

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

Cr.Appeal No. D- 421 of 2010

PRESENT:

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

Appellant: Muhammad Juman Mallah was on bail but today produced in custody as he has been arrested in some other case.
Through Mr. Nandan A. Kella, Advocate.

Respondent: The State
Through Syed Meeral Shah Bukhari, A.P.G.

Date of hearing : 31.01.2018.

Date of judgment : 31.01.2018.

J U D G M E N T

ABDUL MAALIK GADDI, J:- Appellant Muhammad Juman s/o Allah Warrayo by caste Mallah faced trial before learned Special Judge (Narcotics), Badin in Sessions Case No.25 of 2010 for offence under Section 9(c) Control of Narcotic Substance Act, 1997. By judgment dated 03.11.2010, the appellant was convicted and sentenced to suffer R.I for 03 years and to pay fine of Rs.10,000/-. In case of default in payment of fine, he was to undergo S.I for 03 months 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 02.07.2010, complainant SIP Mir Javed Talpur of CIA Police alongwith his subordinate staff left police station for arresting the proclaimed offenders. During patrolling when they reached at Army Sugar Mill by pass stop, they saw the present appellant

having one green colour plastic bag (Theli) in his hand, who on seeing the police party tried to slip away but was apprehended. The plastic Theli was checked wherein five slabs of charas wrapped in a transparent white plastic were recovered whereupon word "2007 EID MUBARAK ALBANG MUHAMMAD HASHMI SPAKE TEHRAN YAK" was written. The charas was weighed which became 1300 grams. Police also recovered Rs.300/- from the side pocket of the appellant. Thereafter, accused and case property were brought at the police station where the complainant lodged FIR No.261 of 2010 at P.S. Badin.

3. After registration of FIR, I.O. investigated the case and on completion of usual investigation he submitted challan before the competent court of law.

4. The charge against the accused was framed under Section 9 (c) Control of Narcotic Substance Act, 1997 at Ex.3, to which he pleaded not guilty and claimed to be tried vide plea at Ex.4.

5. Prosecution in order to prove its case, examined PW-1/mashir LNC Muhammad Bux at Ex.5, who produced the mashirnama of arrest and recovery at Ex.5/A, PW-2 complainant SIP Mir Javed at Ex.6, who produced FIR and entries of departure and arrival back at P.S. at Ex.6/A to 6/C and IO/SIP Sajjad Hussain at Ex.7, who produced the chemical examiner's report at Ex.7/A, thereafter prosecution side was closed vide statement at Ex.8.

6. Statement of appellant under Section 342 Cr.P.C. was recorded at Ex.9, in which he claimed false implication in this case and denied the prosecution allegations. He further submitted that he has been involved at the instance of Ghulam Qadir Khoso who is adjacent Zamindar and has dispute over the water course, hence in collusion with the police implicated him in this false case. He however, neither examined himself on oath nor led any evidence in his defence.

7. 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.

8. 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.

9. Learned counsel for the appellant submits that the appellant is innocent and has falsely been involved in this case due to enmity with one Zaminder Ghulam Qadir. He further submits that alleged charas has been foisted upon him. He submits that it was day time incident and the appellant was arrested from a busy road where 24 hours vehicles are running but the complainant failed to associate any person of the locality to witness the recovery proceedings. He further submits that there are material contradictions in the evidence of the prosecution witnesses which have not been considered by the trial court. He further contended that alleged charas was recovered from the possession of appellant on 02.07.2010 but it was received by the chemical examiner on 07.07.2010 after the delay of 05 days and there is nothing on the record that during this intervening period before whom the property was in possession and in whose custody. According to him if it was lying in Malkhana of the police station then entry of Malkhana has not been produced before the trial court, therefore, on this ground tampering in the case property could not be ruled out.

10. On the other hand, Syed Meeral Shah, learned Additional Prosecutor General Sindh, appearing for the State in view of the arguments advanced by the learned counsel for the appellant and the grounds agitated in this appeal as well in view of the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*, did not support the impugned judgment.

11. We have carefully heard the learned counsel for the parties and scanned the entire evidence with the assistance of learned counsel for the parties.

12. In our considered view the prosecution has failed to prove its case against the appellant for the reasons that on 02.07.2010, complainant alongwith his subordinate staff left police station for arresting the proclaimed offenders. During patrolling from different places when they reached at Army Sugar Mill bypass stop, they arrested the present appellant at 1600 hours in presence of mashirs LNC Muhammad Bux and LNC Muhammad Juman and recovered 1300 grams charas. It is surprising to note that though it was the day time incident and the place of incident is a thickly populated area and a busy road where the shops and hotel are available and the vehicles used to pass for 24 hours but the police did not stop any vehicle to ask any private person 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 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 busy road which is meant for heavy traffic and shops and hotels 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. In our view, complainant, 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. 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 the number of contradictions in the evidence of the prosecution witnesses with the able assistance of learned counsel for the appellant and when confronted these contradictions to the learned A.P.G, he could not reply satisfactorily. For example PW-1 Muhammad Bux in his examination in chief has deposed that the plastic bag recovered from the accused was containing five pieces of charas and three currency notes of Rs.100/- each were recovered from front side of his shirt. Words "Eid Mubarak 2007 Muhammad Hashim Tehrani" were written on each piece of said charas with golden colour. Whereas PW-2 Mir Javed in his examination in chief has deposed that on his personal search, three currency notes of Rs.100/- each from front pocket of his shirt and a plastic shopping bag of green colour containing five slabs of charas was recovered from his right hand. He further deposed that words "Eid Mubarak 2007, Al-Bank Muhammad Hashmi Tehran Yak" were written with golden colour on each slab. Further PW-1 Muhammad Bux in his cross examination has deposed that we have encircled the accused and SIP Javed first of all apprehended him at the distance of one furlong from bypass road. Whereas PW-2 Mir Javed has

contracted this fact in his cross examination by deposing that accused was apprehended at the distance of 3-4 paces away from bypass road.

13. According to the case of prosecution, charas was recovered from the possession of accused on 02.07.2010 and it was received by the chemical examiner on 07.07.2010 after the delay of 05 days which has not been explained by the prosecution. It appears that the prosecution has failed to establish the safe custody of charas at Malkhana for 05 days. 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. There was nothing on the record that how much grams were taken / drawn from the each slab 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. 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.”

14. 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.”

15. While relying upon the aforesaid authorities and keeping in view the material discrepancies in the prosecution case, we have no hesitation to hold that the prosecution has failed to prove its case against the accused. Resultantly, the impugned judgment dated 03.11.2010 passed by learned Special Judge (Narcotics), Badin is set aside. The appeal is allowed. Appellant is acquitted of the charge. Appellant though was on bail but today he has been produced in custody as he has been arrested in some other case. However, in the present case/crime the appellant is acquitted. He shall be released forthwith if he is not required in any other case/crime. His bail bond stand cancelled and surety discharged.

JUDGE

JUDGE

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