

HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Cr. Appeal No.D-127 of 2023.

Mehrab alias Fouji v. The State.

Present:-

Mr. Justice Amjad Ali Sahito.

**Mr. Justice Miran Muhammad
Shah.**

Appellant : Mehrab @ Fouji through Mr. Muhammad Hashim Leghari, Advocate.

Respondent : The State through Mr. Nazar Muhammad Memon, Addl. P.G.

Date of hearing : 25.03.2025.

Date of Decision : 25.03.2025.

J U D G M E N T

Miran Muhammad Shah, J:- Through this Criminal Appeal, appellant Mehrab alias Fouji s/o Muhammad Yousuf Jalbani has called in question the Judgment dated 22.09.2023 passed by the learned Additional Sessions Judge-I/Model Criminal Trial Court, Shaheed Benazir Abad in Sessions Case No.651 of 2022 (Re: The State v. Mehrab @ Fouji) arising out of crime / F.I.R No.80 of 2022, registered at P.S Taluka Nawabshah District Shaheed Benazirabad for an offence under Section 9(i) 3-(E), CNS Act-2022, whereby he was convicted U/s 265-H(ii) Cr.P.C and sentenced imprisonment for life and pay fine to the tune of Rs.800,000/- (Rupees Eight Hundred Thousand only) with benefit of Section 382-B Cr.P.C.

2. The facts as incorporated in the FIR are that on 12.10.2022, police party of PS Taluka Nawabshah headed by SIP Fattoo Mal Oad alongwith his subordinate staff HC Athar Hussain, PC Sajjan Khan, PC Asif Ali, PC Fayaz Ali, PC Khan Muhammad and DPC Inayat Ali along with investigation kit and digital scale on Government vehicle

left PS for patrolling and checking vide entry No.16 at 0700 hours. During patrolling, when reached New Bypass Road near Closed Pepsi Godown started snap checking. During checking, at about 0800 hours, they saw one person was coming on motorcycle and was signaled to stop, who was also carrying a large black coloured bag on his right shoulder. Due to non-availability of private mashirs, HC Athar Hussain and PC Sajjan Khan were appointed as mashir and complainant secured bag hanging on right shoulder of motorcycle rider. On inquiry, the apprehended person disclosed his name as Mehrab @ Fouji s/o Muhammad Yousif Jalbani. The bag was checked and found 25 small & big pieces of contraband Charas (چرس) which was weighed and became 10-kg, and samples were sealed for chemical examination. During personal search, one 30-bore pistol containing 5 live bullets was also recovered, and when asked regarding license of pistol and documents of motorcycle, he replied that both are without proper documentation. During further personal search cash Rs.1500/- was also recovered from the possession of accused. Hence, FIR bearing crime No.80 of 2022 was registered at P.S Taluka Nawabshah District Shaheed Benazirabad for an offence under Section 9(i) 3-(E), CNS Act-2022 against accused Mehrab @ Fouji with separate FIR for offence under Sindh Arms Act.

3. On completion of usual investigation, the police submitted final report under Section 173 Cr.P.C against the accused/appellant. The charge against present appellant/accused was framed to which he pleaded not guilty and claimed trial.

4. In order to prove a charge, prosecution examined as many as five (5) witnesses, which include HC Nazeer Ahmed Maalkhana Incharge at Ex.03, SIP Fatu Mal complainant at Ex.4, PC Athar Hussain mashir at Ex.5, PC Asif Ali dispatcher of case property to chemical examiner at Ex.6, Inspector Maqsood Ahmed Investigation Officer at Ex.7 and thereafter learned ADPP submitted statement at Ex.8, whereby closed the side of prosecution evidence. All the Prosecution witnesses during evidence produced numerous documents, which were exhibited. The Statement of appellant/accused U/s 342 Cr.P.C was recorded, whereby he denied

the allegations of prosecution in terms of Section 342 Cr.P.C, but he neither testified on oath nor called any defense witness(s). He claimed his false implication and pleaded his innocence. According to the appellant, he was taken by police on 12.10.2022, when he alongwith other co-accused were coming to attend the Court hearing in the Court of Additional Sessions Judge-II, Shaheed Benazirabad from outside of the Court and such application was also filed before learned Judge regarding this fact by co-accused (son of appellant Abdul Malik).

5. After hearing the learned State counsel, learned counsel for appellant as well as assessment of evidence available, the learned trial Court passed the Judgment dated 22.09.2023, convicted and sentenced the appellant as stated above. Hence, the appellant preferred instant appeal against the impugned Judgment.

6. The facts of the case have been succinctly stated above, and the evidence presented before the trial court is comprehensively detailed in the impugned Judgment. To avoid repetition, we will refrain from reiterating them here. Instead, we will address the relevant aspects in our findings.

