

**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD
Cr.Appeal.No.D- 308 of 2011**

PRESENT:

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

Appellant : Imam Bux Talpur (present on bail)
through Syed Shahzad Ali Shah, Advocate.

Respondent : The State
through Mr. Amjad Ali Sahito, Special Prosecutor for
ANF.

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 Imam Bux s/o Muhammad Hashim by caste Talpur faced trial before learned IInd Additional Sessions Judge/Special Judge, Control of Narcotic Substance, Hyderabad in Special Case No. 107 of 2008 for offence under Section 9(b) Control of Narcotic Substance Act, 1997. By judgment dated 03.10.2011, the appellant was convicted and sentenced to suffer R.I for 03 years and to pay fine of Rs.10,000/-. In default of the 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. Precisely relevant facts are that on 10.08.2008, complainant SIP Muhammad Muzamil Ahmed alongwith his subordinate staff was on patrolling duty and to arrest the criminal involved in narcotics. During patrolling at about 1420 hours, they received spy information that present appellant is standing at Phuleli Tanga stand having narcotics in his possession. On such information,

complainant alongwith his subordinate staff reached at the pointed place and saw the present appellant having one shopper in his hand, who on seeing the police party tried to slip away. However, the present appellant was apprehended and during search recovery of 550 grams charas was affected from his possession. Out of which 10 grams were sealed separately for sending the same to the chemical examiner. It is further alleged in the FIR that one unlicensed pistol, four live bullets, NIC and Rs.1020/- were also recovered from the possession of accused in presence of mashirs ASI Mujtaba Mehdi and HC Sher Muhammad. Thereafter, the accused and case property were brought at Police Station ANF Hyderabad where the FIR was registered against the present appellant.

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 (b) of CNS, Act, 1997.

4. The charge against the accused was framed under Section 9 (b) 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 complainant/IO SIP Muhammad Muzamil Ahmed at Ex.5, who produced memo of arrest and recovery, FIR, letter referring to the charas for chemical examination, report of the chemical examiner and roznamcha entry pertaining to departure from and arrival back at PS ANF Hyderabad at Ex.5/A to 5/E respectively and P.W-2/mashir HC Sher Muhammad at Ex.6, thereafter learned Special Prosecutor ANF closed the prosecution side vide his statement at Ex.7.

6. Statement of appellant under Section 342 Cr.P.C. was recorded at Ex.8, in which he claimed false implication in this case and denied the prosecution

allegations. He got recorded his statement on Oath, pleading that on 10.08.2008 he was apprehended by the police personnel, who blind folded him and took him at a place where he was maltreated. In his defence he has also examined DWs Noor Muhammad and Abdullah.

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. Syed Shahzad Ali Shah, learned advocate for appellant has mainly 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. He has further contended that the charas was recovered from the possession of accused on 10.08.2008 but it was sent to the chemical examiner on 11.08.2008. 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 nor PC Muhammad Ibrahim 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)* and *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*.

10. Mr. Amjad Ali Sahito, learned Special Prosecutor for ANF, 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 and there is no bar under the law that the complainant himself shall not investigate the matter therefore, conviction awarded by the trial court has been passed on sound reasons. He has placed reliance on the case of Zafar v. The State (2008 SCMR 1254).

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 10.08.2008, the complainant alongwith his subordinate staff left police station for patrolling in the area. During patrolling they received spy information that the present appellant was selling charas at Phuleli Tanga stand. On such information, the police party reached at the pointed place and arrested the present appellant in presence of mashirs ASI Mujtaba Mehdi and HC Sher Muhammad and recovered 550 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 place where he received spy information or from the place of incident. It has been brought in evidence that the Phuleli Tanga station was a populated area and shops and hotels were available there and 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, when the alleged recovery was made on road side which is meant for heavy traffic and shops and hotels 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 being 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 and Muhammad Altaf v. The State (1996 P.Cr.L.J 440). 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. Moreover, the accused is facing the protract trial since last 08 years and there is nothing on the record that he is previously involved in such type of activities. We have noted number of contradictions in the evidence of the prosecution witnesses on material particulars which goes to the root of the case. When these contradictions were confronted with learned Special Prosecutor ANF, he was unable to reply satisfactorily.

13. According to the case of prosecution, charas was recovered from the possession of accused on 10.08.2008 and it was sent to the chemical examiner on 11.08.2008. It is the contention of defence counsel that the prosecution failed to establish the safe custody of charas at Malkhana for this intervening period. Safe transit to the chemical examiner has also not been proved. PC Muhammad Ibrahim who had taken sample to the chemical examiner has not been produced before the trial court for recording his evidence. Furthermore, 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, WHC of the police station with whom the case property was deposited in Malkhana has not been examined. 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 contradictions occurred in the evidence of prosecution, we have no hesitation to hold that the prosecution has failed to prove its case against the accused. Resultantly, the impugned judgment dated 03.10.2011 passed by learned IInd Additional Sessions Judge/Special Judge Control of Narcotic Substance, Hyderabad 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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