

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

Cr. Appeal No. D-81 of 2005

PRESENT:

Mr. Justice Naimatullah Phulpoto
Mr. Justice Zulfiqar Ahmad Khan

Appellant : Ghulamullah through
Mr. Hussain Bux Solangi, Advocate

Respondents : The State
through Syed Meeral Shah Bukhari, D.P.G.

Date of Hearing : 05.04.2017

J U D G M E N T

ZULFIQAR AHMAD KHAN, J:- Appellant Ghulamullah s/o Lal Bux faced trial before learned Special Judge (Narcotics), Dadu in Special Case No. 247 of 2004 for offence under Section 9(b) Control of Narcotic Substance Act, 1997. By judgment dated 31.05.2005, the appellant was convicted and sentenced to undergo R.I for two years and to pay fine of Rs.25,000/-. In default of the payment of fine, he was to undergo R.I for six months more. Benefit of Section 382-B Cr.P.C. was extended to the appellant.

2. Brief facts of the prosecution case as per FIR are that on 26.06.2004 at about 7-00 p.m. Assistant Excise Incharge, Dadu Circle Nazar Muhammad Sial lodged his report at Excise Circle Dadu, stating therein that he along with Excise Dafedars Dodo Khan Jatoi and Zafarullah Ghaloo, EC Akhtar Ali and EC Ghulam Rasool Halepoto left Excise Office for detecting excise crime and patrolling in the city. During patrolling when they reached at Moundar Octroi Post, Dadu, they saw one person, who when stopped on suspect disclosed his name as Ghulamullah son of Lal Bux. From the personal search of that person, one plastic shopper containing charas from the fold of his shalwar was found. The secured charas was weighed by him which became 500 grams. Inspector Nazar Muhammad then sealed the secured charas on the spot and prepared mashirnama of arrest of accused and recovery in presence of mashirs. He then

brought the accused and secured charas at Excise Office where he lodged FIR against the accused.

3. A formal charge was framed on 01.09.2004 as Ex.2, to which accused pleaded not guilty and claimed to be tried. The prosecution has examined P.W-1 Inspector Nazar Muhammad Sial (Complainant/Investigating Officer) at Ex.05, who produced memo of arrest of accused and recovery at Ex.5/A, FIR at Ex.5/B and Report of Chemical Examiner at Ex.5/C, P.W-2, Zafarullah Ghaloo (mashir) at Ex.6. Side of the prosecution was closed vide statement at Ex.7.

4. The statement of the accused under Section 342 Cr.P.C. was recorded at Ex.08, in which he has stated that he has been falsely implicated in this case. He has also examined himself on oath at Ex.9 where has stated that he was taken into custody from a Wagon at Dodani Mori when he was coming from K.N. Shah to Dadu. He stated that one Ashiq Chandio (DW-1) was also travelling with him in the said Wagon. He further stated that the charas has been foisted upon him at the instance of one Majeed Shahani, who is residing in Shahbaz Colony, Dadu and that the complainant Nazar Muhammad Sial is also residing in the same colony. He deposed that the complainant Nazar Muhammad Sial had friendship terms with Majeed Shahani, who was annoyed with him on his refusal to provide him girls. Complainant Nazar Muhammad Sial is still harassing him and his wife by filing applications against them. He also produced a photocopy of an application made by Nazar Muhammad Sial as Ex.9/A. D.W-1 Ashiq Hussain Chandio deposed that he knows the accused since last 3/4 years and that the accused was not involved in any narcotics business. About 10/11 months back when he was coming from Mehar to Dadu in a Wagon in which the accused was also travelling, when wagon reached at Dodani Mori, police stopped the Wagon and took out the accused. Police took his personal search but nothing was recovered. The accused was then taken away by the police. He deposed that Nazar Muhammad Sial was also part of the police party.

5. Learned trial court after hearing the learned counsel for the parties and examining the evidence available on record by judgment dated 31.05.2005 convicted and sentenced the appellant / accused as stated above.

