IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Before:

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

Cr. Jail Appeal No. D- 58 of 2018

Muhammad Subhan. . Versus . . . The State

Appellant Muhammad Subhan	:	Through Mr. Shabbir Ahmed Malik, Advocate
State	:	Through Ms. Rameshan Oad, Asst. Prosecutor General, Sindh
Date of hearing	:	22.09.2020
Date of Judgment	:	22.09.2020

JUDGMENT

ABDUL MAALIK GADDI, J.- Through this Criminal Jail Appeal, the appellant has called in question the judgment dated 29.03.2018, passed by the learned Special Judge (Narcotic), Shaheed Benazirabad in Special Narcotic Case No.921 of 2017 (Old Special Narcotic Case No.10/2015) (Re: The State v. Muhammad Subhan) arising out of Crime No.13 of 2015, registered at Police Station DIO Camp Excise Circle, Kandiaro, for an offence under Section 9(C) of Control of Narcotic Substances Act, 1997, whereby he was convicted and sentenced to suffer imprisonment for life and to pay fine of Rs.1,00,000/- (Rupees one lac), in case of non-payment of fine, he shall suffer S.I for 06 months more with benefit of Section 382-B Cr.P.C.

2. Concisely, the facts as portrayed in the F.I.R, are that on 11.07.2015 at about 10:00 p.m excise police party headed by Excise Inspector / complainant Anwar Ali Solangi during patrolling in their jurisdiction due to suspicion got stopped one truck bearing registration No.TAE-647 at Rasool-Abad Check

Post and arrested the accused, who was plying that truck, in presence of official witnesses and recovered cash amount of Rs.3000/- from the front pocket of his shirt as well as copy of CNIC. Then complainant / excise police party took search of the said truck and from the spare tire fixed on its back side also recovered 30 plastic packets, each packet found contained 01 kg of narcotic substance / charas, same were weighed and found total 30 kilograms. Thereafter complainant took 200 grams of narcotic substance from each packet and sealed them separately for chemical examination, whereas remaining property was sealed separately. The truck was also taken into custody. Then such mashirnama of arrest and recovery was prepared at the spot and the accused and property were brought at PS where F.I.R was registered against the accused on behalf of State.

3. At trial, trial Court framed charge against the accused at Ex.03, to which he pleaded not guilty and claimed to be tried vide his plea at Ex.4. Thereafter, prosecution in order to substantiate the charge against the appellant, examined the following two (02) witnesses:

> P.W No.1: Complainant / Excise Inspector Anwar Ali was examined at Ex.5, who produced mashirnama of arrest, search and recovery at Ex.5-A, F.I.R. at Ex.5-B, copy of roznamcha entry at Ex.5-C, verification letter of vehicle at Ex.5-D, photocopy of letter to chemical examination at Ex.5-E and Chemical Examiner's report at Ex.5-F.
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> P.W No.2: EC Ahmed Khan Kalhoro examined at Ex.6, he is mashir of the case.

Both the above named witnesses have been cross-examined by learned defence counsel. Thereafter, prosecution side was closed as per statement of learned DPP at Ex.7.

4. Later on, statement of accused was recorded u/s 342 Cr.P.C at Ex.8, in which he denied the prosecution allegation and claimed his innocence. However, he did not examine himself on oath nor give any evidence in his defence.

5. Learned counsel for the appellant has contended that the appellant has been involved in this case falsely by the police; that the impugned judgment passed by the learned trial Court is opposed to law and facts and is also against the principles of natural justice; that Excise Inspector Anwar Ali

Solangi, who is complainant in this case has also acted as Investigating Officer, therefore, entire prosecution story is unbelievable; that no recovery was affected from the possession of appellant and the alleged charas has been foisted upon him; that prosecution has miserably failed to establish the guilt of appellant beyond any reasonable shadow of doubt; that there is violation of Section 103 Cr.P.C as no private / independent person has been taken / cited as mashir of the alleged recovery nor any efforts were made by the police party despite of the fact that alleged place of incident was thickly populated area, as such, false implication of the appellant in this case cannot be ruled out; that while recording the statement of accused u/s 342 Cr.P.C, all incriminating pieces of evidence were not put to the appellant even question was not put to the accused with regard to the allegedly recovered truck, hence the appellant has not been awarded fair opportunity of being heard on material points of the case. Lastly he prayed that instant appeal may be allowed and appellant may be acquitted of the charge.

