

ORDER SHEET
 IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR.
Criminal Revision Application No. S- 52 of 2023

DATE	ORDER WITH SIGNATURE OF HON'BLE JUDGE
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29-04-2024.

Mr. Faisal Shams, advocate for the Applicant.
 Mr. Zulfiqar Ali Jatoi, Additional Prosecutor General.

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Adnan-ul-Karim Memon J:- The applicant Muhammad Mughera has impugned the Judgment dated 30-05-2023 passed by learned trial Court/ Assistant Sessions Judge-III Sukkur in Sessions Case No.235/2023 (Re. *The State Vs. Muhammad Mughera*) whereby the learned trial Court awarded the sentence to the applicant for offence under section 7 of The Sindh Prohibition of preparation, Manufacturing, Storage, Sale, and use of Gutka and Mainpuri Act, 2019 (SPPMSSS) to suffer S.I for two years and to pay a fine of Rs.200,000/- in case of default to payment whereof, he shall suffer S.I for 06 months more with the benefit of section 382(B) Cr.P.C. The said judgment was challenged by the applicant by filing Crl. Appeal No.05/2023 and the sentence awarded to him was reduced to one year while the remaining sentence remained intact vide Judgment dated 13-06-2023 passed by learned Vth Additional Sessions Judge Sukkur, which is impugned by the applicant before this Court by preferring the instant Crl. Revision Application.

2. Brief facts of the prosecution case are that complainant ASI Lal Dino lodged the FIR on 31-03-2023 alleging therein that on the day of the report he along with his subordinate staff left the police station vide entry No. 32 at 1900 hours for patrolling. During patrolling, when they reached the main road near Daraza Shop Sukkur, where they saw and identified one person having a white color shopper in his hand, on seeing the police party tried to slip away, but he was apprehended along with the said shopper. PC Faheem Gul and PC Jam Khan were associated as mashirs. The complainant checked out the shopper and found that about 11 packets/puries of Gutka Mava, and 100 puries of Adab Pan Parag were lying in it. On inquiry, the said person disclosed his name Muhammad Mughera son of Nazeer Ahmed bycaste Malik resident of Miani Road Sukkur. From his

body search one currency note Rs. 50/- and one-touch mobile of Vivo company were secured from his possession. Such mashirnama of arrest and recovery were prepared at the spot and then the applicant and case property was brought to the police station where the complainant had lodged the FIR against the applicant on behalf of the State. The Police, after completion of the usual investigation, submitted the challan against the accused before the Court having jurisdiction.

3. After a supply of case papers to the accused, the charge against him was framed to which he pleaded not guilty and claimed to be tried.

4. The prosecution examined PW- 1 Complainant ASI Lal Dino Mahar at Ex.4, he produced entry No.32 at Ex.04/A, Memo of arrest and recovery at Ex. 04/B, entry No.35/2100 hours at Ex.4/C and FIR at Ex.4/D, PW-2 Mashir PC Faheem Gul at Ex.5, he produced memo of place of incident at Ex 5/A, PW-3 IO/ASI Zameer Hussain Khaskheli at Ex.6 he produced entry No.36 at Ex.06/A, entry No.38/2800 at Ex.6/B, letter No. Cr.82/2023 dated 05.4.2023 addressed to DHO Sukkur at Ex.06/C, permission letter No.DHO/SUK/6883/85 dated 05.04.2023 at Ex.06/D, R.C No.99/2023 at Ex.06/E, entry No.05/0830 at Ex.06/F, entry No.10/1030 at Ex.06/G and chemical examination report bearing 552/2030 dated 10.04.2023 at Ex.06/H. PW-4 Dispatcher PC Ghulam Fareed at Ex.7, he produced entry No.05/0830 and Entry No.10 /1030 at Ex.06/E respectively. All the PWs produced the relevant documents to the extent of their evidence and thereafter, the ADPP for the State closed the prosecution evidence side vide statement at Ex.8.

5. The statement of the accused provided U/S 342, Cr. P.C. was recorded at Ex.9, wherein he denied the allegations of prosecution and deposed that Police had falsely implicated him over making the demand of legitimate amount/price of articles sold to Police officials as he runs one General Store. However, neither did he examine himself on oath nor produce any witness in his defense.

