

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD**

Before:

Mr. Justice Abdul Maalik Gaddi  
Mr. Justice Mohammad Karim Khan Agha

Cr. Appeal No.D-55 of 2018.

Abdul Rehman

Versus.

The State.

Appellant : Abdul Rehman	Through Mr. Muhammad Shafique Khan, Advocate
Respondent : The State	Through Mr. Muhammad Ayoob Kasar, Special Prosecutor ANF
Date of hearing	19.09.2018
Date of judgment	19.09.2018

**J U D G M E N T**

**MOHAMMAD KARIM KHAN AGHA, J.-** This criminal appeal is directed against the judgment dated 24.04.2018, passed by the learned Sessions/ Special Judge (CNS), Hyderabad, in Special Case No.91 of 2016, arising out of Crime No.D040403116, registered at Police Station ANF Hyderabad, under section 9(b) of the Control of Narcotic Substances Act, 1997 (CNSA), whereby the appellant Abdul Rehman has been convicted u/s 9(b) CNSA and sentenced to suffer RI for 18 months and to pay the fine of Rs.10,000/-. In case of default in payment of fine he was ordered to suffer imprisonment for 01 month more (the impugned judgment). Benefit of Section 382-B Cr.P.C. was also extended to the accused.

2. Brief facts of the prosecution case as disclosed in the FIR are that present accused was arrested on 15.07.2016 at 07:00 p.m. from a hut situated near Zeal Pak Cement Factory, Hyderabad by a police party headed



by SIP Masood Ahmed alongwith other ANF officials namely ASIs Qurban Hussain and others and on his personal search accused Abdul Rehman was found possessing contraband item / opium weighing 400 grams, which was sealed for chemical examination and report. Thereafter, memo of arrest and recovery was prepared at the spot in presence of mashirs. Then accused and case property were brought at police station where F.I.R. was lodged by the complainant.

3. On the conclusion of investigation challan was submitted against the accused for offence u/s 9(b) CNSA.

4. Trial Court framed charge against accused u/s 9(b) CNSA at Ex.3, to which, he pleaded not guilty and claimed to be tried. At the trial prosecution examined PW-1 mashir/PC Abdul Shakoor at Ex.5, who produced mashirnama of arrest/recovery and extracts of entries of departure and arrival at Ex.5/A and 5/B; PW-2 SI/complainant Masood Ahmed was examined at Ex.6; who produced copy of F.I.R., letter to the chemical examiner and report at Ex.6/A to 6/C and thereafter, prosecution side was closed.

5. Statement of accused was recorded u/s 342 Cr.P.C. at Ex.8, wherein he denied the prosecution allegations and claimed his false implication in this case. He however, did not examine himself on oath nor lead any defense.

6. Learned Special Judge after hearing the learned counsel for the parties and examining the evidence available on record convicted and sentenced the appellant as stated above by the impugned judgment. Hence this appeal.

7. Learned trial court in the impugned judgment has already discussed the evidence in detail and there is no need to repeat the same here, so as to avoid duplication and unnecessary repetition

8. Mr. Mohammed Shafique Khan learned advocate for appellant has contended that the appellant has been involved in this case falsely; that actually the appellant was arrested by the ANF Officials from Raju Nizamani where he used to run his iron shop and the case property has been foisted upon him; that the case in hand is highly doubtful; that the place of incident was located at busy spot, yet, none from public was joined to attest the arrest and recovery; that there are material contradictions in prosecution evidence, hence it cannot be safely relied upon; that the contraband item was allegedly



recovered on 15.07.2016, whereas it was sent for chemical examination on 18.07.2016 with an inordinate delay of 03 days and tampering with the case property during such period could not be ruled out especially when no evidence has been brought on record that the alleged narcotic substance was in safe custody during that period; that as per the F.I.R. weight of the contraband item allegedly secured from the possession of the appellant was 400 grams whereas as per report of the Chemical Examiner it was 395 grams, such contradiction has caused a dent in the prosecution case; that the appellant has already served 5 months out of an 18 month sentence and in any event the amount allegedly recovered is very small in quantity; that the appellant is a first time offender which gives support to his contention that the narcotics were foisted on him; that these material aspects of the case coupled with other material contradictions in the evidence of the prosecution witnesses, the prosecution has miserably failed to prove its case against the appellant, therefore, the impugned judgment may be set aside and the appellant be acquitted of the charge.

9. Mr. Muhammad Ayoob Kasar, the learned Special Prosecutor ANF fully supported the impugned judgment and in particular contended that the issue of independent Mushirs was not relevant as section 103 CR.PC has been specifically excluded by S.25 CNSA; 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 and the report of the chemical analyzer is positive and thus the appeal should be dismissed. In support of his contentions he placed reliance on the cases reported as **Muhammad Sarfraz V The State and others** (2017 SCMR 1874), **Zafar V The State** (2008 SCMR 1254), **Ghulam Nabi V The State** (2018 PCr.LJ Note 91), **Mst. Haseena Baloch V The State** (2018 YLR Note 32) and an unreported order passed by the Honourable Supreme Court of Pakistan in the case of **The State/ANF V Azizullah** (Cr. P. No.93-K/2017).

