IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

Crl. Jail Appeal No.D-43 of 2019

PRESENT:
Mr. Justice Zafar Ahmed Rajput,
Mr. Justice Shamsuddin Abbasi,

Appellant : Bakhat alias Tako Khoso, through Mr. Asif Ali Mohammad Khan Chandio, Advocate.

Respondent : The State, through Mr. Aitbar Ali Bullo, Deputy Prosecutor General.

Date of hearing: 18-03-2020. Date of Judgment: 18.03.2020.

JUDGMENT.

ZAFAR AHMED RAJPUT, J.- This Criminal Jail Appeal is directed against the judgment dated 31.05.2019, whereby the learned Sessions /Special Judge CNS, Larkana, convicted the appellant Bakhat alias Tako son of Sanwan Khan Khoso in Special Narcotics Case No.165 of 2018 (Re: The State Vs. Bakhat alias Tako Khoso) arisen out of Crime No.61/2018, registered at Police Station Taluka, Larkana, under Section 9(c) of Control of Narcotic Substances Act, 1997 and awarded him sentence to suffer R.I. for six years and six months and to pay fine of Rs.30,000/-, in default thereof to suffer S.I. for 06 months more, with benefit of Section 382-B, Cr.P.C.

2. Briefly stated the facts of the prosecution case are that on 12.06.2018, at 1400 hours, a police party headed by ASI Ghulam Rasool Khokhar of Police Station Taluka, Larkana, on a tip-off, arrested the appellant/accused from Waggan Road near Abri Wah, Deh Nazar Thariri and recovered black colour shopper containing charas weighing 3200 grams.

3. After usual investigation, case was challaned against the appellant/accused.

4. The learned trial Court framed charge against the appellant/accused at Ex.2, to which he pleaded 'not guilty' and claimed to be tried. The prosecution to prove the charge examined four witnesses viz., PW-1 complainant ASI Ghulam Rasool Khokhar at Ex.4, who produced departure entry No.12, memo of arrest and recovery and the FIR at Ex.4-A to 4-C respectively; PW-2 mashir PC Ishfaq Ahmed at Ex.5, who produced memo of site inspection at Ex.5-A; PW-3 IO/SIP Liaquat Ali Solangi at Ex.6, who produced letter of sending case property to the Chemical Examiner and report of Chemical Examiner at Ex.6-A and 6-B respectively; and PW-4 PC Mohammad Mithal, who had taken charas to the Chemical Examiner, Sukkur at Rohri, at Ex.7. Thereafter, side of prosecution was closed.

5. In his statement u/s 342, Cr.P.C, the appellant/accused denied the prosecution allegations and stated that he was arrested outside the Sessions Court, Larkana by PC Oshaq Ali and PC Ishfaq Ahmed and was kept under illegal detention at P.S Rehmatpur, hence his wife filed an application under Section 491, Cr.P.C, but he was not recovered during the raid and was then implicated falsely in the instant case by foisting charas upon him. Lastly, he pleaded innocence. The appellant/accused neither examined himself on oath, nor led any evidence in his defence.

6. On the assessment of evidence available on record, the learned trial Court convicted and sentenced the appellant, as mentioned above.

7. The learned Counsel for the appellant has mainly contended that in fact the appellant was arrested by the police of Police Station Taluka on 12.06.2018 and illegally confined him in the police lockup of PS Market, larkana, on that the wife of the appellant, namely, Mst. Haseena had filed an application under Section 491 Cr.P.C on the same date i.e. 12.6.2018 being

Criminal Misc. Application No.nil of 2018 before the learned Sessions Judge, Larkana, in which raid conducted by the Civil Judge & J.M-II, Larkana at P.S Market on 12.06.2018 on the directions of learned Sessions Judge, Larkana, but the appellant was not found confined there, therefore, said application was disposed of by the learned Sessions Judge, Larkana vide order dated 13.01.2019. He has further contended that such defence plea was specifically taken by the appellant in his statement under Section 342, Cr.P.C and certified copies of said documents were produced by him at Ex.9-A, but the same were not considered by the learned trial Court.

8. The learned Deputy Prosecutor General, after consulting the record, concedes to the fact that record in the form of certified true copies of application and order passed by the learned Sessions Judge, Larkana on the application of the wife of the appellant, which were produced by the appellant in his statement under Section 342, Cr.P.C, should have been considered by the learned trial Court.

9. We have heard learned Counsel for the parties and have perused the material available on record.

10. It appears from the perusal of Ex.9-A that the wife of the appellant had filed an application under Section 491, Cr.P.C before the learned Sessions Judge, Larkana on 12.06.2018 with an affidavit sworn at 1.55 p.m., stating therein that on the said date i.e. 12.06.2018 her husband, namely, Bakhat Ali alias Tako Khoso after attending hearing in Sessions Court when came out, police took him away forcibly, hence she apprehended that some criminal case might be registered against him at P.S Market, where he was illegally detained. It further appears that on such application of the wife of the appellant, raid was conducted at P.S Market, Larkana by the Civil Judge &

J.M-II, Larkana under the directions of learned Sessions Judge, Larkana, who after visiting the said police station reported that the appellant was not found confined at Police Station Market, Larkana, hence the said application was dismissed by the learned Sessions Judge, Larkana on being infructuous vide order dated 13.06.2018 and subsequently the appellant was shown arrested in the instant crime on 12.06.2018, at 2.00 p.m., on the charge of having been found in possession of charas. Such documentary evidence available on the record appears to have been discarded by the learned trial Court without discussing and assigning any reason to it. Since it has already come on record that the appellant was forcibly taken away by the police on 12.06.2018 and for that such application filed by the wife of the appellant for his production was already pending adjudication before the learned Sessions Judge, Larkana, it is sufficient to hold that the entire exercise of arrest and recovery of the contraband material from the possession of appellant in the instant case is highly doubtful. It is well-settled principle of law that benefit of doubt is to be extended to the accused not as a matter of grace but as a matter of right. Reliance in this context can be placed on the case of ***Muhammad Akram v. The State*** **(2009 SCMR 230),** wherein Hon'ble Supreme Court of Pakistan has held that:

> ***"It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as 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 accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."***

11. In view of above facts and circumstances, we are of the considered view that the prosecution has in fact failed to prove its case against the appellant beyond reasonable doubt. Accordingly, this appeal is allowed.

Resultantly, the conviction and sentence awarded to appellant Bakhat alias Tako son of Sanwan Khan Khoso by the learned trial Court vide impugned judgment dated 31.05.2019 are set aside and he is acquitted of the charge. The appellant is confined in jail, therefore, he is directed to be released forthwith, if not required to be detained in any other case.

JUDGE

JUDGE

Ozi Tahir PA