

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

Criminal Appeal No. D- 144 of 2021

PRESENT:

Mr. Justice Salahuddin Panhwar.

Mr. Justice Zulfiqar Ahmed Khan.

Appellant : Bharo s/o Bhooro Kachi Kolhi
through Mr. Ali Akbar Lakho, Advocate.

Respondent : The State
through Mr. Fayaz Hussain Sabki, Assistant
Prosecutor General.

Date of hearing : 24.03.2022
Date of judgment : 24.03.2022

J U D G M E N T

ZULFIQAR AHMED KHAN, J: Appellant Bharo was tried by learned Special Judge for CNS, Tando Allahyar in Special Case No. 22 of 2021, emanating from Crime No.59/2021 registered at Police Station Umar Sand for offence under Section 9(c) Control of Narcotic Substance Act, 1997. Vide judgment dated 11.11.2021, 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 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 07.09.2021 vide roznamcha entry No.22 at 1830 hours, the 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 main road Tando Allahyar-Tando Adam Ghaffar boundary curve, they saw that one person was standing on the left side of the road having one black colour shopper in his hand. Having seeing the police party accused tried to run away but was apprehended alongwith aforesaid black shopper at the spot. On enquiry he disclosed his name to be Bharo son of Bhooro by caste Katchi Kolhi resident of Nawazabad Farm, Taluka

Jhando Mari. Black shopper was checked and found one small and large piece of charas. Police weighed the charas, it was 1500 grams. On enquiry accused stated that he sells the said charas. Thereafter recovered charas was separately sealed as sample at spot for chemical examination. SIP Abdul Aziz Chutto prepared mashirnama of arrest and recovery at the spot. Accused and the case property were brought at police station where instant 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 SIP Abdul Aziz Chutto at Ex.03, who produced departure entry, memo of arrest and recovery, FIR, arrival entry, Malkhan entry, departure and arrival entry for site inspection, memo of site inspection, departure and arrival entry of HC Ameer Bux, letter to Chemical Examiner and Chemical Examiner report at Ex.03/A to 03/J. PW-2 HC Mir Muhammad at Ex.04. PW-3 WASI Shah Muhammad at Ex.5. PW-4 HC Ameer Bux at Ex.6. Thereafter, prosecution side was closed at Ex.7.

6. Statement of accused was recorded u/s 342 Cr.P.C. at Ex.8, in which accused claimed false implication in this case and denied the prosecution allegations. Appellant has stated that PWs are interested. He further stated that he has been falsely implicated in this case by the police due to enmity with one Hubdar Zardari and on his influence police has involved him in this false case. Appellant however, did not examine himself on Oath in disproof of the prosecution allegations nor led any evidence in his defence.

7. Learned Special Judge after hearing the learned counsel for the parties and examining the evidence available on record, vide judgment dated 11.11.2021 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. Ali Akbar Lakho, Advocate for appellant, Mr. Fayaz Hussain Sabki, Assistant Prosecutor General for the State and perused the entire evidence minutely.

10. Mr. Ali Akbar Lakho, 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 one Hubdar Zardari 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 13.09.2021 i.e. after the delay of six 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. On the other hand, Mr. Fayaz Hussain Sabki, learned Assistant Prosecutor General opposed the appeal on the ground that appellant has been found in possession of 1500 grams charas which was kept by him for selling purpose. He further contended that there are minor contradictions in the evidence of prosecution witnesses which are not fatal to the case of prosecution. Lastly, he argued that appellant has rightly been convicted by the trial court.

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 as per FIR the complainant party was on patrolling when they found the appellant having one black colour shopper in his hand which was containing 1500 grams charas. It has come on record that the accused was arrested from

the main road Tando Allahyar-Tando Adam Ghaffar boundary curve and the complainant / SIP Abdul Aziz Chutto 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 the complainant have 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 the accused in such like cases. However, where the 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. 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 the independent witness has not been associated in 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.

14. Apart from the above, there is also no mention in the FIR that how the alleged charas recovered from the accused was weighed as the complainant in his cross examination has deposed that **“It is correct to suggest that I have not mentioned in the memo of arrest and recovery and in FIR that I was carrying digital scale with me.”** He has further admitted in cross examination by saying that **“I have not mentioned in the Challan that I have sent the case property to chemical examiner.”** The complainant / I.O further deposed in his cross examination that **“It is correct to suggest that on road vehicles commute. I have not associated any private person as mashir of arrest and recovery.”** Furthermore, no any customer was alleged to have been found at the place of incident though it is the case of prosecution that accused was openly selling charas over there. As per

available record, accused has no previous criminal record. We have also noticed that according to the statement of complainant (PW-1), he recovered the narcotic drugs from appellant on 07.09.2021 and prepared the memo of arrest and recovery and deposited the same in Malkhana. The Report of Director Laboratories & Chemical Examiner (Ex-03/J) reveals that the narcotic drugs were received by hand in the office on 13.09.2021 through HC Ameer Bux after the delay of six days. The chain of custody or safe custody and safe transmission of narcotic drug begins with seizure of the narcotic drug by the law enforcement officer, followed by separation of the representative samples of the seized narcotic drug, storage of the representative samples and the narcotic drug with the law enforcement agency and then dispatch of the representative samples of the narcotic drugs to the office of the chemical examiner for examination and testing. This chain of custody must be safe and secure. This is because, the Report of Chemical Examiner enjoys critical importance under CNSA 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 drug or its representative samples makes the Report of the Chemical Examiner unsafe and unreliable for justifying conviction of the accused. The prosecution, therefore, has to establish that the chain of custody has been unbroken and is 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 and is no more safe and secure, therefore, reliance cannot be placed on the Report of the Chemical Examiner to support conviction of the appellant. 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 one Hubdar Zardari. 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 07.09.2021 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 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. 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 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. We have no hesitation to hold that the prosecution has failed to prove its case against accused. Resultantly, the conviction and sentence recorded by the trial court vide judgment dated 11.11.2021 was set aside and the appeal was allowed. Appellant Bharo son of Bhooro Kachi Kolhi

was acquitted of the charge. Appellant was in custody. He was ordered to be released forthwith if not required in any other case.

Above are the reasons of our short order dated 24.03.2022, whereby we had allowed the instant appeal.

JUDGE

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