IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD

Cr. Appeal No. D- 37 of 2015

PRESENT:

Mr. Justice Naimatullah Phulpoto
Mr. Justice Zulfiqar Ahmad Khan

Appellant	:	Aftab Hussain Jamali through Mr. Pir Bux Bhurgri, Advocate
Respondents	:	The State through Syed Meeral Shah Bukhari, D.P.G.
Date of Hearing	:	12.04.2017

J U D G M E N T

ZULFIQAR AHMAD KHAN, J:- Appellant Aftab Hussain s/o Abdul Aziz faced trial before learned Special Judge for CNS ACT, Tando Allahyar in Special Case No. 27 of 2012 for offence under Section 9(b) Control of Narcotic Substance Act, 1997. By judgment dated 15.04.2015, the appellant was convicted and sentenced to undergo R.I for one year and six months and to pay fine of Rs.10,000/-. In default of the payment of fine, he was to undergo R.I for three months more. Benefit of Section 382-B Cr.P.C. was extended to the appellant.

2. Brief facts of the prosecution case as per FIR are that on 16.04.2012 at about 7-00 p.m. SIP Muhammad Usman Hingoro of police station Tando Allahyar in respect of an incident took place on the same day at about 6-00 p.m, are that on the day of incident he along with subordinate staff namely Ahsan-u-Haq Gujar ASI, Muhammad Farooque PC, Khurum Kaleem PC, and Mohammad Ali DHC left police station concerned in government vehicle bearing registration No.P-01 entry No. 27 at about 5-20 pm for the purpose of patrolling. After paying the visit at some different places, when they reached at Tando Adam Road chowk, where complainant received spy information that one person namely Aftab Hussain Jamali is selling the Charas at Naseer Wah Mori, Bye-pass road. On receipt of such information, complainant party immediately rushed

towards the pointed place, where they saw, that one person was sitting at northern side of Naseer Canal under the shelter of Devi Bushes, besides whom one black colour shopping bag was lying, who on seeing police mobile become confused and after taking said shopping bag in his hand, tried to slip away, therefore, complainant party due to suspicious, got stopped their vehicle near the accused and caught hold of him at about 6-00 p.m. and while taking the above said shopper in their possession, complainant party enquired about his name, upon which he disclosed his name to be Aftab Hussain s/o Abdul Aziz, by caste Jamali, r/o village Safar Khan Jamali, Taluka Jhando Mari. Thereafter complainant opened the said shopping bag and checked it, during which he found that two big pieces of charas were lying in it duly wrapped with plastic, upon which some endorsement like "Jeay Sindh-2012" were written. Thereafter complainant weighed the Charas, which become 970 grams, therefore, accused was arrested under Section 9-b of CNS Act, 1997 and then complainant conducted the personal search of accused and secured Rs.100/- in different currency notes from the front pocket of his shirt. Thereafter, small quantity of Charas was separated from recovered Charas total 10 grams for the purpose of chemical analysis and same was sealed whereas remaining charas viz. 9600 grams was also sealed separately. The complainant due to non-availability of private person, prepared such mashirnama of arrest and recovery in presence of official mashirs namely Ahsan-u-Haq Gujar ASI and Mohammad Farooque PC. Thereafter they came back at PS concerned, where complainant / SIP Mohammad Usman Hingoro lodged such FIR on behalf of the state being head of police party.

After registration of FIR, police conducted usual investigation and after completing all the legal formalities, submitted challan under Section 173 Cr.P.C.

The charge against the accused Aftab Hussain was framed under Section 9-b Control of Narcotic Substance Act, 1997 at Ex.2 to which he pleaded not guilty and claimed to be tried.

Prosecution in order to prove its case, examined SIP Miskeen Gahelo as P.W-1 at Ex.04, who had investigated the matter. He produced carbon copy of letter addressed to the Chemical Examiner at Ex.4/B and Chemical Report at Ex.4/B. Mashir ASI Ahsan-ul-Haq Gujar was examined as P.W-2 at Ex.5, who produced copy of mashirnama of arrest and recovery at Ex.5/A and complainant / SIP Muhammad Usman Hingoro was examined as P.W-3 at Ex.6, who produced

copy of departure entry at Ex.6/Applicant attested photocopy of arrival entry Ex.6/B and copy of FIR at Ex.6/C respectively, thereafter the side of prosecution was closed at Ex.7.

