JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Criminal Appeal No. 171 of 2022
Muhammad Aleem
Versus
The State

Appellant by:	Mr. Abrar Ahmad Nadeem, Advocate
State by:	Syed Shahbaz Shah, State counsel with Saleem SI
Date of Hearing:	**14.07.2022**

Sardar Ejaz Ishaq Khan, J: This appeal is from the judgment dated 31.03.2022 passed by the learned Judge, Special Court (CNS), Islamabad-West, convicting the appellant under section 9(b) of the Control of Narcotic Substances Act, 1997 (CNSA), in case FIR no.256/2020 dated 06.05.2020 registered at police station Tarnol. The appellant was sentenced to 1 year and 6 months rigorous imprisonment with fine of Rs.11,000/-, and further simple imprisonment of 4 months in default of payment of fine, with the benefit of section 382-B CrPC.

2 The prosecution's case per the FIR (Ex-PE) registered on receipt of the IO's complaint (Ex-PC) is that 4 police officers on official patrol in a private car apprehended a person who tried to slip away on seeing the police at Mirchan bus stop at Fateh Jang road. His body search revealed a blue shopping bag in the *naifa* of his *shalwar*. A *littar* of *charas* was found in the shopping bag. Weighed at the spot, its weight came to 500 grams. A test sample of 10 grams was extracted and sealed. Recovery memos of the recovered narcotic, sample, and personal items recovered from the accused were prepared. The recovery memos were witnessed by the police officials, as no private person was willing to become a witness. One of the police party, Sajjad constable, carried the IO's handwritten complaint to the police station, where the FIR was registered. The accused pleaded not guilty to the charge at the trial.

3 At the trial, the prosecution led testimonies of the following police officers:

i) PW-1, Mudassir Mushtaq, head constable, moharrir, deposed to the receipt of the case property and sealed test sample from the IO, and handover of the test sample to PW-2 for delivery to the test laboratory;

ii) PW-2, Arif Hussain, head constable, deposed to being the eye witness to the accused's apprehension, the recovery of charas, witnessing the recovery memo, and delivery of the test sample to the National Institute of Health (NIH);

iii) PW-3, Muhammad Iqbal Gujjar, sub-inspector, the head of the police party and the investigation officer, deposed to the facts narrated in his complaint, the recovery memos, and deposit of the test sample with the moharrir at the police station; and

iv) PW-4, Muhammad Ishaq ASI, deposed to recording the FIR on receipt of the complaint at the police station.

4 The accused in his statement under section 342 CrPC denied the prosecution's case and claimed that he was implicated falsely on refusal to pay money on demand by the police officials. He opted to not make a statement under section 340(2) CrPC.

5 Citing sentencing guidelines laid down in Ghulam Murtaza and another versus The State (PLD 2009 Lahore 362), the learned trial court passed the sentence noted in the opening paragraph of this judgment.

6 The trial court set for itself at para 9(a) of its judgment the following primary questions to be answered on the basis of the evidence led before it:

> Whether prosecution has established beyond any shadow of doubt the occurrence as alleged in the charge and the recovery of narcotics, the sampling, safe custody of recovered narcotics and the safe transmission of sample parcels to the laboratory for chemical analysis through admissible evidence? (emphasis is ours)

7 The learned trial court then proceeded to analyse the prosecution evidence at paragraph 10 and concluded that the accused not recording his statement on oath under section 340 (2) CrPC and not proving any mala fide of the IO and the prosecution witnesses were circumstances in and of themselves sufficient to prove the charge against the accused. At paragraph 11, the learned trial court accepted the prosecution evidence on deposit of case property at malkhana and its safe custody at face value. At paragraph 12, the learned trial court accepted the safe transmission of sample parcels to NIH at face value and disregarded the cross-examination stating that no material contradiction could be brought on record.

