

## JUDGMENT

**MOHSIN AKHTAR KAYANI, J.**---Through this single judgment, we intend to decide the captioned jail appeal and criminal appeal as both the appeals are arising out of same case FIR No.78, dated 01.03.2012, under Section 9-C CNSA, Police Station Tarnol, Islamabad.

2. Through the captioned appeals, the appellant has assailed the judgment dated 04.05.2013 passed by the learned District and Sessions Judge-V (West), Islamabad, whereby the appellant has been convicted in FIR No.78, dated 01.03.2012, under Section 9-C CNSA, Police Station Tarnol, Islamabad and sentenced to life imprisonment (RI.) with fine of Rs.100,000/-, and in default whereof, the appellant will further undergo S.I. for one month, whereas benefit of Section 382-B, Cr.P.C. is also given to the appellant.

3. Brief facts referred in the instant case are that on 01.03.2012 at about 5:00 p.m., the appellant, who was holding a black color bag, was apprehended at Chungi No.26 being suspicious and on search of the said bag, total 12.5 kg of charas packed in 10 packets was recovered, whereafter sample parcels of 10 grams were prepared from the 10 packets for chemical examination, which later on proved to be charas garda. Accordingly, charge against the appellant was framed on 03.05.2012, to which the appellant pleaded not guilty and claimed trial, whereupon the prosecution produced its evidence and the appellant recorded her statement under section 342, Cr.P.C., and ultimately, the learned trial Court vide impugned judgment dated 04.05.2013 awarded life imprisonment (R.I.) to the appellant with fine of Rs.100,000/-, and in default whereof, the appellant shall further undergo simple imprisonment for one month, whereas benefit of Section 382-B, Cr.P.C. has also been given to the appellant. Hence, the instant jail appeal and criminal appeal.

4. Learned counsel for appellant contended that the instant FIR is frivolous and concocted, registered with mala fide intention; that are many contradictions in the statements of witnesses with respect to time factor; that the ocular evidence has wrongly been believed as there are material discrepancies in the statements of eye-witnesses; that the appellant is having no previous criminal history and she has been awarded very harsh and severe punishment, which does not meet with the ends of justice, hence, liable to be set-aside.

5. Arguments heard, record perused.

6. The entire case of the prosecution is based upon the testimony of the complainant i.e. PW-5 Ghulam Shabbir/S.I., who stated that on 01.03.2012 around 5 p.m., he was on duty along with other police constables on official vehicle (IDP-1326) at Chungi No.26, where a young girl in Burqa was standing at the bus stop while holding a black colour bag in her right hand, who on seeing the police party tried to escape from the said place, and on suspicion, she was questioned, whereupon she disclosed her name as Mariam alias Maria alias Shakeeba, daughter of Dost Muhammad, caste Pathan Afghani, resident of Peshawar. On search of the said bag, a black chaddar containing 10 packets was recovered, in which khaki solution tape was wrapped and on opening of each packet, charas garda namdar weighing 12500 grams was recovered. The 10 packets were separately weight and found to have of 1260, 1230, 1250, 1235, 1255, 1255, 1255, 1250, 1255 and 1255 grams, whereas a sample of 10 grams charas was separated from each packet for the purpose of chemical examination and the remaining charas was sealed in a separate packet with mark SK. The complainant requested several individuals to become witness of the recovery, though they refused. PW-5 Ghulam Shabbir/S.I. drafted the complaint Exh.PD, which was sent to Police Station through PW-3 Arshad/Constable, whereupon FIR No.78/2012, 01.03.2012, under section 9-C CNSA, Police Station Tarnol, Islamabad was got lodged, referred as Exh.PA. PW-5 Ghulam Shabbir/S.I. also prepared the recovery memo of charas Exh.PC duly signed by Muhammad Hasnain and Touqeer Ahmad/Constables and also prepared memo of personal search (Exh.PB) of the appellant duly signed by PW-4 Sameen-ur-Rehman/lady constable along with Touqeer Ahmad/ Constable, whereby, 7 mobile SIMs Exh.PB1, Afghan currency Exh.PB2, cash Rs.5075/- Exh.PB3, one receipt of doctor Exh.PB4, one photograph Exh.PB5, one Ayat-ul-Qursi Exh.PB6, Fair & Lovely cream,. Exh.PB7, ladies handkerchief Exh.PB8, four keys Exh.PB9, one ring Exh.PB10, China made mobile phone Exh.PB11, and two Tasbeeh Exh.PB12 were recovered. The Investigation Officer has also prepared the site plan Exh.PE in which the appellant was shown at Point No.2, Chungi No.26 Bus Stop on the same

date. The complainant deposited the recovered charas as well as sample parcels to the PW-6 Akbar Zaman/Moharrar Malkhana, who entered the same in Register No.19. The Investigation Officer after obtaining the result of Chemical Examiner regarding the 10 sample parcels, submitted the same as Exh.PF and submitted challan before the learned Trial Court. After conclusion of the trial, the appellant got recorded her statement under section 342, Cr.P.C., and ultimately, she has been convicted and sentenced to life imprisonment along with fine.

