

IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD

Criminal Appeal No. D- 74 of 2020
Criminal Appeal No. D- 83 of 2020
Criminal Jail Appeal No. D- 84 of 2020

PRESENT:

Mr. Justice Salahuddin Panhwar.
Mr. Justice Zulfiqar Ahmed Khan.

Appellant : Mir Muhammad s/o Allah Dino alias Allah Bachayo (Criminal Appeal No.D-74 of 2020) through Mr. Ghulamullah Chang, Advocate.

Appellant : Sajjad Ali s/o Fayyaz Ali (Criminal Appeal No.D-83 of 2020) through Mr. Sahib Khan Panhwar, Advocate.

Appellant : Qurban Ali s/o Chandio Khan (Criminal Jail Appeal No.D-84 of 2020) through Mir Ali Bakhsh Talpur, Advocate.

Respondent : The State through Mr. Shahnawaz Brohi, Special Prosecutor ANF.

Date of hearing : 20.04.2022
Date of judgment : 20.04.2022

J U D G M E N T

ZULFIQAR AHMED KHAN, J: By this common judgment, we intend to decide the aforementioned appeals together as the same arise out of one and same crime. Appellants Sajjad Ali, Qurban Ali and Mir Muhammad were tried by learned Judge, Model Criminal Trial Court-I / Special Judge Control of Narcotics Substance Act, Hyderabad in Special Case No. 329 of 2019, arising out of Crime No.17/2019 registered at Police Station ANF, Hyderabad for offence under Section 6, 9-C, 14 & 15 CNS, Act, 1997. Vide judgment dated 01.10.2020, the above named

appellants / accused were convicted and sentenced by the trial court as mentioned in Point No.4 of the impugned judgment which for the sake of convenience is reproduced hereunder:-

POINT NO.4.

22- For what has been discussed above, it has been brought on record that accused have committed the offence punishable under section 9-C CNS Act, hence the accused Qurban Ali S/o Chandio Khan B/c Jamali, Mir Muhammad S/o Allah Dino alias Allah Bachayo, and Sajjad Ali S/o Fayyaz Ali are convicted under section 265-H(ii) Cr.P.C and sentenced as per following chart.

Serial No.	Section	Sentence Awarded
1.	6, 9-C CNS Act, 1997	Sajjad Ali S/o Fayyaz Ali is convicted under section 265-H(ii) Cr.P.C for the recovery of 8 Kilograms of chars and sentenced him to suffer R.I for 10 years and six months and to pay fine of Rs.50,000/= (Rupees Fifty Thousand). In case of his default in payment of fine Rs.50,000/= (Rupees Fifty Thousand), he shall suffer S.I for eight months.
2.	6, 9-C CNS Act, 1997	Qurban Ali S/o Chandio Khan B/c Jamali is convicted under section 265-H(ii) Cr.P.C for the recovery of 10 Kilograms of chars and sentenced him to suffer R.I for 12 years and six months and to pay fine of Rs.60,000/= (Rupees Sixty Thousand). In case of his default in payment of fine Rs.60,000/= (Rupees Sixty Thousand), he shall suffer S.I for nine months.
3.	6, 9-C CNS Act, 1997	Mir Muhammad S/o Allah Dino alias Allah Bachayo is convicted under section 265-H(ii) Cr.P.C for the recovery of 10 Kilograms of chars and sentenced him to suffer R.I for 12 years and six months and to pay fine of Rs.60,000/= (Rupees Sixty Thousand). In case of his default in payment of fine Rs.60,000/= (Rupees Sixty Thousand), he shall suffer S.I for nine months.

Benefit of Section 382-B Cr.P.C. was however extended to all the appellants.