7. The learned counsel for appellant has mainly argued that there are major contradictions in the evidence of prosecution witnesses, which have been ignored by the learned trial Court while deciding the impugned Judgment; that all the prosecution witnesses are interested, set up and officials; that all the material witnesses and complainant itself contradicted their version regarding the information about the incident; that there are major contradictions in the evidence of the prosecution witnesses, but the same were totally ignored by the learned trial Court; that the arrest of accused is shown on 12.10.2022 but in fact before present FIR, he was forcibly and illegally picked up prior to the lodgment of this FIR and remained in illegal confinement of police for several days; that the witnesses have so many contradictions in their evidence recorded before learned trial Court. Notwithstanding violation of Section 103 Cr.P.C the investigating officer also failed to record statements of a single person to confirm as to whether the appellant was involved in this crime from any locality. Learned counsel further argued that

alleged recovery of chars was affected from the possession of accused on 12.10.2022 but it was sent to the chemical examiner on 14.10.2022. He further argued that on 12.10.2022 his son (Abdul Malik) had also moved an application before the Court of learned Additional Sessions Judge-II, Shaheed Benazirabad for absence of the accused/appellant Mehrab @ Fouji as he was facing a trial in another case, wherein he stated that his father (present appellant Mehrab @ Fouji) and his brother Hidayatullah have been forcibly picked up by the police when they were coming to Court, which indicating that the appellant/accused was already picked up on the instigation of some political influence for the false implication in another case which was done so; that the son of appellant namely Hidayatullah, who was also taken up alongwith him was implicated in another false FIR after four days at PS Jhirk of District Thatta. He further contended that such application is incorporated here at page No.55 & 56 of the paper book; that the present accused/appellant is innocent and he is being victimized due to political influence.; that the location of the alleged incident is a busy road area with hotels & patrol pumps making it unlikely that no private person was present. The area is one of the busiest road which operates 24 hours a day. This case involves a life of an innocent person, who is being victimized due to political enmity and labelled as a supplier of narcotics. The absence of any private mashir in such a critical matter raises questions especially when the prosecution fails to produce neutral witnesses. He prayed that the impugned Judgment may be set-aside and the appellant/accused may be acquitted from the charge.

8. On the other hand, Mr. Nazar Muhammad Memon, Additional Prosecutor General opposed the appeal on the ground that appellant has been apprehended by the police party of PS Taluka Nawabshah having been found in possession of 10,000 grams charas which was kept by him for selling purpose. He further contended that the case at hand is a crime against society and is increasing day by day. Lastly, it is argued that though there are minor contradictions in the evidence of prosecution witnesses but the same are not fatal to the case of prosecution. He prayed for dismissal of the appeal.

9. We have carefully heard learned counsel for the parties and scanned the entire evidence as well as the record.

10. The case of prosecution is that the police party was on patrolling and checking when they spotted an individual riding a motorcycle with a black bag slung over his shoulder. He was signaled to stop and thereafter, a personal search was conducted, which led to the recovery of 10 kilograms of charas from the bag. On inquiry he disclosed his name as Mehrab @ Fouji (present appellant). A subsequent personal search revealed a pistol with 5 live bullets. As the accused lacked a license for the pistol, a separate FIR was lodged under Sindh Arms Act 2013. Record shows that before registration of the case, the appellant's son Abdul Malik had moved an application before the court of learned Additional Sessions Judge-II, Shaheed Benazirabad, where the appellant/accused was already appearing in another case, regarding his absence in the case, thereafter on the same date the alleged arrest of the appellant/accused in present crime was shown. It means before the arrest of appellant/accused an application was moved by his son wherein it was stated that his father (present appellant/accused) and his brother Hidayatullah were coming and they were arrested outside of the Court forcibly by the police. The available record further shows that the son of appellant (Abdul Malik) had also moved an application U/s 491 Cr.P.C before the Court of learned Sessions Judge, Shaheed Benazirabad, wherein reports were called from concerned officials, who submitted that detainee Mehrab is involved in crime No.80 of 2022 (present crime), while detainee Hidayat is involved in crime No.63 of 2022 at PS Jhirk. The perusal of another FIR bearing crime No.63 of 2022 lodged at PS Jhirk against accused Hidayatullah reflects that same was lodged on 16.10.2022, while the application regarding his absence and detention by police was moved on 12.10.2022. Yet the IO has failed to examine this plea during investigation and the trial Court similarly disregarded the defense evidence without providing the cogent reason for doing so. This omission raises significant alarms regarding the credibility and thoroughness of the investigation especially when scrutinized in the context of the serious allegations against the appellant. These critical details, if true, casts substantial

