IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

Present:-
Mr. Justice Shamsuddin Abbasi
Mr. Justice Jan Ali Junejo

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Criminal Appeal No.D-39 of 2024

Appellant	Abdul Rehman son of Shah Murad by caste Talani Baloch through Miss. Rizwana Khatoon Khand, Advocate.
Respondent	The State through Mr. Ali Anwar Kandhro, Additional Prosecutor General.
Date of hearing	**25.03.2025**
Date of detailed reasons	**19.04.2025**

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JUDGMENT

SHAMSUDDIN ABBASI, J. Abdul Rehman son of Shah Murad, appellant, was tried by learned Additional Sessions Judge-I (MCTC), Special Judge for CNS, Shikarpur, in Special Narcotic Case No.230 of 2024 (FIR No.26 of 2024) registered at Police Station Lakhi Gate, District Shikarpur, for offences under Sections 9(3)(D) of Control Narcotics Substance Amendment Act, 2022. By a judgment dated 15.06.2024 he was convicted under Section 9(3)(D) of the Control of Narcotics Substance Amendment Act, 2022, and sentenced to rigorous imprisonment for 15 years and to pay a fine of Rs.500,000/- and to suffer simple imprisonment for a further period of three years in lieu of fine.

2. FIR in this case has been lodged on 27.03.2024 at 2:15 pm whereas the incident is shown to have taken place on the same day (27.03.2024) at 1:00 pm. Complainant ASI Muhammad Ilyas Khakhrani has stated that on the fateful day he alongwith his subordinate staff namely, HC Abdul Hameed Chang, PC Muhammad Yousuf Noon, PC Noor Ahmed Kalhoro, was busy in patrolling of the area in official mobile. It was about 1:00 pm when reached at link road leading to Maari Village, they saw a person coming from City side and going towards Village Maari, who on seeing police tried to run away, but they overpowered him at a distance of 10 to 15 paces,

who disclosed his name as Abdul Rehman Talani Baloch. He was holding a black colour shopper, which contained 10 pieces of charas, wrapped with yellow colour plastic, weighed on a digital scale and found to be 5100 grams, whereas Rs.500/- were also recovered from right side pocket of his shirt. The complainant arrested the accused and sealed the recovered property at spot, returned back at P.S. and registered a case vide FIR No.26 of 2024 for offence under Section 9(c) Control of Narcotics Substance Act, on behalf of the State.

3. Pursuant to the registration of FIR, the investigation was followed and in due course the challan was submitted before the Court of competent jurisdiction, whereby the appellant was sent-up to face the trial.

4. A charge in respect of offences under Sections 9(3)(D) of Control Narcotics Substance Amendment Act, 2022 was framed against the appellant. He pleaded not guilty to the charged offence and claimed to be tried.

5. At trial, the prosecution has examined as many as five witnesses. The gist of evidence, adduced by the prosecution in support of its case, is as under:-

6. Complainant ASI Muhammad Ilyas appeared as witness No.1 Ex.4, HC Abdul Hameed (mashir of arrest and recovery) as witness No.2 Ex.5, investigating officer SIP Ghulam Nabi as witness No.3 Ex.6, HC Khadim Hussain (Incharge Malkhana) as witness No.4 Ex.7 and PC Ali Muhammad (dispatched official) as witness No.5 Ex.8. They exhibited certain documents in their evidence and were subjected to cross-examination by the defence. Thereafter, the prosecution closed its side vide statement Ex.9.

7. Statement of appellant under Section 342, Cr.P.C. was recorded at Ex.10. He has denied the allegations imputed upon him by the prosecution, professed his innocence and stated his false implication by police. According to him, the police arrested him from his house at odd hours of night and kept him in illegal detention at police station for which his wife filed an application under Section

491, Cr.P.C. before a Court of competent jurisdiction. He, however, opted not to make a statement on Oath under Section 340(2), Cr.P.C. and did not produce any witness in his defence.

