

IN THE HIGH COURT OF SINDH BENCH AT SUKUR
Cr. Jail Appeal No.D-137 of 2022

Before:
Mr. Justice Naimatullah Phulpoto &
Mr. Justice Amjad Ali Bohio.

Appellant: Muhammad Afzal Chandio through Mr. Rukhsar
Ahmed Junejo, advocate.

Respondent: The State through Syed Sardar Ali Shah, Additional
Advocate General, Sindh.

Date of hearing: 19-07-2023

Date of Judgment: 19-07-2023

J U D G M E N T

AMJAD ALI BOHIO, J:- This Criminal Appeal is directed against the judgment dated 12-12-2022, passed by the learned Additional Sessions Judge-I/Special Judge for (CNS) Khairpur. The appeal pertains to the case of Muhammad Afzal Chandio, who was tried for the offence under Section 9 (c) of the Control of Narcotics Substance Act, 1997. Following a regular trial, he was convicted and sentenced to imprisonment for twelve (12) years R.I and ordered to pay a fine of Rs. 50,000/- (Fifty thousand). In the event of default, he would undergo an additional sentence of four (04) months simple imprisonment.

2. According to the prosecution's case, on 22.08.2021 at 2130 hours, the complainant/Inspector Khalid Hussain Dahiri, along with his subordinate staff, apprehended the appellant at the link road leading from Mirwah Canal to Bhurgri bridge. The apprehension led to the recovery of three pieces of charas in a plastic shopper, weighing 1250 grams, from the appellant's possession. The charas was sealed on the spot, and a memo of arrest and recovery was prepared in the presence of PCs Qurban Ali and Abdul Jabbar. Following the arrest and recovery, the accused, along with the seized property, was brought at PS Shaheed Murtaza Mirani, where the Inspector lodged the FIR on behalf of

the State at 2230 hours for the offence under Section 9 (c) of the CNS (Control of Narcotics Substance) Act, 1997.

3. After completing the usual investigation, the investigating officer submitted the report under Section 173 of the Criminal Procedure Code (Cr.P.C) against the appellant. The trial court framed charge against the appellant on 19-11-2022, to which, he pleaded not guilty and chose to proceed with the trial.

4. To prove it's case, the prosecution first examined Mashir PC/Qurban Ali (PW-1), who produced the memo of arrest and recovery, as well as, the memo of inspection of the place of the incident. Then, Complainant/Inspector Khalid Hussain Dahiri (PW-2) testified and presented the entry of departure, the F.I.R, and copy of the entry. Next, SIP/I.O Muhammad Bux Shar (PW-3) produced the letter seeking permission, along with entries, Photostat copy of Road Certificate (RC) with regard delivery of the parcel to the Chemical Examiner, as well as letter addressed to Chemical Examiner showing receipt of parcel and the chemical report. Lastly, PC/ despatcher Niaz Hussain (PW-4) was examined. Subsequently, the prosecution closed its side of the evidence on 14.10.2022.

5. In his statement recorded under Section 342 of the Criminal Procedure Code (Cr.P.C), the appellant denied the allegations and claimed that the chemical report was manipulated by the prosecution witnesses (PWs), claiming his innocence. However, he chose not to examine himself under Section 340 (2) of the Cr.P.C, and he declined to present any evidence in his defense.

6. After hearing the arguments and assessing the evidence, the trial court convicted and sentenced the appellant as mentioned above. Hence, this instant appeal has been filed.

7. We have heard the arguments presented by the learned counsel for the appellant, the learned Deputy Prosecutor General representing the State, and re-examined the evidence brought on record.

8. The appellant's counsel has contended that the appellant is innocent and has been falsely implicated in the case. He argues that the alleged charas was planted on the appellant by the police. The counsel argued that there are major contradictions in the evidence presented by the prosecution witnesses. The appellant's counsel further contends that the prosecution witnesses deliberately avoided to associated private persons at the time of the alleged recovery. It has been highlighted by the defense counsel that the police official to whom, the parcel was delivered for safe custody has not been cited as a witness and has not been examined by the prosecution to establish the chain of custody of the parcel from the date of recovery up till its delivery to the chemical examiner. The sealed parcel according to the prosecution's evidence, was dispatched by the investigating officer on 23-08-2021. However, the actual Road Certificate (RC) bearing memorandum No. 2399 dated 23-08-2021, as mentioned in the chemical report produced at Ex. 5/E, was not presented. But photo state copy of the same submitted without seeking permission of the Court. Lastly, the defense counsel argues that the chemical report does not pertain to the parcel sent to the chemical examiner. In conclusion, the defense counsel has prayed for the appellant's acquittal based on the above-mentioned arguments and contentions.

9. In rebuttal, the learned Deputy Prosecutor General for the State has supported the impugned judgment and argued that the contradictions raised by the defense counsel are minor in nature. He asserts that the parcel containing the alleged charas was delivered to the chemical examiner within 24 hours of the alleged recovery, indicating that there was no delay in dispatching the parcel. The Deputy Prosecutor General contends that the prosecution has successfully proven the guilt of the accused beyond any reasonable doubt.

