

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT
HYDERABAD**

Criminal Appeal No. D-95 of 2023

Present:

Justice Zafar Ahmed Rajput

Justice Amjad Ali Bohio

Appellant : Asad Ali s/o Ghulam Shabbir Shaikh,
through Mr. Ashfaq Ahmed Lanjar,
Advocate

Respondent : The State, through Mr. Nazar Muhammad
Memon, Addl. P.G., Sindh

Date of Hearing : 25.09.2024
Date of Order : 25.09.2024

JUDGMENT

ZAFAR AHMED RAJPUT-J:- The appellant was tried by the Model Criminal Trial Court-I/Special Judge Control of Narcotic Substances Act, Hyderabad ("*the Trial Court*") in Special Case No.65 of 2023, arising out of Crime No.137/2023, registered under section 9(1) 3(c) of the Control of Narcotic Substances Act, 1997 ("*the Act*") at Police station Qasimabad, Hyderabad. After a full-fledged trial, the Trial Court vide its judgment, dated 05.08.2023, convicted the appellant for the said offence and awarded him sentence to endure rigorous imprisonment for nine years and to pay a fine of Rs. 80,000/- or, in default thereof, to undergo simple imprisonment for three months more. The benefit of section 382-B, Cr. P.C was extended to him. It is against that judgment that the instant Crl. Appeal has been preferred by the appellant.

2. Succinctly, the facts of the prosecution case as narrated in FIR are that, on 04.05.2023 at 0100 hrs., the appellant was arrested near London

Town Park Road, Qasimabad by a police party of P.S. Qasimabad headed by SIP Imam Dino Shah on being found in possession of 1100 grams of charas in contravention of section 6 of the Act in presence of mashirs, for that he was booked in the aforesaid crime/FIR.

3. After usual investigation, police submitted the report under section 173, Cr. P.C. The Trial Court framed the formal charge against the appellant as Exh.2, to which he pleaded not guilty and claimed to be tried vide plea recorded at Exh.2/A. At the trial, prosecution in order to substantiate the charge against the appellant examined four witnesses, namely, P.W-1, SIP Imam Dino Shah (*complainant*) at Exh.3; P.W-2, ASI Allah Warayo (*mashir*) at Exh.4; P.W-3, Inspector Gul Sher (*I.O.*) at Exh.5 and P.W-4, WHC Muhammad Umar (*In-charge Malkhana*) at Exh.6. They produced relevant documents in their evidence. The statement of the appellant under section 342, Cr. P.C was recorded at Exh.8, wherein he denied the allegation against him and pleaded innocence. He; however, neither opted for examination on oath under section 340 (2), Cr. P.C. nor even led evidence in his defense. On the assessment of the evidence on record, the Trial Court convicted and sentenced the appellant as mentioned above.

4. Learned counsel for the appellants contends that the impugned judgment is against the law, facts and equity, hence, it is not sustainable in law; that despite prior information, police failed to associate any private person to witness the alleged recovery of charas in compliance of section 103, Cr. P.C.; that no evidence has been brought on record to prove that the case property before sending for chemical analysis

remained in safe custody in *Malkhana* and even the I.O has failed to produce road certificate as provided under Rule 22.72 in Form 10.17 of the Police Rules, 1934 for depositing case property with chemical examiner, which has rendered the prosecution case against the appellant doubtful entitling him for such benefit; hence, the conviction and sentence awarded to the appellant is liable to be set aside. In support of his contentions, learned counsel relies upon the case of *Mir Muhammad and others vs. The State* (2024 P Cr. LJ 370).

5. On the other hand, learned Addl. P.G. fully supports the impugned judgment. He maintains that no enmity has been alleged by the appellant with police to implicate him falsely in the case; that all the four prosecution witnesses have given un-contradicted and trustworthy account of alleged recovery of charas in huge quantity, besides, the appellant has criminal record.

6. We have heard the learned counsel for the appellant as well as learned Addl. P.G for the State and have examined the material available on record with their assistance.

