

IN THE HIGH COURT OF SINDH CIRCUIT COURT HYDERABAD

Cr. Appeal No.D-101 of 2016

PRESENT:

Mr. Justice Naimatullah Phulpoto

Mr. Justice Shamsuddin Abbasi

Date of Hearing: 27.03.2018

Date of Judgment: 27.03.2018

*Appellant/accused: Mehar Ali S/o Khair Muhammad Mallah
through Mr. Ishfaque Ahmed Lanjar,
Advocate.*

*The State: Through Syed Meeral Shah Bukhari,
Additional Prosecutor General, Sindh.*

JUDGMENT

SHAMSUDDIN ABBASI, J.-

Appellant Mehar Ali Mallah

faced trial before the Court of Special Judge (CNSA), Mirpurkhas in Special Narcotic Case No.08 of 2016, arising out of Crime No.02 of 2016, registered at P.S Sindhri, for offence punishable under Section 9(c) of Control of Narcotic Substances Act, 1997, and by judgment dated 26.09.2016, the appellant was convicted and sentenced to undergo Rigorous Imprisonment for 07 years and to pay fine of Rs.35,000/- and in default of payment of fine to further undergo Simple Imprisonment for 06 months and 15 days. Benefit of Section 382-B Cr.P.C. was extended to the appellant.

2. The brief facts of the prosecution case are that on 06.02.2016, complainant / SIP Abdul Sattar Soomro, SHO P.S Sindhri District Sanghar, alongwith his subordinate staff namely PCs Muhammad Saleh and Allah Bux, vide *roznamcha* entry No.8, left the P.S for patrolling of the area at 1600 hours. Having patrolled, when they reached at Sindhri Sanghar Road near Jani Rasti at 1700 hours, they saw a person standing there in a suspicious condition, carrying sky coloured shopper. The police party proceeded to him, who on seeing them tried to run away but was apprehended by the police alongwith shopper. Since there was non-availability of private persons, the complainant / SIP Abdul Sattar nominated PCs Muhammad Saleh and Allah Bux as Mashirs and inquired identity from the apprehended person, who disclosed his name as Mehar Ali S/o Khair Muhammad Mallah (the present appellant / accused). The complainant took shopper from the accused, which was opened, it contained five pieces of chars. Chars was weighed, it became 4555 grams, out of which, 10 grams from each piece were separated for sending it to the chemical examiner for analysis. From personal search of the accused, Rs.250/- were also recovered from him. Complainant / SIP Adul Sattar sealed the property in presence of the mashirs and prepared such *mashirnama* of arrest and recovery of chars at the spot. Thereafter, the accused and case property were brought to P.S, where the complainant lodged FIR of the incident against the accused on behalf of the State vide the aforesaid crime.

3. SIP Abdul Sattar handed over the custody of the accused alongwith *mashirnama* of arrest and recovery to SIP Ghulam Mustafa Shah for conducting investigation. SIP Ghulam Mustafa Shah conducted the investigation of the case and recorded statements of P.Ws / Mashirs under

Section 161 Cr.P.C, he visited at the place of incident and prepared *mashirnama* of place of incident. The I.O also sent the case property to the chemical examiner and after receiving such positive report and completing other formalities, he submitted challan before the learned trial Court.

4. The learned trial Court framed the charge against the accused for offence under Section 9(c) of CNS Act, 1997 at Ex-4. The accused did not plead guilty and claimed to be tried.

5. In order to establish the case, the prosecution examined P.W-1 SIP Ghulam Mustafa Shah, who is I.O of the case at Ex-6. He has produced chemical examiner's report at Ex-6/A. P.W-2 Abdul Sattar was examined at Ex-07. He produced attested copy of *roznamcha* entry No.8 at Ex-7/A, copy of *mashirnama* of arrest and recovery of chars at Ex-7/B. copy of FIR at Ex-7/C. The prosecution also examined P.W-3 PC Muhammad Saleh at Ex-8 and P.W-4 Pervez at Ex-9, who produced copy letter at Ex-9/A. Thereafter, prosecution closed its side.

6. The learned trial Court recorded the statement of accused under Section 342 Cr.P.C at Ex-11, wherein the accused denied the allegations leveled by the prosecution. Accused did not examine himself on oath nor led any evidence in his defence.

7. The learned trial Court after hearing learned Counsel for parties and assessment of evidence by judgment dated 26.09.2016 convicted the accused under Section 9(c) of Control of Narcotic Substances Act, 1997 and sentenced him as referred supra in the foregoing paragraph.

