

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

Criminal Appeal No.D-86 of 2020

Present:-

Mr. Justice Zulfiqar Ahmed Khan

Mr. Justice Muhammad Saleem Jessar,

Date of hearing: 20.04.2021.
Date of Decision: 20.04.2021.

Appellant: Allah Muhammad, through Mian Taj Muhammad Keerio, Advocate.

Respondent: The State, through Ms. Sana Memon, Assistant Prosecutor General Sindh.

J U D G M E N T

Muhammad Saleem Jessar, J- Through instant criminal appeal, appellant Allah Muhammad son of Haji Muhammad Achakzai Pathan assailed judgment dated 10.10.2020, passed by the learned 2nd Additional Sessions Judge/Special Judge, Hyderabad, in Sessions Case No. 117 of 2019 (re: The State v. Allah Muhammad), being outcome of F.I.R. No.66 of 2019, registered at Police Station Seri, Hyderabad, under section 9 (c) of the Control of Narcotic Substance Act, 1997, whereby he was convicted and sentenced to suffer R.I. for four years with fine of Rs.20000/-; and in case of default whereof, he shall suffer S.I. for five month more. However, appellant was extended benefit of section 382-B Cr.P.C.

2. Crux of prosecution case as unfolded by the complainant / ASI Irfan Ali Sipio of PS Seri in the FIR are that he along with his subordinates namely LNC Muhammad Ayoub, P.C Zaheer Ahmed, P.C Nazakat Ali had left PS on official vehicle bearing No.SPD-939 under D.D. entry No.13 at about 2000 hours for patrolling in the area. After visiting different places when they reached at Sahafi Hotel they saw on the light of vehicle that a person was coming in front of them to whom they suspected, therefore, after parking the vehicle apprehended him with the help of his subordinates at 2030 hours. Due to non-availability of private mashirs, he by citing LNC Muhammad Ayoub and P.C Zaheer Ahmed as mashirs inquired of his whereabouts who disclosed his name to be present appellant. On his body search they secured a shopper bag from the fold of his trouser which was containing two different sizes of chars, on weighing it became 1120 grams. On his further search four denomination notes of Rs.100/- total amounting to Rs.400/- was also secured.

On inquiry regarding chars, he disclosed he use to sell it and earn livelihood. Accordingly, he was arrested on spot along with the contraband, such memo of recovery and arrest was handed down; later, they came to police station where instant case was registered against him on behalf of the State.

3. After usual investigation by Investigating Officer, the police submitted the final report before the concerned Judicial Magistrate, who took cognizance of the offence. The learned trial Court framed the charge against the accused, who pleaded not guilty and claimed trial.

4. In order to establish its case, the prosecution examined PW-01 complainant ASI Irfan Ali Sipio at Ex. 04, who produced roznamcha entry No.15 at Ex. 04/A, mashirnama of arrest and recovery at Ex. 04/B, attested copy of roznamcha entry No.30 at Ex. 04/C, attested copy of roznamcha entries No.7 & 9 on one page at Ex. 04/D and attested copy of roznamcha entries No.17 & 10 one page at Ex. 04/E respectively. PW-02, LNK Muhammad Ayoub was examined at Ex. 05, who produced mashirnama of visiting the wardat at Ex. 05/A. PW-03 Investigating Officer Inspector Ghulam Hyder Shahani was examined at Ex. 06, who produced entry No.11 of Register No.19 at Ex. 06/A, permission letter at Ex. 06/B, letter of sending the property to the Chemical Examiner at Ex. 06/C and Chemical report at Ex. 06/D respectively. After closure of the side of the prosecution under the statement of A.D.P.P (Ex. 07), the statement of the accused was recorded under Section 342 Cr.P.C. at Ex. 08. In his statement, the accused denied all the allegations leveled against him by the prosecution and claimed his innocence. However, neither he examined himself on oath under section 340 (2) Cr. P. C. nor led evidence of defense witnesses.

5. Learned counsel submitted that appellant was not found in possession of anything including contraband, however, whatever have been shown was foisted upon him due to grudge and annoyance as he totally failed to grease the palms of complainant. He further submitted that though alleged recovery was effected on 13.03.2019, yet it was dispatched on 18.3.2019 and was delivered to the laboratory through hand of complainant (ASI Irfan Ali) on 15.03.2019, however, no explanation was furnished by the prosecution for keeping the contraband under safe custody as well delay in sending it to the laboratory. He has further drawn attention of the Court towards chemical report available at page-28 of paper book, which reveals that it was returned by the laboratory on 07.08.2019 after delay of about five months from its deposit. The delay in sending sample to the laboratory and subsequently its return has not been explained and such practice has always been deprecated by the superior Courts. The reference can be made from the case of 'SAMANDAR alias QURBAN and others v. The STATE' (2017 MLD 539 Sindh). Learned counsel further pointed

out that though the appellant did not examine any witness in his defense, however, at the time of his statement under section 342 Cr.P.C., he had annexed the copy of daily Urdu Newspaper 'Umat' vide its issue dated 16.03.2019 as well an application(s), which reveals that on 12.03.2019 (one day prior to the alleged recovery) he was taken away by the police who made demand of illegal gratification which the appellant could not arrange, therefore, has been booked under false crime by foisting the contraband. Learned counsel further added that though the plea taken by appellant before trial Court was supported with certain documents yet this aspect of the defense version was not discussed by the trial Court even was not kept by it with juxtaposition to the prosecution case. He, therefore, submitted that when defense plea was not kept in juxtaposition then the prosecution alone could not be given the weight as has been done by the trial Court in this case.

