

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
(JUDICIAL DEPARTMENT)

“Criminal Appeal No. 109 /2016”

Syed Mussarat Hussain

Versus

The State

Appellant By : Mr. Ajmal Khan Khattak, Advocate.

State By : Mr. Husnain Haider Thaheem, State
Counsel with G. Mustafa- Inspector.

Date of Decision : 21.07.2020.

Ghulam Azam Qambrani, J:— This appeal has been directed against the judgment, dated 19.05.2016 passed by the learned Additional Sessions Judge-II/Judge Special Court CNS (East) Islamabad, in case F.I.R. No.340/ 2015, dated 20.09.2015, under Section 9-C of the Control of Narcotic Substances Act, 1997, registered with Police Station Bhara Kahu, Islamabad, whereby appellant (Syed Mussarat Hussain S/o Syed Zakir Hussain) has been convicted under Section 9-C of the Control of Narcotic Substances Act, 1997 (hereinafter be called as “**CNSA**”) and sentenced to rigorous imprisonment of three years with fine of Rs.30,000 (thirty thousand). In case of default in the payment of fine, the appellant/ convict is to further undergo three (03) months simple imprisonment. Benefit of Section 382-B Cr.P.C, was also extended.

2. Briefly stated facts of the prosecution case are that on 20.09.2015, on the written complaint of PW-5, F.I.R No.340 of 2015 was registered with Police Station Bhara Kahu, Islamabad, stating therein that on the above mentioned date, the complainant / PW-5 namely, Ghulam Mustafa-S.I. alongwith Ishfaq Ahmed-A.S.I, Sudheer Khan-HC, Zakheer Ahmed-HC and Yasir Mehmood-C

under the direction of S.H.O. were on patrolling in search of drug sellers and vagabonds on private vehicle and was present at Athal Chowk Bhara Kahu. That at about 09:00 p.m. they saw a person standing in front of Chaman Baryani at Simly Dam Road in suspicious condition, who was holding a white shopping bag in his right hand. That with the help of accompanying police officials, the suspicious person was apprehended who disclosed his name as Syed Mussarat Hussain Shah S/o Zakir Hussain. That a white shopping bag which the accused was carrying in his right hand was checked from which Charas Garda weighing 3000-grams was recovered. That a yellow solution tape was wrapped round the recovered Charas Garda. That 10-grams Charas Garda was separated in a sealed parcel bearing stamp AA for sending for chemical examination and the remaining Charas Garda was sealed in another parcel bearing the stamp AA. On the complaint Exh.PD, F.I.R Exh.PA was registered by PW-1 namely, Rafi Ullah A.S.I. Preliminary investigation was carried out on the spot and un-scaled site plan Ex.PE of the place of recovery was prepared and statements of PWs under Section 161 Cr.P.C were recorded. The sample taken from the recovered contraband was sent to the laboratory for analysis purpose. On completion of the investigation, Challan under Section 173 Cr.P.C. was submitted before the learned trial Court. The appellant was sent to face the trial.

3. The learned trial Court after fulfilling codal formalities, framed charge against the appellant to which he pleaded not guilty and claimed trial. In order to prove its case, the prosecution examined following witnesses.-

- i. *PW-1, Rafi Ullah, ASI, chalked out F.I.R. Ex.PA on receiving the complaint Ex.PD;*
- ii. *PW-2, Muhammad Uqab, HC, received two sealed parcels alongwith articles of personal search of accused from Ghulam Mustafa/SI and; On 28.09.2015, further handed over to*

Muhammad Waseem/HC the sample parcel of Charas alongwith road certificate.

- iii. PW-3, Muhammad Waseem-HC received sealed parcel from Moharrir Malkhana P.S. Bhara Kahu on the instruction of I.O. alongwith road certificate for further transmission to the office of Chemical Examiner, Laboratory Lahore.*
- iv. PW-4, Zakheer Ahmed-HC, is the recovery witness Ex.PB & PC.*
- v. PW-5, Ghulam Mustafa, SI, is the Complainant/Investigating Officer.*

Prosecution after tendering report of chemical examiner Ex.PF closed the prosecution evidence.

4. On completion of prosecution evidence, appellant/convict was examined under section 342 Cr.P.C. He denied the allegations and opted not to be examined on oath under section 340(2) Cr.P.C. On completion of trial, the learned trial Court convicted and sentenced the appellant vide Judgment, dated 19.05.2016, hence this appeal.

5. Learned counsel for the appellant contended that the appellant is innocent and has falsely been implicated by the police in the instant case; that no independent witness was associated to establish the charge against the appellant during recovery proceedings; that there is inordinate and unexplained delay of more than eight days in sending the alleged sample for chemical analysis to the laboratory; that the appellant is an old person and he has no criminal record; that the parcel with the local police cannot be said in safe custody as per contradictory statements of the prosecution witnesses. Learned counsel for the appellant prayed for acceptance of appeal.

6. Conversely, the learned State Counsel opposed the contentions of the learned counsel for the appellant and submitted that there was no enmity of the prosecution witnesses to falsely

involve the appellant in the commission of the alleged offence; that the recovery of contraband has been affected from the physical and conscious possession of the appellant; that sample was separated and sealed at the spot; that the sample was sent to the laboratory and report is available on record as Ex.PF, which confirmed that recovered material was Charas and lastly, urged for dismissal of the appeal.

