

Narcotics Case Spc Custody + Pistol 247  
NFR

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Before:

Mr. Justice Abdul Maalik Gaddi

Mr. Justice Mohammad Karim Khan Agha

Cr. Jail Appeal No.D- 27 of 2014.

Gul Muhammad alias Guloo

Versus

The State

Cr. Jail Appeal No.S-30 of 2014.

Gul Muhammad alias Guloo

Versus

The State

Appellant : Gul Muhammad alias Guloo in both appeals	Through Mr. Tilok Chand, Advocate.
Respondent : The State	Through Ms. Romeshan Oad, A.P.G.
Date of hearing	01.10.2018
Date of judgment	01.10.2018

**JUDGMENT**

**MOHAMMAD KARIM KHAN AGHA, J.-** Since the facts of the aforementioned appeals are almost the same, as the Cr. Jail Appeal No.D-27/2014 is outcome of judgment passed in Crime No.126/2013 (main case) and the Cr. Jail Appeal No.S-30/2014 is outcome of judgment passed in 127/2013, which is offshoot of the aforementioned main case, therefore, we propose to decide both the aforesaid appeals by this single and common judgment.

2. Cr. Jail Appeal No.D-27/2014 is directed against the judgment dated 31.01.2014, passed by learned Sessions/Special Judge for CNS, Badin, in Special Case No.08/2013, arising out of Crime No.126/2013, registered at Police Station Badin, under section 9(c) of the Control of Narcotic Substances

Act, 1997 (CNSA), whereby the appellant Gul Muhammad alias Guloo has been convicted u/s 9(c) CNSA and sentenced to suffer RI for 05 years and to pay the fine of Rs.50,000/-. In case of default in payment of fine he was ordered to suffer simple imprisonment for 01 year more (the impugned judgment). Benefit of Section 382-B Cr.P.C. was also extended to the accused.

3. Cr. Jail Appeal No.S-30/2014 is directed against the judgment dated 31.01.2014, passed by the learned Sessions Judge, Badin, in Special Case No.29/2013, arising out of Crime No.127/2013, registered at Police Station Badin, under section 23(1)A Sindh arms Act, 2013, whereby the appellant Gul Muhammad alias Guloo has been convicted u/s 23(1)(A) Sindh arms Act, 2013 and sentenced to suffer RI for 05 years and to pay the fine of Rs.50,000/-. In case of default in payment of fine he was ordered to suffer simple imprisonment for 06 months more (the impugned judgment). Benefit of Section 382-B Cr.P.C. was also extended to the accused.

4. The facts of the prosecution case in nutshell, are that on 14.06.2013 complainant SIP/SHO Haji Allahdino Panhwar alongwith his subordinate staff namely ASI Kashif Abbas Khuwaja, ASI Zulfiquar Ali Shar, PC Ghulam Muhammad, PC Muneer Ahmed left PS vide entry No.3 at 0810 hours in a Government Mobile for patrolling. After patrolling from different places, when they reached near Allahwala Chowk in Badin Town, complainant received spy information that absconding accused Gul Muhammad alias Guloo Mallah was selling charas near his house in Devi jungle. On such information, police party reached at the pointed place at 0900 hours and saw that one person having a black colour plastic shopper (thelli) emerged from Devi jungle and tried to run away, however, police apprehended him. On inquiry the apprehended person disclosed his name as Guloo son of Luqman. On his personal search one 30-Bore pistol loaded with four live bullets in its magazine was recovered from the left side fold of his shalwar. On inquiry about the license he disclosed that it was without license. Thereafter, the shopper was checked wherein 12 pieces of charas were found; the charas was weighed and it became 1050 grams. Thereafter, the pistol and the bullets were sealed in a cloth bag, whereas the contraband item was sealed in a khaki bag for chemical examination. Such mashirnama of arrest and recovery was prepared in presence of mashirs. Thereafter, the apprehended accused and the case properties were brought at Police Station where on checking of record, it was found that accused was absconder in Crime No.217/2011 of PS; Badin and

others crimes. Then complainant lodged two separate F.I.Rs; one with regard to recovery of contraband item i.e. Crime No.126/2013 and the other in respect of the recovery of pistol and bullets being Crime No.127/2013.