Statement of accused under Section 342 Cr.P.C. was recorded at Ex.8 in which accused false implication in this case and denied the prosecution allegations. He has stated that the prosecution case is false. The chemical report is managed one. The P.Ws have deposed against him as they are police officials and interested. He neither examined himself on oath nor he led any evidence in his defence.

6. Learned Special Judge after hearing the learned counsel for the parties and examining the evidence available on record convicted and sentenced the appellant as stated above hence this appeal.

7. Brief facts of the prosecution and the evidence finds an elaborate in the judgment of the trial court and need not to repeat the same to avoid unnecessary repeatation.

8. Mr. Pir Bux Bhurgri, learned advocate for appellant has mainly contended that it was the case of spy information but the complainant failed to associate any person of the locality to witness the recovery proceedings. He has further contended that the charas was recovered from the possession of accused on 16.04.2012 but it was sent to the chemical examiner on 18.04.2012. The safe custody during that period has not been established. It is also contended that neither WHC of the police station nor HC Bashir Ahmed who had taken sample to the chemical examiner have been produced before the trial court for their evidence. It is contended that there was no evidence that how many grams were taken from the each piece of charas for sending to the chemical examiner. Lastly, it is submitted that there was overwriting in the roznamcha entry. In support of his contentions, learned counsel has placed reliance on the case of *TARIQ PERVEZ V/S. THE STATE (1995 SCMR 1345),* and *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002).*

9. Syed Meeral Shah, Additional Prosecutor General, appearing for the State conceded to the arguments raised by learned counsel for the appellant and recorded no objection. He did not support the judgment of the trial court.

10. We have carefully heard the learned counsel for the parties and scanned the entire evidence in the light of case law cited by the counsel for the appellant.

11. In our considered view the prosecution has failed to prove its case against the appellant for the reasons that according to the case of prosecution charas was recovered from the possession of accused on 16.04.2012 and it was sent to the chemical examiner on 18.04.2012. It is the contention of the defence counsel that the prosecution failed to establish the safe custody of charas at Malkhana for two days. Safe transit to the chemical examiner has also not been proved. HC Bashir Ahmed who had taken sample to the chemical examiner has not been produced before the trial court for recording his evidence. It was the case of the prosecution that the complainant had prior information and accused was arrested from a thickly populated area and the SHO had sufficient time to call the private persons but no effort whatsoever were made by him to call the independent persons of the locality. There was nothing on the record that how much grams were taken / drawn from the each piece recovered from the accused for sending the same to the chemical examiner for analysis. In such circumstances, we are unable to rely upon the evidence of the police officials without any independent corroboration which is lacking in this case. Moreover, there was delay of two days in sending the sample to the chemical examiner. WHC of the police station with whom the case property was deposited in malkhana has not been examined so also the HC who had taken the sample to the chemical examiner to satisfy the court that the charas was in safe custody. In this regard reliance is placed upon the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002), the relevant portion is reproduced hereunder:-*

> ***"5. In the case in hand not only the report submitted by the Chemical Examiner was legally laconic but safe custody of the recovered substance as well as safe transmission of the separated samples to the***

> ***office of the Chemical Examiner had also not been established by the prosecution. It is not disputed that the investigating officer appearing before the learned trial court had failed to even to mention the name of the police official who had taken the samples to the office of the Chemical Examiner and admittedly no such police official had been produced before the learned trial Court to depose about safe custody of the samples entrusted to him for being deposited in the office of the Chemical Examiner. In this view of the matter the prosecution had not been able to establish that after the alleged recovery the substance so recovered was either kept in safe custody or that the samples taken from the recovered substance had safely been transmitted to the office of the Chemical Examiner without the same being tampered with or replaced while in transit."***

12. In our considered view, prosecution has failed to prove that the charas was in safe custody for the aforementioned period. Even positive report of the chemical examiner would not prove the case of prosecution. There are also several circumstances which create doubt in the prosecution case. Under the law if a single doubt is created in the prosecution case, it is sufficient for recording the acquittal. In the case of *Tariq Pervez V/s. The State (1995 SCMR 1345),* the Honourable Supreme Court has observed as follows:-

> ***"It is settled 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."***

13. While relying upon the aforesaid authorities and keeping in view no objection raised by the learned A.P.G. we have no hesitation to hold that the prosecution has failed to prove its case against the accused. Resultantly, the impugned judgment dated 26.05.2010, passed by the trial court is set aside. The appeal is allowed. Appellant is acquitted of the charge. Appellant was present on bail when by our short order dated 12.04.2017, his bail bond was cancelled and surety was discharged. These are the reasons of our short order whereby we had allowed the appeal.