7. It divulges from the evidence of prosecution witnesses that, on 04.05.2023, the complainant, **P.W-1**, SIP Syed Imam Dino Shah, vide Daily Diary Entry No. 50 (Ex: 3/A) was on patrolling duty in police mobile along with his subordinate, namely, ASI Allah Warayo, PC. Sohbat Ali and DPC Muhammad Umar. During patrolling, he received spy information regarding availability of appellant near London Town Park Road, Qasimabad with intention to sell the charas, hence, they reached the pointed place, apprehended the appellant and from his hand they

secured one plastic bag containing charas. They weighed the charas through electronic scale, which came to 1100 grams, and sealed the same for chemical analysis. Such memo of arrest and recovery (Exh. 3/B) was prepared at the spot wherein ASI Allah Warayo and PC. Sohbat Ali acted as mashirs. Thereafter, the appellant and recovered charas were brought at P.S. where complainant recorded FIR (Exh: 3/C) on behalf of the State. In this regard, the complainant kept the arrival entry No. 56 in the Daily Diary (Exh: 3/D). **P.W-2**, ASI Allah Warayo (*mashir*) has also attested the recovery of charas from possession of the appellant and the verified the contents of memo of arrest and recovery (Exh. 3/B) and memo of side inspection (Exh. 4/A). The investigation was entrusted to **P.W-3**, Inspector Gul Sher (*I.O*), who vide D.D. Entry No. 55 (Exh: 5/A) left police station and visited the place of incident pointed where he prepared memo of site incident (Exh: 4/ A *produced by P.W-2 Mashir ASI Allah Warayo*), in presence of ASI Allah Warayo and PC Sohbat Ali. He deposited the case property with Chemical Examiner, Karachi for chemical analysis under letter dated 05.05.2023 (Exh. 5/E), from where a positive report, dated 20.06.2017, (Exh. 5/G) was received. He also produced the criminal record of the appellant (Exh. 5/H). Case property viz. charas was produced before the Trial Court during evidence of the P.Ws.

8. It also appears from the prosecution's evidence that, on 04.05.2023, In-charge Malkhana, **P.W-4**, WHC Muhammad Umar after receiving the sealed parcel/case property from I.O. SIP Gul Sher, kept the same in safe custody under Entry No. 45 of Register No.19 (Exh. 6/A). On 05.05.2023, he handed over the sealed parcel to I.O., SIP Gul Sher, for deposition in the office of Chemical Examiner, Karachi.

9. All four P.Ws have implicated the appellant to have been apprehended on/at aforementioned day, time and place on being in possession of 1100 grams of charas. The evidence of P.Ws. in respect of arrest of appellant and recovery of charas is consistent and confidence inspiring. There appears no material contradiction in the depositions of P.Ws rendering the prosecution case as doubtful. The record shows that after recovery, the case property was kept in Malkhana under safe custody. Admittedly none of the prosecution witnesses had any enmity with the appellants nor was it suggested.

10. So far the arguments of the learned counsel for the appellants are concerned, it may be observed that section 25 of the Act specifically excludes application of Section 103, Cr. P.C in narcotic cases. As regard road certificate under in Form 10.17 of Police Rules, 1934, the P.W-3, Inspector Gul Sher (*I.O*) has produced letter dated 05.05.2023 (Exh. 5/E) under that the case property was deposited by him in the office of Chemical Examiner, Karachi vide departure No. 137/2023, which has duly been acknowledged by the said office. Hence, non-production of road certificate under Police Rules is not fatal to prosecution case. It goes without saying that in narcotic cases the Courts should have a dynamic approach in appreciating the evidence and the discrepancies, which may occur in the statements of prosecution witnesses due to lapse of time or irregularities having no impact on the material aspects of the case, have to be ignored. It is pertinent to note that the alleged charas was recovered on 04.05.2023 and the same was deposited with the Chemical Examiner promptly on the second day i.e. 05.05.2023 and it was not the case of the appellant before the Trial Court that the case property was tampered with

while lying in the *MALKHANA*. Even otherwise, nothing pointed out from the record by the learned counsel for the appellant, which could suggest that the safe chain of custody of the recovered charas was compromised. It may be observed that once the prosecution *prima facie* establishes its case, then under Section 29 of the Act of 1997 burden shifts upon the accused to prove contrary to the case of the prosecution, and in the instant case, the appellants have failed to do so. The case-law cited by the learned counsel for the appellant being on distinguishable facts does not advance the case of the appellant for his acquittal.

11. For the foregoing facts and reasons, we have not found any misreading or non-appreciation of evidence and any illegality or legal or factual infirmity in the impugned judgment so as to justify interference by this Court in recording sentence and conviction to appellant by the Trial Court. Hence, instant criminal appeal is dismissed.

JUDGE

JUDGE