

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

Criminal Appeal No.D- 141 of 2011

Present:

**Mr. Justice Muhammad Junaid Ghaffar**

**Mr. Justice Mohammad Saleem Jessar**

Appellant Yar Mohammad @Yaroo Sabzoe through his counsel  
Mr. Mohammad Afzal Jaghirani, Advocate

Respondent The State through Mr. Khadim Hussain Khoonharo,  
Addl. P.G.

Date of hearing: 14.9.2017.

Date of judgment: 14.9.2017.

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

**Muhammad Junaid Ghaffar-J:-** Through this Criminal Appeal the appellant has impugned Judgment dated 29.11.2011 passed by learned Sessions Judge/Special Judge for CNS, Kashmore @ Kandhkot in C.N.S Case No 29 of 2011 arising out of Crime No.266 of 2011 of P.S A-Section Kandhkot for offence U/S 9(c) of CNS Act, 1997 whereby the appellant has been convicted and sentenced to suffer R.I for four years and to pay fine of Rs.20,000/= and in case of default in payment of fine, he shall suffer S.I for further five months.

2. Briefly the prosecution's case against the appellant is that on 16.8.2011 at 1010 hours complainant ASI Mohammad Ayoob Tunio lodged FIR on behalf of the State stating therein that on 16.8.2011, he along with his subordinate staff left P.S vide Entry No.10 at 0845 hours on police mobile No.SP-6674 for patrolling and during the course of patrolling when at about 0920 hours they reached Degree College Road near Graveyard, they saw one person carrying a plastic shopper of black colour in his hand, who on seeing police party in uniform in police mobile, started running on which the police party stopped the vehicle,

and followed the said person and apprehended him at distance of 60 paces alongwith plastic shopper, who on enquiry disclosed his name to be Yar Muhammad @Yaroo S/O Gulsher. The complainant opened plastic shopper and found that it was containing charas which on weighing became 1050 grams. On personal search of accused, two currency notes of Rs.50/= each and three currency notes of Rs.10/= each were recovered from right side pocket of his shirt (kamees). Complainant prepared such memo in presence of mashirs PC-Muhammad Ismail and PC-Zulfiqar Ali. Thereafter, took accused and case property to Police Station where he lodged the FIR on behalf of the State to the above effect.

3. Thereafter, on completion of usual investigation, challan was submitted against accused U/S 9(c) of CNS Act 1997. The trial Court framed a formal charge against the accused at Ex.2 to which he pleaded not guilty and claimed his trial.

4. The prosecution in support of its case, examined complainant ASI Muhammad Ayoob at Ex.3, he produced departure, arrival entries, memo of arrest and recovery and FIR at Ex.3-A to 3-C respectively; PC Muhammad Ismail at Ex.4 who produced memo of vardat at Ex.4-A and SIO Amanullah Shah at Ex.5, who produced report of Chemical Examiner Chemico Laboratory, Sukkur at Rohri at Ex.5-A. Thereafter prosecution side was closed vide statement at Ex.6. The appellant in his S.342 Cr.P.C. statement denied the allegations and claimed that he has been falsely implicated as his brother had filed a Criminal Misc. application against the police officials for causing harassment.

5. On conclusion of trial, the learned trial Court convicted and sentenced the appellant/accused under impugned judgment, giving rise to filing of instant appeal.

6. Counsel for the appellant has contended that the alleged place of incident is near Degree College which is supposed to be a thickly populated area and therefore, the prosecution ought to have made efforts for engaging private *mashirs*; that there are contradictions in the evidence of the complainant and the *mashirs* regarding the area of patrolling when they purportedly received spy information; that the sample was sent for testing belatedly after one week and it was kept allegedly in *malkhana*, however, no entry of *malkhana* has been produced in the evidence; that the appellant in his 342 Cr.P.,C statement categorically alleged that he was falsely implicated as his brother had filed a Criminal Miscellaneous Application No.299/2011 before the Additional Sessions Judge, against the proposed accused which included the complainant, I.O and *mashirs* in this case. In support, he has relied upon *Mazar v The State* (2009 YLR 1325), *Fazal v The State* (2010 P.Cr.L.J 360), *Muhammad Aslam v The State* (2011 SCMR 820) and *Safar-Ur-Rehman v The State* (2011 P.Cr.L.J 1334).

