

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

Cr. Appeal No. D-15 of 2022.

***Present:***

***MR. JUSTICE KHADIM HUSSAIN TUNIO.***

***MR. JUSTICE ZULFIQAR ALI SANGI.***

Appellant: Zubair Ahmed through Mr. Ghazi Salahuddin Panhwar advocate.

Respondent: The State through Mr. Shewak Rathore D.P.G.

Date of hearing: 02.082022.

Date of decision: 04.082022.

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

**ZULFIQAR ALI SANGI, J:-** By this judgment, we intend to dispose of captioned Cr. Appeal No.D-15 of 2022 filed by appellant Zubair Ahmed against the judgment dated 07.02.2022, passed by Special Judge, CNS Tando Allahyar in Special Case No. 27 of 2021 re: (State vs. Zubair Ahmed) arising out of F.I.R. No.132 of 2021 for the offence under section 9 (C) of CNS Act, 1997, registered at Police Station, A-Section, Tando Allahyar, whereby the appellant was convicted and sentenced to suffer R.I. for four (04) years and six (06) months and to pay fine of Rs.20,000/- and in case of default thereof to suffer SI for five (05) months more. The benefit of section 382-B, Cr.P.C. was extended to the appellant.

2. Brief facts as enumerated in the F.I.R. are that the complainant along with his subordinate staff were on patrolling duty under Roznamcha entry No.35 at 1700 hours on 28.09.2021 in a government vehicle No.SPD-853. During patrolling, when they reached Baqa Dahri Chowk, they saw a person standing on the left side of the road having a black colour plastic shopper. Having seen the police party, he tried to run, but the police party stopped their police van, alighted from it and apprehended him along with the shopper. On enquiry, he disclosed his name to be Zubair Ahmed son of Khair Muhammad by caste Panhwar resident of Deeno Colony Chambar road Tando Allahyar. The black colour shopper was checked and found 02 large pieces of chars. Police weighed the chars, it was (1040 grams). Thereafter, recovered pieces of chars were separately sealed as the sample, at a spot for chemical examination.

SIP prepared such mashirnama of arrest and recovery at the spot. Accused and the recovered case property were brought to PS A-Section, Tando Allahyar, where instant F.I.R. was registered against the accused.

3. After completion of the investigation, I.O submitted challan before the Court for disposal according to law. Copies of the case papers were supplied to the accused and the charge was framed to which he pleaded not guilty and claimed trial.

4. The prosecution, in order to substantiate the charge against the accused, examined PW-1 SIP Aftab Ahmed Abbasi at Ex.3, who produced departure and arrival entry at Ex.3/A, memo of arrest and recovery at Ex.3/B, F.I.R. at Ex.3/C, Maal Khana entry at Ex.3/D, departure and arrival entry for site inspection at Ex.3/E, memo of site inspection at Ex.3/F, departure and arrival entry of PC Deen Muhammad at Ex.3/G, letter to the chemical examiner at Ex.3/H, chemical examiner report at Ex.3/I, PW-2 Nazakat Ali at Ex.4, PW-3 WHC Kareem Bux Kalroo at Ex.05, PW-4 HC Deen Muhammad at Ex.06. Thereafter learned DDPP for the State closed the side of prosecution vide statement at Ex.08.

5. Statement of the appellant / accused u/s 342 Cr. P.C was recorded at Ex. 09 in which he denied the allegations levelled against him by the prosecution. Accused did not examine himself on oath, however, he examined defence witness namely Ghulam Farooque at Ex.10. After hearing the learned counsel for the parties, the trial Court passed the judgment as stated supra.

6. Learned counsel for the appellant contended that there are major contradictions in the evidence of PWs and in presence of such major contradictions the sentence awarded to the appellant is not sustainable; that the impugned judgment is illegal and void as it has been passed by misreading and non-reading of evidence on record; that neither there was strong ocular evidence of witnesses nor any material which could be relied on for awarding conviction, but the trial Court did not consider such aspect of the matter and haphazardly convicted the appellant; that the complainant himself acted as I.O. of the case; that it is a matter of record that the complainant arrested the appellant from a busy road which is even otherwise admitted by the witness, but despite that he failed to

associate private witness and no reason has been shown in the memo regarding the non-association of private witness; that there is six days delay in dispatching the sample to the chemical examiner, which has not been explained properly; that appellant is shown to have been arrested in the day time and it would be impossible that no private person was available on the spot though complainant, as well as mashir, admitted that place of incident is thickly populated area; that the impugned judgment passed by trial Court is based on conjectures, surmises as it suffers from material illegality and infirmities in the said judgment, therefore, the same is liable to be set aside and the appellant may be acquitted from the charge.

