

JUDGMENT SHEET.
HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD.
CRIMINAL APPEAL NO.D-60 OF 2005.

Date

Order with signature of Judge

PRESENT: 1. Justice Ahmed Ali M. Shaikh .
2. Justice Salman Hamid .

Appellant: Younus through Mr. Noorul Haq Qureshi, Advocate.

Respondent: The State through Syed Meeral Shah, Deputy Prosecutor
General, Sindh at Hyderabad.

Date of hearing: 20.08.2010.

Date of judgment: 21.08.2010.

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Ahmed Ali M. Shaikh J: This appeal is directed against the Judgment dated 12.04.2005 passed by the learned Special Judge CNS Dadu in Special Case No.158/2004 culminating from crime No.22/2004 of P.S Johi for offence punishable u/s 9(c) Control of Narcotics Substances Act, 1997 by which the appellant was convicted and sentenced to suffer rigorous imprisonment for 05 years and to pay fine of Rs.30,000/-and in case of non payment of fine, he had to suffer further R.I. for six months, however, benefit of section 382B Cr.P.C was extended to appellant/appellant.

2. Briefly stated the facts of the prosecution case are that on 16.04.2004 at 1545 hours ASI Muhammad Saleh Pitafi incharge P.P Phulji village of P.S. Johi lodged the report at P.S. Johi stating therein that on the same day at 1300 hours, he alongwith his subordinate staff with arms and ammunition left P.P. on two motorcycles for patrolling vide D.D. entry No.7. During patrolling, when they reached near Fazul Fakir Makan, complainant received secret information that Younus Jamali is selling charas at his Poultry Farm, following which, they went towards the pointed place and at about 1415 hours reached there and saw appellant having blue colour shopper in his hand, who on seeing them in police uniform tried to flee but they encircled and apprehended him alongwith blue shopper. The complainant secured the shopper from the appellant, opened the same and found four big pieces and 11 little pieces of charas lying in it. From the body search of appellant, complainant secured cash amount of Rs.185/- from his front pocket. The charas was weighed with weighing scale of Poultry machine, which became 1120 grams, out of which complainant separated two pieces of charas weighing 50 grams for chemical examination while remaining charas was also sealed separately. Such mashimama of arrest and recovery was prepared in presence of mashirs HC Muhammad Umer and PC Abdul Latif. The complainant brought the appellant and property at P.S and lodged the report.

3. After usual investigation, appellant was sent up to face the charge.

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4. Formal charge was framed by the trial court to which the appellant pleaded not guilty and claimed his trial.

5. To substantiate its case, prosecution examined P.W.1 ASI Muhammad Saleh Pitafi, who produced mashimama of arrest and recovery, D.D. entry No.7, FIR and report of chemical examiner, P.W.2 HC Muhammad Umar and P.W.3 Inspector Nazeer Ahmed Solangi and closed its side.

6. Appellant's statement u/s 342 Cr.P.C was recorded whereby he denied the prosecution allegations and pleaded his innocence. He also examined himself on oath and examined D.W.1 Ahmed Ali Jamali and D.W.2 Allah Jurio Jamali.

7. After hearing the learned counsel for the parties, trial court passed the impugned Judgment as stated above.

8. It is inter alia contended by the learned Counsel for the appellant that the appellant is innocent and charas was foisted upon him. Per learned counsel though the police party had advance information but not a single person of the locality was associated to act as mashir. It is further contended that there are various inconsistencies and contradictions in the prosecution evidence on material points. P.Ws have given their own version which did not corroborate the prosecution case. It is lastly contended that per FIR and depositions of P.Ws. 1 & 2, 50 grams charas was sealed separately which was sent to chemical examiner but chemical examiner's report reveals that 38 grams charas was sent for chemical test. It is further contended that per chemical report, charas was sent to the Laboratory on 13.05.2004 through HC Maqbool Shah but the same was received on 18.05.2004, hence no sanctity can be attached to the prosecution case.

