

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR
Criminal Appeal No.D- 45 of 2011

Before:- Mr. Justice Aftab Ahmed Gorar, J.
Mr. Justice Salahuddin Panhwar, J.

FOR REGULAR HEARING

Appellants : Ghulam Muhammad alias Ghulamoo
& Ali Dost, through Mr. Abdul Baqi Jan
Kakar, Advocate.

Respondent: The State, through Mr. Syed Sardar Ali Shah
A.P.G.

Date of hearing: 25th. April, 2013.

JUDGMENT

SALAHUDDIN PANHWAR, J:- The appellants Ghulam Muhammad alias Ghulamoo and Ali Dost have assailed the Judgment dated 01st. April, 2011 passed by learned Special Judge, (CNSA), Ghotki in Special Case No. 29 of 2010 (Re.The State Vs. Ghulam Muhammad alias Ghulamoo & another), Under sections 9(b) C.N.S.Act, 1997, whereby the trial court has convicted the appellants and sentenced them to suffer R.I for 01 years and 06 months and to pay fine of Rs.11,000-00 (Eleven Thousand Rupees), in case of default in payment of fine, they shall suffer further R.I for 04 months. The benefit of Section 382-B, Cr.P.C was extended to them.

02. The relevant facts as set-out in the prosecution case are that complainant ASI Ghulam Sarwar Shar on 26.11.2010 at about 1810 hours lodged FIR at Police Station, Khanpur Mahar, alleging therein that he along with his subordinate staff, HC Muhammad Sharif, HC Amanullah, HC Hubdar Ali, vide roznamcha entry No.18 at 1630 hours, proceeded for patrolling within their jurisdiction; when they reached adjacent to

Telephone Exchange, received spy information that; two persons are going towards Mekhana of Faqir Pahelwan, along with Charas lying in plastic shopper, for selling purpose. Complainant, along with sub-ordinate staff reached at pointed place and when reached at Chowk of Naro Bagh at 1730 hours, they saw two persons were going towards Mekhana, who on encounter with police party tried to elude but complainant party, apprehended them. Due to non-availability of private persons, HC Muhammad Sharif and HC Hubdar Ali acted as mashirs. On query first person disclosed his name as Ghulam Muhammad alias Ghulamoo S/o Ghulam Qadir by caste Meerani R/o Khanpur Mahar, from his personal search Charas was recovered, while from his front side pocket seven currency notes of, having denomination of Rs.10-00 were recovered. The charas was weighed which became 500 grams, out of which 50 grams was separated as sample and sealed and remaining property was also separately sealed. The second person disclosed his name as Ali Dost s/o Ali Sher, Lashari, R/o Gul Akbar Lashari; from his personal search two pieces of Charas wrapped in a paper from his right side pocket of his shirt, was recovered; on further search, two currency notes of Rs.50-00 each and two currency notes of Rs.10-00 each were recovered. The charas was weighed, which became 500 grams, out of which 50 grams of Charas was separately sealed as sample while remaining property was also separately sealed; regarding recovered charas, both disclosed that; they used to sell and smoke the same, such mashirnama was prepared and accused along with property were brought at P.S; where complainant lodged the F.I.R on behalf of State.

03. It is further revealed that after submission of challan, accused persons were sent-up for trial. The charge against the appellants was farmed

U/s 9(b) CNS Act, 1997 at Ex.5, to which they pleaded not guilty and claimed trial by professing their innocence.

04. To substantiate its' case, prosecution examined P.W-1 complainant ASI Ghulam Sarwar at Ex.9, he produced attested copies of roznamcha entries, mashirnama of arrest, search and recovery of Charas and cash and FIR at Ex.9/A to 9/C respectively; P.W-2 HC Muhammad Sharif at Ex.10, he produced mashirnama of inspection of place of wardat at Ex.10/A; ASI Abdul Hakeem Langah at Ex.11, he produced report of Chemical Examiner at Ex.11/A. Thereafter the learned S.P closed the side of prosecution vide his statement at Ex.12.

05. The appellants/accused were examined U/s 342, Cr.P.C at Ex.13 & 14, wherein they denied the prosecution allegations and pleaded their innocence, neither they examined themselves on oath U/s 340(2), Cr.P.C nor led any evidence in defence.

06. Learned counsel for the appellants, inter-alia, contends that the impugned judgment is against the norms of settled principles of justice; the property was sent with the delay of four days, such aspect was fatal to the prosecution case, but same was ignored and not considered by the trial court; according to the prosecution case some pieces of Charas were recovered from each accused but no total count is given by the prosecution and it is also not proved by the prosecution that from which piece the samples were taken for chemical examination; in the instant case, the witnesses are police officials, hence their evidence cannot be relied upon, unless it corroborates from any other independent source, hence the impugned judgment is not maintainable under the law. He has relied upon

case of Amjad Ali Vs. The State reported in 2012 SCMR 577; and case of MuhammadAslam Vs. The State, reported in 2011 SCMR 820.

