

ORDER SHEET.
ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Criminal Appeal No. 325 of 2019

Zeenat Ali

Versus

The State and another.

S.No. of order/ proceeding	Date of order/ proceeding	Order with signature of Judge and that of parties or counsel where necessary.
(07)	01.04.2021	Mr. Ajmal Khan Khattak, Advocate for the appellant. Mr. Danyal Hassan, State Counsel.

TARIQ MEHMOOD JAHANGIRI, J: By this

criminal appeal, the appellant Zeenat Ali has assailed the legality and propriety of the judgment dated 18.06.2019 passed by learned Additional Sessions Judge-IV / Judge MCTC (East), Islamabad arising out of a case registered vide FIR No. 19/18, dated 28.10.2018 offence under section 9-C, CNSA, at police station Shahzad Town, Islamabad, whereby, the appellant has been convicted under section 9-A, CNSA and awarded sentence of 2 months R.I (with fine of Rs. 5000/- in addition to the period i.e. 2 months which, he has already under gone in judicial lock up). In default of payment of fine, further undergo 15 days S.I and benefit of section 382 (B) Cr.P.C was also given to the appellant.

02. Brief facts narrated in the FIR are that on 28.01.2018 at about 12:15 p.m. the appellant was apprehended by the police on spy

information, when he was going towards Darbar Peer Mehal Ali Shah, Ali Pur Farash holding a blue colour shopper in his right hand wherefrom, chars weighing 1382 grams, in the shape of 3 littar, was recovered at the spot, hence the FIR was registered.

03. After the completion of the investigation, challan / report under section 173 Cr.P.C against the appellant for offence under section 9-C, CNSA, 1997 was submitted. Charge was framed against the appellant / accused to which he pleaded not guilty and demanded trial.

04. Prosecution has produced PW-1, Muhammad Afzal ASI, who registered the FIR (Ex-PA), PW-2, Momin Khan ASI, who handed over a parcel of contraband to Chemical Examiner Lab, PW-3, Muhammad Ali, ASI, who was Moharrar of police station and kept the parcel in his safe custody, PW-4, Shafqat Ullah Khan, ASI, who is recovery witness and attesting witness of recovery memo and lastly produced PW-5, Muhammad Ashraf, S.I./I.O, who is Investigating Officer and complainant of the case, who got exhibited Chars as (P-1), recovery memo (Ex-PB), complaint (Ex-PC) and rough site plan (Ex-PD).

05. Statement of the accused under section 342 Cr.P.C was recorded, wherein he denied the prosecution allegation leveled against him and professed his innocence. In his statement, the appellant stated that due to filing of petition

against the Investigating Officer, for registration of false case against him, wherein he was acquitted from the charge, an inquiry was conducted against the I.O. On the basis of said inquiry the I.O has registered the instant case against him to take revenge of his insult. He has also produced the judgment of the case, wherein he was acquitted as Mark-A, however, neither he examined himself nor led any evidence in order to disprove the prosecution case.

06. Learned Additional Sessions Judge / Judge MCTC-East, Islamabad after hearing the arguments of learned counsel for the parties and examining the evidence available on record convicted and sentenced the appellant as stated above vide impugned judgment, hence this appeal.

07. Learned trial Court in the impugned judgment has already discussed the facts of the case as well as the evidence in detail and there is no need to repeat the same to avoid duplication and unnecessary repetition.

08. Learned counsel for appellant has contended that the prosecution case is highly doubtful. That as per prosecution evidence this is a case of spy information and the place of occurrence was located at busy spot, yet , none from public was joined to witness the recovery and arrest of the appellant; that there are material contradictions in the prosecution evidence, hence it cannot be safely relied upon;

that the alleged contraband item was recovered on 28.01.2018 but it was sent to Chemical Examiner on 06.02.2018 with a delay of 09 days and no road certificate has been produced in the evidence and lastly has prayed that appeal be allowed and the impugned judgment be set aside.

09. Learned State Counsel fully supported the impugned judgment and in particular contended that the recovered contraband item had been in safe custody following its recovery until the time it was sent and received in the office of Chemical Analyzer for chemical examination, coupled with the report of Chemical Analyzer which is positive; that the prosecution has fully proved its case beyond any shadow of doubt; that the learned trial Court passed the impugned judgment after appreciating the evidence available on record in its true perspective; therefore, under these circumstances, he prays that the instant appeal be dismissed.

10. We have heard the arguments advanced by learned counsel for the appellant, learned state counsel and perused the record with their able assistance.

