

ORDER-SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Crl. Appeal No. D- 50 of 2023.

Date of hearing	Order with signature of Judge
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02.04.2024.

1. For orders on office objections.
2. For hearing of main case.

Messrs Saeed Ahmed Bijarani and Abdul Rehman A. Bhutto, Advocates for
appellant.
Mr. Aitbar Ali Bullo, Deputy Prosecutor General.

Learned counsel for the appellant submitted that per evidence of complainant SIP Manzoor Ahmed Leghari he had admitted in his cross-examination at page-27, that mashirnama was reduced into writing by ASI Mukhtiar Ahmed under his dictation; however ASI Mukhtiar Ahmed was not examined by the prosecution and being star-witness he was given up by prosecution which gives presumption that if he had been examined, he would not have supported the case of prosecution. Besides, appellant claimed enmity with the complainant SIP Manzoor Ahmed and in this regard the learned counsel files certified true copy of application under Section 491 Cr.P.C. and contended that nothing was secured from the appellant, but due to enmity with complainant since 2014, the appellant had been implicated in this case.

Learned D.P.G. opposed the appeal on the grounds that, there may have been minor contradictions, which cannot be considered at this juncture and that the prosecution has adduced sufficient evidence.

Heard learned counsel for the respective parties.

For the reasons to be recorded later on, instant appeal stands allowed. The conviction and sentence awarded to appellant Hidayatullah son of Wahid Bux vide impugned judgment dated **24.06.2023** passed by learned 1st Additional Sessions Judge/ Special Judge for CNS Kandhkot, in Special CNS Case No. 07 of 2023, arisen out of F.I.R No. 46 of 2022 of P.S Guddu, is hereby **set-aside** and Appellant Hidayatullah is **acquitted** of the charges. He shall be released forthwith, if his custody is not required in any other case. Whereas, proceedings against appellant Wahid Bux are already abated due to his death.


Judge


Judge

IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Criminal Appeal No. D-50 of 2023

Present:

Mr. Justice Muhammad Saleem Jessar,
Mr. Justice Jawad Akbar Sarwana,

Appellants : Wahid Bux Nasirani & another, through
M/s Saeed Ahmed Ahmed Bijarani and
Abdul Rehman A. Bhutto, Advocates.

Respondent : The State through Mr. Aitbar Ali Bullo,
Deputy Prosecutor General.

Date of hearing : 02.04.2024

Date of decision : 02.04.2024

JUDGMENT

Muhammad Saleem Jessar, J.:- Appellants Wahid Bux son of Muhammad Soomar and Hidayatullah son of Wahid Bux, both by caste Nasirani, through this appeal have challenged the judgment dated 24.06.2023, passed by learned 1st Additional Sessions Judge/MCTC/ Special Judge for CNS Cases, Kandhkot, vide Special CNS Case No.07 of 2023 Re-The State v. Wahid Bux & another, based on Crime No.46 of 2023 registered at Police Station Guddu, whereby the trial Court convicted the appellants for offence under section 9(c), CNS (Amendment) Act, 2022 and sentenced them to suffer rigorous imprisonment for nine (09) years, with fine of Rs.80,000/- (*Rupees eighty thousand only*) each, in default whereof to undergo simple imprisonment for two years more. Benefit of section 382-B, Cr.PC was extended to the appellants.

2. Briefly, the prosecution case is that on 19.10.2022, at 0620 hours, a police posse of PS Guddu headed by SIP Manzoor Ahmed Leghari during patrolling along with his staff, apprehended appellant Hidayatullah and co-accused Wahid Bux(since dead), on a tip-off, at near Colony Gate No.1 at the link road leading towards Kashmore and recovered 1320 grams charas from accused Hidayatullah and 1284 grams charas from accused Wahid Bux, which they were carrying in shoppers. The case property was sealed on the spot and such

memo was prepared. Thereafter the appellants were brought to the police station where instant FIR was registered against them on behalf of State.

3. After usual investigation, the appellants were sent up to stand trial.

4. After providing relevant papers to the accused, a formal charge was framed against them by the trial Court, to which they pleaded 'not guilty' and claimed trial. At trial, the prosecution examined in all five witnesses, namely, PW-1 SIP Manzoor Ahmed Leghari (complainant), PW-2 PC Ilahi Bux Mirani (mashir), PW-3 PC Muhammad Hassan Bhangwar (incharge Malkhana), PW-4 SIP Mast Ali Mashori (Investigating Officer) and PW-5 PC Barkat Ali (Dispatch Rider); they produced documents and other artefacts in their evidence, which were duly exhibited. In their statements recorded by the trial Court u/s 342, Cr.P.C, the accused denied the recovery of contraband charas from them and their false implication at the hands of Police. They also professed innocence. They did not examine themselves on oath in disproof of the charge; however, one Habibullah was examined by them in their defence.

5. Learned trial Court, after considering the material available before it, handed down the impugned judgment and sentenced the accused, as mentioned hereinabove.

