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

Criminal Appeal No. D-46 of 2009.

**Present:**

**Mr. Justice Naimatullah Phulphoto**

**Mr. Justice Muhammad Junaid Ghaffar**

**Zulfiqar Ali @ Bhutto .....Appellant**

**Versus**

**The State.....Respondent**

Appellant Through Mr.Saleem Raza Jakhar, Advocate.

Respondent: Through Mr. Khadim Hussain Khoonharo, D.P.G.

Date of hearing: 25.03.2015.

Date of judgment: 25.03.2015.

**J U D G M E N T**

**MUHAMMAD JUNAID GHAFFAR -J:** Through instant Criminal Appeal, the appellant has assailed judgment dated 30.06.2009 passed by the learned Special Judge for Control of Narcotics Substances, Larkana, in Special Narcotics Case No.292 of 2006 for an offence punishable under Section 9 (b) of Control of Narcotic Substances Act 1997, arising out of Crime No.95 of 2006 of P.S Taluka, whereby, the appellant has been convicted Under Section 9 (b) of Control of Narcotics Substances Act, 1997, and sentenced to four years and six months R.I. and to pay fine of Rs.20,000/= and in default of payment of fine, to further undergo S.I for five months. The Appellant has also been granted benefit of Section 382(b) Cr.P.C.

2. The brief facts, in nutshell, as stated in the FIR by the prosecution are as follows:

That on 21.08.2006 ASI Imamdin Chandio of P.S Taluka along with subordinate staff namely HC- Rajib Ali, PCs- Badlo Khan, Mureed Hussain, Driver PC- Ali Nawaz proceeded vide Entry No.11 dated 21.08.2006 at 1130 hours were patrolling and



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checking in order to arrest the proclaimed accused persons. During patrolling, the police party reached at Ladho Kalhoro Laro (curve) at Kamber road and saw one person whom the police party signaled to stop who tried to run away but he was arrested by them. On enquiry, he disclosed his name as Zulfiqar Ali @ Bhutto S/O Muhabat by caste Brahmani Chandio R/O village Ali Hassan Chandio Taluka Kamber. Complainant associated HC- Rajib Ali and PC- Badlo Khan as mashirs and conducted personal search of the accused and recovered heroin powder in the shape of purees from right side pocket of his shirt and also recovered charas from left side fold and from his front pocket of shirt found Rs.80/= in denominations of Rs.10/= which were taken in police custody. The heroin power was weighed and the same came to be 50 grams out of which 25 grams was taken and sealed separately as sample. The charas was weighed and the same came to be one kilogram out of which half kilogram was taken and sealed separately as sample. After preparation of necessary memo of arrest and recovery, the accused along with recovered property was brought at P.S Taluka where the FIR was lodged on behalf of the State to the above effect.

3. Consequent upon registration of the FIR, the complainant conducted investigation of the case and submitted challan before the learned Trial Court under above referred Section and charge was framed on 05.05.2007 to which the appellant pleaded not guilty and claimed to be tried.
4. During trial, the prosecution in support of its case examined P.W/mahsir HC- Rajib Ali and complainant ASI Imamdin, who produced FIR and report of Chemical Examiner, thereafter prosecutions side was closed. On conclusion of the trial, and after hearing learned Counsel for the parties, the learned Trial Court passed the impugned judgment, giving rise to filing of the instant appeal.
5. Learned Counsel for the appellant has contended that there is delay of five days in sending the samples of Narcotics allegedly recovered from the appellant, as the date of incident is 21.08.2006, whereas, the samples were sent to the laboratory on 26.08.2006. Learned Counsel has further contended that according to the prosecution's case, 25 grams of heroin powder, allegedly recovered from the appellant was sent for testing purposes, however, the laboratory report at Exb: 9-b reflects that the net weight of the heroin power is 5 grams. Per learned Counsel the prosecution had also failed to engage any private mashir, though in the evidence the investigating officer has admitted



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that the place of incident was a busy area, but they did not ask any person working nearby, to act as mashir. Learned Counsel has further contended that the prosecution has failed to bring on record the departure and arrival entries of the Police Station which creates serious doubt in the prosecution's case. It has been further contended that there is contradiction in the evidence of the prosecution witnesses in respect of getting hold and arrest of the appellant. Per learned Counsel, it has come in the evidence that the prosecution witness namely Imamdin, (Investigating Officer), in his cross examination has admitted that memo of arrest was prepared at 1400 hours, whereas, the actual time should have been 1415 hours. Learned Counsel has further contended that the Investigating Officer, Imamdin has admitted in his evidence that he was not competent to seize the Narcotics substance or to conduct the investigation. In support of his contention, learned Counsel for the appellant has relied upon the case of *Ansar ul Islam v. The State (PLD 2005 Karachi 146)*.

