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-33 of 2020

Ayaz alias Cottan Shah. . Versus . . . The State

Appellant Ayaz alias Cotton Shah	:	Through Mr. Imtiaz Ali Abbasi, Advocate
State	:	Through Ms. Rameshan Oad, Asst. Prosecutor General, Sindh
Date of hearing	:	03.09.2020
Date of Judgment	:	03.09.2020

JUDGMENT

ABDUL MAALIK GADDI, J.- Through this Criminal Appeal, appellant Ayaz alias Cotton Shah has called in question the judgment dated 04.03.2020 passed by the learned Sessions / Special Judge (CNS), Hyderabad, in Special Case No.241 of 2019 (Re: The State v. Ayaz alias Cotton Shah) arising out of Crime No.102 of 2019, registered at Police Station Phuleli, Hyderabad, for an offence under Section 9(C) of Control of Narcotic Substances Act, 1997, whereby he was convicted and sentenced to suffer R.I for four (04) years and six (06) months and to pay fine of Rs.20,000/-, in case of non-payment of fine, he shall suffer S.I for five (05) months more with benefit of Section 382-B Cr.P.C.

2. Concisely, the facts as portrayed in the F.I.R, are that on 21.07.2019 at 10:00 p.m, police party headed by ASI Muhammad Ishaq during patrolling in their jurisdiction arrested the accused from Goods Naka, in presence of official witnesses and recovered one patti and three pieces of charas from the

fold of his Shalwar weight 1050 grams as well as cash Rs.150/- from the pocket of his shirt. Thereafter such mashirnama of arrest and recovery was prepared after sealing the property by said ASI at the spot and then took the accused and property to PS where he lodged F.I.R against the accused on behalf of State.

3. It appears that after usual investigation, case was challaned before the Court concerned. Thereafter, at trial, trial Court framed charge against the accused, to which he pleaded not guilty and claimed to be tried. Thereafter, prosecution in order to substantiate the charge against the appellant, examined the following three witnesses:

P.W No.1: Complainant ASI Muhammad Ishaq examined at Ex.5, who produced extracts of roznamcha entries, memo of arrest and recovery, F.I.R at Exs.5/A to 5/D.

P.W No.2: Mashir / PC Muhammad Farooq examined at Ex.6, who produced mashirnama of vardat at Ex.6/A.

P.W No.3: Investigating Officer SIP Ghulam Rabbani examined at Ex.7, who produced extracts of entries of Malkhana as also Roznamcha, letter to Chemical Laboratory and the report issued by it at Exs. 7/A to 7/E.

4. All the above named witnesses have been cross-examined by learned defence counsel. Thereafter, prosecution side was closed as per statement of learned DDPP / SPP at Ex.8.

5. Later on, statement of accused was recorded u/s 342 Cr.P.C at Ex.9, in which he denied the prosecution allegation and claimed his innocence. However, he did not examine himself on oath nor led any evidence in his defence.

6. Learned counsel for the appellant has contended that the appellant has been involved in this case malafidely, in fact he was taken away by police from his house and roped in this case due to old hostility with him; that the impugned judgment passed by the learned trial Court is opposed to law and facts and is also against the principles of natural justice; however, no private person has been picked up to act as mashir of event; that no recovery was affected from the possession of appellant and the alleged charas has been foisted upon him; that prosecution has miserably failed to establish the guilt

of appellant beyond any reasonable shadow of doubt; that there is violation of Section 103 Cr.P.C as no private / independent person has been made as mashir of the alleged recovery nor any efforts were taken by the police party despite of the fact that alleged place of receiving spy information and that of incident were thickly populated area, as such, false implication of the appellant in this case cannot be ruled out. Lastly he prayed that instant appeal may be allowed and appellant may be acquitted of the charge.

7. Conversely, learned Asst. Prosecutor General Sindh appearing on behalf of State has fully supported the impugned judgment by submitting that prosecution has fully established the guilt of appellant beyond any reasonable shadow of doubt; that all the above named witnesses have fully supported the case of prosecution and there is no major contradiction in their version on material particulars of the case hence, the impugned judgment does not call for any interference.

8. We have heard the learned counsel for the parties at a considerable length and have gone through the documents and evidence so brought on record.

9. 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. In this case the allegation against the appellant is that on the fateful day he was apprehended from Goods Naka, and 1050 grams of Charas as well as Rs.150/- were recovered from his possession. On perusal of record as well as prosecution evidence it reveals complainant received spy information about alleged presence of the appellant at the place of incident alongwith some narcotic substance and selling the same at Guru Nagar Chow and then they reached at the place of incident. It also appears that place of receiving of spy information and that of incident were thickly populated areas, therefore, availability of independent / private persons cannot be ruled out but complainant / police party did not bother to pick / associate any independent mashir / private person from such places to witness the event; that there was an unexplained delay of 02 days in between the recovery of the charas and receiving the same in the office of chemical analyzer for testing, as Chemical Examiner's report

(Ex.7/E) reflects that case property / alleged charas was received in his office on 24.07.2019 whereas the incident took place on 21.07.2019.

10. 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 and received in the office of Chemical Examiner, which was an unexplained delay of 02 days; that it is the case of prosecution that during intervening period when the alleged narcotic substance was recovered and sent to Chemical Examiner for report it was kept in Malkhana; however, no substantial evidence has been brought on record that during such intervening period i.e. 02 days the property was kept in safe custody. Mere production of Malkhana entry bearing No.93 is not sufficient 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 alleged recovered narcotic during the said 02 days' intervening period may have been interfered with / tampered with, as it was not kept in safe custody and as such 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 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."

11. Apart from above, we have also noticed that there are number of contradictions and lacunas in the evidence of prosecution witnesses as well as the case which have caused serious dent in the prosecution case, hence the contention of the learned counsel for the appellant that the evidence of the PWs is not reliable as the same suffers from the material contradictions and inconsistencies appears to have force, as stated supra.

12. It is also case of the prosecution that accused / appellant at the time of incident was selling Charas and complainant party secured Rs.150/- from the possession of appellant; however, neither any customer to whom the appellant was allegedly selling narcotic was apprehended nor captured. Only showing recovery of small amount of Rs.150/- without any sound and cogent evidence does not mean that such amount was collected by the appellant in lieu of alleged sale of narcotic. This aspect of the case also gives serious jolt to the prosecution case.

13. 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. As stated supra, there are so many contradictions and lacunas in the prosecution evidence, which caused serious doubts in the prosecution case. It is well settled law that the benefit of doubt occurred in prosecution case 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."

14. For the above stated reasons, we hold that prosecution has failed to prove its case against the appellant, therefore, by short order dated 03.09.2020 while extending the benefit of doubt in favour of the appellant, captioned

appeal was allowed and the conviction and sentence recorded by the trial Court against the appellant were set aside and as a result thereof the appellant was acquitted of the charge.

15. Above are the reasons of our short order dated 03.09.2020.

JUDGE

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