doubt on the version of the prosecution and calls into question whether the appellant and his son Hidayatullah were in police custody or otherwise he was unavailable to commit the alleged crime. The failure to investigate this aspect of the case adequately, or to discuss it during the trial, brutally dents the prosecution's stance. In such a serious matter, where the life and liberty of a person are at stake, it is essential that every aspect of the case, including any claims of wrongful detention or abduction, be fully discovered and substantiated. The absence of such investigation constitutes a significant inaccuracy in the prosecution case, which ought to be given due weight in the appraisal of the evidence. In these circumstances, we observe that when there is allegation that firstly the appellant & his son were picked up by the police and subsequently their involvement has been shown at different police stations i.e. PS Taluka Nawabshah & PS Jhirk casts serious doubt to the prosecution case.

11. Regarding the alleged recovery of evidence from the possession of the accused, it was essential for the complainant to involve a private witness from the locality to act as a mashir, being an independent witness, to watch the recovery process. The failure to do so raises questions about the authenticity of the recovery process and the truthfulness of the evidence adduced by the prosecution. It is not sufficient for the prosecution to rely solely on the testimony of police officials without any corroborative evidence from an independent source. Nothing has come on record to show that the police had attempted to involve a private person in the recovery proceedings. The argument of the learned A.P.G. Sindh that public witnesses may be unwilling to come forward due to the potential risks to their safety and liberty does not absolve the police of their responsibility to ensure transparency and impartiality in their actions. It is the duty of law enforcement agencies to make genuine efforts to involve neutral witnesses in order to uphold the integrity of the recovery process. The lack of such efforts not only raises doubts about the credibility of the recovery but also casts doubt on the overall fairness of the investigation. No doubt police witnesses were as good as other independent witnesses and conviction could be recorded on their evidence, but their testimony should be reliable,

dependable, trustworthy and confidence worthy and if such qualities were missing in their evidence, no conviction could be passed on the basis of evidence of police witnesses. Record shows that the alleged charas was recovered from possession of appellant/accused and was kept in Malkhana and the same was sent to Chemical Examiner after the delay of **two days**, hence it had not been proved that it was a safe transit case. In a case of ***Ikramullah and others v. The State (2015 SCMR 1002)***, the Honourable Supreme Court of Pakistan had observed as under;

“5. In the case in hand not only the report submitted by the Chemical Examiner was legally laconic but safe custody of the recovered substance as well as safe transmission of the separated samples to the office of the Chemical Examiner had also not been established by the prosecution. It is not disputed that the investigating officer appearing before the learned trial court had failed to even to mention the name of the police official who had taken the samples to the office of the Chemical Examiner and admittedly no such police official had been produced before the learned trial Court to depose about safe custody of the samples entrusted to him for being deposited in the office of the Chemical Examiner. In this view of the matter the prosecution had not been able to establish that after the alleged recovery the substance so recovered was either kept in safe custody or that the samples taken from the recovered substance had safely been transmitted to the office of the Chemical Examiner without the same being tampered with or replaced while in transit.”

12. Resultantly, in our considered view, prosecution has failed to prove that the charas/property was in safe custody for the aforementioned period. Even positive report of the chemical examiner would not prove the case of prosecution. There are also several circumstances which created doubt in the prosecution case. It is settled law that it is not necessary that there should 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 case of ***“Tariq Parvez v. The***

State” [1995 SCMR 1345] wherein it has been held by Honourable Supreme Court of Pakistan that;

“...For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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.”

13. In light of these serious deficiencies and the failure to investigate crucial aspects of the case, it is clear that the prosecution has not met the required standard of proof beyond a reasonable doubt and in such a case the defense plea should be given careful consideration. There is no dearth of citizens of strong views and character who would come out to support such like cases provided they were taken into confidence, given due respect and were ensured that full protection would be given to them as held in the case of ***Iltaf Hussain versus The State (1996 SCMR 167)***. Relevant portion is reproduced as under:

“The argument that public witnesses do not come forward to support such like recoveries because of risk to their life and liberty, nonetheless could not absolve the Police of their heavy responsibility to produce witnesses from public. There is no dearth of citizens of strong views and character who would come out to support such like cases provided they were taken into confidence, given due respect and were ensured that full protection would be given to them, in case, they aided the law-enforcers to curb the crimes in the best interest of the society as a whole. There may be cases where public witnesses could not be produced because of their non-availability due to odd hours of the night or the day or where the, recovery was effected from a deserted place or during the dead of night. The position in this case was just the reverse because, admittedly, recovery was effected from a populated area where several other people who saw the recovery of kalashnikov were present but no efforts were made to join them to witness the occurrence. We, accordingly, hold that evidence of Police witnesses who are, in a way, the complainant could not solely be accepted to be relied upon to convict the appellant, especially, when the aforesaid public witness was abandoned without any rhyme or reason. The

possibility that the appellant was implicated with some ulterior motive could not be ruled out. For all these reasons, we have no alternative but to acquit the appellant by setting aside his conviction and sentence by giving him benefit of doubt. He is on bail and as such, shall be discharged from the liability of his bail bond. The appeal succeeds and is allowed.”