JUDGE

JUDGE

Tufail

The learned Trial Court after hearing the arguments of counsel for both the sides framed the following two points for determination:-

1. Whether on 16.04.2012 at about 6-00 pm at Bye-pass road near Naseer Wah Mori present accused Aftab Hussain was found in possession of 970 grams Charas which was secured from his personal possession by a police party which stood certified to be Charas by the Chemical Examiner as alleged?
2. What offence, if any, is provided against the accused?

The findings on the above points were as follows:-

Point No.1 Proved

Point No.2 Accused Aftab Hussain is convicted accordingly for the commission of an offence punishable under Section 9(b) Control of Narcotic Substance Act, 1997,

. To prove its case the prosecution has examined I.O SIP Miseen Gahelo, Complainant / SIP Mohammad Usman Hingoro and Mashir/ASI Ahsan-ul-Haq Gujar and thereafter, prosecution side has been closed (as already stated herein above).

SIP Miskeen Gahelo (I.O) was examined at Ex.4, who has deposed regarding stages of the investigation right from getting of accused with Mashirnama, FIR and case property, recording of the statements of P.Ws under Section 161 Cr.P.C. during the course of investigation and sending of sample to the Chemical Examiner; finally submission of challan before the court of law. He too identified the accused and case property in the court to be same.

In cross examination, SIP Miskeen Gahelo has deposed that the case property was remained under the custody of WHC of PS concerned namely Qalandar Bux Pitafi, that he did not see the recovered charas. He however voluntarily replied that it was already in sealed condition. He has further deposed that he was informed by PC Farooq about the currency notes allegedly recovered from the possession of present accused, that he being I.O of the case, visited the place of occurrence, that he visited the place of incident in the capacity of I.O in presence of about 10/15 independent persons of locality and that none of them was willing to act as mashir. He has further deposed that he does not remember their names. He however admitted that numbers of currency notes are not

mentioned either in the FIR or in the mashirnama of arrest and recovery, that he had not produced such mashirnama in the court while recording his examination-in-chief, that place of incident is situated at thickly populated area. He while answering to the suggestions denied that he was deposing falsely being police official in favour of the prosecution.

The next witness examined at Ex.5 is Mashir / ASI Ahsan-ul-Haq Gujar, who was member of police party and has acted as a Mashir of arrest and recovery. He has supported the complainant in material detail to the extent of his examination-in-chief and has identified accused and recovered property available in the court to be same.

In cross-examination Mashir / ASI Ahsan-ul-Haq Gujar replied that the recovered charas produced in court bears his signature as well as signature of complainant, that it was written on spot, that the number of FIR is also written on the spot, that due to non-availability of independent person on the spot, no any person was cited as mashir of the alleged incident, that small quantity of charas was separated from both pieces for the purpose of chemical examiner. He has further deposed that he signed the mashrinama, after going through the contents thereof, that the case property was handed over to the safe custody of WHC of PS concerned, that he does not know whether any case against the present accused was ever registered at police station concerned during the period of his service in police which comes about 3 years, that he did not see the police proceedings regarding completion of investigation. He however admitted that it has not been mentioned in the mashirnama. He however while answering to the suggestions denied that place of incident is situated at thickly populated area, he was deposing falsely in favour of prosecution due to influence of complainant, who is also police official, that nothing was secured from the possession of present accused and case property has falsely been foisted upon him and lastly he was deposing falsely.

