

IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE KHADIM HUSSAIN M. SHAIKH

CRIMINAL REVISION PETITION NO.01-K OF 2021

1. SADAM HUSSAIN SON OF GHULAM SHABIR SHAHANI.
2. SADAM HUSSAIN SON OF FATEH MOHAMMAD LAKHO.

PETITIONERS

VERSUS

THE STATE

RESPONDENT

Counsel for the Petitioners	:	Mr. Safdar Ali Ghori, Advocate
Counsel for the State	:	Mr. Khadim Hussain Khuharo, Additional Prosecutor General, Sindh.
FIR No., Date and Police Station	:	76/2020, 05.10.2020, Radhan Station, District Dadu.
Date of Impugned Judgments	:	05.03.2021 & 20.03.2021
Date of Institution of Appeal	:	12.04.2021
Date of Hearing	:	15.09.2021
Date of Judgment	:	28.03.2022

J U D G M E N T

Khadim Hussain M. Shaikh -J. The captioned Criminal Revision is directed against the judgment dated 20.03.2021, passed by the learned 1st Additional Sessions Judge, Mehar in two CrI. Appeals No.11 & 12 of 2021 re-Sadam Hussain Shahani and another v. The State, whereby the aforesaid appeals were dismissed, maintaining the conviction and sentence of two years with fine of Rs.30,000/- awarded to both the applicants vide judgment dated 05.03.2021, passed by the learned 2nd Civil Judge & Judicial Magistrate/MTMC Mehar in Cr. Case No.21 of 2021 re-State v. Sadam Shahani and another, emanating from Crime No.76 of 2020, registered at

Police Station Radhan Station, District Dadu, under Articles 3/4 of The Prohibition (Enforcement of Hadd) Order, 1979, extending applicant Sadam Hussain Lakho, who remained in custody as under trial prisoner, benefit of Section 382-B Cr.P.C.

2. Briefly, the facts of the case are that on 05.10.2020 at 0100 hours, complainant ASI Dur Mohammad Khoso, Incharge PP Agra Mor of P.S Radhan station lodged his F.I.R at P.S Radhan station to the effect that he alongwith his subordinate staff while checking the vehicles at check post Agra Mor, secured 08 cartons, containing 286 medium and small bottles of wine from white colour XLI car bearing registration No. BHS/197 and apprehended applicants Sadam Hussain Lakho and Sadam Hussain Shahani; of them Sadam Hussain Lakho was driving the car and whereas Sadam Hussain Shahani was found sitting on the other front seat of the car; on their personal search one brown colour wallet, containing cash amount of Rs.6980/-, one CNIC bearing No.41203-9025200-3 and one mobile phone Tecno KC/2, containing two Zong network sims were secured from the possession of applicant Sadam Hussain Lakho and whereas one red brown colour wallet, containing cash amount of Rs.1700/- and one Samsung mobile phone CEO 168, containing one ufone and one zong network sims, were secured from the possession of applicant Sadam Hussain Shahani; one bottle of wine separated from each carton, were sealed for chemical analysis and the remaining bottles were sealed separately; such mashirnama was prepared in presence of mashirs PC Barkat Ali and PC Fayyaz Ali; then the recovered property and the arrested accused were brought at police station Radhan station, where the subject F.I.R was lodged. After usual investigation applicant Sadam Hussain Lakho was sent up with the challan to face his trial, while the name of

applicant Sadam Hussain Shahani was placed in column No.2 of the challan, finding him innocent during the investigation. Subsequently, applicant Sadam Hussain Shahani was joined by the Court and then after completing all the formalities a formal charge was framed against the applicants at Ex.2 to which they pleaded not guilty and claimed their trial vide their pleas at Exs.2/A & 2/B respectively.

3. To prove its case, the prosecution examined PW-1 complainant ASI Dur Mohammad at Ex.3, who produced FIR at Ex.3-A; PW-2 mashir PC Barkat Ali at Ex.4, who produced memo of arrest & recovery and memo of place of incident at Exs.4/A & 4/B respectively, PW-3 Investigating Officer ASI Ali Asghar at Ex.5, who produced two roznamcha entries, two photographs and chemical examiner's report at Exs.5/A, 5/B, 5/C, 5/D and 5/E respectively, whereafter the prosecution closed its side vide statement Ex.6.

