ORDER SHEET

THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANO

Cr. Appeal No. D- 25 of 2023

Date	Order with signature of Judge
	1.For hearing of main case. 2.For hearing of MA No.1838 of 2023. (426)

02.04.2024.

Mr. Sajid Hussain Mahessar, Advocate for the Appellant.
Mr. Ali Anwar Kandhro, Additional Prosecutor General, Sindh

Learned Counsel submits that appellant Imran Ali @ Irfan Ali Bahalkani was apprehended by the police from Ghanta Ghar Chowk (Square) Kandhkot and later the ASI Gul Muhammad of Police Station A-Section Kandhkot demanded huge amount as bribe which the appellant could not pay therefore, he become annoyed and handed over his custody to other fellows who by foisting contraband against him had implicated the Appellant in this case. He further argued that per memo of recovery only slabs have been shown to have been recovered; however, number of pieces or slabs is not mentioned. He also submits that per Register-19 (Page-37 of paper book) the contraband was sent by SIP- Ghulam Shabir to the laboratory through RC-No.370 but said R.C. or the Register-19 does not show the name of person who transported the same from Police Station to the Laboratory. Per Chemical report at Page- 69 one HC-386 Rano Khan had delivered it to the Laboratory on 16.11.2022. However, neither said HC-Rano Khan was examined by the I.O under section 161 Cr.PC nor was produced by the prosecution before the trial court at the time of evidence.

2. In support of his contention learned Counsel for the Appellant has relied upon the case of ***Abdul Majeed v. The State (2023 P Cr. L J 331).***

3. Learned Additional Prosecutor General, Sindh opposes Appeal on the ground that safe transmission to the contraband is immaterial and Superior Courts have deprecated it in its

numerous Judgments. He further could not controvert the fact that per memo of recovery though it is mentioned that the Slabs of contraband were secured but no specific quantity or number has been mentioned in the memo or even in the evidence before the trial court.

4. We have gone through the evidence and found that one PC-Faisal Akhter Bhutto has submitted that he had gone himself to Laboratory and handed over the contraband to the Laboratory, through R.C-370/2022. Perusal of Register-19 (available at Page-37 of paper book) does not show the name of PC-Faisal Akhter to be the person through whom the samples were dispatched to the Laboratory at Sukkur under RC-370 dated 16.11.2022. Hence there are glaring contradictions between the documentary evidence adduced by the police themselves in respect of the safe custody as well as transmission of the contraband. No doubt the safe transmission is not vital for either side but when the prosecution itself had created room for doubt then it must be extended to accused.

5. Heard arguments. For the reasons to follow, instant Appeal is hereby allowed. Consequently, impugned Judgment dated 28.03.2023 handed down by ***1st. Additional Sessions Judge/MCTC/Special Judge for CNS cases, Kandhkot (Trial court) vide Special CNS Case No.11 of 2023, The State v. Imran Ali alias Ifran Ali Bahalkani, being outcome of Crime No.186/2022 P.S A-Section Kandhkot, under section 9 (C) CNS Act 1997*** is hereby set-aside. Resultantly, the Appellant is hereby acquitted of the charge by extending him benefit of doubt. The Appellant is in custody, therefore; he shall be released forthwith if, his custody is no longer required by Jail Authority.

JUDGE

JUDGE

pS-Ashfaq/*

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

Criminal Appeal No. D-25 of 2023

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

Appellant	:	Imran Ali *alias* Irfan Ali Bahalkani, *through* Mr. Sajid Hussain Mahessar, Advocate.
Respondent	:	The State, through Mr. Ali Anwar Kandhro, Additional Prosecutor General, Sindh.
Date of hearing	:	02.04.2024.
Date of Judgment	:	02.04.2024.

J U D G M E N T

Muhammad Saleem Jessar, J.:- Through instant appeal, appellant Imran Ali *alias* Irfan Ali son of Noor Hassan Bahalkani has challenged the judgment, dated 28.03.2023, penned down by learned 1st Additional Sessions Judge/MCTC/Special Judge for CNS Cases, Kandhkot, visw Special CNS Case No.11/2023, re-The State Vs. Imran Ali @ Irfan Ali Bahalkani, being outcome of Crime No.186/2022, registered with Police Station A-Section, Kandhkot, whereby the appellant was convicted for offence under Section 9(c) of Control of Narcotic Substances Act, 1997 and sentenced to under the provisions of Control of Narcotic Substances (Amendment) Act, 2022 to suffer R.I. for 09 years, with fine of Rs.80,000/- (rupees eighty thousand); in default whereof to suffer simple imprisonment for 02 years more. However, benefit of Section 382-B, Cr.P.C was extended to the appellant.

2. The crux of the prosecution case, in brief, as unfolded by complainant SIP Ghulam Shabir Mirani of P.S A-Section, Kandhkot, is that on 15.11.2022, he along with his subordinates was on patrolling, during which, on a tip-off, they spotted the appellant/accused Imran Ali @ Irfan Ali Bahalkani near gate of Mehran High School, Kandhkot and recovered 1750 grams charas lying in a black colour shopping bag. After preparation of memo of arrest and recovery and sealing entire charas on spot, the accused and contraband were taken to police station, where instant case was registered on behalf of State.

3. After registration of the FIR and completion of usual investigation, the appellant was sent up to face trial before the competent Court of law.

4. In order to prove its case, the prosecution examined in all four witnesses, namely, PW-1 mashir PC Muhammad Tayab, PW-2 incharge Malkhana PC Faisal Akhtar, PW-3 IO/SIP Akbar Ali Bhangwar and lastly PW-4 complainant SIP

Ghulam Shabir Mirani, who all produced relevant documents and other artifacts in their evidence. Then side of the prosecution was closed vide Ex.8.

