

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Special Crl. Jail Appeal No.D-66 of 2023

PRESENT

Mr. Justice Khadim Hussain Tunio, J
Mr. Justice Ali Haider 'Ada', J.

Appellant Abdul Jabbar Ujjan : Through Mr. Sohail Ahmed Khoso.
Advocate.

State. : Through Mr. Aftab Ahmed Shar,
Additional Prosecutor General Sindh.

Dates of hearing : 05.03.2025
Date of Decision : 05.03.2025
Date of Reason : 12.03.2025

JUDGMENT

Ali Haider 'Ada', J - By means of this Special Criminal Jail Appeal, the appellant has assailed the judgment dated 30.09.2023, passed by the learned Sessions Judge (CNS), Khairpur, in Special Case No. 77 of 2023, arising out of FIR No. 05 of 2023, registered under Section 9(b) of the Control of Narcotic Substances Act, 1997, at P.S. Gambat, District Khairpur. Through the impugned judgment, the appellant was convicted and sentenced to five years of imprisonment, along with a fine of Rs. 40,000/- (Rupees Forty Thousand). In case of default in payment of the fine, the appellant was directed to undergo simple imprisonment for an additional five months. However, he was extended the benefit of Section 382-B Cr.P.C.

2. According to the prosecution's case, on 18.01.2023, ASI Zaffar Ali, while on patrol, received confidential information that the accused, Abdul Jabbar, who was wanted in Crime No. 03/2023 under Sections 399 and 402 PPC, was present near Naseem Kharal Gate. Acting on this information, the police reached the location at 1440 hours and apprehended the accused. Upon inquiry, he disclosed his identity, and a search of his person led to the alleged recovery of 550 grams of charas. The contraband was sealed on the spot, and a recovery memo was

prepared in the presence of police witnesses. After completing the legal formalities, an FIR was lodged on behalf of the State.

3. After registration of FIR, the investigation was carried and finally the challan was submitted for offence u/s 9 (b) of CNS Act, 1997 and the case was sent-up for trial.

4. On 14.04.2023 the trial Court framed charge against accused at Ex.2, to which he pleaded not guilty and claimed to be tried vide his plea recorded at Ex.2-A. On 11.07.2023 learned District Public Prosecutor Khairpur moved an application u/s 227 Cr.P.C, to alter the charge as the appellant was already convicted in narcotic cases, then the learned trial on 25th August, 2023 framed amended charge at Ex.04 and after framing of the charge the documents were supplied to accused/appellant in which he pleaded not guilty and claimed to be tried vide his plea recorded at Ex.4-A and open the side of prosecution.

5. At the trial, prosecution examined PW-1 complainant/ASI Zaffar Ali at Ex.5, as during chief-examination he produced departure entry, memo of arrest and recovery, FIR and arrival entry, then prosecution examined PW-2/mashir/PC Waheed Ali at Ex.06 who is mashir of arrest and recovery and also the mashir of visiting place of incident. He produced mashirnama of place of incident as well seen the previous documents and affirms that the same are correct, then the prosecution examined PW-3 WHC Sikandar Ali Rajper at Ex.7 who was posted as WHC of Police Station Gambat, who kept entry in malkhana and produced the same. Lastly I.O/SIP Sahib Khan was examined at Ex.08 and he produced entry regarding deposit of case property through WHC at malkhana entry and took out case property from malkhana and proceedings towards chemical examiner for its analysis. Thereafter, prosecution side was closed at Ex.09.

6. Statement of accused was recorded u/s 342 Cr.P.C. at Ex.10 in which he claimed false implication in this case and denied the prosecution allegations. Accused further stated that police arrested him during snap checking and demanded bribe for his release but he refused due to which they managed false case against him and also foisted recovery upon him. However, accused neither examined himself on Oath u/s 342(2) Cr.P.C nor led any evidence in his defence, in disproof of the prosecution allegations.

7. Learned Sessions Judge/Special Judge(CNS) Khairpur after hearing the learned counsel for the parties and examining the evidence available on record, by judgment dated 30.09.2023 convicted and sentenced the appellant as stated above. Hence, this appeal.

