

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

Criminal Appeal No. D- 67 of 2020

PRESENT:

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

Appellant : Shahzaib @ Wadero Feroze s/o Mir Muhammad by caste Panhwar through Mr. Babar Ali Panhwar, Advocate.

Respondent : The State through Mr. Fayaz Hussain Sabki, Assistant Prosecutor General, Sindh.

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 Shahzaib @ Wadero Feroze was tried by learned Special Judge, Control of Narcotic Substance / Model Criminal Trial Court-II / IVth Additional Sessions Judge, Hyderabad in Special Case No. 104 of 2020 [The State v. Shahzaib @ Wadero Feroze], emanating from Crime No.37/2020 registered at Police Station Cantonment, Hyderabad for offence under Section 9(C) Control of Narcotic Substance Act, 1997. Vide judgment dated 10.09.2020, the appellant / accused was convicted u/s 9(C) of CNS Act, 1997 and sentenced to undergo 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 06 months and 15 days more. Benefit of Section 382-B Cr.P.C. was however, extended to both the appellant.

2. The facts of the prosecution case as disclosed by the trial court in its judgement reads as under:-

“Brief facts of the prosecution story as narrated in the FIR lodged by complainant SIP Sarfaraz Ali Qureshi of Police Station Cantonment, Hyderabad, on behalf of the State, are that on 06.05.2020, he alongwith his

subordinate staff PC Hamzo Khan, PC Nadir Ali and driver Shabran, left the Police Station for patrolling in Government Mobile vehicle No.SPC-947, vide daily diary entry No.37 at 1950 hours. After patrolling various places, when they arrived at Tarazoo Chowk, where started checking of vehicles. At about 2130 hours, they spotted a motorcyclist, coming from the side of Press Club, who was cautioned to stop by knowing him suspicious, who stopped the motorcycle. Complainant nominated PC Hamzo Khan and PC Nadir Ali as mashirs and inquired the said person, on which, he disclosed his name as Shahzad alias Wadero Feroze son of Mir Muhammad, by caste Panhwar, R/o Village Ghelo District Matiari. On his personal search, five packets fasten around the fold, having brown colour plastic thelli and inscriptions of words "New England Coffee" in English, were recovered. Complainant checked the packets after opening and found two big pieces of Charas having golden seal and words in Urdu and English "Gumnam 2019/2020" were embossed, which was weighed and found weighing 1000 grams of each packet, total 5000 grams and on query about recovery of Charas, captive disclosed to have the same for selling. On inquiry about motorcycle and its documents, he disclosed that he has no documents and same was stolen by him on 30.04.2020 in evening time from the street of Tilak Incline, which was taken police custody and on checking, found its Registration No.HBS-5665, Maker Honda-125, Model 2017, black colour, Engine No.9014038, Chassis No.EA-496257 and on inquiry about it from Police Station Market, Hyderabad, complainant was informed that the same was required property of Crime No.76 of 2020, U/S. 381-A PPC of Police Station Market, Hyderabad. As the captive committed offences punishable U/S. 9-C CNS Act, 1997 and 381-A PPC, therefore, he was arrested and nothing was recovered on his personal search. Thereafter recovered five packets were sealed in white cloth bag for chemical examination and such memorandum of arrest and recovery was prepared on the spot and then accused and case property were brought at Police Station, where present FIR, whereas FIR for recovery of stolen motorcycle will be registered separately."

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 Sarfaraz Ali at Ex.4, who produced extract of entry No.7 at Ex.4/A, memo of arrest and recovery at Ex.4/B, FIR at Ex.4/C and entry No.4/D; PW-2 PC Hamzo Khan (mashir) at Ex.5, who produced memo of place of incident; PW-3 SIP Syed Maqsood Ali (Investigating Officer) at Ex.6, who produced extract of entry No.7 at Ex.9/A, extracts of entry Nos.9 & 12 at Ex.6/B, extract of entry No.32 at Ex.6/C, chemical letter duly received at Ex.6/D, chemical report at Ex.6/E and CRO of accused at Ex.6/F respectively. Thereafter, prosecution side was closed Ex.7.

6. Statement of accused as required under Section 342 Cr.P.C was recorded at Ex.8, wherein he denied the allegation of prosecution and deposed that he is innocent and has falsely been involved in this case. He further submitted that recovery has been managed and foisted upon him. However, neither he examined himself on Oath nor produced any evidence in his defence to disprove the prosecution allegation.