8. The learned trial Court found the appellant guilty of the offence charged with and, thus, convicted and sentenced him as stated in para-1 (supra), which necessitated the filing of the instant appeal.

9. It is contended on behalf of the appellant that he been falsely implicated in this case by the police just to show their efficiency in the eyes of their high-ups, otherwise he has nothing to do with the alleged offence; that the appellant was arrested from his house at Nawabshah on 25.03.2024 at odd hours of night by police of P.S. B-Section Nawabshah and kept him in illegal detention at police station for which his wife approached a concerned Court and filed an application under Section 491, Cr.P.C., nothing incriminating has been recovered from the possession of appellant and the alleged recovery of charas is foisted upon him; that the entire evidence adduced by the prosecution consists of police officials who are setup and subordinates to complainant, hence their testimony, in absence of an independent corroboration, cannot be relied upon; that no independent person has been associated to witness the arrest and recovery proceedings without assigning a valid and strong cause despite the incident alleged to have taken place in day at a busy road, which is clear violation of the provision of Section 103, Cr.P.C.; that the witnesses in their respective depositions have contradicted each other on crucial points; that positive report of chemical examiner is unsafe to rely upon in view of the admitted delay in sending the recovered charas to the office of Chemical Examiner; that the impugned judgment is the result of misreading and non-reading of evidence and without application of a conscious judicial mind, hence the same is bad in law and facts and the conviction and sentence awarded to the appellant, based on such findings, are not sustainable in law and liable to be set-aside and the appellant deserves to be acquitted of the charge and prayed accordingly.

10. The learned Additional Prosecutor General, on the other hand, has refuted the arguments advanced by the learned counsel for the

appellant and submitted that the appellant is involved in a case of huge quantity recovery of charas, which is heinous one and directed against the society; that the witnesses while appearing before the learned trial Court have supported the case of the prosecution without major contradictions or discrepancies and the minor contradictions, if any, are of no significance and the same may be ignored in view of the facts and circumstances of the case; that the role of appellant is borne out from the ocular evidence, adduced by the prosecution, duly supported by the circumstantial evidence; that the prosecution has also established the point of safe custody of case property and its safe transit to the chemical examiner through valid and reliable evidence coupled with positive report issued by the office of Chemical Examiner which was rightly relied upon by the learned trial Court; that the findings recorded by the learned trial Court in the impugned judgment are based on fair evaluation of evidence and documents brought on record, to which no exception could be taken; that mere statement of appellant that he was arrested from his house at odd hours of the night and thereafter involved in this case by foisting the alleged charas, without producing any witness or any other material, does not carry any weight vis-à-vis providing help to the defence; that the prosecution has successfully proved its case against the appellant beyond shadow of reasonable doubt, thus, the appeal filed by the appellant warrants dismissal and his conviction and sentence recorded by the learned trial Court is liable to be maintained.

11. We have given our anxious considerations to the submissions of both the sides and perused the entire material available on record with their able assistance.

12. The ocular account has been furnished by complainant ASI Muhammad Ilyas (PW.1 Ex.4) and mashir HC Abdul Hameed (P.W.2 Ex.5). Though they have supported the case of the prosecution as set-forth in the FIR, but contradicted each other on crucial points. According to complainant, they patrolled for around an hour before reaching the place of incident whereas according to mashir after leaving the police station they patrolled for half an hour. Per complainant during patrolling they stayed at different places and also

