

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

Criminal Appeal No. D- 47 of 2021

**PRESENT:**

Mr. Justice Salahuddin Panhwar.

Mr. Justice Zulfiqar Ahmed Khan.

Appellant : Ayaz Hussain s/o Sikandar Ali by caste Bhatti  
through Mr. Rafique Ahmed Leghari,  
Advocate.

Respondent : The State  
through Mr. Shahzado Saleem Nahiyoon,  
Deputy Prosecutor General.

Date of hearing : 07.04.2022  
Date of judgment : 07.04.2022

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

*ZULFIQAR AHMED KHAN, J:* Appellant Ayaz Hussain was tried by learned 1<sup>st</sup> Additional Sessions Judge / MCTC, Shaheed Benazirabad in Special Case No. 969 of 2019, emanating from Crime No.94/2019 registered at Police Station Jam Dattar for offence under Section 9(c) Control of Narcotic Substance Act, 1997. Vide judgment dated 02.03.2021, the appellant / accused was convicted u/s 9(c) of CNS Act 1997 and sentenced to suffer R.I for 06 years and 06 months and to pay the fine of Rs.30,000/-. In case of default in payment of fine, appellant was ordered to suffer SI for 06 months more. Benefit of Section 382-B Cr.P.C. was extended to the appellant.

2. Brief facts of the prosecution as disclosed in the FIR lodged by complainant SIP Darhoon Khan Incharge Police Post Head Jamrao of P.s Jam Dattar on behalf of the State are that on 15.12.2019 he alongwith his subordinate staff PC Noor Muhammad PC Sawan Khan left the police post Head Jamrao vide daily diary entry No.07 at 1510 hours for patrolling on private vehicle. During patrolling when they reached at Darya Khan stop, they received spy information that present appellant

Ayaz Hussain was selling charas at Chondko Mour. The police party reached at the pointed place at 1530 hours and spotted a person on northern side of road and that person was having black colour plastic bag in his hand. On seeing the police party he tried to escape but was apprehended by PC Sanwan Khan. Due to non-availability of private mashirs, PC Sawan and PC Noor Muhammad Zardari were appointed as mashirs. The apprehended person disclosed his name as Ayaz Hussain son of Sikandar Ali Bhatti r/o Mithiani District Naushahro Feroze. During personal search two currency notes of Rs.100/- and a currency note of Rs.50/- were recovered from the side pocket of shirt of accused. The black colour plastic bag secured from the hand of accused was checked and found containing eight large pieces of charas. All the recovered pieces of charas were weighed and found to be 4000 grams and the same were sealed. The accused disclosed that he used to sell charas. Mashirnama of arrest and recovery was prepared with signatures of above named mashirs. The accused and case property were taken to Police Station where the FIR was registered against the accused.

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 the accused under the above referred Section of CNS Act, 1997.

4. Trial Court framed charge against the 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 PC Sanwan Khan (mashir) at Ex.3. He produced the mashirnama of arrest and recovery at Ex.3/A and mashirnama of place of incident at Ex.3/B; PW-2 Inspector Ali Jan Zardari (Investigation Officer) at Ex.4. He produced RC No.338 at Ex.4/A, daily diary entries No.23 & 17 at Ex.4/B and report of the chemical examiner at Ex.4/C; PW-3 SIP Darhoon Khan (complainant) at Ex.5. He produced the daily diary entry No.07 at Ex.5/A, daily entry No.11 at Ex.5/B, daily entry No.12 at Ex.5/C, FIR at Ex.5/D and the copy of registered No.19 at Ex.5/E respectively; PW-4 PC Khuda Bux (parcel bearer) at Ex.06. He produced daily diary entries No. 25 and 15 at Ex.6/A and PW-5 PC Ashraf Ali (Incharge of malkhana) at Ex.07. Thereafter, the prosecution side was closed vide statement 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. Appellant has stated that nothing was recovered from his possession and the case property has been foisted upon him. He further stated that all the PWs are police officials and they have falsely deposed against him. Appellant further stated that he was arrested by the police when he was going to Daulatpur from Moro and police snatched cash amount of Rs.3500/- from him. However, appellant neither examined himself on Oath nor produced any evidence in his defence to disprove the prosecution allegations.