4. Statements of the applicants under Section 342, Cr.P.C were recorded, wherein they denying the prosecution allegations, professed their innocence, and denying the recovery, have stated that the alleged bottles of wine etc were foisted upon them. They, however, neither examined themselves on oath nor did they examine any person as their defence witness.

5. On the conclusion of the trial and after hearing the parties' counsel, the learned trial Court vide impugned judgment dated 05.03.2021 convicted and sentence the applicants, who then filed their separate Crl. Appeals No.11 & 12 of 2021 against the conviction judgment dated 05.03.2021, passed by the learned trial Court, which were dismissed by the learned 1st Additional Sessions Judge Mehar, vide impugned judgment dated 20.03.2021, as discussed in paragraph-I *supra*.

6. The applicants having felt aggrieved by both the impugned judgments passed by the learned trial Court and by the learned Appellate Court, have preferred this Criminal Revision Petition.

7. Mr. Safdar Ali Ghori, learned Advocate for the applicants has mainly contended that the applicants are innocent and they have been falsely implicated in this case by the police on account of their refusal to fulfill their demand of money; that there are material contradictions in the evidence led by the prosecution; that only 08 bottles out of the alleged 286 bottles shown to have been recovered, were sent to the chemical examiner that too with delay of four days without any explanation thereof; that PC Nisar Ahmed, through whom 08 bottles were sent to the chemical examiner for analysis, has not been examined by the prosecution; and, that the prosecution has failed to prove its case beyond a reasonable doubt, but the learned trial Court as well as the learned Appellate Court have failed to appreciate the evidence brought on the record in proper manner while passing the impugned conviction judgments. The learned counsel placing his reliance on the cases of GHULAM MUSTAFA alias MUSHTAQ ALI Versus THE STATE (2013 PCr.LJ 860), NAZEER and another Versus THE STATE (2014 PCr.LJ 1358), SADAM HUSSAIN Versus THE STATE (2018 MLD 1025), The STATE through Advocate-General, Khyber Pakhtunkhwa Versus MUHAMMAD SHABRAN alias SHADA and another (2020 YLR 2639), TULSI Versus The STATE (2020 MLD 89), WAHAB ALI and another Versus THE STATE (2010 PCr.LJ 157), IKRAMULLAH and others versus The STATE (2015 SCMR 1002), AMEER HAMZA alias HAMZA versus The STATE (2015 PCr.LJ 1402), GHULAM SARWAR versus The STATE (2015 PCr.LJ 1767), MUHAMMAD RIAZ versus The STATE (2019 PCr.LJ Note 44), MUHAMMAD ASLAM Versus THE STATE (2011 SCMR 820), TARIQ

PERVEZ versus THE STATE (1995 SCMR 1345) Mst. SAKINA RAMZAN versus The STATE (2021 SCMR 451) and ZUBAIR KHAN versus The STATE (2021 SCMR 492), prays for acquittal of the applicants.

8. The learned Additional Prosecutor General, Sindh, supporting the impugned judgments of both the learned Courts below, has contended that the learned trial Court has rightly convicted the applicants and the learned appellate Court has rightly dismissed the Criminal Appeals filed by the applicants. The learned Additional Prosecutor General placing his reliance on the cases of KASHIF AMIR Versus THE STATE (PLD 2010 Supreme Court 1052), SAJJAD Versus The STATE (2013 PCr.LJ 557), NIAZ MUHAMMAD Versus THE STATE (2006 PCr.LJ 228), MUSLIM KHAN and others Versus THE STATE (2002 YLR 2813), BASHIR AHMED and others Versus ABDUL AZIZ and 7 others (PLD 2007 Karachi 489) and QASIM AND OTHERS versus THE STATE (PLD 1967 Karachi 233) prays for dismissal of the instant Criminal Revision.

9. I have carefully considered the submissions of the learned Counsel for the applicants, and the learned Addl. Prosecutor General for the State, and have gone through the material brought on record with their assistance.

