

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Special Cr. Appeal No. D-37 of 2020

**PRESENT: Mr. Justice Muhammad Saleem Jessar
Mr. Justice Abdul Mobeen Lakho**

Dates of hearing : 11.05.2023

Date of Judgment : 11.05.2023

Appellant Imtiaz Lolai : Through Mr. Amanullah G. Malik,
Advocate.

State : Through Mr. Aftab Ahmed Shar,
Addl. Prosecutor General, Sindh.

JUDGMENT

MUHAMMAD SALEEM JESSAR. J- By means of instant Special Cr. Appeal the appellant has assailed the Judgment dated 13.10.2020 passed by learned Additional Sessions Judge-I/Special Judge (CNS) Model Criminal Trial Court, Khairpur in Special Case No. 90 of 2019, being outcome of FIR No. 18 of 2019 U/s 9(c) CNS Act, 1997 registered at P.S. Phullo, whereby appellant was convicted under section 245(2) Cr.P.C. for the offence U/s 9(c) CNS Act, 1997 and was sentenced to suffer RI for four years and six months and to pay a fine of Rs.20,000/-(Twenty Thousand Rupees only) or in default to suffer simple imprisonment for five months more. However, he was extended benefit under Section 382-B Cr.PC.

2. Brief facts of the prosecution case as per above said FIR, are that on 30.07.2019, a police party headed by complainant SIP Feroz Ali Shar of PS Phullo, left Police Station alongwith his subordinate staff vide roznamcha entry No.10 at 2200 hours for patrolling. During patrolling they apprehended accused Imtiaz S/o Muhammad Sadique Lolai from Katchi Sarrak near Pir Karam Shah and recovered contraband charas. The charas was weighed and it came to be

weighing 2000 grams. Besides this, police further secured one denomination note of Rs.100/- & two denomination notes of Rs.50/- each (total 200/-). The alleged property was sealed at the spot under the mashirnama in presence of police mashirs. Thereafter, the property and the accused was brought at police station where FIR was registered on behalf of the State. After completing usual investigation, challan of the case was submitted before the Court having jurisdiction for trial.

3. A formal charge U/S 9 (c) CNS Act, 1997 was framed against the accused to which he pleaded not guilty and claimed to be tried.

4. In order to prove its case, prosecution examined PW-1 complainant SIP Feroz Ali Shar at Ex.05, who produced entry No.10 as Ex.5/A, memo of arrest and recovery as Ex.5/B, copy of FIR as Ex.5/C, entry No.2 & 7 as Ex.5/D, another entry No.12 as Ex.5/E & F, permission letter as Ex.5/G. PW-2 Syed Mehar Ali Shah was examined at Ex.06, who produced order of SSP, Khairpur as Ex.6/A, memo of inspection of the place of vardat as Ex.6/B, chemical examination report as Ex.6/C. PW-3 mashir PC Muhammad Azam Sarohi was examined at Ex.07. Thereafter prosecution side was closed vide statement Ex.08.

5. Thereafter, statement of accused U/S 342 Cr.PC was recorded wherein he denied the allegations and claimed to be innocence. However, he did not examine himself on oath as provided U/S 340 (2) Cr.PC nor produced any witness in his defence.

6. After formulating the points for determination, recording evidence of the prosecution witnesses and hearing advocates for the parties, trial Court vide impugned judgment convicted and sentenced the appellant, as stated above. Against said judgment the appellant has preferred instant appeal.

7. We have heard the arguments advanced by learned counsel for the appellant as well as learned Additional Prosecutor General appearing for the State and have perused the material made available before us on the record.