6. Mr. Hussain Bux Solangi, learned counsel for the appellant contended that the prosecution has failed to produce arrival and departure entries in the evidence. It was also contended that no official car was used and even the car

was admittedly driven by a private person whose details are not provided. The Learned counsel contended that charas as allegedly recovered from the possession of the accused on 26.06.2004 was sent to the chemical examiner for analysis on 06.07.2004 (after the delay of 10 days) and the prosecution has not plausibly explained with regard to this delay in sending the charas to the chemical examiner. It is argued that it has not come in the evidence that at all these times the charas was in safe custody. As well as neither the person who sent the charas was examined nor the Incharge of the Malkhana. Safe passage of charas in the hands of private courier company is highly questionable. The learned counsel also submitted that while the arrest was made in daylight from a main road, however no private persons present at the time of the arrest of the accused were made mashirs. It was next contended that evidence of the officials was dishonest as they deliberately suppressed facts. Referring to the enmity of the accused with the complainant, who also acted as investigation officer, the learned counsel contended that the trial court failed to appreciate this aspect as well as blatantly ignored the holes in the prosecution evidence, but still chose to convict the accused against the settled principles of law.

7. Syed Meeral Shah Bukhari, learned DPG on account of apparent infirmities and delay of 10 days in sending charas to the chemical examiner, and that too by a private courier did not support the impugned judgment.

8. Heard the counsels and perused the records very minutely. From the close scrutiny of the evidence it transpires that the accused was arrested by Nazar Muhammad Sial, Excise and Taxation Officer Dadu in presence of mashirs on 26.06.2004 at 4:00 p.m near Moundar Octroi Post Dadu town. In his examination in chief P.W-1, has deposed that he along with his colleagues left office for detecting the narcotics crime. When they reached at Moundar Naka, they found one suspected person, who disclosed his name as Ghulamullah s/o Lal Bux. When he took personal search of that person in the presence of mashirs, he recovered one plastic bag from the fold of his Shalwar, in which one piece of charas was lying. He arrested the accused and weighed the charas at the spot which became 500 grams. He also recovered Rs.120/- from the front pocket of the accused. He sealed the charas. He deposed that the Memo of arrest and recovery was prepared at the spot in presence of mashirs namely Zafarullah Ghalo and Dodo Jatoi. He then brought the accused and the case property at Circle Office and lodged FIR against the accused and sent the entire quantity of

charas to the Chemical Examiner and thereafter he received a positive report. He affirmed that he did not keep the entry about their departure or arrival because they were not maintaining any Roznamcha in their office. He also affirmed that their departure time from the Circle Office is not mentioned in the FIR and affirmed that they were patrolling in private car of his friend which was being driven by its driver, who was also a private person. He deposed that after leaving their office they came to Ali Restaurant and that he does not remember the time when they reached Ali Restaurant, notwithstanding that the distance between their office and Ali Restaurant is about only one kilometer. He further affirmed that he has not mentioned that from which particular point of Moundar Naka the accused was arrested. He admitted that while the Moundar Naka is situated on the main road and many persons were passing by but he did not find any person except the accused standing at Moundar Naka and that he apprehended the accused at the first instance. He deposed that he approached some private persons at to act as mashir but they refused, however that this fact has not been mentioned in the FIR or in the memo of arrest and recovery nor names of those persons have been given. While he admitted that it can take about five minutes in reaching Moundar Naka from their office and that after completing formalities at the place of incident, they came directly to their office, but he had no answers as to why he lodged the FIR after 2/3 hours after their reaching the office. As to the dispatch of the charas, he deposed that he does not remember particular date but he remembered that he sent the property to the Chemical Examiner after 2 of 3 days of the incident and that the property was sent to the Chemical Examiner through private courier service. He admitted that Majid Shahani is known to him but denied that it is at his instance that the accused has been booked in this case.

9. P.W-2 Dafedar Zafarullah deposed that he left the office under the command of Inspector Muhammad Sial, but admitted that they were in a private car. He further admitted that the place from where the accused was arrested was a main road and many persons were passing from there, but he did not make any effort to call private persons to act as mashirs. While he deposed that the accused was *jointly apprehended*, the P.W-1 in his statement (Ex-5) has stated that "*I arrested the accused*". It is also interesting to note that there is no mention in the deposition of both of the prosecution witnesses as to how the charas was weighted. Did the patrolling team possessed the weighing scale or charas was weighed by using some nearby shop's scale.

