report of chemical examiner at Exh.5-A to 5-F. Thereafter prosecution side was closed vide statement at Exh.6.

6. The statements of accused u/s 342 Cr.P.C, were recorded at Exhs.7 and 8, wherein they denied the prosecution allegations and claimed to be innocent. Accused Aijaz @ Fouji did not examine himself on Oath, however, accused Muhammad Uris examined one Peer Bux

Solangi in his defence as DW-1 at Exh.09. Thereafter, learned defence counsel closed the side of defence evidence vide statement at Exh.10.

7. Learned Special Judge after hearing the learned counsel for the parties and examining the evidence available on record, through its judgment dated 17.11.2021 convicted and sentenced the appellant Muhammad Uris and acquitted co-accused Aijaz @ Fouji 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 Mr. Mian Taj Muhammad Keerio, Advocate for appellant, Mr. Muhammad Noonari, Deputy Prosecutor General for the State and perused the entire evidence minutely with their assistance.

10. Learned advocate for appellant has mainly contended that appellant is innocent and has falsely been implicated in the case in hand. He 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. He next submitted that chemical report is not issued on the prescribed proforma. Learned counsel argued that alleged recovery of charas was affected from the accused on 26.03.2021 but it was sent to the office of chemical examiner on 01.04.2021 i.e. after the delay of about six days and safe custody of charas at Malkhana and its safe transit during that intervening period has not been established at trial. He next submitted that there are also material contradictions in the evidence of prosecution witnesses which have not been considered by the trial court while passing the impugned judgment. 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 on the benefit of doubt he has placed reliance on the case of *TARIQ PERVEZ V/S. THE STATE (1995 SCMR 1345)*.

11. On the other hand, learned Deputy Prosecutor General supported the impugned judgment on the ground that appellant has been apprehended by police having been found in possession of 1010 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 when they reached at Rajwah Mori situated on Samaro-Bachaband road, they saw the present appellant alongwith acquitted accused standing on the Mori having black colour shopper in his hand who was apprehended and recovery of 1010 grams of charas was affected from his possession while co-accused Aijaz @ Fouji succeeded in running away. It has come in evidence that the accused was arrested from Rajwah Mori situated on Samaro-Bachaband road which is a populated area and the complainant ASI Fateh Ali Khaskheli 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), 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, 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 I have not mentioned the description of accused Aijaz in the memo of arrest and recovery as well as in the FIR.”** He further admitted that **“It is correct to say that the charas lying in court is one slab and not piece.”** The I.O of the case SIP Rancho Mal has also admitted in his cross examination by saying that **“It is correct to say that I had not recorded 161 Cr.P.C statement of Incharge of Malkhana.”** We have also noticed that there is some overwriting in the letter dated 01.04.2021 submitted by SHO PS Samaro to the Chemical Examiner. The said letter further shows **“one white cloth shopper having three seals whereas the report of Chemical Examiner on physical examination shows 01 sealed cloth parcel containing black plastic shopper”**. Furthermore, no any customer was found over there for the purpose of selling or purchasing the charas. The appellant Muhammad Uris has also taken plea in his statement recorded u/s 342 Cr.P.C that on the day of incident he was present in village Saleh Bhambhro alongwith Peer Bux Solangi and in his defence he has also examined said Peer Bux to support his version.

15. We have also noticed that according to the statement of complainant (PW-1), he recovered the narcotics from appellant on 26.03.2021 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 01.04.2021 through SHO PS Samaro after the delay of about six days but evidence on the record is silent that where the same remained for six days from 26.03.2021 to 01.04.2021. 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 26.03.2021 and was kept in Malkhana but incharge of the Malkhana has not been examined before the trial court and 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 19.04.2022, the conviction and sentence recorded by the trial court vide judgment dated 17.11.2021 was set aside and the appeal was allowed. Appellant Muhammad Uris was acquitted of the charge. Appellant was produced in custody. He was ordered to be released forthwith if not required in any other custody case.

Above are the reasons of said short order.

JUDGE

Dated. 21.04.2022.

JUDGE

Tufail

