

**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD**

Cr. Jail. Appeal. No.D- 85 of 2016

Present:-
Mr. Justice Naimatullah Phulpoto.
Mr. Justice Shamsuddin Abbasi.

Appellant : Bahar Begum w/o Faqeer Hussain by caste Jatt
through Mr. Asif Ali Talpur, Advocate.

Respondent : The State
through Mr. Shahzado Saleem Nahiyoon,
D.P.G.

Date of hearing : 23.05.2018

Date of judgment : 30.05.2018

J U D G M E N T

NAIMATULLAH PHULPOTO, J: Bahar Begum appellant was tried by learned Special Judge (N)/ Sessions Judge Jamshoro @ Kotri in Special Case No. 08 of 2016. After full-fledged trial, vide judgment dated 11.08.2016, appellant was convicted u/s 9 (c) of CNS Act, 1997 and sentenced to 07 years R.I and to pay fine of Rs.2,00,000/-. In case of default in payment of fine, appellant was ordered to suffer RI for one (01) year more. Appellant was extended benefit of Section 382-B Cr.P.C.

2. Brief facts of the prosecution case as unfolded in the FIR are that on 24.01.2016 complainant AETO Syed Aijaz Ali Shah, Incharge Excise Narcotics Circle, Kotri alongwith his subordinate staff ED Syed Mazhar Ali Shah, ECs Zulfiqar Ali, Bashir Ahmed, Habibullah, Asad Ali, Haji Piyaro, and LEC Ms Nasira, left excise station on spy information vide entry

No.787 at 11.15 a.m, in Government Vehicle No.GS-658-B and reached at the pointed place i.e. near Railway Phattak, Jamshoro. They saw a woman with same features as informed by spy informer having black coloured purse in her right hand. She was standing there. The Excise officials encircled her and apprehended with the help of LEC Nasira. On enquiry, the apprehended lady disclosed her name as Bahar Begum w/o Faqeer Hussain Jatt. Due to non-availability of private mashirs, EC Zulfiqar Ali and LEC Nasira were made as mashirs. It is alleged that personal search of accused was conducted by LEC Nasira. The purse of lady accused was checked by AETO it contained two packets, one note of Rs.500/- eight notes of Rs.100/- and CNIC in the name of lady accused. The packets contained heroin powder. 1- KG heroin powder was found in each packet, total 2 KG powder, out of the same 10- grams of heroin powder were separated from each pocket and sealed the same in khaki envelope respectively for chemical analysis and report while remaining property was sealed separately in cloth parcels. On enquiry, lady accused disclosed that she was standing on road to give the same to customer. Mashirnama of arrest and recovery was prepared in presence of mashirs. Accused and case property were brought at Excise Station, where Excise Inspector lodged FIR against the accused on behalf of State. It was recorded vide Crime No.02/2016 at P.S. Excise& Narcotics Circle, Kotri, under section 9 (c) of CNS Act, 1997.

3. After registration of the FIR, both packets of heroin powder were sent to the chemical examiner for analysis. Positive report of the chemical examiner was received by I.O. On the conclusion of usual investigation, challan was submitted against the appellant/accused u/s 9 (c) of CNS Act, 1997.

4. Trial Court framed charge against accused at Ex.2, to which she pleaded not guilty and claimed to be tried.
5. At the trial, prosecution examined 02 witnesses in this case i.e. complainant and mashir. Thereafter, prosecution side was closed.
6. Statement of accused was recorded u/s 342 Cr.P.C. at Ex.7 in which she claimed false implication in this case and denied the prosecution allegations. Appellant neither examined herself on Oath nor led any evidence in her defence, in disproof of the prosecution allegations.
7. Learned Special Judge after hearing the learned counsel for the parties and examining the evidence available on record, vide judgment dated 11.08.2016 convicted and sentenced the appellant as stated above. Hence, this appeal is filed.
8. We have carefully heard the learned counsel for the parties and scanned the evidence available on record.
9. Facts of this case and evidence find an elaborate mention in the judgement of the trial court hence there is no need to repeat it.
10. Mr. Asif Ali Talpur, learned advocate for the appellant raised the following contentions:-
 - i. That Excise Constable Ms Nasira who conducted the personal search of lady accused has not been examined before the trial court as mashir of arrest and recovery, non-examination of mashir would be fatal to the case of prosecution.

- ii. That EC Asad Ali who had taken heroin powder to the chemical examiner for analysis he has also not been examined before the trial court to prove the safe transit.
- iii. That there was no evidence with regard to safe custody of heroin powder at Excise office and the incharge of Malkhana has also not been examined before the trial court to prove the safe custody of Heroine at Malkhana.
- iv. That I.O failed to interrogate / investigate with regard to the application submitted to the police on behalf of the accused lady with regard to her false implication in this case.
- v. That I.O failed to arrest the customer, to whom appellant wanted to sell the heroin.
- vi. That appellant had no criminal record or previous convict in such type of cases.
- vii. That place of recovery was thickly populated area but no private person was associated to witness the recovery proceedings.

In support of his contentions learned counsel has placed reliance on the case of *Ikramullah & others v/s. The State (2015 scmr 1002)* and *Mansha v. The State (2018 SCMR 772)*.

11. Mr. Shahzado Saleem Nahiyoon, D.P.G. for the State argued that two kilogram heroin powder was recovered from the purse of accused on spy information and the Excise officials had no enmity to falsely involve her in the case. He further argued that report of the chemical examiner was positive. However, learned D.P.G. admitted that prosecution failed to establish safe custody of heroin at Excise office and its safe transit to the chemical examiner. Lastly, he has prayed for dismissal of the appeal.

