

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

Cr. Appeal No. D-02 of 2015

PRESENT:

Mr. Justice Naimatullah Phulpoto
Mr. Justice Zulfiqar Ahmad Khan

Appellant : Ali Akbar through
Mr. Ahsan Gul Dahri, Advocate

Respondents : The State
through Syed Meeral Shah Bukhari, D.P.G.

Date of hearing : 22.05.2017
Date of judgment : 22.05.2017

J U D G M E N T

ZULFIQAR AHMAD KHAN, J:- Appellant Ali Akbar s/o Muhammad Ibrahim Mallah faced trial before learned Special Judge (Narcotics), Shaheed Benazirabad in Special Case No. 307 of 2012 for offence under Section 9(c) Control of Narcotic Substance Act, 1997. By judgment dated 22.12.2014, the appellant was convicted and sentenced to undergo R.I for six years and six months and to pay fine of Rs.30,000/-. In default of the payment of fine, he was to undergo S.I for six month more. Benefit of Section 382-B Cr.P.C. was extended to the appellant.

2. Brief facts of the prosecution case as per FIR are that on 7.8.2012 at 1225 hours at Dargah Syed Muhammad Shah, near Bhaley Dino, Taluka Dour present accused Ali Akbar Mallah was found possessing six big and one small piece of charas weighing 3100 grams, out of which 310 gram charas was separated for chemical examiner, by police party headed by SIP / SHO Ghulam Awais

Mangrio in presence of mashirs ASI Muhammad Muneer and HC Muhammad Ismail. The substance was sealed at the spot under a mashirnama whereafter the accused and the case property were brought at police station where SIP / SHO Ghulam Awais Mangrio, lodged FIR No. 28 of 2012 at Police Station Bandhi. The complainant / I.O investigated the case, examined witnesses under Section 161 Cr.P.C. dispatched substance to the chemical examiner Sukkur at Rohri, collected report in positive and submitted charge sheet in the court of law for offence punishable under Section 9(c) Control of Narcotic Substance Act, 1997.

3. Formal charge at Ex.3 was framed against the accused to which he pleaded not guilty and claimed to be tried.

4. The prosecution in order to prove its case examined PW-1, ASI Muhammad Muneer, mashir at Ex.7, who produced mashirnama of arrest and recovery at Ex.7-A, P.W-2 complainant SIP / SHO Ghulam Awais Mangrio at Ex.9, who produced FIR at Ex.9-A, copy of roznamcha entries of departure and arrival at police station at Ex.9-B and 9-C and Chemical report at Ex.9-D.

5. Statement of accused under Section 342 Cr.P.C. was recorded at Ex.11, in which accused claimed false implication and denied prosecution allegation. He stated that charas has been foisted upon him on the instance of one Haji Bachal Jamali who had enmity with him. He neither examined himself on oath nor led any witness in disproof of prosecution allegations.

6. Learned 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 vide judgment dated 22.12.2014, hence this appeal.

7. Brief facts of the prosecution and the evidence finds an elaborate mention in the judgment of the trial court and need not to repeat the same to avoid unnecessary repetition.

8. Mr. Ahsan Gul Dahri, learned advocate for appellant has mainly contended that it was the case of spy information but the complainant failed to associate any person of the locality to witness the recovery proceedings. He has further contended that the charas was recovered from the possession of accused on 07.08.2012 but it was sent to the chemical examiner on 10.08.2012. The safe custody during that period has not been established. It is also contended that neither WHC of the police station nor HC Muhammad Ashraf who had taken sample to the chemical examiner have been produced before the trial court for their evidence. It is contended that there was no evidence that how many grams were taken from the each rod for sending to the chemical examiner. Lastly, it is submitted that there was overwriting in the roznamcha entry. In support of his contentions, learned counsel has placed reliance on the case of *TARIQ PERVEZ V/S. THE STATE (1995 SCMR 1345)*, and *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*.

9. Syed Meeral Shah, Additional Prosecutor General, appearing for the State conceded to the arguments raised by learned counsel for the appellant and recorded no objection. He did not support the judgment of the trial court.

10. We have carefully heard the learned counsel for the parties and scanned the entire evidence in the light of case law cited by the counsel for the appellant.

