

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

Criminal Appeal No. D- 82 of 2021

Criminal Appeal No.D- 83 of 2021

PRESENT:

Mr. Justice Salahuddin Panhwar.

Mr. Justice Zulfiqar Ahmed Khan.

Appellant : Ghulam Shabbir s/o Hussain Bux by caste Jarwar (in Criminal Appeal No.D-82 of 2021) through Mr. Muzamil Khan, Advocate.

Appellant : Aamir Ali s/o Muhammad Nawaz by caste Jagerani (in Criminal Appeal No.D-83of 2021) through Mr. K.B. Lutuf Ali Leghari, Advocate.

Respondent : The State through Mr. Shawak Rathore, Deputy Prosecutor General.

Date of hearing : 13.04.2022

Date of judgment : 13.04.2022

J U D G M E N T

ZULFIQAR AHMED KHAN, J: By this single judgment we intend to dispose of the captioned appeals as these appeals arise out of one and same crime. Appellants Ghulam Shabbir and Aamir Ali were tried by learned Model Criminal Trial Court-I / Special Judge Control of Narcotics Substance Act, Hyderabad in Special Case No. 36 of 2021 [The State v. Ghulam Shabbir] and Special Case No.36-A of 2021, [The State v. Amir Ali] emanating from Crime No.20/2021 registered at Police Station GOR, Hyderabad for offence under Section 9(C) Control of Narcotic Substance Act, 1997. Vide judgment dated 26.06.2021, the appellant / accused Ghulam Shabbir was convicted u/s 9(C) of CNS Act 1997 and sentenced to suffer R.I for 04 years and 06 months and to pay the fine of Rs.20,000/-. In case of default in payment of fine, appellant Ghulam Shabbir was ordered to suffer SI for 05 months more. Whereas by the same judgment, appellant Aamir Ali (juvenile offender) was convicted u/s 9(C) of CNS Act, 1997 and sentenced to suffer RI for 10 years and 06

months and to pay the fine of Rs.50,000/-. In case of default in payment of fine the juvenile offender will suffer SI for eight months more. Benefit of Section 382-B Cr.P.C. was however, extended to both the appellants.

2. The brief facts of the prosecution case as disclosed by the trial court in its judgement are that:-

“Complainant ASI Arif Hussain Khaskheli was posted as Incharge RRF Cantt., Hyderabad. On 28.02.2021, PC Abdul Ghaffar, PC Rashid Ali on government motorcycle No.HM-5439 and he and PC Hussain Zaido on other government motorcycle No.HM-5513 left the police station of GOR for patrolling and checking vide entry No.17 at 1710 hours. During patrolling via shahbaz chowk, wadhu wah road reached near GTC ground and started checking of the vehicles. During checking at about 1800 hours time, one Mehran car of slaty colour coming from shahbaz chowk. The said car was signal to stop and signalled to side. Suddenly one person who was seated at the back seat of the car was escaped away towards GTC ground. They encircled tactfully and he saw that one person was seated at the side seat of driver having black colour plastic thaili in his lap. The said person was alighted from the car with said thaili. The thaili was taken into police possession and asked about his parentage, who disclosed his name as Aamir Ali s/o Muhammad Nawaz B/c Jagerani R/o Rato Dero, District Larkana. From his body search three currency notes of Rs.100/- each total Rs.300/- were recovered. The driver of the said car was alighted and asked his parentage, who disclosed his name as Ghulam Shabbir S/o Hussain Bux B/c Jarwar R/o Nango line, Kotri District Jamshoro. From his body search two packet were recovered from both fold of his shalwar, one key pad Q-mobile of black colour, and one currency note of Rs.500/- were recovered from side pocket of his shirt. About escaped accused they disclosed that he was Allah Wasayo alias Porho R/o Kotri Jamshoro. The said car was checked which were Mehran car slaty colour bearing registration No.BKY-803 Engine No.PK13702485, Chasis No.SP308PK01241032. The shopping bag of Aamir Jagerani was opened and checked in which one green colour of cloth thaili was found containing eight packets of nassi colour. The each packet was opened and checked and found charas in it. Each packet having wording POUILING JUHLA MOKKA were written on it. The packets were weighed which became 1000/1000 grams each packet total 8000 grams. The two packet of accused Ghulam Shabbir were wrapped with yellow colour thaili which were opened and checked and found each packet of 1000/1000 grams total weight 2000 grams. About recovered charas they disclosed that they and escaped accused used to sell the charas and they were going for selling charas to one Syed Ayan Ali Shah at Fateh Chowk. The recovered charas was sealed separately for chemical

examination. Both the accused were arrested U/s 9-C CNS Act. About documents of the car they disclosed that they have no document of said car. Due to non-availability of private mashirs PC Abdul Ghaffar and PC Rashid Ali were acts as mashirs and prepared such memo. Thereafter, they brought the accused, case property at P.S GOR where such FIR was registered against both the accused. Hence this FIR.”