7. Learned trial Judge after hearing the learned counsel for the parties and examining the evidence available on record, vide judgment dated 02.03.2021 convicted and sentenced the appellant 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. Rafique Ahmed Leghari, Advocate for appellant, Mr. Shahzad Saleem Nahiyoan, Deputy Prosecutor General for the State and perused the entire evidence minutely with their assistance.

10. Mr. Leghari, learned advocate for appellant has mainly contended that appellant is innocent and has falsely been implicated in the case in hand. He next submitted that the prosecution story is utterly 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 they made any effort in this regard and the complainant made his subordinates as mashirs of arrest and recovery. Learned counsel argued that alleged recovery of charas was affected from the possession of accused on 15.12.2019 but it was sent to the chemical examiner on 17.12.2019 i.e. after the delay of two days and safe custody of the charas at Malkhana and its safe transit during that intervening period has not been established at trial. He further contended that there are material contradictions in the evidence of prosecution witnesses which have not been considered by the trial court at the time of 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 *TARIQ PERVEZ V/S. THE STATE (1995 SCMR 1345)*.

11. On the other hand, Mr. Shahzad Saleem Nahiyoan, learned Deputy Prosecutor General opposed the appeal on the ground that appellant has been apprehended by police having been found in possession of 4000 grams charas which was kept by him for selling purpose. 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 enumerating that per FIR the complainant party was on patrolling when they received spy information that the present appellant was selling charas near Chondkol Mour. They apprehended the appellant alongwith charas in the presence of mashirs PC Sanwan and PC Noor Muhammad Zardari. The recovered charas was weighed and it became 4000 grams. It has come on record that on spy information the accused was arrested from Jam Sahib to Mundh Jamrao near Chondko Mour which is a populated area and the complainant / SIP Darhoon Khan Mallah had sufficient time either to take any private mashir from the place where he received spy information or at the place where he arrested the appellant and recovered charas from his possession 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. Furthermore, no customer of purchasing the alleged charas was found at the place of incident, if police could have waited tactfully, some customers may have appeared on the scene, that would have brought some acceptability to police story. 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) 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. In such circumstances it would be advisable for police to take video grabs of such occurrences or wear body-cameras. 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 though the complainant party had much prior information about the presence of appellant alongwith charas. Moreover, it was a day time of incident and the possibility of persons at the place of incident cannot be ruled out. 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 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 material contradictions in the evidence of the prosecution case such as mashir Sanwan Khan in his cross examination has deposed that **“private vehicle was of black colour 2-D corolla car.”** Whereas in his same statement he deposed that **“private car was arranged from friend of complainant and it was white colour car.”** Inspector Ali Jan who is I.O of the case has admitted in his cross examination that **“My signature on mashirnama of place of incident is different from my signature on 161 Cr.P.C statements of witnesses. I have not recorded entry in daily diary about my departure from P.S for inspection of place of incident.”** The complainant SIP Darhoon Khan has also contradicted mashir Sanwal Khan with regard to colour of the private car by saying that **“It was coure car. Registration number, colour and make of private vehicle was not mentioned in daily entry and FIR. It was grey colour car.”** He has also admitted by saying that **“I have not shown place of incident to investigation officer.”** There are also material contradictions in the evidence of complainant and mashir of arrest and recovery on the

material aspects of the case. Furthermore, as per available record, accused has no previous criminal record.

15. We have also noticed that according to the statement of complainant SIP Darhoon Khan, he recovered the narcotics from appellant on 15.12.2019 and prepared the memo of arrest and recovery and deposited the same in Malkhana. The Report of Director Laboratories & Chemical Examiner (Ex-4/C) reveals that the alleged charas was received by hand in the office on 17.12.2019 through PC Khuda Bux after the delay of two days and safe custody of the charas at Malkhana and its safe transit during that intervening period has not proved at trial. It is 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 15.12.2019 and was kept in Malkhana and the same was sent to Chemical Examiner on 17.12.2019 after the delay of two days hence 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.”**

17. Resultantly, 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”.**

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 07.04.2022, the conviction and sentence recorded by the trial court vide judgment dated 02.03.2021 was set aside and the appeal was allowed. Appellant Ayaz Hussain was acquitted of the charge. Appellant was in custody, hence was ordered to be released forthwith if not required in any other case.

Above are the reasons of the said short order.

JUDGE

JUDGE

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