7. On the other hand, learned A.P.G has supported the impugned order and has contended that the evidence is consistent and there are only minor contradictions which are immaterial, whereas, the incident though happened in the morning but by such time classes were underway in the college therefore, no private *mashir* could have been engaged; that delay in sending sample was for the reason that appropriate permission was being obtained from SSP Kashmore, however, the report is positive; that filing of the Criminal Miscellaneous Application was an afterthought and since this is a crime against society the appeal be dismissed.

8. We have heard the learned Counsel for the appellant, and learned A.P.G appearing on behalf of the State and have also perused the record; R&Ps and case law relied upon by the parties.

9. On perusal of the record and material placed before us, it is noticed that as per the prosecution's case the incident occurred on 16.8.2011 at or about 0925 hours, whereas the Test Report (Ex:5A) reflects that samples were received by the Testing Laboratory on 23.8.2011, and the prosecution has not been able to bring on record any plausible justification for sending the samples to the laboratory after delay of almost one week. Though we are mindful of the fact that such delay does not necessarily lead to the conclusion that the prosecution's case is false, however, since the Control of Narcotics Substances (Government Analyses) Rules, 2001, require that the sample of Narcotics recovered from the possession of an accused is to be sent for sampling within a maximum of 72 hours, the prosecution ought to have justified the delay or give some plausible justification for having sent the samples belatedly. Though learned A.P.G has relied upon some letter of approval which according to him was received belatedly from the office of SSP; however, no such letter has been produced in the evidence of prosecution. Further, the prosecution has not been able to justify and or confirm that whether the samples during such period were kept in safe custody or not. In view of such position we are of the view that conduct of the Investigating Officer in this context has created reasonable doubt in the prosecution's case. Reliance in this regard may be placed on the case of *Abdul Majeed v. The State* (2014 YLR 2050), *Muhammad Qasim v. The State* (2014 P.Cr.L.J 1193), *Riaz Ahmed v. The State* (2015 P.Cr.L.J 143).

10. Secondly, it has also come on record through evidence that the incident happened on 23.8.2011 at around 0925 hours near a college where there always is a possibility of availability of people and in such broad daylight no attempt was made by the Investigating Officer to engage any private mashirs, which also creates doubt in the prosecution story. It has been further noted that there is no mention of sealing of

sample in white cloth bag as apparently/allegedly the applicant was carrying it in a black shopper.

11. It has been further noticed that the appellant in his statement recorded U/S 342 Cr.P.C Ex:2-A has categorically stated that he was innocent and was being falsely implicated by the SHO Gul Mohammad, ASI Mohammad Ayoob Tunio, PC Mohammad Ismail and PC Zulfiqar Ali as brother of the appellant had filed a Criminal Miscellaneous Application against these persons for causing harassment. Once the appellant had specifically made allegations against the police officials in his statement U/s 342 Cr.P.C, then prosecution was at least required to negate such assertion of the appellant. The recovered charas was not sent for testing within time admittedly and was kept at Police Station as stated but relevant entries regarding *malkhana* was not produced so that the allegation of foisting of narcotics and false implication of the appellant could be controverted. It further appears that there is also contradiction in sealing of the recovered charas as there are no details as to how and in what manner it was sealed, whereas, the Laboratory report reflects that it was received in a white cloth and according to prosecution it was not wrapped in any packing when it was allegedly recovered from the possession of the appellant. To these questions learned A.P.G could not satisfactorily assist us with any independent material.

12. It is a settled principle of law in criminal cases that if any reasonable doubt is created in the case of prosecution, then its benefit is to be extended to the accused. In the instant matter the prosecution has not been able to prove the case against the appellant beyond reasonable doubt, whereas the delay in sending the samples for laboratory test has also not been properly explained. Reliance in this regard can be placed on the case of *Muhammad Aslam Vs. The State (2011 SCMR 820)*,

wherein the Hon'ble Supreme Court while setting aside the conviction, considered the delay of 7 days in sending the sample for testing as crucial. In the case of **Fazal & 2 others v The State (2010 PCr.LJ 360)** a learned Division Bench of this Court while setting aside the conviction has observed that sending of samples after a delay of 11 days is a mystery as to where the sample was lying and possibility of manipulation cannot be ruled out. Further, it is also pertinent to note that for giving benefit of doubt to an accused, it is not necessary that there should be several instances and or circumstances which must create doubts and if there is even a single circumstance which creates doubt in a prudent mind about the guilt of the accused, then the accused is entitled to such benefit not as a matter of grace and concession but as a matter of right. Reference in this regard may be made to the case of **Tariq Pervez Vs. The State (1995 SCMR 1345)**

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 *malkana* 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.

14. Accordingly, on 14.9.2017 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