2. The relevant facts of the prosecution case as disclosed in the impugned judgment of trial court reads as under:-

"The complainant SHO Aftab Ahmed of P.S ANF, Hyderabad, lodged FIR on 08/11/2019 at 1630 hours, stating that on 08/11/2019, he was present at P.S ANF and through high ups, spy appeared at P.S national narcotics suppliers namely Qurban Ali Jamali, Mir Muhammad, and Sajjad Ali together will be having huge quantity of narcotics concealed in BNP-394 vehicle and will cross Tando Jam road to deliver the same to particular customer via Hyderabad to Mirpurkhas road in between 1300 hour to 1400 hours and if immediate action is taken, recovery and arrest are definite. On receiving such information as per directives of high ups, one raiding party consisting upon complainant himself, HC Muhammad Umar, PC Iqbal Hussain, PC Manzoor Rind, PC Ameen, LNK Asif, sepoy Ahfaz, drivers PC Sajid Akbar, PC Asim and informer duly armed with weapons in two government vehicles vide entry No.8 at 1200 hours left the P.S and at 1230 hours arrived near byco petrol pump leading road, Hyderabad to Mirpurkhas at Tando Jam where started blockade. At 1300 hours they saw that the above vehicle was coming from Hyderabad and on coming near, it was signaled by constables to stop on the clue of spy and got stopped it on left side and apprehended three persons sitting in the said vehicle with the help of staff. Thereafter, they asked passersby to act as mashirs but they showing themselves as travelers refused and in compelling circumstances, HC Muhammad Umar and PC Manzoor Rind were acted as mashirs from the raiding party and person sitting on driver seat was inquired. On inquiry he disclosed his name as Sajjad Ali S/o Fayyaz R/o H.No.280, Laloo Lashari Kali Mori, Hyderabad. Second person disclosed his name as Qurban Ali S/o Chandio Khan Jamali R/o village Adam Khan Jamali, Tehsil and District Hyderabad and person sitting on backside, on inquiry disclosed his name as Mir Muhammad S/o Allah Dino alias Allah Bachayo R/o Sehrish Nagar, Katchi Abadi Qasimabad, Hyderabad. On enquiry about narcotics person sitting on driver seat after resistance admitted the presence of pockets of chars under the cover/carpet and he himself took out 8 multi colour foil packets and handed over the complainant. On opening and checking each packet two slabs were found whereas another person sitting on second seat namely Qurban Ali on inquiry about availability of chars after resistance admitted presence of chars in between the cover/carpet under the legs in a plastic khakhi sack and he himself handed over the same sack to complainant, which was taken out, checked and found 10 multi colour foil pack packets, each having two slabs while on enquiry third person sitting on back side seat namely Mir Muhammad admitted the presence of chars between the cover/carpet under the legs in a plastic khakhi sack and he himself handed over the same sack to complainant, which was taken out, checked and found 10 multi colour foil pack packets, each having two slabs. Eight packets of chars were recovered on the pointation of Sajjad Ali were

weighed separately and found each slabs weighing 1/1 K.G total 08 kilograms. Out of eight double slabs packets chars, 10/10 grams total 20 grams were separated for chemical examination and sealed in 08 separate khakhi envelopes and Nos.01 to 8 were written for identification while remaining packets of chars after applying identification Nos.1 to 8 were sealed in white cloth bag and put No.1 on parcel. 10 packets of double slabs recovered on the pointation of Qurban Ali were weight separately and found each slabs weighing 1/1 kilograms total 10 kilograms, out of 10 double slabs packets chars weighing 10/10 grams total 20 grams were separated for chemical examination and sealed in 10 separate khakhi envelopes and numbers 9 to 18 were written for identification while remaining packets of chars after applying identification Nos.9 to 18 were sealed in white cloth bag and put No.2 on the parcel. 10 packets of double slabs recovered on the pointation of Mir Muhammad were weight separately and found each slabs weighing 1/1 K.G total 10 K.G. Out of 10 double slabs packets chars, 10/10 grams total 20 grams were separated for chemical examination and sealed in 10 separate khakhi envelopes and numbers 19 to 28 were written for identification while remaining packets of chars after applying identification Nos.9 to 18 were sealed in white cloth bag and put No.3 on the parcel. About 28 kilograms chars was recovered from possession of accused persons. On personal search of Sajjad Rs.5,500/= from side pocket of qameez, one colour copy of CNIC in the name of accused, one original registration book No.BNP-394, Suzuki cultus in the name of Asghar were recovered. On personal search of accused Qurban Ali, Rs.4,100/= from right side pocket of qameez and one mobile phone Nokia were recovered and on personal search of accused Mir Muhammad, Rs.3,600/=, one photocopy of CNIC in the name of accused, two mobile phones along with SIMs were recovered. Thereafter, all three accused were arrested and took custody of recovered chars along with parcel Nos.1 to 28 and car No.BNP-394 along with key and such memorandum was prepared in presence of mashirs, contents of which were read over to them who after admitting the same put their signatures on 28 sealed parcels and other remaining parcels of chars. Hence this FIR."

