

41.

ORDER SHEET

THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANO

Cr. Appeal No. D-01 of 2024

Date	Order with signature of Judge
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1. For hearing of main case.
2. For hearing of M.A No. 39/2024 (Appln. U/s 426 Cr.P.C)

01-01-2025

Mr. Athar Abbas Solangi, advocate for the appellant

Mr. Ali Anwar Kandhro, Additional Prosecutor General for the State

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Heard learned advocate for the appellant and learned Additional Prosecutor General for the State and perused the record.

For the reasons to follow, instant criminal appeal is allowed. Consequently, impugned judgment dated 21.12.2023, penned down by learned Special Judge (CNSA & MCTC-II), Jacobabad/trial court, vide Special (C.N.S.) Case No.102 of 2023 (The State Vs. Murad Khan), arising out of Crime No. 38/2023 of P.S. Airport Jacobabad, offence U/s 9(i)(3)(c), C.N.S. (Amendment Act) is hereby set-aside. Resultantly, the appellant is hereby acquitted of the charge. Since the appellant is in custody; therefore, he shall be released forthwith if his custody is not required in any criminal case by the jail authorities.

Judge

Judge

Abdul Salam/P.A

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**IN THE HIGH COURT OF SINDH
CIRCUIT COURT LARKANA**

Crl. Appeal No.D-01 of 2024

*Present;
Mr. Justice Muhammad Saleem Jessar
Mr. Justice Amjad Ali Bohio,*

Appellant : Murad Khan S/o Yar Muhammad Pathan
Through Mr. Athar Abbas Solangi, Advocate

The State : Through, Mr. Ali Anwar Kandhro
Additional P.G Sindh

Date of hearing : 01.01.2025

Date of Judgment : 01.01.2025

JUDGMENT

Amjad Ali Bohio, J: The present Criminal Appeal is filed against the Judgment dated 21-12-2023, passed in Special CNS Case No. 102 of 2023, arising from Crime No. 38 of 2023, registered under Section 9(1), 3(c) of the Control of Narcotic Substances (Amendment) Act, 2022 ("The Act of 2022") at Police Station Airport, Jacobabad. By the said judgment, the learned Special Judge (CNSA & MCTC-II), Jacobabad, convicted the appellant for the stated offence and sentenced him to rigorous imprisonment for a term of nine (09) years, being the lesser punishment provided under Serial No. 9(c) of the Table in Section 9 (1) of the Act of 2022. Additionally, the appellant was directed to pay a fine of Rs. 80,000/- (Eighty Thousand), and in default of payment, to undergo simple imprisonment for an additional one (01) month.

2. Facts leading to prosecution of the case are that on 19-05-2023, at 2100 hours, a police party led by ASI Yar Muhammad Lashari apprehended the accused, Murad Khan Pathan, near "Bughia Bridge" on the road leading to Qaim Shah Shrine. During his arrest, 1100 grams of charas, consisting of two large and one small piece, was recovered from a black plastic shopper concealed in the right fold of his shalwar. The seized charas was weighed using a computerized scale measured to be 1100 grams. A sample parcel, totaling 550 grams, was taken from each

piece for chemical analysis and was sealed separately, while the remaining charas was also sealed at the spot. A memo of arrest and recovery (Ex.05-B) was prepared at the scene, in presence of HC Wazir Ali and HC Muhammad Anwar as mashirs. Subsequently, the appellant and the recovered charas were brought to the Police Station, where the complainant lodged an FIR (Ex.05-C) on behalf of the State.

3. After the usual investigation, challan was submitted against the accused. A formal charge under Section 9(1), 3(c) of the Act, 2022, was framed against accused, Murad Khan, at Ex.04. Upon being charged, he pleaded not guilty and claimed trial, as is reflected in his plea recorded at Ex.4-A.