6. Conversely, learned Asst. Prosecutor General Sindh appearing on behalf of State has fully supported the impugned judgment by submitting that prosecution has fully established the guilt of appellant beyond any reasonable shadow of doubt; that both above named witnesses have fully supported the case of prosecution and there is no major contradiction in their version on material particulars of the case hence, the impugned judgment does not call for any interference.

7. We have heard the learned counsel for the parties at a considerable length and have gone through the documents and evidence so brought on record.

8. 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 in this case the allegation against the appellant is that on the fateful day he was apprehended from near Rasool-Abad Check Post and 30 kilograms of Charas were recovered from the truck plying by him at that time. On perusal of record it reveals that place of incident i.e. Rasool-Abad Check Post as per evidence of both P.Ws though was a thickly populated area, availability of

independent / private persons cannot be ruled out but complainant / excise police party did not bother to pick / cite any independent mashir from that place to witness the event; that there was an unexplained delay of 02 days in between the recovery of the charas and receiving the same in the office of chemical analyzer for testing, as Chemical Examiner's report (Ex.5/F) reflects that samples of case property / alleged charas were received in his office on 13.07.2015 whereas the incident took place on 11.07.2015.

9. Most significantly, we find that there is absolutely no evidence on record to show that the charas / alleged contraband item 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; that it is the case of prosecution that during intervening period when the alleged narcotic substance was recovered and sent to Chemical Examiner for report it was kept in Malkhana; however, neither the Incharge of the Malkhana nor any entry with regard to keeping such contraband item in safe custody has not been examined / brought on record to substantiate such contention. So also EC Haji Khan, who as per prosecution case took the samples for chemical examination to Chemical Examiner's office, has not been examined. There is also nothing on record to testify as to the safe-custody and safe transit of the narcotic to the chemical examiner. During the course of arguments, we have specifically asked the question from learned A.P.G to explain that during such intervening period of 02 days before and with whom the case property was lying and in case it was lying in Malkhana whether any evidence with regard to safe custody has been brought on record to corroborate this fact, she has no satisfactory answer with her. Under these circumstances, there is, in our view, every possibility that the alleged recovered narcotic during the said 02 days' delay in sending it to the chemical examiner may have been interfered with / tampered with, as it was not kept in safe custody and as such even a positive chemical report is of no help to the prosecution. The significance of keeping safe custody of the narcotic in a case under the CNSA has been emphasized in the case of **Ikramullah & others v/s. the State** (2015 SCMR 1002), the relevant portion of which 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."

10. It is also pertinent to mention here that in this case complainant/ Excise Inspector Anwar Ali Solangi had not only lodged F.I.R. but also conducted investigation of the case himself. In our view it is / was not appropriate that the person who is complainant of a case could investigate the same himself because in order to keep all fairness of thing the rule of propriety demands that it must be investigated by an independent officer but not by the complainant himself. The Hon'ble Supreme Court has observed similar view with a different angle in a case reported as **State through Advocate General, Sindh v. Bashir and others** (PLD 1997 Supreme Court 408), wherein it is held as under:

> " As observed above, Investigating Officer is as important witness for the defence also and in case the head of the police party also becomes the Investigating Officer, he may not be able to discharge his duties as required of him under the Police Rules".

11. Similarly, in a case reported as **Ashiq alias Kaloo v. The State** (1989 PCr.LJ 601), the Federal Shariat Court has observed that investigation by complainant while functioning as Investigating Officer is a biased investigation.

