

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

Criminal Appeal No. D- 49 of 2020

**PRESENT:**

Mr. Justice Salahuddin Panhwar.

Mr. Justice Zulfiqar Ahmed Khan.

Appellant : Nazir Ahmed s/o Ali Gul by caste Jamali  
through Mr. Ghulamullah Chang, Advocate.

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

Date of hearing : 29.03.2022  
Date of judgment : 29.03.2022

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

**ZULFIQAR AHMED KHAN, J:** Appellant Nazir Ahmed was tried by learned Sessions / Special Judge (CNS), Hyderabad in Special Case No. 139 of 2019, emanating from Crime No.79/2019 registered at Police Station A-Section Latifabad, Hyderabad for offence under Section 9(c) Control of Narcotic Substance Act, 1997. Vide judgment dated 20<sup>th</sup> August 2020, the appellant / accused was convicted u/s 9(c) of CNS Act 1997 and sentenced to suffer R.I for 12 years and 06 months and to pay the fine of Rs.60,000/-. In case of default in payment of fine, appellant was ordered to suffer SI for 09 months more. Benefit of Section 382-B Cr.P.C. was extended to the appellant.

2. It may be pertinent to mention here that this is second round of litigation as the appellant had already filed an appeal bearing Criminal Appeal No.D-23 of 2020 which was disposed of by this court vide order dated 05.08.2020 in the following terms:-

***“After hearing learned counsel for the parties at some length we have briefly perused the judgment passed by learned trial Court in context of allegation against the appellant, we found that learned trial judge while delivering impugned judgment has not properly appreciated the arguments advanced by learned counsel for the parties. Under these circumstances learned counsel for the appellant and learned Assistant***

**Prosecutor General have submitted that this matter may be remanded back to learned District Judge Hyderabad for re-hearing of arguments of the parties with direction to pass an elaborate/ speaking order as per law after hearing the parties.**

**In view of above, we accordingly set-aside the impugned judgment dated 13.02.2020 and remand the case at the stage of arguments to learned District & Sessions Judge Hyderabad for re-hearing of arguments with direction to decide the same as per law within a period of one month after receipt of this order and no unnecessary adjournment shall be granted to either party. Office is directed to immediately send R&Ps alongwith copy of this order to learned District & Sessions Judge Hyderabad for information and compliance.**

**This appeal is disposed of in the above terms."**

3. Brief facts of the prosecution as disclosed in the FIR lodged by complainant SIP Asif Ali Jatoi with Police Station A-Section Latifabad, Hyderabad are that on 30.3.2019, he alongwith his subordinates named in FIR during patrolling on receiving spy information apprehended the appellant / accused Nazir Ahmed Jamali alongwith Rickshaw bearing registration No.G-70959 from Auto Bhan Road near machine of filthy water Unit No.12 Latifabad, Hyderabad at about 2230 hours and secured 9900 grams Charas in shape of 10 packets from beneath rear seat of the Rickshaw in the presence of police mashirs named in FIR and on his personal search complainant secured cash Rs.650/- from him. It was further alleged that the accused failed to produce the registration documents of the said Rickshaw. Entire recovered charas was sealed on the spot for chemical examination and after preparation of mashirnama of arrest and recovery, the apprehended accused alongwith case property was brought at Police Station, where on behalf of State the aforementioned FIR was registered.

4. 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.

5. 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.

6. At the trial, prosecution examined PW-1 complainant SIP Asif Ali Jatoi at Ex.4, who produced attested copies of entries of departure and arrival on single paper, mashirnama of arrest and recovery and FIR at Exs.4/A to C, PW-2 Mashir PC Arif at Ex.5, who produced mashirnama of place of incident at Ex5/A. PW-3 I.O SIP Saifullah Gill at Ex.6, who produced attested copies of entries of departure and arrival under which he visited place of vardat, entries of sending the property to chemical examiner, corresponding letters, report of chemical examiner and P.C of Register No.19 at Exs.6/A to F and PW-4 PC Azhar Hussain at Ex.7, through whom the property was dispatched to the Chemical Laboratory Karachi. Thereafter, prosecution side was closed at Ex.8.

7. Statement of accused was recorded u/s 342 Cr.P.C. at Ex.9, in which accused claimed false implication in this case and denied the prosecution allegations. Appellant has stated that PWs are interested; the chemical report is false, he denied the recovery of Charas as well as cash. He alleged that PWs being police officials have falsely deposed against him, the accused agreed to examine himself on Oath, but he declined to examine any witness in his defence and claimed to be innocent and alleged that he has been falsely implicated at the instance of his enemies, so also alleged that Police had robbed cash amount of Rs.850/- from him, hence prayed for justice. Accused however did not examine himself on Oath as his counsel filed a statement on 23.01.2020 at Ex.10.

8. Learned Sessions / Special Judge after hearing the learned counsel for the parties and examining the evidence available on record, vide judgment dated 20.08.2020 convicted and sentenced the appellant as stated supra.

9. 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.

