IN THE HIGH COURT OF SINDH KARACHI

Special Criminal Appeal No. 157 of 2013

Before: Mr. Naimatullah Phulpoto
Mr. Justice Muhammad IqbalKalhoro

Applicant : Akbar, through Mr. Asadullah Memon, advocate.

Respondent : The State, through Mr. Abrar Ali Khichi, Additional Prosecutor General

Date of hearing : 24.04.2015.

J U D G M E N T

MUHAMMAD IQBAL KALHORO, J. Being aggrieved by and dissatisfied with the judgment dated 17.04.2013, passed by the Court of learned Special Judge Control of Narcotic Substances, Thatta, in special case No.11/2013, arising out of FIR No.03/2013, under Section 9(c) Control of Narcotic Substances Act, 1997 of P.S. Mirpur Sakro, whereby the appellant was convicted and sentenced to undergo R.I. for ten (10) years with fine of Rs.100,000/- and in default thereof to further suffer S.I. for six (06) months with benefit of Section 382-B Cr.P.C extended to him, the appellant has preferred this appeal.

2. As per facts of the prosecution case, briefly stated here, complainant Inspector Muhammad Nawaz Seral while posted at P.S. Mirpur Sakro, District Thatta as SHO was on patrolling duty in the area along with his sub-ordinate staff on 07.01.2013, during which he received spy information regarding some suspicious persons available at some distance

from Late Sim Nali in the Oil tanker parked by the side of the road. Pursuing which, he reached the spot and saw three persons getting out of the oil tanker to escape. The complainant along with his staff was able to apprehend the appellant and co-accused Natho, whereas the third one namely Akhtar Baloch made his escape good. From the present appellant besides 30 bore pistol loaded with 5 bullets, 1100 grams of charas in pieces of different size was recovered. From co-accused Natho one Kalashnikov having 15 bullets in its magazine and 1050 grams of charas in pieces of different size were recovered. Apart from the above recovered narcotic substances; 2000 grams of charas beneath the seat of oil tanker and 1060 grams of charas left by the escaped accused were also recovered. Such memo of arrest and recovery was prepared by the complainant with the signatures of his staff. Thereafter the recovered property and the arrested accused along with oil tanker were brought at Police Station, where different cases for possessing unlicensed weapons and narcotic substances and snatching the oil tanker were registered against them.

3. Against the appellant the FIR bearing crime No.03/2013 under Section 9(c) Control of Narcotic Substances, 1997 for possessing 1100 grams of charas was registered. After due investigation charge sheet was submitted before the trial Court where, after due formalities, charge against the appellant was framed on 06.02.2013 at Exb.2, to which he pleaded not guilty vide his plea at Exb.3. The prosecution in support of charge examined complainant Inspector Muhammad Nawaz Seral at Exb.4, who produced all the necessary documents in his evidence viz. departure entry No.7 dated 07.01.2013, memo of arrest and recovery, F.I.Rs, and Chemical Examiner’s report at Exb.4/A to 4/E. The evidence of mashir SIP Asif Ahmed Memon was recorded at Exb.5 and then the prosecution examined the last witness namely H.C. Shah Nawaz Panhwar at Exb.6. The appellant

was examined under Section 342 Cr.P.C. on 01.04.2013, wherein he mainly denied the allegations leveled against him in the prosecution case and further stated that due to enmity with one Anwar Gabol, who had pressurized him and his late father to sell the land admeasuring 89.32 acres to him, but which they had refused to succumb to, he was implicated in the present case. The appellant however, neither examined himself on oath nor led any evidence in his defense despite an opportunity provided to him.

4. On the conclusion of trial, after hearing the counsel for the parties learned trial Court found the appellant guilty of the offence he was charged with, hence convicted and sentenced him through the impugned judgment.

5. Mr. Asadullah Memon, learned counsel for the appellant mainly argued that the appellant was innocent and had been falsely implicated in this case by the police at the instance of one Anwar Gabol. He next contended that a joint memo of recovery in relation to case property was prepared by the police although, the recovery made from the spot from each accused was separate and independent, which was illegal and against the law. He laid further stress by stating that joint memo of recovery and arrest had vitiated the trial and had rendered the entire prosecution case doubtful. He also contended that prosecution case was full of material contradictions creating doubt over the veracity of prosecution story and according to him, a single circumstance causing doubt in the prosecution case was sufficient for extending benefit of doubt to the accused. He further contended that the investigating officer since was also complainant in the case; he had not fairly probed the matter and submitted the charge sheet against the appellant with *mala fide* intention. Learned counsel also questioned effectiveness of the Chemical Examiner's report by referring to the delay in sending the property for analysis. He in this regard pointed out that the