The 3rd and last witness is SIP Muhammad Usman Hingoro, who has acted as complainant, was examined at Ex.6 being P.W-3, wherein who has testified his departure from police station concerned along with subordinate staff, patrolling at different places, proceedings to the place of incident, recovery of charas from the possession of accused at place of occurrence preparation of memo of arrest and recovery, their return back at police station concerned, lodging such FIR and handing over the physical custody of accused along with

documents and case property to SIP Miskeen Gahelo for the purpose of further investigation. He has produced attested copies of departure and arrival entries, copy of FIR respectively, lastly he has identified the accused and property available in court to be same.

In cross-examination, the complainant SIP Mohammad Usman Hingoro deposed, that he recovered case property was sealed on spot, that the stamp was lying with them, that he affixed the stamps in all five in numbers on the case property, that he obtained the signature of both the mashirs as well as he himself signed the same on spot. He has further deposed that he deposited the case property was safe custody of WHC of police station concerned, whose name do not remember to him, that since no independent person was found available on the spot or near to place of incident, as such none was shown as mashir of incident while vehicles were also plying there speedily, that the mashirnama was written by him with his own handwriting on spot while other documents were written by WHC of police station concerned, whose name he does not remember at present, that he does not know whether prior to this case, such like case was ever registered against the present accused or not. He however admitted that the sealed sample produced in court does not bear his signature, that it has not been mentioned either in the FIR or in the mashirnama of arrest and recovery that for which piece 10 grams was separated. He however voluntarily replied that from both the pieces it was sealed separately for about 10 grams for the purpose of chemical examiner, that neither said WHC of police station concerned is shown as witness in this case nor produced by the prosecution before the court. He while answering to the suggestions denied that place of incident is situated at thickly populated area. He voluntarily replied that the place of incident is an abandon place. He has further denied that accused was booked in this false and cooked one case at the instance of one Zamindar namely Mir Mohammad Jamali due to enmity over a passage, that nothing was secured from the possession of present accused and he had falsely foisted the case property upon him and lastly that he was too deposing falsely.

Learned trial court after hearing the learned counsel for the parties and examining the evidence available on record by judgment dated 15.04.2015 convicted and sentenced the appellant / accused as stated above.

6. Mr. Hussain Bux Solangi, learned counsel for the appellant contended that the prosecution has failed to produce arrival and departure entries in the evidence. It was also contended that no official car was used and even the car was admittedly driven by a private person whose details are not provided. The Learned counsel contended that charas as allegedly recovered from the possession of the accused on 26.06.2004 was sent to the chemical examiner for analysis on 06.07.2004 (after the delay of 10 days) and the prosecution has not plausibly explained with regard to this delay in sending the charas to the chemical examiner. It is argued that it has not come in the evidence that at all these times the charas was in safe custody. As well as neither the person who sent the charas was examined nor the Incharge of the Malkhana. Safe passage of charas in the hands of private courier company is highly questionable. The learned counsel also submitted that while the arrest was made in daylight from a main road, however no private persons present at the time of the arrest of the accused were made mashirs. It was next contended that evidence of the officials was dishonest as they deliberately suppressed facts. Referring to the enmity of the accused with the complainant, who also acted as investigation officer, the learned counsel contended that the trail court inter alia failed to appreciate this aspect as well as blatantly ignored the holes in the prosecution evidence, but still chose to convict the accused against the settled principles of law.

7. Syed Meeral Shah Bukhari, learned DPG on account of apparent infirmities and delay of 10 days in sending charas to the chemical examiner, and that too by a private courier did not support the impugned judgment.

8. Heard the counsels and perused the records very minutely. From the close scrutiny of the evidence it transpires that the accused was arrested by Nazar Muhammad Sial, Excise and Taxation Officer Dadu in presence of mashirs on 26.06.2004 at 4:00 p.m near Moundar Octroi Post Dadu town. In his examination in chief P.W-1, has deposed that he along with his colleagues left office for detecting the narcotics crime. When they reached at Moundar Naka, they found one suspected person, who disclosed his name as Ghulamullah s/o Lal Bux. When he took personal search of that person in the presence of mashirs, he recovered one plastic bag from the fold of his Shalwar, in which one piece of charas was lying. He arrested the accused and weighed the charas at the spot which became 500 grams. He also recovered Rs.120/- from the front pocket of the accused. He sealed the charas. He deposed that the Memo of arrest and

