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

Criminal Appeal No.S-67 of 2020

Shahrukh v. The State

Appellant Shahrukh : Through Mr. Saghar Ali Sathio, Advocate. present on bail.

The State : Through Ms. Rameshan Oad, A.P.G. Sindh.

Date of hearing : 14.03.2022.

Date of Judgment : 14.03.2022.

JUDGMENT

MUHAMMAD SALEEM JESSAR, J. This criminal appeal, filed by appellant, Shahrukh, is directed against the Judgment dated 02.03.2020, passed by Additional Sessions Judge-I, Tando Muhammad Khan, in Sessions Case No.25 of 2020, arising out of Crime No.12/2020 under sections 269, 270 and 337-J, PPC, registered at P.S. Tando Muhammad Khan City, whereby the appellant was convicted under section 265-H(ii), Cr.P.C. and sentenced to undergo R.I. for one year and to pay fine of Rs.10,000/- and in case of failure to pay fine, he was to further suffer sentence for three months.

2. Facts of the case are that the Complaint, ASI Abdul Ghaffar, on behalf of State reported that "I am posted as ASI at P.S Tando Muhammad Khan, today I along with PC Nisar, PC Noshad and DPC Muhammad Khan left the PS in Government vehicle No.SPD-708 Vide roznamcha entry No.20, at about 1500 hours, for patrolling purpose in the area, while patrolling from Al-fatah Chowk, Old Matli Bus Stop, Lakhat Stop, when we reached at Sijawal road adjacent to Pandhi wah mori, saw one person from northern side having one white color 'Kata' in his right hand came at road, who on seeing police vehicle tried for escaping along with 'Kata' having in his hand, return back from road by knowing him suspicious person, meanwhile stopped

the vehicle on road, arrested him at about 1530 hours, firstly I and then other staff apprehended him, recovered 'Kata' (sack) into our custody and enquired about his name and residence, who disclosed his name to be present appellant. The complainant opened and checked the recovered 'Kata' and found that the same contained 595 mainpuris injurious to human health like causing cancer to human body. On inquiry, accused disclosed that he used to prepare and sell these mainpuris, at present he (the appellant) has taken these for selling purpose, by knowing the offence u/s 269, 270 R/W section 337-J, PPC of arrested accused and did his body search, three notes of 50/50 rupees, total 150 rupees, were recovered, due to non-availability of public mashirs, the recovery mashirnama was prepared in presence of PC Nisar, and PC Noshad and then separated five mainpuri material for chemical examination in two khaki envelopes; which were sealed and remaining 590 mainpuri property was sealed separately, in the presence of above mashirs, then brought the accused and case property at police station and lodged the F.I.R against arrested accused."

3. On conclusion of investigation, the I.O. submitted charge-sheet against the present accused persons. Charge was framed against the accused U/Ss 269, 270, 337-J, PPC, to which he pleaded 'not guilty'. Thereafter, prosecution examined complainant/ I.O. at Ex.03, who produced roznamcha entries, mashirnama, F.1.R, chemical examiner report and letter etc. as Ex.03/A to Ex.03/1. The prosecution then examined Mashir PC Nisar Ahmed at Ex. 04. Thereafter, learned ADPP closed the side of prosecution evidence on 29.02.2020 vide statement at Ex. 05.

4. The statement of accused U/S 342, Cr.P.C. was recorded on 02.03.2020, in which he denied the allegations and also denied to examine himself on oath U/s 340(2), Cr.P.C and also denied to produce any defense evidence. His contention was only that he is innocent and prayed for justice.

5. The trial court framed the following points for determination:

1- Whether on 14.01.2020 at about 1530 hours accused Shahrukh arrested by police with possession of one white

color Kata in which 595 mainpuris were recovered by police, which are injurious for human health. At the time of arrest accused Shahrukh disclosed before police that he prepares mainpuri and also sell the same?

2- What should the judgment be?

6. The trial Court, after recording evidence and hearing the parties, convicted and sentenced the appellant as stated above. The appellant being aggrieved, has filed the present appeal.

7. Leaned counsel for the appellant submitted that complainant himself has acted as an I.O. of the case, therefore, biased investigation cannot be ruled out. He further submitted that no private witness was associated to witness the recovery proceedings, therefore, the entire proceedings stand vitiated when no independent person was associated as witness. In support of his contentions, he placed reliance upon the case(s) of PLD 2009 Karachi 191, 1989 P.Cr.LJ 601. Learned counsel also submitted out of 595 puries only five sachets were sent to laboratory for examination and said five sachets cannot be representative of entire quantity of mainpuries, hence conviction and sentence awarded to appellant upon result taken from five sachets is un-justified, hence said evidence cannot be believed. In support of his contentions, he placed reliance upon 2021 P.Cr.L.J-1036. He further submitted the W.H.C before whom the property was kept in safe custody and the person through whom said property was sent to laboratory were not examined at trial, hence prosecution has miserably failed to prove its charge against the appellant. In support of his contentions, he placed reliance on an un-reported ruling/Judgment dated 02.11.2020 (vide Criminal Appeal No.S-433 of 2019). He further submitted that not a single customer or purchaser was arrested by the police, even the applicant was not found administering the alleged mainpuries to any individual to believe the appellant had allegedly committed the offence within the meaning of section 337-J, P.P.C. He; therefore, submitted that basic ingredients for applying section 337-J, P.P.C are lacking in this case and the conviction as well sentence awarded to appellant under section 337-J, P.P.C is also unwarranted by law, hence submitted that prosecution has miserably failed to prove its charge against the appellant and he is entitled for his acquittal.

