

**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT HYDERABAD**

Cr. Appeal No. S- 17 of 2020

Date of hearing: 17.02.2020
Date of Judgment: 17.02.2020.
Appellant: Mohsin alias Mullan through Mr. Mir Shakir
Ali Talpur, Advocate
State: Through Mr. Shahid Ahmed Shaikh, Deputy
Prosecutor General, Sindh

JUDGEMENT

ABDUL MAALIK GADDI, J.-Through this appeal, the appellant has assailed the legality and propriety of judgment dated 17.01.2020 passed by learned Additional Sessions Judge-II, Tando Muhammad Khan in Sessions Case No.141/2019 (Re: The State V/s Mohsin @ Mullan) arisen out of Crime No.266/2019 registered U/S 269, 270, 337-J PPC at police station Tando Muhammad Khan, whereby the learned trial court after full dressed trial convicted and sentenced the appellant as stated in Point No.3 of the impugned judgment. For the sake of convenience, it would be proper to reproduce Point No.3 of the impugned judgment which reads as under:-

“In light of above discussion on points No.1 & 2, I find that the prosecution has proved the charge against the accused beyond any shadow of reasonable doubt. Consequently, I, therefore, convict and sentence the accused Mohsin @ Mullan S/o Muhammad Aslam u/s 265-H(ii) Cr.P.C to undergo R.I for one (01) year. However, the benefit under section 382-B Cr.P.C is extended to the accused. Let the accused be taken into custody and remanded to jail to serve out punishment”.

2. Facts of the case as stated in the F.I.R are that on 06.11.2019 at about 2300 hours, SIP Muhammad Ismail Mashori of P.S, Tando Muhammad Khan along-with his subordinates left P.S under roznamcha entry No.29 for patrolling in the area. During patrolling when they reached Al-Fateh Chowk, where they received spy information that one Mohsin Memon was present at the main gate of Al-Madina City along with sacks of Safina Gutka which is injurious to human life, for supplying in the city. On receiving such information, they proceeded towards pointed place and when they reached there,

they saw in the headlight of the vehicle that the person informed was present there who was mounted on a motorcycle and there were sacks lying on the ground beside the motorcycle. On seeing the police the suspect took-up one sack on the motorcycle in front of them and tried to decamp there from, but they speedily advanced to that person and captured him at about 2345 hours. On enquiry the suspect disclosed his name as Mohsin @ Mullan (Fruit seller) S/o Muhammad Aslam, by caste Kathiawari Memon, r/o Memon Colony Bathoro Road, Tando Muhammad Khan. On checking the four sacks it appeared that there were packets of Safina Gutka which is likely to cause infection of disease dangerous to human life. Each sack contained 30 packets of Safina Gutka. They checked each packet one by one and came to know that there were "105" small sachets of Safina Gutka in each packet. The accumulative number of packets of Safina Gutkas came to 12600 in total. On personal search of the accused complainant secured one mobile phone of Nokia company, one mobile phone of ITEL company, two notes of Rs.1000/- denomination and one note of Rs.500/- denomination. The 125 black colour motorcycle its registration number was HBV-3303. Thereafter, the case property viz. 12600 out of which 105 Safina Gutkas were sealed in khaki envelop for chemical examination. Besides, the two mobile sets and cash of Rs.2500/- were also sealed separately. The remaining case property lying in four sacks was also sealed separately. Due to non-availability of public mashir complainant prepared the mashirnama of arrest and recovery in presence of mashirs PC-Allah Bachayo and PC-Abdul Raheem and lodged instant on 07.11.2019 at 0100 hours.

3. After usual investigation, the I.O / complainant submitted the final report before the concerned Judicial Magistrate, who took cognizance of the offence and thereafter the case was entrusted to the learned trial Court, where the charge against the accused was framed at Ex.02, who pleaded not guilty and claimed trial.

