IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Before:

Mr. Justice Abdul Maalik Gaddi
Mr. Justice Adnan-ul-Karim Memon

Cr. Appeal No.D-212 of 2019

Parvaiz

Versus

The State

Appellant Parvaiz S/o Muhammad Uris Solangi	:	Through Mr. Nasrullah Korai, Advocate
The State	:	Through Ms. Rameshan Oad, A.P.G. Sindh
Date of hearing & judgment	:	05.08.2020

J U D G M E N T

ABDUL MAALIK GADDI, J.- This appeal is directed against the judgment dated 01.11.2019, passed by the learned Ist. Additional Sessions Judge / Model Criminal Trial Court, Shaheed Benazirabad in Special Narcotic Case No.399 of 2017 (Re: The State V Parvaiz), emanating from Crime No.51 of 2017, registered at Police Station Daur, under section 9(c) Control of Narcotic Substances Act, 1997, whereby appellant Parvaiz after full dressed trial has been convicted u/s 9(c) CNSA and sentenced to suffer RI for four years and six months and to pay the fine of Rs.20,000/-. In case of default in payment of fine he was ordered to suffer simple imprisonment for five months more. Benefit of Section 382-B Cr.P.C. was also extended to the accused / appellant.

2. Brief facts of the prosecution case as disclosed in the FIR lodged by complainant SIP Shahen Shah on 25.04.2017 at Police Station Daur are that present accused / appellant was arrested on said date at 1130 hours from Link Road leading to Daur to Moro near Kirir Stop, by a police party headed by the aforementioned SIP alongwith his subordinate staff. On personal

search, accused Parvaiz was said to be found possessing 06 pieces of charas weighing 1200 grams. Thereafter, the contraband item, as stated above, was sealed and memo of arrest and recovery was prepared on the spot in presence of mashirs. Then, accused and case property were brought at police station where F.I.R. was lodged as mentioned above.

3. During investigation, Investigating Officer recorded 161 Cr.P.C. statements of the PWs. Sample of the substance / charas was sent to the chemical examiner on 27.04.2017 through ASI Muhammad Arif and positive chemical report was received. On conclusion of the investigation challan was submitted against the accused.

4. Trial court framed charge against accused at Ex.2 u/s 9(c) CNSA, to which, he pleaded not guilty and claimed to be tried vide his plea at Ex.2/A. At the trial prosecution examined P.W-1 HC / mashir Ameer Ahmed at Ex.3, who produced mashirnama of arrest and recovery at Ex.3/A. PW-2 Complainant / Investigating Officer Shahen Shah was examined at Ex.4, who produced daily diary No.6 dated 25.04.2017 at Ex.4/A, daily diary entry No.11 at 1300 hours at Ex.4/B, F.I.R. at Ex.4/C, RC No.134 at Ex.4/D and report of Chemical Examiner at Ex.4/E. P.W-3 ASI Muhammad Arif was examined at Ex.5, who produced daily diary entry No.23 and daily diary entry No.15 both dated 27.04.2017 at Ex.5/A and 5/B, respectively. Thereafter, prosecution side was closed at Ex.6.

5. Statement of accused was recorded u/s 342 Cr.P.C. at Ex.7, in which he denied the prosecution allegations and claimed his false implication in this case; however, he did not examine himself on oath nor led any defence evidence.

6. 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.

7. Learned counsel for the appellant has contended that the prosecution case is highly doubtful; the place of incident was located at busy spot, yet, nobody from the public was joined to attest the arrest and recovery; there are

material contradictions in the prosecution evidence, hence it cannot be safely relied upon; that there was delay in sending the case property to the Chemical Examiner and tampering with the case property during such period could not be ruled out. It is also argued that alleged recovery was made on 25.04.2017, whereas the sample was sent to Chemical Analyzer on 27.04.2017 with a delay of 02 days and no evidence has been brought on the record that charas was in the safe custody during that period. Lastly he argued that accused has been involved in this false case by police due to enmity to teach him a lesson.

8. Learned Assistant Prosecutor General Sindh has supported the impugned judgment by arguing that the impugned judgment is perfect in law and facts; that the learned trial Court while convicting the appellant has addressed all the points involved in this case comprehensively; therefore, the impugned judgment does not require any interference.

9. We have heard the parties and considered the evidence on record and the relevant case law.

10. After meticulous examination of the record we have reached the conclusion that the prosecution has failed to prove its case against the appellant to the required criminal standard for the reasons that despite the place of incident being a road where as per evidence of complainant / Investigating Officer several villages were situated and the recovery being made in daylight hours i.e. at 1130 hours no attempt was made to associate an independent mashir to attest the arrest and recovery which was important in this case since the appellant has shown enmity with the Kamdar of his zamindar; as such the evidence of the police personnel cannot be safely relied upon without independent corroboration which is lacking in this case; that there was an unexplained delay of 02 days in the recovery of the charas and sending it to the chemical analyzer for testing.