7. On the other hand, learned D.P.G. supported the case of prosecution by contending that there are no material contradictions in the evidence of PWs; that the complainant/I.O and mashirs have fully supported the case of the prosecution and despite lengthy cross-examination, the evidence of complainant/I.O and mashir remained firm on material points; that safe custody of the charas in the malkhana and its safe transmission for chemical examination has been proved by the prosecution by examining the incharge of malkhana and the person who deposited the property in the laboratory; that the prosecution has proved its case against the appellant beyond any shadow of reasonable doubt, therefore, he prayed for dismissal of this appeal.

8. We have heard learned counsel for the appellant and the state counsel and have gone through the material available on the record with their able assistance.

9. On scanning the entire evidence produced by the prosecution in respect of the recovery, safe custody and its safe transmission for chemical analysis of the charas we are of the view that the prosecution failed to prove the safe custody and its transmission for chemical examination. The complainant/investigation officer PW-1 SIP Aftab Ahmed deposed that he deposited the case property in the malkhana under the roznamcha entry and on 04-10-2021 he sent the same through HC Deen Muhammad. PW-3 Kareem Bux (Incharge of malkhana) deposed that on 04-10-2021 he took out the property from the malkhana and handed it over to HC Deen Muhammad for sending the same to the chemical examiner. Both the witnesses

claimed to hand over the property to HC Deen Muhammad which is not possible and it established that one of them is telling a lie. Even otherwise their claim in respect of handing over the contraband to HC Deen Muhammad on 04-10-2021 has not been supported by HC Deen Muhammad PW-4 who deposed that he received the case property from WHC on 28-09-2021 and went to chemical examiner Karachi along with case property. PW-4 during cross-examination stated that on 04-10-2021 he went for the chemical examiner and at that time he was carrying 3/4 properties of different cases, he does not explain as to where he kept the contraband (charas) of the present case from 28-09-2021 to 04-10-2021. The Honourable Supreme Court of Pakistan in the recent Judgment dated: 02-06-2022 in the case of **Qaiser and another v. The State** (Jail Petition No. 587 OF 2016 A/W Cr1 . S.M.R.P No.14 OF 2022), has observed that *“The chain of custody of sample parcels begins from the recovery of the narcotics by the police including the separation of representative samples of the recovered narcotics, their dispatch to the MaIkhana and further dispatch to the testing laboratory. The said chain of custody and transmission was pivotal as the entire construct of the Act 1997 and the Control of Narcotic Substances (Government Analysts) Rules 2001 (Rules 2001), rests upon the report of the analyst. It is prosecution's bounded duty that such chain of custody must be safe and secure because the report of chemical examiner enjoined critical importance under the Act 1997, and the chain of custody ensure the reaching of correct representative samples to the office of chemical examiner. Any break in the chain of custody i.e. the safe custody or safe transmission of the representative samples, makes the report of chemical examiner worthless and un-reliable for justifying conviction of the accused. Such laps on the part of the prosecution would cast doubt and would vitiate the conclusiveness and reliability of the report of chemical examiner.”* Reliance was also made upon the cases of **Ikramullah v. The State (2015 SCMR 1002)**, **The State v. Imam Bakhsh (2018 SCMR 2039)**, **Abdul Ghani v. The State (2019 SCMR 608)**, **Kamran Shah v. The State (2019 SCMR 1217)**, **Mst. Razia Sultana v. The State (2019 SCMR 1300)**, **Faizan Ali v. The State (2019 SCMR 1649)**, **Zahir Shah alias Shat v. State through AG KPK (2019 SCMR 2004)**, **Haji Nawaz v. The State (2020 SCMR 687)**, **Qaiser Khan v. The State (2021 SCMR 3631)**, **Mst. Sakina Ramzan v. The State (2021 SCMR 451)**, **Zubair**

***Khan v. The State (2021 SCMR 492) and Gulzar v. The State (2021 SCMR 380).***

10. It is settled by now that the prosecution is bound to prove its case against the accused beyond any shadow of reasonable doubt, but no such duty is cast upon the accused to prove his innocence. It has also been held by the Superior Courts that conviction must be based and founded on unimpeachable evidence and certainty of guilt, and any doubt arising in the prosecution case must be resolved in favour of the accused. Several aspects of the case have raised numerous doubts in the prosecution case, benefit of which must go to the accused. It is well settled principle regarding dispensation of 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 ***Tarique Pervez v. The State (1995 SCMR 1345)***.

11. Thus based on the particular facts and the circumstances of the present case and by relying on the above precedents of the Apex Courts, we are of the view that the prosecution has failed to prove the case against the appellant beyond a reasonable doubt by producing reliable, trustworthy and confidence-inspiring evidence. Therefore, we allow the instant appeal, set aside the impugned judgment dated 07-02-2022, passed by the learned Special Judge (CNSA) Tando Allahyar in Special Narcotics case No. 27 of 2021 arising out of FIR No. 132 of 2021, P.S A- section Tando Allahyar for the offence under section 9 (c) CNS Act, 1997, and acquit the appellant Zubair Ahmed s/o Khair Muhammad by caste Panhwar from the charges by extending him the benefit of the doubt. He shall be released forthwith if not required in any other custody case.

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