8 The general rule that the police witnesses are good enough to be believed in the absence of any proof of mala fide is somewhat unique to narcotics cases under CNSA. This general rule has become axiomatic to a degree where the prosecution's narrative in recovery of smaller quantities of narcotics has become formulaic (the drugs are always recovered in blue shopping bags, always wrapped over by solution tape usually khaki in colour, there is never any witness produced under section 103 CrPC, etc.) and, progressively, the ancillary investigative documents referred to in the prosecution witnesses' testimony are no longer insisted upon by the trial courts to be produced at the trial. Is this the proverbial thin edge of the wedge? If the police witnesses refer to any documents in their testimony relating to their investigation procedures, are we to believe that those investigation procedures were duly carried out as claimed even when those ancillary documents are not produced? We have already started witnessing judicial waivers despite absence of credible explanation of failure to produce the police officers who take the complaint from the site where the accused are apprehended to the police station as being not a material requirement. Does this mean that in the not-too-distant future we might also encounter waivers of the failure to produce other items of evidence that appeared in the prosecution's overall narrative but which are not produced at the trial? Some judgements are putting up a valiant effort to insist on all the items of evidence in the narrative to be produced and are not prepared to look the other way in not giving the benefit of doubt to the accused, but they seem to be in a minority.

9 Let us revisit the fundamental principles. The burden remains on the prosecution to establish its case beyond reasonable doubt; shortcomings in the defence do not lighten the prosecution's burden. The prosecution evidence is to be seen in its totality and not on piecemeal basis. The criminal law deprecates the tendency to let the prosecution witnesses' testimonies being believed in such part that favours the prosecution while ignoring the part that the prosecution's alleges but fails to prove. In some cases, the cumulative effect of the items of evidence, ancillary though they might be, which the prosecution witnesses swear to but withhold on trial can lead to the inference that the ancillary items actually did not exist, making suspect the probative value of the primary items of evidence to which those ancillary items pertain.

10 Learned counsel for the appellant wove his defence around the core theme that the entire paperwork was carried out in the police station and the events of the apprehension of and recovery from the accused never occurred as claimed by the prosecution. He relies on the following circumstances to prove his theme:

i) Constable Sajjad, who is stated in the complaint to have carried the complaint to the police station and brought it back to the alleged spot of accused's apprehension, was never produced at the trial. No reason was given for not producing him. Although the IO in his testimony states that he sent the complaint at the hand of Sajjad to the police station, and PW-4 who recorded the FIR confirms so, it is the learned defence counsel's contention that these witnesses were naming Sajjad only because he was mentioned in the complaint, and that it was up to the prosecution to establish this fact by producing Sajjad. The defence ties-in the failure to produce Sajjad with the suggestion in the cross examination that the events per the prosecution's narrative never occurred, that further ties-in with his next point, namely, the incredibility of official patrol in a private car without identifying its registration number or explaining whose car it was and how come the police came by the car to carry out official patrol therein, i.e., the private car in

this case was a key missing link for which no satisfactory explanation was offered and which makes the very fact that the police were at the Mirchan bus stop open to serious doubt.

ii) The IO was cross-examined to accept that he did not produce the *roznamcha* register. He also accepted in cross-examination that the registration number of the private car on which the official patrol was being carried out was not mentioned in the complaint nor in the testimony of any witness. Learned counsel emphasises that no rationale is given as to why an official patrol was being carried out in a private car, and, referring to the common practice in drugs cases where the registration number of the official vehicle when used for patrol is almost always mentioned, he submits that the reason the registration number was not mentioned was precisely that there was no patrol in fact being carried out at the time, and that if the registration number of the car were given then the car would have had to be produced if the defence made an application to this end during the trial; a risk that the police did not want to take, and which they avoided by evading the car's identity altogether. He further states that the reason the patrol is shown to be in a private car is that, if it were an official vehicle, then the entry thereof would have appeared in the *roznamcha*. Per his submissions, in order to evade the burden of producing these supportive items of evidence, the prosecution concocted the story of an official patrol in a private vehicle. He says that, though superficially unimportant, the official patrol in a private vehicle with its attendant omissions of insufficient identification of the car and the failure to produce the roznamcha makes this a most fundamental flaw in the prosecution's case, the import of which was utterly lost on the learned trial court, given that this flaw casts a reasonable doubt on the allegations of the accused's apprehension at Mirchan bus stop and recovery of charas from him, which can be trusted as credible only if the police patrol in the private car (as an

event subsequent) without roznamcha entry can be trusted as credible (as an event precedent).