4. At trial, the prosecution to prove its case has examined following witnesses:

- i. PW-1 / Complainant / I.O SIP Muhammad Ismail Mashori examined at Ex.03. He produced roznamcha entry at Ex.3/A, mashirnama of arrest and recovery at Ex.3/B, F.I.R at Ex.3/C, copy of Malkana entry of case property at Ex.3/D, roznamcha entry of sending case property at

Ex.3/E, letter of P.S for chemical examiner at Ex.3/F and report of chemical examiner at Ex.3/G.

ii. PW-2 / Mashir PC-Allah Bachayo examined at Ex.4.

It appears that both the above witnesses have been cross-examined by the counsel for appellant.

5. Thereafter, learned ADPP closed prosecution side at Ex.05. Later on statement of accused was recorded U/S 342 Cr.P.C at Ex.06, in which he denied the prosecution allegation and claimed his innocence. However, he did not examine himself on oath nor led any evidence in his defence.

6. Learned counsel for the appellant contended that the case is managed one and appellant is innocent and has been falsely implicated in this case; that nothing was recovered from the appellant and the alleged recovery has been foisted upon him; that whole prosecution case is based upon the evidence of police officials; that more particularly SIP Muhammad Ismail, who is complainant of the case, and at the same time has conducted the investigation of the case therefore, his investigation cannot be safely relied upon for maintaining the conviction. During the course of arguments, he has also pointed out a number of contradictions in between the evidence of the prosecution witnesses and was of the view that in presence of such contradictions, conviction awarded to the appellant by the trial Court cannot be maintained. He lastly prayed for acquittal of the appellant from the charge.

7. Conversely, learned D.P.G. Sindh while supporting the impugned judgment submits that prosecution has fully established its case beyond any reasonable doubt by producing consistent / convincing and reliable evidence and the impugned conviction and sentenced awarded to the appellant are the result of proper appreciation of evidence brought on record, which needs no interference by this Court. He prayed for dismissal of this appeal.

8. I have heard the learned counsel for appellant, learned D.P.G for the State and perused documents & evidence so brought on record.

9. It appears from the record that on the relevant date and time, complainant of the case namely SIP Muhammad Ismail along with his

subordinate staff namely PC Allah Bachayo, PC Abdul Raheem and DPC Bashir Ahmed left P.S under roznamcha entry No.29 for patrolling in the area to eliminate the crime. During patrolling when they reached Al-Fateh Chowk, they received spy information that present appellant was available at the main gate of Al-Madina City alongwith sacks of Safina Gutka, for selling purpose. On such information, they proceeded and reached at the pointed place and apprehended the present appellant along with safina gutka as mentioned in the FIR. It is noted that place of information and the place of arrest were thickly populated area and were surrounded by shops and houses but despite this fact, the complainant has failed to take services of any independent person of the locality to witness the event. No doubt, the evidence of police official is as good as that of any other witness but when the whole prosecution case rests upon the police officials and hinges upon their evidence and when the private persons / witnesses were available at the place of information as well as incident and non-association of private witness in the arrest and recovery proceedings create some doubt in the prosecution case. During the course of arguments, I have specifically asked question from learned D.P.G. that when private persons were available at the place of information and place of wardat, then why the complainant did not bother to take any independent person from the locality to witness the event, he has no satisfactory answer with him. In these circumstances, I am of the view that non-association of independent / disinterested person from general public to witness the recovery in a case where incident took place near main gate of Al-Madina city which is a busy road as well as populated area, would render prosecution case highly doubtful and would support the claim of accused / appellant that case against him was concocted by I.O. on the ground of malafide.

10. During the course of arguments, I have gone through the evidence of prosecution witnesses which consists of complainant SIP Muhammad Ismail who is also I.O of the case as well as evidence of PC Allah Bachayo who is mashir of the case and have come to the conclusion that the evidence so brought on record is contradictory to each other on material particulars of the case. For example complainant has stated in his cross examination that he did not enquire about the name of person from whom the accused / appellant purchased the recovered safina gutka whereas mashir PC

Allah Bachayo had deposed that complainant had enquired from the appellant about the person from whom he used to purchase the alleged recovered articles but he did not disclose the name of any person.

