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Judgment Sheet
LAHORE HIGH COURT, LAHORE
Judicial Department

Crl. Appeal No.1477/2014

Mst. Zakia Bibi Versus The State and another

Date of hearing:	08.03.2018
Appellant by:	Mr. Intizar Mehdi, Advocate (Defence Counsel)
Respondents by:	Mr. Muhammad Waqas Anwar, Deputy Prosecutor General

KHALID MAHMOOD MALIK, J. Despite repeated calls no one has entered appearance on behalf of the appellant inspite of fact that name of learned counsel for appellant (Mr. Shahid Hussain Rahi, Advocate) is duly reflected in today's cause list and on last date of hearing i.e. 1.11.2017, this appeal was adjourned for today in his presence. Since it is an old matter as this appeal pertains to year 2014, therefore, we are not inclined to adjourn the same and to decide it on merits, Mr. Intizar Mehdi, Advocate, present in court, is appointed as defence counsel to represent the appellant in this case at State expense. After giving sufficient time, case has been taken up and both learned Defence Counsel and Deputy Prosecutor General are ready to advance their respective arguments.

2. Through this appeal, judgment dated 21.06.2014 passed by learned Addl. Sessions Judge, Faisalabad, has been called in question whereby appellant Mst. Zakia Bibi was convicted and sentenced as under: -

“under Section 9 (c) of Control of Narcotic Substances Act, 1997 to suffer R.I. for one year with fine of Rs.10,000/- and in default of payment of fine she shall further undergo S.I for 15 days with benefit of section 382-B Cr.P.C.”

3. The facts of the case have already been described in the impugned judgment. However, for ready reference, in short, the prosecution story as per F.I.R (Ex.PA/1) is that on 20.07.2011 at about 7.00 p.m., on spy information, a raid was conducted, appellant was apprehended and on her personal search allegedly “heroin” weighing 1015 grams alongwith sale proceed Rs.9990/- was recovered from her possession. Out of recovered contraband, 01-gram “heroin” was separated for chemical analysis and sealed into parcel vide recovery memo Ex:PB. On complaint (Ex:PA), F.I.R (Ex:PA/1) was chalked out.

4. After completion of investigation and observing legal formalities, challan was submitted before learned trial court whereafter charge was framed against appellant, to which she pleaded not guilty and claimed trial. The prosecution evidence was summoned. In support of its version, prosecution examined Muhammad Saeed 184-HC (PW-1), Amjad Ali 1622/HC (PW-2), Muhammad Najam-ul-Hassan 1522/HC (PW-3), Qasim Ali 1970/C (PW-4), Babar Ali 3609/C (PW-5) and Muhammad Bashir SI(retired) (PW-6). Thereafter appellant/convict was examined under section 342 Cr. P.C. and the entire evidence produced by the prosecution was put to her in shape of questions, which she termed as incorrect. However, she has neither recorded her statement under section 340(2) of Cr.P.C nor produced any defence evidence. Learned trial Judge unimpressed by the stance taken by the appellant vide impugned judgment dated 21.6.2014 proceeded to

convict the appellant and awarded sentence as referred above.

Hence, this appeal.

5. It has been argued by learned counsel for appellant that alleged recovered contraband was neither in possession of appellant nor was recovered from her; that raiding party was not accompanied any lady constable despite the fact that alleged prohibited contraband was to be recovered from lady accused, which is clear violation of section 52 of Cr.P.C.; and that prosecution has failed to establish the guilt of appellant beyond any reasonable doubt, as such, by allowing this appeal, the appellant may be acquitted from the charge.

6. Conversely learned Deputy Prosecutor General has supported impugned judgment by pleading that prosecution has proved its case beyond any shadow of doubt by producing cogent and reliable evidence; that sufficient material is available on record to connect the appellant with the commission of alleged crime. Lastly prayed for dismissal of this appeal.

