

IN THE HIGH COURT OF SINDH CIRCUIT COURT HYDERABAD

Cr. Appeal No.D-132 of 2023

Present:-
Mr. Justice Amjad Ali Sahito.
Mr. Justice Khadim Hussain Soomro

Appellant: Ghulam Hyder son of Khatir Khan Gadahi through Mr. Sajjad Ali Gopang, advocate.

The State: Through Mr. Shawak Rathore, Deputy Prosecutor General, Sindh.

Date of hearing: 15.10.2024.

Date of reasons: 17.10.2024.

J U D G M E N T

AMJAD ALI SAHITO, J.- The above named appellant was tried by learned 1st Additional Sessions Judge/Model Criminal Trial Court, Shaheed Benazirabad, in Special Narcotic Case No.02/2013, for offence punishable under sections 9 (i) 3-E CNS Act, vide Crime No.02/2022, registered with police station Excise Narcotics Police EPS, Shaheed Benazirabad, whereby he has been convicted and sentenced to imprisonment for life and to pay fine of Rs.800,000/-. Benefit of Section 382-B CrPC has also been extended to him.

2. The brief facts of the case, as narrated in FIR No. 02 of 2022 of P.S. Excise Narcotics Police, EPS, Shaheed Benazirabad, lodged on 20.12.2022 at 7:00 p.m. by complainant Najeeb Ali Memon, Excise Narcotics Inspector ECP, Shaheed Benazirabad Circle, on behalf of the State, are that on 20.12.2022, the complainant, along with the staff of EPS Shaheed Benazirabad, namely Qurban Ali Kaloi, Excise Inspector EPS Shaheed Benazirabad Circle, and subordinates EC Ghulam Hyder, EC Ghulam Mustafa, EC Khalid Hussain, EC Javed Ali, EC Javed Ahmed, and EC Agha Suhail-ud-Din, as per daily diary entry No. 1, boarded a government vehicle (mobile van) bearing No. GSB-518 and proceeded to the Excise Check Post on National Highway Road, Sakrand. There, they began checking suspicious vehicles. After some time, a white-colored Corolla car approached from the Sakrand side. The complainant signaled the car to stop with a hand gesture and noted that the registration number was ALD-941. Inside the car, along with the driver, two persons were seated in a suspicious manner. The complainant's party had them exit the vehicle and inquired about their identities. The person seated in the front passenger seat disclosed his name

as Ghulam Shabir S/o Abdul Majeed Gadahi, resident of Village Mir Khan Gadahi, Taluka Naseer Abad, District Qambar Shahdad Kot. The other person disclosed his name as Ali Hyder S/o Khatir Khan Gadahi, resident of Taluka Warah, District Qambar Shahdad Kot. After appointing EC Ghulam Hyder and EC Ghulam Mustafa as witnesses (mashirs), the complainant conducted a personal search of accused Ghulam Shabir. From the front pocket of his shirt, the complainant recovered three currency notes of Rs. 500/-, totaling Rs. 1500/-. No other items were recovered from him. A personal search of accused Ali Hyder revealed a currency note of Rs. 500/- from the front pocket of his shirt, with no further recoveries. From the trunk (diggy) of the car, a green-colored sack was recovered. Upon removing the sack from the car, it was found to contain yellow-colored bundles. These bundles were counted and totaled 15 in number. Each bundle was opened and found to contain charas, which was seized by the team. The car was further searched, but nothing else was recovered. All the recovered charas were weighed, totaling 15 kilograms, and were sealed on the spot in the same green-colored plastic sack, which was wrapped in a white-colored shopper for analysis. The chassis and engine numbers of the car were checked, with the chassis number found to be NZE120-6037917 and the engine number 1512432. The complainant then prepared the memo of arrest and recovery in the presence of the aforementioned witnesses. The accused, along with the case property, were brought to the police station, where FIR was lodged.

3. After completing the usual investigation, the charge against the appellant was framed on 14.02.2023, to which he pleaded not guilty and claimed to be tried.

4. The prosecution in order to prove its case examined 03 Prosecution Witnesses and exhibited various documents and other items. The statement of the appellant was recorded under Section 342 Cr.P.C in which he denied all allegations leveled against him. After appreciating the evidence on record, the learned trial Court convicted the appellant as mentioned above; hence, the appellant has preferred this appeal against his conviction.