5. On the conclusion of investigation challans in both cases were submitted against the accused for offence u/s 9(c) CNSA as well as under section 23(1)(A) Sindh Arms Act, 2013.

6. Trial court in both cases framed the charge against accused, to which he pleaded not guilty. In order to prove its case in Sessions Case No.08 of 2013 arising out of Crime No.126/2013 (U/s 9(c) CNSA) the prosecution examined PW-1 complainant SIP/SHO Haji Allah Dino at Ex.6, who produced memo of arrest and recovery at Ex.6-A, F.I.R. at Ex.6-B, Roznamcha entries Nos. 3 and 8 (one leaf) at Ex.6-C, criminal record of the accused at Ex.6-D, Roznamcha entries No.22 and 24 (one leaf) at Ex.6-E, Chemical Examiner's report at Ex.6-F; P.W-2 Mashir ASI Zulfiquar Ali at Ex.7. Thereafter, prosecution side was closed at Ex.8.

7. Whereas, in order to prove its case in Spl. Case No.29 of 2013, arising out of Crime No.127/2013, (U/s 23(1)(A) Sindh Arms Act, 2013) the prosecution examined PW-1 complainant SIP/SHO Haji Allah Dino at Ex.6, who produced memo of arrest and recovery at Ex.6-A, F.I.R. at Ex.6-B, Roznamcha entries Nos.3 and 8 (one leaf) at Ex.6-C, Forensic Science Laboratory report at Ex.6-D; P.W-2 ASI Zulfiquar Ali at Ex.7. Thereafter, prosecution side was closed at Ex.8.

8. Statements of accused in both cases were recorded u/s 342 Cr.P.C. at Ex.9, wherein the accused denied the prosecution allegations and claimed his false implication in these cases.

9. Learned Sessions/Special Judge after hearing the learned counsel for the parties and examining the evidence available on record convicted and sentenced the appellant as stated above by the impugned judgments. Hence these appeals.

10. Learned trial court in the impugned judgments has already discussed the evidence in detail and there is no need to repeat the same here, so as to avoid duplication and unnecessary repetition.

11. Learned advocate for the appellant has contended that the prosecution case is highly doubtful; that the place of incident was located at busy spot, yet, none from public was joined to attest the arrest and recovery; there are material contradictions in prosecution evidence, hence it cannot be safely relied upon; that the alleged contraband item as well as the pistol alongwith

bullets were received in the office of Chemical Examiner and Forensic Science Laboratory(FSL) on 17.06.2013 and 20.06.2013, with a delay of 03 days and 06 days, respectively, and tampering with the case property during such period could not be ruled out especially as no evidence has been brought on record that the narcotic substance as well as the pistol/bullets were in safe custody during that period; that for all the above reasons the appellant should be acquitted in both cases.

12. Learned APG fully supported the impugned judgments and in particular contended that the recovered chemical as well as the pistol and bullets had been in safe custody following their recovery until the time it was sent and received in the office of Chemical Analyzer for chemical examination and the Forensic Science Laboratory. She also drew the court's attention to the past criminal record of the appellant which indicated that he was a habitual offender in respect of cases under the CNSA and thus for the above reasons the appeals should be dismissed.

13. We have heard the learned counsel for the parties, scanned the entire evidence and considered the relevant law.

14. We have come to the conclusion that prosecution has failed to establish its case in respect of both impugned judgments for the following main reasons; that the alleged place of incident was a busy area and the arrest and recovery was made in day light hours and despite the police receiving advance spy information the police made no effort to recruit any independent mushirs which although not being fatal to the prosecution case raises suspicions especially when the defense is one of false implication; that as per record on 14.06.2013 the contraband item and the pistol were recovered, however, the same were sent and received for chemical examination/forensic test on 17.06.2013 and 20.06.2013, with a delay of 03 and 06 days which delay has not been explained and although not being fatal to the prosecution case again raises suspicions. Even otherwise the appellant has almost served out his sentence in both cases since he has been in jail for over 5 years.

