

47

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

Crl. Appeal No.D-74 of 2019

PRESENT:

Mr. Justice Muhammad Saleem Jessar,
Mr. Justice Khadim Hussain Tunio,

Appellants : Babal Brohi, through Mr. Habibullah G. Ghouri,
Advocate.

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

Date of hearing : 21.07.2020.
Date of Judgment : 21.07.2020.

J U D G M E N T.

Muhammad Saleem Jessar, J.- Through instant appeal, appellant Babal son of Azeem Brohi has assailed the judgment, dated 26.10.2019, penned down by learned Additional Sessions Judge-I/Model Criminal Trial Court, Jacobabad, in CNS Case No.50/2019, re-The State Vs. Babal Brohi, being outcome of Crime No.128/2019, registered at Police Station Saddar, Jacobabad, for offence under Section 9(c) of Control of Narcotic Substances Act, 1997, whereby he was convicted and sentenced to suffer R.I. for 7 years and 6 months, with fine of Rs.35,000/- (rupees thirty-five thousand); in default whereof to suffer simple imprisonment for six months and 15 days more. However, benefit of Section 382-B, Cr.P.C was extended to the appellant.

2. The crux of the prosecution case as unfolded by complainant HC Ahsan Ahmed of P.S Saddar Jacobabad is that on 25.08.2019 he along with his subordinates was on patrolling, when they received spy information that one person duly boarded in a Corolla Car bearing registration No.BBD-737 was coming from Balochistan side along with

contraband of 5 kilograms. Upon receipt of such information they proceeded towards the pointed place and saw a high-speed vehicle was coming, which was signaled to stop, but the driver instead to stop it crossed away and was followed by them, during which said car went out of control of driver and fallen down in the ditches near Village Abdullah Lashari, District Jacobabad. Ultimately, the car was recovered and it was found that 5 kilograms charas was lying in shape of 10 slabs in five packets inside the seat adjacent to driver seat of the car, besides twenty Bachkas (sacks) containing Pan Parag and Ghutka were also recovered from rear seat and dickey of the car. On enquiry, the driver disclosed his name to be Babal son of Mohammad Azim, by caste Brohi, resident of Dera Murad Jamali, Balochistan, therefore, such memo of his arrest and recovery was prepared on spot. The property and the accused were then brought at police station, where instant case was registered against him on behalf of State.

3. After registration of the FIR, investigation was assigned to SIP Shabir Ahmed Sahto, who after completion of usual formalities submitted challan before the competent Court of law.

4. In order to prove its case, the prosecution examined in all three witnesses, namely, PW-1 complainant HC Ahsan Ali at Ex.5; PW-2 mashir PC Mohammad Rafique Lashari at Ex.6; and PW-3 SIP Shabir Ahmed Sahto, I.O. of the case, at Ex.7. Then side of the prosecution was closed vide Ex.8.

6. After discussing the evidence and formulation of points for determination, the learned trial Court held the appellant guilty of the offence, hence awarded him conviction and sentence in terms of the

sentencing policy viz. R.I. for 7 years and 6 months etc, which has been challenged by the appellant through this appeal.

7. Mr. Habibullah G. Ghouri, learned Counsel for the appellant, after arguing the case, submits that case against him is false and the contraband as shown was not recovered from him, as on 22.08.2019 the vehicle of appellant collided with Parado Jeep belonging to local MNA, whose vehicle was having number plate of MNA, in which said Prado Jeep was damaged and the appellant also sustained injuries, therefore, he was admitted in Civil Hospital, Jacobabad, where he was treated by medicolegal officer, namely, Dr. Mukhtiar Ahmed Dayo (Ex.11 at Page-83 of paper book). He next submits that besides the case has no merit, as the alleged incident is said to have taken place on 25.08.2019 and the SSP concerned had written a letter to the laboratory for sending contraband through PC-1660 Shahzad Hussain vide dated 26.08.2019 (Page-65 of paper book); however, later it was sent through PC/2359 Qalati Khan on 03.09.2019 as per the deposition of IO SIP Shabir Ahmed Sahto. He further submits that the contraband was sent to the laboratory after 09 days and even such delay has not been explained by the prosecution. He further submits that though some Pan Parag as well as Ghutka were also recovered from the car belonging to the appellant, yet the same were not sent to the laboratory for its examination. Lastly, learned Counsel submits that the plea taken by the accused at trial has not been kept in juxtaposition by the trial Court. He, therefore, submits that the case against the appellant is full of doubts, hence he may be acquitted by extending benefit of doubt. In support of his contentions, he has placed reliance on the case of *Tariq Pervaiz vs. The State* (1995 SCMR 1345).