12. Further, in the case in hand, P.W-2 EC Ahmed Khan was the subordinate / colleague of the complainant and no third party/independent person from the place of incident was picked up to act as mashir of arrest and recovery; therefore, this is a case of insufficient evidence. In this context we are fortified by the cases of **Muhammad Altaf v. The State** (1996 PCr.LJ 440),

(2) **Qaloo v. The State** (1996 PCr.LJ 496), (3) **Muhammad Khalid v. The State** (1998 SD 155) and (4) **Nazeer Ahmed v. The State** (PLD 2009 Karachi 191).

13. Another important aspect of the case is that as per F.I.R, the charas was allegedly recovered from spare tire of the truck bearing registeration No.TAE-647, which was plying by the appellant at that time, however, the statement of the accused / appellant recorded under section 342 Cr.P.C, does not contain the question with regard to recovery / plying of the said truck by the appellant at the time of alleged recovery. We are persuaded to hold that it was the primary responsibility of the trial Court to ensure that truth is discovered. The procedure adopted by the trial court is reflective of miscarriage of justice. Offence is punishable for up to death penalty or imprisonment for life and appellant has been awarded imprisonment for life without providing him opportunity with regard to material questions to be put to him in his statement u/s 342 Cr.P.C. As regards to the contention of learned counsel for appellant that all the pieces of evidence were not put to accused under section 342, Cr.P.C for his explanation, Honourable Supreme Court in an unreported judgment in **Criminal Appeal No.292 of 2009** dated 28.10.2010 passed in the case of **MUHAMMAD HASSAN v. THE STATE**, held as under:-

> " 3. In view of the order we propose to pass there is no occasion for going into the factual aspects of this case and it may suffice to observe that the case of the prosecution against the appellant was based upon prompt lodging of the F.I.R., statements of three eyewitnesses, medical evidence, motive, recovery of weapon of offence and a report of the Forensic Science Laboratory regarding matching of some of the crime-empties with the firearm allegedly recovered from the appellant's possession during the investigation but we have found that except for the alleged recovery of Kalashnikov from the appellant's possession during the investigation no other piece of evidence being relied upon by the prosecution against the appellant was put to the appellant at the time of recording of his statement under section 342, Cr.PC."

14. It is by now a settled principle of criminal law that each and every material piece of evidence being relied upon by the prosecution against an accused person must be put to him at the time of recording of his statement u/s 342 Cr.P.C. so as to provide him an opportunity to explain his position in that regard and denial of such opportunity to the accused person defeats the

ends of justice. It is also equally settled that failure to comply with this mandatory requirement vitiates the trial. The case in hand is a case of narcotics entailing a sentence of life imprisonment or death and we have truly been shocked by the cursory and casual manner in which the learned trial Court had handled the matter of recording of the appellant's statement u/s 342 Cr.P.C which statement is completely short of the necessary details which were required to put to the appellant. It goes without saying that the omission on the part of the learned trial Court mentioned above was not merely an irregularity curable under section 537, Cr.P.C but the same was a downright illegality which had vitiated the appellant's conviction and sentence recorded and upheld by the trial Court. In the case of **MUHAMMAD NAWAZ and others** v. **The STATE and others** (2016 SCMR 267), Honourable Supreme Court of Pakistan has observed as under:-

> " ……While examining the appellants under section 342, Code of Criminal Procedure, the medical evidence was not put to them. It is well settled by now that a piece of evidence not put to an accused during his / her examination under section 342, Code of Criminal Procedure, could not be used against him / her for maintaining conviction and sentence."

15. Apart from above, we have also noticed that there are so many contradictions and lacunas in the evidence of prosecution witnesses as well as the case which have cause serious dent in the prosecution case. The contention of the learned counsel for the appellant that the evidence of the PWs is not reliable as the same suffers from the material contradictions and inconsistencies has force, as stated supra.

16. Under these circumstances and for the other reasons mentioned above we are of the considered view that the prosecution has not been able to prove its case against the appellant beyond a reasonable doubt. 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. 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."

17. For the above stated reasons, we hold that prosecution has failed to prove its case against the appellant, therefore, the instant appeal is allowed and the impugned judgment dated 29.03.2018 is set aside. As a result thereof, the appellant is acquitted of the charge; he is in custody, he shall be released forthwith if not required in any other custody case.

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