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

Cr. Appeal No.D-93 of 2015

PRESENT

**Mr. Justice Muhammad Junaid Ghaffar &
Mr. Justice Rasheed Ahmed Soomro**

Appellant: Malik Dino @ Fouji through Mr. Muhammad Ali Memon, Advocate along with appellant.

The State: Through Mr. Khadim Hussain Khooharo, Additional Prosecutor General, Sindh.

Date of Hearing: 03.10.2017

Date of Judgment: 03.10.2017

J U D G M E N T

RASHEED AHMED SOOMRO, J:-Appellant Malik Dino @ Fouji was tried by the learned Sessions Judge/Special Judge Narcotics Shikarpur for the offence under Section 9(c) Control of Narcotics Substance Act, 1997. After full-dressed trial, the appellant was found guilty, he was convicted under Section 9(c) of Control of Narcotics Substance Act, 1997 by judgment dated 20.11.2015 and sentenced to undergo rigorous imprisonment for four years and six months and to pay fine of Rs.20,000/- and in default of payment of fine to undergo S.I for five months more. However, benefit of Section 382(B) Cr.P.C was extended to him.

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2. Brief facts of the prosecution case as disclosed in the FIR are that on 08.09.2013 at 1810 hours, complainant Muhammad Ali Soomro lodged the FIR No.98/2013 U/S 9-C of CNS Act 1997 at P.S Staurt Ganj Shikarpur. On same day he along with ASI Amjad Parvez, ASI Ghulam Hussain Chang, H.C Talib Hussain, P.Cs Amanullah and Fayaz Ahmed left police station on official motorcycles under roznamcha entry No.16 at 1600 hours for patrolling duty. During patrolling when they reached at Kirri Atta Muhammad Muhalla Shikarpur, where they received spy information that absconding accused namely Malik Dino Jatoi involved in Crime No.163/2012, U/S 392 PPC was going towards Masan having Charas. At 1700 hours they arrived at pointed place, saw a person having black shopper in his hand. They asked him to stop, but he started running, however, they under suspicious, apprehended him along with shopper. Due to non-availability of private persons, complainant appointed ASI Amjad Parvez and ASI Ghulam Hussain as mashir and enquired name and parentage of the captive, who disclosed his name as Malikdino @ Fouji Jatoi. The shopper was opened, found Charas in shape of pieces. From body search of appellant recovered one currency note of Rs.100/- and CNIC in his name. Recovered Charas was sealed at the spot. After finalization of usual investigation, the Challan was submitted against the appellant for offences under Section 9(c) of Control of Narcotic Substance, 1997.

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3. Charge was framed by learned trial court against the appellant under Section 9(c) of CNSA, 1997 at Ex-02. The appellant pleaded not guilty and claimed to be tried.
4. In order to substantiate the charge, prosecution examined P.W-1 ASI Ghulam Hussain at Ex-06 and complainant Inspector Muhammad Ali Soomro at Ex.7. Thereafter, prosecution closed its side.
5. The statement of appellant was also recorded under Section 342 Cr.P.C at Ex-8, in which the appellant denied the recovery of Charas from his possession and stated that Chemical Examiner's report has been managed by the Police and raised plea that the police officials are interested in the case. The appellant did not examine himself on oath so also did not lead any evidence in his defence.
6. Trial Court after hearing the learned Counsel for the parties and assessment of the evidence, convicted and sentenced the appellant, as stated above. Hence the appellant has preferred the present appeal.
7. The facts of the case and evidence adduced by the prosecution have already been mentioned by the learned Trial Court in detail. Therefore, there is no need to repeat the same.
8. Mr. Muhammad Ali Memon, Advocate for appellant contended that the impugned judgment is biased in the eyes of law hence, liable to be set aside. According to him, the learned trial judge has not properly appreciated the evidence on record and the whole judgment is based on mis-reading and non-reading the evidence, without taking

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into consideration the cardinal principal of criminal justice. He next contended that it is a case, where reasonable doubt has been created in respect of the involvement of the appellant in the commission of alleged offence and the prosecution has miserably failed to prove the charge against the appellant. He further contended that though it was the case of spy information but SHO failed to associate independent and respectable persons of locality to witness the recovery proceedings, which reflected mala fide on the part of the Police. He has further contended that there are many material contradictions in the prosecution evidence, which go to the root of the prosecution case. Learned counsel for the appellant further contended that appellant is also acquitted in Crime No.163/2012 of P.S.Staurt Ganj-Shikarpur under section 392 PPC. In support of his contentions, learned Counsel for appellant has relied upon the cases of TARIQ PERVEZ V/S. THE STATE (1995 SCMR 1345) & MUHAMMAD AKRAM V/S. THE STATE (2009 SCMR 230).

9. Mr. Khadim Hussain Khooharo, Additional P.G appearing for the State has contended that no specific enmity has been alleged by the appellant with the police officials. He has pointed out that the report received from the chemical examiner is in positive. No any major contradictions in the depositions of the P.Ws. He has supported the judgment passed by the Trial Court.

10. We have carefully heard the learned Counsel for the parties and scanned the entire evidence.

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11. From the perusal of the evidence, it transpires that there are material contradictions in the evidence of the both prosecution witnesses i.e. complainant SHO as well as Mashir. PW-1 Mashir ASI Ghulam Hussain in his cross-examination has deposed that they jointly caught hold the appellant, while PW-2 Muhammad Ali in his cross-examination deposed that ASI Amjad and HC Talib caught hold the appellant. Record further reflects that police party reached at place of recovery at 1700 hours. It would ^{not} be out of place ~~to~~ mention here that when complainant party reached at place of recovery at 1700 hours and consumed sufficient time in following and arresting the appellant at the distance of about 15/20 paces, then enquired from the appellant and conducted his personal search, then how it is possible to prepare Mashirnama at the same time i.e. 1700 hours. Another important aspect of the case is that the alleged recovery is claimed to have been effected from the possession of appellant on spy information received to complainant at Panj Guli Chowk, where according to PW-1, houses, shops and hotels were situated, but SHO did not associate any independent person to witness the recovery proceedings. Moreover, appellant has been acquitted of the charge in crime No.163 of 2012 registered at P.S. Staurt Ganj Shikarpur for offence under section 392 PPC. This is extremely fatal to the prosecution case.

12. In this case there are several circumstances/infirmities in the prosecution case, which created reasonable doubt in the prosecution case so far involvement of the appellant is concerned.

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13. The Hon'ble Apex Court in case of Muhammad Akram v. The State (2009 SCMR 230) has been pleased to observe as under:

“The nutshell of the whole discussion is that the prosecution case is not free from doubt. It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the appellant as a matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the appellant then the appellant would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right”.

14. While relying upon the case law, we have no hesitation to hold that prosecution has failed to establish its case against the appellant beyond shadow of reasonable doubt, therefore, by extending benefit of doubt we allow this appeal, the conviction and sentence recorded by the learned trial court vide impugned judgment dated 20.11.2015 are set aside and the appellant Malik Dino alias Fouji Jatoi son of Khaliqdad is acquitted from the charge. Appellant is present on bail, his bail bond stands cancelled and surety discharged.

15. These are the reasons of our short order dated 03.10.2017.)