10. D.W-1, Ashique Hussain deposed that about 10/11 months back, he was coming from Mehar to Dadu in a Wagon, in which accused was also traveling. When their wagon reached at Dodani Mori, police was present there and the Wagon was stopped. Police took out the accused from the Wagon and took his personal search, but nothing was recovered from his possession. Accused was kept by police and the wagon was let go along with other passengers. He affirmed that Inspector Nazar Muhammad Sial was also with police party.

11. On the basis of the foregoing, following points of facts and law arise for the determination of this court:

- (a) The patrolling team kept no record of departure or arrival by way of roznamcha;
- (b) Charas was sent for chemical analysis after the delay of 10 days; and
- (c) Contradictions in the evidence of the prosecution witnesses

12. In the following, each of these points will be addressed:

It is an admitted fact that the neither the departure/arrival roznamcha entries were produced during the trial, nor they have been mentioned in the FIR or the prosecution witnesses' statements. In his cross, Inspector Nazar Muhammad admitted that *'I did not kept the entry about our departure or arrival because we are not maintaining roznamcha'*.

The failure of production of Roznamcha entries is dealt with iron hands by the courts as it been held that such a failure is fatal to the extent of *'cutting very root of the prosecution case'*. In the case of Shahid Iqbal vs. The State (2016 MLD 230) Court held that *"prosecution had failed to prove its case against accused beyond any shadow of doubt for the reasons that despite contention of defence counsel, arrival and Roznamcha entries had not been produced in evidence, in order to satisfy the court that Police party had actually left at relevant time for patrolling. Non-production of departure and arrival entries in evidence would cut the roots of prosecution case."* In the case of Mashooque Ali Mallah vs. The State (2016 P.Cr.L.J 08). Court refused to uphold the conviction awarded by the trial court on the ground that *"Police party left Police Station through Roznamcha entry, but original departure and arrival entries had not been produced at trial, in order to show that Police party had actually left*

Police Station for investigation of crime registered at Police Station”. On account of the failure of the prosecution party maintaining and to have produced original departure and arrival entries, it could not be said that they at all left for patrolling. This fatal error, cutting the root of prosecution’s case, will obviously yield benefit to the accused.

Patrolling duties in town and cities are conducted as per Police Rule 21.34, however in rural stations these duties are regulated by Rule 23.1 which provides that the officers in charge of police stations and assistant sub-inspectors at those stations are empowered to move about in their jurisdictions ‘freely’. While no provisions are made under these Rules enabling patrolling to be done in private vehicles, however the freedom of movement granted under Rule 23.1 could obviously not be impaired in case patrolling is necessitated when no official vehicles were handy. The Rules however (in the greater interest of docketing) have provided a mechanism where a proforma in the shape of Form 22.43(4) is provided which requires when any travel within the sphere of duty is performed, the said proforma is needed to be filled, for one of the simple reason that costs incurred in such a travel needs to be reimbursed in accordance with Rules. Notwithstanding therewith, details of such private vehicle are needed to be made in the daily diary. Accordingly unless details of the private vehicle are provided in the roznamcha, duly supported by the appropriate form as prescribed by the Police Rules, the very act of patrolling on private vehicles will be seen dubious and any benefit of doubt created with such an uncertainty will definitely be passed on the accused.

