

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Before:

Mr. Justice Abdul Maalik Gaddi

Mr. Justice Mohammad Karim Khan Agha

Cr. Jail Appeal No.D-33 of 2014.

Gul Muhammad alias Guloo

Versus.

The State.

Appellant : Gul Muhammad alias Guloo	Through Mr. Tilok Chand, Advocate.
Respondent : The State	Through Ms. Romeshan Oad, A.P.G.
Date of hearing	01.10.2018
Date of judgment	01.10.2018

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- This appeal is directed against the judgment dated 31.01.2014 passed by learned Special Judge for Narcotics/Sessions Judge, Badin, in Special Case No.03 of 2011, arising out of Crime No.07/2011, registered at Police Station Badin, under section 9(c) of the Control of Narcotic Substances Act, 1997 (CNSA), whereby the appellant Gul Muhammad alias Guloo has been convicted u/s 9(c) CNSA and sentenced to suffer RI for 05 years and to pay fine of Rs.50,000/-. In case of default in payment of fine he was ordered to suffer simple imprisonment for 01 year more (the impugned judgment). Benefit of Section 382-B Cr.P.C. was also extended to the accused.

2. Brief facts of the prosecution case as disclosed in the FIR are that Complainant SIP Ashique Hussain Memon lodged FIR on behalf of State at P.S Badin on 11.01.2011 at 1915 hours stating therein that on the date of report, he alongwith his staff members ASI Zulfiqar Ali Shar, PC Bhojomal, PC Mukhtiar Ali left P.S vide entry No.12 at 1630 hours in a government mobile driven by POC Waqar Ali for patrolling. During patrolling when police party reached near Mehran Shadi Hall at 1730 hours, they saw two persons standing on western side of the road out of them one was having a plastic bag and some thing was in his hand, who on seeing police party tried to run away

towards western side. The police party stopped the vehicle, got down from it encircled them and apprehended both of them alongwith shopper (theli). On inquiry, one person disclosed his name as Abdul Karim alias Papu son of Uris Mallah and the other disclosed his name Gul Muhammad alias Guloo son of Luqman Mallah. The plastic shopper was recovered from accused Guloo alias Gul Muhammad in which 12 big and small pieces of charas were found. On personal search of accused Abdul Karim two notes of Rs.50/- each and from accused Gul Muhammad alias Guloo, two notes of Rs.100/- each were recovered. As there was no public person available, hence complainant weighed the charas in presence of ASI Zulfiqar Ali Shar and PC Mukhtiar Ali which became 1230 grams. Thereafter, complainant separated some quantity from each piece of charas weighing ten grams for sending to the chemical examiner and sealed the same separately and prepared such memo of arrest and recovery. Thereafter, complainant put the accused in mobile and proceeded towards police station. In the meantime, at 1815 hours near Mehran Shadi Hall some persons attacked the police mobile in order to get the accused released which enabled accused Gul Muhammad Mallah alias Guloo to make his escape good. Accused Abdul Karim was brought to P.S and the above F.I.R. was lodged. On completion of the investigation challan was submitted showing accused Gul Muhammad alias Guloo as absconder.

3. The case was proceeded in absentia of accused and after recording evidence of I.O/SIP Sajjad Hussain, Mashir PC Mukhtiar and the complainant SIP Ashique Ali, the case against accused was kept on dormant file till his arrest vide order dated 19.09.2011. Later on accused Gul Muhammad alias Guloo was arrested and supplementary challan was submitted against him.

4. After supplying case papers to the accused, Charge Exh.10 was framed against the accused Gul Muhammad alias Guloo for the offence punishable under Section 9-C CNSA to which he pleaded not guilty and claimed to be tried vide his plea as Exh.11.

5. At the trial prosecution examined PW-1 ASI Zulfiqar Ali at Ex.14, he testified memo of arrest and recovery at Exh.3-C to be same correct and bears his signature. PW-2 SIP Sajjad Hussain was examined at Exh.15. He testified FIR at Exh.3-A, roznamcha entries No.12 and 17 at Exh.3-B, memo of arrest and recovery at Exh.3-C, receipt of chemical examiner at Ex.3-D, roznamcha entry No.32 and 23 of departure and arrival at Exh.3-E, chemical examiner report at Exh.3-F. PW-3 complainant SIP Ashique Ali was examined at Exh.16, thereafter, prosecution side was closed at Ex.17.