7. Arguments heard. Record perused.

8. To prove its case, prosecution has examined six witnesses as stated above. Muhammad Saeed 184-HC (PW-1) lodged formal FIR (Ex:PA/1) on receipt of complaint (Ex:PA). Amjad Ali 1622/HC (PW-2) is the recovery witness in whose presence alleged prohibited contraband was recovered from the possession of appellant. Muhammad Najam-ul-Hassan 1522/HC (PW-3) being Moharrir kept one sealed parcel of heroin in malkhana, who later on handed over the same to Qasim Ali 1970/C for its onward

transmission to the office of Chemical Examiner, Lahore. Qasim Ali 1970/C (PW-4) deposited the parcel in the office of Chemical Examiner, Lahore intact. Babar Ali 3609/C (PW-5) is another recovery witness of alleged recovered contraband. Muhammad Bashir S.I (retired) (PW-6) is complainant of the FIR, who conducted raid and thereafter investigated the matter and prepared report under section 173 Cr.P.C.

9. On careful scrutiny and reappraisal of available evidence, we find that it was the prosecution case that being notorious drug peddler appellant was selling heroin in public street and many people were purchasing heroin from her. On spy information, raid was conducted. Resultantly appellant was apprehended and upon search, heroin weighing 1015 grams alongwith sale proceed Rs.9990/- was allegedly recovered from her possession. Surprisingly, inspite of well and advance information about the fact that appellant was a woman and notorious drug seller, the complainant/head of the raiding party did not try to accompany a lady constable for her arrest and search, which is clear violation of mandatory provisions of law concerning body or personal search of some lady involved in the crime. Further the complainant, who is Sub-Inspector by rank and being an employee of police department is supposed to well aware and having knowledge of substantive as well as procedural law but in this case, non-accompanying of lady constable with the raiding party by the complainant, speaks a volume about his efficiency, knowledge and command on investigation.

10. It is pertinent to mention here that whether the act of Investigating Officer was illegal or merely irregular. In this regard, several factors are to be taken into consideration such as the form and language of the mandatory provisions; the scheme and the object to be achieved; and the nature of the violation etc. To determine the gravity of the defect, it has to be seen that whether is it a mere unimportant mistake in procedure or is it substantial and vital? The answer will depend on the facts and circumstances of each case. To resolve the controversy as involved in this matter, it will be appropriate to reproduce section 25 of Control of Narcotic Substances Act, 1997: -

“Mode of making searches and arrest. The provisions of the Code of Criminal Procedure, 1898, except those of Section 103, shall mutatis mutandis, apply to all searches and arrests insofar as they are not inconsistent with the provisions of sections 20, 21, 22 and 23 to all warrants issued and arrests and searches made under these Sections”.

Whereas section 52 of Code of Criminal Procedure, 1898 provides as under: -

“Mode of searching woman. Whenever it is necessary to cause a woman to be searched, the search shall be made by another woman, with strict regard to decency”

In the above quoted section 52 of Cr.P.C., two words ‘shall’ and ‘decency’ have been used. The word ‘shall’ connotes that *whenever a thing is required to be done in a particular manner, then it should have been done in that manner and not otherwise.* Whereas the word ‘decency’ literally connotes *behavior that conforms to accepted standards of morality or respectability,*

conformity to be recognized standard of propriety/modesty etc. In our considered view, the decency towards a woman has wider meaning, which also includes that: -

- i) As far as possible, investigation of crime against women shall be conducted by a woman police officer or at least it should be conducted in presence of woman police official;
- ii) If a woman accused is to be arrested, then the police shall keep a woman police personnel present on such occasion;
- iii) No woman in police custody shall be lodged even for a single night in a police station except in unavoidable circumstances;
- iv) A woman prisoner shall be placed forthwith before a Magistrate for remand to judicial custody except where a remand to police custody is necessary and has been obtained;
- v) A police officer making an application for remand to police custody shall be responsible for the taking of necessary measures for the safe and decent custody of the woman prisoner;
- vi) Whenever it is necessary to cause a arrested woman to be searched, the search shall be made by another female with strict regard to decency;
- vii) Female accused persons shall be treated with all due dignity irrespective of the nature of the crime committed by her;
- viii) Female prisoner shall be separated as far as possible from adult male prisoners;
- ix) Women shall not be handcuffed.