7. During the course of cross-examination, PW-5 Ghulam Shabbir/S... acknowledged that they were 5 police officials along with driver at the place of occurrence when the lady accused was arrested. However, PW-4 Sameer-ur-Rehman/lady constable reached at spot after 15 minutes, when the appellant was already apprehended and even the bag was already taken into possession and searched before the arrival of the said lady constable.

8. Similarly, the prosecution has produced PW-4 Sameen-ur-Rehman/lady constable, who witnessed the personal search (Exh.PB) of the appellant. During her cross-examination, she acknowledged that when she reached at the spot, the bag of the appellant was searched and taken by the police officials.

9. The prosecution has produced PW-2 Touqeer Ahmad/Constable, who also witnessed the recovery, arrested the appellant, and recovered the alleged charas from the appellant which she allegedly kept in her black color bag, wrapped in black cloth with yellow scotch tape. However, during the course of cross-examination, PW-2 Touqeer Ahmad/Constable stated that the appellant was stepped down from Toyota Hiace, who was stopped by the Investigation Officer and the bag of the appellant was searched by the Investigation Officer on the main bus stop and the bag taken from the appellant was already searched prior to arrival of the lady constable.

10. Arshad Mehmood/Constable while appearing before the Court as PW-3 stated that on 02.03.2012, Akbar Zaman/ Head Constable, Moharrar Malkhana, handed over him 10 packets of charas garda stamped with Mark "SK" for chemical examination. He took road certificate from Akbar Zaman/HC and reached to ETO Office and obtained a letter in the name of Chemical Examiner, Rawalpindi. However, due to closing time of office, he handed over the sample parcels back to the Moharrar Malkhana. On 03.03.2012, he again took the 10 sample parcel along with road certificate and deposited it to the Chemical Examiner, Rawalpindi and returned the road certificate to Moharrar Malkhana.

11. PW-1 Muhammad Ejaz/S.I. lodged the case FIR No.78/2012 (Exh.PA), and stated that when he received the complaint, the case property was already received by Moharrar Malkhana.

12. After closing evidence of the prosecution, the appellant recorded her statement under section 342, Cr.P.C. and denied the recovery of charas and has taken the stance that all the witnesses are police officials, and no private witness from vicinity has been produced against her.

13. The entire evidence as well as the impugned judgment of the learned Trial Court establish that the prosecution has not produced the black colour bag allegedly recovered from the appellant at the time of her arrest and the said bag was duly notified in complaint Exh.PD, recovery memo Exh.PC, as well as in the testimony of PW-5 Ghulam Shabbir/S.I. and PW-2 Touqeer Ahmad/Constable, therefore, it is incumbent upon the prosecution to prove the important elements from the evidence i.e. firstly, a black color bag was used in the alleged crime for transportation of narcotics by the appellant, secondly, a black chaddar in which 10 packets of charas were wrapped in the bag, and thirdly, all 10 packets were wrapped in a khaki solution tape, whereas evidently neither the black colour bag nor the black colour chadar has been produced during the trial, which were parts of the recovery memo Exh.PC, even otherwise, the subject matter of recovery memo Exh.PC reads that:

14. Similarly, one of the witnesses of recovery i.e. Touqeer Ahmad/Constable in his statement has confirmed that a black color bag as well as black color cloth is used, whereas the alleged packets of charas were wrapped in yellow scotch tape which is entirely different from khaki solution tape as referred by the complainant.

15. It is trite law that prosecution is bound to produce the case property allegedly being used in a criminal activity. Reliance is placed upon 2012 SCMR 577 (Amjad Ali v. The

State), 2017 PCr.LJ 14 (Abrar Hussain v. The State), 2009 PCrLJ 1334 (Agha Qais v. The State), and 1997 PCr.LJ 1093 (Mst. Nargis v. The State), therefore, by non-production of such incriminating piece of evidence, a serious doubt emerges on record, benefit of which should be extended to the accused not as a matter of grace but as a matter of right.

16. Keeping in view the above background, this Court has observed that the prosecution has failed to prove the recovery of contraband from appellant and as such, appellant is entitled for acquittal, especially when the incriminating articles have neither been exhibited by the prosecution nor even produced during the trial, therefore, instant appeal stands ACCEPTED, the impugned judgment dated 04.05.2013 is hereby SET-ASIDE, the appellant is ACQUITTED from the charge, and she be released forthwith, if not required in other case.

17. Before parting with this judgment, we have observed that the Investigation Officer, although, has taken the black color bag and a chaddar in his possession, but both these incriminating articles have neither been produced in the Court nor the same have been exhibited, which also resulted into acquittal of the appellant and such lapse on the part of prosecution should be rectified, therefore, we hereby direct the Inspector General of Police and SSP (Investigation) to direct all the Investigation Officers to ensure submission of all incriminating articles in the Trial Court at the time of evidence as the Investigation Officers are responsible for exhibition of those incriminating articles in the Trial Court and similarly, the Prosecutors are also bound to ensure the production of those incriminating articles which are necessary to be exhibited. We also expect a sacred duty from the learned Trial Courts to call such incriminating articles from the police and after notifying the same in the judicial proceedings, exhibit those articles while recording the evidence, including the remaining contraband which was sealed separately at the time of recovery proceedings.

Appeal accepted.

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