ORDER SHEET

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Spl. Criminal Appeal No. D – 130 of 2022.

Date	Order with signature of Judge

Before:
Mr. Justice Naimatullah Phulpoto, J
Mr. Justice Amjad Ali Bohio, J

Appellant : Qurban Ali
Through Mr. Manzoor Hussain Larik Advocate.

Respondent: The State
Through Mr. Sardar Ali Shah Rizvi Additional Prosecutor General.

Date of Hearing: 25th July, 2023.

JUDGMENT

AMJAD ALI BOHIO, J:- This instant criminal appeal is directed against the judgment dated 16 November 2022, passed by the learned First Additional Sessions Judge/Special Judge for CNS, Khairpur, in Sessions Case No.273 of 2021, arising out of Crime No. 130 of 2021, registered at Police Station Sobhodero, for an offence under Section 9(c) of the CNS Act, 1997.

2. On 01 September 2021, at 1300 hours, complainant SIP Ali Raza Shah registered an FIR stating that he and his subordinate staff apprehended appellant Qurban Ali at the Mango Garden of Soomra community situated at the link Road leading from Sobhodero to Gambat at 1200 hours. Due to the non-availability of a private witness, in the presence of HC Mumtaz Ali Ujjan and PC Zamir Ahmed Pathan, they took a plastic shopper from his possession. On enquiry, the apprehended person disclosed his name as Qurban Ali, son of Muhammad Bachal Larik, resident of village Piyalo, Taluka Sobhodero. On his personal search, two currency notes of Rs.100/- in

total Rs.200/- were recovered from the front pocket of his shirt. They found 6 pieces of charas lying in the recovered plastic shopper. The weight of the recovered charas became 2000 grams. A memo of arrest and recovery was prepared on the spot, and then the complainant lodged the FIR. After the completion of the usual investigation, the Investigating Officer submitted a report under Section 173, Cr.P.C against the appellant.

3. A formal charge was framed against the appellant on 06 January 2022, to which he pleaded not guilty and opted to face the trial.

4. During the trial, the prosecution adduced the evidence of SIP Ali Raza Shah (P.W-1), who produced the entry of departure, memo of arrest and recovery, FIR, entry of Register No.19, entry with regard delivery of copy of FIR, mashirnama of arrest and recovery, and apprehended accused to Investigating Officer SIP Muharram Ali Hattar. Mashir HC Mumtaz Ali (P.W-2), who produced mashirnama of place of incident, first I.O Inspector Mukhtiar Ali Pathan (P.W-3), who produced the order granting his leave, second I.O SIP Muharram Ali (P.W-4), who produced certain entries in connection with investigation, road certificate, and chemical report.Thereafter, the prosecution closed its side on 15 September 2022.

5. In his statement recorded under Section 342 Cr.P.C before the trial court, the appellant denied the allegation and claimed that he had been falsely implicated at the instance of a police constable who is from his village. However, he did not express his desire to examine himself on oath under Section 340(2) of Cr.P.C, nor did he produce any evidence in his defence.

6. After hearing the arguments presented by the counsel for both the parties, the trial court convicted the appellant/accused. The appellant has challenged the conviction and sentence in this court.

7. We have heard the arguments of learned counsel for the appellant, as well as learned Deputy Prosecutor General on behalf of the State. We have carefully re-examined the evidence brought on record.

8. Learned counsel for the appellant contends that the constable at Police Station, who resides in the appellant's village, has falsely implicated the appellant in this case. He has further contended that the charas was foisted upon the appellant at the constable's instance. He has pointed out material contradictions in the evidence of prosecution witnesses. The defence counsel has also pointed out that the prosecution failed to prove the delivery of the parcel to the Chemical Examiner. Inspector Mukhtiar Ali did not utter a single word about delivering the parcel to the Chemical Examiner. Therefore, the chemical report in respect of the parcel has lost its authenticity. The prosecution failed to prove the safe custody of the parcel. For 24 hours, the parcel was kept in the malkhana, as reported by SIP Muharram Ali. The prosecution was liable to have examined the incharge of the malkhana, but they failed to do so. Lastly, the defence counsel argued that the chemical report did not pertain to the parcel sent to the Chemical Examiner in this case. He has prayed for the acquittal of the appellant.