checked certain persons as well as vehicles. On the other hand, the mashir has stated that during patrolling neither they stayed at any place nor checked any other person or a vehicle except the appellant. Worth to mention here that incident is said to have taken place at 1:00 pm on 27.03.2024 whereas the FIR has been lodged on the same day at 2:15 pm after 01 hour and 15 minutes of the incident and that too without furnishing any plausible explanation. Both complainant and eye-witness in their respective evidence have not uttered a single word as to why the FIR was lodged after the delay of 01 hour and 15 minutes. It was the duty of the complainant to explain each and every aspect of the matter such as how much time he consumed in arresting the accused, what time spent in the process of recovery of case property, at what time he weighed the case property on digital scale, how much time in sealing the case property and preparing two sealed parcels, till when he stayed at the place of incident and completed entire formalities and the exact time of reaching the police station. A bare perusal of the evidence of complainant and eye-witness reveals that they have not given a single detail as to how much time they stayed at the place of incident and as to at what time they reached the police station. They have simply deposed that after arrest of the appellant and completing the formalities at spot they returned back to police station alongwith the accused and the recovered property. In such eventuality, the lodgment of FIR after the delay of 01 hour and 15 minutes, without furnishing any explanation, gives rise to a presumption that FIR has been lodged after consultation and due deliberation. The Hon'ble apex Court, in absence of any plausible explanation, has always considered the delay in lodgment of FIR to be fatal and castes a suspicion on the prosecution story, extending the benefit of doubt to the accused. It is a well-settled principle of law that FIR is always treated as a cornerstone of the prosecution case to establish guilt against those involved in a crime, thus, it has a significant role to play. If there is any delay in lodging of a FIR and commencement of investigation, it gives rise to a doubt, which, of course, cannot be extended to anyone else except to the accused. Reliance in this behalf may well be made to the case of *Zeeshan @ Shani v The State* (2012 SCMR 428) wherein it has been held that *"delay of more than one hour in lodgment of FIR give rise to an inference that occurrence*

did not take place in the manner projected by prosecution and time was consumed in making effort to give a coherent attire to prosecution case, which hardly proved successful". In another case reported as 2010 SCMR 97 *(Noor Muhammad v The State)* it has been held that *"when the prosecution could not furnish any plausible explanation for the delay of twelve hours in lodging the FIR, which time appeared to have been spent in consultation and preparation of the case, the same was fatal to the prosecution case.* Besides, the contradictions, noted above, are vital in nature, which have not only demolished the case of the prosecution but also shattered the entire fabric of the testimony of complainant and eye-witness. It is a well settled that once a single loophole is observed in a case presented by the prosecution much less glaring conflict in the ocular account coupled with unexplained delay in lodgment of FIR, the benefits must go to the accused.

13. The another intriguing aspect of the matter is that the incident alleged to have taken place at day time at a busy road, despite the complainant did not bother to associate an independent source to strengthen prosecution case by collecting any independent evidence either from the place of incident, We are conscious of the fact that people normally refrain from becoming a witness in criminal cases but still no signs appear in the case to show that the complainant (recovery officer) tried his level best to associate an independent witness but could not succeed. It seems that police handled the case quite in a mechanical manner and failed to obey the requirement of Section 103, Cr.P.C. It is, thus, held that the prosecution case rests on very weak circumstantial evidence which cannot be considered randomly for maintaining conviction and sentences awarded to the appellants. Reliance in this behalf may well be made to the case of *Tayyab Hussain Shah v The State* (2000 SCMR 683) wherein it has been held as follows:-

> *"The plea of the accused was that the gun had been planted on him and this fake recovery was proved by the police witnesses namely, the Investigating Officer alongwith the Foot Constable. The plea is that the said recovery is of no evidentiary value as the same was made in violation of requirements of section 103, Cr.P.C. In the case of State through Advocate General, Sindh v. Bashir and others (PLD 1997 SC 408) Ajmal Mian, J., as he then was, later Chief Justice of Pakistan,*

> *observed that requirements of section 103, 'Cr.P.C. namely that the two members of the public of the locality should be Mashirs to the recovery, is mandatory unless it is shown E by the prosecution that in the circumstances of a particular case it was not possible to have two Mashirs from the public. If, however, the statement of the police officer indicated that no effort was made by him to secure two Mashirs from public, the recoveries would be doubtful. In the instant case, from the statement of the Investigating Officer it is apparent that no efforts were made to join any member of the public to witness the said recovery. In F the overall circumstances of the case, we do not find it safe to rely on the said recovery. Once recovery of gun is considered doubtful the report of the fire-arm expert that the empty statedly recovered from the spot matched with the gun loses its significance".*

