IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Crl. Appeal No. D – 80 of 2019

Before;
Mr. Justice Irshad Ali Shah
Mr. Justice Amjad Ali Sahito

Appellant: Abdul Hameed son of Khuda Bux Makrani,
through Mr. Muhammad Sharif M.Sial, Advocate.

Respondent: The State, through Ms. Rameshan Oad, A.P.G.

Date of hearing: 10-12-2019.
Date of decision: 10-12-2019.

J U D G M E N T

IRSHAD ALI SHAH, J. It is alleged that on arrest from the appellant was secured 3200 grams of charas, in shape of 14 pieces by police party of PS B-Section Nawabshah led by complainant SIP Muhammad Iqbal, for that he was booked and reported upon.

2. At trial, appellant did not plead guilty to the charge and prosecution to prove it, examined PW-1 complainant SIP Muhammad Iqbal, he produced memo of arrest and recovery, daily diaries, FIR of the present case and report of chemical examiner; PW-2/mashir ASI Manzoor Ali and PW-3 PC Lutaf Ali and then closed the side.

3. The appellant in his statement recorded u/s 342 Cr.P.C denied the prosecution allegation by pleading innocence by stating that he has been involved in this case falsely by the police. He did not examine anyone in his defence or himself on oath to disprove the prosecution allegation against him.

4. On conclusion of the trial, learned Ist Additional Sessions Judge/ MCTC, Shaheed Benazir Abad found the appellant to be guilty for

offence punishable u/s 9(c)of CNS Act, and then convicted and sentenced him to undergo Rigorous Imprisonment for ten years with fine of Rs.200,000/=and in case of his failure, to make payment of fine to undergo Simple Imprisonment for six months with benefit of section 382-B Cr.P.C vide his judgment dated 26.04.2019, which is impugned by the appellant before this Court by way of instant appeal.

5. It is contended by learned counsel for the appellant that the appellant being innocent has been involved in this case falsely by the police only to show its efficiency; there is no independent witness to the incident; the sample of charas has been subjected to chemical examination with un-plausible delay of six days to its recovery; the incharge of malkhana has not been examined by the prosecution to prove the safe custody of charas and evidence of the prosecution being inconsistent and untrustworthy has been relied upon by learned trial Court without lawful justification. By contending so, he sought for acquittal of the appellant. In support of his contention he has relied upon case of ***Nazeer and another vs The State (2014 P.Cr.L.J Sindh 1358).***

6. Learned A.P.G for the State has sought for dismissal of the appeal by contending that the prosecution has been able to prove its case against the appellant beyond shadow of doubt.

7. We have considered the above arguments and perused the record.

8. Admittedly, the complainant went at the place of incident on information, yet he failed to associate independent person to witness the possible arrest and recovery, such omission on his part could not be lost sight of. As per complainant, mashirnama of arrest and recovery was

prepared at his dictation by PC Irshad. No such note is put up on the said mashirnama, which appears to be significant. Be that as it may, PC Irshad has not been examined by the prosecution for no obvious reason. The 161 Cr.P.C statements of the PWs as per complainant were recorded by WPC Ghulam Ali. If, it is believed to be so, then WPC Ghulam Ali being investigating officer of the case was to has been examined by the prosecution. His non examination for no obvious reason could not be ignored. The sample of the charas has been subjected to chemical examination with un-plausible delay of about six days to its recovery; such delay could not be overlooked. The incharge of "malkhana" to prove the safe custody of the charas has not been examined by the prosecution. His non-examination could not be lost sight of.

9. In case of **Ikramullah & ors vs. the State (2015 SCMR-1002)**, it has been observed by Hon'ble apex court that;

> *"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 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. The discussion involved a conclusion that the case of the prosecution is not free from doubt and appellant is appearing to be entitled to such benefit.

11. In case of ***Muhammad Masha vs The State (2018 SCMR 772),*** it was observed by the Hon'ble Supreme Court of Pakistan that;

> ***"4….Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of Tariq Pervez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Muhammad Akram v. The State (2009 SCMR 230) and Muhammad Zaman v. The State (2014 SCMR 749)."***

12. Based upon above discussion, the conviction and sentence awarded to the appellant by way of impugned judgment are set-aside, the appellant is acquitted of the offence, for which he has been charged, tried and convicted by the learned trial court. The appellant is in custody, he shall be released forthwith in the present case.

13. The instant appeal is disposed of accordingly.

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Ahmed/Pa