9. Learned Additional Prosecutor General has supported the impugned judgment of the trial court. He argues that the contentions raised by the defence counsel are insignificant. According to him, the testimony of the prosecution witnesses corroborates the recovery of charas, its safe custody in the malkhana, and its dispatch through SIP Muharram Ali. The chemical report came in positive, recognizing the contraband material as charas. The Deputy Prosecutor General contends that the parcel was sent to the chemical examiner within the stipulated period of 72 hours of the alleged recovery. He argues that the prosecution has successfully proven the guilt of the accused beyond any reasonable doubt.

10. We have re-examined the evidence brought on the record by the prosecution minutely. The overwriting in the mashirnama of arrest and recovery is a serious issue. The prosecution has not provided a plausible explanation for this, which calls into question the authenticity of the document. The prosecution has failed to produce the arrival entry at the police station, which shows that the police officials had not left for patrolling on the relevant date. This casts doubt on the timing of the alleged recovery. Non-production of the arrival and departure entries of police station also cut the roots of the prosecution case as held in case of *"Muhammad Faisal v. State",(2022 MLD 1557).*

11. According to the prosecution's case, six pieces of charas were recovered from the appellant's possession, but only three pieces were produced before the trial court. The explanation furnished by the head of the police party is not satisfactory. The description of the property was not mentioned in the mashirnama of arrest and recovery. However, PW-2 admitted in cross-examination that the property (charas) had a logo/symbol of an "apple" on it, but this is not mentioned in the mashirnama. Therefore, tempering in the case property under the circumstances of the case could not be ruled out. Moreover, the parcel was retained by whom from 01.09.2021 to 02.09.2021 has also not been explained that after its recovery under whose custody the parcel was lying. The reliance in this regard is placed on the case of *Mst. Marvi and another v. The State (2019 P.Cr.L.J. 1133).* It has also come in evidence that complainant SIP Ali Raza Shah PW-1 stated in his evidence that no private person was present at the time of the arrest of the accused around the place of arrest. However, mashir H.C Mumtaz Alir PW-2 admitted in cross-examination that the place of the incident was thickly populated and a private person was not called by the head of the police party deliberately. It is true that the provisions of Section 103 of the Code of Criminal Procedure are not applicable to cases of personal search

of an accused, particularly, in cases related to Narcotics. However, the complainant concealed the fact that there were private persons present at the time of the search and recovery at the link road, which is a public place. Therefore, to ensure transparency, the complainant cannot be authorized to exclude independent witnesses in the circumstances when appellant had raised specific defence plea of his false implication in this case. This is in accordance with the ruling in the case of *Muhammad Basheer and another v. The State (2019 YLR 1000).*

12. The prosecution has failed to establish the chain of safe custody of the property. They have not produced evidence to show that the charas was brought to the police station, stored in the malkhana, and then taken to the chemical examiner in a sealed condition. The head muharrar of the malkhana has also not been examined. In light of these circumstances, we believe that the conviction of the appellant should be set aside. The prosecution has not proven it's case beyond a reasonable doubt. The reliance in this regard is placed on the case of *Javed Iqbal v. The State (2023 SCMR 139).* The relevant excerpt from the aforementioned case is reproduced as under:-

> *"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."

13. The prosecution has not been able to provide a satisfactory explanation for the discrepancies in the evidence. The slip on which the name of the accused is mentioned has different caste, and the prosecution has not been able to resolve this ambiguity. The appellant has also raised the specific plea that he is the victim of enmity between the Khaskheli and Larik communities, but the prosecution has not been able to provide any evidence to corroborate this.

14. The prosecution has also failed to associate a private mashir for independent corroboration, even though there were private persons available. This is a serious omission, as it casts doubt on the reliability of the prosecution's witnesses. Finally, the close scrutiny of the evidence reveals a number of contradictions. For example, the prosecution witnesses have different accounts of the routes adopted by the police officials at the time of patrolling, and the mode of recovery of the charas and its transmission to the chemical examiner. Reliance in this regard is placed on the case of *Taiz Ali v. The State (2018 P.Cr.L.J. Note 30).*

15. In light of these circumstances, we believe that the conviction of the appellant should be set aside. The prosecution has not proven its case beyond a reasonable doubt.