14. We are cognizant that application of Section 103, Cr.P.C. is not attracted in the cases of personal search of an accused in cases relating to recovery of narcotics, but where the alleged recovery was made from a busy place, omission to join independent mashirs cannot be brushed aside lightly. Prime object of Section 103, Cr.P.C. is to ensure transparency and fairness on the part of police during course of recovery, curb false implication and minimize the scope of foisting of fake recovery upon an accused. No iota of evidence is available on record as to why complainant has not tried to join an independent person to witness the arrest and recovery proceedings though it was a day time incident and the place of recovery was a busy road. All this shows that proceedings were carried out in a casual and cursory manner without making an effort to join an independent witness /mashir of arrest and recovery proceedings, which is a clear violation of the provisions of Section 103 Cr.P.C. We are also cognizant of the fact that on the same day the investigating officer SIP Ghulam Nabi (PW.3 Ex.6) visited the place of incident and conducted site inspection on the pointation of complainant, but he also failed to discharge his duties in the manner as provided under the law. He was well aware of the fact that no independent and private person was associated by the complainant to act as mashir of arrest of accused and recovery of charas, therefore, he was under obligation to make positive efforts and arrange an independent witness while visiting the place of incident, but no such indication is available on record. As bare perusal of the record reveals that the investigating officer has failed to discharge his duties in the manner as provided under the law.

Omission to join an independent witness by both the officers, thus, rendered the case of the prosecution extremely doubtful.

15. No doubt police witnesses are as good witnesses as that of any other person from the public and conviction could be based on their evidence, but when a police witness was going to charge a person for an offence which carries punishment in shape of detention, his testimony should be reliable, dependable, trustworthy and confidence inspiring and if such qualities are missing, no conviction could be recorded on the basis of evidence of a police witness. The entire record is silent as to whether any effort was made to persuade any person from the locality or for that matter the public was asked to become a witness. Per settled law every accused would be deemed to be innocent and may not be termed as criminal unless found guilty of charge by a competent Court of law after safe trial. Hence, on this count too, the alleged recovery of charas is fatal to the case of the prosecution. Reliance in this behalf may well be made to the case of *Shahid Hussain alias Multani v The State and others* (2011 SCMR 1673).

16. The recovery of charas alleged to be effected on 27.03.2024, but it was sent to the office of Chemical Examiner on 28.03.2024 after one day of its recovery. The investigating officer has deposed that complainant handed over him the case property in a sealed parcel and on the same day of incident viz 27.03.2024 he handed over the same to Incharge Malkhana WHC Khadim Hussain for keeping the same in safe custody and on the next day (28.03.2024) he took back the sealed parcel from Incharge Malkhana and transmitted the same to the office of Chemical Examiner. The prosecution though established that after recovery the case property was kept in Malkhana but failed to place on record any explanation as to at what time it was kept in safe custody and at what time the same was taken back. In such eventuality, the safe custody of case property and its safe transit to the office of Chemical Examiner has not been proved. PW.4 HC Khadim Hussain while appearing before the learned trial Court though supported the investigating officer with regard to handing over the case property to him and keeping the same in Malkhana under an

