Judgment Sheet

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Criminal Appeal No. D – 44 of 2020

Before:
Mr. Justice Khadim Hussain Tunio
Mr. Justice Irshad Ali Shah

Appellant:	Mujahid alias Mujoo, through Mr. Shahid Hussain Phulpoto, Advocate.
Respondent:	The State, through Mr. Aftab Ahmed Shar, Additional Prosecutor General.
Date of hearing:	20-04-2021
Date of decision:	20-04-2021

J U D G M E N T

Khadim Hussain Tunio, J. **–** Through instant Criminal Appeal, appellant Mujahid alias Mujoo son of Ghulam Abbas Phulpoto has impugned the judgment dated 05-12-2020, passed by the learned Sessions Judge / Special Judge (CNS), Khairpur, in Special Case No.77 of 2019 (*Re. The State v. Mujahid alias Mujoo*), emanating from FIR No.48 of 2019, registered at Police Station Piryaloi, for offence punishable under Section 9(c) of Control of Narcotic Substances Act, 1997, whereby he was convicted and sentenced to suffer imprisonment for four years and six months and to pay fine of Rs.20,000/- or in case of default in payment of fine, to suffer S.I for five months more, however, with benefit of Section 382-B Cr.P.C.

2. Allegedly, on 14-07-2019 at 1830 hours, the appellant / accused was apprehended by the police party of Police Station Piryaloi, which was headed by ASI Muhammad Ismail Khorkhani and from possession of the appellant / accused, 1100 grams of charas and cash amount of Rs.200/- were secured, hence, this FIR was lodged.

3. After usual investigation, charge was framed against the appellant / accused, to which he pleaded not guilty and claimed to be tried.

4. The prosecution in order to prove the charge against the appellant / accused, examined in all three witnesses namely ASI Muhammad Ismail Khorkhani (Complainant), PC Zulfiqar Ali (Mashir) and Inspector Sadiq Ali Abbasi (Investigating Officer), who produced numerous documents through their evidence. Thereafter, prosecution side was closed.

5. Statement of the accused under Section 342, Cr.P.C, was recorded in which he denied all the allegations made against him by the prosecution and claimed to be innocent. He further stated that he has been falsely implicated in this case by foisting charas at the instance of one Adial Phulpoto owing to dispute over the landed property. The accused did not examine himself on oath in terms of Section 340(2), Cr.P.C, nor examined any witness in his defence.

6. Learned counsel for the appellant has contended that the appellant has been involved in this case malafidely by the police; that the impugned judgment is contrary to the law and facts, more so it is against the principle of natural justice; that the learned trial Court has failed to appreciate the evidence produced by the prosecution; that no independent person from the locality, wherefrom the alleged recovery was made from the appellant, has been examined by the prosecution; that entries in the *roznamcha* with regard to depositing the sample in *malkhana* and taking out the same from there have not been produced; that the incharge of *malkhana* and WPC who deposited the sample in the office of chemical examiner have not been examined; that there are many contradictions in the evidence of the prosecution witnesses on material points, which create doubt in the prosecution case and the appellant has succeeded to create doubt in the prosecution case.

7. Learned Additional Prosecutor General appearing for the State supported the conviction and sentence recorded by the learned trial Court while arguing that there are some minor contradictions and discrepancies which can be ignored by this Court while deciding the appeal.

8. We have given due consideration to the submissions made by learned counsel for the parties and have perused the material available on record.

9. We have examined the evidence adduced by the prosecution and have come to the conclusion that the prosecution has failed to establish the charge against the appellant in view of the infirmities and discrepancies. More particularly, complainant-ASI Muhammad Ismail Khorkhani recovered the narcotic substance from the appellant on 14-07-2019 under memo of recovery and deposited the same in the *malkhana*, but incharge of *malkhana* has not been examined by the prosecution in order to establish the safe custody of narcotic drug after its recovery. The report of chemical examiner transpires that the narcotic substance was received by hand in the office on 15-07-2019 through WPC Waheed Abbas. Said Waheed Abbas through whom the sample was referred to the chemical examiner has not been examined by the prosecution and entry in the property register regarding depositing the sample in *malkhana* has not been produced in evidence by the prosecution. Simultaneously, the entry regarding taking out the sample from the *malkhana* for its transmission to the chemical examiner through WPC Waheed Abbas has also not been produced in evidence. The facts of the case in hand transpires that the chain of custody has been compromised and is no more safe and secure, therefore, reliance cannot be placed on the report of chemical examiner to support conviction of appellant. In this respect, reliance may respectfully be placed on the order dated 06-01-2021 passed by the Hon'ble Supreme Court in the case of *Mst. Sakina Ramzan v. The State* while deciding **Criminal Appeal No.184 of 2020**, placing reliance on the cases reported as *The State v. Imam Bakhsh* (**2018 SCMR 2039**) and *Ikramullah and others v. The State* (**2015 SCMR 1002**).

10. Besides the above infirmities in the prosecution case, we have carefully perused the evidence of the prosecution witnesses in which they have made so many contradictions in their statements, which create doubt

in the prosecution story. No private person was asked to act as mahsir of arrest and recovery. Non-association of the private mashir is a gross violation of the provision of Section 103, Cr.P.C, which is meant for maintaining transparency and sanctity to the process of investigation. No doubt Section 25 of the Control of Narcotic Substances Act, 1997, is an exception to the general rule under extraordinary circumstances, yet necessity of implying private persons as mashirs cannot be overlooked wherever same is possible. It is well settled principle regarding dispensation of criminal justice that for extending benefit of doubt, it is not necessary that there should be many circumstances creating doubt, 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 of doubt not as a matter of grace or concession but as a matter of right. Reliance may also be placed upon the case of *Tariq Pervez v. The State* (**1995 SCMR 1345**).

11. In view of the aforesaid reasons, we are of the considered opinion that the prosecution has miserably failed to prove its case against the appellant beyond reasonable shadow of doubt, therefore, the benefit of such doubt in view of the above observation of the Hon'ble Apex Court is to be extended to the accused as a matter of right. Accordingly, by our short order dated 20-04-2021 the appeal was **allowed**; conviction and sentence recorded by the learned trial Court against the appellant, vide judgment dated 05-12-2020, was set aside and the appellant was acquitted of the charge with direction to release him forthwith, if not required in any other criminal case. These are the reasons for the same.

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Abdul Basit