3. During investigation 161 Cr.P.C. statements of the PWs were recorded, recovered substance was sent to the chemical examiner, positive report was received. On the conclusion of investigation, challan was submitted against both the accused showing the accused Aamir Ali as juvenile offender under the above referred Section of CNS Act, 1997.

4. Trial Court framed charge against both the accused u/s 9(C) of CNS Act, 1997 at Ex.2, to which, they pleaded not guilty and claimed to be tried.

5. At the trial, prosecution examined PW-1 complainant ASI Arif Hussain at Ex.3, who produced entries, mashirnama of arrest and recovery at Ex.3/A to 3/D respectively. PW-2 Mashir Abdul Ghaffar at Ex.4, who produced memo of site inspection at Ex.4/A. PW-3 HC Muhammad Ramzan at Ex.5, who produced entry at Ex.5/A and PW-4 IO/SIP Shafi Muhammad at Ex.6, who produced entries, permission letter, chemical letter, letter to Incharge ACLC, letter to Director Excise, chemical report, rent agreement and other documents at Ex.6/A to 6/L respectively. Thereafter, prosecution side was closed at Ex.7.

6. Statements of accused were recorded u/s 342 Cr.P.C. at Ex.8, in which accused claimed false implication in this case and denied the prosecution allegations. Appellants have stated that PWs are interested and the alleged charas has been foisted upon them. Appellant Ghulam Shabbir stated that he was arrested from Kotri taxi stand. Police came in civil dresses at Kotri stand and hired him for taking one patient of delivery case at defence. When it reached shahbaz chowk they required him to make a sit one person in taxi which he denied and after hot words they took him to the police station and booked him in this false FIR. However, appellant Aamir Ali stated that he was taken from Giddu chowk and detained for two days in a private flat. Police demanded illegal money and due to non-payment they booked him in this false case. Accused however, neither examined themselves on Oath nor produced any evidence in their defence to disprove the prosecution allegations.

7. Learned trial Judge after hearing the learned counsel for the parties and examining the evidence available on record, vide judgment dated 26.06.2021 convicted and sentenced the appellants as stated supra.

8. Facts of the prosecution case as well as evidence find an elaborate mention in the judgment of the trial court as such there is no need to repeat the same to avoid unnecessary repetitions.

9. We have heard Mr. Muzamil Khan, Advocate for appellant Ghulam Shabbir, Mr. K. B. Lutuf Ali Leghari, Advocate for appellant Aamir Ali, Mr. Shawak Rathore, Deputy Prosecutor General for the State and perused the entire evidence minutely with their assistance.

10. Mr. Muzmil Khan, learned counsel appearing for the appellant Ghulam Shabbir contended that appellant is innocent and has falsely been implicated in the case in hand; that the prosecution story was unnatural and unbelievable; that the appellant is a taxi driver and at the time of incident he was plying taxi at Kotri Taxi stand and after hot words between the appellant and police he has been falsely involved in the case in hand; that though the place of incident was a thickly populated area but police did not associate any private person to act as mashir nor even they made any effort in this regard; that alleged recovery of charas was affected from the accused on 28.02.2021 but it was sent to the chemical examiner on 02.03.2021 i.e. after the delay of two days and safe custody of the charas at Malkhana and its safe transit during that intervening period has not been established at trial; that there are material contradictions in the evidence of prosecution witnesses which have not been considered by the trial court. He has prayed for acquittal of accused / appellant Ghulam Shabbir.

