

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

Criminal Appeal No. D-49 of 2016

*Present:-*

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

Date of hearing: 18.01.2018

Appellant: Lal Bux through Mr. Masood Rasool Babar, Advocate.

Respondent: The State through Syed Meeral Shah, APG

**ABDUL MAALIK GADDI, J:-** By means of this appeal, the appellant has assailed the legality and propriety of the judgment dated 03<sup>rd</sup> May, 2016 passed by the learned Sessions Judge / Special Judge (CNS), Tando Muhammad Khan in Special Case No. 05 of 2015 (re-The State v. Lal Bux) under Crime No. 108 of 2015 registered under Section 9(b) of CNS Act, 1997 at PS Tando Muhammad Khan, whereby the learned trial court after full dressed trial convicted and sentenced the appellant as stated in point No.2 of the impugned judgment. For the sake of convenience, it would be advantageous to reproduce the relevant portion of findings in point No.2 which reads as follows:-

**Point No.2**

In view of the above discussion on point No.1, I am of the considered view that the prosecution has established its case against the accused beyond any shadow of doubt, therefore, accused Lal Bux s/o Ghulam Qadir by caste Pittafi, is convicted U/S: 265-H(2) Cr.P.C. and sentenced to suffer rigorous imprisonment for three years for the offence punishable U/S: 9-B CNS Act, and shall also be liable to pay fine of Rs.20,000/- (Rupees Twenty Thousand only) in default whereof, he shall suffer simple imprisonment for three months more. The benefit of Section 382-B Cr.P.C. is also extended to him. The accused is present on bail, and taken in to custody and remanded to Central Prison, Hyderabad along with conviction warrant, to serve out the sentence awarded to him. The bail bond of accused stand cancelled and surety discharged.

2. Facts of the prosecution case as unfolded in FIR are that on 19.08.2015 at about 2000 hours, at Mal Pidi, Sijawal to Tando Muhammad Khan road, deh city Taluka Tando Muhammad Khan, the police party of CIA centre, Tando

Muhammad Khan headed by SIP Shams-ul-Din Khokhar, during patrolling arrested the accused and recovered one white colour cloth bag from his personal search containing one big piece of charas, which was weighed on spot, which became 480 grams besides cash of Rs.400/-. SIP Shams-ul-Din Khokhar prepared such memo of arrest and recovery in presence and with the signatures of mashirs PC Zahid and PC Soorat. Then, they brought the accused and recovered property at PS: Tando Muhammad Khan and lodged the FIR.

3. It appears from the record that after registration of FIR, the investigation was carried by SIP Shams-ul-Din Khokhar, who after recording the statements of P.Ws under Section 161 Cr.P.C., submitted the final report against the appellant in the court of law.

4. After usual investigation, challan was submitted against accused above named. Copies of documents under Section 265-C Cr.P.C. were supplied to the accused vide receipt at Ex.01. Vakalatnama of accused is on record as Ex.02. Charge under Section 9(b) of CNS Act, 1997 was framed against accused above named at Ex.03, to which he pleaded not guilty and claimed to be tried vide his pleas at Ex.04 respectively.

5. It also reveals from the record that in order to establish accusation against the appellant / accused, prosecution had examined complainant SIP Shams-ul-Din Khokhar at Ex.05, who produced memo of arrest and recovery, entry of departure, FIR, entry of departure and arrival back at CIA centre and chemical examiner report at Ex.05/A to Ex.05/E respectively. Mashir PC Zahid Hussain was examined at Ex.06. Thereafter learned A.D.P.P. for the State closed the side of the prosecution through statement at Ex.07.

6. Statement of appellant / accused under Section 342 Cr.P.C. was recorded at Ex.08 respectively in which the appellant / accused denied the prosecution case and stated that nothing was recovered from his possession and due to enmity with local landlord he has falsely been implicated and such F.C. Suit No. 46 of 2009 filed by father of appellant against the said landlord he has been involved in this case falsely. During the course of recording her statement he has produced Photostat copy of judgment and decree of said suit. However, the appellant has neither examined himself on oath nor led any evidence.

7. The trial court after hearing the learned counsel for the parties and assessment of evidence, by judgment dated 03.05.2016, convicted and sentenced the appellant as stated above, hence this appeal has been filed by the appellant.

8. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the judgment dated 03.05.2016 passed by the trial court and therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

9. Mr. Masood Rasool Babar, learned counsel for appellant while arguing has submitted that the appellant has been involved falsely in this case and the case property has been foisted upon him by the complainant and mashir, due to previous filing of F.C. Suit No. 46 of 2009 by the father of appellant against the local landlord. During the course of arguments he has taken to us towards the memo of plaint filed in above suit, therefore, according to him due to this reason false implication of accused could not be ruled out. He further submitted that there is a delay in depositing case property in the office of chemical examiner, hence the property has been managed and tampered. He further submits that no private mashir has been cited as witness in this case and alleged incident took place on the road side where the shops were available. He further submits that both the mashirs are police officials and subordinate of the complainant. He further submitted that there are material contradictions and inconsistencies in the evidence of prosecution witnesses regarding route of patrolling which creates doubt but these aspects of the case has not been appreciated by the trial court and convicted and sentenced the appellant in a hasty manner therefore, the impugned judgment is liable to be set-aside and appellant be acquitted from the charge. In support of his contention he has relied upon the case of Agha Qais v. The State (2009 P.Cr.L.J 1334), Nigar Ahmad v. The State (2013 YLR 196) & Nazeer Ahmed v. The State (PLD 2009 Karachi 191).

