

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

Criminal Appeal No. D- 147 of 2021

**PRESENT:**

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

Appellant : Abdul Nasir s/o Muhammad Usman  
Makrani Baloch  
Through Mr. Ayaz Hussain Tunio, Advocate

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

Date of hearing : 22.03.2022  
Date of judgment : 22.03.2022

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

***ZULFIQAR AHMED KHAN, J:*** Appellant Abdul Nasir was tried by learned Special Judge for CNS, Tando Allahyar in Special Case No. 12 of 2021, emanating from Crime No.43/2021 registered at Police Station Umar Sand for offence under Section 9(c) Control of Narcotic Substance Act, 1997. Vide judgment dated 09.11.2021, the appellant / accused was convicted u/s 9(c) of CNS Act 1997 and sentenced to suffer R.I for 05 years and 06 months and to pay the fine of Rs.25,000/-. In case of default in payment of fine, appellant was ordered to suffer SI for five months more. Benefit of Section 382-B Cr.P.C. was extended to the appellant.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 24.07.2021 vide roznamcha entry No.23 at 1730 hours, police party of P.S Umar Sand left the police station for patrolling in government vehicle. After patrolling from the different places when they reached at Keeria Shakh stop, they received spy information that the present appellant is selling Charas at the link road village Murad Baloch near katcha path of banana crop. On receipt of such information they proceeded to the pointed place and saw that one person was sitting near

Banana pavement under the tree having one black color large shopper in his hand, who on seeing the police party tried to slip away but was apprehended alongwith aforesaid black shopper at the spot. On enquiry he disclosed his name to be Abdul Nasir son of Muhammad Usman by caste Makrani Baloch resident of village Murad Baloch Taluka Jhando Mari. Black shopper was checked where 3 big pieces of charas were found in it. Police weighed the charas, it turned out to be 3000 grams i.e. 3 kilograms. On further search of the accused, police secured three currency notes of Rs.100/- total Rs.300/- from his right side pocket. Thereafter recovered charas was separately sealed after taken sample at the spot for chemical examination. ASI Murad Ali Birhamani prepared mashirnama of arrest and recovery at the spot. Accused and the case property were brought to police station where the subject FIR was lodged against him on behalf of the State.

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

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 ASI Murad Ali Birhamani at Ex.03, who produced departure entry, memo of arrest and recovery, FIR, arrival entry and Malkhan entry at Ex.3/A to 3/E respectively. PW-2 HC Mir Muhammad at Ex.04, who produced memo of site inspection at Ex.4/A. PW-3 WASI Shah Muhammad at Ex.5. PW-4 SIP Allah Bachayo Shoak at Ex.6, who produced the roznamcha entry No.32 for receiving investigation from SHO, departure and arrival entry for site inspection at, departure and arrival entry of HC Ameer Bux, letter of FSL at, FSL report and C.R.O of accused at Ex.6/A to 6/F respectively. PW-5 HC Ameer Bux 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. Regarding positive report of chemical examiner, accused replied that it has been managed by police. Appellant stated that PWs are interested. He further stated that he has been falsely implicated in this case by the police due to enmity with Muhammad

Sharif, Gul Muhammad, Muhammad Hashim and others. His cousin had registered FIR against Muhammad Hashim at P.S Umar Sand as he was injured in that case. Appellant did not examine himself on Oath in disproof of the prosecution allegations nor led any evidence in defence.

7. Learned Special Judge after hearing the learned counsel for the parties and examining the evidence available on record, by judgment dated 09.11.2021 convicted and sentenced the appellant as stated above.

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 repetition.

9. We have heard Mr. Ayaz Hussain Tunio, Advocate for appellant, Mr. Shewak Rathore, Deputy Prosecutor General for the State and perused the entire evidence minutely.

10. Mr. Tunio, 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. He further argued that appellant has been falsely implicated in the case in hand by police on account of his enmity with Muhammad Sharif and others and such defence plea has been taken by him in his statement recorded u/s 342 Cr.P.C. Learned counsel argued that after recovery of charas from the accused, it was sent to the chemical examiner on 29.07.2021 i.e. after five days and safe custody of the charas at Malkhana and its safe transit have not been established at trial. He further contended that there are material contradictions in the evidence of prosecution witnesses. On the point of safe custody and safe transit, learned counsel for the appellant has placed reliance on the case of *TARIQ PERVEZ V/S. THE STATE (1995 SCMR 1345)*, and *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*.

11. Mr. Shewak Rathore, Deputy Prosecutor General, appearing for the State opposed the appeal and argued that appellant has rightly been convicted by the trial court. He further contended that there are minor contradictions in the evidence of prosecution witnesses which are not fatal to the case of prosecution.

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 utterly failed to prove its' case against the appellant for the reasons that it was the case of spy information when complainant / ASI 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. It has come in cross examination of complainant that there was Madarassa nearby the place of arrest and recovery and there are also some villages of Baloch community around the place of arrest and recovery, hence the question arises when the private persons were available at the spot, why the police party did not join them as recovery witness. It is settled principle that judicial approach has to be a conscious in dealing with the cases in which 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 the accused in such like cases. However, where alleged recovery was made on a road and the peoples were available there, omission to secure independent mashirs, particularly, in the case of spy information cannot be brushed aside lightly by this court as 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, however, there is no explanation on record why the independent witnesses were not associated in the recovery proceedings. No doubt police witnesses are 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.

14. Apart from the above, there is also no mention in the FIR that how the alleged charas recovered from the accused was weighed. No any customer was found at the place of incident though it is the case of prosecution that accused was openly selling charas over there. Furthermore, as per available record, accused has no previous criminal

record and the appellant / accused did not make any effort to run away from the place of incident. After recovery of charas from the accused, it was sent to the chemical examiner on 29.07.2021 i.e. after five days and safe custody of the charas at Malkhana and its safe transit have not been established at trial. There is also no corroboration in the evidence of prosecution witnesses. Accused in his statement recorded u/s 342 Cr.P.C has also taken the plea that he has been falsely implicated in this case by the police on account of his enmity with his community people Muhammad Sharif and others and in this regard he has also annexed the copies of two FIRs to strengthen his plea. All these factors suggest the false implication of appellant in this case which cannot be ruled out.

15. It is the matter of record that the charas was recovered from possession of accused on 24.07.2021 and was kept in Malkhana but it has not been proved that it was a safe transit case. It would be unsafe to believe that prosecution evidence in respect of appellant without independent corroboration, which is lacking in this case. On the point of safe custody of charas and its safe transit, the counsel has rightly relied upon the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*, the relevant portion 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.”***

16. As said earlier, the prosecution has hopelessly 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 marred with unexplained delay. Admittedly, there are also several circumstances which created doubt in the prosecution case and it is settled law that it is not necessary that there should 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".***

17. Resultantly, we have no hesitation in holding that prosecution miserably failed to prove its case against the accused beyond the requisites of reasonable doubt. Hence, the conviction and sentence recorded by the trial court vide judgment dated 09.11.2021 were set aside and the appeal was allowed. Appellant Abdul Nasir son of Muhammad Usman Makrani Baloch was acquitted of the charge. Appellant was in custody, he was directed to be released forthwith if not required in any other case through our short order dated 22.03.2022. These are the reasons of our said short order.

JUDGE

JUDGE

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