6. It is relevant to mention here that during pendency of instant appeal, appellant No.1 Wahid Bux died in jail, therefore, proceedings against him were abated on 28.02.2024.

7. Learned Counsel for appellant Hidayatullah has mainly contended that the charas was foisted upon the appellant/accused by complainant SIP Manzoor Ahmed Leghari due to previous enmity. They next submitted that in the year 2022 complainant SIP Manzoor Ahmed was posted at same police station and the brother of appellant, namely, Habibullah had filed an application u/s 491, Cr.P.C against illegal detention of the appellant Hidayatullah and co-appellant Wahid Bux (since dead), which was not pressed on account of registration of this false case against them by the police. They further contended that nothing

was recovered from the appellant and the contraband charas was looted by complainant SIP Manzoor Ahmed due to the previous grudge. They submitted that such defence plea was specifically taken by the accused in their statements under Section 342, Cr.P.C. and copies of said documents were produced by them. Besides, DW Habibullah Sasirani examined by the accused/appellant in his defence also fully supported above facts and produced copy of the application u/s 491, Cr.P.C. but the same were discarded by the learned trial Court.

8. The learned Deputy Prosecutor General, after consulting the record, though supported the impugned judgment; however, he could not controvert the documentary evidence adduced and placed by the appellant(s) on record in his (their) statement under Section 342, Cr.P.C.

9. We have heard learned Counsel for the parties and have perused the material available on record.

10. It appears from perusal of evidence of complainant SIP Manzoor Ahmed Leghari that in cross-examination he admitted that the mashirnama of arrest of accused and recovery of contraband was written by ASI Mukhtiar Ahmed under his dictation. However, record reflects that said ASI Mukhtiar Ahmed was not examined by the prosecution at trial and was given up. Suffice to say that ASI Mukhtiar Ahmed, who had not only authored the memo of arrest and recovery, but was admittedly an eye-witness of such proceedings thus he was a material eye witness to be examined in support of the prosecution, but he was given up without any valid ground. Therefore, it gives rise to strong presumption that in case he was examined he would not have supported the prosecution case. It has also come on record that on same day of alleged incident i.e. 19.10.2022, one Habibullah, brother of appellant Hidayatullah, had filed an application u/s 491, Cr.P.C. before the learned Sessions Judge, Kashmir at Baramulla, alleging that on 18.10.2022 i.e. one day prior to the alleged incident, his father and brother (appellants Wahid Bux (since dead) and Hidayatullah) were taken away from their house by complainant SIP Manzoor Ahmed, SHO PS Guddu. Said

application was dismissed as not pressed, seemingly on account of registration of instant case against the appellants. Such documentary evidence available on the record appears to have been discarded by the learned trial Court without discussing and assigning any good reason to it. It is sufficient to hold that the entire exercise of arrest and recovery of the contraband material from the possession of appellant in instant case is highly doubtful. It is well-settled principle of law that benefit of doubt is to be extended to the accused not as a matter of grace but as a matter of right. Reliance in this context can be placed on the case of *Muhammad Akram v. The State* (2009 SC MR 230), wherein Hon'ble Supreme Court of Pakistan has held that:

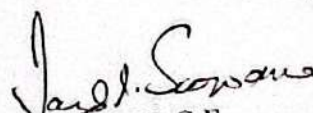
"It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1993 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

11. After having analyzed the entire record, we are of the considered view that the prosecution has failed to prove its case against the appellant beyond shadow of reasonable doubt, therefore, in the given circumstances, the evidence so produced by the prosecution cannot be safely relied upon for maintaining the conviction. We have also gone through the case of *Zeeshan @ Shani v. The State* (2012 SCMR 428). In this case it has been observed as under :-

"11. The standard of proof in this case should have been far higher as compared to any other criminal case when according to the prosecution it was a case of police encounter. It was thus, desirable and even imperative that it should have been investigated by some other agency. Police, in this case, could not have been investigators of their own cause. Such investigation which is woefully lacking independent character cannot be made basis for conviction in a charge involving capital sentence. That too when it is riddled with many lacunas and loopholes listed above, quite apart from the afterthoughts and improvements. It would not be in accord of safe administration of justice to maintain the conviction and sentence of the appellant in the circumstances of the case. We therefore, by extending the benefit of doubt, allow this appeal, set-aside the

conviction and sentence awarded and acquit the appellant of the charges. He be set free forthwith if not required in any other case."

12. As observed above that the case in hand is riddled with many lacunas and loopholes, but the learned trial Judge has utterly failed to consider and appreciate these aspects of the case in its true perspective, therefore, in the given circumstances, benefit of doubt must go in favour of the appellants. Therefore, while extending benefit of doubt to the appellant, instant appeal was allowed by us by a short order dated 02.04.2024, whereby the conviction and sentence awarded to appellant Hidayatullah Nasirani by the learned trial Court vide impugned judgment dated 24.06.2023 were set aside and he was acquitted of the charge. Above are the detailed reasons for said short order.

JUDGE

JUDGE