10. Conversely, Syed Meeral Shah learned APG while considering the ground of appeal as well as arguments and contradictory evidence of the prosecution witnesses on material particular of the case has not supported the impugned judgment, and raised his no objection for acquittal of the appellant.

11. We have heard the learned counsel for the parties and scanned the entire evidence available on record.

12. After careful consideration and meticulous examination of the available record, suffice to say that mere heinous nature of the offence is not sufficient to convict the accused because the accused continues with presumption of innocence until found otherwise at the end of the trial. It is the settled principle of law that burden is always upon the prosecution to prove the case beyond shadow of doubt. Keeping in view of the basic touch stone of criminal administration of

justice, we have examined the ocular evidence as well as circumstantial and documentary evidence along with impugned judgment.

13. We have come to the conclusion that the prosecution has failed to prove its case against the appellant for the reason that in this case all the pieces of evidence produced by the prosecution are weak in nature. It appears from the record that the alleged incident took place on 19.08.2015 and the present appellant was arrested when police party during patrolling reached at Mal Pidi bridge, Sijawal to Tando Muhammad Khan road deh city Taluka Tando Muhammad Khan and recovered 480 grams of charas along with cash of Rs.400/-. It has also come in evidence that the place from where the present appellant was arrested is a road side and surrounded by houses and shops but despite of this fact complainant who himself is I.O of the case did not bother to associate any independent person from the locality to witness the arrest and recovery proceedings. It is settled principle that 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. However, where 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 independent witnesses, particularly, in case of a checking cannot be brushed aside lightly by the court. Prime object of Section 103 Cr.P.C. is to ensure transparency and fairness on the part of the police during course of recovery, curb 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 private person as recovery witnesses and only relied upon his subordinates and further more he himself registered the complaint and investigated the case. In our view investigating officer of police or such other force, under Section 25 of Control of Narcotic Substance Act, 1997, was not authorized to exclude independent witnesses. It does not do away with principle of producing the best available evidence. No doubt that no specific bar exists under the law against complainant who is also investigating officer of the case, but being the complainant it cannot be expected that as an investigating 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 case of Nazir Ahmed v. The State reported in PLD 2009 Karachi 191 & Muhammad Khalid v.

The State reported in 1998 SD 155. As observed above non-association of independent witness as mashir in this case false implication of the appellant could not be ruled out.

14. We have gone through the evidence and documents available on record with the able assistance of the parties counsel and found that the evidence of the prosecution witnesses are contrary on material particular of the case. We have also noted that incident took place on 19.8.2015 whereas the sample parcel were sent to the office of chemical examiner on 24.8.2015 after a delay of 06 days for which no explanation has been furnished. Nothing on record that during this intervening period before whom the case property was in custody and in case if the property was laying at police Malkhana its entry has also not produced therefore, on this aspect tampering in the case property could not be ruled out. It appears from the record that the appellant is facing protracted trial since 2015 and nothing on record to show that the present appellant has ever been convicted in similar type of cases. It is the case of the appellant that he has been involved in this case by the police at the instance of local zamindar against whom his father has already filed a civil suit. This fact has not been disputed by learned APG in court. On the other hand learned APG has conceded and recorded his no objection if this appeal is allowed.

15. In view of the above contradictions in the evidence of prosecution witnesses false implication of the appellant in this case could not be ruled out but the learned trial court has utterly failed to appreciate this aspect of the case.

16. For the above stated reasons, there are several circumstances / infirmities in the prosecution case, which have created reasonable doubts about the guilt of the appellant.

17. In case of Tariq Pervaiz v. The State reported as 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 single circumstance, which creates reasonable doubt in the prudent mind about the guilt of the accused, then accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right”.

Similar view has also been taken in the case of Muhammad Akram v. The State reported as 2009 SCMR 230.

18. While respectfully relying upon the case laws referred to above, we have no hesitation to hold that prosecution has failed to establish its case against the

appellant beyond reasonable doubt. Therefore, by extending the benefit of doubt, this appeal is allowed. The conviction and sentence recorded by the learned Sessions Judge / Special Judge (C.N.S), Tando Muhammad Khan vide judgment dated 03.05.2016 is set-aside. Appellant is acquitted of the charge. The appellant is produced in custody by Superintendent Special Prison Nara, Hyderabad. He is remanded back with direction to release him in this case if he is not required in any other custody case.

JUDGE

JUDGE

Karar\_hussain/PS\*

It has been also come in evidence that the place from where the present appellant was arrested is a road side and surrounded by houses and shops and despite of this fact the complainant did not bother to associate any independent person of the locality to witness the arrest and recovery proceedings. Non-association of private witnesses in the recovery proceedings appears to fatal in the prosecution. No reason has been given that why the complainant did not associate any private person of the locality, therefore, in absence of private person in the recovery proceedings false implication of the appellant could not be ruled out. I have noted that recovery was made on 19.08.2015 but the case property was received to the office of Chemical Examiner on 24.8.2015 after a delay of about 06 days for which absolutely no explanation has been furnished to the effect that during this intervening period where the property was lying and in whose custody, therefore, under these circumstances tampering in the case property could not be ruled out. I have also noted that HC Zahid Hussain in his examination in chief stated that on 19.08.2015 he along with complainant SIP Shamsuddin Khokhar Incharge CIA Center Tando Muhammad Khan went for patrolling and when reached at Mall Pidi Bridge, they saw a person standing on eastern / southern side of the road in suspicious position and apprehended him but in cross examination the said witness has stated that they patrolled Ayoubia stop, Sirat-ul-Nabi chowk, city bridge, Kiran hotel, Masjid Aqsa road, Bathoro road, Lakhat stand, old Matli bus stand and reached at the place of recovery and arrested the appellant.