3. During investigation 161 Cr.P.C. statements of the PWs were recorded, recovered substance was sent to the chemical examiner, positive report was received. On the conclusion of investigation, challan was submitted against accused under the above referred Sections of CNS Act, 1997.

4. Trial Court framed charge against all the three accused u/s 9(C) of CNS Act, 1997 at Ex.2, to which, they pleaded not guilty and claimed to be tried.

5. In order to prove its case prosecution examined complainant Inspector Aftab Ahmed as PW-1 at Exh.3 (who produced entry No.8, memo of arrest and recovery, FIR, entry No.9, notice, sale receipt of car, memos, sale receipt of Amanullah, memo, notice to Rehmautllah, chemical report as Exh.3/A to Exh.3/L respectively), mashir Muhammad Umar as PW-2 at Exh.4, PC Asif Ali as P.W-3 at Exh.5 (who produced entry No.8, and original chemical laboratory letter at Exh.5/A & Exh.5/B respectively), SI Syed Salman as PW-4 at Exh.6 (who produced entry No.196 at Exh.6/A).Thereafter, prosecution side was closed at Ex.8.

6. The statements of accused u/s 342 Cr.P.C, were recorded at Exhs.9 to 11 respectively, wherein they denied the prosecution allegation and claimed to be innocent. To support their contentions they have also annexed certain documents. Appellants however neither examined themselves on Oath nor produced any evidence in their defence.

7. Learned Special Judge after hearing the learned counsel for the parties and examining the evidence available on record, through its judgment dated 01.10.2020 convicted and sentenced the appellants as stated supra.

8. Facts of the prosecution case as well as evidence find an elaborate mention in the judgment of the trial court as such there is no need to repeat the same to avoid unnecessary repetitions.

9. We have heard learned counsel for the appellants, learned Special Prosecutor for ANF and perused the entire evidence minutely with their assistance.

10. Mr. Ghulamullah Chang, learned advocate for appellant Mir Muhammad has mainly contended that appellant is innocent and has falsely been implicated in the case in hand; that prosecution story is false, fabricated and highly unbelievable and is without any independent or corroborative piece of evidence; that actually the accused is victim of highhandedness of ANF police on instigation of his opponents; that FIR is delayed for about three and half hours; that complainant himself has inscribed the FIR and has conducted investigation, as such, he has acted as complainant, inscriber of FIR and I.O of the above case, which shows lack of fairness, transparency and the same is bad in the eyes of law, justice and equity; that the place of alleged recovery and arrest is a busy place but inspite of that not a single independent person of the

locality was called to act as mahirs nor any effort in this regard has been made; that alleged recovery was affected neither from the exclusive nor physical or constructive possession of the appellant but the same is foisted upon him to strengthen the case; that all the P.Ws are interested and subordinates of the complainant. He prayed for acquittal of the accused. In support of his arguments, learned counsel has placed reliance on the case laws reported in 2019 SCMR 326, 2019 SCMR 1102, SBLR 2018 Sindh 1286, SBLR 2019 Sindh 119, 2014 SCMR 862, PLD 2020 Supreme Court 57, 2019 SCMR 2004, PLD 2009 Karach 191.