8. Learned counsel for the appellant submitted that appellant, his father Sadique Lolai and his cousin Gulab were taken away by the SHO Police Station, 'B' Section, Khairpur on 09.07.2019 and were detained at unknown place and demanded bribe for their release. He further submitted that mother of the

appellant was continuously visiting the SHO Police Station B' Section, Khairpur and had been making request for release/ recovery of the appellant as well as other detainees and when she did not get any fruit, she got filed Crl. Misc. Application U/S 491 Cr.P.C. bearing No.364/2019 through her well-wisher Arbab Ali Shah on 22.07.2019 before the Court of Sessions Judge Khairpur which was subsequently transferred to Additional Sessions Judge-IV, Khairpur and it was adjourned to 30.07.2019. Learned counsel for the appellant further submitted that on 30.07.2019, SHO of Police Station 'B' Section, Khairpur disclosed before the Court that appellant was found in possession of 2000 grams Charas, therefore, he has been booked vide Crime No. 18/2019 registered at Police Station, Phuloo under Section 9(c) of CNS Act, 1997, therefore, the advocate for applicant filed an statement thereby seeking withdrawal of the Application U/S 491 Cr.P.C, therefore the same was disposed-off as withdrawn vide order dated 30.07.2019. Learned counsel further submitted that co-detainee, namely, Gulab was also shown arrested by the SHO Police Station, Pir-Jo-Goth in FIR No.59/2019 under Section 9(c) CNS Act, 1997 dated 30.07.2019. Learned counsel for the appellant while referring evidence of the prosecution witnesses submitted that as per FIR the police party was having a digital scale through which they got weighed the contraband but by virtue of Police Rules 25.58 of 1934 the police is not permitted to retain or take digital scale alongwith investigation kit, therefore, it seems that the police had cooked-up the story. He further submitted that 03 detainees were taken away by the SHO Police Station B' Section, Khairpur and out of whom Sadique, father of the appellant being an aged person was released whereas appellant and his cousin Gulab Khan were booked in two different crimes of like nature on same date at two different Police Stations which are situated at the distance of about 40/50 K.Ms, to each other. Learned counsel for the appellant further submitted that co-detainee, namely Gulab Khan was also tried by the same Presiding Officer vide Spl. Case No.88/2019 Re- The State v. Gulab Khan Lolai being outcome of FIR No.59/2019 Police Station, Pir-Jo-Goth who had been acquitted almost in the case of similar nature but said grace was not extended by the trial Court in favour of the present appellant. He next submitted that appellant had been taken away by the police on 09.07.2019 and such plea has categorically been taken by the appellant before the trial Court in his statement u/s 342 Cr.P.C. by filing copy of Application U/s 491 Cr.P.C. but the trial Court did not appreciate such defence nor kept it in juxtaposition with prosecution evidence hence, he submitted that prosecution has failed to establish its charge against the appellant

even then the trial court has convicted the appellant. Learned counsel further submitted that alleged contraband was secured on 30.07.2019 at about 2300 hours and it was sent to Laboratory on 31.07.2019 hence, during intervening period it was kept before whom has not been disclosed by the prosecution nor any person claiming to be the incharge of Mallkhanan has been examined in order to establish that contraband chars was lying with him in safe custody. Lastly, learned counsel for the appellant prayed for allowing the appeal and acquittal of the appellant.

9. Mr. Aftab Ahmed Shar, learned Additional Prosecutor General appearing for the State opposed the appeal on the ground that plea taken by the appellant before the trial Court is afterthought as the application filed by Arbab Shah before Sessions Court was withdrawn on 30.07.2019 whereas, FIR in instant case was registered by the police on 30.07.2019 at 1200 hours of the night.