11. In our considered view the prosecution has failed to prove its case against the appellant for the reasons that according to the case of prosecution charas was recovered from the possession of accused on 07.08.2012 on spy information and it was sent to the chemical examiner on 10.08.2012. It is the contention of the defence counsel that the prosecution failed to establish the safe custody of charas at Malkhana for three days. Safe transit to the chemical examiner has also not been proved. HC Muhammad Ashraf who had taken sample to the chemical examiner has not been produced before the trial court for recording the evidence. It was the case of the spy information and the SHO had sufficient time to call the private persons but no effort whatsoever were made by him to call the independent persons of the locality. There was nothing on the record that

how much grams were taken / drawn from the each of 6 big and 1 small pieces recovered from the accused for sending the same to the chemical examiner for analysis. In such circumstances, we are unable to rely upon the evidence of the police officials without any independent corroboration which is lacking in this case. Moreover, there was delay of three days in sending the sample to the chemical examiner. WHC of the police station with whom the case property was deposited in malkhana has not been examined so also the PC who had taken the sample to the chemical examiner to satisfy the court that the charas was in safe custody. In this regard reliance is placed upon the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*, the relevant portion 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.”

12. In our considered view, prosecution has failed to prove that the charas was in safe custody for the aforementioned period. Even positive report of the chemical examiner would not prove the case of prosecution. There are also several circumstances which create doubt in the prosecution case. Under the law if a single doubt is created in the prosecution case, it is sufficient for recording the acquittal. In the case of *Tariq Pervez V/s. The State (1995 SCMR 1345)*, the Honourable Supreme Court has observed as follows:-

“It is settled law that it is not necessary that there should 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.”

13. While relying upon the aforesaid authorities and keeping in view no objection has been raised by the learned A.P.G, we have no hesitation to hold that the prosecution has failed to prove its case against the accused. Resultantly, the impugned judgment dated 22.12.2014, passed by the trial court is set aside. The appeal is allowed. Appellant is acquitted of the charge. Appellant was present when by our short order dated 22.05.2017 his bail bond was cancelled and surety was discharged. These are the reasons of our short order whereby we had allowed the appeal.

JUDGE

JUDGE

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The learned trial court framed the following point for determination.

- Point No.1. Whether substance recovered from the accused by SIP Ghulam Awais Mangrio SHO PS Bandhi is charas as alleged by the prosecution?
- Point No.2. Whether on 7.8.2012 at 1225 hours, at Dargah Syed Muhammad Shah, near Bhaley Dino Taluka Dour, present accused Ali Akbar Mallah was found possessing 3100 grams charas, secured by SIP / SHO Ghulam Awais Mangrio in presence of mashirs as alleged by prosecution?
- Point No.3. What offence if any is proved against accused?

The findings on above points with reasons as under:-

Point No.1 Proved.

Point No.2 Proved

Point No.3 Accused Ali Akbar Mallah is convicted under Section 265-H(2) Cr.P.C.

After recovery of substance six big and one small pieces of charas weighing 3100 gram, out of which 310 gram was separated and sent to the chemical examiner, Sukkur at Rohri, who vide his report Ex.9-D has opined that it was charas, the report of expert was not challenged by the defence. The defence contended that the substance was not recovered from the accused which is subject matter of point No.2. Thus the point No.1 stands answered accordingly.

To prove its case the prosecution has examined complainant SIP / sho Ghulam Awais Mangrio, and ASI Muhammad Muneer, mashir who both deposed in line with memo of arrest and recovery and FIR stating that on 7.8.2012 they left police station along with other staff namely HC Muhammad Ismail, PC Imdad Ali, PC Abdul Razaq and driver HC Ali Gul, vide roznamcha entry No.5, at 11-00 hours, for patrolling. Partrolling from different places when they reached at Amerji Mori where he received spy information that one person namely Ali Akbar Mallah standing at Dargah of Syed Muhammad Shah possessing Charas for selling the same. They proceeded pointed place reached there at 1225 hours, saw one person seeing them in police uniform in police vehicle. They alighted from vehicle and caught hold him. On enquiry he disclosed his name as Ali Akbar s/o Muhammad Ibrahim Mallah R/o Taluka

Daur. Due to non-availability of private persons complainant appointed ASI Muhammad Muneer and HC Muhammad Ismail, conducted personal search and recovered six big pieces and one small piece of charas tied with his abdomen wrapped with white cloth piece and also recovered an amount of Rs.600/- (three notes of Rs.100/- denomination, four currency notes of Rs.50/- denomination and 10 currency notes of Rs.10/- denomination). Substance was weighed and found each big piece of 500 grams, and small piece 100 grams, total 3100 grams. 50 grams from each big piece and 10 grams of a small piece was separated for chemical examination and sealed separately. The remaining substance weighing 2790 grams was separately sealed. Such mashirnama was prepared at place of incident and both the P.Ws have testified the accused and property present in the court as same.

