IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Before:

Mr. Justice Abdul Maalik Gaddi
Mr. Justice Adnan-ul-Karim Memon

Cr. Appeal No.D- 38 of 2019

Karim Bukhsh and another

Versus

The State

Appellants Karim Bukhsh and Maqbool	:	Through Shahnawaz Brohi, Advocate
Respondent the State	:	Through Ms. Safa Hisbani, A.P.G. Sindh
Date of hearing & judgment	:	12.08.2020

J U D G M E N T

ABDUL MAALIK GADDI, J.- Through this appeal, the appellants have assailed the legality and propriety of the judgment dated 27.02.2019, passed by the learned Special Judge for CNS Tando Muhammad Khan, in Special Case No.44 of 2012 (Re: The State V Karim Bukhsh and another), emanating from Crime No.03 of 2011, registered at Excise Police Station, Tando Muhammad Khan, under section 9(c) Control of Narcotic Substances Act, 1997, whereby after full dressed trial they have been convicted u/s 9(c) CNSA and sentenced to suffer imprisonment for life each and to pay the fine of Rs100,000/- each. In case of default in payment of fine they were ordered to suffer further simple imprisonment for 01 year each. They were also extended the benefit of section 382-B Cr.P.C.

2. Brief facts of the prosecution case as disclosed in the FIR lodged by Excise Inspector Khan Muhammad Samoon are that both the appellants / accused were arrested by the Excise police party headed by the said Inspector on 23.10.2011 at about 09:00 a.m. from Dadoon Pako on Bulri Shah Kareem Road, when they both were transporting contraband Charas in Polythene Bag

on a motorcycle without registration number and recovered a total 35 kilograms of charas from their possession. Then, accused and case property were brought at police station where F.I.R. was lodged as mentioned above.

3. During investigation, Investigating Officer recorded 161 Cr.P.C. statements of the PWs. Sample of the substance / charas was sent to the chemical examiner for examination and positive chemical report was received. On conclusion of the investigation challan was submitted against the accused.

4. Trial court framed charge against accused u/s 9(c) CNSA, to which, he pleaded not guilty and claimed to be tried vide their respective pleas. At the trial prosecution examined P.W-1 complainant / Excise Inspector Khan Muhammad Samoon at Ex.07, who produced Roznamcha entry No.1147 showing their departure from their office at ex.7/A, mashirnama of arrest and recovery at Ex.7/B, F.I.R. at Ex.7/C, report of Chemical Examiner at Ex.7/D. P.W-2 EC / mashir Saleem Shaikh was examined at Ex.8. Thereafter, prosecution side was closed by learned ADPP vide his statement at Ex.9.

5. Statements of accused were recorded u/s 342 Cr.P.C. at Ex.10 and 11, respectively, in which they denied the prosecution allegations and claimed their false implication in this case; however, they did not examine themselves on oath nor led any defence evidence.

6. It is noted that initially both accused were tried by the trial Court and vide judgment dated 17.09.2014 they both were convicted and sentenced to suffer imprisonment for life. Both accused / appellants preferred Criminal Jail Appeal before this Court bearing No.D-98/2014, which was disposed of vide order dated 28.09.2017 and the impugned judgment was set aside and case was remanded back to the trial Court for de-novo trial. After receiving the file of the case, learned trial Court proceeded with the case and after hearing the parties' counsel again convicted and sentenced the appellants in the manner as mentioned in preceding para.

7. Learned counsel for the appellants has contended that the prosecution case is highly doubtful; the place of incident was located at busy spot, yet, nobody from the public was joined to attest the arrest and recovery

proceedings; there are material contradictions in the prosecution evidence, hence it cannot be safely relied upon; that there was delay in sending the case property to the Chemical Examiner and tampering with the case property during such period could not be ruled out. It is also argued that alleged recovery was made on 23.10.2011 at 0900 hours (morning time), whereas the sample was sent and received to Chemical Analyzer on 25.10.2011 with a delay of 02 days and no evidence has been brought on the record that charas was kept in the safe custody during that period. Lastly he argued that accused have been involved in this false case by police due to enmity to teach them a lesson.

8. Learned Assistant Prosecutor General Sindh has supported the impugned judgment by arguing that the impugned judgment is perfect in law and facts; that the learned trial Court while convicting the appellants has addressed all the points involved in this case comprehensively; therefore, the impugned judgment does not require any interference.

9. We have heard the learned parties' counsel and perused the entire evidence available on record and the relevant case law.