10. From perusal of the record it appears that the accused/appellant in his statement recorded under Section 342 Cr. P.C., had produced a copy of a Habeas Carpus Petition under Section 491 Cr. P.C. From perusal of said petition, it appears that said petition was moved by one Arbab Ali Shah who claimed to be business friend of the detainees wherein he stated that the appellant Imtiaz and his father Sadiq as well as one Gulab S/o Mahyar all by caste Lolai were taken away by the police on 09.7.2019 and were kept in wrongful confinement. Thereafter, on 30.07.2019 said Application was withdrawn on the basis of statement of concerned SHO that the appellant had been booked in instant case. It seems that police had got booked accused/appellant Imtiaz in instant case whereas Ghulab was booked in another FIR registered at P.S. Pir Jo Goth. However, as per defence plea father of present appellant was released due to his old age. However, accused Gulab was acquitted by the Trial Court whereas the present appellant has been convicted by the same presiding officer/ trial judge. It seems that the police have tried to show that both the accused were arrested from different places and were booked in different cases at two different police stations; however, prosecution has not been able to furnish a plausible explanation that if this was the position, then as to how aforesaid Application under section 491 Cr. P.C. was moved on 22.07.2019 i.e. even before the registration of two FIRs which strongly supports defence plea that, in fact, present appellant alongwith his father Sadiq and his cousin Gulab who was subsequently acquitted, were apprehended on the same date and time and from the same place and thereafter father of the appellant was

released, whereas appellant and acquitted accused Gulab were booked in two different cases. Such defence plea is also strengthened by the fact that although the two accused were booked in two different FIRs at two different Police Stations; however, date of the two FIRs is the same besides the scenario/background of apprehension of both the accused and the manner of recovery of contraband chars from their respective possession in two different cases also appear to be most similar which supports the defence plea.

11. It may also be observed that such plea of moving Application under section 491 Cr. P.C. cannot be said to be afterthought, as argued by learned A.P.G. Sindh, because admittedly the FIRs in both cases were registered on 30.07.2019, whereas Application Under Section 491 Cr. P.C. was moved on 22.07.2019 i.e. about 08 days before the registration of two FIRs. Needless to say that the accused party cannot be said to have a prior information that after 08 days FIRs under the CNS Act would be registered against them. In this view of the matter, it seems that the present appellant has been convicted in contravention of Rule of consistency.

12. In view of above, rule of consistency would apply in instant case. On the point of '*rule of consistency*', it would be advantageous to refer to a judgment of Honourable Supreme Court passed in case of Muhammad Asif v. The State reported in 2017 SCMR 486 wherein it was held as under:

“It is a trite of law and justice that once prosecution evidence is disbelieved with respect to a co-accused then, they cannot be relied upon with regard to the other co-accused unless they are corroborated by corroboratory evidence coming from independent source and shall be unimpeachable in nature but that is not available in the present case.”

13. In another case reported as Umar Farooque v. State (2006 SCMR 1605) Honourable Supreme Court held as under:

“On exactly the same evidence and in view of the joint charge, it is not comprehensible, as to how, Talat Mehmood could be acquitted and on the same assertions of the witnesses, Umer Farooque could be convicted.”

14. In another case reported as Muhammad Akram v. The State (2012 SCMR 440) the Apex Court while holding that same set of evidence which was disbelieved qua the involvement of co-accused could not be relied upon to convict the accused on a capital charge, acquitted the accused. In view of this

legal position, appellant should also have been extended same benefit as given to the aforesaid six exonerated accused.

15. There are also certain lacunas / defects in the investigation which create doubts in the prosecution case. The I.O. of the case namely Syed Mehar Ali Shah in his evidence deposed, ***“On 01.08.2019, I was posted as SIO at PS “B” Section, PS Phullo for receiving the case papers from complainant of this case for compliance of order of SSP, Khairpur and reached there. I received case papers and case property from complainant SIP Feroz Ali for further investigation.”*** However, very strangely even before receiving the investigation papers and case property, he got remand of the accused on 30.07.2019 as admitted by himself in his cross examination to the effect, ***“On 30.07.2019, I obtained remand of the accused from concerned Judicial Magistrate”*** Not only this, but, according to the evidence of PW-3 PC Muhammad Azam the I.O. had handed over him the case property i.e. contraband chars on 31.07.2019 for depositing the same in the Laboratory / Office of Chemical Examiner as admitted by him in his evidence, ***“On 31.07.2019, I left PS and proceeded towards chemical laboratory for handing over the property to chemical analysis.....”*** It is not understandable that when the I.O. namely Syed Mehar Ali Shah had received the investigation papers and the case property on 01.08.2019 then as to how he could handover the case property to the said witness prior to receiving the same for the purpose of depositing the same in the laboratory.