Mohammad Paryal Excise Inspector of Excise Police Station Nawabshah Town, lodged his report on behalf of the State stating therein that today i.e. 24.6.2008, he along with his subordinate staff namely E.C Ghulam Mustafa and E.C. Shah Mohammad Khoso, duly dressed and armed with official weapons vide roznamcha entry No.3, on government mobile bearing No.GS-4008, left Excise Police station for detecting Excise crime. During patrolling when they reached at the place of incident viz. Near bold Kazi Ahmed railway crossing, situated on Kazi Ahmed Nawabshah road, they saw that one person was coming on motorcycle via; Kazi Ahmed road, towards Nawabshah city. Have gave signal to said person to stop, who stopped his motorcycle. The motorcycle of the accused was not bearing registration No. He alighted the accused from motorcycle and apprised him Excise laws and enquired name etc; on which the accused disclosed his name to be Sikandar Ali s/o Ghulam Qadir Abbasi R/o Bhangwar colony, Nawabshah. He then cited E.C. Mashooq Ali and E.C. Mohammad Sajjan, as mashirs, and in their presence he took the personal search of accused and secured one plastic shopper from fold of his shalwar. He opened the secured shopper and found 43 rods of charas were lying in it. He also opened the secured cash Rs.250/- from front pocket of the shirt of accused in shape of currency notes of different denomination. He enquired about documents of

motorcycle on which the accused disclosed that documents are not available with him. Then he checked the Chasis No. And Engine No. Of motorcycle which was bearing Chasis No.MAF 300418, and Engine No.247707 and motorcycle was of Super Star Company. He then weighed the secured charas on the spot which become 500 grams, out of which he separated 9 rods of charas weighing 100 grams, as sample and sealed the same for chemical examination, and so also sealed the remaining 34 rods weighing 400 grams, while keeping it in said plastic shopper. He then prepared such mashirnama on the spot, read over its contents to mashirs, who then after accepting it as true and correct put their signatures on it. They then brought the accused along with secured property at Excise police station where he lodged his report against accused for offence punishable under Section 6/9(b) Control of Narcotic Substance Act, 1997.

3. After registration of case he started investigation and recorded 161 Cr.P.C. statements of P.Ws and send sample parcel of charas to the chemical Examiner for examination and report. Then after completion of usual investigation he submitted challan against the accused in the court.

Case papers were supplied to the accused free of cost on proper receipt kept on record at Ex.1. Charge was framed against the accused at Ex.2 for which he did not plead his guilt and claimed to be tried vide plea kept on record at Ex.3.

The prosecution then in order to prove its case examined P.Ws No.1 Excise Inspector Mohammad Paryal complainant at Ex.7, who produced mashirnama at Ex.7-Applicant, FIR at Ex.7-B, attested photocopy of roznamcha entry No.3 and 4 at Ex.7-C, chemical report at Ex.7-D, P.W No.2 E.C. Mashooque Ali mashir at Ex.8. Then the Incharge D.P.P. for the State closed the prosecution side vide statement kept on record at Ex.9.

Statement of accused under Section 342 Cr.P.C. was recorded at Ex.10 in which he has stated that the prosecution case is false. The chemical report is managed one. The P.Ws have deposed against him as they are police officials and interested in the prosecution case. He neither examined himself as D.W on oath under Section 340 Cr.P.C. nor does he examined any other defence witness in his defence. He further stated that his brother is news reporter who exchanged hot words with the complainant therefore; due to said dispute the complainant has implicated him in this false case. Nothing was recovered from his possession and alleged charas has been foisted upon him. He prayed for justice.

The learned trial court framed the following point for determination:-

“Whether on the alleged date, time and place the accused was found in possession of 500 grams charas in shape of two big pieces lying in plastic shopper recovered from fold of his shalwar, and cash Rs.250/- from front pocket of his shirt, by the Excise Police party headed by Excise Inspector Mohammad Paryal, of Excise Police station Nawabshah Town, as alleged by the prosecution

The learned trial court after hearing counsel for both the parties gave finding on the above point as under:-

Point No.1 In positive. The accused is convicted under Section 265-H(2) Cr.P.C. and sentenced to undergo simple imprisonment for six months and to pay fine of Rs.10,000/- in default to further undergo simple imprisonment for one month more. The benefit of Section 382 B Cr.P.C. was granted to the accused for the period which he has already undergone as under trial prisoner in this case.

On this point there is evidence of P.W-1 Excise Inspector Mohammad Paryal complainant and P.W-2 E.C. Mashooq Ali mashir.