4. To prove its case, the prosecution examined the PW-1: Complainant ASI Yar Muhammad (Exh-5), who produced the D.D Entry No. 31 (Exh. 5-A), Mashirnama of Arrest & Recovery (Exh. 5-B), First Information Report (FIR) (Exh. 5-C), PW-2: Mashir and eyewitness HC Wazir Ali (Exh-6), who produced DD Entry No. 33 (Exh. 6-A), Memo of Inspection of the Recovery Site (Exh. 6-B), PW-3: PC Abid Ali (Exh-7), who transmitted the case property to the Chemical Laboratory. He produced R.C. No. 53 (Exh. 7-A), DD Entries Nos. 12 and 28 (one sheet) (Exh. 7-B), PW-4: Investigation Officer SIP Shahzado Pechuho (Exh-8), who produced, Entry/Serial No. 28 of Register-19 (Exh. 8-A), Attested copies of DD Entries Nos. 35 to 37 (one sheet) (Exh. 8-B), Letter for permission issued by him (Exh. 8-C), Permission letter from SSP (Exh. 8-D), Positive Chemical Report dated 24-05-2023 (Exh. 8-E), PW-5: WHC Mehrab Khan Odho (Exh-9), who kept the case property in safe custody. Thereafter, the learned Prosecutor appearing on behalf of the State, closed the prosecution's evidence by filing a statement at Exh-10.

5. The statement of the appellant, Murad Khan, under Section 342 Cr.P.C., was recorded at Exh.11. In his statement, the appellant denied the allegations, asserting that the witnesses had provided false testimonies, the case was manipulated, and he was innocent. He stated that he was traveling from Quetta to Sukkur by coach when SIP Akhtar Abro forcibly removed him from the coach at Umrani Laro check post. At that time, he was carrying Rs. 3,00,000/- in cash, which, according to him, was snatched by SIP Akhtar Abro. The appellant alleged that when he

demanded the return of his money, he was falsely implicated in the present case by the police. However, he neither examined himself on oath nor opted to present any evidence in his defense. After hearing the arguments from both sides, the learned trial Court passed the impugned judgment dated 21-12-2023, convicting the appellant as stated above. Hence, this appeal.

6. Appellant's counsel contends that the appellant is innocent and has been falsely implicated in the case. He has contended that the Charas was foisted on the appellant by the Police. He pointed out that in this case independent witnesses could have been associated as it was a case of advance spy information, such an omission suggests malice and in fact nothing had been recovered from the exclusive possession of the appellant at the time of the arrest. Lastly, he argues that no separate parcel of the samples separated from the recovered charas were prepared, but the same were kept in a single cloth bag parcel. He further pointed out major contradictions in the evidence of the prosecution witnesses, particularly with regard description of case property and the manner of separating samples, which creates sufficient doubts, therefore, the impugned judgment, cannot be maintained. Lastly, he prayed that by allowing instant appeal, the appellant may be acquitted of the charge.

7. Conversely, learned Additional Prosecutor General for the State has supported the impugned judgment and argues that the contradictions raised by the defence counsel are insignificant, as they are minor in nature. He asserts that the parcel was sent to the Chemical Examiner within 72 hours of the alleged recovery. He contended that the appellant was found in possession of 1100 grams charas and no malafide has been alleged against the prosecution. The prosecution has successfully proven the guilt of the accused beyond any reasonable doubt.

8. We have heard the arguments presented by the learned counsel for the appellant and the learned Additional Prosecutor General representing the State. With their able assistance, we have thoroughly re-assessed the evidence and material placed on record.

9. Admittedly, the complainant, ASI Yar Muhammad, received spy information at P.S. Airport indicating that the accused would transport charas from Balochistan for sale in Jacobabad. Acting on this information,

the police party left the Police Station, traveled approximately two kilometers, and apprehended the accused near 'Bughla Bridge' on Dargah Qaim Shah Road. However, despite having prior information about the expected recovery of contraband, the police failed to associate any private persons in the operation, thereby violating the principles of Section 103 Cr.P.C., which mandates the involvement of private witnesses when a search is conducted based on prior information, then in order to ensure transparency and fairness on the part of the police party they were liable to have associate private persons to witness the recovery proceedings but failed. The complainant, ASI Yar Muhammad, failed to provide any explanation as to why private individuals were not associated as mashirs in the case. Both the complainant, ASI Yar Muhammad, and mashir HC Wazeer Ali, admitted during their testimonies that they had the opportunity to involve private persons as witnesses while proceeding from the police station to the place of occurrence based on spy information about the recovery of charas. However, they did not associate any independent witnesses along the way and failed to furnish any justification for this omission. This oversight violates the spirit of Section 103 of the Criminal Procedure Code. Although this section is not directly applicable to cases under the CNS Act, the absence of independent witnesses without any valid reason creates a doubt that necessitates reliable evidence to eliminate. Reliance in this regard can be placed on relevant case law. reported as 'Wakwul v. The State' (2024 P.Cr.LJ 592) which reveals as under:

"Under the given circumstances, the doubt thus, created in further compounded by the absence of private persons serving as witnesses to the arrest and seizure, with the judgment of a learned Division Bench in the case reported as Murad Ali v. The State addressing this aspect, as follows:

"Admittedly, the police had prior information of the alleged incident that the present appellant along with absconding accused was coming on motorcycle having narcotics in their possession but despite of that they did not bother to collect any private person to witness the incident. The exclusion of section 103 of the Code by Section 25 of the Act is not meant completely absolve the police from asking for private mashirs to witness a recovery process, therefore, whenever an attempt to associate private mashirs is not likely to result in escape of the accused the same be not avoided."

10. Upon perusal of the memo of arrest and the FIR, we observed that there is no mention of the recovered pieces of charas being wrapped or

pasted with yellow panni. . Complainant ASI Yar Muhammad and Mashir HC Wazir Ali, both during their cross-examination, also testified that the recovered charas was plain and not wrapped in any panni. Subsequently, during the proceedings, at the request of the learned defense counsel, the parcels containing the remaining property and the charas returned by the Chemical Laboratory were de-sealed. It was then discovered that each piece of charas was wrapped in yellow panni. This inconsistency raises significant doubts about the identity of the property. The charas sent to the Chemical Laboratory, which was wrapped in yellow panni, cannot be conclusively believed to be the same charas recovered in the presence of the complainant and the mashir, both of whom categorically stated that the recovered charas was not wrapped in any panni. Additionally, the Chemical Examiner's report does not include any description indicating whether the two large and one small pieces of charas were received with yellow panni. This omission further casts doubt on the reliability of the chemical report. It remains uncertain whether the charas analyzed by the Chemical Laboratory and subsequently returned relates to the contraband allegedly recovered from the possession of the accused or pertains to a different case altogether.

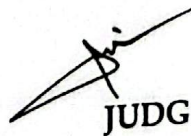
11. The learned Assistant Prosecutor General failed to provide a satisfactory explanation regarding the material contradictions in the description of the case property allegedly recovered on 19-05-2023 at 2115 hours near 'Bughia Bridge' and the pieces of charas taken out from the parcels. As a result, tampering with the case property cannot be ruled out under the circumstances discussed above. Consequently, the safe custody and transportation of the sample parcel are brought into question. Reliance in this regard is placed on the case of Mst. Marvi & another v. The State (2019 P.Cr.L.J 1133) [Sindh(Hyderabad Bench)] wherein the articles contained in the parcel showing description being covered with yellow colour plastic panni but said description of case property has not been mention in the memo of arrest and recovery, therefore, tempering in the case property under the circumstances of the case could not be ruled out. It was also held that no official from the Director Laboratories and Chemical Examiner has been examined in this case to corroborate the case of prosecution like in the above case in hand, therefore, under these


circumstances no reliance can safely be placed on chemical report for conviction of the appellant on the basis of contradictory evidence.

12. The prosecution has failed to provide a satisfactory explanation for the discrepancies identified in their evidence. The appellant has raised a specific plea that SHO Akhtar Abro had forcibly removed him from the passenger Coach at Umrani Laro, Jacobabad, on 17-05-2023, and robbed him of Rs. 300,000/-, subsequently handing over his custody to HC Wazir Ali. A thorough scrutiny of the evidence reveals several contradictions, as outlined above. Reliance is placed on the case of Tez Ali v. The State (2018 P.Cr.L.J Note 30).

13. In light of these circumstances, we are of the opinion that the conviction of the appellant is liable to be set aside. The prosecution has failed to prove its case, and the trial Court did not adequately consider the material discrepancies and loopholes in the prosecution's evidence, which undermined the reliability of the evidence presented to support the charge against the accused.

14. Based on the above discussion and the evidence presented, we allow the appeal, set aside the conviction of the appellant, and acquit the appellant of the charge. These are the reasons for our short order dated 01-01-2025.


JUDGE


JUDGE