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Judgment Sheet

IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

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CRIMINAL APPEAL NO.1875 of 2009

HUSNAIN RIAZ

Versus

THE STATE

JUDGMENT

Date of hearing:	28.02.2017
Appellant by:	Ms. Ayesha Aslam Zia, defence counsel.
State by:	Rana Muhammad Shafique, Deputy District Public Prosecutor.

MIRZA VIQAS RAUF, J. The appellant namely Husnain Riaz was arrested on 29th of April, 2008 on the allegations that from two sacks under his control, 40 kilograms poppy (*poast*) was recovered. The alleged recovery resulted into registration of case F.I.R. No.278 of 2008 (Exhibit-PA/1) on the complaint of Muhammad Ayub A.S.I., who appeared as PW4. After formal registration of first information report and investigation, report under Section 173 of The Code of Criminal Procedure, 1898 (hereinafter referred as "Cr.P.C.") was placed before the learned Additional Sessions Judge, Depalpur, District Okara for conducting trial of the said case. While taking cognizance, the learned Additional Sessions Judge framed the charge against the appellant on 30th of October, 2008 under Section 9(c) of The Control of Narcotic

Substances Act, 1997 (hereinafter referred as "C.N.S.A., 1997") to which he pleaded not guilty and claimed trial.

2. In order to prove the charge against the appellant, prosecution examined six witnesses in toto. The edifice of the prosecution story was structured on the statement of Muhammad Ayub A.S.I. (PW4) which reads as under :-

> ***"On 29.4.2008 I was posted in P.S. City Depalpur. We were present in front of Ghausia Tibia College for interrogation of Riaz Hussain accused. The informer intimated me that another person is also standing with Poast. Accordingly we proceeded towards the stipulated place and where Husnain accused was standing with 2 bags of poast. On weighing, they were found 20 K.G. each. Out of which, 5 K.G. each was separated for Chemical Analysis and whereas the remaining was taken into possession vide recovery memo Ex.PA duly attested by Shaukat Ali and Fateh Muhammad PWs. I drafted complaint Ex.PB which was sent to the P.S. through Siraj Din PQR. Thereafter, Manzoor Ahmad SI came on the spot and the accused, case property and police papers were handed over to him."***

In addition to the statement of Muhammad Ayub A.S.I., statement of Muhammad Amin No.1009/H.C. who was officiating as Moharrer at the relevant time was recorded as PW1. Muhammad Ibrahim A.S.I., being the scribe of F.I.R. (Exhibit-PA/1) was examined as PW2. Muhammad Shahban No.467/C, while posted at Police Station Depalpur deposited one sealed parcel to the office of Chemical Examiner on 23rd of May, 2008, he appeared as PW3. One of the recovery witness namely Shaukat Ali No.134/C appeared as PW5 whereas investigating officer namely Manzoor Ahmad S.I. entered into

the witness box as PW6. The prosecution also tendered certain documents in support of the case and report of Chemical Examiner was made part of record as Exhibit-PD. On completion of prosecution evidence, the appellant while pleading his innocence recorded his statement under Section 342 of "Cr.P.C.". In answer to a question why this case against you and why the prosecution witnesses deposed against you, the appellant answered as under :-

> ***"The PWs are police officials who are subordinate of the I.O and have deposed falsely against me. In fact, I am resident of 34/4-L, District Sahiwal and I alongwith my father came to Hakeem Sain Shah at his Matab for taking medicine for my father as he was ill in those days. I and my father were sitting at the said Matab waiting the Hakeem. The police raided Ghosia Tibbia College of the said Hakeem but none was apprehended by the police from the said college and in order to initiate its proceedings, the police brought me and my father and falsely involved me and my father in two different cases, while planting bogus recovery of post. I am innocent and have been falsely implicated in this case."***

The appellant, however, did not opt either to record his statement under Section 340(2) of "Cr.P.C." or to lead any defence evidence. After completion of evidence, the learned trial court vide its judgment dated 12th of October, 2009, after holding the appellant guilty of offence under Section 9(c) of "C.N.S.A., 1997" sentenced him to imprisonment for life alongwith fine of Rs.1,00,000/- and in default thereof, he was held liable to further undergo six months simple imprisonment. Benefit of Section 382-B of "Cr.P.C." was, however, extended to the appellant.

3. Learned defence counsel representing the appellant submitted that there are material contradictions in the statements of prosecution witnesses which are sufficient to falsify the prosecution story. In order to supplement her contentions, learned counsel has drawn our attention to the statements of Muhammad Ayub A.S.I. (PW4) and Shaukat Ali No.134/C (PW5). It is contended that sample was sent to the office of Chemical Examiner with an unexplained delay of twenty two days, which renders the recovery inadmissible. Learned counsel emphatically contended that case property was not produced at the time of trial and the conviction thus cannot sustain. It is argued that finding of conviction recorded by the learned trial court is not tenable under the law.