P.W-1 Excise Inspector Muhammad Paryal complainant deposed that on 24.6.2008, he was working as Excise Inspector at Excise Police Station Nawabshah Town. He along with his subordinate staff namely E.C. Shah Muhammad E.C. Zulfiqar Ali, E.C. Dad Muhammad E.C. Muhammad Sajjan, E.C. Ghulam Mustafa, and E.C. Mashooq Ali vide roznamcha entry No.3 on government mobile bearing No. GS-4008 left their police station at 2:00 p.m. for detecting Excise crime. They were on Kazi Ahmed road, when they saw one person on motorcycle who was coming towards city side. He gave signal to said person to stop. The motorcycle of accused was not bearing registration number. He alighted accused from motorcycle and apprised him about Excise laws. He enquired name etc from the accused on which he disclosed his name to be Sikandar Ali s/o Ghulam Qadir, by caste Abbasi R/o Bhangwar Colony Nawabshah city. He cited E.C. Mashooq Ali and E.C. Mohammad Sajjan as mashirs and took the personal search of accused and secured one plastic shopper from fold of his shalwar below his shirt. He also secured cash Rs.250/- from front pocket of his shirt. He enquired from the accused about the registration book of motorcycle on which he disclosed that he has no registration book of motorcycle in his possession. He checked the motorcycle which was bearing Chassis No.MAF-300418, and Engine No. 247707. The said motorcycle was of Super Star Company. He opened the secured plastic shopper and found that 43 rods of charas were lying in said shopper. He separated 9 rods of charas

weighing 100 grams from the secured rods of charas and sealed the same as sample for chemical examination, and so also sealed separately remaining 34 rods weighing 400 grams, while keeping it in same plastic shopper and then while keeping it in white paper sealed the same separately. He arrested the accused and secured motorcycle. He then wrote mashirnama of arrest and recovery on the spot, read over its contents to mashirs, who after hearing the contents of mashirnama accepted it as true and correct and put their signatures on it. They then brought the accused at Excise police station Nawabshah where he lodged his report against accused. He recorded 161 Cr.P.C. statements of mashirs. He submits that challan against the accused in the court. He produced mashirnama of arrest and recovery at Ex.7-Applicant and accepted it to be same, and bears his signature and signatures of both mashirs. He produced FIR at Ex.7-B, and accepted it to be same and bears his signature. He produced attested photocopy of roznamcha entry No.3 and 4 at Ex.7-C and accepted them to be same. He send sealed sample parcel of charas to the chemical examiner Rohri for examination and report. He produced chemical report at Ex.7-D and accepted it to be same. He produced sealed sample parcel of charas checked by the chemical examiner at Article-Applicant and accepted it to be same. He produced sealed parcel of remaining 400 grams charas at Article B, and accepted it to be same, and bears his signature and signature of both mashirs. He produced two currency notes of Rs.100/- one currency note of Rs.50/- at Article C to E. He identified the accused present in the court to be same.

In cross examination to the Advocate for the accused he stated that they reached at place of incident at 2-00 P.M. Again says at 3-00 P.M. At the time of incident there was population around the place of incident, but now there is population. He denied the suggestion of the Advocate for the accused that i.e. old society and Ghulam Hyder Shah Colony is in the vicinity of place of incident. He denied the suggestion of the Advocate for the accused that there was scholl near the place of incident. Voluntarily says now Sachal School has been constructed there and previously there was no school building at that time. The place of incident was 45-50 paces ahead from Kazi Ahmed Railway crossing. The place of incident is on northern side from Sachal School at the distance of about 40/50 paces away. No any person during that period came at the place of incident. There was no body except accused at the place of incident. He did not try to cite any person from locality. He admitted the suggestion of the Advocate for the accused that peoples were present at the railway crossing. He denied the

suggestion of the Advocate for the accused that he sealed the parcels at police station Excise, and not at the place of incident. He denied the suggestion of the Advocate for the accused that sealing material and weighing scale was not available with them at the place of incident. He denied the suggestion of the Advocate for the accused that he arrested the accused from dry clean shop situated near Regal Cinema and foisted charas upon him in order to show his efficiency.