14. Furthermore, while recording a statement under section 342 Cr.P.C, the appellant had produced a copy of 491 Cr.P.C application, FIR lodged against his son, application moved by his son to the Court of learned Additional Sessions Judge-II, Shaheed Benazirabad at Ex.9/A to Ex.9/C and stated that the case is managed and due to that grudge, he was handed over to Police Station Taluka Nawabshah, while his son Hidayatullah was sent to Thatta police as prior to this case they were apprehended by police, upon which his son had moved an application to the court of learned Additional Sessions Judge-II, Shaheed Benazirabad, but all the above material have not been considered by the Trial Court while awarding conviction. Since, the appellant was already in the custody of police and subsequently handed over to the police of Taluka Nawabshah, as such, the question of recovery of Charas from his possession does not appeal to the prudent mind. That part of statement of accused is reproduced as under;

“I am innocent and falsely implicated in this case by foisting huge charas upon one due to enmity by police at the instance of political party one issue of land and infact I and my son Hidayatullah were took by police on 12.10.2022 at about 08:15 a.m. as we were coming to attend in court of 2nd ADJ SBA and such application for excuse absence filed by co-accused my son Abdul Malik and also he filed application U/s 491 Cr.P.C, due to that grudge I was handed over to Police Station Taluka while my son Hidayatullah was sent to Thatta Police hence this case, I pray for Justice. I produce photocopies of application of excuse copy of application U/s 491 Cr.P.C and copy of FIR against my son Hidayatullah in Thatta at Ex.9a to 9c.”

15. In this case, we found deficiencies in the investigation, the lack of transparency in the recovery process and the absence of consideration for critical defense claims, which manifestly create a

cloud of doubt over the prosecution case. In light of these significant faults, the prosecution has failed to establish the case beyond a reasonable doubt and the accused is entitled to the benefit of this doubt. It is a known principle of appreciation of evidence that the benefit of all favourable circumstances in the prosecution evidence must go to the accused regardless of whether he has taken any such plea or not. Reliance is placed on the case of ***Muhammad Nawaz and another v. The State and others (PLD 2005 Supreme Court 40)***.

16. We further place our reliance on the case of ***Abdul Ghafoor v. The State & another*** reported as 2022 SCMR 819, wherein the Honourable Supreme Court of Pakistan had observed as under;

“3. Heinousness of the charge and huge quantity of the alleged contraband, notwithstanding, the prosecution was under a bounden responsibility to drive home the charge by proving each limb of its case that essentially included production of the witness, tasked with the responsibility of transmitting the samples to the office of Chemical Examiner. Failure is devastatingly appalling with unredeemable consequences that cast away the entire case. Petition is converted into appeal and allowed; the impugned judgment is set aside; the appellant shall be released forthwith if not required to be detained in any other case.”

17. In light of the above discussion, we have thoroughly examined the evidence brought on record along with the various infirmities and inconsistencies as highlighted above and after careful consideration, we have come to the firm conclusion that the prosecution has failed to prove its case against the appellant beyond any shadow of doubt. The prosecution has not been able to establish the guilt of the accused with the necessary level of confidence required for a conviction and several critical aspects of the case have raised reasonable doubt including the failure to investigate key defense claims and the lack of independent verification of crucial evidence. In such circumstances, we find that the conviction and sentence awarded to the appellant by the Trial Court through the impugned Judgment are not sustainable.

18. Consequently, the conviction and sentence awarded to the appellant **Mehrab @ Fouji s/o Muhammad Yousuf Jalbani** through impugned Judgment dated 22.09.2023 passed by the learned Additional Sessions Judge-I/Model Criminal Trial Court, Shaheed Benazir Abad in Sessions Case No.651 of 2022 (Re: The State v. Mehrab @ Fouji) arising out of crime / F.I.R No.80 of 2022, registered at P.S Taluka Nawabshah District Shaheed Benazirabad for an offence under Section 9(i) 3-(E), CNS Act-2022 were **set-aside** and as a result, whereof, he was **acquitted** of the charge. He was ordered to be released forthwith if not required in any other custody case. Instant Criminal Appeal stands **allowed**.

19. These are reasons of our short order dated 25.03.2025.

JUDGE

JUDGE

Ali.