

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

Criminal Appeal No. D- 117 of 2021

**PRESENT:**

Mr. Justice Salahuddin Panhwar.  
Mr. Justice Zulfiqar Ahmed Khan.

Appellant : Basit Ali s/o Shahid Mallah  
through Mr. Ikhtlaque Ahmed, Advocate.

Respondent : The State  
through Mr. Muhammad Noonari, Deputy  
Prosecutor General.

Date of hearing : 26.04.2022  
Date of judgment : 26.04.2022

**J U D G M E N T**

**ZULFIQAR AHMED KHAN, J:** Appellant Basit Ali was tried by learned Judge, MCTC-I / Special Judge, Control of Narcotics Substance Act, Hyderabad in Special Case No. 125 of 2021, emanating from Crime No.60/2021 registered at Police Station Cantonment, Hyderabad for offence under Section 9(C) Control of Narcotic Substance Act, 1997. Vide judgment dated 25.09.2021, the appellant / accused was convicted u/s 9(C) of CNS Act 1997 and sentenced to suffer R.I for 07 years and 06 months and to pay the fine of Rs.35,000/-. In case of default in payment of fine, appellant was ordered to suffer SI for six months and fifteen days more. Benefit of Section 382-B Cr.P.C. was extended to the appellant.

2. Brief facts of the prosecution as disclosed in the impugned judgment of the trial court reads as under:-

*"The facts of the prosecution case are that complainant SIP Syed Maqsood Shah was posted at P.S Cantonment, Hyderabad. On 16/7/2021, he along with his subordinate staff namely PC Khadim Hussain, PC Ali Imran and DPC Shabran left the police station for patrolling vide entry No.20 at about 1700 hours in government*

*vehicle No.SPC-947. During patrolling from different places when they reached Qasim chowk, where he received spy information that one person having black colour shopping hag in his hand is available at the barrage colony gate for selling the chars. Upon such information complainant briefed the staff and they reached at the pointed place and saw one person was available of same huliya as disclosed by the spy having black colour shopping bag in his hand. Being considered him suspicious he was apprehended at about 1900 hours time and black shopping bag was taken into police custody. The black colour shopping bag was opened and checked and found small and big pieces of chars in it. On enquiry, the person disclosed his name as Basit Ali S/o Shahid Mallah R/o barrage colony Hyderabad. On enquiry about recovered chars he disclosed that he used to sell the chars for his livelihood. Due to non-availability of private mashirs PC Khadim Hussain and PC Ali Imran were appointed as mashirs. The recovered chars was weighed which became five kilograms. From wearing pent pocket cash Rs.600/= in different notes were recovered. The recovered chars was sealed in white cloth bags. The mashirnama of arrest and recovery was prepared and obtained the signatures of mashirs on it. The accused and recovered case property were brought at P.S where such FIR was lodged against 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 the accused under the above referred Section of CNS Act, 1997.
4. Trial Court framed charge against the accused u/s 9(C) of CNS Act, 1997 at Ex.2, to which, he pleaded not guilty and claimed to be tried.
5. At the trial, prosecution examined PW-1 complainant SIP Syed Maqsood Shah at Ex.3, who produced entries, FIR and mashirnama of arrest and recovery at Ex.3/A to 3/D respectively, PW-2 Mashir PC Khadim Hussain at Ex.4, who produced memo of site inspection at Ex.4/A, PW-3 IO/SIP Sarfraz Qureshi at Ex.5, who produced entries, property test permission letter, CRO, chemical laboratory letter and chemical report at Ex.5/A to 5/H respectively. Thereafter, prosecution side was closed at Ex.6.
6. Statement of accused was recorded u/s 342 Cr.P.C. at Ex.7, wherein accused claimed false implication in this case and denied the prosecution allegations. Appellant has stated that case has been managed and the PWs are interested; nothing was recovered from him and the property has been foisted upon him. He further stated that he

was arrested from in front of his house, taken to police station where police demanded bribe money and on failure he was booked in this case. He has also produced photocopy of application submitted by his mother dated 16.07.2021 for his recovery. Accused however neither examined himself on Oath nor produced any witness in his defence to disprove 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 25.09.2021 convicted and sentenced the appellant 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. Ikhtlaque Ahmed, Advocate for appellant, Mr. Muhammad Noonari, Deputy Prosecutor General for the State and perused the entire evidence minutely with their assistance.