8. We have carefully heard learned counsel for the parties and perused the entire evidence available on record.

9. In our considered view, the prosecution has failed to prove its case against the appellant for the following reasons: PW-1/complainant, during his examination-in-chief, deposed that the mashirnama of arrest and recovery was prepared in the presence of the mashir. However, during cross-examination, he testified that the second mashir, Muhammad Soomar Narejo, wrote the memo/mashirnama on his dictation. This version is further contradicted by the first mashir, Waheed Ali, who deposed that the complainant himself prepared the mashirnama of arrest and recovery. Additionally, the complainant, in his examination-in-chief, deposed that: *"thereafter I handed over the FIR, memo, custody of accused and case property to I.O/SIP Sahib Khan for investigation purposes."* However, upon reviewing the record, it is clear that the complainant did not hand over the case property to the IO, as he himself kept the malkhana entry in Register No. 19 as per Rule 22.70 of the Police Rules, 1934. The

complainant's name is listed as the depositor in column No. 3 of the entry. Moreover, WHC Sikander testified that the IO handed over the case property to him for safekeeping in the malkhana, and he deposited it in the malkhana. The IO deposed that he got the property deposited in the malkhana through WHC Sikander and also made the corresponding entry in Register No. 19 at Serial No. 3. This is completely contradicted by the record, which indicates that the complainant himself kept the property and is listed as the depositor in the relevant entry. In this regard, we are by the case of *Asif Ali and another v. The State, reported in PLD 2024 SCMR 1408*.

10. The description of place of incident which were disclosed by mashir of place of incident are totally different as per mashirnama of visit of place of incident as the mashir disclosed that there is road on northern and southern side, on eastern side there is open plots and on western side there is line while the mashir in his deposition deposed the description as that in the north National Highway road behind the Nasim Kharal gate is located, in the west road leading towards gate, in the south of National highway road and in the east also National highway road is located. A perusal of the malkhana register entry reveals that the complainant, who initially deposited the case property, is also recorded as the dispatcher of the property. The entry further indicates that the complainant dispatched the case property to the Chemical Examiner through a road certificate for chemical analysis. However, column No. 7, which pertains to the signature of the person responsible for dispatching the property, remains blank, in clear violation of the legal requirement. Additionally, the WHC testified that he recorded the entry and deposited the case property in the malkhana, while the Investigating Officer claimed to have dispatched the property for chemical analysis. However, the record does not substantiate the IO's claim.

11. It is also pointed out that after going through with the record that in arrival entry of visit of place of incident nowhere it is mentioned as to what kind of proceedings were initiated by I.O, at the time of visit the place of incident as only it was simply mentioned in arrival entry that they visited place of incident. It is not noted that a memo was also prepared at the time of the visit to location of the incident. The chemical examiner received one sealed parcel containing black-brown piece wrapped in plastic pani while no one deposed that the contraband was wrapped in any plastic pani. We are conscious of the fact that provisions of Section 103 Cr.P.C. are not attracted to the case of personal search of accused relating to the narcotics. However, when the alleged recovery was made on road side which is meant for heavy traffic and happened in this case, omission to secure the independent mashirs, particularly, in the case of spy information cannot be brushed aside lightly by the court. Prime object of Section 103 Cr.P.C. is to ensure the transparency and fairness on the part of the police during course of recovery, curbs false implication and minimize scope of foisting of fake recoveries upon accused. As observed above, at the time of recovery from appellant, complainant/ASI Zaffar Ali did not associate any private person to act as recovery witness and only relied upon his subordinates. Hence, as observed above, due to non-association of independent witness as mashir in this case, false implication of the appellant cannot be ruled out.

12. Moreover, justice is not to be done only in courts. Other persons particularly the one who is entrusted with power is responsible to do the justice at his level. A responsible officer of Police, invested with powers of investigation is also obliged in law to do the justice and conduct fair and independent investigation. Investigation Officer had also failed to arrest the particular customer who had to receive the narcotics from the appellant to find out the truth as held in the case of *Nazeer Ahmed v. The State (PLD 2009 Karachi 191)* that:-

14. According to para. 3 of rule 25.2 of Police Rules, 1934, it is the duty of an Investigating Officer to find out the truth and his object shall be to discover the actual facts and for the achievement of such object he shall not commit himself prematurely to any view of the facts for or against any person.