alleged recovery of charas was effected on 07.01.2013, but it was sent to the office of Chemical Examiner after the delay of seven (07) days against the relevant rules. During arguments, learned counsel also referred to findings of acquittal observed by learned Judicial Magistrate in Cr. Case No.6 of 2013, arising out of FIR No.06 of 2013, for the offence punishable under Section 13(d) Arms Ordinance, 1965 registered against the appellant and stated that since the appellant was acquitted in the case of possessing an unlicensed weapon, which was registered against him simultaneously with the present case, the benefit of doubt on the basis whereof be also extended to him in the present case. Lastly, in support of his arguments, he relied upon the following case laws:-

i.Taj Wali and 6 others v/s the State (PLD 2005 Karachi 128)

ii. Kamil zaman v/s the State (1999 P.Cr.L.J. 1546 [Peshawar])

iii.Ghulam Abbas v/s The State (2006 P.Cr.L.J. 1455 [Lahore])

iv.Suhail Khan @ Saleh Muhammad v/s The State (2008 P.Cr.L.J. 146 [Karachi])

v.Hakim ali v/s The State (2001 P.Cr.L.J. 1865 [Karachi])

vi.Naeem Akhtar and others v/s The State (1993 P.Cr.L.J. 769[Federal Shariat Court])

vii.Abdul Ghafoor v/s the State (2013 P.Cr.L.J. 1185 [sindh]

6. Rebutting his arguments, Mr. Abrar Ali Khichi, learned Additional Prosecutor General appearing for the state stated that prosecution had proved the case against the appellant beyond any reasonable doubt as there was no any material contradictions in the depositions adduced by the prosecution witnesses, who had fully supported the salient features of the case and the minor discrepancies pointed out by the learned counsel for the appellant had no bearings on

the merits of the case. He also suggested that preparation of separate memo for the recovery of different illegal articles was not the requirement of law and if a joint memo amply identified each recovery distinctively, the same could be relied upon. He stressed vehemently that in the present case since the narcotic substances and the unlicensed weapons were recovered from the one and same place by the same police party, preparing the joint memo was but natural and more realistic than the separate memos for each incriminating article would have been. He also argued that sending the sample of narcotic substances within 72 hours in terms of Control of Narcotic Substances (Government Analysts) Rules, 2001 was not mandatory but directory in nature, thus departure therefrom would not make much difference in respect of merits of the case. He lastly submitted that in the narcotic cases, as per the dictum laid down by the Honorable Supreme Court, dynamic approach was to be adopted as it was an admitted fact that narcotic dealers were well organized people, who by their shenanigans were able to save themselves by hook and by crook and avoid the cold hands of law. In support of his submission, he placed his reliance upon the precedent of Apex Court reported in PLD 2006 S.C 61 (Ghulam Qadir V.S The State).

7. We heard the learned counsel for the parties and perused the material available on record as well as the case laws cited at bar. The prosecution case revolves around the depositions of three witnesses, out of whom Inspector Muhammad Nawaz is the complainant and SIP Asif Ahhmed and HC Shahnawaz are the mahirs of the arrest and recovery. Their evidence is to the effect that on the day of incident viz. 07.01.2013 while they being on patrol duty in the area on a tip-off arrested the appellant along with another accused. Their arrest led to the recovery of charas weighing 1100 grams and one .30 bore pistol from the appellant and charas weighing 1050 grams and an unlicensed Kalashnikov from

the other accused namely Natho in addition to charas found under the seat of oil tanker and the charas left by the accused, who had decamped from the venue. Such memo of arrest and recovery was prepared, and then the property including the oil tanker along with accused was brought at police station where different FIRs for possessing unlicensed weapons and narcotic substances were registered against them. The prosecution witnesses have been subjected to a lengthy cross-examination by the defense counsel and we have minutely perused it to appreciate points taken by learned counsel during his arguments. Their evidence is consistent, confidence-inspiring and does not suffer from any material contradictions, irregularities or discrepancies to cause irreparable blow to the authenticity of the prosecution case. Their evidence on the point of recovery of narcotic substances from the possession of the appellant at the given place has not been shattered. The witnesses have reiterated the case against the appellant in its entirety and have supported the timings and place of incident coupled with the arrest and recovery proceedings in a well-worded manner corresponding with the contents of FIR and memo. Minor variations in the evidence pointed out by the learned counsel have not caused a serious or reasonable doubt in our minds to give benefit whereof to the appellant; more so some variations do occur naturally in the evidence of witnesses which however, neither take away or reduce the intrinsic value of the evidence nor imply false implication of the accused. The contradictions in the evidence which could be considered material for acquitting the accused must create reasonable doubt in the prudent mind and should be strong enough to undermine and weaken the main features of the prosecution case to give benefit thereof to the accused. Plethora of such circumstances is however, not requirement of the law goes without saying, even if there is a single situation or circumstance creating a reasonable doubt to a sensible person, the benefit of which not as a matter of grace

but as a right can be extended to the accused in the shape of his acquittal. Despite deep examination of the record, we have not found any worthwhile discrepancy in the evidence of prosecution witnesses and do not find the appellant entitled for his acquittal on that account.