4. Conversely, learned prosecutor, while defending the impugned judgment submitted that prosecution has led sufficient evidence to prove the case against the appellant and he was rightly convicted by the learned trial court. It is contended that all the prosecution witnesses fully supported the recovery effected from the appellant and there is no misreading and non-reading of evidence, rendering the judgment under challenge, illegal and unlawful.

5. After having heard learned defence counsel and the prosecutor, we have also perused the record in order to appreciate the respective contentions of both the sides.

6. The appellant was apprehended by the police on the basis of spy information. It is prosecution's own case that alleged recovery was effected from two sacks containing 20 kilograms poppy each out of which 05 kilograms each was separated for chemical analysis. The recovery was effected when the

appellant was allegedly present at Pipli Road Depalpur which is a thoroughfare. The prosecution case mainly hinges upon the statement of Muhammad Ayub A.S.I. complainant (PW4) and Shaukat Ali No.134/C (PW5), who was cited as one of the recovery witness. Bare perusal of their statements clearly reflects that even an iota of evidence is not available qua the fact that sacks were in physical possession of the appellant. As per statement of Muhammad Ayub A.S.I. (PW4), at the time of raid, the appellant was standing with the bags whereas Shaukat Ali No.134/C (PW5) narrated this aspect with complete divergence by stating that he was sitting with two bags of *poast*. The alleged recovery was effected in the late hours of night and it has come on the record especially in the statement of Shaukat Ali No.134/C (PW5), that appellant was previously not known to the raiding party and informer was not with them at the time of raid. The manner of recovery in such an eventuality causes serious doubts about the prosecution case. Even otherwise above said two prosecution witnesses also stated different timings regarding their departure from police station on the eventful day and reaching at the place of recovery. The contradictions occurred in the statements of Muhammad Ayub A.S.I. (PW4) and Shaukat Ali No.134/C (PW5) are neither trivial nor inconsequential. Guidance in this respect can be sought from ***"MUHAMMAD ASLAM versus THE STATE" (2011 SCMR 820)***. The relevant extract from the same is reproduced below :-

> **"**6.....In the instant case, it seems to be highly improbable that the informer, after seeing the appellant, allegedly standing at Toll Tax with huge quantity of narcotics, will cover long distance to inform the police party, who will come back at the place of occurrence in

> his company and will catch hold of appellant, as if he was waiting for them at the place of occurrence; no evidence has come on record to show that either the informer or any person had seen the appellant either loading or unloading the said sacks containing narcotic substances from any vehicle or other source, which, in other words, means that even if the said ten sacks were containing narcotic substances in the form, as reported by the Chemical Examiner, mere fact that the appellant was standing near those sacks or a passerby will not establish that the same were in his active possession or even he had any knowledge about the contents of those bags. It is well-settled legal principle regarding dispensation of justice in criminal cases that if any reasonable doubt is created in the case of the prosecution then its benefit is to be extended to the accused party. In the instant case, as discussed above, even if whole evidence of the prosecution is considered in its totality, it is not established beyond reasonable doubt that the alleged quantity of 9-1/2 mounds contained in ten sacks was owned by the appellant or it was in his possession.....**"**

7. Leaving aside material discrepancies in the statements of prosecution witnesses, there is yet another important aspect that case property i.e. *poast* was never produced before the learned trial court and this fact is even not refuted by the learned prosecutor which even otherwise is clearly substantiated from the record. We are well aware that "C.N.S.A., 1997" provides stringent punishments on account of recovery of prohibited contraband and an accused can only be held guilty of the offence if the prosecution is once established the recovery of narcotics substance by leading cogent and convincing evidence and for the said purpose, it is obligatory

upon the prosecution to tender the recovered substance in evidence, as the initial onus of proof always lies upon the prosecution. Our above formulated view is fortified by the judgment of Hon'ble Supreme Court of Pakistan in the case of ***"AMJAD ALI versus THE STATE" (2012 SCMR 577)***. Even this Court in the case of ***"Agha QAIS versus THE STATE" (2009 P Cr. L J 1334)*** adopted the same view.