entry in Property Register No.19 at serial No.14, but produced attested copy of Register No.19 in his evidence instead of original one without furnishing any explanation. The investigating officer too has exhibited attested copies of certain entries and that too without furnishing any explanation as to the original entries. Per Article 75 of the Qanun-e-Shahadat Order, 1984, a document is to be proved by primary evidence whereas Article 76 of the Order ibid provides an exception to what is embodied in Article 75 of Qanun-e-Shahadat Order, 1984 and according to its clause (c), the contents of a document can be proved through secondary evidence in cases provided therein. It emerges from clause (c) of Article 76 that secondary evidence in respect of a document can only be tendered if it is shown to have been destroyed or lost. Though in order to fill up the lacuna, the prosecution got examined HC Khalid Hussain, who kept the case property in safe custody and PC Ali Muhammad, who got the sealed parcel in the laboratory, but failed prove the safe transmission of the case property to the office of Chemical Examiner by exhibiting attested copies of entries without furnishing any explanation as to the original entries. The appellant alleged to be indulged in the business of narcotics and in like cases evidence of high standard is required to bring home the charge to its hilt, which is lacking in this case. Even otherwise, no explanation or a valid excuse has been furnished by the prosecution as to why the case property was kept in Malkhana for a sufficient period and why it was sent to the office of Chemical Examiner after one day of its recovery. The law is settled by now that if safe custody of narcotics and its transmission through safe hands is not established, same cannot be used against the accused. It is also an established position that the chain of custody or safe custody and safe transmission of narcotics begin with seizure of the narcotic, followed by separation of the representative samples, storage of the representative samples with the law enforcement agency and then dispatch thereof to the office of the Chemical Examiner for analysis. This chain of custody must be safe and secure because the report of Chemical Examiner enjoys very crucial and pivotal importance in the cases relating to recovery of narcotics and the chain of custody ensures that correct representative samples reach the office of the Chemical Examiner.

Any break or gap in the chain of custody i.e. in the safe custody or safe transmission of the narcotic or its representative samples makes the report of the Chemical Examiner fail to justify conviction of the accused. The prosecution, therefore, is to establish that the chain of custody has remained unbroken, safe, secure and indisputable so as to place reliance on such report, however, what we have discussed herein above, reveal that the chain of custody of case property has been compromised, hence no reliance can be placed on the report of Chemical Examiner to maintain conviction of the appellant. Guidance is taken from the case of *The State through Regional Director ANF v Imam Bakhsh and others* (2018 SCMR 2039) and an unreported judgment, passed in Criminal Appeal No.184 of 2020 *[Mst. Sakina Ramzan v The State].*

17. Insofar as the contention of learned Additional Prosecutor General that why the police would foist a huge quantity of charas upon the appellant more particularly when the defence has failed to place on record any ill-will or animosity against the police. Mere absence of enmity is not sufficient to stamp the statement of a witness with truth. The mere fact that the police witnesses had no enmity or grudge or malice against the appellant, by itself, is not a strong circumstance to hold that whatever has been alleged by the prosecution, should be relied implicitly without asking supporting evidence from independent source. In a criminal trial the quantity of evidence is of no important, but it is the quality of evidence which weights with the Court while appreciating the evidence.

18. The appellant in his statement under Section 342, Cr.P.C. has taken a specific plea that he was arrested by Nawabshah police from his house at Nawabshah two or three days prior to the incident and kept in wrongful confinement and when his wife and other relatives approached the police, they demanded illegal gratification for his release and since his wife failed to accept their illegal demand, they got him involved in this false case. The appellant in support of his defence has produced attested photocopy of application under Section 491, Cr.P.C. filed by his wife Mst. Wazeeran before the learned Sessions Judge Shaheed Benazirabad on 27.03.2024, which shows that police of Nawabshah arrested the appellant from his

house on 25.03.2024 two days prior to the incident. As to the filing of application under Section 491, Cr.P.C. after two days of arrest of appellant is concerned, suffice to observe that it is mentioned in para-4 of the application that she first approach her brother and alongwith him went to P.S. for release of her husband, but instead of releasing her husband, the police demanded illegal gratification and she being a poor lady failed to fulfill the illegal demand of police. It is also noteworthy that she is a household lady and definitely it will take time in approaching an Advocate, drafting of an application under Section 491, Cr.P.C. and completing other legal formalities. In such a situation, the delay in filing the application could be ignored. Even otherwise, the defence plea is always to be considered in juxta position with the prosecution case and in the final analysis if the defence plea is proved or accepted, then the prosecution case would stand discredited and if the defence is substantiated to the extent of creating doubt in the credibility of the prosecution case then in that case it would be enough but it may be mentioned here that in case the defence is not established at all, no benefit would occur to the prosecution on that account and its duty of proving its case beyond reasonable doubt would not diminish even if the defence plea is not proved or is found to be false.

