IN THE HIGH COURT OF SINDH AT KARACHI

Cr. Appeal. NO.D-32/2012

Present Before: **Mr. Justice Ahmed Ali M. Shaikh,**
Mr. Justice Muhammad Iqbal Kalhoro.

Farooq Khan..Appellant

Versus

The State..Respondent

Date of hearing : 25.03.2015.

Syed Zakir Hussain, Advocate for the Appellant.
Ms.Akhter Rehana, Additional Prosecutor General.

JUDGMENT

MUHAMMAD IQBAL KALHORO, J: The appellant was tried by the learned Special Court II (CNS) Karachi in Special Case No.71/2006 bearing Crime No.84/2006 under Section 9(c) CNS Act, 1997 lodged at P.S. Mehmoodabad Karachi. At the culmination of trial, the appellant was found guilty of committing offence under Section 6 punishable under Section 9(c) CNS Act, 1997 and was convicted and sentenced to suffer R.I. for ten years and fine of Rs.500,000/-(Rupees five hundred thousand only) and incase of default to further undergo R.I. for two and half years. The benefit contemplated under Section 382-B Cr.P.C. was also extended to the appellant in terms of the impugned judgment dated 28.12.2011.

2. The facts of the prosecution case in brief are that the appellant already arrested in FIR No.79/2006 under Section 6/9 (c) CNS Act, 1997 of P.S. Mehmoodabad was interrogated by SIP Muzaffar Ahmed on 7.4.2006, during which he disclosed about availability of heroin powder and charas in a house situated in Katchi Abadi Hazara Colony, near Kala Pul, Karachi. On such information the said SIP along with other police staff and the appellant came at the pointed place at about 1815 hours where appellant led the police party to the house and produced one plastic bag containing 7 packets of charas 'roll in shape' wrapped with biscuit colour tape having 666 inscribed thereon and one packet of brown paper containing heroin powder. On opening one packet was found containing hundred rods of charas. The total weight of 07 packets of charas became 8750 grams, out of which one packet having 100 rods of charas weighing 1250 grams and 10 grams sample out of 1000 grams of heroin were separately sealed for sending to Chemical Analyzer. Such memo of recovery was prepared at the spot with the signatures of accompanying staff. Appellant and recovered case property were brought at police station Mehmoodabad where the FIR bearing Crime No.84/2006 was registered to the above effect.

3. After usual investigation the challan/final report in terms of Section 173 Cr.P.C. was submitted against the appellant before the learned trial court, where a formal charge for the offence under section 6/9 (c) CNS Act, 1997 was framed against him on

10.12.2007 to which he pleaded not guilty hence, trial against him commenced. The prosecution in order to support its case examined PW-1 complainant SIP Muzaffar Ahmed at Exb-6 who produced memo of recovery and arrest at Exb.6-A, FIR at Exb.6-B, daily diary entries of departure and arrival at Exb-6-C and at Exb-6-D respectively. PW-2 ASI Muhammad Sarwar, Mushir of recovery, was examined at Exb-7 who produced entry dated 7.4.2006 at Exb.7-A. Prosecution also examined I.O. of the case namely, SIP Tajuddin at Exb-8, who produced road certificate showing deposit of samples in the office of Chemical Analyzer at Exb-8-A, Chemical Analyzer's report at Exb-8-B and a letter dated 7.4.2006 at Exb-8-C. After his examination prosecution closed its side, which followed recording of statement of appellant under Section 342 Cr.P.C. at Exb-10 wherein he denied the prosecution case and showed his desire to examine himself on oath and two witnesses in his defence. The statement of appellant on oath under Section 340(2) Cr.P.C. was recorded at Exb-11 and he produced certified copy of criminal misc. application No.151/2006 at Exb-11-A. Maroof Khan and Haroot Khan both brothers of the appellant were examined at Exb-12 and Exb-13 respectively in his defense. Learned trial Court on the basis of evidence and after hearing the parties, convicted and sentenced the appellant in the terms stated above.