6. After the trial, the applicant was convicted and sentenced by the learned trial Court vide Judgment dated 30-05-2023, as discussed in the preceding paragraph, which he impugned before the appellate Court whereby his sentence was reduced to one year with purported reasoning, while the remaining portion of sentence remained the same vide Judgment dated 13-06-2023.

7. It is, *inter-alia*, contented on behalf of the applicant that applicant/appellant is innocent and has falsely been implicated in the present case;

that the alleged incident took place in a thickly populated area but no independent person has been cited as a witness; that applicant was involved by the police party just the applicant runs his general store situated at Miani Road Sukkur and there was due amount upon police officials and he was demanding his amount; that there are material contradictions in the evidence of PW-1 Complainant ASI Lal Dino Mahar, PW-2/Mashir PC Faheem Gul, PW-3 IO/ASI Zameer Hussain Khaskheli and PW-4 Dispatcher PC Ghulam Fareed; that if the applicant/appellant admitted his guilt regarding possession of the 11 packets/puries of Gutka Mava, and 100 puries of Adab Pan Parag, why the entire property was not produced in Court, besides the same was sent at the belated stage i.e after 5 days of alleged recovery as admitted by the witnesses. He further submitted that the impugned Judgments passed by learned Courts below are not warranted under the law and are liable to be set aside and have been passed hurriedly. He further contended that the prosecution had miserably failed to establish the case against the applicant. He further contended that impugned Judgments are the result of non-reading and misreading of the evidence and are liable to be set aside. Learned counsel further contended that the prosecution has failed to bring independent and trustworthy evidence against the applicant to prove the charge against him, therefore, his conviction is liable to be set aside, and the applicant may be acquitted of the charge.

7. On the other hand, learned Additional P.G. for the State has supported the impugned judgments passed by learned Courts below and contended that the prosecution has been able to prove its case against the applicant beyond the shadow of reasonable doubt; therefore, the instant CrI. Revision Application is liable to be dismissed.

8. I have heard learned counsel for the applicant and the learned APG and have also examined the material available on record and the relevant provisions of the Act of 2019.

9. Before dilating upon the evidence of the parties, firstly I would like to see the rule position of the case, Section 8(1) of the Act of 2019, under which the applicant has been booked, provides that whoever contravenes the provisions of Sections 3, 4, 5, 6, and 7 of the Act of 2019 shall be punishable with imprisonment that may extend to three years, but shall not be less than one year, and shall also be liable to fine which shall not be less than Rs.200,000.00. Sections 3, 4, and 5 of

the Act of 2019 provide that the mixture or substance defined in clauses (vi) and (viii) of Section 2 of the Act of 2019 shall not be produced, prepared, manufactured, offered for sale, distributed, delivered, imported, exported, transported and dispatched by any person. Section 6 of the Act of 2019 prohibits the ownership and operation of premises or machinery for the manufacture of manpuri, gutka, or their derivatives; and, Section 7 of the Act of 2019 prohibits the acquisition and possession of the asset derived from manpuri, gutka and their derivatives. To invoke the provisions of Sections 3, 4, and/or 5 *ibid*, the mixture or substance must fall within the following definitions of “*derivative*” and “*gutka and manpuri*”, mentioned in clauses (vi) and (viii), respectively, of Section 2 of the Act of 2019 :

10. A perusal of the above-mentioned provisions of the Act of 2019 shows that to invoke the provisions of Sections 3, 4, and/or 5 *ibid*, the prosecution must show that there was a “*mixture*” or “*substance*”, as defined in clauses (vi) and (viii) of Section 2 of the Act of 2019, and the accused was involved in the production, preparation, manufacture, sale, distribution, delivery, import, export, transportation and/or dispatch thereof. *Prima facie*, it appears that there was no mixture as all the items allegedly recovered from the applicant were found packed separately. It may be noted that if all or any of the said items viz. chalia, choona, katthah, salt, and bottles of water meant for batteries, are possessed, transported, sold, etc., independently or individually, the provisions of Sections 3, 4 and/or 5 the Act of 2019 shall not be attracted. The word “mixture” used in Sections 2(vi), 2(viii)(a), and 3 of the Act of 2019 is significant which clearly shows that unless a mixture of the ingredients prescribed by the Act of 2019 is made, the aforesaid provisions will not be attracted. In the absence of a mixture, the substance shall not fall within the definitions of “derivative”, “gutka” or “manpuri” contained in clauses (vi) and (viii) of Section 2 of the Act of 2019.

