

IN THE HIGH COURT OF SINDH CIRCUIT COURT HYDERABAD

Cr. Appeal No.D-05 of 2018

Cr. Appeal No.D-30 of 2018

PRESENT:

Mr. Justice Naimatullah Phulpoto

Mr. Justice Shamsuddin Abbasi

Date of Hearing: 29.03.2018

Date of Judgment: 29.03.2018

Appellant/accused: Shoaib Ali S/o Muhammad Halepoto,
through Syed Madad Ali Shah,
Advocate.

Anti-Narcotic Force: Through Muhammad Ayoub Kasar,
Special Prosecutor.

J U D G M E N T

SHAMSUDDIN ABBASI, J:-

Through this appeal

No.05 of 2018, appellant Shoaib Ali S/o Muhammad Halepoto has called in question the judgment dated 06.01.2018 passed by the learned Illrd Additional Sessions Judge / Special Judge, CNSA, Hyderabad in Special Case No.84 of 2016 arising out of Crime No.DO40402616, registered at P.S ANF Hyderabad, under Section 9(c) of CNS Act, 1997, whereby the appellant was convicted and sentenced to suffer 05 years R.I and to pay fine of Rs.50,000/-, and in default of payment of fine to further undergo Simple Imprisonment for one month. Benefit of Section 382-B Cr.P.C. was extended to the appellant.

2. The State / Anti-Narcotics Force through Muhammad Akram Khan Niazi, Assistant Director P.S ANF Hyderabad filed Criminal Revision Application for enhancement of sentence of appellant Shoaib Ali as per law, which was converted into criminal appeal vide order dated 29.03.2018 passed by this Court in view of a case of *Mahamood Ahmed Butt, Deputy Director, Regional Directorate, Anti-Narcotics Force, Lahore V/s. Mst. Fazelat Bibi* reported in *PLD-2013 SC 361*. Both the appeals arise out of same judgment and require same appreciation of evidence, therefore, we decide both the appeals together with this common judgment.

3. The brief facts of prosecution case are that on 03.07.2017, complainant / S.I Masood Ahmed received spy information that a person namely Shoaib Ali had to hand over a huge quantity of narcotics substance to his customer near Bye-Co Petrol Pump, Tando Jam. On receipt of such spy information, he alongwith other ANF officials left P.S at 1415 hours vide roznamcha entry No.03 and reached at the pointed place at 1445 hours, where they saw a person standing there, having black coloured bag in his left hand, who while seeing the ANF officials tried to run away but he was surrounded and caught-hold. On inquiry, apprehended person disclosed his name as Shoaib Ali S/o Muhammad Halepoto resident of Village Bashir Ahmed Halepoto, Matli, District Badin. It is further alleged by the complainant that the private persons, who were available at the time of arrest and recovery, were asked to act as mashir but they refused. Hence, ASI Raza Ali and PC Jazeb were made as mashirs. The complainant recovered shopper from the accused, it was opened, it contained 12 multi coloured foil packets of chars, each packet contained two slabs. The recovered chars was weighed, it became 12.5 kilograms and from personal search of the accused, cash of Rs.1820/- was also recovered.

Complainant / S.I Masood Ahmed sealed the property in presence of the mashirs and prepared such mashirnama of arrest and recovery at the spot. Thereafter, the accused and case property were brought to P.S, where FIR of the incident was lodged against the accused on behalf of the State vide Crime No.DO40402616, under Section 9(c) of CNS Act, 1997 of P.S A.N.F Hyderabad.

4. S.I Masood Ahmed conducted himself the investigation of the case and recorded statements of P.Ws / Mashirs under Section 161 Cr.P.C. The complainant / 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.

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

6. In order to prove its case, the prosecution had examined P.W-1 S.I Masood Ahmed, who is complainant and I.O of the case, at Ex-6. He produced mashirnama of arrest and recovery, FIR, departure and arrival entries, letter sent to the chemical examiner and its report at Exs.6/A to 6/E respectively. He also produced 12 packets of chars as Article A/1, one slab as Article A/2, one bag as Article A/3. P.W-2 Mashir ASI Raza Ali was examined at Ex-7. Thereafter, prosecution closed its side.

7. The learned trial Court recorded the statement of accused under Section 342 Cr.P.C at Ex-10, whereby the accused denied the allegations leveled by the prosecution. Accused did not examine himself on oath nor led any evidence in his defence.

8. The learned trial Court after hearing the learned Counsel for parties and examining the evidence available on record, by judgment dated 06.01.2018, convicted the accused under Section 9(c) of Control of Narcotic Substances Act, 1997, and sentenced him as stated in the foregoing paragraph, hence, the appellant by impugning the said judgment has preferred this appeal.

