

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Present:-

Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Zulfiqar Ali Sangi

Cr. Appeal No.D-66 of 2019

Mumtaz Ali Chandio.Appellant.

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Versus.

The State.

Appellant Mumtaz Ali
Chandio

: Through Mr. Abdul Hafeez Khoso,
Advocate.

The State:

: Through Miss Safa Hisbani,
Assistant Prosecutor General, Sindh

Date of hearing and judgment: 11.09.2019.

J U D G M E N T

Zulfiqar Ali Sangi, J.-Appellant Mumtaz Ali Chandio was tried by learned Special Judge (Narcotics) Shaheed Benazirabad, in Special Case No.817 of 2017, arisen out of Crime No.206 of 2017, registered at Police Station Kazi Ahmed, under section 9(c) Control of Narcotic Substances Act, 1997, whereby he was convicted u/s 9(c) of CNS Act, 1997 and sentenced to suffer R.I. for 03 years and to pay fine of Rs.30,000/-. In case of default in payment of fine, he was ordered to suffer SI for 06 months more. Benefit of Section 382-B Cr.P.C. was also extended to him.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 27.10.2017, complainant/SIP Moula Bux Khaskheli of Police Station Qazi Ahmed alongwith his subordinate staff namely, HC Muhammad Paryal, PC Bashir Ahmed, PC Muhammad Siddique and DPC Rasool Bux was on patrol duty under roznamcha entry No.33 at 0730 hours. After patrolling at different places, they took road from Qazi Ahmed to Nawabshah and when reached near a barren cotton factory, they saw one person having one black colour shopper in his hand, was coming in front of

them. He tried to run away after seeing the police party but was apprehended. On enquiry, he disclosed his name as Mumtaz Ali Chandio, from whom the black colour shopper was recovered which on opening was found containing 10 pieces of charas which, on weighing, became 5000 grams. The charas was sealed at spot for sending to Chemical Examiner. Besides charas, an amount of Rs.50/- was also recovered, which was lying in front pocket of his shirt. Accused alongwith recovered narcotic substance was then brought at Police Station, where above case was registered. Thereafter, I.O. sent the charas to the Chemical Examiner for examination and report. After completion of usual investigation, challan was submitted before the Court of law.

3. Trial Court framed charge against accused u/s 9(c) of CNS Act 1997, at Ex.2, to which accused pleaded not guilty and claimed to be tried. At the trial, prosecution examined PW-1 / complainant SIP Moula Bux at Ex.03, who produced mashirnama of arrest, search and recovery at Ex.3-A, F.I.R. at Ex.3-B, compared attested copy of roznamcha entries at Ex.3-C, photocopy of RC at Ex.3-D, Chemical report at Ex.3-E. Then prosecution examined P.W-2 Mashir / HC Muhammad Pariyal Kalhoro at Ex.4 and P.W-3 PC Nizamdin at Ex.5; thereafter, prosecution side was closed by learned DDPP vide his statement at Ex.6.

4. Statement of accused was recorded u/s 342 Cr.P.C.at Ex.7, whereby he claimed his innocence and denied all the incrementing pieces of evidence against him. However, neither he examined himself on oath nor led any defense evidence in disproof of prosecution allegations.

5. Learned Special Judge after hearing the learned counsel for the parties and examining the evidence available on record vide impugned judgment dated 18.04.2019, convicted and sentenced the accused / appellant as stated above hence this appeal.

6. We have heard Mr. Abdul Hafeez Khoso, learned advocate for appellant, Ms. Safa Hisbani, learned A.P.G. for the State and scanned the entire evidence.

7. Learned counsel for the appellant has mainly contended that there is violation of section 103 Cr.P.C, as no efforts were made by the police to associate a private

person as mashir. He further contended that the learned trial Court has not appreciated the evidence properly and overlooked the material contradictions, which were brought on the record. He next contended that there is delay in sending the case property to the Chemical Examiner which creates doubt in the prosecution case and that the prosecution has not established its case beyond shadow of reasonable doubt. Lastly he prayed for acquittal of the appellant.