16. According to complainant / SHO Feroz Ali, the contraband charas was allegedly recovered from the possession of accused on 30.07.2019 whereas the same was sent to the Chemical Examiner on 31.07.2019 through PW-3 PC Muhammad Azam. Both, the S.H.O. Feroz Ali as well as I.O. Syed Mehar Ali Shah, are silent on the point that after alleged recovery of the contraband chars as to where the same was kept during the intervening period before sending the same to the Laboratory / Chemical Examiner. There is nothing on the record that the same was kept in safe custody / Mal Khana. In the circumstances, it creates serious doubts about the recovery of the contraband chars or at least about the fact that the material sent to the Laboratory / Chemical Examiner was the same which was allegedly recovered from the possession of the accused. In this connection, reference may be made to the case of **Subhanullah Vs. State** reported in 2022 SCMR 1052 decided by Hon’ble Supreme Court wherein it was held that ***prosecution had failed to establish the safe custody of sample***

parcels in the MAL KHANA as the Moharar of the MAL KHANA was not produced. It was further observed that *Police official who allegedly transmitted the sample parcels to the concerned laboratory, was also not produced, hence prosecution failed to prove SAFE transmission of sample parcel to concerned laboratory.* It was further held that *no explanation was provided for withholding such important piece of evidence, therefore, in view of such defect on the part of the prosecution it could not be held with any degree of certainty that the prosecution had succeeded in establishing its case against the accused beyond any reasonable doubt.*

17. Similar view was taken by Hon'ble Peshawar High Court in the case of Sher Afzal Versus State reported in 2022 MLD 1529 (Peshawar).

18. Yet there is another lacuna in the investigation i.e. no independent person from the locality where the accused was allegedly arrested and from his possession contraband charas was recovered, was associated as mashir of the arrest and recovery and both the mashirs are police officials who were also accompanying the complainant / S.H.O. at the time of the incident. Besides being police officials, both the mashirs were also subordinate to the complainant / S.H.O. and it cannot be expected that they would depose against the instructions of their superior officer.

19. It is also to be noted at this stage that the same Presiding Officer (Additional Sessions Judge) had tried and decided both the cases i.e. one against the present appellant by convicting him and the other against the acquitted accused Gulab. However, while dealing with this legal point in these two cases, he has shown double criteria, inasmuch as, in the case of acquitted accused Gulab while dealing with this point the trial Judge had observed as under:

“The perusal of record shows that admittedly the recovery of charas weighing 1500 grams said to have been made from the link road Kanhar Moor to village Manghanwari near Abra Simnali at 1400 hours in day time which is populated area as admitted by the prosecution witnesses in their evidence during cross examination but the complainant has not associated any private person to act as mashir of recovery proceedings, in this respect in case law reported in as Khalid Ahmed V/S The State (PLD 2008 Karachi Page 08) where in it is observed that in the cases of recovery “It is quite certain that the applicability of provision of Section 103 CrPC has been excluded under CNS Act, yet it does not debar or prohibit the police officers/ complainant from making recoveries on such places surrounded by people to take some steps/measures to associate private persons in the process so as to lend credence to the recovery in order to create confidence in general public.”

20. However, while dealing with the same legal point in instant case, the trial Judge has made totally different observations to the effect:

“So far, applicability of Section 103 Cr.P.C for non-association of private witnesses is concerned, it carries no weight per provisions of Section 25, Control of Narcotic Substances Act 1997, which specifically ousts its application in the cases of such like nature revealing that the official witnesses are good and reliable witnesses like public and their testimony could not be discarded merely on the score that they belong to Police department but they have no ill will with the present accused”.