recovery was prepared at the spot in presence of mashirs namely Zafarullah Ghalo and Dodo Jatoi. He then brought the accused and the case property at Circle Office and lodged FIR against the accused and sent the entire quantity of charas to the Chemical Examiner and thereafter he received a positive report. He affirmed that he did not keep the entry about their departure or arrival because they were not maintaining any Roznamcha in their office. He also affirmed that their departure time from the Circle Office is not mentioned in the FIR and affirmed that they were patrolling in private car of his friend which was being driven by its driver, who was also a private person. He deposed that after leaving their office they came to Ali Restaurant and that he does not remember the time when they reached Ali Restaurant, notwithstanding that the distance between their office and Ali Restaurant is about only one kilometer. He further affirmed that he has not mentioned that from which particular point of Moundar Naka the accused was arrested. He admitted that while the Moundar Naka is situated on the main road and many persons were passing by but he did not find any person except the accused standing at Moundar Naka and that he apprehended the accused at the first instance. He deposed that he approached some private persons at to act as mashir but they refused, however that this fact has not been mentioned in the FIR or in the memo of arrest and recovery nor names of those persons have been given. While he admitted that it can take about five minutes in reaching Moundar Naka from their office and that after completing formalities at the place of incident, they came directly to their office, but he had no answers as to why he lodged the FIR after 2/3 hours after their reaching the office. As to the dispatch of the charas, he deposed that he does not remember particular date but he remembered that he sent the property to the Chemical Examiner after 2 of 3 days of the incident and that the property was sent to the Chemical Examiner through private courier service. He admitted that Majid Shahani is known to him but denied that it is at his instance that the accused has been booked in this case.

9. P.W-2 Dafedar Zafarullah deposed that he left the office under the command of Inspector Muhammad Sial, but admitted that they were in a private car. He further admitted that the place from where the accused was arrested was a main road where many persons were passing from there, but he did not make any effort to call private persons to act as mashirs. While he deposed that the accused was *jointly apprehended*, the P.W-1 is his statement (Ex-5) has stated that "*I arrested the accused*". It is also interesting to note that there is no mention in the deposition of both of the prosecution witnesses as to how the charas was

weighted. Did the patrolling team possessed the weighing scale or charas was weighed by using some nearby shop's scale.

10. D.W-1, Ashique Hussain deposed that about 10/11 months back, he was coming from Mehar to Dadu in a Wagon, in which accused was also traveling. When their wagon reached at Dodani Mori, police was present there and the Wagon was stopped. Police took out the accused from the Wagon and took his personal search, but nothing was recovered from his possession. Accused was kept by police and the wagon was let go along with other passengers. He affirmed that Inspector Nazar Muhammad Sial was also with police party.

11. From the basis of the foregoing, following points of facts and law arise for the determination of this court:

(a) The patrolling team kept no record of departure or arrival by way of roznamcha

(b) The team admittedly left in a private vehicle

(c) Charas was found in the possession of the accused arrested from main road but no private mashirs were taken

(d) No details as to how the charas was weighted are provided by any of the prosecution witnesses

(e) Charas was sent for chemical analysis after the delay of 10 days

(f) Charas was sent by a private courier

(g) Inimical relations exist between the accused and the investigation officer

(h) Contradictions in the evidence of the prosecution witnesses.

12. In the following, each of these points will be addressed:

(a) The patrolling team kept no record of departure or arrival by way of roznamcha

It is an admitted fact that the neither the departure/arrival roznamcha entries are produced during the trial, nor they have been mentioned in the FIR or the prosecution witnesses' statements. In his cross, Inspector Nazar Muhammad admitted that '*I did not kept the entry about our departure or arrival because we are not maintaining roznamcha*'.

Section 44 of the Police Act, 1861 obligates keeping of daily diary (roznamcha) records. The intent of this section is expounded in Rule 22.48(2) of the Police Rules, 1934 which describes that daily diary is to serve as a complete record of all events which take place at the police station, such events not only to include the movements

and activities of all police officers. The very purpose of these provisions is to create sense of accountability and to keep a constant vigil on daily activities taking place between the four corners of a police station. Rule 22.48 requires that daily diary is to be kept in the shape of prescribed Form 22.48 named as Register No. II. Rule 22.49 makes a selective list of the matters which must be entered in the Register No. II, of relevance is the entry (c) which is reproduced in the following:

> (c) The hour of arrival and departure on duty at or from a police station of all enrolled police officers of whatever rank, whether posted at the police station or elsewhere, with a statement of the nature of their duty. This entry shall be made immediately on arrival or prior to the departure of the officer concerned and shall be attested by the latter personally by signature or seal.