10. From a perusal of the record, it would be seen that besides several infirmities, omissions and admissions adverse to the prosecution case, there are also material and glaring contradictions in the evidence led by the prosecution e.g. I.O ASI Ali Asghar has admitted that the property was not recovered from possession of accused Sadam Hussain Shahani as per his investigation; he cannot say about second accused whether he is culprit or not; complainant ASI Dur Mohammad has stated that he has not produced the entry of his duty hours which could show his presence at the place of incident

on the day of incident; three cartons of wine were found lying on the back seat of the vehicle and five cartons of wine from the dikki of the said car, but he did not state about the quantity of the bottles while mashir Barkat has stated that three cartons containing 70 bottles were lying in the back seat of the vehicle and five cartons, were lying in dikki, out of which four contained 190 quarters bottles of wine and one carton contained 24 half liter bottles of wine of white colours, and whereas I.O ASI Ali Asghar has stated that the quantity of the recovered property was three cartons of wine comprised upon 70 Aadhiyas of wine, forth carton contained 24 white colour Aadhiya wine and remaining total four cartons contained 192 PAWA (a little bottle of wine than Aadhiyas); per complainant ASI Dur Mohammad, the time of incident was 2330 hours and mashirnama was prepared at 2340 hours and he admitted that they consumed ten minutes at the place of incident and completed whole proceeding there, then proceeded towards P.S Radhan Station and whereas mashir PC Barkat Ali does not speak about preparation of mashirnama at the place of recovery and has stated that they took the said car into their possession and returned back to P.S Radhan station, where ASI Dur Mohammad Khoso registered the F.I.R, they prepared mashirnama there; due to un-availability of private mashirs ASI engaged them as mashirs. Contradicting their own stances complainant ASI Dur Mohammad has stated that they consumed about one hour or one and half hour in sealing the recovered property at the place of incident while mashir Barkat Ali has stated that ASI prepared said mashirnama after sealing the case property; they consumed 10/15 minutes in completing all formalities at the place of incident; ASI sealed the said property within 10 minutes; complainant ASI Dur Mohammad has stated that he saw the car of accused at the distance of about

20 steps first while mashir PC Barkat Ali has stated that they saw the vehicle of the accused from the distance of about two kilometers; complainant ASI Dur Mohammad has stated that he separated one bottle from each carton for chemical examination report, and sealed the remaining property separately, but in cross examination he has stated that PC Ghulam Mohammad Siyal sealed the recovered case property on his dictation, and he admitted that it is not mentioned in the memo of recovery that PC Ghulam Mohammad sealed the recovered property; they sealed the recovered property at check post after taking out the same from the car and whereas mashir PC Barkat Ali has stated that ASI himself sealed the recovered property after separating the same from the vehicle, he does not speak about the separation of one bottle from each carton i.e. 08 bottles and sealing of the same as samples etc, but he only stated that they took the recovered property into safe custody; complainant ASI Dur Mohammad has stated that they left the checking post at about 12.45 a.m. for P.S Radhan station and whereas mashir PC Barkat Ali has stated that they left check post at 12/12-15 a.m. and they reached at P.S within five minutes; complainant ASI Dur Mohammad has stated that they went to Radhan Station by the car of accused persons as well as two motorcycles belonging to them; PC Ghulam Mohammad was with him in the car at the time when they went to P.S Radhan Station; he himself drove the car of accused persons at the time of going to P.S Radhan station and PC Ghulam Mohammad was driving the motorcycle and leading their car, while mashir PC Barkat Ali has stated in his cross examination that, they went to P.S Radhan station by police mobile which was called by ASI Dur Mohammad; they put the case property as well as accused persons in police mobile and then went to P.S Radhan station from check post Agra Mor; one driver PC Azam drove the car of accused person to

police station Radhan along with them, and whereas I.O ASI Asghar Ali has stated that the complainant came at police station on the recovered car alongwith the accused and the recovered property; PC Barkat Ali and PC Ghulam Mohammad were also accompanied with the complainant; accused Sadam Lakho was driving the recovered car when he arrived at police station. When confronted to the contents of F.I.R and memo of arrest & recovery complainant ASI Dur Mohammad has stated that company of recovered wine is not mentioned in the F.I.R as well as in memo of recovery; he further admitted that it is not mentioned in memo of recovery that PC Ghulam Mohammad sealed the recovered property; he has not produced the entry of arrival at the police station Radhan and copy of entry of register No.19 (property register) regarding safe custody of alleged recovered property. It is worthwhile to mention here that under the given circumstances PC Ghulam Mohammad and PC Azam were necessarily to be examined, but the prosecution has not examined either of them.