11. It is noted that the alleged incident took place on 06.11.2019 at 2300 hours whereas FIR was lodged on 07.11.2019 at 0100 hours and the alleged property recovered from accused which was sent to the chemical examiner for its examination through HC Imtiaz Ahmed, was received by the concerned laboratory on 08.11.2019 with a delay of one day. However, the said HC Imtiaz Ahmed has not been examined in this case and in my view he could have been a best witness of the prosecution to corroborate the whole incident as well as to disclose whether actually he delivered the case property in the office of the Director Laboratories and Chemical Examiner, Government of Sindh, Karachi or otherwise. Since the said witness has not been examined, therefore, adverse inference would be drawn.

12. As observed above, complainant SIP Muhammad Ismail himself has conducted the investigation therefore, it is to be seen whether in criminal prosecution, it would be inconsonance when principle of justice, fair play and fair investigation, if informant or investigating officer are to be the same person. No doubt, that no specific bar exists under the law against complainant who is also the investigation officer of the case but being the complainant it cannot be expected that an investigation officer will collect any material which goes against the prosecution or gives any benefit to the accused. The importance of a fair investigation from the point of view of an accused as a guaranteed constitutional right under Article 10/A of the Constitution of Islamic Republic of Pakistan, 1973, it is considered necessary that the law in this regard be laid down with certainty. To leave the matter for being determined on the individual facts of a case, may not only lead to a possible abuse of powers, but more importantly would leave the police, the accused, the lawyers, and the courts in a state of uncertainty and confusion which has to be avoided. It is therefore, held that a fair investigation, which was but the very foundation of fair trial, necessarily postulates that the informant and the investigator must not be the same person. Justice must not only be done, but must appear to be done also. Any possibility of bias or a predetermined conclusion has to be excluded.

13. Learned counsel for the appellant also stated that complainant / PW-1 being head of the police party was present at the time of search, recovery and also acted as investigating officer of the case, which is fatal to the case of the prosecution. PW-1 according to the prosecution, was present with PW-2 at that time. In-fact, PW-1 alone took-up investigation in the case and he had examined the witnesses. It therefore, follows that P.W-1 was the person who had searched the appellant and he being the investigating officer, certainly it is not proper and correct. The investigation ought to have been done by any other investigating officer. On this score alone, the investigation is bound to suffer and as such the entire proceedings will be vitiated. In this regard I am fortified by the cases of Nazeer Ahmed v/s The State (PLD 2009 Karachi 191), Muhammad Altaf v/s The State (1996 P.Cr.L.J 440) and Qaloo v/s The State (1996 P.Cr.L.J 496).

14. As far as the chemical report with regard to its being hazardous or poisonous substance allegedly recovered from the possession of appellant, nothing is available on record to show that it was administered to anybody at the hands of appellant. No purchaser was arrested nor any purchased money was recovered from the possession of appellant; therefore, it cannot be said that the appellant is responsible for causing hurt through administration of such poisonous material to anybody. Also there is nothing on record to show that appellant was found selling the alleged safina / gutka, as no evidence about presence of any purchaser at the spot has been brought on record.

15. Keeping in view of the above, I am of the affirmed view that the learned Presiding Officer of the trial Court acted erroneously in the matter with misconception and misinterpretation of law and facts and disposed of the matter purely on non-appreciation and non-application of required norms of law and that of justice. Consequently, I allowed this appeal, set-aside the impugned judgment dated 17.01.2020 and acquit the appellant of the charge. The appellant is in custody, he shall be released forthwith, if not required in any other custody case.

JUDGE

Fahad Memon
17.02.2020