9. The learned Counsel for the appellant contended that complainant had received spy information at P.S Hyderabad and despite such spy information no private person was associated to act as mashir; that name of the accused has not been mentioned in the departure entry though the spy informer had disclosed the name of accused and thereafter the complainant kept entry in roznamcha register; that the complainant did not know about the spy informer from where he came and what were the reasons for giving such information to the SHO; that ANF officials did not contact the SHO P.S Tandojam from whose territorial jurisdiction the alleged recovery was effected; that the mashirnama of the place of arrest of accused has not been prepared in this case; that the accused was allegedly arrested near the petrol pump but the employees of the said petrol pump were not associated to act as mashir; that in his defence the accused and his witnesses had raised plea that accused was arrested from his house and they were not cross-examined by the prosecution to the extent that he was arrested near the petrol pump; that there is overwriting in the mashirnama of arrest and recovery in respect of date of incident; that neither the prosecution had examined head moharrir of Malkhana of P.S, nor examined P.C Arif who brought the property to the chemical examiner. Lastly, the learned Counsel prayed for acquittal of the appellant by relying upon the cases of (i) *IKRAMULLAH & OTHERS V/S.*

THE STATE (2015 SCMR 1002) (ii) NAZEER AHMED V/S. THE STATE (PLD 2009 Karachi 191) (iii) KHALIL AHMED V/S. THE STATE (PLD 2008 Karachi 8) and (iv) KHAN MUHAMMAD V/S. THE STATE (PLD 2004 Karachi 681).

10. Mr. Muhammad Ayoub Kassar, learned Special Prosecutor ANF has supported the judgment passed by the learned trial Court on the ground that the judgment passed by the learned trial Court is based on sound reasons as the huge quantity of narcotic substance was recovered from the possession of the appellant. He further submitted that the report of chemical examiner is positive and the prosecution witnesses have fully supported the case of the prosecution. Beside the sentence awarded to the appellant by the trial Court, learned Special Prosecutor prays for enhancement of sentence of the appellant. In support of his contentions, learned Special Prosecutor ANF has relied upon the case of *MUHAMMAD SARFRAZ V/S. THE STATE & OTHERS (2017 SCMR 1874)*.

11. Heard the learned Counsel for the appellant as well as learned Special Prosecutor ANF and scanned the record very minutely.

12. The case of the prosecution rests upon evidence of P.W-1 SI Masood Ahmed, who is complainant and I.O of the case and P.W-2 ASI Raza Ali, who is first mashir of the case.

13. At the first we have examined the evidence of P.W-1 SI Masood Ahmed (Ex-06). He deposed that on 03.07.2016, he was posted as SI at P.S ANF Hyderabad. On the same date, he was present at P.S where informer came at P.S and disclosed that accused Shoaib Ali was handing over huge quantity of narcotic substance to the customers nearby Bye-Co Petrol Pump, Tandojam. On receipt of such spy information,

complainant alongwith ASI Raza Ali, HC Rahim Bux, PCs Abdul Shakoor, Muhammad Ahmed, Jazib, Imran and PC/HC Ghulam Rasool left P.S in two government vehicles alongwith informer under the supervision of Assistant Director Ghulam Abbas. They left P.S vide entry No.03 at about 1415 hours. He further deposed that they reached at the place of recovery at 1445 hours, where they saw that one person having a bag in his hand was standing there, informer pointed out that this person is Shoaib Ali, who seeing the police party tried to run away but excise police caught-hold him at the spot alongwith bag. He further deposed that he took efforts for private mashir but nobody was ready to act as mashir. Thereafter, SI Masood Ahmed had appointed ASI Raza Ali and PC Jazib as mashirs and inquired the name from apprehended person, who disclosed his name as Shoaib Ali S/o Muhammad Halepoto, resident of Bashir Ahmed Halepot Taluka Matli District Badin. SI Masood Ahmed checked the bag recovered from the hands of accused Shoaib and found 12 multi-coloured foil packets, each packet contained two slabs of chars. He weighed each packet through electronic scale and found 1 K.G from each packet and 500 grams from one slab. The total weight of chars became 12.5 kilograms. He sealed all the recovered chars in one white coloured bag. SI Masood Ahmed took personal search of accused and recovered one original CNIC and Rs.1280/- from his left pocket. Thereafter, accused was arrested and SI Masood Ahmed prepared memo of arrest and recovery and obtained signature on mashirnama after reading over the contents of memo of arrest and recovery to the mashirs. SI Masood Ahmed also sealed the case property and obtained signature over the sealed property. Thereafter, SI Masood Ahmed brought the accused and case property at P.S and lodged FIR of the incident. After registration of FIR, complainant had started investigation and kept the case property in Malkhana. During the

