HIGH COURT OF SINDH CIRCUIT COURT, HYDERABAD

Cr. Appeal No.D-02 of 2019
[Muhammad Qasim versus The State]

DATE **ORDER WITH SIGNATURE OF JUDGE**

BEFORE:
MR. JUSTICE MUHAMMAD KARIM KHAN AGHA
JUSTICE MRS. KAUSAR SULTANA HUSSAIN

Appellant : Through Mr. Ishrat Ali Lohar advocate

The State : Through Ms. Rameshan Oad Assistant P.G

Date of hearing: 16.02.2023

Date of judgment: 09.03.2023

J U D G M E N T

KAUSAR SULTANA HUSSAIN, J: Through instant appeal, appellant has impugned the judgment dated 13.12.2018, passed by learned Special Judge for Control of Narcotic Substance Shaheed Benazirabad in Special Case No.766 of 2017 [**Re: The State versus Muhammad Qasim**], outcome of Crime No.47 of 2017 registered at P.S Pubjo for offence punishable under Section 9(c) of CNS Act, 1997, whereby he was convicted and sentenced to undergo Rigorous Imprisonment for Life with fine of Rs.1,00,000/- and in case of failure in payment of fine, he was directed to further suffer Simple Imprisonment for six months, however, benefit of Section 382-B Cr.P.C was provided to him.

2. The allegation against the appellant/accused, per FIR, is that on 16.10.2017 he was arrested by the patrolling police party headed by Complainant SIP Zafar Ali Khoso near Dooro Fall Mori and from black coloured shopper lying on his motorcycle police recovered 11 pieces of Chars total weighing 11000 grams, hence aforesaid FIR was registered against him.

3. After registration of FIR Complainant himself conducted the investigation and on its completion challan was submitted before the concerned trial Court. Then copies of the case were provided to the appellant/accused at **Ex.01** and Charge was framed against him at **Ex.02**, to which he pleaded not guilty and claimed trial vide his plea at **Ex.02/A**, however, the said Charge was amended at **Ex.03** to the extent of the quantity of chars as due to oversight in previous Charge it was mentioned as 1100 grams instead of 11000 grams and accused accordingly signed a fresh plea at **Ex.05**. In order to prove the charge, prosecution examined

three witnesses at **Ex.6 to 08**, who produced and recognized certain documents. Thereafter prosecution closed its side at **Ex.09** and the statement of appellant/accused under Section 342 Cr.P.C was recorded at **Ex.10** wherein he denied the allegations, leveled against him, however, neither he produced any witness in his defence nor examined himself on Oath under Section 340(2) Cr.P.C. The learned trial Court finally after hearing the parties convicted and sentenced the appellant/accused, as noted above, vide impugned Judgment at **Ex.10/A,** hence he preferred captioned appeal.

4. Learned counsel for the appellant argued that impugned judgment is against the law, facts and principles of criminal justice; that learned trial Court has failed to discuss the material contradictions in the evidence of prosecution witnesses; that there was no independent witness of the alleged incident, however, same has not been considered by the learned trial Court; that alleged recovery has been foisted upon the appellant by concocting a false and managed story; that while passing the impugned judgment the learned trial Court has committed seriously illegalities; that prosecution case is not free from doubts; that neither Malkhana Incharge was examined nor any entry with regard to deposit of case property was produced and as such no safe custody of the narcotic has been proved; that in first charge liability of 1100 grams of Chars was said to have recovered from the appellant, however, it was amended later on, which is not permissible under the law. He lastly prayed for acquittal of appellant/accused. In support of his arguments he relied upon the cases of (i) MUHAMMAD SHOAIB and another versus The STATE [**2022 SCMR 1006**], (ii) SUBHANULLAH versus The STATE [**2022 SCMR 1052**], (iii) ISHAQ versus The STATE [**2022 SCMR 1422**] and (iv) JAVED IQBAL versus The STATE [**2023 SCMR 139**].

5. Learned Assistant P.G, however, vehemently opposed the appeal and supported the impugned judgment and argued that prosecution has fully established its case and there are no contradictions in the evidence of the prosecution witnesses who arrested the appellant red handed on the spot with contraband; that safe custody has been proved which lead to a positive chemical report; that appellant/accused has failed to prove any enmity with police officials. She prayed for dismissal of appeal. She relied upon the case of AJAB KHAN versus The STATE [**2022 SCMR 317**].

6. We have heard the learned counsel for the appellant as well as learned Additional P.G and have also perused the material available on record.

7. At the outset we have perused the Charges framed against the appellant/accused at **Ex.02 & 03**. Record reflects that in the first Charge (**Ex.02**)

appellant was informed about recovery of 1100 grams of chars from his possession, which per FIR and evidence of prosecution witnesses was 11000 grams, but it appears that same was typographical mistake and learned trial Court, while realizing the same bonafide mistake, amended the Charge (**Ex.03**) for which learned defense counsel had also raised no objection vide Order dated 30.07.2018 (**Ex.04**). Therefore, this aspect of the matter requires no deliberation being typographical mistake.