7. We have heard the learned counsels for the parties and gone through the available record with their able assistance, which reveals that the alleged recovery was effected on 20.09.2015 at about 09:00 p.m. The recovery memo was prepared at the spot, sample was taken and separated for chemical analysis purpose, which was sent on 28.09.2015 through Muhammad Waseem-HC to the laboratory and besides this, the witnesses have also been examined before the Court.

8. Reappraisal of statements of the prosecution witnesses reveals that they remained consistent in their respective depositions despite being subjected to lengthy cross examination. Their testimonies are consistent regarding the time, date, place and the recovery. The laboratory report i.e. Ex.PF has confirmed the sample to contain narcotic drugs/Charas.

9. Perusal of the depositions of the witnesses shows that though the prosecution was able to prove the recovery but delay in sending the samples to the laboratory have raised questions, which could be considered as a mitigating factor in reducing the sentence. PW-2 namely, Zakheer Ahmed-HC, has deposed on oath that on 20.09.2015, he was posted at Police Station Bhara Kahu Islamabad, on the same day he alongwith Ghulam Mustafa-S.I, Ishafaq Ahmed, Sudher Khan-HC, Yasir Mehmood constable, were on area patrolling. That when they reached at Athal Chok, Bhara Kahu at about 09:00 p.m., they saw the appellant standing in front of the Chaman Biryani holding a white colour shopper in his

right hand and was apprehended. That on search of the white shopping bag, Charas Garda wrapped in yellow insulation was taken into possession through recover memo Ex.PB. On weighing, it became 3000-grams, out of recovered contrabands, 10-grams was separated and sealed into a separate parcel for chemical analysis, the remaining was also sealed into a parcel. This witness has further deposed that he signed over the recovery memo Ex.PB and identified his signature as Ex.PB/1. PW-5 Ghulam Mustafa-S.I, has also deposed the same statement as narrated by PW-4 and has further deposed that he prepared un-scaled site plan; that on the same day, he handed over the recovered Charas, sample parcel and personal belonging of the appellant to PW-2/ Moharrir Malkahan of Police Station Bhara Kahu, Islamabad, recorded the statements of witnesses. On 28.09.2015, the sample parcels were handed over to Muhammad Waseem/HC for onward transmission to the laboratory and he submitted challan under Section 173 Cr.P.C. During cross examination, this witness admitted that on 23.09.2015, he submitted application to the office of ETO for issuance of docket and also admitted that the official who visited the office of ETO for issuance of docket also taken the sample parcel to the ETO office for putting seal on the same and specifically stated that PW-1 Muhammad Waseem had visited the office of ETO and had obtained the parcel from Moharrir for taking to the ETO office. PW-3 Muhammad Waseem-HC has deposed that on 28.09.2015 Moharrir Malkhana/PW-2 namely, Muhammad Uqab handed over him a sealed parcel on the instruction of Investigating Officer for transmission of the same to the office of Chemical Examiner Laboratory, Lahore. He deposited the same in the concerned laboratory and got endorsement on the back of the road certificate from the said office. The parcel remained intact as long as it remained in his custody. The statement of PW-3 is silent for taking the parcel on 23.09.2015 to the office of ETO, which is contradictory to the statement of PW-5. This piece of evidence made by the above said PW-5 raised a question with regard to

safe custody of the parcel that when on 23.09.2015, the parcel was taken by the PW Waseem, thereafter, there is no evidence that when it was returned to the Moharrir for keeping the same in the Malkhana. In this regard, there is no evidence that from 23.09.2015 till 28.09.2015, whether it remained in safe custody and whether any tampering was not committed or otherwise? Therefore, during this period, evidence of safe custody is missing which has created doubt with regard to chain of safe custody.

10. The appellant was arrested on 20.09.2015 and the recovery was affected on the same date. Sample was taken and sealed at the crime scene but it was sent to the Laboratory on 28.09.2015 i.e. after a delay of eight days. The delay in sending the samples has not been explained. Rule 4(2) of the Control of Narcotic Substances (Government Analyst) Rules, 2001 provides that the samples are required to be sent to the laboratory for analysis within 72 hours of the recovery/seizure. No plausible explanation for violation of the aforementioned rule is available on record. This crucial factor was taken into consideration by the august Supreme Court in the case titled "Muhammad Aslam v/s The State" (2011 SCMR 820). It is settled law that the benefit of doubt always goes in favour of the accused. Reliance in this regard is placed on the judgments of the august Supreme Court reported as "Muhammad Shahbaz Ali Khalid vs State" (2019 SCMR 2012), "Safdar Mehmood vs. Tanvir Hussain" (2019 SCMR 1978) & "Ramer Khan vs Noor-Ul-Haq" (2019 SCMR 1949).

11. It is pertinent to mention here that during the pendency of instant appeal, the appellant moved an application under Section 426 Cr.P.C. for suspension of his sentence (C.M. No. 01/2016), which was allowed by this Court vide order, dated 30.06.2016 and he was released on bail. The appellant remained incarcerated for a period of about nine (09) months and ten (10) days, approximately.

12. Keeping in view the above facts and circumstances of

the case, particularly the unexplained delay in sending the samples to the laboratory in violation of Rule 4(2) of the Control of Narcotic Substances (Government Analyst) Rules, 2001, and chain of safe custody of the alleged sample not being established, we, while maintaining his conviction, reduce the sentence of the appellant to the period already undergone by him.

13. With the above modification, the instant appeal stands disposed of, accordingly. Since the appellant is on bail, his bail bonds are discharged and the surety is discharged from liability.

(CHIEF JUSTICE)

**(GHULAM AZAM QAMBRANI)
JUDGE**

Rana M. Iqbal