8. Learned A.P.G. contended that minor contradictions in prosecution evidence are not helpful to the appellant. She further contended that prosecution has proved its case by producing the evidence of complainant, who is also Investigating Officer of the case and mashir namely Muhammad Pariyal. She also relied on Chemical Examiner's report, which is in positive and contended that PC Nizamuddin was also examined before the trial Court, who had taken the case property to the Chemical Examiner in safe custody. In these circumstances, she prayed that appeal of the appellant be dismissed and the impugned judgment be maintained.

9. On perusal of evidence available on record, it appears that there are material contradictions in the evidence of the complainant and mashir. The complainant in his cross-examination has stated that "*accused was fettered by me at vardat*", whereas mashir in his cross-examination stated that "*accused was not fettered*". Complainant in his cross-examination has further stated that "*I prepared mashirnama over bonnet of police mobile*" whereas mashir stated that "*the complainant prepared mashirnama by putting paper on writing pad and standing at Vardat*". Complainant in cross-examination has further stated that "*I sealed the currency note with charas in parcel*", whereas mashir during his cross-examination stated that "*complainant kept recovered currency note in his possession*". Complainant further deposed during cross-examination that "*I did not send any of my staff members to bring private mashir*", whereas mashir during his cross-examination has stated that "*we tried for private mashir but could not find anyone*".

10. In the present case as is clear there are contradictions between the evidence of both the prosecution witnesses regarding material facts, such contradictions go to

the root of the case and suggest a probability that the case was prepared at police station.

11. Perusal of record further shows that road certificate issued by complainant is dated 27.10.2017, meaning thereby that on 27.10.2017 the case property was handed over to PC Nizamuddin but Chemical Examiner's report shows that the parcel was received on 02.11.2017. Deposition of PC Nizamuddin shows that he received the case property on 02.11.2017, which was given to him by complainant after taking out from Malkhana through WHC. Prosecution has failed to produce any roznamcha entry to establish that the property was kept in Malkhana in safe custody, and further in this regard has not examined the Incharge of Malkhana. In similar circumstances, the Honourable Supreme Court of Pakistan in the case of **Abdul Ghani and others v. The State and others** reported in 2019 SCMR 609 held as under:-

“ 2. There is hardly any occasion for discussing the merits of the case against the appellants because the record of the case shows that safe custody of the recovered substance as well as safe transmission of samples of the recovered substance to the office of the Chemical Examiner had not been established by the prosecution in this case. Nisar Ahmed, S.I./SHO complainant (PW1) had stated before the trial court that he had deposited the recovered substance at the Malkhana of the local Police Station but admittedly the Moharrir of the said Police Station had not been produced before the trial court to depose about safe custody of the recovered substance. It is also not denied that Ali Sher, H.C. who had delivered the samples of the recovered substance at the office of the Chemical Examiner had also not been produced during the trial so as to confirm safe transmission of the samples of the recovered substance. It has already been clarified by this Court in the cases of The State through Regional Director ANF v. Imam Bakhsh and others (2018 SCMR 2039), Ikramullah and others v. The State (2015 SCMR 1002) and Amjad Ali v The State (2012 SCMR 577) that in a case where safe custody of the recovered substance or safe transmission of samples of the recovered substance is not proved by the prosecution through independent evidence there it cannot be concluded that the prosecution had succeeded in establishing its case against the appellants beyond reasonable doubt. The case in hand suffers from the same legal defects. This appeal is, therefore, allowed, the convictions and sentences of the appellants recorded and upheld by the courts below are set aside and they are acquitted of the charge by extending the benefit of doubt to them. They shall be released from the jail forthwith if not required to be detained in connection with any other case.”

12. From the above discussion, it is evident that there are serious doubts in the case of prosecution. It is settled law that even a single doubt in the prosecution story is disastrous and its benefit must go to the accused. In this regard, we would like to

place reliance on the case of **Tariq Pervez v. The State** (1995 SCMR 1345) wherein Honourable Supreme Court of Pakistan held as under:-

“ The concept of benefit of doubt to an accused person is deep rooted in our country. For giving him benefit of doubt, it is not necessary that there should be 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. Above are the reasons of short order dated 11.09.2019, whereby while extending benefit of doubt, instant appeal was allowed, the conviction and sentence recorded by the trial Court vide judgment dated 18.04.2019 were set aside and the appellant was acquitted of the charge.

JUDGE

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