16. The prosecution has not been able to establish the safe custody and safe transmission of the charas. There are a number of discrepancies in the evidence, and the prosecution has not been able to provide a satisfactory explanation for these. The appellant has also raised the specific plea that he is the victim of enmity between the Khaskheli and Larik communities, but the prosecution has not been able to provide any evidence to corroborate this. The prosecution must prove its case beyond a reasonable doubt. Reliance is placed on the case of *Ahmed Ali and another v. The State (2023 SCMR 781)*, which reveals as under:-

> *"11. It is further to be noted that in a stringent law such as the CNSA, where capital punishment or imprisonment for life can be awarded even on the testimonies of police officials, in order to bring home guilt against an accused, it is necessary for the prosecution to prove their case through reliable, unimpeachable, and confidence-inspiring evidence beyond any reasonable doubt. The harder the punishment, the stricter the standard of proof. In this regard, reliance can be placed on the judgment of this Court reported as Ameer Zeb v. The State (PLD 2012 SC 380), where it was observed that:*
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> > *"Punishments provided in the Control of Narcotic Substances Act, 1997 were quite stringent and long, if not harsh, and, thus, a special care had to be taken that a court trying such an offence had to be convinced that the entire quantity allegedly recovered from the accused person's possession was indeed narcotic substance. We, reverently and respectfully, tend to agree with the latter view and would like to add that the rule of thumb for safe administration of criminal justice is: "The harsher the sentence the stricter the standard of proof." (Underling is provided by us for emphasis.)*
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> *In the said Ameer Zaib's case it was also observed by this court that:*
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> > *"We may also observe that in such cases it is the accused person who is at the receiving end of long and stringent punishments and, thus, safeguards from his point of view ought not to be allowed to be sacrificed at the altar of mere comfort or convenience of the prosecution."*
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> *12. Even otherwise, it is well settled that for the purposes of extending the benefit of doubt to an accused, it is not necessary that there be multiple infirmities in the prosecution case or several circumstances creating doubt. A single or slightest doubt, if found reasonable, in the prosecution case would be sufficient to entitle the accused to its benefit, not as a matter of grace and concession but as a*

> *matter of right. Reliance in this regard may be placed on the cases reported as Tajamal Hussain v. The State (2022 SCMR 1567), Sajjad Hussain v. The State (2022 SCMR 1540), Abdul Ghafoor v. The State (2022 SCMR 1527 SC), Kashif Ali v. The State (2022 SCMR 1515), Muhammad Ashraf v. The State (2022 SCMR 1328), Khalid Mehmood v. The State (2022 SCMR 1148), Muhammad Sami Ullah v. The State (2022 SCMR 998), Bashir Muhammad Khan v. The State (2022 SCMR 986), The State v. Ahmed Omer Sheikh (2021 SCMR 873), Najaf Ali Shah v. The State (2021 SCMR 736), Muhammad Imran v. The State (2020 SCMR 857), Abdul Jabbar v. The State (2019 SCMR 129), Mst. Asia Bibi v. The State (PLD 2019 SC 64), Hashim Qasim v. The State (2017 SCMR 986), Muhammad Mansha v. The State (2018 SCMR 772), Muhammad Zaman v. The State (2014 SCMR 749 SC), Khalid Mehmood v. The State (2011 SCMR 664), Muhammad Akram v. The State (2009 SCMR 230), Faheem Ahmed Farooqui v. The State (2008 SCMR 1572), Ghulam Qadir v. The State (2008 SCMR 1221) and Tariq Pervaiz v. The State (1995 SCMR 1345).”*

17. As a result, the prosecution has failed to prove it’s case and the trial court did not adequately consider the material discrepancies and loopholes in the prosecution's evidence, which shattered the reliability of prosecution evidence to prove the charge as against the accused.

18. For the above discussion and reasons, while allowing instant appeal, the impugned judgment is set aside and the appellant is acquitted of the charge. These are the reasons for our short order dated 25th July, 2023.

JUDGE

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