P.W-2 E.C. Mashooque Ali mashir deposed that on 24.6.2008, he was working at E.C. at Excise police Nawabshah. On the same date he along with Excise Inspector Mohammad Paryal Bhambro, E.C. Shah Muhammad, E.C. Zulfiqar Ali, E.C. Dad Muhammad, E.C. Muhammad Sajjan, E.C. Ghulam Mustafa left their police station on government mobile at 2-00 p.m. for detecting Excise crime, vide Roznamcha Entry No.3. They reached at the place of incident viz. old railway crossing Kazi Ahmed Nawabshah road, Nawabshah and saw that one suspected motorcycle was coming. They stopped said motorcycle and found that motorcycle was without registration number. The complainant alighted the motorcycle rider from said motorcycle, apprised him Excise laws and enquired name etc; from him on which he disclosed his name to be Sikandar Ali s/o Ghulam Qadir by caste Abbasi R/o Bhangwar colony, Nawabshah. The complainant took the personal search of accused and secured one plastic shopper from fold of his shalwar below his shirt. The secured shopper was opened and it was found that 43 rods of charas were lying in the said shopper. On further search cash Rs.250/- was also recovered from front pocket of his shirt. Enquiry was made from accused about documents of motorcycle on which he disclosed that he is not in possession of the documents of motorcycle. The Chassis No. and Engine No. of motorcycle was checked and found that the Chassis No.MAF 300418, and Engine No.247707. The secured charas weighed which become 500 grams, 9 rods of charas weighing 100 grams, was separated from the secured rods of charas and was sealed separately. The remaining 34 rods of charas weighing 400 grams was sealed separately. The accused was arrested and motorcycle was secured. Such mashirnama was prepared by complainant and its contents were read over to him and E.C. Muhammad Sajjan and they then while accepting it as true and correct put their signatures on it. They then brought the accused along with secured property at Excise police station Nawabshah, where complainant lodged his report against accused. He saw mashirnama at Ex.7- Applicant and accepted it to be same and bears his signature, signature of co-

mashir E.C. Muhammad Sajjan and complainant. His 161 Cr.P.C. statement was recorded. He saw sealed sample parcel of charas checked by chemical examiner present in the court at Article Applicant and accepted it to be same. He saw sealed parcel of remaining 400 grams charas present in the court at Article B, and accepted it to be same and bears his signature and signature of co-mashir and complainant. He saw two currency notes of Rs.100/- one currency note of Rs.50/- present in the court at Article C to E, and accepted them to be same. He also identified the motorcycle standing outside the court to be same which is brought by the accused as it is restored to him on superdari.

In cross examination of the advocate for the accused he admitted the suggestion of the advocate for the accused that Ghulam Hyder Shah Colony, and Housing Society is in the vicinity of place of incident. He admitted the suggestion of the advocate for the accused that there is school at the corner. He admitted the suggestion of the advocate for the accused that at railway cross the Railway peoples are available and so also the police constables. He admitted the suggestion of the advocate for the accused Sachal School is adjacent to place of incident and peoples remains present at Sachal School. He admitted the suggestion of the advocate for the accused that they were at the place of incident, the peoples cross the said road by foot and so also vehicles. The Excise Inspector asked the passer by people to act as mashir but they refused. He denied the suggestion of the advocate for the accused that they brought the secured property at Excise Office, Nawabshah and then prepared parcels and sealed the same. He denied the suggestion of the advocate for the accused that they neither arrested the accused from the place of incident nor charas cash and motorcycle was recovered by them from his possession. He denied the suggestion of the advocate for the accused that they brought the accused from dry clean shop situated at Regal Cinema and then foisted charas upon him.

The In-charge District Public Prosecutor for the State argued that the prosecution has examined two witnesses viz. Complainant and mashir in this case, and they have fully supported the prosecution case. All the documents viz. FIR, mashirnama, roznamcha entry are produced by the prosecution, and the ocular version of the prosecution is supported by chemical report issued by the chemical examiner certifying that the material recovered from the possession of the accused is charas. There is no any major contradiction in the evidence of both

the prosecution witnesses. He therefore, prayed that the accused may kindly be convicted.

5. Learned trial court after hearing the learned counsel for the parties and examining the evidence available on record by judgment dated 31.05.2005 convicted and sentenced the appellant / accused as stated above.