7. Learned trial Judge after hearing the learned counsel for the parties and examining the evidence available on record, vide judgment dated 10.09.2020 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. Babar Ali Panhwar, learned counsel for appellant, Mr. Fayaz Hussain Sabki, learned A.P.G for the State and perused the entire evidence minutely with their assistance.

10. It is contended by learned for the appellant that appellant is innocent and has falsely been implicated in the case in hand; that the prosecution story was un-natural and unbelievable; 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

06.05.2020 but it was received by the office of chemical examiner on 12.05.2020 i.e. after the delay of six 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 appellant. In support of his contentions, learned counsel has placed reliance on the case law reported as Mst. Sakina Ramzan v. The State (2021 SCMR 451), Qaiser Khan v. The State, through Advocate-General, Khyber Pakhtunkhwa, Peshawar (2021 SCMR 363), Javed and others v. The State (2019 P.Cr.L.J Note 112), Anti-Narcotics Force Regional Director Sindh through Deputy Director (Law) v. Farhad Khan (2020 YLR 1453) and Ikramullah & others v. The State (2015 SCMR 1002).

11 On the other hand, learned Assistant Prosecutor General, Sindh opposed the appeal on the ground that appellant has been apprehended by police having been found in possession of huge quantity of charas; that at hand is a crime against society and is increasing day by day; that evidence of witnesses could not be discarded despite lengthy cross examination; that the recovered property was sent to chemical examiner and positive report has been brought on record; 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 after patrolling when they reached at Tarazoo Chowk, they started checking of vehicles and during checking they apprehended the present appellant and recovered 5000 grams charas from him as disclosed in the FIR while coming from Press Club side on a motorcycle in presence of mashirs PC Hamzo Khan and PC Nadir Ali. It has come in evidence that the accused was arrested from Tarazo Chowk which is a thickly populated area and the complainant SIP Sarfraz Ali Qureshi had sufficient time to call the independent persons of 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 police case 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. After all, preparation of mashirnama is not a formality but it's object is to prevent unfair dealings. 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.

14. Apart from above, there are also discrepancies and flaws in the evidence of prosecution witnesses. The complainant in his cross examination has admitted that **"It is fact that near the place of recovery, at the main gate of Sessions Court, Hyderabad, as well as at the gate of Record Room, security remains available. It is fact that I did not call anyone from the security guards to act as mashir. It is correct that fact regarding investigation box is neither mentioned in the memo of arrest nor FIR. It is fact that I only opened one packet and then sealed all the packets as case property without opening and checking remaining four packets.** Whereas the mashir of arrest and recovery in his cross examination has also admitted that **"Complainant did not call the security guard of Session Court for acting as mashir. At the time of recovery, complainant had opened only one packet. Accused did not resist when we stopped**

him for checking. Complainant recorded my 161 Cr.P.C statement on 07.05.2020 at Police Station.” The I.O SIP Syed Maqsood Ali in his cross examination has also admitted by saying that “It is fact that near the place of incident, Security Guards remain available at the main gate of Sessions Court. It is fact that accused did not disclose that from where he obtained the Charas. It is fact that I had deposited the case property to chemical examiner with the delay of about 06 days.” Furthermore, the question arises that as per FIR and the evidence of complainant party, the accused was coming on motorcycle having charas in his possession but he on seeing the police party neither resisted nor tried to slip away which does not appeal to a prudent mind. All the above things make the case of prosecution doubtful.

15. We have also noticed that according to the statement of complainant (PW-1), he recovered the narcotics from the appellant on 06.05.2020 and prepared the memo of arrest and recovery and handed over the case property to SIP Syed Maqsood Shah who deposited the same in Malkhana. The Report of Director Laboratories & Chemical Examiner (Ex-6/E) reveals that the narcotics were received by the office on 12.05.2020 after the delay of 06 days. The tampering with the case property during that intervening period at Malkhana cannot be brushed aside. Moreover, the incharge of Malkhana has also not been examined before the trial court to prove the safe custody of recovered charas and its safe transmit. 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 appellant in this case which cannot be ruled out.

16. As discussed above, the charas was recovered from possession of accused on 06.05.2020 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, 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, 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".

18. For the aforementioned reasons, we have no hesitation to hold that the prosecution has miserably failed to prove its case against the appellant. Resultantly, by our short order dated 26.04.2022, the conviction and sentence recorded by the trial court vide judgment dated 10.09.2020 was set aside and the captioned appeal was allowed. Appellant Shahzaib @ Wadero Feroze was acquitted of the charge. Appellant was in custody, hence was ordered to be released forthwith if not required in any other case.

Above are the reasons of said short order.

JUDGE

Dated. 25.05.2022.

JUDGE

Tufail