

THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA.

Crl. Appeal No. **D-62** of **2019**

Present:

Justice Zafar Ahmed Rajput
Justice Shamsuddin Abbasi

Appellant : Ayaz Ali @ Shah s/o Aiwaz @ Ashique Jeho, through Mr. Habibullah G. Ghouri, advocate.

Respondent : The State, through Mr. Muhammad Noonari, Deputy Prosecutor General

Date of hearing : 28.01.2020

Date of order : 28.01.2020

J U D G M E N T

ZAFAR AHMED RAJPUT, J- Appellant Ayaz Ali @ Shah s/o Aiwaz @ Ashique Jeho and co-accused Aamir Ali s/o Azizullah Jeho were booked in Crime No.30/2019, registered on 14.03.2019 at Police Station Saddar Jacobabad, under section 9(c) of the Control of Narcotic Substances Act, 1997 and after a regular trial under CNS Case No.15 of 2019, they were convicted by the Additional Sessions Judge-I/Model Criminal Trial Court, Jacobabad for the said offence, vide judgment dated 31.08.2019, and sentenced to suffer R.I for five years and to pay fine of Rs.10,000/- each, in default thereof, they should further undergo S.I for five months. Benefit of Section 382-B, Cr. P.C was, however, extended to them. Against that, the instant criminal appeal has been preferred by the appellant.

2. Learned counsel for the appellant has contended that the impugned judgment is a result of misreading and non reading of the evidence on record; that the learned trial Court has failed to evaluate and assess the evidence and thus miserably failed to give due weight to it; that there are material contradictions in the depositions of the

prosecution witnesses which discredit their testimony and benefit thereof should have been given to appellant; that bare perusal of the impugned judgment reveals that the trial Court has taken into consideration only the examination-in-chief of the prosecution witnesses and failed to dilate upon their cross-examination; that there is un-explained delay of four days in sending the alleged samples to Chemical Examiner; that the prosecution has failed to prove safe custody of the recovered substance at the police station and its safe transmission to Chemical Examiner which fact alone is sufficient to create doubt in prosecution case and thus prosecution has failed to prove its case against the appellant beyond reasonable doubt; hence, the conviction and sentence recorded by the trial Court is liable to be set-aside.

3. On the other hand, learned D.P.G has fully supported the impugned judgment by maintaining that huge quantity of narcotic substance has been recovered from the appellant by the police against whom he has not pleaded any malice or enmity for his false implication in the case. He has also maintained that the contradictions in deposition of PWs and irregularity in investigation being minor in nature are liable to be ignored.

4. We have heard the learned counsel for the appellant and D.P.G. and scanned the material available on record with their assistance.

5. The case of the prosecution as per F.I.R. (Ex:5/B) is that on 14.03.2019, complainant A.S.I. Ashique Ali Lashari proceeded from police station along with his subordinate staff, namely, P.Cs. Babal Khan and Israr Ahmed, under Entry No.25 at 1710 hours, for patrolling in Government vehicle and reached link road leading towards Baluchistan, near Shah Ghazi at 1800 hours, where they saw two persons having bags on their back, who on seeing police party tried to escape but they

were apprehended. On query, the first person disclosed his name as Aamir Ali s/o Azizullah Jeho and the other as Ayaz Ali @ Shah son of Aiwarz Khan (*the appellant*). When police party opened black colour bag of co-accused Aamir Ali and brown colour bag of appellant Ayaz Ali, they recovered 10/10 slabs of charas from each bag; on being weighed each of the slabs came to one kg., total ten Kgs. of charas was recovered from each of the accused. Out of which 500 grams charas from each slab was separately sealed for chemical analysis and such memo of arrest and recovery (Ex:5/A) was prepared in presence of mashir P.Cs. Babal Khan and Israr Ahmed at the spot.

6. After going through the evidence brought on record of the case, we have observed that in case in hand the prosecution has failed to prove the safe custody of the recovered charas and its safe transmission to Chemical Examiner. The recovery of charas was allegedly affected on 14.03.2019. PW-4 S.I.P. Shabbir Ahmed, the I.O (Ex-8) has deposed that he deposited the case property in *Malkhana* of the police station through WHC; he has produced such attested copy of entry No.309 (Ex.8-A). It reflects from perusal of the said entry that it does not bear date, name and signature of the official who recorded it. Besides, the name of WHC has not been disclosed by the said PW in his statement nor he (WHC) was examined by the prosecution to corroborate the evidence of said PW. The said P.W has also deposed that he sent the sample of substance to Laboratory on 18.03.2019 through PW-3 P.C Shahzad Hussain (Ex.7). The latter has deposed that on 18.03.2019, S.I.P. Shabbir Ahmed handed over him two parcels of charas to deposit the same with Chemical Laboratory, Rohri, which he deposited under RC receipt, dated 18.03.2019, but PW-4 S.I.P. Shabbir Ahmed has also deposed that on 15.03.2019, he visited Wardat and on the same date he wrote a letter to SSP for getting permission to send the sample of charas to concerned



Laboratory and such permission was accorded to him and then he sent the same to Chemical Laboratory on 18.03.2019. He has produced a letter dated 15.03.2019 at Ex.8-D, regarding that he has deposed that he had written it to SSP which reflects that in fact said letter was written by the SSP, Jacobabad to In-charge Chemical Analyzer Sukkur at Rohri enclosing the case property with request to examine it and send the report through P.C Shahzad Hussain, who was deputed to send the case property. Such state of affairs, indeed leads to inference that the case property was not laying in the Malkhana from 15.03.2019 to 18.03.2019. As such, no evidence is available in record to prove the safe custody of the recovered substance at the police station and its safe transmission from said place to the office of Chemical Examiner. It has been held by the Apex Court in the cases of Abdul Ghani and others v. The State and others (2019 SCMR 608), Faizan Ali v. The State (2019 SCMR 1649), The State through Regional Director ANF v. Imam Bukhsh and others (2018 SCMR 2039), Ikramullah and others v. The State (2015 SCMR 1002) and Amjad Ali v. The State (2012 SCMR 577) that in a case where safe custody of the recovered substance or safe transmission of sample of the recovered substance is not proved by the prosecution through any independent evidence, it cannot be said with any degree of confidence that the prosecution had succeeded in proving its case against an accused beyond reasonable doubt.

7. In view of above facts and reasons, we are of the considered view that the prosecution has in fact failed to prove its case against the appellant beyond reasonable doubt. It is settled principle of law that for basing conviction against the accused there should be strong evidence before the Court and if doubt even slightest arises in the prudent mind as to the guilt of the accused, benefit of the same has to be extended in favour of the accused. This appeal is, therefore, allowed. Consequently



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the conviction and sentence of the appellant Ayaz Ali @ Shah are set aside and he is acquitted of the charge by extending benefit of doubt to him. He shall be released from the jail forthwith, if not required to be detained in connection with any other case.

8. Above are the reasons of our short order, dated.28.01.2020.