6. Conversely, learned D.P.G has supported the impugned judgment and contended that the evidence produced by the prosecution in the instant matter is consistent, whereas, the recovery of Narcotic substance has been made from the appellant. Learned D.P.G has further contended that though there is delay in sending the samples, however, such delay is not material to the prosecution's case. Learned D.P.G has further submitted that production of departure and arrival entries of the Police Station are not mandatory, whereas since no enmity has been alleged therefore, evidence of police officials is reliable.

7. We have heard the learned Counsel for the appellant, and learned D.P.G appearing on behalf of the State and perused the record, evidence and case law relied upon by the parties.



8. On perusal of the evidence, it is noticed that as per the prosecution's case, the incident occurred on 21.08.2006 at 1400 hours whereas, admittedly the samples were sent for laboratory testing on 26.8.2006 which were received by the Chemical Examiner, Chemico Laboratory, Sukkur @ Rohri on 28.08.2006 as reflected from the Laboratory Testing Report (Exh:9-B). Learned D.P.G while confronted with such delay in sending the samples could not satisfactorily respond to the query of this Court in this regard, nor could refer to any material or evidence which could justify such delay in sending samples to the Laboratory. In terms of *Control of Narcotics Substances (Government Analyses) Rules, 2001*, it is mandatory to send the samples of Narcotics for testing purposes within a period of 72 hours, whereas, in the instant matter the samples have been forwarded for testing purposes after more than five days. It is further noted that no plausible justification or explanation has been brought on record to justify such delay in sending samples for laboratory test. Such conduct on the part of prosecution creates serious doubts regarding sanctity of report and benefit, if any, of such delay and the doubts so created, as per settled law, is to be granted to the appellant.

9. It has been further noticed that the appellant/accused in his statement recorded Under Section 342 Cr.P.C. at Exb: 11, had categorically stated that he was innocent and was being falsely implicated by D.S.P Sardar Khan Chandio, as the appellant had failed to fulfill his illegal demands. Once the appellant had specifically made allegation against the DSP of Police in his statement under Section 342 Cr.P.C, then the prosecution was required to negate such assertion of the appellant and for this purpose it was incumbent upon the prosecution to have brought on record the departure and arrival entries of the Police Station, so that the allegation of foisting of Narcotics and false implication of the appellant could be controverted. No such entries of the Police Station have been produced in evidence, nor learned D.P.G could assist



this Court with any such material, therefore, even on this count without independent corroboration, the case of the prosecution is full of doubts and the appellant is entitled for such benefit of doubt.

10. It has also been admitted by the complainant that he was not competent to act as Investigating Officer in the matter, whereas, even otherwise, there is no legal bar as complainant / SHO may investigate the case, however, propriety demands that the complainant should not act as Investigating Officer as it is beyond imagination that the complainant would collect evidence against his own case and would naturally act in a manner, which would be prejudicial to the interest of appellant / accused, as well as against the norms and principles enunciated for proper dispensation of justice. Reliance in this regard may be placed on the case of *Nazeer Ahmed V/s The STATE (PLD 2009 Karachi 191)*, wherein the following observations of the learned Division Bench are relevant;

“An officer, who is himself complainant in the case, cannot be expected to collect and preserve evidence, which goes against his case. He cannot properly perform duties of an independent and fair investigating officer. It is, therefore, that the superior Courts have never approved the practice of complainant police officers acting as Investigating Officers.”

11. The complainant has also admitted in his cross examination that according to the evidence which had been narrated in the FIR, the memo of arrest would or should have been prepared by, or around 1415 hours and not at 1400 hours, as reflected in Exh: 9-A i.e. mashirnama and FIR respectively. Such evidence led by the Complainant / Investigating Officer, itself creates serious dent in the prosecution's case and cannot be expected to be accepted by this Court so as to bring the prosecution's case beyond reasonable doubt, specially when the appellant in his statement under Section 342 Cr. P. C. has alleged foisting of Narcotics and false implication by the police officials.



12. Lastly, both the prosecution witnesses namely Rajib Ali and Imamdin have admitted in their evidence that the place of incident is one of the busiest road, where several vehicles are plying round the clock, and have further admitted that there is brick line situated near to the place of incident, however, no effort was made by them to contact or request any private person to act as mashir in the instant matter.

13. In view of hereinabove facts and circumstances of the instant case, contradictions noted in the prosecution witnesses, delay in sending the samples and non production of departure and arrival entries of the Police Station, we are of the view that the prosecution has miserably failed to establish its case against the appellant beyond reasonable doubt, whereas the impugned judgment suffers from legal defects, hence cannot be sustained in law.

14. Accordingly, on 25.03.2015 we had allowed instant appeal by means of a short order, whereby, the conviction and sentence recorded by the Trial Court was set aside and the appellant was acquitted, whereas, the bail bond furnished by the appellant, in view of suspension of sentence by this Court, was cancelled and the surety was discharged. The above are the reasons for such short order.

  
JUDGE  
1.4.2015

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