

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT
HYDERABAD**

Criminal Appeal No. S -102 of 2021

Appellant : Ishtiaque Ali s/o Muhammad Yousif Memon
Through Mr. Shahnawaz Brohi, Advocate.

The State : Through Mr. Nazar Muhammad Memon,
Additional Prosecutor General, Sindh.

Date of hearing : **17.07.2023**

Date of decision : **04.08.2023**

JUDGMENT

ARBAB ALI HAKRO, J;- This Criminal Appeal under Section 410 of Criminal Procedure Code, filed by Ishtiaque Ali, the appellant, is directed against the Judgment dated 06.07.2021, passed by Additional Sessions Judge-I, Tando Muhammad Khan, emanating from Crime No.139 of 2020 registered under Section 8 of the Sindh Prohibition of Preparation, Manufacturing, Storage, Sale and Use of Gutka and Manpuri Act, 2019 ("**the Act of 2019**") at Police Station Tando Ghulam Hyder District Tando Muhammad Khan, whereby the appellant has been convicted and sentenced to suffer rigorous imprisonment for 02(two) years and to pay a fine of Rs.200,000/- and in default of payment thereof to further undergo 06(six) months simple imprisonment.

2- The case of the prosecution is that on 07.11.2020, SIP Kashif Abbas Khawaja of Police Station Tando Ghulam Hyder District Tando Muhammad Khan, along with Constables Mehboob Ali and Naveed Ahmed, left PS for patrolling at 6:00 a.m. vide entry No.22 in the official vehicle driven by Constable Ali Nawaz, and when they reached at Dando link road near Bukhari Dargah, they spotted one person standing holding white sack on the road towards the eastern side, who on seeing them, tried to slip away, but was rounded up at 7:00 a.m. On enquiry, he disclosed his name as the present appellant. On opening the sack, 15(fifteen) packets of Indian Safina Gutka, each packet containing 105 sachets total of 1575 were found

in it, out of which one packet containing 105 sachets was sealed for chemical analysis, while the remaining 14(fourteen) packets were sealed separately in the same sack. His further personal search was conducted, which yielded the discovery of two currency notes of Rs.500/-, and seven currency notes of Rs.100/- a total of Rs.1700/- from the side pocket of his shirt. Nobody from the public was seen around; hence, complainant nominated Constables Mehboob Ali and Naveed Ahmed as mashirs, and in their presence accused was arrested under a mashirnama attested by them. The accused and the recovery made from him were taken to the Police Station, where the case was registered against him by the complainant on behalf of the State.

3- After completion of the investigation, a complete challan was drawn and accordingly sent up for trial. To substantiate its' version, the prosecution placed reliance on the account / statements of as many as 03(three) witnesses. On the close of prosecution evidence, the appellant's statement was recorded under Section 342 Cr.P.C, wherein he professed innocence and false implication; however, he neither opted to be examined on oath as provided under Section 340(2) Cr.P.C nor wished to produce defence evidence. After hearing arguments, the trial Court concluded that the prosecution had successfully brought home a charge against the appellant, as such, vide impugned Judgment dated 06.07.2021, convicted and sentenced the appellant as mentioned above. Hence, the instant appeal against the Judgment of conviction.

4- It was contended by learned counsel for the appellant that the appellant is innocent and has been involved in this case falsely by the Police otherwise he has nothing to do with the alleged incident and the evidence of the witnesses being doubtful has been believed by the trial Court without lawful justification, and there is inconsistency in the evidence of the complainant and the mashir; that handwriting as well as signatures of the mashirs are different; that there is a delay of about 02 days in sending the samples to the chemical analysis for which no plausible explanation has been furnished, that the prosecution has not examined Malkhana Incharge, therefore, the appellant is entitled to be acquitted by extending him the benefit of doubt. In support of his contentions, he relied upon the case laws reported in **2018 MLD 1329, 2020 MLD 1883, 2021 P Cr. LJ 1334, 2022 MLD 150 and 2022 YLR 2047.**

5- On the contrary, the learned Additional Prosecutor General has supported the impugned Judgment and submitted that the prosecution had proved the case against the appellant beyond a reasonable doubt, that all the eye-witnesses have supported the case of the prosecution, and there are no material contradictions in their evidence; that chemical Report in respect of the case property viz. Gutka is positive; that no enmity was suggested to implicate the appellant in the present case falsely; lastly, he prayed that the appeal of the appellant might be dismissed.