5. On conclusion of trial, the learned trial Court held the appellant guilty of the charge and convicted the appellant and sentenced him as mentioned supra vide impugned judgment dated 28.03.2023, which has been challenged by the appellant through this appeal.

6. Learned Counsel for the appellant contended in fact the appellant was apprehended by ASI Gul Muhammad of PS A-Section, Kandhkot from Ghanta Ghar Chowk (Square) of Kandhkot Town, where said ASI demanded huge bribe from him and due to his failure to pay the same, he was implicated in this case falsely by foisting contraband (charas) against him. He further contended that there are so many material contradictions and discrepancies in the evidence of PWs examined at trial, which have not been properly discussed and considered by the learned trial Court while passing the impugned judgment. He, therefore, prayed that by allowing instant appeal, the appellant may be acquitted. In support of his contentions, he placed reliance upon the case reported as *Abdul Majeed v. the State* (2023 PCr.LJ 331).

7. On the other hand, learned Addl. P.G., while supporting the impugned judgment, opposed the appeal and contended that the prosecution has succeeded in establishing the charge against the appellant and the impugned judgment does not suffer from any illegality or infirmity, which may warrant interference by this Court through instant appeal.

8. We have considered the submissions of learned Counsel for the parties and have examined the material made available before us on record.

9. Per prosecution case, as is evident from the FIR as well as the memo of arrest and recovery, the charas weighting 1750 grams, was allegedly recovered from the appellant in shape of pieces/slabs; however, in the entire prosecution case the number of pieces/slabs of charas has not been mentioned; even the complainant and mashir have not disclosed the number of pieces/slabs of charas in their evidence. From perusal of record, it further reveals that per entry No.65 of Register No.19 the contraband charas was sent by Investigating Officer/SIP Akbar Ali Bhangwar to the laboratory for examination under RC No.370, dated 16.11.2022; however, said entry does not mention the name of official through whom the contraband was dispatched to the laboratory. Moreover, according to the Chemical Examiner's report, the charas was deposited in the laboratory by HC-386 Rano Khan, but said Rano was not examined at trial and even his 161, Cr.P.C statement was not recorded by Investigating Officer/SIP Akbar Ali Bhangwar. The prosecution had not proved the safe transmission of the property

to the chemical examiner which creates serious doubt in its case. In this regards Honourable Supreme Court in 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 but the said officer was not produced to prove 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. This Court has held time and again that in case the chain of custody is broken, the Report of the chemical examiner loses reliability making it unsafe to support conviction. Reliance is placed on State v. Imam Bakhsh 2018 SCMR 2039).*
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> *3. For the above reasons the prosecution has failed to establish the charge against the appellant beyond reasonable doubt, hence the conviction and sentence of the appellant is set aside and this appeal is allowed, setting the appellant at liberty unless required in any other case."*

In another case of Zahir Shah alias Shah V. The State through Advocate General, Khyber Pakhtunkhwa (2019 SCMR 2004), Honourable Supreme Court has held as under:-

> *"2. We have reappraised the evidence with the able assistance of learned counsel for the parties and have noticed at the very outset that the Police constable, bearing No.FC-688, who delivered the sealed parcel to the Forensic Science Laboratory, Peshawar on 27.2.2013 was not produced by the prosecution. This fact has been conceded by the learned law officer appearing on behalf of the respondents. This court has repeatedly held that safe custody and safe transmission of the drug from the spot of recovery till its receipt by the Narcotics Testing Laboratory must be satisfactorily established. This chain of custody is fundamental as the report of the Government Analyst is the main evidence for the purpose of conviction. The prosecution must establish that chain of custody was unbroken, unsuspicious, safe and secure. Any break in the chain of custody i.e., safe custody or safe transmission impairs and vitiates the conclusiveness and reliability of the Report of the Government Analyst, thus, rendering it incapable of sustaining conviction. Reliance is placed on State v. Imam Bakhsh (2018 SCMR 2039)."*

10. The alleged recovery was effected in the heart of Kandhkot Town i.e. near the gate of Mehran High School, Kandhkot and that too in the daytime i.e. at 0630 hours, even then no independent person was picked up from general public to act as witness/mashir of alleged recovery. No doubt Section 34 of the Act of 1997 debars the applicability of Section 103, Cr.P.C; however, when a police officer was going to charge a person for the offence which carries punishment of

imprisonment, then it was incumbent upon him to associate some independent person(s) aims to avoid possibility of any doubt as to the recovery proceedings.

11. There cannot be squabble with the proposition that it is the primary obligation of the prosecution to prove its case against the accused beyond reasonable doubt and its burden is not shifted under the presumption contained in section 29 of the Act. It only says that once the prosecution establishes recovery beyond shadow of doubt it is then that the burden is shifted. Section 29 of the Control of Narcotic Substances Act, 1997 does not absolve the prosecution of its primary duty to prove its case beyond doubt. 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 SCMR 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 1995 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."*

12. 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 dictum laid down by learned Apex court in case of *Zeeshan @ Shani v. The State* (2012 SCMR 428); where 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."*

13. 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. Hence, while extending benefit of doubt to the appellant, instant appeal was accepted, the conviction and sentence recorded/awarded to the appellant by the trial Court vide impugned judgment dated 28.03.2023 was set-aside and he was acquitted of the charge by a short order dated 02.04.2024. Above are the detailed reasons for said short order.

JUDGE

JUDGE