10. We have heard Mr. Ghulamullah Chang, Advocate for appellant, Mr. Shawak Rathore, Deputy Prosecutor General for the State and perused the entire evidence minutely with their assistance.

11. Mr. Chang, learned advocate for appellant has mainly contended that appellant is innocent and has falsely been implicated in the case in hand. He argued that the prosecution story was un-natural and unbelievable. He further argued that appellant has been falsely

implicated in the case in hand by police at the instance of his enemies and such defence plea has also been taken by him in his statement recorded u/s 342 Cr.P.C. He further argued that no proper description of Rickshaw wherein the alleged charas was being transported has been given nor it is alleged that the alleged charas was recovered from the exclusive possession of the appellant however, it is alleged that the same was recovered under the back seat of Rickshaw. 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. It is further contended that neither the owner of Rickshaw has been investigated nor any proof has been submitted that the said Rickshaw belonged to the appellant. Learned counsel argued that alleged recovery of charas was affected from the accused on 30.03.2019 but it was sent to the chemical examiner on 01.04.2019 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 the trial. He further contended that there are material contradictions in the evidence of prosecution witnesses. 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 *TARIQ PERVEZ V/S. THE STATE (1995 SCMR 1345)*.

12. On the other hand, Mr. Shawak Rathore, learned Deputy Prosecutor General opposed the appeal on the ground that appellant has been apprehended by police having been found in possession of 9900 grams charas which was kept by him beneath the rear seat of the Rickshaw he was driving. 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 appellant for the reasons starting that per FIR the complainant party was on patrolling when they received spy information that the present appellant was coming in a Rickshaw bearing No.G70959

alongwith huge quantity of charas for supplying to his customers. They apprehended the appellant alongwith charas lying under the back seat of Rickshaw in the presence of mashirs PC Arif Khan and PC Hamza Ali. The recovered charas was weighed and it became 9900 grams. It has come on record that the accused was arrested from the motor of filthy water Auto Bhan Road Unit No.12 Latifabad at 2230 hours which is a thickly populated area and the complainant / SIP Asif Ali 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 coming of appellant in a Rickshaw alongwith charas. 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, there is nothing available on record to show the details or descriptions of Rickshaw involved in the commission of offence. No documents have been brought on record about the

ownership of the said Rickshaw and it is not ascertained that prior to the incident in whose custody the Rickshaw had remained. Furthermore, the alleged recovery of charas has been affected under the back seat / passengers' seat of Rickshaw and not from the exclusive possession of appellant. It appears from the record that the appellant, being the driver, having no conscious knowledge about the concealment of recovered substance in the vehicle and he was made scape goat in place of actual culprits as the police has failed to investigate about the actual owner of said Rickshaw. 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 fact that I have not investigated about the actual owner of rickshaw."** He further admitted that **"It is fact that in the FIR, it is not mentioned that at the time of leaving the PS, we took investigation box with us. It is fact that excepting the charas, nothing else was recovered from the accused."** He further admitted in his cross examination by deposing that **"It is fact that during investigation, we had not reached to the person to whom the accused had come for supplying the charas."** He has also admitted in cross examination that **"It is fact that in the FIR, engine and chasis number of the richshaw are not mentioned."** There are also contradictions in the evidence of complainant and mashir of arrest and recovery. Such as complainant in his examination in chief has deposed that **"The torch was taken out by me from the investigation box."** Whereas the mashir in his cross examination stated that **"there was no torch in the investigation box."** Furthermore, as per available record, accused has no previous criminal record.

16. We have also noticed that according to the statement of complainant (PW-1), he recovered the narcotics from the appellant on 30.03.2019 and prepared the memo of arrest and recovery and deposited the same in Malkhana. The Report of Director Laboratories & Chemical Examiner (Ex-6/E) reveals that the narcotic drugs were received by hand in the office on 01.04.2019 through PC Azhar Hussain after the delay of two days. There is also conflict with regard to affixation of seals as the package sent for analysis of recovered charas made by concerned SHO to the Chemical Examiner where it is stated that 03 sealed were affixed on the samples being forwarded, but the report of Chemical Examiner shows 04 seals on the package received. 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.

17. It is the matter of record that the charas was recovered from possession of accused on 30.03.2019 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 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."***

18. 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".***

19. Also of importance is the failure of the prosecution to find who was the actual owner of the Rickshaw. Was the appellant a mere carrier or the master mind. Lack of such information is also discouraging. Failure of such critical piece of investigative finding also makes the prosecution case doubtful. Reliance in this regard is placed on the cases of DIRECTOR GENERAL, PAKISTAN COASTGUARD HEAD QUARTER, KARACHI through Deputy Attorney General v. SIKANDAR (2020 YLR 731), GHULAM ALI v. The STATE (2021 P.Cr.L.J 438) and HAMEED ULLAH QURESHI v. The STATE (2020 P.Cr.L.J 284).

20. 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 29.03.2022, the conviction and sentence recorded by the trial court vide judgment dated 20.08.2020 was set aside and the appeal was allowed. Appellant Nazir Ahmed 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 the said short order.

JUDGE

JUDGE

Tufail