6. On the other hand, learned A.P.G. opposed the appeal on the ground that appellant was found in possession of certain quantity of the contraband and prosecution witnesses have supported case of prosecution, therefore, appeal merits no consideration, hence, she opposed the appeal. She, however, admits that defense plea taken by the appellant was not kept in juxtaposition with the prosecution case.

7. Heard arguments perused the record.

8. According to FIR, the complainant party during patrolling when reached at Journalist hotel they apprehended appellant, who was coming from the road, however, the complainant did not associate private person to witness the recovery proceedings at relevant time. Though it is settled standard that judicial approach must be conscious in dealing with the cases in which testimony rotates upon the evidence of police officials alone but we are also conscious of the fact that provisions of section 103 Cr.P.C. are not attracted to the cases of personal search of accused. However, where alleged recovery was made on a public place, even there is presence of private persons in a Journalist hotel, hence, failure to secure independent witnesses, particularly, in case of a recovery, cannot be brushed aside lightly by the Court. No doubt the application of section 103 Cr.P.C. is ousted under section 34 of the Act, 1997 and police persons are good witnesses as anyone good from the public; however, when a person was going to be charged or any recovery of incriminating was expected to be effected from his possession then it was incumbent upon the police officer to associate independent person to witness the recovery proceeding only to show and maintain the safe administration of criminal justice system. In this case, as admitted by the complainant the place of recovery is a hotel where many people use to gather and available yet not an attempt was made by the complainant, therefore, in absence of any independent material the evidence of police personnel cannot be believed in toto to maintain the conviction; more particularly, when there

was availability of the people and nexus of complainant with Investigating Officer is apparent on record. The main object of Section 103 Cr.P.C. is to ensure transparency and fairness on the part of the police during course of recovery, restrain false implication and diminish scope of foisting fake recoveries upon accused and the complainant has only relied upon his subordinate police constables but did not associate private person to witness recovery proceedings. In such circumstances, no weight can be given to the evidence of witnesses, particularly when he is subordinate of the complainant as held by this Court in the case of 'NAZIR AHMED v. The STATE' (PLD 2009 Karachi 191). As far as non-association of independent / disinterested person from public to witness recovery in a case where incident took place near Journalist hotel is concerned, we are fortified with decision of the Hon'ble Shariat Court in the case of 'MUHAMMAD KHALID v. The STATE' (1998 SD 155).

9. Record further reflects that the alleged incident is stated to have taken place on 13.03.2019 while the Investigating officer sent the case property for analysis through complainant ASI Irfan Ali on 15.03.2019, however, interestingly it was received by the office of Chemical Examiner on 18.03.2019 after five days of incident and three days of sending it from police station to the Expert and no explanation is given about the late delivery of the sample to the Laboratory. In our view, where the recovered property is not sent promptly to the Chemical Examiner, there must be explanation for such delay as to whether it was kept in safe custody or not but instant case is lacking from such explanation, which also creates doubts about the safe and secure handling of the sample during such extended period. Whereas, the Chemical Examiner's report (Ex:06/D) shows that report was sent on 07.08.2019 after about five months of the incident. The prosecution has also not brought any previous criminal record of the appellant showing his involvement in such type of offences.

10. Another important aspect of the case which though cuts the roots of the prosecution case is to the effect that complainant ASI Irfan Ali was the head of patrolling police party and allegedly narcotics was recovered but the prosecution did not bother to take care of the imperative aspect of the case as Investigating Officer SIP Ghulam Hyder Shahani sent the case property through the hands of ASI Irfan Ali, who himself is complainant of instant case. It is not appreciable that the complainant of an offence and carrier of case property to the laboratory would be one and same person as happened in this case. In fact, examination of the case property is a main part of investigation and the Investigating Officer ought to have kept aside to the complainant from taking part as a Co-Investigating Officer as both these officers are opposing parties. We are of the view that the critical and essential

responsibility of Investigating Officer demands that he should not have affiliated the complainant as a member of investigation. We consider that it will not be out of place to point out that this sacred duty of Investigating Officer is to find out the truth of the matter under investigation. His object shall be to discover the actual facts of the case and to arrest the real offender(s) and investigate all the aspects of the case. He; however, was not supposed to make the complainant as a party to an Investigating Officer team. **The gist of the above discussion is that the prosecution has miserably failed to prove the charge against the appellant beyond reasonably shadow of doubt, as such, this court has no other way except to interfere with the judgment passed by the trial Court as the case of the appellant is full of doubts.** It is settled law that even there appears a single doubt in the prosecution story in any case, it affects the whole prosecution case and the benefit whereof as a matter of right must go to the accused. In the present case, there are series of circumstances creating doubts, and under the settled principle of criminal justice, the benefit of such doubt is to go to the present appellant. In this respect, we would like to take reliance from a case of the honorable Supreme Court reported as **TARIQ PERVEZ v. The STATE (1995 SCMR 1345)**, wherein it is 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 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."

11. For the foregoing reasons, by a short order passed on 20.04.2021, instant Criminal Appeal was **allowed**. Consequently, Judgment dated 10.10.2020, passed by the learned 2nd Additional Sessions Judge, Hyderabad, in Sessions Case No.117 of 2019 (re: The State v. Allah Muhammad), being outcome of F.I.R. No.66 of 2019, registered at Police Station Seri, under section 9 (c) CNS Act, 1997, was set aside. Resultantly, appellants namely Allah Muhammad was acquitted of the charges and he was ordered to be released from Central Prison, Hyderabad, if not required in other custody case.

12. Above are the reasons for the said short order.

JUDGE

JUDGE