11. Most significantly, we find that there is absolutely no evidence on record to show that the charas was kept in safe custody from the time of its recovery until it was sent to the chemical Examiner, which was an unexplained delay of 02 days which is bolstered by the fact that in the F.I.R. it is no mention that the recovered charas was sealed in what material whether

it was a paper or cloth, whereas the report of the Chemical Examiner (Ex.4/E) shows that it was wrapped in a white coloured papers; that there is no evidence that the recovered narcotic substance was kept in the Malkhana of the police station; that no Malkhana entry to this effect has been produced on record; that the Incharge of the Malkhana has also not been examined to testify as to the safe-custody and safe transit of the narcotic to the chemical examiner. During the course of arguments, we have specifically asked the question from learned A.P.G to explain that during such intervening period of 02 days before and with whom the case property was lying and in case it was lying in Malkhana whether any evidence with regard to safe custody has been brought on record to corroborate this fact, she has no satisfactory answer with her. Under these circumstances, there is, in our view, every possibility that the sample of the narcotic during the said 02 days' delay in sending it to the chemical examiner may have been interfered with / tampered with, as it was not kept in safe custody and as such even a positive chemical report received 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 the case of **Ikramullah & others v/s. the State** (2015 SCMR 1002), 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."

12. In this case the allegation against the appellant is that on the fateful day he was apprehended from Link Road leading from Daur to Moro near Kirir and 1200 grams of Charas alongwith three currency notes each one of 100/-

and two of 50/- denomination were recovered from his possession. On perusal of prosecution evidence it reveals that the place of incident was a Link Road and surrounded by villages therefore, availability of private / independent persons cannot be ruled out but complainant / police party did not bother to pick / associate any independent person from that place to witness the event. So also no explanation is available on record that why police party did not obtain the services of private persons though available. No doubt the evidence of police official is good as that of any other witness but when the whole prosecution case rests upon the police officials and hinges upon their evidence and when the private witnesses were available at the place of incident then non-association of private witness in the recovery and arrest proceedings create serious doubt in the prosecution case. It is settled principle that the judicial approach has to be conscious in dealing with the cases in which testimony hinges upon the evidence of police officials alone.

13. We are conscious of the fact that provisions of Section 103 Cr.P.C. are not attracted to the cases of personal search of accused relating to narcotics. However, when the alleged recovery was made on busy place and villages were available there as happened in this case omission to secure the independent mashirs, particularly, in the case of patrolling cannot be brushed aside lightly by the court. Prime object of Section 103 Cr.P.C. is to ensure the transparency and fairness on part of the police during course of recovery, curb false implication and minimize scope of foisting of fake recoveries upon accused. As observed above, at the time of recovery in this case, complainant did not bother to associate any private person to act as recovery mashir / witness and only relied upon his subordinates / colleagues and furthermore he himself registered the FIR. It does not do away with the principle of producing the best available evidence. In this regard we are fortified with the cases of **Nazir Ahmed v. The State** reported in PLD 2009 Karachi 191 and **Muhammad Khalid v. The State** reported in 1998 SD 155. Hence as observed above, due to non-association of independent witness as mashir in this case, false implication of the appellant cannot be ruled out.

14. It is also pertinent to mention here that in this case complainant/ SIP Syed Shahen Shah had not only lodged F.I.R. but also conducted the

investigation of the case himself. In our view it is not appropriate that the person who is complainant of a case could investigate the same case because in order to keep all fairness of thing the rule of propriety demands that it must be investigated by an independent officer but not by the complainant himself. The Hon'ble Supreme Court has observed similar view with a different angle in a case reported as **State through Advocate General, Sindh v. Bashir and others** (PLD 1997 Supreme Court 408), wherein it is held as under:

> " As observed above, Investigating Officer is as important witness for the defence also and in case the head of the police party also becomes the Investigating Officer, he may not be able to discharge his duties as required of him under the Police Rules".

15. Similarly, in a case reported as **Ashiq alias Kaloo v. The State** (1989 PCr.LJ 601), the Federal Shariat Court has observed that investigation by complainant while functioning as Investigating Officer is a biased investigation.

16. Further, in the case in hand, P.W-1 HC Ameer Ahmed and P.W-3 ASI Muhammad Arif were the subordinate / colleague of the complainant and no third party/independent person from the place of incident was picked up to act as mashir of arrest and recovery; therefore, this is a case of insufficient evidence. In this context we are fortified by the cases of **Muhammad Altaf v. The State** (1996 PCr.LJ 440), (2) **Qaloo v. The State** (1996 PCr.LJ 496), (3) **Muhammad Khalid v. The State** (1998 SD 155) and (4) **Nazeer Ahmed v. The State** (PLD 2009 Karachi 191).

17. Under these circumstances and for the other reasons mentioned above we are of the considered view that the prosecution has not been able to prove 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), wherein the Honourable Supreme Court has observed as follows:-

> " It is settled law that it is not necessary that there should many circumstances creating doubts. If there is a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of the

accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."

18. For the above stated reasons, we hold that prosecution has failed to prove its case against the appellant, therefore, by short order dated 05.08.2020 while extending the benefit of doubt in favour of the appellant, instant appeal was allowed and the conviction and sentence recorded by the trial Court were set aside and appellant was acquitted of the charge.

19. Above are the detailed reasons for our short order of even date.

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