11. Mr. Sahib Khan Panhwar, learned counsel for appellant Sajjad Ali has argued that that there are no reasonable grounds to believe that the accused has committed offence with which he stand charged; that appellant has been arrested by police in this case at the instance of local zamindar/wadera; that there was a dispute in between the father of accused and Ghulam Nabi son of Ghulam Ali over ancestral property and opponent party firstly get involved the accused in this false case in collusion with ANF authorities by foisting huge quantity of chars; that accused is well educated person and he used to reside in Saudia Arabia where he was plying taxi and he also applied Visa for china, which shows that accused is a respectable person; that admittedly police party had prior information about arrival of accused at the place of incident with chars but no person was asked or cited as witness of alleged incident; that no purchaser was found available at the place of incident nor complainant party sent any fake purchaser in order to clarify the business of narcotics by accused; that place of incident is thickly populated area surrounded by shops, houses, and hotels but no private person was associated as mashir; that prosecution has failed to produce the original owner of the alleged Cultus car which was used in the commission of offence; that recovery was not affected from exclusive possession of accused. In support of his arguments he has relied upon the case laws reported in 2020 YLR 503, 2018 SCMR 1425, PLD 2012 S.C 369, PLD 2009 Karachi 191 and 2007 P.Cr.L.J 483.

12. Mir Ali Bux Talpur, learned counsel appearing for the appellant Qurban Ali has adopted the arguments advanced by the counsel for the co-accused and further contended that appellant is innocent and has falsely been booked in the present case; that actually he is landlord and he has dispute with one Fareed Sipio on an amount of Rs.7,00,000/- for business transaction; thereafter Fareed Sipio broken the said agreement

and then he moved an application to SHO P.S Tando Jam against said Fareed Sipio. He further argued that appellant was taken by ANF officials and detained at P.S ANF P.S and they demanded Rs.10,00,000/- for his release and on refusal they have booked him in this case falsely; that nothing was recovered from the possession of accused; that prosecution has failed to produce evidence against the appellant and there are many lacunas and legal infirmities in the prosecution evidence. He prayed for acquittal of appellant Ali. In support of his arguments he has relied upon the case laws reported in 2019 SCMR 326 and 2015 P.Cr.L.J 235. Lastly, it is argued that alleged recovery of charas was affected from the accused on 08.11.2019 but it was sent to the office of chemical examiner on 11.03.2021 i.e. after the delay of three days and safe custody of charas at Malkhana and its safe transit during that intervening period has not been established at trial. On the point of safe custody and safe transit, learned counsel for the appellant has placed reliance on the case of IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002) and on the benefit of doubt, he placed reliance on the case of TARIQ PERVEZ V/S. THE STATE (1995 SCMR 1345).

13. On the other hand, learned Special Prosecutor for ANF supported the impugned judgment on the ground that appellants have been apprehended by police having been found in possession of huge quantity of charas. He further contended that at hand is a crime against society and is increasing day by day. Lastly, it is argued that though there are minor contradictions in the evidence of prosecution witnesses but the same are not fatal and ignorable. He has prayed for dismissal of the appeals.

14. 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.

15. In our considered view, prosecution has failed to prove its' case against the appellants for the reasons starting that per FIR the complainant party was available at police station where spy appeared and given information about the offence and when the police party reached near byco petrol pump leading road, Hyderabad to Mirpurkhas at Tando Jam where they saw the present appellants coming in a car, they got stopped it and apprehended the accused and recovery of 28 kilograms of charas was affected from their possession. It has come in