21. It is not understandable that as to why he has not applied the dictum laid down in the case of Khalid Ahmed V/S The State (PLD 2008 Karachi Page 08) to the instant case which was applied by him to the case of acquitted accused Gulab.

22. Apart from above, it is also noteworthy that the accused in his Statement under Section 342 Cr. P.C. has made a categorical statement by producing copy of a Habeas Corpus Petition moved by one Arbab that he alongwith his father namely Sadiq and acquitted accused Gulab was illegally taken away and detained by the police on 09.07.2019; however, from perusal of the impugned judgment we are unable to find out that the trial Court has dealt with said plea of the accused, rather the trial Court has made following observations which, on the face of it, seems to be factually incorrect:

“It is important to note that the accused has failed to substantiate his claim through documentary evidence to show any previous ill will with complainant and that accused was falsely booked in this case.”

23. Needless to emphasis that when a specific plea was taken by the defence that the present appellant along with his father and acquitted accused Gulab had been detained in wrongful confinement for want of bribe, then what else requires to claim ill will against the police. Besides, when such specific plea had been taken by the defence, then it was incumbent upon the Trial Court to discuss the same and give its proper findings on the said point.

24. The accumulative effect of above lacunas and defects in the investigation is that the prosecution has not succeeded in proving its case against the accused / appellant beyond shadow of reasonable doubt which is the requirement of the law.

25. It is well settled principle of law that the prosecution is bound under the law to prove its case against the accused beyond any shadow of reasonable doubt. It has also been held by the Superior Courts that conviction must be based and founded on unimpeachable evidence and certainty of guilt, and any doubt arising in the prosecution case must be resolved in favour of the accused. In instant case prosecution does not seem to have proved the allegations against the accused/appellant by producing unimpeachable evidence, thus doubts have been created in the prosecution version. In the case reported as Wazir Mohammad Vs. The State (1992 SCMR 1134) it was held by Honourable Supreme Court as under:

*“In the criminal trial whereas it is the duty of the prosecution to prove its case against the accused to the hilt, but **no such duty is cast upon the accused, he has only to create doubt in the case of the prosecution.**”*

26. In another case reported as Shamoan alias Shamma Vs. The State (1995 SCMR 1377) it was held by Honourable Supreme Court as under:

*“The prosecution must prove its case against the accused beyond reasonable doubts **irrespective of any plea raised by the accused in his defenc.** Failure of prosecution to prove the case against the accused, entitles the accused to an **acquittal.**”*

27. Needless to emphasize the well settled principle of law that the accused is entitled to be extended benefit of doubt as a matter of right and not as a grace or concession. In the present case, there are various admissions in the evidence of prosecution witnesses which create doubts and put dents in the prosecution case. Even an accused cannot be deprived of benefit of doubt merely because there is only one circumstance which creates doubt in the prosecution story. In the recent case of **Ahmed Ali and another Vs. The State** reported in **2023 SCMR 781**, a Full Bench of Honourable Supreme Court has held as under:

“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).”

28. For the forgoing reasons, by a short order dated 11.05.2023 instant Spl. Criminal Appeal was allowed and the conviction and sentence awarded to the appellant vide impugned Judgment dated 13.10.2020 passed by learned Additional Sessions Judge-I/Special Judge (CNS) Model Criminal Trial Court, Khairpur in Special Case No. 90 of 2019, being outcome of FIR No. 18 of 2019 U/s 9(c) CNS Act, 1997 registered at P.S. Phullo was set aside and consequently appellant Imtiaz S/o Muhammad Sadiq Lolai was acquitted of the charge. He was present on bail, his bail bonds stood cancel and surety was directed to be discharged.

Above are the reasons for said short order of even date.

JUDGE

JUDGE