8. With regard to the strong objection of learned counsel for the appellant over the preparation of joint memo of arrest and recovery of different incriminating articles found at the spot that are punishable under different penal laws, it may be observed that writing a joint or a separate memo has never been considered an absolute requirement of law to be followed at every cost. Law would only require identification of each item distinctively and independently in the memo of recovery to fend off any chance of vagueness or confusion in the trial. It is the rule of convenience favouring the prosecution to present its case unambiguously before the Court or at times to be used for the benefit of the accused if the memo lacks the necessary details to recognize each incriminating article properly against the accused from whom it is alleged to have been recovered. Even a separate memo wanting in necessary particulars in respect of a recovered article cannot be construed to have furnished sufficient incriminating evidence warranting conviction of the accused. The issue, therefore, in the context would not be of writing a joint or separate memo of arrest and recovery at the spot in case of a joint recovery from either one or more than one accused, but is of the requirement of law pertaining to clear, explicit and precise particulars relating to each incriminating article so that the cause of justice could be served adequately to the satisfaction of all concerned. A joint memo regarding more than one incriminating articles punishable under different and separate penal laws either recovered from one accused or more than one arrested simultaneously would be admissible in evidence and can be safely relied upon and it would not be fatal to the prosecution case, if it precisely mentions the recovery of each illegal article against the

specific accused from whom it is effected explicitly. In support of our view, we rely upon the case of State through Advocate General, Sindh v/s Basher and others (PLD 1997 Supreme Court 408). The Honorable Supreme Court has observed in paragraph No.11 as under:-

> ***" 11. Referring to the fourth submission of Mr. Aqil that even the Mashirnama of recovery could not have been relied upon as it was a joint Mashirnama of recovery of the arrest as well as recoveries of the arms and ammunition, it may be stated that simpliciter the fact that there is a joint Mashirnama of recoveries of the incriminating articles, may not be fatal if the same identifies each of the recovery with the accused concerned with all relevant particulars but if such a joint Mashirnama is vague and cannot identify with certainty the articles recovered from a particular accused, such a Mashirnama cannot be relied upon."***

9. Coming to the contention of learned counsel for the appellant that since the complainant was the investigating officer of the case, a serious prejudice had been caused to the appellant and conviction awarded to him was illegal; we are of the view that law does not stipulate any prohibition on the Police Officer to become investigating officer and complainant of the case if he is a witness to certain facts, unless his interest is shown to be obvious in falsely implicating the accused. In the above cited case law, the Honorable Apex Court has held that ***"Police Officer is not prohibited under law to be a complainant if he is a witness to the commission of an offence and also to be an Investigating Officer, so long as it does not, in any way, prejudice the accused person".*** Learned counsel was unable to point out any prejudice caused to the appellant just because the complainant investigated the matter. No enmity with the said witness has even been suggested by the defense. The personal interest of the complainant to rope the appellant

falsely is not the case of defense even. The dual capacity performed by the police officer as complainant and investigating officer in the present case does not appear to have influenced and manipulated the manner and result of the investigation because, no material has been brought on record by the defense to suggest false implication of the appellant at the hands of the complainant.

10. The delay in sending the narcotic substances for chemical analysis is also not fatal for the prosecution as the Control of Narcotic Substances (Government Analysts) Rules, 2001 which regulate sending of samples to Chemical Examiner are directory and not mandatory in its nature and import. They do not make it obligatory for the investigating officer to send sample of narcotic substances within the stipulated period of seventy two hours. The departure from applying such scheme in sending the sample within a certain period would not undermine or frustrate the larger purpose for which CNS Act, 1997 has been enacted. For reliance the case of Tariq Mehmood versus The State through Deputy Attorney-Gernral, Peshawar (PLD 2009 Sc 39) can be cited.

11. Having been unable to find the case against the appellant doubtful or slackly on merits, we consider it in the interest of justice to streamline his conviction and sentence as per sentencing policy formulated in Ghulam Murtaza's case (PLD 2009 Lahore 362) approved by Honorable Apex Court in Ameer Zeb's case (PLD 2012 SC 380) as there is nothing on the record to suggest that the appellant is a previous convict in narcotic substances case. The conviction and sentence for possessing Charas exceeding I kilogram and up to 2 kilograms is R.I for 4 years 6 months and fine of Rs.20,000/- in default whereof further S.I for 6 months. The last jail roll dated 20.04.2015 reflects that appellant has served sentence of 02 years 03 months and 04 days and has earned remission of 08 months and his unexpired portion of

sentence is 07 years 05 months and 26 days. Accordingly, we while dismissing the instant appeal on merits modify the conviction and sentence from 10 years and fine of Rs. 100,000/-(Rupees one hundred thousand only) awarded to the appellant vide impugned judgment to 4 years 6 months and fine of Rs.20,000/- in default whereof S.I for 6 months more. The order of the learned trial Court concerning the destruction of narcotic substances recovered from the appellant shall remain same. With this conclusion, the instant appeal stands disposed of.

JUDGE

J U D GE