

IN THE HIGH COURT OF SINDH CIRCUIT COURT, HYDERABAD

Criminal Revision Application No.D-21 of 2021

Present:-

Mr. Justice Amjad Ali Sahito

Mr. Justice Khadim Hussain Soomro.

Applicant: The State/Anti-Narcotics Force through its Assistant Director, through Mr. Shahreyar Shar, Special Prosecutor for ANF.

Respondent No.1: Bismillah Sanjrani through Mian Taj Muhammad Keerio, Advocate.

Respondent No.2: Ghulam Mustafa Brohi through Mr. Manzoor Ali Jessar, Advocate.

Date of hearing: 19.11.2024

Date of Decision: 27.11.2024.

ORDER

AMJAD ALI SAHITO, J. Through this Criminal Revision Application, the applicant has challenged the judgment dated 05.05.2021 passed by learned 1st Additional Sessions Judge/MCTC, Kotri in Special Case No.28/2020 arising out of the FIR No.06/2020 for offence under sections 9-C CNS Act, 1997 registered at PS ANF Hyderabad, whereby the respondents were convicted and sentenced in the following manner:-

*“The accused namely **1.Bismillah s/o Dost Muhammad Sanjrani and 2.Ghulam Mustafa s/o Peer Muhammad Brohi** are hereby convicted for offence punishable under 9-C CNS Act, 1997 while exercising powers under section 265 H(ii) Cr.P.C. However, instead of sentencing them to prison, keeping in view the concept of law, the facts and circumstances of this case I find the present case fit where the accused can be sent on probation. I, therefore, exercise the powers provided under section 5 of Probation of Offenders Ordinance 1960 and send him on probation for a **period of three (03) years** and I hereby place the accused persons under the supervision of probation officer who is required to take their physical custody in accordance with law. The execution of such a harsher sentence is suspended and a milder one is substituted on the very clear understanding that the harsher one will be re-*

*imposed upon them if they being tested fail to honor the terms and conditions of this judgment. Accused are further required to execute a bond for committing no offence and for observing good behavior for the above said period. Let the copy of this judgment be supplied to the accused persons and the Probation Officer as to comply with further requirements of the law. The accused **1.Bismillah s/o Dost Muhammad Sanjrani and 2.Ghulam Mustafa s/o Peer Muhammad Brohi** are produced in jail custody and they are remanded back to jail along with conviction slip/warrant with directions to jail authorities to handover their custody to the Probation Officer namely **Mr.Ghulam Murtaza Shah**, Assistant Director, Probation Department, Jamshoro, who shall further get the bond executed from the accused and observe other legal formalities and also required to submit **quarterly reports** about the convict's regular attendance, conduct, behavior etc. regularly before this court. Needless to add, the surety of accused shall automatically stands discharged after completion of the above probationary period and submission of Final Report by the concerned Probation Officer before this court."*

2. Briefly the facts of the prosecution case are that on 20.04.2020 at 1130 hours the respondents/accused were arrested by Anti-Narcotic Force police party Hyderabad from Petaro Toll Plaza Indus Highway Jamshoro and recovered 8 kilograms of Opium from accused Bismillah and 3 kilograms of Opium from accused Ghulam Mustafa, as such, they were booked for the for the offence punishable u/s 9-C of CNS Act 1997 and lodged instant FIR against them.
3. After completing the investigation of the case, the challan was submitted by the Investigating Officer against the respondent/accused before the concerned Court.
4. The trial Court framed the charge against respondents/accused, to which they pleaded not guilty and claimed to be tried. In order to establish accusation against the accused, the prosecution examined complainant Sub-Inspector Zahoor Shah and mashir Police Constable Asif Ali, who produced numerous documents in evidence. Thereafter the prosecution closed its side through statement.
5. Statements of respondents/accused were recorded under Section 342 Cr. P.C., wherein they denied the prosecution allegations leveled against them and stated that nothing was

recovered from them but they were involved in the instant case falsely on political influence.

6. The learned trial Court, after hearing the learned counsel for the parties and appraisal of the evidence, convicted and sentenced the respondents/accused in the matter as stated above. As such, the applicant has preferred instant criminal revision application for enhancement of the sentence and confiscation of recovered Car bearing Registration No.ANR-486, which was allegedly used in the transportation of narcotics.