The failure of production of Roznamcha entries is dealt with iron hands by the courts as it been held that such a failure is fatal to the extent of '*cutting very root of the prosecution case'*. In the case of Shahid Iqbal vs. The State (2016 MLD 230) Court held that *"prosecution had failed to prove its case against accused beyond any shadow of doubt for the reasons that despite contention of defence counsel, arrival and Roznamcha entries had not been produced in evidence, in order to satisfy the court that Police party had actually left at relevant time for patrolling. Non-production of departure and arrival entries in evidence would cut the roots of prosecution case."* In the case of Mashooque Ali Mallah vs. The State (2016 P.Cr.L.J 08) Court refused to uphold the conviction awarded by the trial court on the ground that "*Police party left Police Station through Roznamcha entry, but original departure and arrival entries had not been produced at trial, in order to show that Police party had actually left Police Station for investigation of crime registered at Police Station"*. On account of the failure of the prosecution party maintaining and to have produced original departure and arrival entries, it could not be said that they at all left for patrolling. This fatal error, cutting the root of prosecution's case, will obviously yield benefit to the accused.

(b) The team admittedly left in a private vehicle

Patrolling duties in town and cities are conducted as per Police Rule 21.34, however in rural stations these duties are regulated by Rule 23.1 which provides that the officers in charge of police stations and assistant sub-inspectors at those stations are empowered to move about in their jurisdictions '*freely*'. While no provisions are made under these Rules enabling patrolling to be done in private vehicles, however the freedom of movement granted under Rule 23.1 could obviously not be impaired in case patrolling is necessitated when no official vehicles were handy. The Rules however (in the greater interest of docketing) have provided a mechanism where a proforma in the shape of Form 22.43(4) is provided which requires when any travel within the sphere of duty is performed, the said proforma is needed to be

filled, for one of the simple reason that costs incurred in such a travel needs to be reimbursed in accordance with Rules. Notwithstanding therewith, details of such private vehicle are needed to be made in the daily diary. In the case of Muhammad Hussain vs. The State (2012 YLR 768) Court admitted the accused on bail on the ground that "*F.I.R. had stated that Police party went patrolling in a private car. From where the said private car came, was not stated in the F.I.R. and prosecution was also unable to make any statement in that regard*. Accordingly unless details of the private vehicle are provided in the roznamcha, duly supported by the appropriate form as prescribed by the Police Rules, it acts done by patrolling on private vehicles will be seen dubious and any benefit of doubt created with such an uncertainty will definitely be passed on the accused.

(c) Admittedly charas was found from the possession of the accused at Moundar Naka which is a main road, however no private mashirs were taken.

This deficiency is however held by the Apex court to be of no consequence [Karl John Joseph vs. The State (2004 PLD 394 SC)]. However this aspect was differently dealt with in the case of Riaz Ahmed vs. The State (2004 PLD 988 SC) where the Apex Court altered the said finding and held that *unless it is brought to the record that police officials have any malice against the accused/witnesses, police officials were as good witnesses as private persons of the society.*

(d) No details as to how the charas was weighted are provided by any of the prosecution witnesses

The manner in which charas was weighed has not be described by any of the prosecution witnesses. PW-1 has stated that "the charas was weighed at the spot and it was 500 grams". This clearly shows that the patrolling party was without investigation bag of which scales are integral part. It is not confidence aspiring that the patrolling party left their offices for '*detecting narcotics crime*' without an investigation bad or without a weighing scale. Be that as it may, no details are given as to how the secured charas was weighed. This point has been considered in the recent judgment of Akramullah vs. The State (2017 YLR 712) where a Divisional Bench of the Hon'ble Islamabad High Court has raised red flag on such discrepancy and held that this act is not 'confidence aspiring'.

