

IN THE HIGH COURT OF SINDH, CIRCUIT COURT,
HYDERABAD

Criminal Appeal No.D-37 of 2023

Present:

Mr. Justice Mahmood A. Khan

Mr. Justice Zulfiqar Ali Sangi

Appellant: Khurram Ali S/o Muhammad Aslam through Mrs. Razia Ali Zaman Patoli, Advocate.

Respondent: The State through Mr. Nazar Muhammad Memon, Additional Prosecutor General, Sindh.

Date of hearing: **30.08.2023.**

Date of decision: **30.08.2023.**

JUDGMENT

ZULFIQAR ALI SANGI, J.- Through instant Criminal appeal, the appellant has assailed the judgment dated 31.03.2023, passed by learned 1st Additional Sessions Judge / MCTC / Special Judge for CNSA, Mirpurkhas, in Special Case No.32 of 2022 (Re-State Vs. Khurram Ali) arising out of FIR No.22 of 2022, offence U/S; 9 (c) of Control of Narcotic Substance Act, 1997, registered with P.S Mehran, whereby he has been convicted and sentenced to suffer rigorous imprisonment for four years and six months with fine of Rs.20,000/- (Rupees Twenty Thousand) and in default whereof, to suffer simple imprisonment for five months more, however the benefit of Section 382-B Cr.PC was not extended.

2. The case in hand has been registered on behalf of State by SIP Kamran Ali Halepoto alleging therein that on the fateful day viz. 14.05.2022 a secret information received to him whereon present appellant Khurram Ali Rajput from Oil Mill Malhi Colony Mirpurkhas has been apprehended securing cash amounting to Rs.500/- and 1200 grams of Chars from his possession which was witnessed by official witnesses under the memo of arrest and recovery then police party brought accused along-with property at P.S and lodged the FIR.

3. After registration of FIR investigation was conducted then the I.O of the case submitted report under section 173 Cr.P.C against the appellant before the competent Court of law. The formal charge was framed against the appellant, to which he pleaded not guilty and claimed trial.

4. To establish the charge against the appellant, the prosecution examined P.W-01 SIP Kamran Ali, who was complainant-cum-author of FIR; PW-02 ASI Ghulam Rasool, who was eye-witness-cum-mashir of the case; P.W-3 PC / Dispatch Official Shahid; P.W-4 Fateh Muhammad Bhayyo, who was investigating officer in the case and lastly P.W-05 Mehrab Khan Incharge of Malkhana. All the said witnesses produced / identified the documents at trial related to them. Thereafter, learned State Counsel closed the side of the prosecution.

5. The accused in his statement recorded in terms of Section 342 Cr.PC, denied the allegations leveled against him by pleading his innocence. Neither he examined himself on oath nor led any evidence in his defence.

6. The learned trial Court on assessment of the evidence and after hearing the counsel for the respective parties convicted and sentenced the present appellant/accused vide impugned **Judgment dated 31.03.2023**, which he has impugned before this Court by way of preferring the instant Criminal Appeal.

7. Per learned defence counsel, the trial of the appellant was conducted in a hasty manner which fact is evident from the impugned judgment itself as the statement of accused was recorded on the same day when the state prosecutor closed its side of evidence; that appellant being innocent has been falsely implicated in this case for the reason that his version of enmity with Pathans over civil dispute was not appreciated by the learned Presiding Officer though he moved application seeking to adduce defence witness in terms of section 540 Cr.P.C was dismissed; that the alleged Charas has not been secured from the physical possession of the appellant but has been foisted against him; that the Chemical Examiner's report is not with protocol of the test, hence it has lost its sanctity in the eye of law; that there are material contradictions in evidence of prosecution witnesses; that safe custody/transmission of Charas to the Chemical Examiner has also not been established; that no private person has been associated by the complainant to witness the alleged arrest and recovery, hence the evidence of such interested witnesses requires independent corroboration which is also lacking in present case, which was in clear violation of the mandatory provision of Section 103 Cr.PC. She lastly contended that the prosecution has failed to prove its case against the appellant and thus he is entitled to his acquittal.