7. Learned counsel for the applicant mainly contended that the learned trial Court cannot pass lesser punishment beyond punishment provided under section 9 (c) of CNS Act, 1997. He contended that the recovery of the narcotic substance was made from the respondents/accused, and the offence with which they are charged is punishable by death, imprisonment for life, or imprisonment for a term that may extend to fourteen years, along with a fine, as such, a punishment lesser than the prescribed minimum cannot be awarded to the respondents/accused. He further contended that the learned trial Court in the impugned judgment has held that the case is proved against the respondents/accused, therefore, in accordance with the law the punishment is liable to be enhanced. He also pointed out that since the quantum of sentence awarded to the respondents is not as provision of law which is liable to be enhanced, as such, by exercising power under section 5 of Probation of Offenders Ordinance 1960 and sending the respondents/accused on probation and entrustment of their physical custody under the supervision of Probation Officer is not in accordance with law.

8. The learned counsel for the respondents/accused have contended that though the alleged recovery was foisted upon the accused and despite nothing was recovered from their exclusive possession the respondents/accused were sent on probation and their physical custody was entrusted under the

supervision of Probation Officer instead they could have acquitted. There are sufficient grounds for acquittal of the respondents/accused but the same were not considered by the learned trial Court. They emphasized that there were not private witnesses to have cited by the Anti-Narcotic Force to act as mashir in order to cut any doubt for false implication of the accused in a narcotic case. They also contended that the complainant has stated that the accused had admitted their guilt before the learned Magistrate but no 164 Cr.P.C statements of the respondents were got recorded before the learned Magistrate. There is admission of the complainant that no fake or dummy customer was sent to the accused to confirm the availability of contraband with them. The complainant has admitted that there is CCTV camera installed at Toll Plaza from its both sides but its footages were not produced during the trial by the prosecution in order to strengthen the prosecution case. The fruit seller and juice seller were also available at the Toll Plaza but they were not made as prosecution witnesses. The complainant has admitted that no narcotic substance was recovered from exclusive/physical possession of accused persons and the alleged recovery has been foisted upon the accused. The learned counsel pointed out that the memorandum of arrest and recovery was prepared by P.C Iqbal Hussain but the said P.C Iqbal Hussain neither is shown as witness nor was he produced before the trial court to adduce his evidence. Three extra pieces of opium out of 3-packets were found in sealed parcel of Opium allegedly recovered from accused Bismillah but the prosecution failed to properly explain the same. The complainant admitted that on the day of incident, there was strict lockdown in the Country then how there was usual traffic plying on the Highway and people were travelling. The description of vehicle is not mentioned in the memorandum of arrest and recovery. The complainant did not know that who had brought Chemical Report from Chemical Examiner Karachi. The complainant admitted that he did not write letter for collecting criminal record of the accused persons and the complainant admitted that he did not collect CDR of

SIMS of the accused persons in order to ascertain their exact locations. The complainant did not write the memorandum of place of incident and the complainant himself is complainant, I.O of the case and Incharge Malkhana but no single document has been prepared by him. They further pointed out that for fair investigation, it was necessary that the complainant must have separated himself to investigate the case but there should have been another Officer to investigate the case to order to dig out the truth in the case. They further contended that P.W Asif Ali the mashir of arrest and recovery admitted that no efforts was made for associate any private witness and he did not notice any CCTV Cameras installed at Toll Plaza. They also contended that the mashir has stated that the color of opium is blackish brown whereas other P.W has contradicted him on this point. Lastly, they contended that there are serious of contradictions and lacunas in the prosecution case, and this Court by exercising its vast powers may be pleased to acquit of the respondents/accused from the charge or dismiss instant criminal revision application.

9. We have heard the learned counsel for the parties and have gone through the impugned judgment with their able assistance.