6. Mr. Hussain Bux Solangi, learned counsel for the appellant contended that the prosecution has failed to produce arrival and departure entries in the evidence. It was also contended that no official car was used and even the car was admittedly driven by a private person whose details are not provided. The Learned counsel contended that charas as allegedly recovered from the possession of the accused on 26.06.2004 was sent to the chemical examiner for analysis on 06.07.2004 (after the delay of 10 days) and the prosecution has not plausibly explained with regard to this delay in sending the charas to the chemical examiner. It is argued that it has not come in the evidence that at all these times the charas was in safe custody. As well as neither the person who sent the charas was examined nor the Incharge of the Malkhana. Safe passage of charas in the hands of private courier company is highly questionable. The learned counsel also submitted that while the arrest was made in daylight from a main road, however no private persons present at the time of the arrest of the accused were made mashirs. It was next contended that evidence of the officials was dishonest as they deliberately suppressed facts. Referring to the enmity of the accused with the complainant, who also acted as investigation officer, the learned counsel contended that the trial court inter alia failed to appreciate this aspect as well as blatantly ignored the holes in the prosecution evidence, but still chose to convict the accused against the settled principles of law.

7. Syed Meeral Shah Bukhari, learned DPG on account of apparent infirmities and delay of 10 days in sending charas to the chemical examiner, and that too by a private courier did not support the impugned judgment.

8. Heard the counsels and perused the records very minutely. From the close scrutiny of the evidence it transpires that the accused was arrested by Nazar Muhammad Sial, Excise and Taxation Officer Dadu in presence of mashirs on 26.06.2004 at 4:00 p.m near Moundar Octroi Post Dadu town. In his examination in chief P.W-1, has deposed that he along with his colleagues left office for detecting the narcotics crime. When they reached at Moundar Naka, they found one suspected person, who disclosed his name as Ghulamullah s/o Lal Bux. When he took personal search of that person in the presence of mashirs, he

recovered one plastic bag from the fold of his Shalwar, in which one piece of charas was lying. He arrested the accused and weighed the charas at the spot which became 500 grams. He also recovered Rs.120/- from the front pocket of the accused. He sealed the charas. He deposed that the Memo of arrest and recovery was prepared at the spot in presence of mashirs namely Zafarullah Ghalo and Dodo Jatoi. He then brought the accused and the case property at Circle Office and lodged FIR against the accused and sent the entire quantity of charas to the Chemical Examiner and thereafter he received a positive report. He affirmed that he did not keep the entry about their departure or arrival because they were not maintaining any Roznamcha in their office. He also affirmed that their departure time from the Circle Office is not mentioned in the FIR and affirmed that they were patrolling in private car of his friend which was being driven by its driver, who was also a private person. He deposed that after leaving their office they came to Ali Restaurant and that he does not remember the time when they reached Ali Restaurant, notwithstanding that the distance between their office and Ali Restaurant is about only one kilometer. He further affirmed that he has not mentioned that from which particular point of Moundar Naka the accused was arrested. He admitted that while the Moundar Naka is situated on the main road and many persons were passing by but he did not find any person except the accused standing at Moundar Naka and that he apprehended the accused at the first instance. He deposed that he approached some private persons at to act as mashir but they refused, however that this fact has not been mentioned in the FIR or in the memo of arrest and recovery nor names of those persons have been given. While he admitted that it can take about five minutes in reaching Moundar Naka from their office and that after completing formalities at the place of incident, they came directly to their office, but he had no answers as to why he lodged the FIR after 2/3 hours after their reaching the office. As to the dispatch of the charas, he deposed that he does not remember particular date but he remembered that he sent the property to the Chemical Examiner after 2 of 3 days of the incident and that the property was sent to the Chemical Examiner through private courier service. He admitted that Majid Shahani is known to him but denied that it is at his instance that the accused has been booked in this case.

9. P.W-2 Dafedar Zafarullah deposed that he left the office under the command of Inspector Muhammad Sial, but admitted that they were in a private car. He further admitted that the place from where the accused was arrested was a main road where many persons were passing from there, but he did not make

any effort to call private persons to act as mashirs. While he deposed that the accused was *jointly apprehended*, the P.W-1 in his statement (Ex-5) has stated that "*I arrested the accused*". It is also interesting to note that there is no mention in the deposition of both of the prosecution witnesses as to how the charas was weighted. Did the patrolling team possessed the weighing scale or charas was weighed by using some nearby shop's scale.

10. D.W-1, Ashique Hussain deposed that about 10/11 months back, he was coming from Mehar to Dadu in a Wagon, in which accused was also traveling. When their wagon reached at Dodani Mori, police was present there and the Wagon was stopped. Police took out the accused from the Wagon and took his personal search, but nothing was recovered from his possession. Accused was kept by police and the wagon was let go along with other passengers. He affirmed that Inspector Nazar Muhammad Sial was also with police party.