19. Insofar as to the contention of learned Additional Prosecutor General that though the witnesses belong to police department, but they were impartial and dis-interested witnesses to establish the charge, thus their testimony cannot be discarded merely on the basis of minor discrepancies, suffice to observe that it is not necessary that a witness, who is neither related to complainant nor inimical towards the accused, always speaks true, but it is the duty of the Court to scrutinize the statement of such witness with utmost care and caution. Reliance may well be made to the case of *Muhammad Saleem v The State* (2010 SCMR 374), wherein it has been held as under:-

> *"The acid test of veracity of a witness is the inherent merit of his own statement. It is not necessary that an impartial and independent witness, who is neither related to the complainant nor inimical towards the accused would stamp his testimony necessarily to be true. The statement itself has to be scrutinized thoroughly and it is to be seen as to whether in the circumstances of the case the statement is reasonable, probable*

> *or plausible and could be relied upon. The principle that a disinterested witness is always to be relied upon even if his statement is unreasonable, improbable and not plausible or not fitting in the circumstances of the case then it would lead to a very dangerous consequence. Reference is invited to Muhammad Rafique v. State 1977 SCMR 457 and Haroon v. State 1995 SCMR 1627. … Applying the test to the prosecution witnesses, we find that their statements do not come within the ambit of above rule of acceptance of evidence, therefore, no implicit reliance can be placed on such type of evidence without any corroboration which is lacking in the present case".*

20. It is a well-settled principle of law that involvement of an accused in criminal cases is not sufficient to convict him as the accused continues with presumption of innocence until found guilty at the end of the trial. Conviction and involvement in many cases on no count could be made basis for maintaining conviction. It is a well settled that each and every criminal case is to be decided on its own facts and circumstances. All that may be necessary for the accused is to offer some explanation of the prosecution evidence against him and if this appears to be reasonable even though not beyond doubt and to be consistent with the innocence of accused, he should be given the benefit of it. The proof of the case against accused must depend for its support not upon the absence or want of any explanation on the part of the accused but upon the positive and affirmative evidence of the guilt that is led by the prosecution to substantiate accusation. Here in this case, the prosecution has not been able to bring on record any convincing evidence. Rather, there are so many circumstances, discussed above creating serious doubts in the prosecution case, which cut the roots of the prosecution cases and according to golden principle of benefit of doubt one substantial doubt would be enough for acquittal of the accused. The rule of benefit of doubt is essentially a rule of prudence, which cannot be ignored while dispensing justice in accordance with law. Conviction must be based on unimpeachable evidence and certainty of guilt and any doubt arising in the prosecution case, must be resolved in favour of the accused. The said rule is based on the maxim *"it is better that ten guilty persons be acquitted rather than one innocent person be convicted"* which occupied a pivotal place in the Islamic Law and is enforced strictly in view of the saying of the ***Holy Prophet (PBUH)*** that the *"mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent".*

21. The epitome of whole discussion gives rise to a situation that the appellant has been convicted without appreciating the evidence in its true perspective, rather the prosecution case is packed with various discrepancies and irregularities, which resulted into a benefit of doubt to be extended in favour of the appellant. Accordingly, the conviction and sentence recorded by the learned trial Court vide impugned judgment dated 15.06.2024 is set-aside and the appellant is acquitted of the charge by extending him the benefit of doubt. He shall be released forthwith if not required to be detained in connection with any other case. Appeal stands allowed.

22. Foregoing are the reasons for our short order, announced in open Court on 25.03.2025, whereby this Criminal Appeal No.D-39 of 2024 was allowed.

JUDGE

JUDGE

Naeem/PA