IN THE HIGH COURT OF SINDH,
CIRCUIT COURT HYDERABAD

Cr. Appeal No. D- 51 of 2020

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

Date of hearing:	29.09.2020
Date of Judgment:	29.09.2020
Appellant:	Asghar through Mr. Bilawal Ali Ghunio, Advocate.
State:	Through Ms. Sobia Bhatti, Asst. Prosecutor General, Sindh.

JUDGMENT

ABDUL MAALIK GADDI, J- Through this Criminal Appeal, appellant Asghar s/o Muhammad Usman alias Sango, has called in question the judgment dated 22.08.2020 passed by the learned Special Judge for CNS / MCTC-1, Hyderabad, in Special Case No.266 of 2019 (Re: The State v. Asghar) arising out of Crime No.166 of 2019, registered at Police Station Qasimabad, Hyderabad, for an offence under Section 9(C) of Control of Narcotic Substances Act, 1997, whereby he was convicted and sentenced to suffer R.I for four (04) years & six (06) months and to pay fine of Rs.20,000/- (Rupees Twenty Thousand), in case of non-payment of fine, he shall suffer S.I for five (05) 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 21.08.2019 at 1730 hours, ASI Nazeer Ahmed Shoro arrested the accused from near Check Post-19 Bypass, Hyderabad in presence of official witnesses and recovered 1100 grams of charas lying in green colour shopper from his possession. Thereafter such mashirnama of arrest and recovery was prepared after sealing the property at the spot and then took the accused and case property to PS where lodged the F.I.R against the accused on behalf of State.

3. The Prosecution in order to substantiate the charge against the appellant, examined the following three (03) witnesses:

P.W No.1: ASI Nazir Ahmed Shoro was examined at Ex.5, who produced entries No.14 & 16, memo of arrest and

recovery and F.I.R, entry No.34 of register No.19 as Exh.5/A to Exh.5/E respectively.

P.W No.2 Mashir PC Nisar Ahmed Mirbehar was examined at Ex.6, who produced mashirnama of wardat, extract of entries Nos.29 & 22 at Exh.6/A & Exh.6/B respectively.

P.W No.3 Investigating Officer SIP Ali Asghar was examined at Ex.7, who produced entries Nos.18 and 19, report of chemical examiner at Exh.7/A and Exh.7/B respectively.

All the above named witnesses have been cross-examined by the learned DDPP for State.

4. Later on, statement of accused was recorded u/s 342 Cr.P.C at Ex.9, 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 malafdely 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 no recovery was affected from the possession of appellant and prosecution has miserably failed to establish the guilt of appellant beyond any reasonable shadow of doubt as the evidence of PWs are contradictory to each other on material particular of the case; that no private / independent person has been made as mashir of the alleged recovery nor any efforts were taken by the police party as the incident took place in the populated area, as such, false implication of the appellant in this case cannot be ruled out. Lastly he prayed that instant appeal may be allowed and appellant may be acquitted of the charge.

6. Conversely, learned Asst. Prosecutor General 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. She has further contended that all the prosecution witnesses have fully supported and corroborated the version of each other and there is no 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. We have perused the evidence of complainant / ASI Nazir Ahmed Shoro who deposed that on 21.08.2019 he alongwith subordinate staff left PS for patrolling of the area and during patrolling when they reached to Check Post 19 Bypass, Qasimabad Hyderabad they started checking of the vehicles. During checking, they saw one person coming on a motorcycle from Nasem Nagar Chowk, who on seeing police party trying to escape away however, police party tactfully apprehended him and on enquiry he disclosed his name as Asghar s/o Muhammad Usman alias Sango by caste Soomro and from his possession 1100 grams of charas was recovered in presence of mashirs namely PC Nisar Ahmed and PC Ali Akbar. It is noted that vehicles were passing at place of incident during arrest and recovery proceedings; therefore, the question arises when the vehicles were available at the spot then why complainant did not join / ask any private person to act as mashir. It is also noted that whole case of the prosecution hinges upon the evidence of police officials. No doubt police witnesses are as good as other independent witnesses and conviction could be recorded on their evidence, but their testimony should be reliable, dependable, trustworthy and confidence worthy and if such qualities are missing in their evidence, no conviction could be passed on the basis of evidence of police witnesses. But here in this case, we have also noted number of contradictions in between the evidence of prosecution witnesses. We are conscious of the fact that provisions of Section 103 Cr.P.C are not attracted to the cases of personal search of the accused in narcotic cases. However, where alleged recovery was made on a road and the peoples were available there, omission to secure independent mashirs cannot be brushed aside lightly by this Court.

9. Further, in the case in hand, P.W-2 PC Nisar Ahmed Mirbehar was the subordinate / colleague of the complainant and he took the case property for chemical examiner for its analysis and no third party / independent person was authorized by the complainant to take the case property for chemical examination, 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).

10. It reveals from the record that alleged recovery was made from the appellant on 21.08.2019 but the alleged contraband items recovered from the appellant was received by chemical examiner on

26.08.2019, after the delay of five (05) days for which no satisfactory explanation has been furnished. 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, the Incharge of the Malkhana has not been examined to substantiate such contention. There is 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 05 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 06 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 assistance 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."*

11. It is stated by learned counsel for the appellant that appellant has been booked in Crime No.139 of 2019 registered u/s 324, 353, 147, 148, 504, 427 PPC at PS Qasimabad and police has falsely been involved the appellant in this case on the instructions of ruling party as the accused belongs to rival group of ruling party. It has further

been stated by the counsel for appellant that in view of the contradictory evidence on record, foistation of charas against the appellant could not be ruled out. As stated above, we have also observed number of contradictions in between the statements of prosecution witnesses. Not only this the other infirmities and lecunas are also appearing in the case of prosecution as highlighted above. When these contradictions and infirmities were also confronted with learned A.P.G, she has no satisfactory answer with her. Therefore, plea of innocence raised by appellant in this case cannot be ignored and the appellant appears to be entitled for benefit of such contradictory evidence.

12. 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/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."*

13. For the above stated reasons, we hold that prosecution has failed to prove its case against the appellant, therefore, while extending the benefit of doubt in favour of the appellant, this Criminal Appeal is ***allowed***. Consequently, the conviction and sentence recorded by the trial Court vide judgment dated 22.08.2020 are set-aside and appellant is acquitted of the charge. He is in custody, he shall be released forthwith if not required in any other custody case.

JUDGE

JUDGE

Hafiz Fahad