15. **Most significantly**, we find that there is very little evidence, if any, on record to show that either the charas or the pistol and the bullets were kept in safe custody from the time of their recovery until the charas was received by the chemical examiner after an unexplained delay of 3 days and the pistol and bullets received by the FSL after a delay of 6 days; that PC Jan Mohd who took the chemical to the chemical examiner has not been examined as to the safe custody of the recovered narcotic nor has the guard to the Malkhana. In

the case of **Muhammad Sarfraz V The State (2017 SCMR 1874)** where there was no negative evidence of non safe custody the conviction was upheld. **Muhammad Sarfraz's case (Supra)** however was by a two member bench of the Hon'ble Supreme Court and the case of **Ikramullah & others v/s. the State (2015 SCMR 1002)** which was by a three member bench does not seem to have been brought to its attention. In **Ikramullah's case (Supra)** the emphasis was on the **positive proof** of safe custody of the narcotic by the prosecution from the time of its recovery until the time it went for chemical examination which would rule out any possibility of the narcotic being tampered with. Since **Ikramullah's case (Supra)** was decided by a three member bench of the Hon'ble Supreme Court and was not brought to the attention of the Hon'ble Supreme Court in **Muhammad Sarfraz's case (Supra)** we are inclined to follow **Ikramullah's case (Supra)** in respect of safe custody of the narcotic.

16. Thus, in our view in this case since there is a possibility that the narcotic during the time it was recovered from the appellant and was received by the chemical examiner may not have been kept in safe custody and may have been tampered with we find that even a positive chemical report is of no assistance to the prosecution; Likewise the case of the FSL Report; the significance of keeping safe custody of the narcotic in a case under the CNSA has been emphasized in **Ikramullah's case (Supra)**, the relevant portion of which is reproduced hereunder:-

**"5. In the case in hand not only the report submitted by the Chemical Examiner was legally laconic but safe custody of the recovered substance as well as safe transmission of the separated samples to the office of the Chemical Examiner had also not been established by the prosecution. It is not disputed that the investigating officer appearing before the learned trial court had failed to even to mention the name of the police official who had taken the samples to the office of the Chemical Examiner and admittedly no such police official had been produced before the learned trial Court to depose about safe custody of the samples entrusted to him for being deposited in the office of the Chemical Examiner. In this view of the matter the prosecution had not been able to establish that after the alleged recovery the substance so recovered was either kept in safe custody or that the samples taken from the recovered substance had safely been transmitted to the office of the Chemical Examiner without the same being tampered with or replaced while in transit."** (bold added)

17. We do not consider the fact that other narcotics cases have been registered against the appellant to be particularly relevant as the appellant

has not been convicted in any such cases to date. Under these circumstances and for the other reasons mentioned above we are of the considered view that the prosecution has not proved its case against the appellant beyond a reasonable doubt. It is well settled law that the benefit of doubt must go to the accused by way of right as opposed to concession. In this respect reliance is placed on the case of **Tariq Pervez V/s. The State** (1995 SCMR 1345), wherein the Honourable Supreme Court has observed as follows:-

“It is settled law that it is not necessary that there should be many circumstances creating doubts. If there is a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right.”

18. For the above stated reasons, we hold that the prosecution has failed to prove its case against the appellant, therefore, while extending the benefit of doubt, by short order instant appeals were allowed; the impugned judgments were set aside and the appellant was acquitted of both the charges under the CNSA and the Sindh Arms Act. The short order announced in open court today is reproduced as under:-

“Parties’ advocates have been heard at length. They have concluded their arguments. For the reasons to be recorded later on, the instant appeals are allowed; the impugned judgments dated 31.01.2014, passed by the learned Sessions / Special Judge (CNS) Badin are set aside and the appellant is acquitted of the charge. The appellant is in custody. He shall be released forthwith if not required in any other custody case.”