Admittedly charas was found from the possession of the accused at Moundar Naka which is a main road however no private mashirs were taken. The Apex court in the case of Karl John Joseph vs. The State (2004 PLD 394 SC) has though held that this deficiency is of no consequence. But this aspect was differently dealt with in the case of Riaz Ahmed vs. The State (2004 PLD 988 SC) where the Apex Court held that *unless it is brought to the record that police officials have any malice against the accused/witnesses, police officials were as good witnesses as private persons of the society.*

The manner in which charas was weighed has not be described by any of the prosecution witnesses. PW-1 has stated that “the charas was weighed

at the spot and it was 500 grams”. This clearly shows that the patrolling party was without investigation bag of which scales are integral part. It is not confidence aspiring that the patrolling party left their offices for ‘*detecting narcotics crime*’ without an investigation bag or without a weighing scale. Be that as it may, no details are given as to how the secured charas was weighed. This point has been considered in the recent judgment of Akramullah vs. The State (2017 YLR 712) where a Divisional Bench of the Hon’ble Islamabad High Court has raised red flag on such discrepancy and held that this act is not ‘confidence aspiring’.

As per Ex-6 and FIR, charas was seized on 26.06.2004 whereas Ex-5 (Chemical Examination Report) shows that the sample arrived at the laboratory on 06.07.2004, after a delay of 10 days and there was no evidence that Charas was in the safe custody in between this intervening period. In the above stated circumstances, positive report of Chemical Examiner would not improve the case of prosecution. This finds support from the dictum laid down in the recent cases of Shahid Dada vs. The State (2017 MLD 288), Arshad Mehmood Khan vs. The State 2017 P.Cr.L.J 668), Hussain Bux vs. The State (2017 P.Cr.L.J 501), Saeed Gul vs. The State (2016 YLR 1205) and Khani Gull vs. The State (2016 YLR 1093). In all of these cases courts have held that handing of charas from its taking over from the accused to passing it off to prosecution witness including its safe custody in the Malkhana, and its onward delivery to constable to be taken to laboratory has to be seamlessly achieved. Courts have further held that prosecution was under duty to establish by cogent evidence that the charas, seized from possession of accused, had been kept in safe custody and the Malkhana. As in the case at hand, no explanation has been provided as to what transpired in the 10 days’ long period, thus these vacuums in the prosecution’s case inspire no confidence. Guidance in this regards could be obtained from the case of Ikramullah & Others vs. The State (2015 SCMR 1002), of which the relevant portion is reproduced as under:-

“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 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.”

The appellant has clearly stated in his S.342 Statement that the complainant Nazar Muhammad Sial had friendship terms with one Majeed Shahani, who was annoyed with him on his refusal to provide him girls. He further stated that the complainant Nazar Muhammad Sial is still harassing him and his wife by filing applications against them. He in fact has produced a photocopy of such an application made by Nazar Muhammad Sial as Ex.9/A. It is important to note that to rebut these allegations the prosecution failed to produce Majeed Shahani. As mentioned in paragraph (c), the Apex Court in the case of Riaz Ahmed vs. The State (2004 PLD 988 SC) has shadowed evidence of police officials in a case wherein malice is alleged by the accused towards police or investigating officer.

We have already observed that prosecution case appears to be unnatural and unbelievable. While the incident took place at a main road, but no private mashirs were made. Also the officials were patrolling with the objective of detecting narcotics crime, however they did not have a weighing scale. Patrolling was being done in a private car, driven by a private person. Charas was sent after delay of 10 days and that too via a private courier. Admittedly, in this case there are several circumstances which have created serious doubts in the prosecution case. It is settled law that a single circumstance which creates doubt in the prosecution case is sufficient to extend benefit of doubt to the accused. 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. This has been held by Hon’ble Supreme Court in the case of Tariq Pervez vs. The State (1995 SCMR 1345).

In the case of Muhammad Imran vs. The State (2011 SCMR 1954) the Apex court has laid down principles with regards narcotic substance. On account of stringent sentences having been provided under the Control of Narcotic Substances Act, 1997, for such reasons Apex court had mandated *that the said Act has to be construed strictly and relevant provision of law dealing with the procedure as well as furnishing proof like report of expert etc. are to be followed strictly in the interest of justice, otherwise it becomes impossible to hold that total commodity recovered from the possession of accused was narcotics.*

13. On account of the above infirmities and while relying upon the above cited authorities, we vide our short order dated 05.04.2017 allowed this appeal and set aside the conviction and sentence recoded by the learned trial court vide its judgment dated 31.05.2005. These are the reasons of our short order.

JUDGE

JUDGE