

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

Cr.Appeal No. D- 135 of 2017

**PRESENT:**

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

Appellant Muhammad Hanif produced in custody.  
Syed Meeral Shah Bukhari, A.P.G. for the State.

Date of hearing : 15.01.2018.

Date of judgment : 15.01.2018.

**J U D G M E N T**

**ABDUL MAALIK GADDI, J:-** Appellant Muhammad Hanif s/o Ghulam Abbas by caste Khaskheli faced trial before learned Special Judge (Narcotics), Shaheed Benazirabad in Special Case No. 514 of 2016 for offence under Section 9(c) Control of Narcotic Substance Act, 1997. By judgment dated 24.11.2017, the appellant was convicted and sentenced to suffer R.I for 02 years and to pay fine of Rs.20,000/-. In case of default in payment of fine, he was to undergo S.I for 04 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 11.09.2016 at about 1730 hours, complainant SIP Asghar Ali Awan alongwith his subordinate staff was on patrolling duty and after patrolling from the different places, when they reached at Mehrabpur, road they received spy information that the present appellant was openly selling charas at Sodhro Pir Bukhari graveyard. After receipt of such information, they reached at the pointed place where they saw the

present appellant who on seeing the police party tried to slip away but was apprehended and was found possessing one plastic shopper from the fold of his shalwar containing four pieces of chars, which became 2000 grams. Such memo of arrest and recovery was prepared in presence of mashirs ASI Ali Bux and HC Rano Khan. Thereafter, accused and case property were brought at the police station where SIP Asghar Ali Awan lodged FIR No.153 of 2016 at P.S. Sakrand.

3. After registration of FIR, complainant/I.O. himself investigated the case, examined witnesses u/s 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 u/s 9 (c) of CNS, Act, 1997.

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

5. Prosecution in order to prove its case, examined PW-1 complainant SIP Asghar Ali Awan at Ex.3, who produced the mashrinama of arrest, search and recovery, FIR, attested photocopy of roznamcha entries of No.18 and 20, mashirnama of wardat, chemical report and photocopy of RC at Ex.3/A to 3/G, P.W-2/mashir ASI Ali Bux Magsi at Ex.4 and PW-3 PC Ghulam Rasool Jamali at Ex.05, thereafter learned incharge DDPP for the State closed the prosecution side vide statement at Ex.6.

6. Statement of appellant under Section 342 Cr.P.C. was recorded at Ex.7, in which he claimed false implication in this case and denied the prosecution allegations. He further stated that he is innocent and the alleged charas has been foisted upon him at the instance of complainant of murder case pending trial against him before the learned IInd Additional Sessions Judge, Shaheed

Benazirabad. 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. The appellant has been produced in custody by the jail authorities. He submits that his counsel could not reach as he is not in contact with him since long. However, he submits that he will argue the matter himself as such he has been heard. It is contended by the appellant that the case against him is false and has been registered due to enmity. He further submits that alleged charas has been foisted upon him. He submits 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 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 his possession on 11.09.2016 but it was sent to the chemical examiner on 20.09.2016 after the delay of 09 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. He lastly contended that in this case complainant SIP Asghar Ali Awan who himself has

investigated the matter, therefore, the evidence collected by the I.O. of the case cannot safely be relied upon.

10. On the other hand, Syed Meeral Shah, learned Additional Prosecutor General Sindh, appearing for the State has supported the impugned judgment by arguing that the judgment passed by the learned trial court is perfect under the law and facts. He further submits that the prosecution witnesses have supported the case and during cross examination they have not been shaken. He further submits that there is no material contradiction in the evidence of prosecution witnesses therefore, appellant is not entitled for the relief.

11. 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.

12. In our considered view the prosecution has failed to prove its case against the appellant for the reasons that on 11.09.2016, complainant alongwith his subordinate staff left police station for patrolling in the area. During patrolling from different places when they reached at Mehrabpur road, they received spy information that the present appellant was selling charas at Sodhro Pir Bukhari graveyard, on such information, the police party reached at the pointed place and arrested the present appellant in presence of mashirs ASI Ali Bux and HC Rano Khan and recovered 2000 grams charas. It is surprising to note that the police party had advance spy information about the availability of present appellant on the pointed place despite of that the complainant who is also I.O. of the case has not bothered to associate any independent person either from the Mehrabpur road where they received spy information or from the place of incident. It has been brought in evidence that the place from where the complainant party received spy information is road side where the traffic was available. It has also been brought on record that the place of incident was also surrendered by the shops and it was

evening 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 witnesses, 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 the 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.

13. According to the case of prosecution, charas was recovered from the possession of accused on 11.09.2016 and it was sent to the chemical examiner on 20.09.2016 after the delay of 09 days. It appears that the prosecution has failed to establish the safe custody of charas at Malkhana for nine 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 piece 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 nine 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.”***

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 24.11.2017 passed by learned Special Judge

(Narcotics) Shaheed Benazirabad is set aside. The appeal is allowed. Appellant is acquitted of the charge. Appellant is produced in custody, he is remanded back to the judicial custody with direction that he shall be released forthwith if he is not required in any other case.

JUDGE

JUDGE

Tufail