10. Upon careful consideration of the contentions raised by both parties, it has been found that the prosecution failed to establish a clear chain of custody regarding the recovery of the alleged charas, its safe custody, dispatch, and delivery to the chemical examiner. They have also pointed out material contradictions in the testimonies of the complainant and mashir PC Qurban Ali.

11. The complainant stated that after the arrest and recovery, they brought the accused and the case property to PS Shaheed Murtaza Mirani, where he lodged the FIR at 2230 hours whereas, mashir PC Qurban Ali, during cross-examination, mentioned that they reached Police Post Shah Abdul Latif at 2230 hours. This inconsistency raises doubts about the availability of the complainant at both places viz. Police Post Shah Abdul Latif and PS Shaheed Murtaza Mirani at the same time, i.e., 2230 hours. Furthermore, the fact that the police party had left the police post, as mentioned in entry No. 20, at 2100 hours for patrolling has not been adequately explained by the complainant in relation to the entry of their departure from PS Shaheed Murtaza Mirani or PP Shah Abdul Latif.

12. During their cross-examination, both the complainant and mashir (PC Qurban Ali) testified that no private person was present at the time of the alleged recovery. However, it has been admitted by the investigating officer (I.O) that residences and shops are situated near the place of recovery, particularly the shops and houses of the Maitla community. The complainant, during his cross-examination, expressed unawareness about the availability of shops at the place of the incident. In light of these discrepancies and uncertainties, the prosecution's case with regard to the recovery and handling of the alleged charas lacks credibility and consistency.

13. Both the complainant and mashir have also contradicted each other regarding the manner in which the memo of arrest and recovery was prepared. According to mashir, the complainant prepared the mashirnama

by keeping it on a clipboard, while the complainant stated that he prepared it by keeping it on the bonnet of a mobile vehicle and not on a clipboard.

14. These loopholes and inconsistencies in the statements of the prosecution witnesses, especially their lack of knowledge about certain realities, raised doubts about the credibility of their testimonies. After re-assessment of evidence, we have come to the conclusion that the prosecution has failed to establish its case against the appellant beyond a reasonable doubt. The reliance in this regard is placed on the case of Naveed Daud vs. State (2023 P.Cr.L.J 154).

15. Another critical aspect of the case pertains to positive chemical report relied upon by the prosecution. The FIR was registered on 22-08-2021 at 2230 hours. According to the complainant he deposited case property in malkhana and I.O had received the same on 23-08-2021. Therefore, it was duty of prosecution to prove that the parcel was kept in malkhana on 22-08-2021 and same remained in safe custody till it's delivery to I.O 23-08-2021 and it was incumbent upon the prosecution to have adduced the evidence of incharge malkhana, but failed. However, there is no evidence during the intervening period regarding the safe custody of the parcel. The parcel was kept in the malkhana, as entry in register No. 19 produced by the complainant at Ex. 4/C. In order to prove that the parcel was kept in safe custody in the malkhana, the prosecution should have examined the Head Moharrar of the malkhana. In the case of Javed Iqbal Vs The State (2023 S.C.M.R 139) it is held the prosecution is responsible to establish each and every step from the stage of recovery till the delivery of the parcel to the concerned laboratory.

“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”.

16. Moreover, the safe custody of the parcel and the safe transmission of the sample are in question, as Photostat copy of Road Certificate (RC) No.2399 has been produced without seeking permission for production of Photostat copy and furnishing explanation with regard non-production of the original. It is well settled law that Photostat copy is not admissible in evidence until/unless permission for the same was obtained from the Court. Reliance in this regard is placed upon Azhar Abbas and others v. Haji Tahir Abbas and another (2021 CLC 1351), which reads as under:-

“Mere marking of a document as an exhibit would not dispense with requirement of proving the same and the same cannot be exhibited unless it is proved. In the present case,

the situation remained the same, but the learned Courts below have not considered and dilated upon the requirement of law because admitting Photostat copy of a document in evidence and reading the same in evidence without observing legal requirements of Article 76 of the Qanun-e-Shahadat Order, 1984 would be illegal. Reliance is placed on the case of Feroz Din and others v. Nawab Khan and others (AIR 1928 Lahore 432), Fazal Muhammad v. Mst. Chohara and others (1992 SCMR 2182) and Abdul Rehman and another v. Zia-Ul-Haq Makhdoom and others (2012 SCMR 954)”.

Thus, the prosecution failed to prove the delivery of parcel to the Chemical Examiner vide R.C.No.2399 dated 23.08.2021. As a result, the chain of safe custody was broken, which is a vital and fundamental ingredient in establishing a conviction of the accused under the CNS Act, 1997.

17. In our re-assessment of evidence, the prosecution has failed to prove that the alleged charas was in safe custody for aforementioned period. Even positive report could not prove the recovery of charas 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. It is settled principle of 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 as held in the case of Tariq Parvez Vs. The State (1995 SCMR 1345) 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 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, announced on 19th July, 2023.

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