5. Learned counsel for the appellant argued that the impugned judgment dated 12-10-2023 is against the facts, law, and evidence on record, and is liable to be set aside. The impugned judgment and conviction are not sustainable in law. The learned trial court failed to appreciate that the appellant/accused is innocent and has not committed the alleged offence. It also failed to acknowledge that the appellant/accused has no connection with the alleged car from which the charas was recovered. Furthermore, the trial court did not consider that the complainant failed to recover the driving license of the appellant s/accused and did not establish any link between the appellant /accused and the

alleged car or recovery. It also neglected the fact that appellant/accused has no criminal record or history of involvement in narcotics dealings. Additionally, the alleged recovery was shown to have occurred on the National Highway, where there are numerous hotels, shops, garages, and petrol pumps, and traffic flows round the clock, yet no independent witness was associated with the recovery to corroborate the complainant's version. The trial court also failed to note that the owner of the alleged car was not named as an accused, nor did the complainant verify the documents of the alleged car from which the recovery was made. Moreover, the court did not properly evaluate the prosecution's evidence, particularly the entries and copy of register No. 29. The depositions of the complainant and other witnesses were in conflict with the chemical report, which creates doubt regarding the recovery. The trial court relied solely on the words of the complainant, without any direct evidence connecting the appellant/accused to the commission of the offence. The appellant/accused has been the victim of enmity due to a dispute with private opponents, with ongoing litigation between the parties. Appellant and co-accused were captured from their native place, illegally detained, and later handed over to the excise police in Nawabshah, where a false FIR was registered, falsely implicating them with the alleged charas. The appellant/accused has no connection with the commission of the offence as alleged. The impugned judgment is the result of misreading and non-reading of the evidence placed on record and was rendered in a hasty manner. The trial court failed to appreciate that no such incident as alleged ever took place, and the entire case was fabricated.

6. On the other hand, learned Deputy Prosecutor General Sindh contended that all the witnesses have fully supported the case of prosecution; that no major contradictions in their evidence has been pointed out by learned defence counsel; that the police officer who conducted the arrest and recovery proceedings had no prior enmity with the appellant. Moreover, such a huge quantity of 15 kilograms of charas is unlikely to be planted on a person for the purpose of false implication.

7. We have heard learned counsel for the appellant as well as learned Deputy Prosecutor General Sindh and perused the material available on record with their able assistance.

8. From the perusal of the record, it appears that the case of the prosecution is full of contradictions, improvements, infirmities, and is an afterthought. Complainant/PW.1 Najeeb Ali deposed that on 20.12.2022, he was posted as Excise Inspector, ECP at Shaheed Benazirabad Circle. On the same day, he, along with subordinate staff, left the Excise Office vide Daily Diary Entry No.1 and reached the Excise Check Post at National Highway Road, Sakrand, where

they started checking suspicious vehicles. After some time, a white-colored Corolla car approached from the Sakrand side. They stopped the car. Two individuals were seated inside, and they were asked to alight from the vehicle and disclose their identities. The person driving the car disclosed his name as Ghulam Shabir, son of Abdul Majeed Gadahi, resident of Village Mir Khan Gadahi, Taluka Naseer Abad, District Qambar Shahdadkot. The other person disclosed his name as Ali Hyder, son of Khatir Khan Gadahi, resident of Taluka Warah, District Qambar Shahdadkot. From the trunk/diggy of the car, a green-colored sack was recovered. Upon inspection, it was found to contain 15 bundles. Each bundle was opened, revealing charas, which was secured by the officers. The total recovered charas weighed 15,000 grams, which was sealed on the spot for analysis. PW.1 Najeeb Ali prepared the mashirnama of arrest and recovery, read out its contents to the witnesses, and obtained their signatures. The said mashirnama was produced as Ex.3/A. He then returned to the police station and registered an FIR against the accused persons/appellant. He produced Daily Diary No.1 & 2 as Ex.3/B and the FIR as Ex.3/C. Thereafter, he deposited the case property parcel in the excise office and made an entry in Register No.19, produced as Ex.3/D. On the following day, 21.12.2022, through RC No.03, he sent the parcel to the office of the chemical examiner through EC Javed Jamali and produced RC No.03 as Ex.3/E. On the same day, he recorded the 161 CrPC statements of the PWs and later produced the chemical examiner's report as Ex.3/G.

9. During cross-examination, PW.1 admitted that the documents produced by him were written down by his Munshi, EC Khalid Hussain, under his dictation. He further admitted that they entered their arrival at the check post in the roznamcha but failed to produce this entry before the trial court. He also conceded that the memo of arrest and recovery did not disclose the exact time of their arrival at the check post. Additionally, he admitted that they had checked 8 to 10 vehicles prior to this incident, consuming about three hours, and no private person was associated as a mashir during the proceedings. He further admitted that the vehicle in question was not owned by the accused/appellant.