6. Statement of accused was recorded u/s 342 Cr.P.C. at Ex.18. The accused denied the prosecution allegations and claimed his false implication in this case. He however, did not examine himself on oath nor lead any evidence in his defense.
7. Learned Special Judge after hearing the learned counsel for the parties and examining the evidence available on record convicted and sentenced the appellant as stated above by the impugned judgment. Hence this appeal.
8. Learned trial court in the impugned judgment has already discussed the evidence in detail and there is no need to repeat the same here, so as to avoid duplication and unnecessary repetition.
9. Mr. Tilok Chand, learned advocate for appellant has contended that the appellant has been involved in this case falsely; that the case in hand is highly doubtful; that the place of incident was located at busy spot, yet, none from public was joined to attest the arrest and recovery; that there are material contradictions in prosecution evidence, hence it cannot be safely relied upon; that the contraband item was allegedly secured on 11.01.2011, however, it was sent to Chemical Analyzer for examination on 14.01.2011 with an inordinate delay of 03 days and tampering with the case property during such period could not be ruled out especially as no evidence has been brought on record that the narcotic substance was in safe custody during that period; that the appellant has nearly served out his sentence and for all the above reasons the appeal should be allowed.
10. Ms. Romeshan Oad, the learned A.P.G. fully supported the impugned judgment and in particular contended that the recovered contraband item had been in safe custody following its recovery until the time it was sent and received in the office of Chemical Analyzer for chemical examination.
11. We have carefully heard the learned counsel for the parties, scanned the entire evidence and considered the relevant law.
12. We have come to the conclusion that prosecution has failed to establish its case for the main reason that there is very little evidence, if any, on record to show that the charas was kept in safe custody from the time of its recovery until it was received by the chemical examiner after an unexplained delay of 3 days; that HC Din Mohd who took the chemical to the chemical examiner has not been examined as to the safe custody of the recovered narcotic nor has the guard to the Malkhana. In the case of **Muhammad Sarfraz V The State (2017 SCMR 1874)** where there was no negative evidence of non safe custody the conviction was upheld. **Muhammad Sarfraz's case** (Supra)

however was by a two member bench of the Hon'ble Supreme Court and the case of **Ikramullah & others v/s. the State** (2015 SCMR 1002) which was by a three member bench does not seem to have been brought to its attention. In **Ikramullah's case** (Supra) the emphasis was on the **positive proof** of safe custody of the narcotic by the prosecution from the time of its recovery until the time it went for chemical examination which would rule out any possibility of the narcotic being tampered with. Since **Ikramullah's case** (Supra) was decided by a three member bench of the Hon'ble Supreme Court and was not brought to the attention of the Hon'ble Supreme Court in **Muhammad Sarfraz's case** (Supra) we are inclined to follow **Ikramullah's case** (Supra) in respect of safe custody of the narcotic.

13. Thus, in our view in this case since there is a possibility that the narcotic during the time it was recovered from the appellant and was received by the chemical examiner may not have been kept in safe custody and may have been tampered with we find that even a positive chemical report is of no assistance to the prosecution; the significance of keeping safe custody of the narcotic in a case under the CNSA has been emphasized in **Ikramullah's case** (Supra), the relevant portion of which is reproduced hereunder:-

"5. In the case in hand not only the report submitted by the Chemical Examiner was legally laconic but safe custody of the recovered substance as well as safe transmission of the separated samples to the office of the Chemical Examiner had also not been established by the prosecution. It is not disputed that the investigating officer appearing before the learned trial court had failed to even to mention the name of the police official who had taken the samples to the office of the Chemical Examiner and admittedly no such police official had been produced before the learned trial Court to depose about safe custody of the samples entrusted to him for being deposited in the office of the Chemical Examiner. In this view of the matter the prosecution had not been able to establish that after the alleged recovery the substance so recovered was either kept in safe custody or that the samples taken from the recovered substance had safely been transmitted to the office of the Chemical Examiner without the same being tampered with or replaced while in transit." (bold added)

14. Under these circumstances we are of the considered view that the prosecution has not proved its case against the appellant beyond a reasonable doubt. It is well settled law that the benefit of doubt must go to the accused by way of right as opposed to concession. In this respect reliance is placed on the case of **Tariq Pervez V/s. The State** (1995 SCMR 1345), 15.

15. For the above stated reasons, we hold that the prosecution has failed to prove its case against the appellant, therefore, while extending the benefit of doubt, the appeal is allowed. The conviction and sentence recorded by the trial court through the impugned judgment are set aside and the appellant is acquitted. These are the reasons for our short order which was announced in open court today which reads as under:

"Parties' advocates have been heard at length. They have concluded their arguments. For the reasons to be recorded later on, the instant appeal is allowed; the impugned judgment dated 31.01.2014, passed by the learned Sessions / Special Judge (CNS) Badin is set aside and the appellant is acquitted of the charge. The appellant is in custody. He shall be released forthwith if not required in any other custody case."