11. **Complainant ASI Lal Dino** has admitted in evidence that at the time of arrest, the place of incident was a busy and populated area, however, he made efforts to arrange private mashirs but could not succeed. He further admitted that the white shopper cited in the police papers was not available in Court. He also admitted that the quantity of the recovered property produced in Court did not align with the property mentioned in the police papers. He deposed that the subject shop was/is of the brother of the applicant, however denied the suggestion that he used to demand cigarettes and other articles from the applicant free of costs, and

on-demand of his legal outstanding amount, he had foisted case property upon the applicant.

12. **Pw PC Faheem Gul** admitted in his evidence that he did not know whether the property produced in Court was in line with the recovered property or not. He admitted that the recovered white-colored shopper was not produced in Court. He admitted that the place of the incident was a busy area and deposed that no private person was seen to be associated as a private witness. Both witnesses contradict each other on the point of associating witnesses and admit that the case property was insufficiently produced in court which shows that the same did not align with actual case property.

13. **ASI Zameer Hussain Investigation officer** has admitted that the place of arrest was a busy area and he had invited about 2/3 persons to act as mashirs but they refused to do so. This contradiction in the deposition of the witnesses is material, however, he further admitted that the recovered white shopper was not available in Court. He deposed that the case property was deposited with the Chemical Laboratory through WHC of PS whose statement was not recorded by him. He further deposed WHC was also not cited as a witness in the final report. He admitted that he sought permission from the DHO Office, Sukkur with a delay of about more than 05 days to dispatch recovered material. He admitted that despite having permission and delay, he further delayed for two days to send the property for a chemical examination. He deposed that the case property produced in Court was meager than the recovered one. He deposed that they did not explain the reason for such a meager quantity produced in court.

14. The material weakness in the prosecution's case is the delayed dispatch of sample parcels to the Chemical analyzer. They were dispatched to the Chemical analyzer after 5 days of the purported recovery, with no explanation at all. The secure custody of the seized substance during the intervening period lacks substantiation through a well-knit chain of custody. Consequently, the unexplained delay presents an additional factor that may weigh against the prosecution.

15. While section 103 Cr.P.C. is not applicable under the Act, the established precedents of the higher courts emphasize the importance of associating private witnesses with search and seizure proceedings when the seizing officers receive prior information about the trafficking of such hazardous substances, ensuring fairness. This view aligns with what the Supreme Court observed in *Muhammad*

Aslam v. The State (2011 SCMR 820). In the present case, the prosecution witnesses admitted the presence of private persons at the scene, yet none was associated with the proceedings.

16. While police witnesses are generally considered reliable, there is a judicial consensus that the inclusion of private witnesses in the recovery process adds an extra layer of caution, as observed in various cases. For instance, in Hakim Ali v. The State (2001 PCr.L.J 1865 [Karachi]), the conviction and sentence were set aside due to the absence of an independent witness despite the occurrence taking place during daylight. Similarly, in a 2013 case Ghulam v. The 2013 PCr.L.J 860 [Sindh], the court, while acquitting the accused, noted that the prosecution's failure to cite private witnesses, despite a significant number of people being present at the crime scene, made the story unnatural. This view was also expressed by the Court in Imran v. The State (2013 PCT.IJ 640 Peshawar).

17. Upon thorough scrutiny of the prosecution evidence, I have arrived at the inescapable conclusion that despite the recovery of hazardous substances, the prosecution has failed to substantiate the charges against the applicant. A fundamental principle of criminal law dictates that even a single, slight, but reasonable doubt is sufficient for the acquittal of the accused. Recently, the Supreme Court reiterated the significance of this principle in Ahmed Ali v. State 2023 SCMR 781).

18. It is noted that the present applicant/appellant has been shown as first alladged offender and having no past criminal history on his credit, therefore, I have, for what has been observed above, come to the conclusion that prosecution has failed to prove its case against the applicant/appellant beyond shadow of reasonable doubt and as a result, I allow the present Criminal Revision application and set-aside both the judgments rendered by the trial and appellate Court and acquitt the applicant from the charges leveled against him in Sessions Case No. 235/2023.

19. These are the reasons of my short Order dated 29.04.2024 whereby the applicant was acquitted of the charge.

JUDGE