11. Mr. K. B. Lutuf Ali Leghari, learned counsel appearing for appellant Aamir Ali (juvenile offender) has mainly contended that he is innocent and has falsely been implicated in the case in hand; that the prosecution story was un-natural and unbelievable; that the accused Aamir Ali was arrested from Giddu chowk and was detained by police in a private flat and on account of non-payment of illegal gratification he has been falsely implicated in the case in hand; that though the place of incident was a thickly populated area but police did not associate any private person to act as mashir nor even they made any effort in this regard; that alleged recovery of charas was affected from the accused on

28.02.2021 but it was sent to the chemical examiner on 02.03.2021 i.e. after the delay of two days and safe custody of the charas at Malkhana and its safe transit during that intervening period has not been established at trial; that there are material contradictions in the evidence of prosecution witnesses which have not been considered by the trial court. On the point of safe custody and safe transit, both the learned counsel for appellants have placed reliance on the cases of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)* and *TARIQ PERVEZ V/S. THE STATE (1995 SCMR 1345)*.

12. On the other hand, Mr. Shawak Rathore, learned Deputy Prosecutor General opposed the appeals on the ground that both the appellants have been apprehended by police having been found in possession of huge quantity of charas. He further contended that at hand is a crime against society and is increasing day by day. Lastly, it is argued that though there are minor contradictions in the evidence of prosecution witnesses but the same are not fatal to the case of prosecution. He prayed for dismissal of the appeal.

13. We have carefully heard the learned counsel for the parties and scanned the entire evidence in the light of case law cited by the counsel for the appellant.

14. In our considered view, prosecution has failed to prove its' case against the appellants Ghulam Shabbir and Aamir Ali (juvenile offender) for the reasons starting that per FIR the complainant party was on patrolling and checking the vehicles and during checking they apprehended the present appellants and recovered charas from them as disclosed in the FIR while they were coming from shahbaz chowk in a slatty colour Mehran car in the presence of mashirs PC Abdul Ghaffar and PC Rashid Ali. It has come in evidence that the accused were arrested from wadhu wah road near GTC ground which is a thickly populated area and the complainant ASI Arif Hussain Khaskheli had sufficient time to call the independent persons of the locality to witness the recovery proceedings but it was not done by him for the reasons best known to him and only the police officials who are subordinates to the complainant were made as mashirs of arrest and recovery proceedings. It is settled principle that judicial approach has to be a conscious in dealing with the cases in which entire testimony hinges upon the evidence of police officials alone. We are conscious of the fact that

provisions of Section 103 Cr.P.C are not attracted to the cases of personal search of accused in narcotic cases but where the alleged recovery was made on a road (as has happened in this case) and the peoples were available there, omission to secure independent mashirs, particularly, in the case of spy information cannot be brushed aside lightly by this court. Prime object of Section 103 Cr.P.C is to ensure transparency and fairness on the part of police during course of recovery, curb false implication and minimize the scope of foisting of fake recovery upon accused. There is also no explanation on record why the independent witness has not been associated in the recovery proceedings. No doubt police witnesses were as good as other independent witnesses and conviction could be recorded on their evidence, but their testimony should be reliable, dependable, trustworthy and confidence worthy and if such qualities were missing in their evidence, no conviction could be passed on the basis of evidence of police witnesses. But here in this case, we have also noted number of contradictions in between the evidence of prosecution witnesses which cannot be easily brushed aside. Above conduct shows that investigation has been carried out in a casual and stereotype manner without making an effort to discover the actual facts/truth.

15. Apart from above, it has come in evidence that the alleged recovery of charas has been affected from accused while they were coming from shahbaz chowk in a Mehran car but owner of the car has not been investigated in this case. There are also discrepancies and flaws in the evidence of complainant and mashir of arrest and recovery. The complainant in his cross examination has admitted that **“It is correct to suggest that shahbaz chowk and wadhu road are busiest road.”** **“It is correct to suggest that words written on cloth bag are not mentioned in mashirnama.”** He further admitted in his cross examination by deposing that **“It is correct to suggest that mobile model is not mentioned in mashirnama.”** Whereas the mashir in his cross examination has also admitted that **“It is correct to suggest that mobile model is not written in memo.”** He further deposed that **“We put three seals on property parcel. It is correct to suggest that such fact is not mentioned in memo.”** It has also come in the evidence of Head Mohrrir HC Muhammad Ramzan who in his cross examination has stated that **“I did not weight the property parcels. Personal search articles were lying in thaili which I received from the I.O in unsealed condition.”** The IO SIP Shafi Muhammad in his cross examination has

