

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

Cr. Appeal No. D- 67 of 2016

**PRESENT:**

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

Appellant : Ali Nawaz s/o Saeed Khan Rind (present on bail)  
through Mr. Saad Salman, Advocate.

Respondent : The State  
through Mr. Shahzado Saleem Nahiyoon, D.P.G.

Date of hearing : 16.01.2018.  
Date of judgment : 16.01.2018.

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

**ABDUL MAALIK GADDI, J:-** Appellant Ali Nawaz s/o Saeed Khan by caste Rind faced trial before learned Special Judge (Narcotics), Tando Allahyar in Special Case No. 12 of 2015 for offence under Section 9(c) Control of Narcotic Substance Act, 1997. By judgment dated 09.06.2016, the appellant was convicted and sentenced to suffer R.I for 05 years and 06 months and to pay fine of Rs.25,000/-. In default of the payment of fine, he was to undergo S.I for 05 months and 15 days more. Benefit of Section 382-B Cr.P.C. was extended to the appellant.

2. Precisely relevant facts are that on 28.03.2015, complainant SIP Ghulam Hussain Mirani of PS CIA Centre Tando Allahyar alongwith his subordinate staff left P.S. for patrolling in the area and after patrolling from the different places when they reached at Tando Allahyar Mirpurkhas Road Chowk, they noticed that one person (present appellant) having black colour plastic bag was

standing there, due to suspicion police party stopped their vehicle, upon which the present appellant tried to slip away but he was apprehended and during search four big pieces of charas total 2025 grams were recovered from the possession of accused in presence of mashirs PC Abdul Aziz Ali and PC Mohsin Ali. The accused and case property were brought at Police Station where such FIR was registered against the appellant.

3. After registration of FIR, the I.O. conducted investigation, examined witnesses u/s 161 Cr.P.C, dispatched substance to the Chemical Examiner, Sukkur at Rohri, collected report in positive and thereafter 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 Ghulam Hussain Mirani at Ex.3, who produced mashrinama of arrest and recovery, FIR, departure and arrival entries at Ex. 4 to 7, P.W-2/mashir Abdul Aziz at Ex.8, who produced the memo of place of incident at Ex.9 and PW-3 IO/SIP Naeem Ashraf Shaikh at Ex.10, who produced the entry No.19 and chemical report at Ex.11 & 12 respectively. Thereafter learned DPP for the State closed the prosecution side vide his statement at Ex.13.

6. Statement of appellant under Section 342 Cr.P.C. was recorded at Ex.14, in which he claimed false implication in this case and denied the prosecution allegations. He however, offered himself to be examined on oath and produced his evidence in 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. Mr. Saad Salman, learned advocate for appellant has mainly contended that the alleged charas has been foisted upon the appellant. He contended 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 contended that there are material contradictions in the evidence of prosecution which have not been considered by the trial court. He has further contended that the charas was recovered from the possession of accused on 28.03.2015 but it was sent to the chemical examiner on 31.03.2015 after the delay of three days for which no explanation has been furnished by the prosecution. It is contended that there was no evidence that how many grams were taken from the each piece of charas for sending to the chemical examiner. The safe custody during that period has not been established. It is also contended that neither WHC of the police station under whose custody the charas was deposited in Malkhana nor HC Ghulam Qadir who had taken sample to the chemical examiner have been produced before the trial court for recording their evidence. In support of his contentions, learned counsel has placed reliance on the case of *TARIQ PERVEZ V/S. THE STATE (1995 SCMR 1345)*, *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*, *ISHFAQUE AHMED V. THE STATE (2013 YLR 1641)*, *GHULAM MUSTAFA @ MUSHTAQ ALI V/S. THE STATE (2013 P.Cr.L.J 860)* AND *WAHAB ALI AND ANOTHER V/S. THE STATE (2010 P.Cr.L.J 157)*.

10. Mr. Shahzado Saleem Nahiyoan, learned Deputy 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. He lastly concluded that evidence of the police officials is as good as that of other witnesses therefore, conviction awarded by the trial court has been passed on sound reasons.

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 28.03.2015, the complainant alongwith his subordinate staff left police station for patrolling in the area. During patrolling from different places when they reached at Tando Allahyar Mirpurkhas Road Chowk, they found the present appellant having one black colour plastic bag in suspicion manner and then he was apprehended by the police party and 2025 grams charas was recovered from the possession of accused in presence of mashirs PC Abdul Aziz Ali and PC Mohsin Ali. It is surprising to note that the place of incident though is alleged to be a thickly populated area but despite of that the complainant has not bothered to associate any independent person nor he made any effort in this regard as apparent from the record itself. It has also been brought on record that it was day time when the incident is alleged to have been occurred but the complainant did not make any effort to collect any private person from the locality to witness the recovery proceedings. 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, where 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. 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. In this regard 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.

13. We have also gone through the evidence available on record and found that the evidence of the prosecution witnesses is contradictory to each other on material particular of the case. For example, complainant Ghulam Hussain in his evidence deposed that the he alongwith his subordinate staff left Bhatti Hotel at 1245 hours whereas PW Abdul Aziz mashir of the case stated that they arrived at 1245 hours at bye-pass Tando Allahyar Mirpurkhas road. Complainant further says that they reached at P.S. at 1400 and soon after reaching at P.S. he registered the FIR whereas PW Abdul Aziz while contradicting this fact has

stated that they reached at P.S. at 1400 hours and his statement u/s 161 Cr.P.C. was recorded prior to the registration of FIR. PW-1 in his deposition has stated that accused was arrested alongwith contraband which was wrapped in one black colour plastic Theli whereas PW-2 in his deposition did not disclose the colour of Theli in which the alleged charas was wrapped. Complainant and PW Abdul Aziz have deposed that they reached at the police station at 1400 hours whereas I.O. in his deposition stated that police party reached at police station at 1340 hours.

14. According to the case of prosecution, charas was recovered from the possession of accused on 28.03.2015 and it was sent to the chemical examiner on 31.03.2015 after the delay of three days. It is the contention of the defence counsel that the prosecution failed to establish the safe custody of charas at Malkhana for three days. Safe transit to the chemical examiner has also not been proved. HC Ghulam Qadir who had taken sample to the chemical examiner has not been produced before the trial court for recording his evidence. 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 three days in sending the sample to the chemical examiner. WHC of the police station with whom the case property was deposited in Malkhana has not been examined so also HC Ghulam Qadir who had taken sample to the chemical examiner 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 discrepancies occurred in the evidence of the prosecution witnesses, we have no hesitation to hold that the prosecution has failed to prove its case against the accused. Resultantly, the impugned judgment dated 09.06.2016 passed by

learned Special Judge (Narcotics) Tando Allahyar is set aside. The appeal is allowed. Appellant is acquitted of the charge. Appellant is present on bail, his bail bond stands cancelled and surety discharged.

JUDGE

JUDGE

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