10. The version of the complainant was not fully supported by PW.2 Ghulam Hyder, who stated that they arrived at the check post at 4:00 p.m. and checked 20 to 25 vehicles within 30 to 45 minutes. According to him, they stopped the present vehicle and brought it to the check post, where the complainant himself removed the charas from the vehicle, secured it, and measured the recovered property. He stated that the charas was in different shapes and that the sack was tied but not sealed. The case property was sealed by EC Ghulam Mustafa, who placed two brass seals on it. PW.2 also admitted that they arrived at the excise

office around 6:15 p.m., and the mashirnama of arrest and recovery was prepared by Munshi Khalid under the complainant's dictation.

11. PW.2 admitted that his statement U/s 161 Cr.P.C. was recorded by investigation officer through munshi Ghulam Mustufa at check post on 19.12.2022. There is a significant discrepancy in the timeline: the incident allegedly took place on 20.12.2022, but the statement of PW.2 was recorded on 19.12.2022, before the incident occurred. The complainant, Najeeb Ali, claimed that they arrived at the check post at 1:00 p.m., while PW.2 stated they arrived at 4:00 p.m. Additionally, the complainant stated that they checked 8 to 10 vehicles prior to the incident, whereas PW.2 mentioned they checked 20 to 25 vehicles within 30 to 45 minutes.

12. Further contradictions arose when PW.1 claimed to have prepared the mashirnama of arrest and recovery, while he later in cross-examination admitted that Munshi Khalid Hussain had written the documents. PW.2 stated that they arrived at the excise office at 6:15 p.m., while the FIR was lodged at 7:00 p.m., leaving 45 minutes unaccounted for regarding the custody of the accused/appellant and the case property.

13. The statement under Section 161 CrPC was recorded by the Investigating Officer (IO) through Munshi Ghulam Mustafa at the check post on 19.12.2022. However, the IO/complainant of the case admitted that on 21.12.2022, he sent the case property to the office of the chemical examiner and on the same day recorded the statements under Section 161 CrPC of the prosecution witnesses (PWs). This implies that the next day he recorded the statements of the PWs, whereas PW.2 admitted that his statement under Section 161 CrPC was recorded on 19.12.2022, which is prior to the incident. The complainant/IO of the case also admitted that all the documents produced by him were in the custody of Munshi EC Khalid Hussain, but said Munshi Khalid Hussain was not examined by the prosecution to corroborate the complainant's version that he had prepared all the documents under the dictation of the complainant/IO.

14. Furthermore, PW.1 stated that on 21.12.2022, the case property was sent to the office of the chemical examiner through EC Javed Jamali. PW.3, Javed Jamali, in his evidence, admitted that Ex.3/E, which is RC No.3, does not contain his signature. The case property was handed over on 21.12.2022 at approximately 06:30 a.m. and returned to his office after being deposited at about 08:30 p.m. He also admitted, "It is correct that no entry of departure and arrival of my officer regarding me was kept by officer." His statement under Section 161 CrPC was recorded by Munshi Khalid through the complainant on 21.12.2022 at about 08:30 p.m. In this regard reliance is placed upon the case of

Muhammad Pervez and others versus the State and others (2007 SCMR 670) wherein Hon'ble Supreme Court of Pakistan has held that:

“It is pertinent to mention here that statement of eye-witnesses was not in consonance with each other. There are material contradictions and improvements in their statements which were not noted by the learned Federal Shariat Court in its true perspective. It is a settled law that person making contradictions and improvements cannot be held worthy of credence. See Muhammad Shafique Ahmad's case PLD 1981 SC 472; Roshin's case PLD 1977 SC 557 and Shahbaz Khan Jakhrani's case 1984 SCMR 42. It is a settled principle of law that witness not related to the deceased does not necessarily prove that he is a witness of truth. Intrinsic worth of his statement is the test of his veracity. It is also a settled law that injuries on a P.W. only indication of his presence at the spot but is not informative prove of his credibility and truth. See Said Ahmad's case 1981 SCMR 795. As mentioned above in case each set of evidence is put in a juxtaposition even then prosecution has failed to connect the convicts with the commission of offence beyond any shadow of doubt. It is a settled law that each and every case is to be decided on its own peculiar circumstances and facts as law laid down by this Court in Trustees of the Port of Karachi v. Muhammad Saleem 1994 SCMR 2213. This Court does not, normally, interfere in the concurrent conclusion arrived at by the Courts below qua awarding conviction and sentence but in case the Courts below had awarded conviction and sentence while reappraisal of the evidence in violation of the law laid down by this Court then in such situation it is difficult to avoid the impression that the conclusion reached by the Federal Shariat Court and the trial Court suffer from serious errors of law and fact, which unless set right are likely to result in miscarriage of justice. We have already referred to misreading of evidence. The occurrence took place at 8-45 p.m. on the dark hours, therefore, statement of the eye-witnesses that they had seen the convicts/appellants do not appeal to the reason. It is no doubt that conviction can be awarded on the sole statement of one eye-witness subject to the condition that his statement inspires confidence. In the present case in view of the aforementioned discussion, we do not find that the statement of eye-witness inspires confidence.”