11. Record further reveals that the property i.e. the alleged liquor was shown to have been recovered on 04.10.2020 and chemical examiner's report produced at Ex.5/E reflects that the same was sent through letter No.RC 74 dated 07.10.2020, which was received in the office of chemical examiner's laboratory on 08.10.2020 through PC Nisar Ahmed B.No.1448 i.e. after four days and no explanation for sending the parcel for its analysis after such delay has been offered by the prosecution; even PC Nisar Ahmed, who allegedly carried and delivered the aforesaid parcel in the chemical examiner's laboratory was neither examined by the prosecution nor was even cited as witness and even receipt or entry of roznamcha showing the deposit of the recovered property including parcel sealed separately for analysis in

malkhana has not been produced in evidence. And, thus the safe custody and/or safe transmission of the aforesaid parcel for its analysis to the chemical examiner's laboratory and its safe return to the I.O has also not been established by the prosecution by producing any sort of evidence oral and/or documentary. Moreover, per complainant ASI Dur Mohammad, he himself written down the mashirnama of recovery while sitting on the chair and table at check post Agra Mor; PC Ghulam Mohammad Siyal, who sealed the recovered case property on his dictation, consumed about one hour or one and half hour in sealing the recovered property at the place of incident; which also negates the prosecution case, for, the incident was shown to have taken place on 04.10.2020 at 2330 hours, but the F.I.R produced at Ex.03/A reveals that it was lodged by complainant ASI Dur Mohammad on 05.10.2020 at 0100 a.m i.e. within one and half hours of the incident that too after completing all the formalities namely stopping the vehicle, making search and recovery of 08 cartons separating one bottle from each carton, making body search of the two applicants, recovering currency notes and other personal belongings of the applicants including mobile sets etc, sealing the separated bottles and remaining property separately, preparing mashirnama and then leaving the check post and reaching at police station by covering a distance of 02 kilometers and lodging the F.I.R at 0100 hours i.e. within one and half hour of the incident, is manifestly incomprehensible.

12. The above infirmities; material and glaring contradictions; omissions and admissions adverse to the prosecution case; and dishonest and deliberate improvements in their statements by the PWs during the trial qua the contents of the F.I.R, and mashirnama of arrest & recovery, rendered the credibility of the prosecution witnesses doubtful and their evidence unreliable and in my

humble view, no explicit reliance can be placed upon their evidence and mere fact that the police witnesses have no enmity to falsely implicate the applicants, by itself, is not a strong circumstance to hold that whatever has been alleged by the prosecution witnesses should be implicitly relied upon without asking for supporting evidence. In case of **Muhammad Mansha Vs. The STATE [2018 SCMR 772]**, the Hon'ble Supreme Court of Pakistan has held that:

Once the Court comes to the conclusion that the eye-witnesses had made dishonest improvements in their statements then it is not safe to place reliance on their statements. It is also settled by this Court that when ever a witness made dishonest improvement in his version in order to bring his case in line with the medical evidence or in order to strengthen the prosecution case then his testimony is not worthy of credence. The witnesses in this case have also made dishonest improvement in order to bring the case in line with the medical evidence (as observed by the learned High Court), in that eventuality conviction was not sustainable on the testimony of the said witnesses. Reliance, in this behalf can be made upon the cases of Sardar Bibi and another v. Munir Ahmad and others (2017 SCMR 344), Amir Zaman v. Mahboob and others (1985 SCMR 685), Akhtar Ali and others v. The State (2008 SCMR 6), Khalid Javed and another v. The State (2003 SCMR 1419), Mohammad Shafiqe Ahmad v. The State (PLD 1981 SC 472), Syed Saeed Mohammad Shah and another v. The State (1993 SCMR 550) and Mohammad Saleem v. Mohammad Azam (2011 SCMR 474).