8. Being aggrieved and dissatisfied from the said judgment, the appellant / accused preferred the present appeal.

9. The learned Counsel for the appellant *inter alia* contended that there is no independent witness of recovery and both the mashirs of recovery of chars and arrest of the accused are subordinate staff to the complainant. He further contended that there is a delay of five days in sending samples of the chars to the chemical examiner and that the prosecution had failed to prove safe custody of chars at *Malkhana*. It is argued that neither the prosecution has examined the Incharge of *Malkhana* nor produced such entry thereof. He further contended that there are material contradictions in the evidence of the prosecution and that the evidence of the prosecution witnesses is not reliable, believable and confidence inspiring, therefore, the judgment passed by the learned trial Court is a result of misreading and non-reading of the evidence and lastly he prayed for acquittal of the appellant.

10. On the other hand, the learned Additional P.G by supporting the judgment of the learned trial Court has argued that the prosecution evidence is reliable, believable and trustworthy and that the learned trial Court has rightly convicted the appellant / accused for the recovery of 4555 grams of chars from his possession. However, he admitted that there was delay of five days in sending chars to the chemical examiner and the prosecution had not led evidence on safe custody of the recovered substance.

11. Heard the learned Counsel for the appellant as well as learned A.P.G for the state and perused the material available before us minutely.

12. We have carefully examined the evidence of P.W-1 SIP Ghulam Mustafa, P.W-2 SIP Abdul Sattar and P.W-3 PC Muhammad Saleh. P.W-2 SIP Abdul Sattar has stated in his evidence that on the day of

incident he was SHO P.S Sindhri and at about 1600 hours he left the Police Station alongwith his subordinate staff in police mobile vide *roznamcha* entry No.8 for patrolling in the area. After patrolling at difference places when they reached on the road adjacent to Jani Rasti at about 1700 hours, they saw a person standing on the road side in a suspicious condition having a shopper in his right hand and on seeing police mobile he tried to escape way but was apprehended. On inquiry, he disclosed his name as Mehar Ali. SHO secured plastic shopper and opened the same, it contained five pieces of chars and out of five pieces, four pieces were complete while fifth one was half. SHO made PCs Muhammad Saleh and Allah Bux as mashirs of the case and separated 10 grams of chars from each piece / slab and sealed the recovered chars in two parcels. On personal search from the accused, a cash of Rs.250/- was also recovered. Thereafter, SHO brought the accused and case property at Police Station where he lodged FIR of the incident. Further investigation was handed over to SIO / SIP Ghulam Mustafa Shah.

13. During cross examination, P.W-2 SIP Abdul Sattar has admitted that he had not produced *roznamcha* entry No.8 before the trial Court but he stated that he had produced attested copy of *roznamcha* entry No.8. He replied in his cross examination that he made search for the witnesses but failed to find out anyone till preparation of *mashirnama* of arrest and recovery. This fact has neither been mentioned by the complainant SIP Abdul Sattar in the *mashirnama* of arrest and recovery nor in the FIR. Another aspect of the case is that, during cross examination the complainant SIP Abdul Sattar stated that he used knife (chhurri) for separation of samples but again this fact has not been disclosed by him neither in the *mashirnama* of arrest and recovery nor in the FIR, even he

has deposed that he has not produced said knife (chhurri) before the trial Court. He further admitted in the cross-examination that he had not given the detail of currency notes secured by him from the accused in the *mashirnama* or in the FIR. He further stated that he had prepared *mashirnama* of arrest and recovery of chars by putting it in bonnet of police mobile. He also stated that they used to put case property in tin boxes which are being used as *Malkhana* and those are kept in separate room of the police station and that W.H.C of the police station is custodian of *Malkhana* / Tin Boxes. He further contended that entries were kept in the relevant register but the same were not produced before the trial Court. He further deposed that there was no criminal record of the present accused.

14. We have also perused the evidence of P.W-03 mashir P.C Muhammad Saleh, who deposed on the same lines as deposed by the complainant SIP Abdul Sattar. However, P.C Muhammad Saleh has deposed that the recovered chars was in the shape of five pieces but he did not disclose that out of five pieces, four pieces were in large size and one piece was in small size. This prosecution witness has replied in his cross-examination that they had apprehended the accused after chasing of one furlong. Here we have observed that the complainant Abdul Sattar in his cross-examination has stated that they had apprehended the accused after chasing 25 to 50 feet but this P.W Muhammad Saleh has contradicted the complainant by stating that the accused was apprehended after chasing of one furlong. In our humble view, there is much difference in between the distance of 25 / 50 feet and one furlong. Another contradiction is that the complainant has stated that P.C Allah Bux raised hakkals to the accused and he himself arrested the accused but P.W-3 Muhammad Saleh stated that both the SHO and PC Allah Bux apprehended the accused first.