8. Since the entire case of the prosecution is based on the evidence of Complainant/IO and mashir of arrest and recovery, therefore, we have minutely perused the evidence of both these witnesses. The Complainant/IO deposed that on 16.10.2017 he was posted as SHO of P.S Pubjo and on same day he alongwith ASI Muhammad Muneer (mashir), HC Dost Ali Jamali, PC Asif Ali, PC Muhammad Waris and DPC Khadim Hussain left with police station for patrolling purpose under entry No.15 at 1415 hours and during patrolling they arrested the appellant/accused with 11000 grams of Chars and then brought him at police station and lodged the FIR and made entries No.19 and 20 in this regard. We have perused the entries No.19 and 20 (**Ex.06/D**). Both these entries only reflect arrival of police party at P.S alongwith case property and lodging of FIR against the appellant/accused, however, nowhere it is mentioned in said entries that case property was deposited in Malkhana or it was handed over to Malkhana Incharge. The Complainant/I.O admitted during cross-examination that '*I have not produced entry under which I kept parcel in malkhana'*. Complainant/IO further deposed that he was the Malkhana Incharge, however, mashir ASI Muhammad Muneer contradicted this statement of Complainant/IO, while deposing that Incharge of Malkhana was WPC Mursaldin. In the present case admittedly neither any entry was produced with regard to deposit of case property in Malkhana nor WHC Mursaldin, who per evidence of mashir was Incharge of Malkhana, was examined to establish the safe custody of case property till its deposit in the office of Chemical Examiner. In the case of JAVED IQBAL versus The STATE (**2023 SCMR 139**), the Hon'ble Apex Court acquitted the accused of the charge while holding that:-

> 4. We have heard the learned counsel for the appellant, learned Additional A.G. KP, perused the record and observed that in this case, the recovery was effected on 18.12.2013 and the sample parcels were received in the office of chemical examiner on 20.12.2013 by one FC No.1007 but the said constable was never produced before the Court. **Even the Moharrar of the Malkhana was also not produced even to say that he kept the sample parcels in the Malkhana in safe custody from 18.12.2013 to 20.12.2013. It is also shrouded in**

> **mystery as to where and in whose custody the sample parcel remained**. So the safe custody and safe transmission of the sample parcels was not established by the prosecution and this defect on the part of the prosecution by itself is sufficient to extend benefit of doubt to the appellant. It is to be noted that in the cases of 9(c) of CNSA, it is duty of the prosecution to establish each and every step from the stage of recovery, making of sample parcels, safe custody of sample parcels and safe transmission of the sample parcels to the concerned laboratory. This chain has to be established by the prosecution and if any link is missing in such like offences the benefit must have been extended to the accused. Reliance in this behalf can be made upon the cases of Qaiser Khan v. The State through Advocate-General, Khyber Pakhtunkhwa, Peshawar (2021 SCMR 363), Mst. Razia Sultana v. The State and another (2019 SCMR 1300), The State through Regional Director ANF v. Imam Bakhsh and others (2018 SCMR 2039), Ikramullah and others v. The State (2015 SCMR 1002) and Amjad Ali v. The State (2012 SCMR 577) wherein it was held that in a case containing the above mentioned defects on the part of the prosecution it cannot be held with any degree of certainty that the prosecution had succeeded in establishing its case against an accused person beyond any reasonable doubt. So the prosecution has failed to prove the case against the petitioner and his conviction is not sustainable in view of the above mentioned defects." [**Emphasis added**].

9. Record further reflects that though Complainant himself investigated the matter, yet on same day he again visited the place of incident for its re-verification, which does not appeal to a prudent mind. Further the Complainant and mashir deposed that WHC Mursaldin was with them at the time of inspection of place of incident, however, entries exhibited do not contain the name of said WHC. Therefore, it cannot be said that prosecution case is free of doubts. In the case of MUHAMMAD MANSHA versus THE STATE (**2018 SCMR 772**) the Hon'ble Supreme Court has held as under:

> *"Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of Tariq Pervez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Muhammad Akram v. The State (2009 SCMR 230) and Muhammad Zaman v. The State (2014 SCMR 749)."*

10. In view of the above observations, prosecution has failed to prove safe custody of contraband till its deposit in the office of Chemical Examiner, hence considerable doubt had crept into the prosecution case, the benefit of which doubt should have been given to the appellant in accordance with well settled principles of law. Therefore, we while taking guidance from the reported cases (*supra*), allow this appeal and set aside the conviction and sentence awarded to the appellant/accused through impugned judgment 13.12.2018, passed by the learned trial Court in Special Case No.766 of 2017 [**Re: The State versus Muhammad Qasim]**. Resultantly appellant/accused is acquitted of the charge of present crime bearing FIR No.47 of 2017 registered at P.S Pubjo for offence punishable under Section 9(c) of CNS Act, 1997. Appellant is in custody, he shall be released forthwith, if not required in any other custody case.

Captioned appeal stands disposed of accordingly.

JUDGE

JUDGE

Sajjad Ali Jessar