11. From the basis of the foregoing, following points of facts and law arise for the determination of this court:

- (a) The patrolling team kept no record of departure or arrival by way of roznamcha
- (b) The team admittedly left in a private vehicle
- (c) Charas was found in the possession of the accused arrested from main road but no private mashirs were taken
- (d) No details as to how the charas was weighted are provided by any of the prosecution witnesses
- (e) Charas was sent for chemical analysis after the delay of 10 days
- (f) Charas was sent by a private courier
- (g) Inimical relations exist between the accused and the investigation officer
- (h) Contradictions in the evidence of the prosecution witnesses.

12. In the following, each of these points will be addressed:

- (a) The patrolling team kept no record of departure or arrival by way of roznamcha

It is an admitted fact that the neither the departure/arrival roznamcha entries are produced during the trial, nor they have been mentioned in the FIR or the prosecution witnesses' statements. In his cross, Inspector Nazar Muhammad admitted that '*I did not kept the entry about our departure or arrival because we are not maintaining roznamcha*'.

Section 44 of the Police Act, 1861 obligates keeping of daily diary (roznamcha) records. The intent of this section is expounded in Rule 22.48(2) of the Police Rules, 1934 which describes that daily diary is to serve as a complete record of all events which take place at the police station, such events not only to include the movements and activities of all police officers. The very purpose of these provisions is to create sense of accountability and to keep a constant vigil on daily activities taking place between the four corners of a police station. Rule 22.48 requires that daily diary is to be kept in the shape of prescribed Form 22.48 named as Register No. II. Rule 22.49 makes a selective list of the matters which must be entered in the Register No. II, of relevance is the entry (c) which is reproduced in the following:

- (c) The hour of arrival and departure on duty at or from a police station of all enrolled police officers of whatever rank, whether posted at the police station or elsewhere, with a statement of the nature of their duty. This entry shall be made immediately on arrival or prior to the departure of the officer concerned and shall be attested by the latter personally by signature or seal.

The failure of production of Roznamcha entries is dealt with iron hands by the courts as it been held that such a failure is fatal to the extent of '*cutting very root of the prosecution case*'. In the case of *Shahid Iqbal vs. The State* (2016 MLD 230) Court held that "*prosecution had failed to prove its case against accused beyond any shadow of doubt for the reasons that despite contention of defence counsel, arrival and Roznamcha entries had not been produced in evidence, in order to satisfy the court that Police party had actually left at relevant time for patrolling. Non-production of departure and arrival entries in evidence would cut the roots of prosecution case.*" In the case of *Mashooque Ali Mallah vs. The State* (2016 P.Cr.L.J 08) Court refused to uphold the conviction awarded by the trial court on the ground that "*Police party left Police Station through Roznamcha entry, but original departure and arrival entries had not been produced at trial, in order to show that Police party had actually left Police Station for investigation of crime registered at Police Station*". On account of the failure of the prosecution party maintaining and to have produced original departure and arrival entries, it could not be said that they at all left for patrolling. This fatal error, cutting the root of prosecution's case, will obviously yield benefit to the accused.

- (b) The team admittedly left in a private vehicle

Patrolling duties in town and cities are conducted as per Police Rule 21.34, however in rural stations these duties are regulated by Rule 23.1 which provides that the officers in charge of police stations and assistant sub-inspectors at those stations are empowered to move about in their jurisdictions '*freely*'. While no provisions are made under these Rules enabling patrolling to be done in private vehicles, however the freedom of movement granted under Rule 23.1 could obviously not be impaired in case

patrolling is necessitated when no official vehicles were handy. The Rules however (in the greater interest of docketing) have provided a mechanism where a proforma in the shape of Form 22.43(4) is provided which requires when any travel within the sphere of duty is performed, the said proforma is needed to be filled, for one of the simple reason that costs incurred in such a travel needs to be reimbursed in accordance with Rules. Notwithstanding therewith, details of such private vehicle are needed to be made in the daily diary. In the case of Muhammad Hussain vs. The State (2012 YLR 768) Court admitted the accused on bail on the ground that “*F.I.R. had stated that Police party went patrolling in a private car. From where the said private car came, was not stated in the F.I.R. and prosecution was also unable to make any statement in that regard.* Accordingly unless details of the private vehicle are provided in the roznamcha, duly supported by the appropriate form as prescribed by the Police Rules, it acts done by patrolling on private vehicles will be seen dubious and any benefit of doubt created with such an uncertainty will definitely be passed on the accused.

- (c) Admittedly charas was found from the possession of the accused at Moundar Naka which is a main road, however no private mashirs were taken.