In the case of **Muhammad Ilyas V. The State (1997 SCMR 25)**, the Hon'ble Supreme Court of Pakistan has held that:-

"It is well-settled principle of law that where evidence creates doubt about the truthfulness of prosecution story, benefit of such a doubt had to be given to the accused without any reservation. In the result, there is no alternative but to acquit the appellant by giving him benefit of doubt".

13. In view of what has been stated above, it is crystal clear that the prosecution case is full of doubts and the prosecution has failed to prove its case against the applicants beyond a reasonable doubt. It needs no reiteration that a single circumstance creating reasonable doubt in the prudent mind about the guilt of the accused, benefit thereof is to be extended to the accused not as a matter of grace or concession, but as matter of right. Reliance in this context is placed on the case of **Ghulam Qadir and 2 others V. The State (2008 SCMR 1221)**, wherein the Hon'ble Supreme Court of Pakistan has held that:-

"16. It needs no reiteration that for the purpose of giving benefit of doubt to an accused person, more than one infirmity is not required, a single infirmity creating reasonable doubt in the mind of a reasonable and prudent mind regarding the truth of the charge-makers the whole case doubtful. Merely because the burden is on the accused to prove his innocence it does not absolve the prosecution from its duty to prove its case against the accused beyond any shadow of doubt end this duty does not change or vary in the case. A finding of guilt against an accused person cannot be based merely on the high probabilities that may be inferred from evidence in a given case. Mere conjectures and probabilities cannot take the place of proof. Muhammad Luqman v. The State PLD 1970 SC 10."

In the case of MUHAMMAD MANSHA supra, the Hon'ble Supreme Court of Pakistan has observed that:

"4. Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of Tariq Pervez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Muhammad Akram v. The State (2009 SCMR 230) and Muhammad Zaman v. The State (2014 SCMR 749).

In the case of **Muhammad Akram v. The State (2009 SCMR 230)**, the Hon'ble Supreme Court of Pakistan has held that:

"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 the 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 of right."

14. The cases cited by the learned Prosecutor General for the State being distinguishable on facts and circumstances are not helpful to the prosecution, for, none of the cases cited by him involved the facts and circumstances as are involved in the case one in hand.

15. Patently, the aforesaid material and glaring contradictions, infirmities, omissions and admissions adverse to the prosecution case and dishonest and deliberate improvements in the statements of the prosecution witnesses during the trial, which did go to the root of the case, rendering it doubtful, were not at all attended to by the learned trial Court while passing the impugned judgment dated 05.03.2021, convicting and sentencing the applicants, although the learned Trial Court was obliged to take into consideration the material placed before it for arriving at the conclusion as to whether a fact was proved or not, because the proof of a fact depends upon the probability of its having existed; likewise the learned Appellate Court which is the Court of reappraisal of evidence, without considering the aforesaid aspects of the case and appreciating the evidence in its true perspective, has dismissed the criminal appeals filed by the applicants against the impugned conviction judgment dated 05.03.2021, maintaining the

conviction and sentence awarded to them by the learned trial Court. In such view of the matter, the impugned judgment dated 05.03.2021, passed by the learned trial Court, convicting and sentencing the applicants as discussed supra and the impugned judgment dated 20.03.2021, passed by the learned Appellate Court, maintaining the conviction and sentence awarded to the applicants by the learned trial Court, suffer from mis-reading and non-reading of the evidence, which cannot sustain. Accordingly, the captioned Criminal Revision Petition is allowed and conviction and sentence awarded to the applicants vide impugned judgment dated 05.03.2021, passed by the learned trial Court and the impugned judgment dated 20.03.2021 passed by the learned Appellate Court, maintaining the conviction and sentence of the applicants, are set aside and the applicants are acquitted of the charge, extending them benefit of doubt. The applicants are on bail and their bail bonds stand discharged.

(JUSTICE KHADIM HUSSAIN M.SHAIKH)
JUDGE

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