10. Learned advocate for appellant has mainly contended that appellant is innocent and has falsely been implicated in the case in hand; that complainant has not mentioned in the FIR that at the time of departure whether he took investigation bag along with him or not; that no private person was associated to act as mashir of recovery and arrest though the place of incident is a thickly populated area; that it is also an admitted position that no any effort was taken for arrangement of private persons, which clearly shows malafide on the part of complainant; that when the charas was found in countable pieces then why the complainant failed to mention the number of pieces in the FIR, such act of the complainant also makes the prosecution case as doubtful; that prosecution story was un-natural and unbelievable; that alleged recovery of charas was affected from the accused on 16.07.2021 but it was received by the office of chemical examiner on 26.07.2021 i.e. after the delay of 10 days and safe custody of the charas at Malkhana and its safe transit during that intervening period has not been established at the trial; that there are material contradictions, lacunas and legal infirmities in the testimonies of all the P.Ws, which makes the case of prosecution highly doubtful. On the point of safe custody and safe transit, learned counsel for the appellant has placed reliance on the case of IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002) and on benefit of doubt

he placed reliance on the case reported as TARIQ PERVEZ V/S. THE STATE (1995 SCMR 1345).

11. On the other hand, learned Deputy Prosecutor General opposed the appeal on the ground that appellant has been apprehended by police having been found in possession of five kilograms charas which was kept by him for selling purpose; that PWs / police officials have supported the prosecution case by producing the relevant documents. 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.

12. 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.

13. In our considered view, prosecution has failed to prove its' case against the appellant for the reasons starting that per FIR the complainant party was on patrolling when they received spy information that the present appellant was available at the barrage colony gate alongwith charas for selling purpose. They apprehended the appellant and recovered five kilograms charas from his possession. It has come on record that the place of incident is a thickly populated area and the complainant / SIP Syed Maqsood Shah 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 though the complainant party had much prior

information about the availability of appellant at the gate of barrage colony. 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.

14. Apart from above, there are also discrepancies and flaws in the evidence of prosecution witnesses. For example, the complainant in his cross examination has admitted that **“It is correct to suggest that barrage colony remain busy for 24 hours. I did not count the number of small and big pieces. I did not send dummy purchaser to the accused. I did not see purchaser of charas there. It is correct to suggest that description of currency notes is not mentioned in FIR and in mashirnama. It is correct to suggest that number of seals on property parcel is not specifically mentioned in memo and in FIR.”**

Similarly, PW-2 PC Khadim Hussain who acted as mashir of arrest and recovery in his cross examination admitted that **“It is correct to suggest that guards and chowkidars remain present on duty at the main gate. We did not count the big and small pieces of charas. It is correct to suggest that in mashirnama preparation of white cloth bag is not mentioned. It is correct to suggest that three seals on property parcel are not specially mentioned in memo.”**

The I.O of the case PW-4 SIP Sarfraz Qureshi also replied in a manner that **“It is correct to suggest that place of arrest is busy road. I did not produce road certificate regarding taking case property to Karachi. I went to Karachi on public coach transport. I do not remember the time when laboratory received the property. I do not remember the time when I proceeded from Karachi. I do not know number of pieces is mentioned in chemical report or not.”** Furthermore, as per available record, accused has no previous criminal record.

15. We have also noticed that according to the statement of complainant (PW-1), he recovered the narcotics from the appellant on 16.07.2021 and prepared the memo of arrest and recovery and deposited the same in Malkhana. The Report of Director Laboratories & Chemical Examiner (Ex-6/G) reveals that the narcotic drugs were received in the office on 26.07.2021 through SI Sarfraz after the delay of 10 days. 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 suggest the false implication of appellant in this case which cannot be ruled out.

16. It is the matter of record that the charas was recovered from possession of accused on 16.07.2021 and was kept in Malkhana but it has not been proved that it was a safe transit case. Safe custody and transmission of samples of the narcotic from the police to the chemical examiner was not established. Allegation against the accused was that five kilograms of charas was recovered from his possession. Forensic Science Laboratory Report depicted that samples of alleged contraband were received through SIP Sarfraz on 26.07.2021. Prosecution was bound to establish safe custody of the recovered substance as to where the alleged material was kept and that samples, taken from the recovered substance were safely transmitted to the office of Chemical Examiner. Circumstances suggested that the

prosecution had failed to prove the chain. On the point of safe custody of charas and its safe transit, the counsel has rightly relied upon the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*, the relevant portion is reproduced hereunder:-

***“5. 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 the 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.”***

17. In our considered view, 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 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 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".***

18. For the aforementioned reasons, we have no hesitation to hold that the prosecution has miserably failed to prove its case against the appellant / accused. Resultantly, by our short order dated 26.04.2022, the conviction and sentence recorded by the trial court vide judgment dated 25.09.2021 was set aside and the appeal was allowed. Appellant Basit Ali was acquitted of the charge. Appellant was in custody, hence was ordered to be released forthwith if not required in any other custody case.

Above are the reasons of the said short order.

JUDGE

Dated. 27.05.2022

JUDGE

Tufail