This deficiency is however held by the Apex court to be of no consequence [Karl John Joseph vs. The State (2004 PLD 394 SC)]. However this aspect was differently dealt with in the case of Riaz Ahmed vs. The State (2004 PLD 988 SC) where the Apex Court altered the said finding and held that *unless it is brought to the record that police officials have any malice against the accused/witnesses, police officials were as good witnesses as private persons of the society.*

- (d) No details as to how the charas was weighted are provided by any of the prosecution witnesses

The manner in which charas was weighed has not be described by any of the prosecution witnesses. PW-1 has stated that “the charas was weighed at the spot and it was 500 grams”. This clearly shows that the patrolling party was without investigation bag of which scales are integral part. It is not confidence aspiring that the patrolling party left their offices for ‘*detecting narcotics crime*’ without an investigation bad or without a weighing scale. Be that as it may, no details are given as to how the secured charas was weighed. This point has been considered in the recent judgment of Akramullah vs. The State (2017 YLR 712) where a Divisional Bench of the Hon’ble Islamabad High Court has raised red flag on such discrepancy and held that this act is not ‘confidence aspiring’.

- (e) Charas was sent for chemical analysis after the delay of 10 days

As per Ex-6 and FIR, charas was ceased on 26.06.2004 whereas Ex-5 (Chemical Examination Report) shows that the sample arrived at the laboratory on 06.07.2004, after a delay of 10 days

and there was no evidence that Charas was in the safe custody in between this intervening period. In the above stated circumstances, positive report of Chemical Examiner would not improve the case of prosecution. This finds support from the dictum laid down in the recent cases of *Shahid Dada vs. The State* (2017 MLD 288), *Arshad Mehmood Khan vs. The State* 2017 P.Cr.L.J 668), *Hussain Bux vs. The State* (2017 P.Cr.L.J 501), *Saeed Gul vs. The State* (2016 YLR 1205) and *Khani Gull vs. The State* (2016 YLR 1093). In all of these case court has held that handing of charas from its taking over from the accused to passing it off to prosecution witness including its safe custody in the Malkhana, and its onward delivery to constable to be taken to laboratory has to be seamlessly evidenced. Court held that prosecution was under duty to establish by cogent evidence that the charas, seized from possession of accused, had been kept in safe custody and the Malkhana. As in the case at hand, no explanation has been provided as to what transpired in the 10 days' long period, thus these vacuums in the prosecution's case inspire no confidence.

- (f) Charas was sent by a private courier

It is very interesting in this case that admittedly charas was sent by a private courier. While it is highly questionable as to how a private courier could ship a narcotic substance, this act of the IO is highly questionable. As discussed in the foregoing paragraph it is the duty of the prosecution to establish a seamless trajectory from the point of seizure of a narcotic substance to its safe delivery at the laboratory. Guidance in this regards could be obtained from the case of *Ikramullah & Others vs. The State* (2015 SCMR 1002), of which the relevant portion is reproduced as under:-

“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 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.”

- (g) Inimical relations existing between the accused and the investigation officer

The appellant has clearly stated in his S.342 Statement that the complainant Nazar Muhammad Sial had friendship terms with one Majeed Shahani, who was annoyed with him on his refusal to provide him girls. He further stated that the complainant Nazar Muhammad Sial is still harassing him and his wife by filing applications against them. He in fact has produced a photocopy of such an application made by Nazar Muhammad Sial as Ex.9/A. It is important to note that to rebut these allegations the prosecution failed to produce Majeed Shahani. As mentioned in paragraph (c), the Apex Court in the case of Riaz Ahmed vs. The State (2004 PLD 988 SC) has shadowed evidence of police officials in a case wherein malice is alleged by the accused towards police of investigating officer.

(h) Contradictions in the evidence of the prosecution witnesses

We have already observed that prosecution case appears to be unnatural and unbelievable. While the incident took place at a main road, but no private mashirs were made or even asked. Also the officials were patrolling with the objective of detecting narcotics trade, however they did not have a weighing scale. Patrolling was being done in a private car, driven by private person. Charas was sent after delay of 10 days and that too via a private courier. Admittedly, in this case there are several circumstances which have created serious doubts in the prosecution case. It is settled law that a single circumstance which creates doubt in the prosecution case is sufficient to extend benefit of doubt to the accused. 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. This has been held by Hon'ble Supreme Court in the case of Tariq Pervez vs. The State (1995 SCMR 1345)

13. On account of the above infirmities and while relying upon the above cited authorities, we vide our short order dated 05.04.2017 allowed this appeal and set aside the conviction and sentence recoded by the learned trial court vide its judgment dated 31.05.2005. These are the reasons of our short order.

JUDGE

JUDGE