

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

Criminal Appeal No. D- 142 of 2021

**PRESENT:**

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

Appellant : Bachando s/o Aghedino by caste Keerio through M/s Ghulamullah Chang and Aijaz Ahmed Chandio, Advocates.

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

Date of hearing : 18.05.2022

Date of judgment : 18.05.2022

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

**ZULFIQAR AHMED KHAN, J:** Appellant was tried by learned Special Judge for CNS, Tando Allahyar in Special Case No. 23 of 2021, arising out of Crime No.62/2021 registered at Police Station Umar Sand for offence under Section 9(C) Control of Narcotic Substance Act, 1997. Vide judgment dated 09.11.2021, the appellant / accused 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 was ordered to suffer SI for 05 months more. Benefit of Section 382-B Cr.P.C. was however extended to the appellant.

2. The relevant facts of the prosecution case as disclosed in the judgment of trial court reads as under:-

*“Brief facts as enumerated in the FIR are that on 15-9-2021 as per Roznamcha entry No.10 at 1100 hours in Government Vehicle No.SPD-857, police party of P.S Umar Sand left PS for patrolling in the area. After patrolling from different places, when they (police party) reached at Bahar Khan Mirjat Stop, where they received spy information that one person namely BachandoKeerio is selling charas near TandoSoomro-Bahar Khan Mirjat link road near Banana crop, on receipt of such information, they headed towards pointed place, where they saw*

*that one person was standing at Banana crop curve having one black colour shopper in his hand, who one seeing police party, accused tried to run, but police party stopped police van, alighted from it and apprehended him at spot. On inquiry he disclosed his name to be Bachando son of Aghedino by caste Keerio resident of TalibMola Colony TandoAllahyar. Black colour shopper was checked and found 04 large pieces of charas. Police weighed the charas, it was (2000) grams 02 kilograms. On inquiry he disclosed that he sells the charas. Thereafter recovered Charas were separately sealed as sample, at spot for chemical examination. SIP prepared such mashirnama of arrest and recovery at the spot. Accused and property brought at P.S, where instant F.I.R was registered against accused.”*

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 accused under the above referred Section of CNS Act, 1997.

4. Trial Court framed charge against 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 S.I.P Allah BachayoShaok at Exh.03, who produced departure entry at Exh.03/A, memo of arrest and recovery at Exh.03/B, F.I.R at Exh.03/C, arrival entry at Exh.03/D, MaalKhana entry at Exh.03/E, departure and arrival entry of HC Ameer Bux at Exh.03/F, letter of Incharge Chemical Examiner at Exh.03/G, Chemical Examiner's Report and Chemical Examiner's Report at Exh.03/H. PW-2 H.C Mir Muhammad at Exh:04. PW-3 WASI Shah Muhammad Jahejo at Exh:05. PW-4 HC Ameer Bux at Exh.06. Thereafter learned DDPP for the State closed the side of prosecution vide statement at Exh.07.

6. Statement of accused was recorded u/s 342 Cr.P.C. at Ex.8, in which accused claimed false implication in this case and denied the prosecution allegations. He further stated that one day prior to lodging of the FIR he was arrested and on account of non-payment of bribe by SHO Alam Abbasi, he has been implicated in this case. He also produced the photocopies of certain newspapers. Appellant however, neither examined himself on Oath nor produced any evidence 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, through its judgment dated 09.11.2021 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 M/s Ghulamullah Chang and Aijaz Ahmed Chandio, Advocates for appellant, Mr. Shewak Rathore, Deputy Prosecutor General for the State and perused the entire evidence minutely with their assistance.

10. Learned advocate for appellant has mainly argued that appellant is innocent and has falsely been implicated in the case in hand; that the prosecution story was un-natural and unbelievable. It is also argued 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. Learned counsel argued that alleged recovery of charas was affected from the accused on 15.09.2021 but the sample was received by the office of chemical examiner on 20.09.2021 i.e. after the delay of 05 days and safe custody of charas at Malkhana and its safe transit during that intervening period has not been established at trial. He next submitted that there are also 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, learned counsel for the appellant has placed reliance on the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*.

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 2000 grams 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.

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. We have perused the evidence of complainant SIP Allah Bachayo who deposed that on 15.09.2021 he along with his sub-ordinate staff left police station for patrolling in the area vide Roznamcha entry No.10 at 1100 hours in government mobile van and during patrolling when they reached at Behar Khan Mirjat Stop, they received spy information that present appellant was available near Tando Soomro link road, Behar Khan Mirjat for the purpose of selling charas and when they reached at the pointed place, the present appellant was apprehended and they recovered 2000 grams charas in presence of mashirs namely PC Ibrahim and PC Pir Muhammad. This fact has been denied by appellant in his statement recorded u/s 342 Cr.P.C. It is noted that police party though had advanced information about the availability of present appellant alongwith charas but they did not bother to take with them any private person either from the place of information or from the place of incident to witness the event.

It is settled principle that judicial approach has to be a conscious in dealing with the cases in which 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 the accused in such cases. However, where alleged recovery was made on a road (as has happened in this case), 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.

14. 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. 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 after receiving spy information I have not sent any fake customer for purchasing charas from the accused. It is correct to suggest that I have**

mentioned in FIR that accused was selling charas in open way and at that time no purchaser of charas was available. It is correct to suggest that no any currency notes recovered from the present accused at the time of his arrest. It is correct to suggest that I am complainant as well as IO in this case.” The mashir HC Mir Muhammad in his cross examination has deposed that “It is correct to suggest that I do not know exact time of receiving spy information by SHO. “Accused was selling charas in banana crop” while the complainant as stated above deposed that “accused was selling charas in open way” He further deposed that “It is correct to suggest that place of arrest and recovery subsists near link road. It is correct to suggest that we have not send any fake purchaser to accused for verifying spy information.” All these discrepancies and lacunas in the case of prosecution lead to us that perhaps the incident has not taken place in a fashion as stated in the FIR.

15. We have also noticed that according to the statement of complainant (PW-1), he recovered the narcotics from appellant on 15.09.2021 and prepared the memo of arrest and recovery and deposited the same in Malkhana. The Report of Director Laboratories & Chemical Examiner (Ex-3/H) reveals that the charas was received by hand in the office on 20.09.2021 through HC Ameer Bux after the delay of five (05) days but evidence on the record is silent that where the same remained for five (05) days from 15.09.2021 to 20.09.2021. During the course of arguments, we have specifically asked the question from learned D.P.G to explain the delay and also to explain that during this intervening period before whom the property was lying, he had no satisfactory answer with him. Similarly, evidence regarding safe transmission of alleged recovered narcotics to the laboratory for chemical analysis is also missing. The law in this regard is settled by now that if safe custody of narcotics and its transmission through safe hands is not established on the record, same cannot be used against the accused. It is also 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 15.09.2021 and was kept in Malkhana but it has not been proved that it was a safe transit case. On the point of safe custody of charas and its safe transit, the counsel has rightly placed reliance on the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*, the relevant portion thereof 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 the 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 18.05.2022, the conviction and sentence recorded by the trial court vide judgment dated 09.11.2021 was set aside and the appeal was allowed. Appellant Bachando 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 said short order.

JUDGE

JUDGE

Dated. 30.05.2022.

Tufail