10. We have heard the learned counsel for the parties, scanned the entire evidence and considered the relevant law.

11. We have come to the conclusion that prosecution has failed to establish its case for the following reasons; that the alleged place of incident was a busy area but apparently no efforts have been made to pick up an independent person of the locality to witness the arrest and recovery



proceedings although this requirement of independent mushirs alone is not fatal to the prosecution case (and is not a mandatory requirement bearing in mind S.25 CNSA) in cases such as this where the police have advance spy information where the offense is being committed at least some effort should be made by the police to bring independent Mushirs along with them to bolster their case and give more weight to the same; that the complainant and the IO were the same and although this is not unlawful as a matter of propriety and transparency it is preferable if the IO is not also the complainant; that as per record the alleged contraband item was recovered on 15.07.2016, but it was sent for chemical examination on 18.07.2016 with a delay of 03 days although such delay is not fatal to the prosecution case it causes concern.

12. **Most significantly**, we find that there is very little evidence on record to show that the opium was kept in safe custody from the time of its recovery until it was received by the chemical examiner after an unexplained delay of 3 days; that no entry of the chemical being deposited in the Malkhana has been produced; that the person in charge of the Malkhana was not examined to prove the safe custody of the narcotic in the Malkhana; that although PC Abdul Shakoor who took the chemical to the chemical examiner has been examined he was **not** examined on the point of safe custody of the narcotic and even otherwise there is no entry as to his arrival and departure. In the case of **Muhammad Sarfraz V The State (2017 SCMR 1874)** where there was no negative evidence of non safe custody the conviction was upheld. **Muhammad Sarfraz's case** (Supra) however was by a two member bench of the Hon'ble Supreme Court and the case of **Ikramullah & others v/s. the State (2015 SCMR 1002)** which was by a three member bench does not seem to have been brought to its attention. In **Ikramullah's case** (Supra) the emphasis was on the **positive proof** of safe custody of the narcotic by the prosecution from the time of its recovery until the time it went for chemical examination which would rule out any possibility of the narcotic being tampered with. Since **Ikramullah's case** (Supra) was decided by a three member bench of the Hon'ble Supreme Court and was not brought to the attention of the Hon'ble Supreme Court in **Muhammad Sarfraz's case** (Supra) we are inclined to follow **Ikramullah's case** (Supra) in respect of safe custody of the narcotic.



13. Thus, in our view in this case since there is a possibility that the narcotic during the time it was recovered from the appellant and was received by the chemical examiner may not have been kept in safe custody and may have been tampered with we find that even a positive chemical report is of no assistance to the prosecution; the significance of keeping safe custody of the narcotic in a case under the CNSA has been emphasized in **Ikramullah's case** (Supra), the relevant portion of which is reproduced hereunder:-

**"5. In the case in hand not only the report submitted by the Chemical Examiner was legally laconic but safe custody of the recovered substance as well as safe transmission of the separated samples to the office of the Chemical Examiner had also not been established by the prosecution. It is not disputed that the investigating officer appearing before the learned trial court had failed to even to mention the name of the police official who had taken the samples to the office of the Chemical Examiner and admittedly no such police official had been produced before the learned trial Court to depose about safe custody of the samples entrusted to him for being deposited in the office of the Chemical Examiner. In this view of the matter the prosecution had not been able to establish that after the alleged recovery the substance so recovered was either kept in safe custody or that the samples taken from the recovered substance had safely been transmitted to the office of the Chemical Examiner without the same being tampered with or replaced while in transit."** (bold added)

14. Under these circumstances and for the other reasons mentioned above we are of the considered view that the prosecution has not proved its case against the appellant beyond a reasonable doubt. It is well settled law that the benefit of doubt must go to the accused by way of right as opposed to concession. In this respect reliance is placed on the case of **Tariq Pervez V/s. The State** (1995 SCMR 1345), wherein the Honourable Supreme Court has observed as follows:-

**"It is settled law that it is not necessary that there should be 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."**

15. For the above stated reasons, we hold that the prosecution has failed to prove its case against the appellant, therefore, while extending the benefit of doubt, by short order announced in open court today the instant appeal



was allowed; the impugned judgment was set aside and the appellant was acquitted of the charge. The short order is reproduced as under:-

" Parties' Advocates have been heard at length. They have concluded their arguments. For the reasons to be recorded later on, this appeal is allowed and the impugned judgment dated 24.04.2018 passed by the learned Sessions Judge / Special Judge (CNS) Hyderabad in Special Case No.91 of 2016, arising out of Crime No.D040403116 of 2016 of P.S. ANF, Hyderabad, is set-aside and consequently the appellant is acquitted of the charge. Appellant *Abdul Rehman S/o Abdul Jabbar* is behind the bars, **he is ordered to be released forthwith, if he is not required in any other custody case.**"