(e) Charas was sent for chemical analysis after the delay of 10 days

As per Ex-6 and FIR, charas was ceased on 26.06.2004 whereas Ex-5 (Chemical Examination Report) shows that the sample arrived at the laboratory on 06.07.2004, after a delay of 10 days and there was no evidence that Charas was in the safe custody in between this intervening period. In the above stated circumstances, positive report of Chemical Examiner would not improve the case of prosecution. This finds support from the dictum laid down in the recent cases of Shahid Dada vs. The State (2017 MLD 288),

Arshad Mehmood Khan vs. The State 2017 P.Cr.L.J 668), Hussain Bux vs. The State (2017 P.Cr.L.J 501), Saeed Gul vs. The State (2016 YLR 1205) and Khani Gull vs. The State (2016 YLR 1093). In all of these case court has held that handing of charas from its taking over from the accused to passing it off to prosecution witness including it's safe custody in the Malkhana, and its onward delivery to constable to be taken to laboratory has to be seamlessly evidenced. Court held that prosecution was under duty to establish by cogent evidence that the charas, seized from possession of accused, had been kept in safe custody and the Malkhana. As in the case at hand, no explanation has been provided as to what transpired in the 10 days' long period, thus these vacuums in the prosecution's case aspire no confidence.

(f) Charas was sent by a private courier

It is very interesting in this case that admittedly charas was sent by a private courier. While it is highly questionable as to how a private courier could ship a narcotic substance, this act of the IO is highly questionable. As discussed in the foregoing paragraph it is the duty of the prosecution to establish a seamless trajectory from the point of seizure of a narcotic substance to its safe delivery at the laboratory. Guidance in this regards could be obtained from the case of Ikramullah & Others vs. The State (2015 SCMR 1002), of which the relevant portion is reproduced as under:-

> "5. In the case in hand not only the report submitted by the Chemical Examiner was legally laconic but safe custody of the recovered substance as well as safe transmission of the separated samples to the office of the Chemical Examiner had also not been established by the prosecution. It is not disputed that the investigating officer appearing before the learned trial court had failed to even to mention the name of police official who had taken the samples to the office of the Chemical Examiner and admittedly no such police official had been produced before the learned trial Court to depose about safe custody of the samples entrusted to him for being deposited in the office of the Chemical Examiner. In this view of the matter the prosecution had not been able to establish that after the alleged recovery the substance so recovered was either kept in safe custody or that the samples taken from the recovered substance had safely been transmitted to the office of the Chemical Examiner without the same being tampered with or replaced while in transit."

(g) Inimical relations existing between the accused and the investigation officer

The appellant has clearly stated in his S.342 Statement that the complainant Nazar Muhammad Sial had friendship terms with one Majeed Shahani, who was annoyed with him on his refusal to provide him girls. He further stated that the complainant Nazar Muhammad Sial is still harassing him and his wife by filing

applications against them. He in fact has produced a photocopy of such an application made by Nazar Muhammad Sial as Ex.9/A. It is important to note that to rebut these allegations the prosecution failed to produce Majeed Shahani. As mentioned in paragraph (c), the Apex Court in the case of Riaz Ahmed vs. The State (2004 PLD 988 SC) has shadowed evidence of police officials in a case wherein malice is alleged by the accused towards police of investigating officer.

(h) Contradictions in the evidence of the prosecution witnesses

We have already observed that prosecution case appears to be unnatural and unbelievable. While the incident took place at a main road, but no private mashirs were made or even asked. Also the officials were patrolling with the objective of detecting narcotics trade, however they did not have a weighing scale. Patrolling was being done in a private car, driven by private person. Charas was sent after delay of 10 days and that too via a private courier. Admittedly, in this case there are several circumstances which have created serious doubts in the prosecution case. It is settled law that a single circumstance which creates doubt in the prosecution case is sufficient to extend benefit of doubt to the accused. 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. This has been held by Hon'ble Supreme Court in the case of Tariq Pervez vs. The State (1995 SCMR 1345)

13. On account of the above infirmities and while relying upon the above cited authorities, we vide our short order dated 05.04.2017 allowed this appeal and set aside the conviction and sentence recoded by the learned trial court vide its judgment dated 31.05.2005. These are the reasons of our short order.

JUDGE

JUDGE