In view of above circumstances, it is not possible and acceptable that raiding party comprising male members could maintain decency/modesty of a woman at the time of her arrest because it is a common observation in our society that every accused either man or woman tries to show resistance to the police in order to make his/her good escape from the place of occurrence and the police

officials also make every effort to cause his/her arrest and in this eventuality, they lost sight the principles of decency/modesty of a woman and could not maintain strict decency of a woman. This act and conduct of police is not acceptable to the general public particularly when the police has to cause arrest of a woman at a thoroughfare. Although in the cases where emergency involves, taking of a lady constable at the time of arrest of a woman can be ignored but such extra ordinary concession can only be given in very extra ordinary/exceptional circumstances, which are not available in this case. So, entire exercise of search and recovery of prohibited contraband attributed to appellant stands controversial and doubtful, which fact alone makes the prosecution case doubtful.

11. Another aspect of the matter is that order sheet of learned trial Court shows that on 7.6.2014, learned Deputy District Public Prosecutor after furnishing report of Chemical Examiner Lahore (Ex.PD) closed the prosecution evidence whereas an attested copy of the report of Chemical Examiner without any exhibit or mark instead of original report Ex.PD is available on the record. Further this report also negates the prosecution stance of safe custody of sealed sample parcel of recovered heroin at Malkhana and later on sending the same to the office of Chemical Examiner Lahore as according to PW-3 Najam-ul-Hassan, Moharrir, on 8.8.2011, he handed over a sealed sample parcel of recovered heroin to Qasim Ali, C-1970 for its onward transmission to the office of Chemical Examiner Lahore, who on 9.8.2011 deposited the said parcel in the office of Chemical Examiner Lahore intact i.e. after about eighteen

days of alleged occurrence whereas according to said report, a packet was received by Ch. Abdul Qayyum No.1571 from E.T.O. Faisalabad. The relevant paragraph of the report is reproduced as under: -

“I hereby certify that I received by C. Abdul Qayyum No.1571, a packet from the ETO of Faisalabad alleged to have been despatched by him on the 4th of August, 2011 referred to in his office letter No.1486, dated 4.8.2011 and received by me on the 10th of the August, 2011”.

Besides the raiding party had not arrested any other person, who according to the prosecution case were purchasing heroin from the appellant and they were sufficient in number coupled with the fact that prosecution has not brought any evidence regarding sale of alleged contraband on record. All these facts lead to hold us that prosecution case is not above board. It has been held by august Supreme Court of Pakistan in case titled “Muhammad Khan and another Vs. State” (PLJ 2000 SC 1041) that it is axiomatic and universal recognized principle of law that conviction must be founded on unimpeachable evidence and certainty of guilt and hence any doubt that arises in prosecution case must be resolved in favour of accused. Moreover it is cardinal principle of criminal jurisprudence that a single instance caused a reasonable doubt in the mind of Court entitles the accused to the benefit of doubt not as a matter of grace but as a matter of right. Reliance is placed on case law titled as “Muhammad Akram versus The State” (2009 S C M R 230). Reliance is also placed upon the case titled “Tariq Pervaiz Vs. The State” (1995 SCMR 1345).

12. In the wake of foregoing reasons, we are convinced that prosecution has failed to prove its case against appellant beyond any shadow of doubt. Resultantly, appeal in hand is accepted and impugned judgment dated 21.06.2014 is set aside and appellant Mst. Zakia Bibi is acquitted of the charge. Appellant is on bail, therefore, her surety is discharged from his liability.

(Aalia Neelum)
Judge

Naeem

(Khalid Mahmood Malik)
Judge

Approved for reporting

Judge

Judge