investigation, he recoded the statements of witnesses under Section 161 Cr.P.C. P.W-1 also deposed that during interrogation, the accused admitted his guilt and disclosed that he had purchased chars from Dilbar and further disclosed that he wanted to sale out the said chars to one Haji at Tandojam. P.W-1 was cross-examined at length by the learned Counsel for the accused. During the cross-examination, complainant has admitted that crime number of P.S was written over the seal cover of case property. He further admitted that total slabs were 25 in number and admitted that black bag was not sealed. He further admitted that entire property was sent to the chemical analyzer. He further admitted that he and A.D were present at P.S where spy informer came there, where A.D identified the spy informer. He further admitted that he did not take efforts to call any private person to act as mashir. He further stated that they did not stay and directly reached at the place of recovery. He stated that they reached at Tandojam at about 1445 hours and did not keep entry in daily diary of P.S Tandojam. He further stated that it is fact that name of the accused and name of the spy informer is not mentioned in roznamcha entry for departure. He further admitted that at the time of recovery, 4 / 5 persons were passing from there but they refused to act as mashir. He further deposed that he did not disclose to the persons that action will be taken against them if they refuse to act as mashir. He further stated that he did not inquire regarding their names and addresses. However, P.W-1 had denied the suggestions made by the appellatant.

14. We have examined mashirnama of recovery of chars and arrest of accused, which clearly shows that there was also overwriting in respect of date of incident. We have also examined the report of chemical

examiner, which reveals that the property was sent to the chemical examiner through P.C Arif.

15. Thereafter, we have examined the evidence of P.W-2 ASI Raza Ali as mashir of the case (Ex-07). He has supported the version of the complainant and stated on the same line as stated by the complainant. He deposed that SI Masood Ahmed caught-hold accused Shoaib Ali at the place of recovery, where he took efforts but nobody was ready to act as mashir. During the cross-examination, he has contradicted P.W-1 Masood Ahmed on many aspects of the case and admitted that two little envelopes were not sealed in which the cash amount and CNIC were lying. He further admitted that *"it is fact that signature of both mashirs are not mentioned over the both envelops and crime number is mentioned over it"*. He further admitted that denomination of currency notes were not mentioned at the memo of recovery. He contradicted himself on the point that on one hand he stated that 4 / 5 persons came there but again he stated that no any private person came there, even he did not know that SI Masood Ahmed had inquired about their names and addresses from the persons came at the time of recovery. He further admitted that it is a usual practice that in most of the FIRs it is mentioned that due to non-availability of private persons they arrested the accused in presence of police officials. However, he has denied the suggestions of defence plea of the accused.

16. After examining the deposition of both the above prosecution witnesses, it appears that the complainant had received spy information at P.S Hyderabad regarding presence of accused at the place of incident / recovery, which is situated at Tandojam. The place of incident was far away, despite that the complainant did not associate any private person to witness the recovery proceedings, nor he attempted to associate any

person from Hyderabad or from the way to Tandojam and place of recovery, who could disclose the truth of the incident. We cannot ignore this aspect of the case as the complainant not only had sufficient time but so many chances to collect / associate any independent person to act as mashir in this case. We have also noticed that there is overwriting in the mashirnama of arrest and recovery in respect of date of incident and it has also been noticed that some writing was written over the roznamcha entry No.3 dated 03.07.2016, which apparently shows that such writing was erased. We have also noticed that chars was recovered on 03.07.2016, whereas the same was sent to the chemical examiner on 04.07.2016. However, the prosecution neither produced any entry of Malkhana, nor examined head moharrir of Malkhana in respect of safe custody. It is also pertinent to mention here that the case property was sent to the chemical examiner through P.C Arif, who was not examined by the prosecution. We do not satisfy with the judgment passed by the learned trial Court for the reasons that the learned trial Court has overlooked all the material aspects of the case such as;

- (i) Despite the case of spy information, which was received by the complainant at 1415 hours at P.S and they reached at the place of incident / recovery at 1445 hours, the complainant had several chances to associate any private / independent person either from the place of incident or from Hyderabad where they received spy information, to witness the alleged recovery, therefore, we are of the considered view that the complainant did not try anywhere deliberately to associate such a person to witness the recovery proceedings.

- (ii) The accused was allegedly arrested near the petrol pump but the employees of the said petrol pump were not associated to act as mashir.
- (iii) There appears some writing in the roznamcha entry No.4 regarding entry of return to P.S but in column No.2 of the entry, the writing was erased, which is not readable, however, it creates doubt in a prudent mind as to whether the writing was erased to achieve the objects or otherwise, which shatters the whole case of the prosecution.
- (iv) There is overwriting in the mashirnma of arrest and recovery regarding date. This overwriting has been made perhaps for the purpose as we have discussed above.
- (v) Prosecution neither produced any entry of Malkhana, which may show that the property was kept at Malkhana, nor examined head moharrir of P.S, who may state that he had placed the property in Malkhana.
- (vi) The case property was sent to the chemical examiner through P.C Arif, who was also not examined by the prosecution for the reasons best known to them.