We find the submissions of the learned counsel to carry much weight, and find that the learned trial court, despite cross-examination on these lines, did not pay the attention these points deserved. We find that these omissions cannot be dismissed as inconsequential for they are sine qua non to establish the presence of the police officials at the alleged sport, and are the foundational component of the prosecution's narrative.

iii) PW1, the moharrir, was cross-examined to accept that he did not produce at the trial register number 19, wherein the deposit and exit of case properties and test samples is entered, even though he claimed to have done so. According to the learned counsel, this failure to produce this important register renders the examination-in-chief of the witness meaningless when he claims to have 'kept [the test sample] in malkhana for safe custody', and that he transcribed the road certificate in the relevant register. He asks why should this Court believe that PW-1 carried out his official duties simply on his claiming that he did so, without producing the relevant register; after all, what is the purpose of those registers but by way of a verifiable record of the performance of official duties as claimed by the witness, and when that record was not produced, would a criminal court accept that the event required to be recorded in the register occurred as claimed without producing that register? Why keep any register at all, if all that is required is for the moharrir to say – and for the court to believe – that he did receive the case property and the test samples, kept them in his proper custody, and handed them over for onward transmission?

Again, we are unable to disagree with the learned counsel. If a prosecution witness claims to have carried out certain official

acts by making official entries in the registers which by his duty he is required to make, then he is bound to produce those registers to prove that he did carry out his duty as opposed to merely claiming orally to have done so, all the more so in criminal cases where the primary burden of proof beyond reasonable doubt rests on the prosecution.

iv) The cumulative effect of the foregoing circumstances, learned counsel urges, is that though the delivery of the test sample and its turning out to be charas are proved beyond reasonable doubt, the antecedent facts of police patrol in a private car, the accused's apprehension at Mirchan bus stop, the recovery of charas from him and the test sample being a genuine one taken from the alleged recovery are not proved beyond reasonable doubt. In short, the prosecution's narrative *preceding* the deposit of the test sample with NIH is not established beyond reasonable doubt.

11 We find that the trial court's judgement of conviction does not accord due weight to the defence submissions and is content with taking the prosecution evidence at face value solely for the reason that no animosity of the police witnesses was brought on record. While this presumption per se is not invalid, and carries much weight when large quantities of narcotics are recovered, it weakens where smaller quantities of narcotics are recovered; if the criminal courts taking notice of the zeitgeist condone the requirement of private witnesses in drug trials, they ought also note the acknowledged though unpleasant practice of false implications by the police of the poor and the uninfluential. When the police officers want the court to believe their story which departs from the normal course, then it is incumbent upon them that they produce all relevant particulars and the official documents and registers for a criminal court to dispel that creeping doubt which is unavoidable when such particulars and documents are not proved without any explanation, let alone a plausible one, coming forth on record.

12 In Wahab Ali and another vs The State (2010 PCrLJ 157), the failure of the prosecution to produce the *roznamcha* entry regarding the departure

from the police station was taken to cast doubt on the prosecution's narrative of the inspector going on patrol on the date and time when the accused were apprehended from the roadside (as in this case) and the benefit of doubt of the patrol actually being carried out as alleged by the prosecution was extended to the accused. In Javed and 2 others vs The State (2020 YLR 311), the failure to produce the witness police officer who carried the complaint to the police station for lodging the formal FIR and the failure to produce the extract of the register at the police malkhana for recording the deposit of the recovered narcotics and the test samples were taken to cast doubt on the prosecution's claim that these events actually occurred and the benefit thereof was extended to the accused. In Rahmatullah versus The State (2020 PCrLJ Note 184), a Division Bench of the Peshawar High Court counted against the prosecution the fact that the investigating officer's claim that he had made an entry in respect of his departure from police station to the spot in the daily diary was not supported by the investigation record.

13 The principle that police witnesses are good enough ought not to be carried to such lengths that the golden rule of the prosecution's responsibility to prove its entire narrative beyond reasonable doubt be whittled down to such an extent that the missing links in the prosecution's narrative be ignored and the criminal courts asked to convict on testimony at its face value without producing the related official records which are not only required to be maintained but which the witnesses also testify at the trial were duly maintained.

14 The cumulative effect of the foregoing discussion is that we find it unsafe to sustain conviction. This appeal is allowed. The judgement of the trial court under appeal is set aside. The appellant is acquitted. He shall be set at liberty forthwith if in confinement.

(Mohsin Akhtar Kayani)
Judge

(Sardar Ejaz Ishaq Khan)
Judge

Announced in open Court on 29th Aug 2022.

Judge

Judge

Imran