8. Learned Assistant Prosecutor General Sindh opposed instant criminal appeal and submitted that police witnesses are as good witnesses as anyone from the public, therefore, arguments advanced above by learned counsel for the appellant carries no weight. She placed reliance upon the cases reported in PLD 1997 SC-408, 2021 SCMR-198, 2021 SCMR-128 and 2021 SCMR-175.

9. I have heard learned counsel for the appellant as well as the learned Assistant Prosecutor General, Sindh for the State and have gone through the record with their assistance. The case law cited at the Bar has also been examined.

10. A perusal of the FIR shows that there are three sections mentioned therein under which the present appellant has been booked. These are: sections 269, 270 and 337-J. Per learned counsel for the appellants, the ingredients of section 337-J, PPC are lacking in this case.

11. So far as sections 269 and 270, PPC are concerned, it has not been mentioned as to what diseases are likely to spread as Gutka and mainpuri affect only those persons who use them. Therefore, sections 269 and 270, PPC are not attracted. Although, in the impugned judgment at page-49 of the file, the trial Court has stated "***The material contained in the recovered articles is said to be poison."*** However, the chemical examiner's report does not mention the word "poison" at all. The trial Court, without realizing that the chemical examiner has not termed the recovered material as "poison" has given definition of the word "poison" from a judgment of this Court in C.P. No. D-868/2019. It would have been proper if the definition of "hazardous material" was given instead of the definition of the word "poison".

12. So far as offence under section 337-J is concerned, I would like to examine the same in some detail. It would be advantageous to reproduce the above section for the sake of convenience. The same reads as under:

> "337J. Causing hurt by means of a poison. Whoever administers to, or causes to be taken by, any person, any poison or any stupefying, intoxicating or unwholesome drug or such other thing with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence, or knowing it to be likely that he will thereby

> cause hurt may, in addition to the punishment of arsh or daman provided for the kind of hurt caused, be also punished, having regard to the nature of the hurt caused, with imprisonment of either description for a term which may extend to ten years."

13. The above section opens with the words "Whoever administers to, or causes to be taken by, any person, any poison or any stupefying, intoxicating or unwholesome drug or such other thing with intent to cause hurt to such person,…" and the clear import of these words is that there must be a person to whom any material, as mentioned in the above section, was administered or was caused to be taken "any poison or any stupefying, intoxicating or unwholesome drug …." With intent to cause hurt to such person, meaning thereby that there must be a victim to testify that he was administered or was caused to be taken some poison or any stupefying, intoxicating or unwholesome drug. In the present case, there is no such victim to say so. I have also examined the chemical examiner's report which also does not say that the recovered material was poison, as the report (Exh.3-h) only says that "The above said parcel contains hazardous materials, therefore unfit for human consumption." In my considered opinion, section 337-J of the PPC cannot be applied without a victim making complaint that he was administered such drugs as mentioned in the referred to section with such result as mentioned therein. There is no victim in this case, therefore, the provisions of section 337-J, PPC are not attracted at all. The reason for such finding is that there is no evidence to substantiate the allegation that by consuming any such drug anybody suffered the consequences as mentioned in the said section.

14. Adverting to the arguments of the learned counsel for the appellant, the first argument raised was that the complainant himself acted as I.O. of the case, therefore, biased investigation cannot be ruled out. The purpose of investigation in a criminal matter is to thoroughly search for facts which may connect an accused with the alleged crime. When a neutral person is entrusted with the investigation of a crime, he will examine both types of facts i.e. pro and con and will come to a conclusion whether the accused is actually guilty of offence alleged against him. If the answer to such question is in the negative, such investigating officer will submit such his report against the complainant. However, it is not expected that a

complainant acting as an I.O. in the same case would adopt such neutral course. Therefore, there is possibility of biased investigation.

15. In the case of **Ashiq alias Kaloo** (1989 Pr.C.L.J. 601 (Federal Shariat Court), the allegation against the appellant was that he was apprehended near Madni Masjid, Chowk Chabotra Bazar, Ahmedpur Sharqia, District Bhawalpur and on his search five "Purries" of heroin, weighing 12 grams, were recovered from his possession. In this case also, the complainant acted as I.O. of the case. The Hon'ble Federal Shariat Court observed as under:

> "The learned counsel further submitted that Muhammad Ghafoor (P.W.1) is the complainant and he himself is the Investigating Officer, his investigation is biased. It is rather a mockery. It is also not shown as from which packet the sample was obtained."

