IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD

Cr.Appeal No. D- 35 of 2008

PRESENT:

Mr. Justice Abdul Maalik Gaddi.
Mr. Justice Arshad Hussain Khan.

Appellant produced in custody by SIP Haji Muhammad PS Pangrio in response to NBWs issued against him.
Surety present in person.
Syed Meeral Shah Bukhari, A.P.G. for the State.

Date of hearing : 29.01.2018.
Date of judgment : 29.01.2018.

J U D G M E N T

ABDUL MAALIK GADDI, J:- Appellant present submits that he is a poor person, aged about 80 years and since long he is not in contact with his counsel as well he was not aware about the date of hearing as he was lying ill, hence he requests that the order dated 17.01.2018 and 23.01.2018, by which NBWs were issued against him and notice u/s 514 Cr.P.C. was issued against his surety may be recalled and they may be pardoned this time as they are very poor persons.

Accordingly, keeping in view the health condition of the appellant who appears to be of more than 80 years and seems to be a poor person, facing trial since 2004 as well on humanitarian ground and while taking lenient view, the order dated 17.01.2018 and 23.01.2018, whereby NBWs against the appellant and notice to his surety were issued, are hereby recalled and this appeal is taken up for hearing as the appellant states that he may be heard in person.

2. Appellant Leemoon s/o Masoo by caste Leghari faced trial before learned Special Judge for Narcotics/Sessions Judge, Badin in Special Case No. 186 of 2004 for offence under Section 9(b) Control of Narcotic Substance Act, 1997. By judgment dated 22.04.2008, the appellant was convicted and sentenced to suffer R.I for 02 years and to pay fine of Rs.10,000/-. In case of default in payment of fine, he was to undergo R.I for 15 days more. Benefit of Section 382-B Cr.P.C. was extended to the appellant.

3. Brief facts of the prosecution case as per FIR are that on 05.09.2004, complainant SIP Abdul Rauf Nohrio alongwith his subordinate staff was on patrolling duty and after patrolling from the different places, when they reached at Pitafi bus stop, a person on seeing the police party tried to run away but he was apprehended and identified to be the present appellant. On his personal search, police recovered one plastic theli from the pocket of his shirt containing 110 grams charas. Such memo of arrest and recovery was prepared in presence of mashirs LNC Muhammad Tayab and DPC Ghulam Qadir. Thereafter, accused and case property were brought at the police station where the complainant lodged FIR No.54 of 2004 at P.S. Pangrio.

4. After registration of FIR, complainant/I.O. himself investigated the case and after usual investigation submitted challan before the competent court of law.

5. The charge against the accused was framed under Section 9 (b) Control of Narcotic Substance Act, 1997 at Ex.2, to which he pleaded not guilty and claimed to be tried.

6. Prosecution in order to prove its case, examined PW-1 LNC Muhammad Tayab at Ex.5 and PW-2 complainant/IO SIP Abdul Raoof Nohrio at Ex.6, who produced mashrinama of arrest and recovery, roznamcha entry, FIR and chemical

report at Ex.7 to 10 respectively. Thereafter prosecution side was closed vide statement at Ex.11.

7. Statement of appellant under Section 342 Cr.P.C. was recorded at Ex.12, in which he claimed false implication in this case and denied the prosecution allegations. He however, neither examined himself on oath nor led any evidence in his defence.

8. 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, hence this appeal.

9. Brief facts of the prosecution case and the evidence find an elaborate in the judgment of the trial court and need not to repeat the same to avoid unnecessary repetition.

10. Appellant present in court submits that since his counsel is not in his contact since long and his age is about 80 years, therefore, he may be heard in person. Heard the appellant in person. He submits that he is innocent and alleged charas has been foisted upon him. He further submits that nothing incriminating has been recovered from his possession. He lastly contended that all the PWs are police officials hence interested witnesses hence he has prayed for acquittal.