Another aspect which we cannot ignore that P.W mashir Muhammad Saleh has stated that after arrest of the accused they made search for private persons in order to make them mashir of recovery and arrest but they failed. He further stated that they consumed 10 / 15 minutes in making search for private persons. He also deposed that no vehicle had crossed them during karwai against the present accused, whereas the complainant has stated that one or two vehicles crossed them during arrest of the accused and those vehicles were not stopped in order to make a request to the persons available in the said vehicle to act as mashir in the present case. There is also contradiction in between the evidence of the complainant and mashir on the point that the complainant has stated that they consumed 30 minutes in the entire karwai against the accused at the place of incident, whereas, mashir has stated that they consumed 10 minutes in apprehending the accused and conducting his search. P.W-3 mashir Muhammad Saleh has further stated in his cross-examination that the colour of chars was black, which has entirely been contradicted by the report of chemical examiner, wherein the colour of chars has been disclosed as greenish brown.

15. We have also examined the evidence of P.W-01 SIO / SIP Ghulam Mustafa Shah, who has stated that on 06.02.2016, he was SIP / SIP at P.S Sindhri and SIP Abdul Sattar Soomro had handed over to him the custody of the accused alongwith *mashirnama* of arrest and recovery and FIR. Thereafter, he recorded the statement of P.Ws under Section 161 Cr.P.C and sent the property to the chemical examiner for its report and after receiving such report he submitted challan before the competent Court of Law. SIP Ghulam Mustafa Shah in his cross-examination has admitted that on 11.02.2016 he sent the case property to the chemical examiner and

that for the intervening period the property was kept in Malkhana but on the same time he admitted that he has not produced the entry of property register whereby the property was kept in Malkahana. He has further admitted that he had not recorded the statement under Section 161 Cr.P.C of W.H.C of P.S Sindhri as Incharge of Malkhana. He further admitted that he had not visited the place of incident in order to prepare the *mashirnama* of place of incident, where the arrest of the accused and recovery of chars was made. He has also admitted that he had not examined any private person in this case. He further admitted that he had not ascertained during the course of investigation that from where the accused purchased the chars and what the accused did with the said chars. This P.W has further stated that three seals were affixed on the parcel containing chars when it was given to him by SIP Abdul Sattar Soomro for further investigation, whereas the report of the chemical examiner shows that two and three seals were affixed on the parcel.

16. Furthermore, the appellant / accused has taken plea in his statement under section 342 Cr.P.C as well as in defence plea put to the prosecution witnesses, who have denied the reason for false implication as stated by the appellant / accused that he had contracted love marriage with a lady from Larkana, whereupon her family members were annoyed and he had returned his wife to her parents due to private settlement and then he was pardoned but thereafter the family of his wife got managed this false case through the Police, therefore, the chars was foisted upon him, though he had not examined himself on oath nor led any defence evidence.

17. We have carefully examined the evidence of the prosecution witnesses and have gone through the material available on the record and have come to a conclusion that the prosecution had failed to prove safe

custody of chars as neither any entry of *malkhana* had been produced by the prosecution nor the prosecution examined the Incharge of *malkhana*. Delay of five days in sending chars to the chemical examiner has created doubt in the prosecution case. At this juncture, we rely upon the case of *IKRAMULLAH & OTHERS V/S. THE STATE*, reported as 2015 SCMR 1002, wherein, the august Supreme Court of Pakistan has observed 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 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.”

18. Report of chemical examiner was also deficient as it was not prepared as per rules. As such, positive report of chemical examiner would not be helpful to the prosecution.

19. We are of the opinion that the evidence of the police officials is as good as that of private witnesses but we cannot trust on the version of the prosecution without independent corroboration, which is lacking in this case and in this case we have gone through the evidence of the prosecution witnesses and came to a considerable view that there are material contradictions in the evidence of the complainant and mashirs and such type of evidence cannot be relied upon to make an accused guilty of

an offence. It is well settled principle of law that if there creates some reasonable doubt in a prudent mind then the benefit whereof should go in favour of the accused as observed in the case of TARIQ PERVEZ V/S. THE STATE, reported as 1995 SCMR 1345, wherein, the Honourable Supreme Court of Pakistan has held as under:

“It is not necessary that there should be many circumstances creating doubts. If there is a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of any accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right.”

20. In view of what has been discussed herein above, we have no hesitation to say that the prosecution has failed to prove it's case against the appellant / accused beyond reasonable shadow of doubt, therefore, vide short order dated 27.03.2018, the present criminal appeal was allowed, whereby the appellant / accused was released, the contents of the said short order are reproduced hereunder:-

“Heard arguments of learned Counsel for the parties. For the reasons to be recorded later on, Cr. Appeal No.D-101/2016 is allowed. Conviction and sentence recorded by the learned Sessions/Special Judge, CNSA, Mirpurkhas vide judgment dated 26.09.2016 are set-aside. Appellant Mehar Ali S/o Khair Muhammad Mallah shall be released in Crime No.02/2016 of P.S Sindhri, registered under section 9(c) Control of Narcotic Substances Act, 1997, if no more required in some other case.”

21. These are the reasons for the aforesaid short order.

JUDGE

JUDGE