4. The appellant through this appeal has challenged his conviction and sentence. During hearing of the appeal, Syed Zakir

Hussain learned counsel for the appellant contended that the appellant was innocent and had been falsely implicated by the prosecution. He further contended that the learned trial Court had not property appreciated the evidence of prosecution witnesses wherein several contradictions were available making the prosecution case against the appellant doubtful. He next contended that as per FIR the incident took place on 7.4.2006 at about 1815 hours, but in the charge at Exb-2 and statement of appellant recorded under section 342 Cr.P.C the date of incident was shown as 3.4.2006 which had vitiated the entire prosecution case because the appellant was not properly put on notice about the allegations leveled against him through the charge and statement under section 342 Cr.P.C to defend himself adequately. The learned counsel was of the view that such defect in the charge and statement of appellant had caused him serious prejudice in putting up his defense, therefore the conviction and sentence awarded to the appellant by the trial Court was illegal and not sustainable under the law. In his arguments, the learned counsel also raised the issue of jurisdiction of police station Mehmoodabad, where present case was registered and tried to hit the roots of the case by emphasizing that alleged place of incident was not situated within the precincts of the said police station but within the jurisdiction of DHA police station. He next contended that the learned trial Court failed to determine the sanctity and veracity of defense evidence by putting it in juxtaposition with the

prosecution case in the light of principles laid down by the superior Courts in this regard and to give benefit whereof to the appellant as that evidence had sufficiently demonstrated that appellant was innocent. He also laid emphasis on the fact that the alleged place of incident was thickly populated area but the police did not make any effort to associate private persons to witness the recovery proceedings, hence entire proceedings conducted by the police officials were not legal. He also made it a point that the appellant was booked in the case at the instance of DSP Chaudhry Bakhtawar against whom he had filed applications for registration of FIRs before Sessions Court South Karachi. He lastly prayed for acquittal of the appellant.

5. Conversely, Ms.Akhter Rehana, Additional Prosecutor General supported the impugned judgment in her arguments and contended further that the wrong mention of date in charge and statement under section 342 Cr.P.C. had caused no prejudice to the appellant as he and his witnesses had categorically referred to the allegations in their deposition with precise time and date. She further argued that the trend and trail of cross examination of prosecution witnesses conducted by the learned defense Counsel showed that the appellant was duly and properly on notice regarding allegations contained in the prosecution case against him. She lastly prayed for dismissing the instant appeal.

6. We have considered the arguments of the parties and gone through the material available on record. The entire prosecution case is based on the depositions of three witnesses, who all are police officials. PW.1 SIP Muzaffar Ahmed, the complainant and ASI Muhammad Sarwar, the Mushir/eye witness examined by the prosecution have fully supported the prosecution case and in their depositions have reiterated story appearing in the FIR as well as in the memo of recovery. Their evidence shows that appellant while in custody in another crime that too pertaining to recovery of narcotic substance made a disclosure regarding the case property being available in a house situated in Kachiabadi Hazara Colony near Kala Pul Karachi that led to the recovery of charas weighing 8750 grams and 1000 grams of heroin powder. They have been cross examined by the defense counsel at considerable length on these salient aspects of the case but without any success so far as any discrepancy causing reasonable doubt in the veracity of prosecution case is concerned. The record does not reflect that the evidence of prosecution witnesses over the recovery of narcotic substance from the house has been shattered to such extent that the conviction and sentence awarded to the appellant can be declared illegal and set aside. Minor variations do occur in the evidence of witnesses and so is the case here, however as discussed above we have not found any contradiction worth giving benefit of reasonable

doubt to the appellant. The evidence of PW 3 SIP Tajuddin is to the effect that he after being entrusted investigation of the case recorded statements of the witnesses under section 161 Cr.P.C, produced the appellant before the concerned Magistrate for the remand and sent samples of charas and heroin for chemical analysis on 15.4.2006. The plea of false implication at the instance of some DSP against whom the appellant had moved application for registration of FIRs cannot be given much weight for the reasons said DSP is neither the witness nor has conducted any investigation in the present case. The record in hand does not show that he has played any part to contrive things against the appellant. It appears that during pendency of application filed by the appellant against said DSP, the SHO concerned had submitted criminal record of the appellant showing as many as 20 criminal cases of different kinds registered from the year 1992 onwards at various police stations against him and his brothers. The smartness of the appellant (who is also convicted in another narcotic case) to defend himself in advance by moving applications against police officials and on account of criminal record his strained relations with the police could be but anybody's guess. Since nothing concrete to suggest false implication of appellant at the hands of said DSP is found on record, we will not hold so.