8. On the other hand, learned Additional Prosecutor General, Sindh while supporting the impugned judgment has submitted that the prosecution has successfully proved its case against the present appellant/accused in whose possession Charas was recovered; that the police officials had no enmity to foist narcotics substance against him of its own, as such, he prayed for dismissal of the instant Criminal Appeal.

9. We have given due consideration to the arguments advanced by learned counsel for the parties and have closely gone through the material available on record.

10. The deeper re-appraisal of the material brought on record demonstrates that prosecution has failed to prove charge of securing chars weighing 1200 grams from possession of appellant for the reason that entry No.23 produced as exhibit 03/C by complainant SIP Kamran Ali at the time of his evidence at trial seems to be tampered for which presumption can be drawn that same was managed to entangle the present appellant otherwise suggesting that movement of police party from police station Mehran to place of incident is doubtful from its inception. Admittedly, the record also reveals that appellant is belong to business community, as such, he has produced certain documents before trial Court for and against him to establish his enmity against his business opponents but neither the same has been considered nor discussed in the impugned judgment whereas he has got exhibited such documents through his evidence in terms of section 342 Cr.P.C specified in question No.8 available from pages-34 to 47 of the paper book, therefore, the learned Trial Judge failed to appreciate the defence plea which if seen in juxtaposition appears to be more convincing than the prosecution one.

11. We have noticed that prosecution is unable to place on record any criminal record of appellant which could convince us that he is habitual offender or has been remained in business of Narcotics as alleged by it. Otherwise there is admission on part of complainant Kamran Ali that he failed to collect previous criminal record of the appellant. He deposed that three seals affixed on the parcel of chars whereas mashir / alleged eyewitness Ghulam Rasool stated that number of seals has not been specifically written in the memo of arrest and recovery which fact also confirmed by PW-5 Malkhana Incharge Mehrab Khan that number of seals was not written in the property register specified it as serial No.15.

12. Safe custody of Chars is very essential aspect in Narcotic cases for which evidence of PC Shahid was recorded wherein he stated that on 16.05.2022 being posted at Police Line Mipurkhas he was called by Investigating Officer Fateh Muhammad Bhayyo at P.S Mehran and handed over him sealed parcel of chars alongside letter No.22/2022 for depositing the same in chemical laboratory Karachi. The record is silent with regard to acquiring necessary permission from high ups by Inspector Bhayo to depute a constable from police line to police station Mehran for the purpose of depositing the case property at Karachi and why it was needed in presence of available constables at Police Station Mehran which also creates doubt. More so said constable replied during cross examination that incharge Malhano handed over him case property on the orders of Inspector Fateh Muhammad Bhayyo but no entry

was shown to him at that time. Whereas it has been admitted by Inspector Fateh Muhammad Bhayo that no entry for leaving Mirpur Old to conduct investigation of P.S Mehran was produced by him. Incharge Malkhana Mehrab Khan has stated that on 14.05.2022 he received sealed parcel containing chars and a currency note of Rs.500/- from Inspector Fateh Muhammad Bhayo whereon he kept the same in custody of Malkhana while at the time of cross examination he negated his own statement by replying that "no entry in roznamcha register No.2 was maintained in respect of receiving case property." It appears to us from the said statements of prosecution's witnesses that they are not only contradicting to each other on material points but also not in line with the story narrated by the prosecution to support conviction of the appellant, hence their evidence on safe custody and safe transmission of the property being Chars is discarded. Even positive report of the chemical examiner also would not prove the case of prosecution in absence of reliable, trustworthy and confidence inspiring evidence. There are also several circumstances which have 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".

13. 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 30.08.2023, the conviction and sentence recorded by the trial court vide impugned judgment dated 31.03.2023 was set aside and the appeal was allowed by acquitting him of the charge. He was ordered to be released forthwith if not required in any other custody case.

14. Above are the reasons of said short order.

JUDGE

JUDGE