

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Special Criminal Jail Appeal No.D-106 of 2022
(*Muhammad Afzal Khan v. The State*)

Before:

Mr. Justice Zulfiqar Ahmad Khan &
Mr. Justice Khadim Hussain Tunio.

Mr. Rukhsar Ahmed Junejo, Advocate for the Appellant.
Mr. Muhammad Farooq Ali Jatoi, SPP, ANF.

Date of hearing: **10.12.2024**

Date of Decision: **10.12.2024**

J U D G M E N T

ZULFIQAR AHMAD KHAN J.,- Appellant Muhammad Afzal Khan was tried by learned 1st Additional Sessions Judge/Special Judge Narcotics (MCTC), Sukkur in Special Case No.36 of 2016, arising out of Crime No.04 of 2016, registered at P.S ANF, Sukkur, under section 9(c) CNS Act, 1997 and through impugned judgment dated 17.08.2022, he was convicted for the offence under section 9(c) CNS Act, 1997 and sentenced to suffer imprisonment for life with fine of Rs.100,000/- and in case of default thereof, to suffer S.I for one year more. Appellant was duly extended benefit of section 382-B CrPC.

2. On 17.02.2016, SIP Nooruddin lodged an FIR, stating that he had received secret information regarding a drug peddler, Muhammad Afzal, who was about to supply a large quantity of narcotics to a specific customer at the Bus Terminal in Sukkur. Acting on this information, the complainant formed a raiding party and proceeded to the specified location, where the appellant was apprehended. From his travelling bag, 15 foil packs, each containing one kilogram of Charas, were recovered, totaling 15 kilograms. The recovery was made in the presence of mashirs HC Ayaz Ahmed and PC Riaz Ahmed. Following the necessary formalities at the spot, the recovered narcotics and the apprehended accused were brought to the police station, where the FIR was duly registered.

3. After investigation, the Challan was submitted against the appellant. Thereafter, charge was framed against the appellant, to which he pleaded 'not guilty' and claimed trial. To prove its charge, the

prosecution examined as many as two prosecution witnesses i.e. PW-1 Inspector Nooruddin, who acted as complainant and I.O and PW-2 PC Riaz Ahmed, who is shown as eyewitness and Mashir of the recovery. Then, prosecution side its side.

4. Statement of appellant in terms of section 342 CrPC was recorded, wherein he denied prosecution allegations and claimed his false implication in the case on the pretext of enmity.

5. Counsel for the appellant contended that the appellant is innocent and has been falsely implicated in this case by the police due to personal enmity. It was further submitted that the impugned judgment suffers from several infirmities, discrepancies, material contradictions, and illegalities. He further argued that the original entries in the daily dairy, which recorded the police party's departure and arrival, were not produced in evidence. Instead, only attested Photostat copies were exhibited. Additionally, it was pointed out that A.D. Manzoor Ahmed, a senior police officer and member of the raiding party, was not cited as a witness, nor was his statement recorded under Section 161 of the CrPC by the I.O. The in-charge of the *Malkhana*, where the recovered property was deposited, was also not examined by the prosecution. Moreover, the complainant acted in a dual capacity, both as the complainant and as the I.O raising concerns about the fairness of the investigation. It was further argued that the police constable dispatching the case property to the laboratory, as well as *Malkhana* incharge with whom case property was deposited, were not examined, indicating deficiencies in the investigation. Additionally, the case property and the chemical report were not confronted to the appellant during the recording of his statement under Section 342 of the CrPC. In light of these contentions, counsel prayed for the acquittal of the appellant.

6. On the contrary, learned Special Prosecutor ANF, opposing the appeal, contended that the attested copy of the Roznamcha entry was duly produced in evidence. It was further argued that the case property was dispatched to the laboratory within 12 hours, thereby negating any concerns regarding safe custody and proper transmission. The learned prosecutor also submitted that there is no animosity between the parties, and thus, the question of false implication of the appellant does not arise.

7. We have heard learned counsel for the appellant as well as learned Special Prosecutor ANF, and have perused the material available on record. According to arrival entry No.10 (available at Exh.4/A & 4/C), it is evident that the complainant-Inspector Nooruddin, who also acted in dual capacity as I.O of the case, secured the narcotic substance from the possession of the appellant on 17.02.2016, which he subsequently handed over to H.C Ayaz Ahmed, but during his cross-examination, he failed to disclose the name of said personal, being the incharge *Malkhana*. Moreover, the said incharge of the *Malkhana* was not examined by the prosecution to establish the safe custody of the narcotic substance following its recovery. The report of the chemical examiner indicates that the narcotic substance was received by hand on 18.02.2016, through PC Shoukat Ali, but the prosecution did not examine the said person through whom the sample was transmitted to the chemical examiner, and the testimony of other prosecution witnesses is silent on the matter of where the case property was kept during the intervening period between its recovery and its transmission to the chemical examiner. Furthermore, no entry regarding the depositing of the property in the *Malkhana* was produced in evidence, and the incharge of the *Malkhana* was not examined by the prosecution in this regard. In light of these facts, it appears that the chain of safe custody of the narcotic substance has been compromised, which raises serious concerns about the integrity of the evidence. In this regard, we place reliance on the principles set forth in the cases of *The State v. Imam Bakhsh* (**2018 SCMR 2039**) and *Ikramullah and others v. The State* (**2015 SCMR 1002**), where the importance of maintaining an unbroken chain of custody for the case property was emphasized.

8. Furthermore, from the above infirmities in the prosecution case, we have carefully evaluated the evidence of the prosecution witnesses in which they have made so many contradictions in their evidence, which create doubt in the prosecution story. No private person was asked to act as mashir of arrest and recovery. Non-association of the private *mashir* is a gross violation of the provision of Section 103, CrPC, which is meant for maintaining transparency and sanctity to the process of investigation. No doubt, section 25 of the CNS Act, 1997 is an exception to the general rule under extraordinary circumstances, yet necessity of implying private persons as *mashirs* cannot be overlooked wherever same is possible. It is well settled principle regarding dispensation of criminal justice that for

extending benefit of doubt, it is not necessary that there should be many circumstances creating doubt, 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 of doubt not as a matter of grace or concession but as a matter of right. Reliance may also be placed upon the case of Tariq Pervez v. The State (**1995 SCMR 1345**).

9. For what has been discussed above, we are of the considered opinion that the prosecution has miserably failed to prove its case against the appellant beyond reasonable shadow of doubt, therefore, the benefit of such doubt in view of the above observations of the Hon'ble Apex Court is to be extended to the appellant as a matter of right. Accordingly, by our short order dated 10.12.2024, while setting aside conviction and sentence awarded to the appellant through impugned judgment, passed by the trial Court, instant appeal was **allowed** and the appellant was acquitted of the charge with direction to jail authorities to release him forthwith, if not detained in any other custody case. Above are the reasons of our short order.

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