11. On the other hand, Syed Meeral Shah, learned Additional Prosecutor General Sindh, appearing for the State conceded that in this case the complainant himself has investigated the matter, therefore, according to him the investigation carried out by I.O. cannot safely be relied upon. He also did not support the impugned judgment in view of case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002).*

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

13. In our considered view the prosecution has failed to prove its case against the appellant for the reasons that on 05.09.2004, complainant alongwith his subordinate staff left police station for patrolling in the area. During patrolling from different places when they reached at Pitafi bus stop, they arrested the appellant in presence of mashirs LNC Muhammad Tayab and DPC Ghulam Qadir and recovered 110 grams charas. It is surprising to note that the police party had arrested the appellant from a bust stop which is a thickly populated area but despite of that the complainant who is also I.O. of the case has not bothered to associate any independent person to witness the recovery proceedings. It has been brought in evidence that the place of incident is a road side where the traffic was available and was surrendered by shops and hotels and it was day time when the incident is alleged to have been occurred but despite of this fact, the complainant did not make any effort to collect any private person from the locality to witness the recovery proceedings. No doubt that the evidence of police official is as good as that of any other witness but when the whole prosecution case rests upon the police officials and hinges upon their evidence and when the private witnesses were available at the place of information or at the place of incident then non-association of private witness in the recovery proceedings create some doubt in the prosecution case. It is settled principle that the judicial approach has to be conscious in dealing with the cases in which testimony hinges upon the evidence of police officials alone. We are conscious of the fact that provisions of Section 103 Cr.P.C. are not attracted to the cases of personal search of accused relating to the narcotics. However, when the alleged recovery was made on road side which is meant for heavy traffic and shops were available there as happened in this case, omission to secure the independent

mashirs, particularly, in the case of patrolling cannot be brushed aside lightly by the court. Prime object of Section 103 Cr.P.C. is to ensure the transparency and fairness on the part of the police during course of recovery, curbs false implication and minimize scope of foisting of fake recoveries upon accused. As observed above, at the time of recovery from appellant, complainant did not associate any private person to act as recovery witness and only relied upon his subordinates and furthermore he himself registered the FIR and investigated the case. In our view, investigation officer of police or such other force, under section 25 of Control of Narcotic Substance Act, 1997 was not authorized to exclude the independent witness. It does not do away with the principle of producing the best available evidence. No doubt that no specific bar exists under the law against complainant who is also the investigation officer of the case, but being the complainant it cannot be expected that an investigation officer he will collect any material which goes against the prosecution or gives any benefit to the accused. Evidence of such officer therefore, is a weak piece of evidence and for sustaining a conviction it would require independent corroboration which is lacking in this case. We are supported with the case of Nazir Ahmed v. The State, reported in PLD 2009 Karachi 191 & Muhammad Khalid v. The State, reported in 1998 SD 155. Hence as observed above, due to non-association of independent witness as mashir in this case, false implication of the appellant cannot be ruled out. We have also noted number of contradictions in the evidence of the prosecution witnesses with the able assistance of learned A.P.G. and when confronted these contradictions to the learned A.P.G, he could not reply satisfactorily.

14. According to the case of prosecution, charas was recovered from the possession of accused on 05.09.2004 and it was received by the chemical examiner on 08.09.2004 after the delay of 03 days which has not been explained

by the prosecution. HC Khuda Bux who had taken sample to the chemical examiner has also not been examined before the trial court. It appears that the prosecution has failed to establish the safe custody of charas at Malkhana for this intervening period. Safe transit to the chemical examiner has also not been proved. Even otherwise the chemical examiner has not been examined in this case who was the best witness to corroborate the evidence of prosecution in respect of the examination of case property therefore, adverse presumption would be taken. 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 03 days in sending the sample to the chemical examiner. WHC of the police station with whom the case property was deposited in Malkhana has also not been examined 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."***

15. 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 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."***

16. While relying upon the aforesaid authorities and keeping in view the material discrepancies in the prosecution case besides no objection extended 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 22.04.2008 passed by learned Special Judge for Narcotics/Sessions Judge, Badin is set aside. The appeal is allowed. Appellant is acquitted of the charge. As observed above the order of issuance of NBWs against the appellant has been recalled therefore, appellant is present on bail. His bail bond stands cancelled and surety discharged.

JUDGE

JUDGE

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