

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

Cr. Appeal No. D- 22 of 2015

PRESENT:

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

Appellant : Moula Bux s/o Kundhal Khan Shar
through Mr. Hameedullah Dahri, Advocate.

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

Date of hearing : 17.01.2018.
Date of judgment : 17.01.2018.

J U D G M E N T

ABDUL MAALIK GADDI, J:- Through this appeal, the appellant Moula Bux s/o Kundhal Khan by caste Shar has assailed the legality and propriety of the impugned judgment dated 16.02.2015 passed by learned Special Judge, for CNS Cases, Sanghar/Camp at inside Central Prison, Hyderabad in Special Case No. 02 of 2013 for offence under Section 9(c) Control of Narcotic Substance Act, 1997, whereby the learned trial court after full dressed trial convicted and sentenced the appellant as mentioned in point No.2 of the impugned judgment. For the sake of convenience it would be proper to reproduce the said point which is as under:-

“In view of the above discussion in point No.1, accused Moula Bux s/o Kundhal Khan Shar is convicted u/s 9-c of CNS Act 1997 and is sentenced to suffer rigorous imprisonment for 07 years with fine of Rs.50,000/- (Fifty thousand) and in case of default in payment of fine, he shall suffer further imprisonment of 90 (Ninety) days. However, the benefit of Section 382-B Cr.P.C. is also extended to the above named accused. Accused Moula Bux Shar who is produced in custody by the jail authorities is remanded back to jail with direction to serve out his sentence/conviction accordingly.”

2. Precisely relevant facts are that on 16.12.2012 at 1830 hours complainant SIP Abdul Majeed Nizamani SHO of Police Station Tando Adam city alongwith his subordinate staff left P.S. for patrolling in the area and after patrolling from the different places when they reached near Railway Station Chowk, they received information that two persons are selling charas in front of the railway godowns. On receipt of such information they proceeded to the pointed place and saw the two persons having shoppers in their hands standing there with some passerby who on seeing the police party tried to escape but they were apprehended by the police. Out of them one person disclosed his name to be the present appellant and from his possession 10 pieces of charas weighing 1100 grams were recovered whereas other accused disclosed his name to be Mehboob son of Muhammad Yaqoob Khoso and from his possession police recovered 11 small and big pieces of charas weighing 1200 grams. 10 grams charas from each of the case property were sealed separately for sending the same to the chemical examiner. Such memo of arrest and recovery was prepared in presence of mashirs ASI Yasir Nawaz Mughal and PC Ghulam Hyder on the head light of police mobile. The accused and case property were brought at Police Station where such FIR was registered against the appellant.

3. After completion of the usual investigation challan was submitted against the accused in the competent court of law for offence punishable u/s 9 (c) of CNS, Act, 1997.

4. The charge against the appellant was framed under Section 9 (c) Control of Narcotic Substance Act, 1997 at Ex.3, to which he pleaded not guilty and claimed to be tried vide plea at Ex.3/A.

5. Prosecution in order to prove its case, examined PW-1 complainant SIP Abdul Majeed Nizamani at Ex.5, who produced attested copy of roznamcha

entry No.20 at Ex.5/A, carbon copy of memo of arrest and recovery at Ex.5/B while original is produced in other case of co-accused Mehboob Khoso and FIR at Ex.5/C. He also produced 10 pieces of charas as article "A", currency notes as article "B", P.W-2/mashir ASI Muhammad Yasir Mughal at Ex.6 and PW-3 IO/SIP Abdul Haque Umrani at Ex.7, who produced chemical examiner's report at Ex.7/A. Thereafter learned ADPP for the State closed the prosecution side vide his statement at Ex.8.

6. Statement of appellant under Section 342 Cr.P.C. was recorded at Ex.9, in which he claimed false implication in this case and denied the prosecution allegations. 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. Mr. Hameedullah Dahri, learned advocate for appellant has mainly contended that the appellant is innocent and has falsely been involved in this case and the charas has been foisted upon him. He further 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 16.12.2012 but it was sent to the chemical examiner on 19.12.2012 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 Muhammad Younis 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.

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 16.12.2012, the complainant alongwith his subordinate staff left police station for patrolling in the area. During patrolling from different places when they reached at Railway Station Chowk, they

received spy information that the present appellant alongwith co-accused Mehboob are selling charas in front of the railway godowns. They proceeded to the pointed place and then accused were apprehended by the police party and 1100 grams charas was recovered from the possession of present appellant in presence of mashirs ASI Yasir Nawaz Mughal and PC Ghulam Hyder. It has been brought on the record that the place wherefrom the police received spy information and the place of arrest are surrounded by the shops and hotels while the complainant despite of that did not bother 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 and hotels 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. Moreover, complainant SIP Abdul Majeed in his cross examination has deposed that *“It is correct to suggest that the place of information is a thickly populated area where shops and hotels are*

situated. It is correct to suggest that we did not try to collect any private person witness/mashir either from the place of information or from the place of incident. It is correct to suggest that the place of incident is situated at a busy path". 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 of the prosecutions with the able assistance of learned counsel for the parties and found that the evidence of the prosecution witnesses is contradictory to each other on material particular of the case which goes to the route of the case. For example PW-2/mashir ASI Muhammad Yasir Mughal while admitting the number of facts in his cross examination has deposed that *"It is correct to suggest that no such incident was taken place and the allegedly recovered charas is foisted upon the accused."* When this aspect was confronted to the learned D.P.G, he was not in a position to reply the court satisfactorily. On the contrary he concedes that on this ground only the prosecution has failed to prove its case. We have also noted other many contradictions which have been pointed out in the memo of appeal.

14. According to the case of prosecution, charas was recovered from the possession of accused on 16.12.2012 and it was sent to the chemical examiner on 19.12.2012 after the delay of three days. It is the contention of the defence counsel that the prosecution has 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 Muhammad Younis 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 Muhammad Younis 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 as appeared 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 beyond any shadow of doubt. Resultantly, the impugned judgment dated 16.02.2015 passed by learned Special Judge, for CNS Cases, Sanghar/Camp at inside Central Prison, Hyderabad is set aside. The appeal is allowed. Appellant is acquitted of the charge. It may be mentioned here that during pendency of this appeal appellant was granted bail by suspending the impugned judgment thereafter as per record he was arrested in some other case. Therefore, he is acquitted in this crime and shall be released forthwith if he is not required in any other custody case/crime.

JUDGE

JUDGE