6- I have attentively heard the learned counsel for the appellant as well as learned Addl. Prosecutor General representing the State and carefully reviewed the record. It has been noticed that under the deposition of the complainant SIP Kashif Abbas, Gutka was purportedly discovered on 07.11.2020, while its corresponding samples were dispatched to the office of the Chemical Examiner on 09.11.2020, thereby resulting in a delay of two days. However, the prosecution has failed to provide any justification for this inordinate delay in sending the sample for chemical examination. It is also noted with great concern that the samples from the police station to the chemical laboratory for analysis have been handed over to PC Imtiaz, however, neither has he been cited as a witness nor examined to support the prosecution's version regarding the safe transmission of the samples to the laboratory. Thus, by not producing the material witness by the prosecution, no chain exists to prove the safe custody of the samples to the laboratory. The missing chain creates serious doubts about the authenticity and credibility of the chemical Report. In this regard, the Apex Court, in the case of **Mst. Razia Sultana v. The State and another (2019 SCMR 1300)** has held as under:-

"2. At the very outset, we have noticed that the sample of the narcotic drugs was dispatched to the Government Analyst for chemical examination on 27.2.2006 through one Imtiaz Hussain, an officer of ANF. However, the said officer was not produced to prove the safe transmission of the drug from the Police to the chemical examiner. The chain of custody stands compromised. As a result, it would be unsafe to rely on the Report of the chemical examiner. The Apex Court has repeatedly held that if the chain of custody is broken, the chemical examiner's Report loses reliability, making it unsafe to support the conviction. Reliance is placed on State v. Imam Bakhsh (2018 SCMR 2039)."

7- In addition, there are glaring contradictions in the evidence of the PWs. For example, mashir PW-2 in his evidence stated that on 07.11.2020, he, along with SIP Adam Khushk, SIP

Kashif Abbas, PC Naveed Ahmed and DPC Nawaz Ali, left P.S. for inspection of the place of incident where SIP Adam Khushk, (I/O) prepared mashirnama of the place of incident, whereas PW-3 SIP Adam Khushk in his examination-in-chief belied the words of PW-2 and stated that PC Naveed wrote mashirnama of the place of an incident under his dictation. Similarly, PW-1 in his examination in chief, stated that he prepared a memo of arrest & recovery. However, during the trial, at the request of learned defence counsel, in order to verify it, the handwriting of the complainant was obtained, which shows that there is much difference in the same meaning, thereby that the memo of arrest & recovery is not in the handwriting of the complainant. This fact is conceded by the complainant in his cross-examination, who admitted that there is a difference in the handwriting. It is also matter of record that only one packet was sealed for chemical analysis but the remaining 14 packets allegedly containing 105 packets each were not sent for chemical examination in order to prove that the said packets contained substance hazardous and unfit for human consumption. The numbers and description of the currency notes are not mentioned in the memo of arrest and recovery. No purchaser was seen at the place of incident, nor the appellant was seen while selling the alleged substance; therefore, there appears no proof of sale of the alleged substance. Thus, the entire prosecution case become highly doubtful.

8- Another essential aspect of the case is that the place of the arrest of the appellant and recovery from him was shown to be a link road of Dargah frequented by its' disciples and the general public. The timing was early hours of the day, i.e. 0700 hours, yet nobody from the public was taken as mashir. Thus, the mandatory provisions of section 103 Cr. P.C. had been flagrantly violated. Indeed no effort appeared to have been made for it; therefore, non-compliance with the provision of Section 103, Cr.P.C. creates doubt in the prosecution story. In this regard, I am supported by the cases of **Mushtaq Ahmed v. The State (PLD 1996 SC 574)** and **The State through Advocate General, Sindh v. Bashir and others (PLD 1997 SC 408)**.

9- In light of the prevailing circumstances, a sound and reliable conclusion can be drawn that the prosecution has failed to provide conclusive evidence supporting its case against the appellant. Consequently, the appellant is entitled to the benefit of the doubt. In

the case of **Muhammad Mansha vs. The State (2018 SCMR 772)**, it has been held by the Apex Court that:

"4. Needless to mention that while giving the benefit of the 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".

10- In view of the facts and reasons discussed above, instant appeal is **allowed** and the conviction and sentence awarded to the appellant by impugned Judgment are set-aside. Consequently, he is acquitted of the offence for which he was charged, tried, convicted and sentenced by the trial Court. The appellant is on bail, his bail bond stands cancelled and surety discharged.

JUDGE

Hafiz Fahad