evidence that the accused were arrested near from byco petrol pump leading road, Hyderabad to Mirpurkhas at Tando Jam which is a thickly populated area and the complainant SHO Aftab Ahmed of PS ANF had sufficient time to call the independent persons of the locality to witness the recovery proceedings but it was not done by him for the reasons best known to him and only the police officials who are subordinates to him were made as mashirs of arrest and recovery proceedings. It is settled principle that judicial approach has to be a conscious in dealing with the cases in which entire testimony hinges upon the evidence of police officials alone. We are conscious of the fact that provisions of Section 103 Cr.P.C are not attracted to the cases of personal search of accused in narcotic cases but where the alleged recovery was made on a road (as has happened in this case), omission to secure independent mashirs, particularly, in police case cannot be brushed aside lightly by this court. Prime object of Section 103 Cr.P.C is to ensure transparency and fairness on the part of police during course of recovery, curb false implication and minimize the scope of foisting of fake recovery upon accused. There is also no explanation on record why no any independent person either from the place where they received spy information or from the place of incident has been joined to witness the recovery proceedings though it was a day time incident. No doubt police witnesses were as good as other independent witnesses and conviction could be recorded on their evidence, but their testimony should be reliable, dependable, trustworthy and confidence worthy and if such qualities were missing in their evidence, no conviction could be passed on the basis of evidence of police witnesses. But here in this case, we have also noted number of contradictions in between the evidence of prosecution witnesses which cannot be easily brushed aside. Above conduct of the police shows that investigation has been carried out in a casual and stereotype manner without making an effort to discover the actual facts/truth.

16. Apart from above, there are also discrepancies and flaws in the evidence of prosecution witnesses. The complainant in his cross examination has deposed that **"It is correct to suggest that at the time of filing charge sheet report, property was not deposited in court malkhana. It is correct to suggest that size of chars slabs and colour of chars are not mentioned in the memo of arrest and recovery. It is correct to suggest that I have not produced roznamcha entry about handing over the case property to malkhana incharge. It**

is correct to suggest that I did not record the malkhana incharge statement on same date. It is correct to suggest that in memo of arrest and recovery, car colour, engine number, chasis number, model and manufacturing company name, and word cultus are not written. It is correct to suggest that I have not disclosed the ANF team vehicle registration number, make and model so also colour. It is correct to suggest that accused Mir Muhammad wife Zulkhan filed application against me regarding harassment and illegal demand, to my high ups. I did not note the time of memo of arrest and recovery preparation. It is correct to suggest that I have not specifically disclosed the sealing articles in my case." Mashir HC Muhammad Umar in his cross examination has admitted by saying that "It is correct to suggest that engine number and chasis number of car are not mentioned in memo. It is correct to suggest that slab size and colour size are not mentioned in the memo."

Furthermore, no any customer was found over there for the purpose of purchasing charas. The police has also failed to trace out the original owner of the car. It has also come on record that the car of accused had come through Naka but no any receipt of Toll Plaza has been produced. The description of the vehicle in which police party had left the police station has also not been given. The prosecution also failed to prove that the car in question belonged to the appellants / accused. The owner of the car is neither made as an accused nor witness in the case. If the owner of the car is not an accused, then he must be associated as witness in the case to clarify how the car was gone into the hands of the appellants / accused and under what capacity the possession of such vehicle was with claimed possessor of such vehicle. Therefore, non-associating the owner of the vehicle / car in the case, in any capacity also creates a serious doubt regarding the prosecution case that the appellants were in exclusive possession of such vehicle hence it would be not safe to saddle them with a claimed recovery. No log book was produced by the police. Total recovery which allegedly was recovered from the accused persons was of 28 kilograms but only 560 grams as sample was sent to the chemical examiner. There is also no mention of the time of depositing of case property in malkhan and when it was removed. Furthermore, the appellants in their statements recorded u/s 342 Cr.P.C have also taken defence pleas. Appellant Sajjad Ali stated that he has been falsely implicated in the case at hand at the instance of his uncle Ayaz Ali

Deepar with whom he has property dispute. Similarly, appellant Qurban Ali taken the plea that he had some business transaction with one Fareed Sipio and on demand of his outstanding amount of Rs.7,00,000/-, he been involved in this case. The appellant Mir Muhammad also stated that he contracted love marriage with Mst. Zulekhan hence his in-laws being antagonized on such marriage have falsely implicated him in this case. **The number of documents have been annexed with their respective statements to prove their innocence but the same are not considered by the trial court.** It is settled law that when the specific allegation of animosity is levelled against the complainant, the prosecution should be more careful in respect of establishing the case and some private and independent witness ought to be examined and non-examination of private and independent witness has thrown thick clouds of doubt on the entire prosecution case as held in the case SBLR 2019 Sindh 119 (supra). As per available record, the appellants have also no criminal history.