07. Conversely, learned A.P.G on behalf of State argued that no illegality is committed by the trial court, while awarding impugned judgment; sufficient iota of evidence was available against the appellants, therefore, the conviction recorded by the trial court is completely in accordance with law.

08. Heard counsel and perused the record.

09. After consideration of contentions, raised by counsel's for respective parties and on careful examination of impugned judgment and evidence brought on record, it is manifest that all the three witnesses are police officials; according to mashirnama the recovery of 500 grams of charas in various pieces was recovered from each accused, but it is not evident that how many pieces were recovered from each accused and from which piece the representative part was taken for chemical examination. It is further surfaced that witnesses have taken divergent pleas in their cross-examination regarding the availability of other persons and manner of recovery affected from the accused persons; it will be conducive to refer the relevant portion of their cross-examination of all the three witnesses.

P.W-1 Complainant ASI Ghulam Sarwar in his cross-examination has stated as follows:-

"I was on northern side and accused were at southern side when I seen the accused persons. It is fact tha four roads are leading from NaroBgah Chow. It is fact that vehicles are plying through Naro Bagh Chowk. I have approached one person, who refused to become police mashir. Said person was coming by foot. I have not

enquired name from said person. HC Muhammad Sharif arrested accused Ali Dost. I conducted personal search of accused Ali Dost. I have not sealed recovered Charas along with plastic shopper in which same was lying at the time of recovery. No person was present at place of incident as purchaser.”

P.W-2 HC Muhammad Sharif in his cross-examination has stated as follows:-

“When we saw the accused persons at that time we were on northern side from accused persons. It is fact that four roads are leading from Naro Bagh Chowk. It is not a fact that vehicles are frequently crossing from Naro Bagh Chowk. ASI has not taken any private person to act as mashir as neither vehicle nor any private person was available there. We have not found any purchaser of Charas from accused persons at place of vardhat. We have not sealed recovered charas along with plastic shopper which were containing Charas at the time of recovery. We have not tied hands of accused persons. Complainant has obtained signatures at memo and sealed parcel. I do not remember that I have mentioned date under my signature put at memo and sealed parcel. It is fact that date and time is not mentioned under my signature available at sealed parcel.”

P.W-3 ASI Abdul Hakeem in his cross-examination has stated as follows:-

“It is fact that mashirs of recovery, arrest and inspection of place of vardat are same. It is fact that I have not recorded statement U/s 161, Cr.P.C of any private person during investigation of present case. I made departure entry in the roznamcha. It is fact that I have not produced said roznamcha entry in my evidence. When we proceeded to place of vardat at that time three persons crossed from there on motorcycle, to whom I requested to become mashirs but they refused. I have not enquired names from said persons. It is incorrect to suggest that my reputation is not good being an I.O. It is fact that FIR of case punishable U/s 9(b) CNSA is registered against me.”

10. Bare perusal of above referred evidence along with chemical examination report, FIR and mashirnama of arrest and recovery, it is surfaced that four days delay in sending the samples for chemical examination is not plausibly explained by the prosecution, when it is matter of fact that Chemical Examination Laboratory is situated in adjoining District, where the recovery was affected and first information report was registered. It is also not disputed that all the witnesses are police officials, however they cannot be termed as unreliable witnesses but when it has come on record that private persons were available at the site, in spite of that they have not taken efforts to join them, therefore, they manner of recovery as narrated through evidence recorded by police officials has lost its' sanctity. It has also come on record that alleged recovered property was in pieces, weighing 500, recovered from each accused grams and 50 grams as representative part was taken for chemical examination, but, it is not clear that from which piece such representative part was taken for chemical examination. Thus, the adverse inference can be drawn that the evidence recorded by the prosecution is not up to the mark and on this evidence the conviction of appellants/accused cannot be maintained.

11. It is settled proposition of law that a single dent in prosecution case is sufficient to acquit the accused and for all reason it is true to say "that miscarriage of justice may arise from acquittal of the guilty, no less from conviction of the innocent", reference can be made to the case of Muhammad Aslam v. The State reported in 2011 SCMR 820.

12. For the reasons discussed above, we allow this appeal and set-aside the impugned Judgment dated 01st. April, 2011 passed by the trial Court. The appellants are on bail, their bail bonds stand cancelled and surety discharged.

JUDGE

JUDGE

A.R.BROHI