17. In respect of our first opinion as above, the learned Counsel has rightly relied upon a case of *NAZEER AHMED V/S. THE STATE (PLD 2009 Karachi 191*, in which it has been observed as under:-

“Under Section 25 of the C.N.S Act, applicability of section 103 of the Code of Criminal Procedure, 1898 (Cr.P.C), has been excluded in making searches and arrests in respect of narcotics. Section 103 Cr.P.C enjoins the officer or other person, who wants to make search of a place, to call upon, before making the search, two or more respectable inhabitants of the locality to attend and witness the search. The purpose, according to the unanimous opinion of the superior Courts, is to prevent chicaneries of police.

18. The learned Counsel with regard to our second point has rightly relied upon a case of *KHALIL AHMED V/S. THE STATE (PLD 2008 Karachi 8)* wherein it is maintained as under:-

“Besides, it is also an admitted position that the recovery was effected on a highway in-front of Patrol Pump in the close proximity of town, which presumably is busiest place. However, neither any person from public was made witness of recovery nor anyone was persuaded to attest the recovery proceedings.”

19. So far as, our last two submissions regarding safe custody of property at Malkhana as well as its safe transit to the chemical examiner, the principles settled by the Honourable Supreme Court of Pakistan in a case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*, have been violated in the present case by the prosecution. This case has been endorsed by an unreported case of *NADEEM V/S. THE STATE through Prosecutor General, Sindh in Criminal Appeal No.06-K of 2008 in Criminal Petition No.105-K of 2016*, wherein the Honourable Supreme Court by order dated 04.04.2018 has observed as under:-

“According to the FIR the petitioner and his co-convict had tried to escape "with" the motorcycle when they were intercepted by the police party but before the trial court Muhammad Ayub, S.I.P (PW1) had stated that upon seeing the police party the petitioner and his co-convict had started running away while leaving the motorcycle on the road and the engine of that motorcycle had gone off. Muhammad Jaffar, PC (PW2) had also deposed about running away of the petitioner and his co-convict but had kept quiet regarding leaving of the motorcycle by the petitioner and his co-convict while running away. Both the above mentioned witnesses produced by the prosecution, however, unanimously stated that while running away upon seeing the police party the petitioner and his co-convict had kept the relevant bag containing narcotic substance in their hands and it was in that condition that the petitioner and his co-convict had been apprehended by the police party. It is quite obvious that the initial story contained in the FIR had been changed during the trial and the changed story was too unreasonable to be accepted at its face value. Muhammad Ayub, S.I.P. (PW1) had stated before the trial court that after recovering the narcotic substance he had brought the same to the Police Station and

it was he who had kept the recovered substance in safe custody whereas he had never claimed to be the Moharrir of the relevant Police Station. The record of the case shows that it was Ghulam Ali, P.C. who had taken the recovered substance to the office of the Chemical Examiner for analysis but it is not denied that the said Ghulam Ali, P.C. had not been produced before the trial court by the prosecution. It is, thus, evident that safe transmission of the recovered substance from the local Police Station to the office of the Chemical Examiner had not been established by the prosecution. The record further shows that the Chemical Examiner's report adduced in evidence was a deficient report as it did not contain any detail whatsoever of any protocol adopted at the time of chemical analysis of the recovered substance. This Court has already held in the case of Ikramullah and others v. The State (2015 SCMR 1002) that such a report of the Chemical Examiner cannot be used for recording conviction of an accused person in a case of this nature. For all these reasons we find that the prosecution had not been able to prove its case against Nadeem petitioner beyond reasonable doubt.”

20. On close scrutiny of the case, it appears that the case of the prosecution is full of discrepancies, lacunas, contradictions and against the principles settled by the Honourable Supreme Court. There are several circumstances in this case which creates doubt in the prosecution story. It is not necessary that there should be many circumstances which may create doubts. If there is 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 as observed by the Honourable Supreme Court in the case of *TARIQ PERVEZ V/S. THE STATE (1995 SCMR 1345)*.

21. In view of what has been discussed above, we have reached to a conclusion that the prosecution has not discharged it's liabilities. Therefore, we by extending benefit of doubt to the appellant, *set-aside* the conviction and sentence recorded by the trial Court vide judgment dated 06.01.2018 and consequently the appeal in hand is allowed. Vide our short

order dated 29.03.2018 the appellant was ordered to be released forthwith if not required in any other custody case. These are the reasons for the said short order.

22. Since the criminal appeal No.05 of 2018 is allowed, therefore, the criminal appeal No.30 of 2018 filed through Special Prosecutor ANF for enhancement of sentence of appellant has become infructuous, the same stands dismissed.

JUDGE

JUDGE

Shahid