17. We have also noticed that according to the statement of complainant (PW-1), he recovered the narcotics from appellant on 08.11.2019 and prepared the memo of arrest and recovery and deposited the same in Malkhana. The Report of Director Laboratories & Chemical Examiner (Ex-3/L) reveals that the charas was received by hand in the office on 11.11.2019 through PC Asif Ali **after the delay of three days** but evidence on the record is silent that where the same remained for three days from 08.11.2019 to 11.11.2019. Similarly, evidence regarding safe transmission of alleged recovered narcotics to the laboratory for chemical analysis is also missing. The law in this regard is settled by now that if safe custody of narcotics and its transmission through safe hands is not established on the record, same cannot be used against the accused. It is also an established position that the chain of custody or safe custody and safe transmission of narcotics begin with seizure of the narcotic by the law enforcement officer, followed by separation of the representative samples of the seized narcotic, storage of the representative samples with the law enforcement agency and then dispatch thereof to the office of the Chemical Examiner for examination and testing. This chain of custody must be safe and secure. Such is because, the Report of Chemical Examiner enjoys very critical and pivotal importance under CNS Act and the chain of custody ensures that correct representative samples reach the office of the Chemical Examiner. Any break or gap in the chain of

custody i.e., in the safe custody or safe transmission of the narcotic or its representative samples makes the report of the Chemical Examiner fail to justify conviction of the accused. The prosecution, therefore, is to establish that the chain of custody has remained unbroken, safe, secure and indisputable in order to be able to place reliance on the report of the Chemical Examiner. However, the facts of the present case reveal that the chain of custody has been compromised at more than one occasion, therefore, reliance cannot be placed on the report of the Chemical Examiner to support conviction of the appellant. All such factors suggest the false implication of appellant in this case which cannot be ruled out.

18. From the facts narrated by prosecution witnesses it gets that the 10 packets each weighing 1Kg was found under the carpet of the car and that too under each and every accused. This is admitted position that charas was not hidden in specially made cavities, or found in the Boot or Glove Box. How 10 packets each of 1Kg be slipped under the carpet of a car is a mystery, best known to the prosecution witnesses. It is also unbelievable that each accused handed out his own charras to the raiding team. Why they did not run away or left the car to be checked by the police itself. Entire story appears to be made out from a ferry tale, best suited for any issue of MAD Magazine, which sadly is no more in publication.

19. It is the matter of record that the charas was recovered from possession of accused on 08.11.2019 and was kept in Malkhana but it has not been proved that it was a safe transit case. On the point of safe custody of charas and its safe transit, the counsel has rightly placed reliance on the case of IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002), the relevant portion thereof 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."

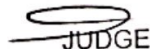
20. In our considered view, prosecution has failed to prove that the charas was in safe custody for the aforementioned period. Even positive report of the chemical examiner would not prove the case of prosecution. There are also several circumstances which created doubt in the prosecution case. It is settled law that it is not necessary that there should be 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. In this regard, reliance can be placed upon case of 'Tariq Parvez v. The State' [1995 SCMR 1345] wherein it has been held by Honourable Supreme Court of Pakistan that:

"For giving benefit of doubt to appellant it is not necessary that there should be many circumstances creating doubts. If there is a 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 matter of right".

21. For the aforementioned reasons, we have no hesitation to hold that the prosecution has miserably failed to prove its case against the appellant / accused. Resultantly, by our short order dated 20.04.2022, the conviction and sentence recorded by the trial court vide judgment dated 01.10.2020 was set aside and the appeal was allowed. Appellants Mir Muhammad, Sajjad Ali and Qurban Ali were acquitted of the charge. Appellants were in custody hence they were ordered to be released forthwith if not required in any other custody case.

Above are the reasons of said short order.


JUDGE


JUDGE

Dated. 31.05.2022.

Tufail