8. We have also noticed that when the appellant was examined under Section 342 of "Cr.P.C.", he was even not confronted with the case property as it was never produced before the court. It is well settled principle of law by now that no incriminating material can be used against the accused, unless it is specifically put to him during his statement under Section 342 of "Cr.P.C.". The purpose behind this principle is that the accused must be aware of all the material evidence which is to be used against him. As already observed that when the appellant was not confronted with the case property, he was not in a position to refute the same properly. This lapse on the part of prosecution is fatal and it goes to the root of the prosecution case. The recording of statement under Section 342 of "Cr.P.C." is not a mere formality, rather its primary object is to afford the accused an opportunity of explaining the circumstances which are tending to incriminate and likely to influence the mind of the Judge in arriving at a conclusion adverse to him. Guidance in this regard can be sought from the case of ***"ASIF ALI ZARDARI and another versus THE STATE (PLD 2001 Supreme Court 568)***, wherein the Hon'ble Supreme Court of Pakistan has held as under:-

> **"**37. The mode and manner in which the statement of Ms. Benazir Bhutto under section 342 Cr. P.C. was recorded

> leaves no doubt in our mind that the provision of section 342, Cr.P.C. was abused with a view to reach a hasty conclusion. The underlying object of section 342, Cr.P.C. is to enable an accused to explain the incriminating circumstances in the prosecution evidence appearing against him. In our view, this is the most valuable right being sacrosanct principle of natural justice. No doubt, the attendance of Ms. Benazir Bhutto appellant had been exempted but as she was available in Pakistan, it was incumbent upon the learned Judges to have summoned her for recording her statement. The features of the prosecution case also necessitated her examination in person. To our utter dismay the learned Judges opted not to do so and considering the compliance of the provisions of law sufficient by recording the statement of her counsel who according to the learned counsel for the appellants was not authorised to speak on her behalf. According to Ms. Benazir Bhutto appellant, when she came to know that her statement under section 342, Cr.P.C. had been got recorded through her counsel she at once made an application to supplement her statement under section 342, Cr.P.C. and made a supplementary statement in writing containing answers to all the questions put to her counsel and requested the Court to treat the statement in writing as her statement under section 342, Cr.P.C. but queerly enough her said statement was ignored. The circumstance is also a link in the bias.**"**

Reliance in this regard can safely be placed on ***"MUHAMMAD NAWAZ and others versus The STATE and others" (2016 SCMR 267)***. The above laid principles have also been followed by this Court in the case of ***"MUBASHER and another versus THE STATE" (PLD 2015 Lahore 426).***

9. There is yet another important aspect that complaint (Exhibit-PB) reflects that two samples of five kilograms each

were separated for chemical analysis at the time of alleged recovery, however, only one sample parcel without specifying any weight was sent to the office of Chemical Examiner on 23rd of May, 2008 with an unexplained delay of about twenty two days. We are cognizant of the fact that mere delay in sending the sample parcel to the office of Chemical Examiner is not sufficient to dislodge the prosecution case, however, in view of above noted multiple infirmities, we cannot ignore this fact, rather this causes a further dent in the prosecution case. Reference in this respect, if needed, can be made to ***"TAIMOOR KHAN and another versus The STATE and another" (2016 SCMR 621)***.

10. The joint analysis of the evidence led by the prosecution, leaving aside the defence plea of the appellant, leads us to an irresistible conclusion that prosecution has badly failed to bring on record any tangible evidence to establish the guilt of the appellant. We have no hesitation to observe that prosecution story is fraught with doubts. The prosecution has even badly failed to establish the exclusive possession of the appellant. It is not obligatory for an accused to point out number of circumstances creating doubts in the prosecution story but even a single circumstance, creating a reasonable doubt in the prudent mind is sufficient to extend him benefit of the same. Guidance in this respect, if needed can be sought from the judgment of Hon'ble Apex Court reported as ***"MUHAMMAD ZAMAN versus The STATE" (2014 SCMR 749)***. Even this Court in the case of ***"MUHAMMAD ASHRAF and others versus THE STATE and others" (PLD 2015 Lahore 1)*** has adopted the same principles in the following manner :-

"19.....It is by now well settled law that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created doubt about the prosecution story. In *'Tariq Pervez v. The State' (1995 SCMR 1345)*, the Hon'ble Supreme court of Pakistan, at page 1347, was pleased to observe as under:--

> '5..... The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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.'

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of *'Muhammad Akram v. The State'* (2009 SCMR 230), at page 236, observed as under:--

> '13..... It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving of benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter or right.**"**

11. For the reasons noted hereinabove, we are inclined to observe that the prosecution evidence is highly deficient and the conviction recorded by the learned Additional Sessions Judge in the circumstance is not sustainable. We thus, while **allowing** the appeal, set aside the judgment dated 12th of October, 2009 and acquit the appellant from the charge against him by extending benefit of doubt to him. The appellant Husnain Riaz is in jail, he be released forthwith, if not required in any other case.

(Sardar Muhammad Sarfraz Dogar)
Judge

(Mirza Viqas Rauf)
Judge

Shahbaz Ali*

APPROVED FOR REPORTING