15. In the case of the State v. Bashir and others, reported in PLD 1997 SC 408, the Supreme Court, referring to the above Police Rule observed.--

"It could hardly be expected that a police officer, who is heading a raiding party and is a witness, also becomes the complainant and lodges an F.I.R. against the accused, and then becoming an Investigating Officer of the same case, will comply with the aforesaid Police Rule. In the circumstances, the practice of seizing officer or the head of a police party who is also a witness to the crime becoming or being nominated as an Investigating Officer of the same case should be avoided and if any other competent officer is available in the police station, he may be nominated as the Investigating Officer rather than the head of the police party. As observed Investigating Officer is as important witness for the defence also and in case the head of the police party also becomes the Investigating Officer he may not be able to discharge his duties as required of him under the Police Rules."

13. We are clear in our mind that investigation in the case in hand has been carried out in a casual and stereotype manner, without making an effort to discover the actual facts/truth. There were several other circumstances / infirmities in the prosecution case. There was no evidence that after the recovery of charas, the same was safely kept in Malkhana of Police Station. In this, we are also fortified with the case law reported in the case of ***Rustam Ali v. The State*** reported in ***2023 P.Cr.LJ Note 112*** in which it has been held that:

"Record showed that the complainant had not deposed that he kept the case property in the Malkhana and kept such entry nor disclosed the name through whom he had sent the property in question to the office of Chemical Examiner. Complainant deposed that during the investigation he dispatched the samples parcels for chemical examination. Prosecution failed to examine Head Muharrar to establish that the case property was kept in safe custody nor Head constable, who transmitted the sample parcel to the office of the chemical examiner. Prosecution failed to prove the safe custody and safe transmission of the case property. Circumstances established that the prosecution had failed to prove the guilt against the accused beyond any

reasonable doubt. Appeal was allowed and accused was acquitted by setting aside convictions and sentences recorded by the Trial Court.”

14. We have already held that the safe custody of the recovered substances as well as safe transmission of the samples to chemical examiner had not been established by the prosecution. We add that report of the chemical examiner was also legally laconic and deficient as such tampering or replacement while in transit of the narcotics cannot be ruled out. The Honourable Supreme Court in the case of ***Javed Iqbal v. The State*** reported as **2023 SCMR 139** on the point of safe custody of sample parcels and safe transmission of the sample parcels has held that:

“In cases of under Section 9(c) of the Control of Narcotic Substances Act, 1997, it is duty of the prosecution to establish each and every step from the stage of recovery, making of samples parcels, safe custody of sample parcels and safe transmission of the sample parcels to the concerned Laboratory. Such chain has to be established by the prosecution and if any link is missing in such like offences the benefit must be extended to the accused. In a case containing the said defect on the part of the prosecution it cannot be held with any degree of certainty that the prosecution had succeeded in establishing its case against an accused person beyond any reasonable doubt.”

15. The Supreme Court in an unreported judgment dated 17.02.2025 passed in **Crl. Petition No. 828 of 2024** on the same point has held as under:

7. *“Considering the aforementioned deficiencies, it is evident that the prosecution has failed to prove its case against the petitioner beyond reasonable doubt. The chain of custody remains unverified, and the prosecution has not conclusively established the safe transmission of the recovered contraband. The contradictions in the handling of case property and failure to produce key witnesses responsible for its movement further weaken the prosecution’s case. It is a settled principle that where any link in the chain of evidence remains doubtful, the benefit thereof must accrue to the accused, held in the (*Javed Iqbal v. The State 2023 139*). The prosecution was under a bounded duty to establish each stage of the recovery, storage,*

and transmission of case property with unimpeachable certainty, and its failure to do so renders the conviction unsustainable (Muhammad Hazir v. The State, 2023 SCMR 986)."

16. 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. Above mentioned circumstances have created reasonable 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 the case of *Tariq Pervez v. The State (1995 SCMR 1345)*, the Supreme Court has observed as follows:-

"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."

17. We have no hesitation to hold that the prosecution has failed to prove its case against the accused. Resultantly, instant Cr. Jail appeal was allowed. Conviction and sentence recorded by the trial court vide judgment dated 30.09.2023 was set aside and appellant Abdul Jabbar was acquitted of the charge. He was ordered to be released forthwith if he is not required in some other custody case. These are the reasons of our short order dated 05.03.2025.

J U D G E

J U D G E

*Ihsan/**