5. On the other hand, learned DPG while opposing the appeal has contends that huge quantity of contraband was shown to have been recovered from the car, which was in possession of and being driven by the appellant. He further contends that the appellant has not denied the ownership of car, which had fallen in ditches due to high-speed, hence the prosecution has succeeded to establish the charge against him and the impugned judgment does not suffer from any illegality or infirmity, which may require interference by this Court in this appeal. He; however, could not controvert the fact that why WHC, before whom the contraband was kept for noticeable period and PC Qalati Khan, through whom contraband was sent for its examination, were not examined at trial.

6. We have considered the submissions of learned Counsel for the parties and have examined the material available on record.

7. Admittedly, the prosecution has not explained delay for keeping the contraband in safe custody and subsequently its dispatch to the laboratory concerned for its examination. The delay so occasioned on the part of the prosecution is sufficient to hold that the prosecution has not come with clean hands. Moreover, the prosecution has not examined the WHC, with whom the alleged contraband was kept in safe custody. Even PC Qalati Khan was not examined at trial to substantiate the plea of prosecution to the effect that the contraband sent through him was in fact delivered at the laboratory. Therefore, the safe custody of alleged contraband right from the date of its recovery to 'Malkhana' and then to laboratory has not been established rather its chain seems to be missing. Reliance can be placed on the cases reported as *Samandar @ Qurban and others v. The State (2017 MLD 539 Karachi)*, *IKRAMULLAH and*

others V/s The STATE (2015 SCMR 1002), The STATE Through Regional Director ANF v/s IMAM BAKSH (2018 SCMR 2039), STATE OIL COMPANY LIMITED versus BAKHT SIDDIQUE (2010 SCMR 1181) and ABDUL GHANI and others V/s The STATE and others (2019 SCMR 608).

In the case of IKRAMULLAH and others (supra), the Hon'ble Supreme Court has observed that:-

"It is not disputed that the investigating officer appearing before the learned trial Court had failed 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."

In the case of The STATE Through Regional Director ANF (supra), the Hon'ble Supreme Court has observed that :-


"The chain of custody begins with the recovery of the seized drug by the Police and includes the separation of the representative sample(s) of the seized drug and their dispatch to the Narcotics Testing Laboratory. This chain of custody, is pivotal, as the entire construct of the Act and the Rules rests on the Report of the Government Analyst, which in turn rests on the process of sampling and its safe and secure custody and transmission to the laboratory. The prosecution must establish that the chain of custody was unbroken, unsuspicious, indubitable, safe and secure. Any break in the chain of custody or lapse in the control of possession of the sample, will cast doubts on the safe custody and safe transmission of the sample(s) and will impair and vitiate the conclusiveness and reliability of the Report of the Government Analyst, thus, rendering it incapable of sustaining conviction. This Court has already held in Amjad Ali v. State (2012 SCMR 577) and Ikramullah v. State (2015 SCMR 1002) that where safe custody or safe transmission of the alleged drug is not established, the Report of the Government Analyst becomes doubtful and unreliable."


8. Furthermore, the plea taken by the appellant during trial to the effect that his vehicle had collided with PRADO Jeep of one local MNA on 22.08.2019, hence the appellant was maltreated and caused severe injuries, who was then shifted to hospital, where he remained under treatment and subsequently he was booked in this case by the police at the instance of said MNA. In support of his said defence plea the appellant has examined medicolegal officer, namely, Dr. Mukhtiar Ahmed Dayo (Ex.11, at page 83 of paper book). He further added that medical prescriptions issued by the hospital show his name with parentage (Ex.9-A and 9-B, available at pages-77 – 79 of paper book), hence the police by misusing their authority at the instance of said MNA had foisted contraband upon him; thus, we do not feel any hesitation in holding that the prosecution has failed to prove its case against the appellant beyond shadow of reasonable doubt and the recovery has not been satisfactorily proved.

9. It needs no reiteration that it is the primary obligation of the prosecution to prove its case beyond reasonable doubt and its burden is not shifted under the presumption contained in section 29 of the Act. It only says that once the prosecution establishes recovery beyond shadow of doubt it is then that the burden is shifted. Section 29 of the Control of Narcotic Substances Act, 1997 does not absolve the prosecution of its primary duty to prove its case beyond doubt.

10. After having analyzed the entire case, we are of the considered view that prosecution has failed to prove its case against the appellant beyond reasonable doubt so, we while extending the benefit of doubt accept this appeal, set-aside the conviction and sentence recorded against the appellant by the trial Court vide impugned judgment dated

26.10.2019 and acquit him of the charge. The appellant is confined in jail, therefore, he shall be released forthwith if his custody is not required in any other case.


JUDGE
21. 7. 2020


JUDGE
21/07/2020