16. In view of the above illegality, which was termed as 'mockery' by the learned Bench (FSC), the appeal was allowed and the appellant was acquitted after setting aside his conviction and sentence.

17. In the case of **Qaloo v. The State** (1996 P.Cr.L.J.), appellant, Qaloo son of Muharram, was convicted in Sessions Case No.150 of 1994 by the learned IInd Additional Sessions Judge, Jacobabad, under Article 3 as well as 4 of the Prohibition (Enforcement of Hadd) Order, 1979. Under Article 3, he was sentenced to five years' R.I., five stripes and a fine of Rs.10,000 and in case of default in the payment of fine to suffer further R.I. for six months. Under Article 4, he was sentenced to suffer R.I. for seven years, five stripes and a fine of Rs.10,000 and in default in the payment of fine to suffer six months more. The learned Bench observed as under in this case:

> "In the present case, Inspector Sikandar Ali Khoso was the head of the patrol party. He knew the appellant previously. He is the complainant. On his own complaint he records the formal F.I.R. and then himself becomes the Investigating Officer. Under the law, there is no specific bar against complainant officer becoming the Investigating Officer, but, being the complainant, it cannot be expected that as an Investigating Officer he will collect any material which does not go against

> the prosecution or gives any benefit to the accused. Evidence of such officer, therefore, is a weak piece of evidence and, for sustaining a conviction, such evidence would require independent corroboration, Evidence of' such Police Officer would also require to be scrutinized with great care and caution and benefit of any contradiction and infirmity which raises any doubt should be extended to the accused."

18. Learned counsel next submitted the W.H.C before whom the property was kept in safe custody and the person through whom said property was sent to Laboratory were not examined at trial, therefore, safe custody of the recovered material was doubtful in view of the judgment of the Hon'ble Supreme Court in the case of **Abdul Ghani and others** (supra). In the cited case, in similar circumstances, the Hon'ble Supreme Court held as under:

> "2. There is hardly any occasion for discussing the merits of the case against the appellants because the record of the case shows that safe custody of the recovered substance as well as safe transmission of samples of the recovered substance to the office of the Chemical Examiner had not been established by the prosecution in this case. Nisar Ahmed, S.I./SHO complainant (PW1) had stated before the trial court that he had deposited the recovered substance at the Malkhana of the local Police Station but admittedly the Moharrir of the said Police Station had not been produced before the trial court to depose about safe custody of the recovered substance. It is also not denied that Ali Sher, H.C. who had delivered the samples of the recovered substance at the office of the Chemical Examiner had also not been produced during the trial so as to confirm safe transmission of the samples of the recovered substance. It has already been clarified by this Court in the cases of The State through Regional Director ANF v. Imam Bakhsh and others (2018 SCMR 2039), Ikramullah and others v. The State (2015 SCMR 1002) and Amjad Ali v The State (2012 SCMR 577) that in a case where safe custody of the recovered substance or safe transmission of samples of the recovered substance is not proved by the prosecution through independent evidence there it cannot be concluded that the prosecution had succeeded in establishing its case against the appellants beyond reasonable doubt. The case in hand suffers from the same legal defects. This appeal is, therefore, allowed, the convictions and sentences of the appellants recorded and upheld by the courts below are set aside and they are acquitted of the charge by extending benefit of doubt to them."

19. It was also contended that there is delay in sending the sample to chemical examiner and that no person alleging injury caused by the harmful substances has come forward, which also creates a doubt in

the prosecution case. Learned counsel for the appellant also relied on an un-reported Judgment in Criminal Appeal No.S-433 of 2019 (Aijaz Ali v. The State) in which following relevant observation was made:

> "Admittedly, there is no independent witness to the incident and the property allegedly secured from the appellant has been subjected to chemical examination with delay of about five days such delay having not been plausibly could not be overlooked. As per report of chemical examiner, the substance analyzed by him was not found to be recommended for human consumption within meaning of Section (5) of the Pure Food Ordinance, 1960 and it also Contravenes the provision of Rule (11) of Sindh Pure Food Rules, 1965. Surprisingly, no such penal section is applied by the police against the appellant while submitting the final charge sheet. No hurt is caused to any one by means of alleged substance by the appellant. Neither, the incharge of "Malkhana" nor the person who has taken the alleged substance to the chemical examiner has been examined by the prosecution to prove its safe custody and transmission."

20. This criminal appeal was heard on 14.3.2022 and by a short order of the same date it was allowed as under:

> "Heard arguments. For the reasons to follow, instant appeal is hereby allowed. Consequently, impugned Judgment dated 02.03.2020 re-The State Vs. Shahrukh being outcome of Crime No.12 of 2020 PS. Tando Muhammad Khan under sections 269, 270, 33/-J P.P.C is hereby set-aside. Resultantly, the appellant is acquitted of the charge. Appellant is present on bail, therefore, his bail bonds are canceled and surety furnished by him is hereby discharged.

21. These are the reasons of my short order dated 14.03.2022 whereby the instant criminal appeal was allowed.

Hyderabad, the _____. Judge