also admitted that **“I did not make the car owner as accused as per DPP office opinion.”** The question arises that as per FIR and the evidence of complainant party, the police party was on motorcycles during the patrolling then from where they got the weighing scale and weighed the case property. In mashirnama the description of property is also not given. There is also failure on the part of prosecution as the Investigation Officer failed to interrogated or investigated the owner of car namely Saleem Akhtar. It has also come on record that complainant party belonging to RFF is a special force meant for rescue the operation against terrorism hence the question with regard to their competency arises and since they were on motorcycles how it is possible that one accused made his escape good within their site and they even did not chase him. PC Hassan Zaidi was also on patrolling duty and on checking the vehicles but his name does not appear even in the chllan sheet. All these things make the case of prosecution doubtful. Furthermore, as per available record, accused have no previous criminal record.

16. We have also noticed that according to the statement of complainant (PW-1), he recovered the narcotics from the appellants on 28.02.2021 and prepared the memo of arrest and recovery and deposited the same in Malkhana. The Report of Director Laboratories & Chemical Examiner (Ex-6/l) reveals that the narcotics were sent to the office on 02.03.2021 through SIP Shafi Muhammad after the delay of two days. The tampering with the case property during that intervening period at Malkhana also cannot be brushed aside. It is an established position that the chain of custody or safe custody and safe transmission of narcotics begin with seizure of the narcotic by the law enforcement officer, followed by separation of the representative samples of the seized narcotic, storage of the representative samples with the law enforcement agency and then dispatch thereof to the office of the Chemical Examiner for examination and testing. This chain of custody must be safe and secure. Such is because, the Report of Chemical Examiner enjoys very critical and pivotal importance under CNS Act and the chain of custody ensures that correct representative samples reach the office of the Chemical Examiner. Any break or gap in the chain of custody i.e., in the safe custody or safe transmission of the narcotic or its representative samples makes the report of the Chemical Examiner fail to justify conviction of the accused. The prosecution, therefore, is to establish that the chain of custody has remained unbroken, safe, secure and indisputable in order to be able to place reliance on the report of the

Chemical Examiner. However, the facts of the present case reveal that the chain of custody has been compromised at more than one occasion, therefore, reliance cannot be placed on the report of the Chemical Examiner to support conviction of the appellant. All such factors stated hereinabove suggest the false implication of appellants in this case which cannot be ruled out.

17. With regards incompetency of Rapid Response Force to check vehicles and make arrest under CNS Act, guidance could be sought from the judgment of a learned Divisional Bench of this Court at the Principal Seat in the case of Abdul Rehman v. The State [Criminal Jail Appeal No.144 of 2019] when competency of such checking and arrest were declared highly questionable in respect of Coast Guards. As regards RRF (Rapid Response Force), as per scheme of regulations creating the said Force, and as the name RRF suggests it is a standby force consisting of specially trained police units created to react and respond in the events of organized armed assaults by terrorists or in a hostage taking situation hence it can only act in response to a call. From the Roznamcha Entry No.17 [Exh 3/A] it does not transpire that the patrolling duty was being performed in response to any call. What they were doing at the place of incident is a questionable and colorable exercise of authority. Police officials have to act strictly in accordance with law and rules to inspire confidence of the public and the courts. Any access or misuse of authority is counter predictive.

18. In our considered view, for the above quoted numerous reasons prosecution has failed to prove that the charas was in safe custody for the aforementioned period. Even positive report of the chemical examiner would not prove the case of prosecution. There are also several circumstances which created doubt in the prosecution case. It is settled law that it is not necessary that there should 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. In this regard, reliance can be placed upon case of 'Tariq Parvez v. The State' [1995 SCMR 1345] wherein it has been held by Honourable Supreme Court of Pakistan that:

"For giving benefit of doubt to appellant 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 matter of right".

19. For the aforementioned reasons, we have no hesitation to hold that the prosecution has miserably failed to prove its case against the appellants / accused. Resultantly, by our short order dated 13.04.2022, the conviction and sentence recorded by the trial court vide judgment dated 26.06.2021 was set aside and the captioned appeals were allowed. Appellants Ghulam Shabbir and Aamir Ali were acquitted of the charge. Appellants were in custody, hence were ordered to be released forthwith if not required in any other case.

Above are the reasons of the said short order.

JUDGE

Dated. 26.04.2022.

JUDGE

Tufail