12. We have carefully heard the learned counsel for the parties and scanned the entire evidence available on record.

13. In our considered view, prosecution utterly failed to establish its case against the appellant for the reasons that it was the case of spy information, inspite of that no private person was associated as mashir of the recovery. Evidence reflects that personal search of lady accused was conducted by Excise Constable Ms. Nasira and heroin was recovered from Purse of accused but the prosecution failed to examine EC Nasira before the trial court. Presumption would be if she would have been examined, she might have not supported the case of prosecution therefore, non-examination of such material witness would be fatal to the case of prosecution. EC Asad Ali, had taken Heroine parcel to the chemical examiner for analysis but he has not been examined before the trial court to prove the safe transit. Head Mohrer / incharge of the Malkhana of Excise police station has also not been examined to establish the safe custody of the heroin powder at Excise office Malkhana. We have observed that a fair investigation has not been conducted in this case. It is matter of record that application was submitted on behalf of the appellant to the police that heroin has been foisted upon her. Excise Inspector/I.O did not bother to interrogate/investigate regarding that application from concerned officer/agency in order to ascertain the truth. It is pointed out that lady accused is aged about 55 years. She has no criminal record or previous convict in such type of offences. We have also noted some material contradictions in the evidence of the prosecution. Complainant / I.O deposed that private persons were not available at the time of arrest and

recovery but in the cross examination replied that private persons were present around the place of recovery. PW-2 has admitted that place of arrest and recovery was thickly populated area. Moreover, it was day time incident and it was the case of spy information. Mashir has admitted that personal search of lady accused was not conducted at the time of her arrest. We are unable to believe that the private persons were not present except Excise officials. We are also not prepared to believe the prosecution story that lady accused was waiting on road for customer to sell the heroin powder while carrying heroin in her purse. Excise officials could not search the said customer. Whole prosecution story appears to be unnatural and unbelievable. Keeping in view the defence theory, we are unable to rely upon the evidence of Excise officials without independent corroboration, which lacked in this case. No doubt report of the chemical examiner was positive. The scrutiny of the chemical report produced before the trial court at Ex.4/E reflects that said report has not been prepared by the chemical examiner according to the protocol as provided in the rules. As such positive report of the chemical examiner was deficient, in the eye of law and the same would not improve the case of prosecution. Rightly reliance has been placed upon the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*, which has been endorsed by the Honourable Supreme Court in the recent judgment in the case of Nadeem v. The State through Prosecutor General, Sindh, Criminal Appeal No.06-K of 2008 in Criminal Petition No.105-K of 2016, dated 04.04.2018 which reads as follows:-

“According to the FIR the petitioner and his co-convict had tried to escape “with” the motorcycle when they were intercepted by the police party but before the trial court Muhammad Ayub, S.I.P (PW1) had stated that upon seeing the police party the petitioner and his co-convict had started running away while leaving the motorcycle on the road and

the engine of that motorcycle had gone off. Muhammad Jaffar, PC (PW2) had also deposed about running away of the petitioner and his co-convict but had kept quiet regarding leaving of the motorcycle by the petitioner and his co-convict while running away. Both the above mentioned witnesses produced by the prosecution, however, unanimously stated that while running away upon seeing the police party the petitioner and his co-convict had kept the relevant bag containing narcotic substance in their hands and it was in that condition that the petitioner and his co-convict had been apprehended by the police party. It is quite obvious that the initial story contained in the FIR had been changed during the trial and the changed story was too unreasonable to be accepted at its face value. Muhammad Ayub, S.I.P. (PW1) had stated before the trial court that after recovering the narcotic substance he had brought the same to the Police Station and it was he who had kept the recovered substance in safe custody whereas he had never claimed to be the Moharrir of the relevant Police Station. The record of the case shows that it was Ghulam Ali, P.C. who had taken the recovered substance to the office of the Chemical Examiner for analysis but it is not denied that the said Ghulam Ali, P.C. had not been produced before the trial court by the prosecution. It is, thus, evident that safe transmission of the recovered substance from the local Police Station to the office of the Chemical Examiner had not been established by the prosecution. The record further shows that the Chemical Examiner's report adduced in evidence was a deficient report as it did not contain any detail whatsoever of any protocol adopted at the time of chemical analysis of the recovered substance. This Court has already held in the case of fkramullah and others v. The State (2015 SCMR 1002) that such a report of the Chemical Examiner cannot be used for recording conviction of an accused person in a case of this nature. For all these reasons we find that the prosecution had not been able to prove its case against Nadeem petitioner beyond reasonable doubt."

14. In our considered view, prosecution has failed to prove its' case against the appellant. Circumstances mentioned above have created reasonable doubt in the prosecution case. It is settled law that 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 would be entitled to the benefit not as a matter of grace and concession but as a matter of right. In this regard reliance can be placed upon the case of

Muhammad Mansha V/s. The State (2018 SCMR 772), wherein the Honourable Supreme Court has observed as follows:-

“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).”

15. For the above stated reasons, we have no hesitation to hold that the prosecution has failed to prove its' case against the accused beyond reasonable doubt. Appellant would be entitled to benefit of such doubt. Resultantly, instant appeal is allowed. Conviction and sentence recorded by the trial court vide judgment dated 11.08.2016 are set aside and appellant is acquitted of the charge. Appellant Bahar Begum w/o Faqeer Hussain by caste Jatt is in custody, she shall be released forthwith, if she is not required in some other case.

JUDGE

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