7. The objection of the learned Counsel over the territorial jurisdiction of police station to register the case against the

appellant is also without any merits. Over the point although the witnesses have been cross examined but nothing has come on the record to point out that the house where the appellant led the police party and produced narcotic substance was or is not situated in the bounds of subject police station. We have given due consideration to the defect of date in the charge and statement of appellant under section 342 Cr.P.C and are of the view the same is not helpful either to the appellant, for section 537 Cr.P.C prescribes that no error, omission or irregularity in the charge or other proceeding shall cause alteration or reversion in the sentence or findings, unless it has occasioned a failure of justice. The whole record consisting of all necessary documents i.e. FIR, Memos, Challan and statements of the witnesses under section 161 Cr.P.C etc. illustrating the actual date and time of incident was supplied to the appellant much before framing of charge in compliance of section 265-C Cr.P.C. Because of those documents, the appellant was certainly aware of the nature and exact time and date of incident reported against him. A perusal of cross examination of the prosecution witnesses reflects that learned defense counsel has referred to 07.4.2006 as the date of incident. The appellant and his witnesses in their depositions have also stated that initially they were arrested in between the night of 3rd and 4th April 2006 and after four days the present case was registered against the appellant; such calculation exactly fits in the date of incident

reported by the prosecution. All the prosecution witnesses have deposed the date of incident as 07.04. 2006 and all the prosecution paper show same date, under the circumstances it cannot be said that the appellant did not know about the allegations contained in the prosecution case against him or he was misled by such error in putting up his defense or such irregularity had caused him serious prejudice. Unless it is proved or otherwise it is so apparent on the record to perceive that an accused has been misled in understanding the prosecution case and on that account seriously prejudiced, the conviction and sentence merely because of an error in the charge or in the trial would not be reversed or declared illegal. In absence of any thing convincing in favour of the appellant establishing above proposition, the trial would not stand vitiated nor can the conviction and sentence against him be set aside.

8. The stringent compliance of section 103 Cr.P.C. has been dispensed with in terms of section 25 CNS Act, 1997, it has now become a well-recognized fact that people fearing for their life do not come forward to give evidence against drug barons. In such situation, we do not feel convinced from the argument of learned counsel that due to non association of private persons to witness the recovery proceedings, the case is not free from doubt. The information disclosed by the appellant led to discovery of narcotic substance; hence same is relevant as per

scheme of Article 40 of Qanun-e-Shahadat Order, 1984 and can be relied upon.

9. Yet a particular aspect of the case, which we have found favouring the appellant in respect of term of sentence awarded to him is the sample of charas sent to the Chemical Analyzer. The prosecution case is about recovery of 7 packets of charas, each having rods and each weighing 1250 grams. Out of those 7 packets one packet individually consisting 100 rods was separately sealed and subsequently sent for examination to Chemical Expert, the report of which has come in positive establishing unequivocally the same to be charas. Regarding 6 remaining packets the prosecution has not brought any evidence to establish the same to be narcotic substance punishable under CNS Act, 1997. Under the law, it was incumbent upon the prosecution to take sample from every packet for examination to prove it to be narcotic substance. In absence of which, while following the dicta laid down by the Honorable Supreme Court in Ameer Zeb's case (PLD 2012 SC 380), we hold the appellant liable for possessing 1250 grams of charas and 1000 grams of heroin. As per sentencing policy formulated in Ghulam Murtaza's case (PLD 2009 lahore 362) and approved by Honorable Apex Court in Ameer Zeb's case supra, the conviction and sentence for possessing Charas exceeding I kilogram and up to 2 kilograms is RI for 4 years 6 months and fine of Rs.20,000/- in default SI for 6 months and for possessing heroin exceeding

600 grams and up to 1000 grams, the sentence is RI 1 year 10 months and fine of Rs. 15000/- in default SI for 5 months. We are of the view that same punishment for the appellant will meet ends of justice. The last jail roll dated 19.01.2015 reflects that appellant has served sentence of 06 years 11 months and 14 days and has earned remission of 02 years 01 month and 19 days. Accordingly, we dismiss the instant appeal, however modify the conviction and sentence of 10 years and fine of Rs 500,000/-(Rupees five hundred thousand only) awarded to the appellant to the period already undergone by him. The order of the learned trial Court concerning the case property shall remain same.

Judge

Judge