

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

Cr. Appeal No. S- 18 of 2020

Date of hearing: 17.02.2020
Date of Judgment: 17.02.2020.
Appellants: Noor Hassan & Noor Ahmed through
Mr. Shoukat Ali Pathan, Advocate.
State: Through Mr. Shahid Ahmed Shaikh, Deputy
Prosecutor General, Sindh.

JUDGEMENT

ABDUL MAALIK GADDI, J- Through this appeal, the appellants have assailed the legality and propriety of judgment dated 23.01.2020 passed by learned Additional Sessions Judge-I, Tando Muhammad Khan in Sessions Case No.160/2019 (Re: The State V/s Noor Hassan & another) arisen out of Crime No.289/2019 registered U/S 269, 270, 337-J PPC at PS Tando Muhammad Khan, whereby the learned trial court after full dressed trial convicted and sentenced the appellants as stated in Point No.2 of the impugned judgment. For the sake of convenience, it would be proper to reproduce Point No.2 of the impugned judgment which reads as under:-

“In view of reasons given in point No.1, the accused Noor Hassan S/o Khan Muhammad Leghari and accused Noor Ahmed S/o Ibrahim Khaskheli are hereby convicted under section 265-H(ii) Cr.P.C. They are given conviction in sections 269, 270, 337-J PPC. They are convicted for one year and fine of Rs.10,000/- each, in case of failure of payment of fine, they shall further suffer simple imprisonment for three months more. The accused persons brought in court in judicial custody, they are remanded back to serve sentence awarded to them. The accused persons are also given benefit of Section 382-B Cr.P.C since date of arrest which is 30.11.2019”.

2. Facts of the case as stated in the F.I.R are that complainant ASI Soof Khan lodged instant F.I.R on behalf of the State stating therein that on 29.11.2019 he along-with his subordinate staff left PS on Government vehicle vide entry No.20 at about 1800 hours, and while patrolling through different places viz. City Pul, Seerat-Ul-Nabi Chowk, Shell Pump and Burdi Mori when they reached at Hyderabad-Tando Muhammad Khan road beside Shaheed Baba and start checking of vehicle. During checking, they noticed one silver color Van bearing No.CJ.5352 wherein two persons were sitting, was

coming towards them. The complainant got stopped the said Van, checked the same and recovered three Kata of Safina Gutka from backside of seat of Van. On enquiry, both persons disclosed their names as Noor Hassan S/o Khan Muhammad Laghari R/o Bacha Mohallah Tando Adam and Noor Ahmed S/o Ibrahim Khaskheli R/o Tando Adam. Thereafter, police party checked the recovered Safina Gutka which is harmful for human life and found 30 packets in each Kata which became total 90 packets, each packet carries 105 Safina Gutka, which became total 9450 puris (sachets) of Safina Gutka. However, when complainant enquired about the said recovered substance from both accused, they disclosed that they took the same for selling purpose. Thereafter personal search of both apprehended persons was conducted from which three currency notes of 100 and one currency note of 50 rupees, total 350 were recovered from accused Noor Hassan from his side pocket whereas one currency note of 100 and five notes of 10 rupees, total 150 were recovered from accused Noor Ahmed Khaskheli from his side pocket. Thereafter the complainant party checked silver color van No.CJ.5352 Toyota company, chassis No.CR.210020664, Engine No.3C337835. Due to non-availability of private mashirs PC Abdul Raheem & PC Muhammad Ali were acted as mashirs. Later on, one packet of Safina Gutka was sealed separately for chemical examination in envelope and other property were sealed separately and prepared mashirnama of place of incident and arrest in presence of the said mashirs, thereafter case property, vehicle and accused were brought at PS where F.I.R was registered.

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 vide their plea at Ex.2/A and Ex.2/B.

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

- i. PW-1 / Complainant / I.O ASi Soof Khan examined at Ex.03. He produced roznamcha entry No.20 at Ex.3/A, mashirnama at Ex.03/B, entry No.25 at Ex.03/C, F.I.R at Ex.03/D, entry in register 19 at Ex.03/E, entry No.29 at Ex.03/F, report of chemical analysis at Ex.03/G.

ii. PW-2 / Mashir PC-Abdul Raheem 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 statements of accused were recorded U/S 342 Cr.P.C at Ex.06 and Ex.07, in which they denied the prosecution allegation and claimed their innocence. However, they did not examine themselves on oath nor led any evidence in their defence.

6. Learned counsel for the appellants contended that the case is managed one and appellants are innocent and have been falsely implicated in this case; that nothing was recovered from the appellants and the alleged recovery has been foisted upon them; that whole prosecution case is based upon the evidence of police officials; that more particularly ASI Soof Khan, 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 appellants by the trial Court cannot be maintained. He lastly prayed for acquittal of the appellants 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 appellants 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 ASI Soof Khan along with his subordinate staff namely PC Abdul Raheem, PC Muhammad Ali and DPC Khan Muhammad left PS on Government vehicle vide entry No.20 for patrolling in the area to eliminate the crime. During patrolling from

different places viz. City Pul, Seerat-Ul-Nabi Chowk, Shell Pump and Burdi Mori when they reached at Hyderabad-Tando Muhammad Khan road beside Shaheed Baba they started checking of vehicles. During checking, they noticed one silver color Van bearing No.CJ.5352 wherein two persons were sitting, was coming towards them. The complainant got stopped the said Van, checked the same and recovered three Kata of Safina Gutka, from backside of seat of Van. Thereafter, the complainant party apprehended the appellants along with safina gutka as mentioned in the FIR. It is noted that place of incident was thickly populated area and was 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 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 superficially asked from learned D.P.G. that when private persons were available at the 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 arrest and recovery in a case where incident took place at Hyderabad-Tando Muhammad Khan road, which is a busy road as well as populated area, would render prosecution case highly doubtful and would support the claim of accused / appellants that case against them 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 ASI Soof Khan who is also I.O of the case as well as evidence of PC Abdul Raheem, 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 “they left PS at about 8 pm” whereas mashir PC Abdul Raheem had deposed that “they left PS at 5 pm”.

11. It is noted that the alleged incident took place on 29.11.2019 at 2300 hours whereas FIR was lodged on 30.11.2019 at 0030 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 02.12.2019 with a delay of two days. 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 ASI Soof Khan 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 investigating officer of the case but being the complainant it cannot be expected that an investigating 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 appellants also stated that complainant / PW-1 being the head of 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 / poisonous substance, allegedly recovered from the possession of appellants, nothing is available on record to show that it was administered to anybody at the hands of appellants. No purchaser was arrested nor any purchased money was recovered from the possession of appellants; therefore, it cannot be said that the appellants are responsible for causing hurt through administration of such poisonous material to anybody. Nothing on record that appellants were 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 23.01.2020 and acquit the appellants of the charge. Although, the appellants are not present today but as per learned counsel for the appellants, they have been released from jail after furnishing surety pursuant to order dated 14.02.2020, as such, their bail bonds stand cancelled and surety discharged.

JUDGE

Fahad Memon
17.02.2020