15. We have also perused the record and observed that Muharir who kept the property in Malkhana was never examined nor was produced before the court as witness to say he kept the parcel in Malkhana in the safe custody from 20.12.2022 to 21.12.2022 and subsequently handed over to EC Javed Ali for depositing the same in the office of chemical examiner. PW.1 /complainant admitted that he deposited the parcel of case property in excise office and recorded such entry in Register No.19 and produced same as Ex.3/D. But it is also shrouded in mystery as to where and in whose custody the parcel remained. So the safe custody and safe transmission of the sample parcel is not established by the prosecution and this defect on the part of prosecution itself is sufficient to extend benefit of doubt to the appellant. It is to be noted that in cases of 9 (C) CNS Act it is duty of the prosecution to establish each and every stage from the stage of recovery to making of sample parcel and safe custody of

sample parcel and safe transmission of the sample parcel to the concerned Laboratory. This chain has to be established by the prosecution and if any link is missing in such like offences the benefit must be extended to accused. Reliance is placed upon cases of Javed Iqbal versus The State (2023 SCMR 139), Qaiser Khan v. The State through Advocate-General, Khyber Pakhtunkhwa, Peshawar (2021 SCMR 363), Mst. Razia Sultana v. The State and another (2019 SCMR 1300), The State through Regional Director ANF v. Imam Bakhsh and others (2018 SCMR 2039), Ikramullah and others v. The State (2015 SCMR 1002) and Amjad Ali v. The State (2012 SCMR 577) wherein it was held that in a case containing the above mentioned defects on the part of the prosecution it cannot be held with any degree of certainty that the prosecution has succeeded in establishing its case against an accused person beyond any reasonable doubt. So the prosecution has failed to prove the case against the appellant and his conviction is not sustainable in view of the above mentioned defects.

16. While recording the statement under Section 342 CrPC, the appellant/accused submitted that they were not arrested from the place of the incident, and nothing was recovered from them. Instead, they claimed that the items/Charas had been planted by the complainant. The appellant further stated that there is an ongoing dispute between Rustam Ali and others, for which an FIR was lodged, and it was on the basis of that FIR that the appellant was arrested. In support of his contention, he also produced the said FIR.

17. Re-appraisal of the evidence reflects that the learned trial court failed to properly appreciate the material contradictions, improvements, and admissions made by the prosecution witnesses, rendering the case highly doubtful. In this respect reliance can be placed upon the case of Muhammad Mansha versus The State (2018 SCMR 772) wherein Hon'ble Supreme Court of Pakistan has held as under:-

"4. Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of Tariq Pervez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Muhammad Akram v. The State (2009 SCMR 230) and Muhammad Zaman v. The State (2014 SCMR 749)."

18. Under these circumstances, this Criminal Appeal was allowed vide our short order dated 15.10.2024 in the following manner:-

"For reasons to be recorded later, this appeal is allowed. The conviction and sentence awarded to the appellant, Ali Hyder, vide

impugned judgment dated 12.10.2023, passed by the learned 1st Additional Sessions Judge/Model Criminal Trial Court, Shaheed Benazirabad, in Special Narcotic Case No. 02/2023, arising out of Crime No. 02/2022, under Section 9(i) 3-E of the CNS Act, 1997, PS Excise Narcotics Police, EPS, Shaheed Benazirabad, are hereby set aside. The appellant is acquitted of the charges. As he is currently confined in jail, he shall be released forthwith, if he is not required in any other custody case.

The appellant, Ghulam Shabir, has passed away, and this appeal, to his extent, has already been abated vide order dated 03.09.2024.”

19. These are the reasons of our short order dated 15.10.2024.

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Irfan Ali