10. With no denial the offence under section is punishable by death, imprisonment for life, or imprisonment for a term that may extend to fourteen years, along with a fine. Learned trial Court in the impugned judgment has held that the prosecution has successfully established its case against the respondents/accused. However, instead of sentencing them to prison, keeping in view the concept of law, the facts and circumstances of the case held the present case fit where the accused can be sent on probation. Consequently, in exercise the powers provided under section 5 of Probation of Offenders Ordinance 1960 the respondents/accused were sent on probation for a period of three years and entrusted their physical custody under the supervision of probation officer. In this regard,

we would like to reproduce the section 5 of Probation of Offenders Ordinance, 1960, which reads as under:-

“5. Power of court to make a probation order in certain cases.– (1) Where a court by which–

(a) any male person is convicted of an offence not being an offence under Chapter VI or Chapter VII of the Pakistan Penal Code (Act XLV of 1860), or under section 216A, 328, 382, 386, 387, 388, 389, 392, 393, 397, 398, 399, 401, 402, 455, or 458 of that Code, or an offence punishable with death or [imprisonment] for life, or

(b) any female person is convicted of any offence other than an offence punishable with death, is of opinion that, having regard to the circumstances including the nature of the offence and the character of the offender, it is expedient to do so, the court may, for reasons to be recorded in writing, instead of sentencing the person at once, make a probation order, that is to say, an order requiring him or her to be under the supervision of a probation officer for such period, not being less than one year or more than three years, as may be specified in the order :

Provided that the court shall not pass a probation order unless the offender enters into a bond, with or without sureties, to commit no offence and to keep the peace and be of good behaviour during the period of the bond and to appear and receive sentence if called upon to do so during that period:

Provided further that the court shall not pass a probation order under this section unless it is satisfied that the offender or one of his sureties, if any, has a fixed place of abode or a regular occupation within the local limits of its jurisdiction and is likely to continue in such place of abode or such occupation, during the period of the bond.

(2) While making a probation order, the court may also direct that the bond shall contain such conditions as in the opinion of the court may be necessary for securing supervision of the offender by the probation officer and also such additional conditions with respect to residence, environment, abstention, from intoxicants and any other matter which the court may, having regard to the particular circumstances of the case, consider necessary for preventing a repetition of the same offence or a commission of other offences by the offender and for rehabilitating him as an honest, industrious and law-abiding citizen.

(3) When an offender is sentenced for the offence in respect of which a probation order was made, that probation order shall cease to have effect.”

11. After taking into consideration of the above position, we are of the opinion that section 5 of Probation of Offenders Ordinance, 1960 is not supposed to be exercised when the offences are not being offences provided in it or punishable with death or imprisonment for life. Admittedly, the quantum of sentence is not specified in the impugned judgment by the learned trial Court, which may be either death, imprisonment for life, or imprisonment for a term that may extend to fourteen years.

12. Both parties, learned counsel for the applicant seeks enhancement of sentence to the respondents/accused while the counsel representing the respondents/accused seek acquittal or dismissal of instant revision application. However, keeping in view the above legal position, we are of the considered view that the trial Court ought to have awarded sentence to the respondents/accused as prescribed under the law, and in such eventuality, if the offences not being offences as prescribed or an offence punishable with death or imprisonment for life mentioned in section 5 of Probation of Offenders Ordinance, 1960 could have, by exercising powers to make a probation order in certain cases, entrusted custody of respondents/accused to the Probation Officer for such period i.e. three years OR could have acquitted the respondents/accused.

13. For what has been discussed above, the impugned judgment is not sustainable under the law as discussed above. Consequently, impugned judgment is set aside. Case is remanded back to the learned trial Court with direction to decide the same afresh after hearing both the parties and pass the judgment in accordance with law. Learned Prosecutor appearing on behalf of applicant and the learned counsel representing the respondents are directed to advance their arguments before the learned trial Court and the learned trial Court, shall decide the case afresh without being influenced with the impugned judgment within a period of one month. Since, the impugned judgment stand set aside, as such, fate of the custody of the

respondents/accused is to be decided by the learned trial Court. The applicant as well as respondents/accused along with their pleaders shall attend the trial Court on 14.12.2024 without claiming any notice further.

14. Instant criminal revision application stands disposed of in the above terms.

JUDGE

JUDGE

Abdullah Channa/PS
Hyderabad dated 27.11.2024.