IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD

Cr. Appeal No. D- 59 of 2016

PRESENT:

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

Appellant: Muhammad Nawaz (present on bail)
Through Mr. Muhammad Sharif Sial, Advocate.

Respondent: The State
Through Syed Meeral Shah Bukhari, A.P.G.

Date of hearing : 22.01.2018.
Date of judgment : 22.01.2018.

J U D G M E N T

ABDUL MAALIK GADDI, J:- Appellant Muhammad Nawaz s/o Shah Nawaz by caste Brohi faced trial before learned Special Judge (Narcotics), Shaheed Benazirabad in Special Case No. 37 of 2015 for offence under Section 9(c) Control of Narcotic Substance Act, 1997. By judgment dated 07.05.2016, 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 case of default in 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. Brief facts of the prosecution case as per FIR are that on 06.01.2015, complainant SIP Sanaullah Panhwar alongwith his subordinate staff was on patrolling duty and after patrolling from the different places, when they reached at railway road, they received spy information that the present appellant was

openly selling charas at Jamshed Colony near his otaq. After receipt of such information, they reached at the pointed place where they saw the present appellant having one black colour shopper in his hand who on seeing the police party tried to slip away but was apprehended. Police recovered from the appellant six big pieces of charas which became 3000 grams. Such memo of arrest and recovery was prepared in presence of mashirs ASI Pir Bux Abbas and PC Ghulam Akbar Korai. Thereafter, accused and case property were brought at the police station where the complainant lodged FIR No.06 of 2015 at P.S. B-Section.

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.5, to which he pleaded not guilty and claimed to be tried vide plea at Ex.6.

5. Prosecution in order to prove its case, examined PW-1 complainant/IO SIP Sanaullah Panhwar at Ex.7, who produced mashrinama of arrest and recovery, FIR, roznamcha entry of departure and arrival and chemical report at Ex.7/A to 7/D and P.W-2/mashir ASI Pir Bux Abbasi at Ex.8, thereafter prosecution side was closed vide 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. Learned counsel for the appellant submits that the appellant is innocent and has falsely been involved in this case. 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 06.01.2015 but it was sent to the chemical examiner on 16.01.2015 after the delay of 10 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 further contended that PC Lutuf Ali who had taken sample to the chemical examiner has also not been examined by the prosecution. He lastly contended that in this case complainant SIP Sanaullah Panhwar 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 contended that in this case the

complainant himself has investigated the matter, therefore, according to him the investigation carried out by I.O. cannot safely be relied upon. He therefore, did not support the impugned judgment on material points of the case.

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 06.01.2015, complainant alongwith his subordinate staff left police station for patrolling in the area. During patrolling from different places when they reached at railway road, they received spy information that the present appellant was selling charas at Jamshed Colony near his otaq, on such information, the police party reached at the pointed place and arrested the present appellant in presence of mashirs ASI Pir Bux Abbas and PC Ghulam Akbar Korai and recovered 3000 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 railway 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 hotels and it was day 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 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 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 06.01.2015 and it was sent to the chemical examiner on 16.01.2015 after the delay of 10 days which has not been explained by the prosecution. PC Lutuf Ali who had taken sample to the chemical examiner has also not been examined before the trial court. It appears that the prosecution has failed to establish the safe custody of charas at Malkhana for 10 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 10 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 07.05.2016 passed by learned Special Judge (Narcotics) Shaheed Benazirabad 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

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