10. After meticulous examination of the record we have reached the conclusion that the prosecution has failed to prove its case against the appellant to the required criminal standard for the reasons that despite the place of incident i.e. Dado Pakko Shah Karim Road, where, as per evidence of both P.Ws many motorcycles and other vehicles were going on and off and the recovery being made in daylight hours i.e. at 0900 hours (morning time), no attempt was made to associate an independent witness / mashir to attest the arrest and recovery which was important in this case since the appellants in their statements under section 342 Cr.P.C. have shown enmity with ETO Syed Hussain Shah, as such the evidence of the excise police personnel cannot be safely relied upon without independent corroboration, which is lacking in this case. During the course of arguments, we have specifically asked the question from learned A.P.G that when the place of incident was a busy road and private persons were available there why they have not been made mashirs / witnesses of the event? she has no satisfactory reply with her; however, she submits that in such like cases people always avoid to come

forward to act as witness. We are not impressed with this explanation for the reason that as per record no sincere efforts have been made by the excise police party to pick / join any independent person to witness the incident. This aspect of the case gives jolt to the prosecution case.

11. It is noted that the whole case of prosecution hinges upon the evidence of police officials. No doubt the evidence of police official is 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 incident then non-association of private witness in the recovery and arrest proceedings create serious doubt in the prosecution case.

12. It is also noted that in this mater Roznamcha entry with regard to departure of police party from excise police station has been produced being entry No.1147 without mentioning any year but it is surprising to note that arrival entry of the police party at Police Station alongwith the case property and the accused persons has not been produced in evidence. Non-production of entry in Roznamcha by the prosecution in Court to prove the movement of police from the police station to the place of recovery of narcotic substance cuts at the root of the prosecution case making the entire episode doubtful and the prosecution version unbelievable. In this context we are fortified by the case of **Abdul Sattar and others V The State** (2002 PCr.LJ 51).

13. We have gone through the evidence so brought on record by prosecution, which is not only contradictory but in the given circumstances it cannot be safely relied upon because the evidence so brought is not confidence inspiring. For convenience purpose some important contradictions, which were found in the evidence of prosecution witnesses, are as follows:

> "1. PW-1 says that he received spy information in late hours of night and PW-2 says that they received spy information before departure of office.
>
> 2. PW-1 says they started checking of vehicles at 07:30 AM and PW-2 says that they reached place of occurrence at 09:00 AM.

3. The PW-1 says that it took about one hour in preparation of mashirnama, conducting weight & sealing the property while PW-2 says that it took about two & half hour in completing all formalities at place of recovery.

4. The PW-1 says that they reached PS back at 11:45 Am and PW-2 says that they reached after 12:00 Noon.

5. The departure entry shows time as 05:15 AM, while FIR shows that they (PWs) left PS at 06:00 AM.

6. The PW-1 says that they did not stop any vehicle.

7. The Malkhana entry has not been produced."

When the above contradictions were confronted to the learned A.P.G for reply she has no satisfactory answer with her.

14. The case and claim of the appellants is that they have been involved in this case due to enmity with Syed Hussain Shah E.T.O Tando Muhammad Khan.

15. Not only this, the alleged incident took place on 23.10.2011 whereas the case property was sent to Chemical Examiner on 25.10.2011 after a delay of 02 days and no satisfactory explanation has been furnished by the prosecution that during such intervening period where the case property was lying. Most significantly, we find that there is absolutely no evidence on record to show that the charas was kept in safe custody from the time of its recovery until it was sent to and received in the office of Chemical Examiner, which was an unexplained delay of 02 days. This aspect of the case has also caused a serious dent in the prosecution case.

16. The case and claim of the appellant is based upon denial of incident. In their statements recorded under section 342 Cr.P.C. they denied all the allegations leveled against him in the F.I.R.

17. As stated above in para-6, it is noted that this is the second round of litigation of the case. Earlier the appellants were convicted by the trial Court on 17.09.2014 and same sentence was awarded to them and on filing appeal bearing Cr. Jail Appeal No.D-98/2014 the case was remanded to the trial Court on 28.09.2017 for de-novo trial after granting bail to the appellants in the sum of Rs.500,000/- each and P.R Bond in the like amount to the

satisfaction of the trial Court and on remand present appellants were again convicted and sentenced as stated in the preceding paragraph of this judgment, hence under the circumstance it can be safely inferred that the case of the prosecution appears to be doubtful. We have noted number of contradiction, infirmities and lacunas in the prosecution case, as mentioned above in para -13, therefore, we have come to the conclusion that the case of prosecution is full of doubts. It is well settled law that the benefit of doubt occurred in prosecution case must go to the accused by way of right as opposed to concession. In this respect reliance is placed on the case of **Tariq Pervez V/s. The State** (1995 SCMR 1345), wherein 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."

18. It is noted that the present appellants are first offenders and having no past criminal history on their credit, therefore, we have, for what has been observed above, come to the conclusion that prosecution has failed to prove its case against the appellants beyond shadow of reasonable doubt. Therefore, we had allowed the captioned appeal by our short order passed in open Court today i.e. 12.08.2020 and set aside the impugned judgment dated 27.02.2019, passed by the learned Special Judge for CNS Tando Muhammad Khan, in Special Case No.44 of 2012 (Re: The State V Karim Bukhsh and another) and acquitted the appellants of the charge.

19. Above are the detailed reasons for our short order of even date.

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