11. In the FIR (Ex-PA), it is mentioned that the complainant / I.O was accompanied by Shafqat Ullah Khan ASI, Momin Khan ASI, Liaquat Ali Head Constable, Ahmed Nawaz Constable, at the time of arrest of the appellant, hence all said persons are the eye-witnesses of the

occurrence. PW-5, Muhammad Ashraf, S.I / I.O and Shafqat Ullah Khan, ASI, PW-4, have categorically mentioned in their statements that Momin Khan, ASI, PW-02, was present at the spot when the accused was apprehended and further stated that it will be false or incorrect to say that Momin Khan, ASI, PW-2, was not present at the spot but Momin Khan, ASI, PW-2 has categorically denied to witness the occurrence stating that *“it is correct that I am not witness of the occurrence”* and stated that on 06.02.2018 he took sealed parcel of the samples alongwith road certificate for transportation to NIH laboratory and after issuance of docket from E.T.O. office, Islamabad he deposited the sample parcels in the office of NIH on the same day and returned the road certificate to the Moharrar but road certificate has not been exhibited in the evidence. Register showing the entry of safe custody of the narcotics was also not produced, which could hardly prove safe custody of the samples while they were lying in the police station, before their dispatch to the Forensic Science Laboratory, so as to make report of FSL credible and worthy of reliance.

12. In FIR (Ex-PA) date and time of occurrence is mentioned as 28.01.2018 at 12:45 p.m. and date of report is mentioned as 28.01.2018 at 01:05 p.m. but in the complaint (Ex-PC) the complainant / I.O has mentioned the time of

occurrence as 12:15 p.m. but no explanation has been given regarding the contradictions in complaint (Ex-PC) and FIR (Ex-PA).

13. The contraband was recovered on 28.01.2018 and was sent for chemical examination on 06.02.2018 i.e. after unexplained delay of 9 days, though as per rule 4(2) of the Control of Narcotics Substance (Government Analysts) Rules, 2001, this exercise was required to be completed within 72 hours of the recovery and for this purpose, there is no plausible explanation from the prosecution side that why such inordinate delay was caused in completion of this exercise by the Investigating Officer.

14. It has been held by the Hon'ble Supreme Court of Pakistan in a case titled as **"Muhammad Aslam V. The State (2011 SCMR 820)"** that *"there is no explanation, whatsoever, from the side of the prosecution about the delay of over seven days in the remission of samples to Chemical Examiner for its report"*, the accused was extended benefit of doubt and the appeal was allowed.

15. It is also pertinent to mention here that in this case the complainant / Muhammad Ashraf, S.I had himself conducted the investigation of the case. In our view the person who is complainant of the case in order to keep all fairness of thing cannot investigate the same case, which 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:

"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".

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. In the case in hand, P.W-2 HC Abdul Razzaq was subordinate of the complainant, no third party/independent person from or while going towards 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), Qaloo v. The State (1996 PCr.LJ 496), Muhammad Khalid v. The State (1998 PCr.LJ 808) and Nazeer Ahmed v. The State (PLD 2009 Karachi 191).

16. Liaquat Ali Constable / eye-witness, who took the written complaint / Istighasa from the

place of occurrence to police station for registration of FIR and brought back the FIR after its registration, has not been produced as a witness / PW during the trial. In a case titled as “*Minhaj Khan V. The State (2019 SCMR 326)*” the Hon’ble Supreme Court of Pakistan by extending the benefit of doubt has acquitted the accused of CNSA on the ground of non production of constable who was eye-witness and took the written compliant for registration of FIR.

17. In view of the above, coupled with the other above mentioned reasons we hold that in this case the prosecution has failed to prove its case against the appellant beyond a reasonable doubt. There are so many defects and contradictions in the prosecution case/evidence; thus, the prosecution case appears to be doubtful and benefit of the same should be extended in favour of the appellant as of right as opposed to concession as was held in the case of Tariq Pervez v. The State (1995 SCMR 1345), wherein it was observed as under:-

"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. The same principle has been laid down by the Hon'ble Supreme Court of Pakistan in a case titled as **"Muhammad Aslam V. The State (2011 SCMR 820)"**, wherein it is held that *"it is well settled legal principle regarding dispensation of justice in criminal case that if any reasonable doubt is created in the case of the prosecution then its benefit is to be extended to the accused party"*.

19. For the above stated reasons, we hold that prosecution has failed to prove its case against the appellant, therefore, while extending the benefit of doubt in favour of the appellant, instant appeal is **allowed** and the impugned judgment dated 18.06.2019 passed by learned Additional Sessions Judge / Judge MCTC (East-Islamabad), is set aside and the appellant is acquitted from the charge, as the appellant has undergone the punishment, so no order for his release from custody is required.

(AMER FAROOQ)
JUDGE

(TARIQ MEHMOOD JAHANGIRI)
JUDGE

Announced in open Court on this ____ day of May, 2021.

JUDGE

JUDGE