9. Learned Deputy Prosecutor General Sindh for the State supported the impugned Judgment.

10. Heard learned counsel for the parties and perused the record.

11. P.W.1 Muhammad Saleh in deposition narrated the same facts with regard to the spy information, arrest and recovery of the charas from the appellants as well as weight. In his examination in chief he stated that he recovered charas lying in blue shopper, however, in cross examination while replying to a suggestion he admitted as under:-

"It is correct to suggest that the charas is lying in white plastic shopper"

As far as the quantity of sample is concerned, in the FIR as well as deposition, he stated that he got separated 50 grams of charas for sending it to the chemical examiner, however, in the FIR he has mentioned that two pieces of charas were separated which became 50 grams and same were sealed separately for chemical examination. On this point, P.W H.C. Muhammad Umar in his examination in chief stated that 50 grams charas was taken from little pieces of charas for sending to the

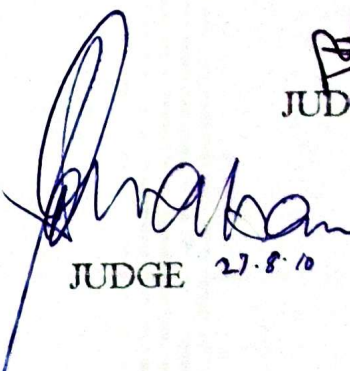
chemical examiner. In cross examination, P.W ASI Muhanunad Saleh stated that he reached at the place of incident at about 2.15 p.m. whereas P.W.2 HC Muhammad Umar in cross examination while replying to a suggestion explained that it was 1415 hours when they reached at Stop of Fazul Fakeer. In cross examination, he further stated that "We took one hour in reaching the place of incident from Fazul Fakir Bus Stop". Apparently there is inconsistency between the evidence of the P.Ws with regard to their arrival at the place of occurrence.


12. Admittedly, alleged incident took place on 16.04.2004 whereas the sample was sent to the Chemical Examiner on 13.05.2004 after about one month, the same was received on 18.05.2004. With regard to mashirnama of place of wardat, the complainant stated that "I do not know if SHO had prepared memo of place of incident or not". In examination in chief, he did not state that he led the SHO to the place of incident. In his examination in chief, P.W.1 Muhammad Saleh stated that he recorded the 161 Cr.P. C statements of P.Ws whereas P.W.3 Inspector Nazeer Ahmed stated that he recorded the statements of P.Ws and interrogated the appellant. In cross examination, he admitted that he did not visit the place of incident but he had received the memo of place of incident with other papers.

13. From the perusal of depositions of the P.Ws it appears that there are glaring contradictions in the prosecution evidence with regard to quantity of charas, which was sent to the chemical examiner as in the FIR as well as in their depositions. P.Ws. No.1 & 2 stated that 50 grams of charas was sent to the Chemical Examiner but Chemical Examiner's report reveals that 38 grams of charas was sent for test. On the point of recording 161 Cr.P.C statements of P.Ws, ASI Muhammad Saleh stated that he recorded 161 Cr.P.C statements of the witnesses whereas P.W.3 Inspector Nazeer Ahmed stated that he recorded 161 Cr.P.C statements of the witnesses. In FIR and memo of recovery it is mentioned that charas was found in blue colour shopper whereas during trial the charas was produced in white colour shopper. So far arrival at place of occurrence is concerned, in this regard, P.W. ASI Muhammad Saleh stated that they reached at place of incident at 2.15 p.m. whereas on this point H.C. Muhammad Umar stated that at 1415 hours, when they reached at Stop of Fazul Fakir ASI received spy information. He further stated in his cross examination that they took one hour in reaching at the place of incident from Fazul Fakir Bus Stop. However, mashirnama of arrest and recovery as well as FIR show that the police party reached at the place of occurrence at 1415 hours, hence FIR and memo of arrest and recovery do correspond with the deposition of P.W Muhammad Umar Panhwar. The charas was sent for chemical examination after delay of about one month, therefore, report of Chemical Examiner could not be relied upon as good piece of evidence against the appellants/appellant and the prosecution did explain that during such time whether the charas was kept in safe custody or same was not tampered with.

14. In view of above contradictions and inconsistencies, we are of the opinion that prosecution could not prove its case beyond shadow of doubt. In the prosecution case there are many circumstances creating doubt about the guilt of the appellant. In case of *Tarique Bashir Vs. The State* reported in 1995 SCMR 1345, it was held by their Lordships that for giving benefit of doubt to an appellant it is not necessary that there should be many circumstances creating doubt. If a single circumstance creates reasonable doubt in the prudent mind about the guilt of the appellant, then he will be entitled to such benefit not as a matter of grace and concession but as a matter of right. In case of *Ghulam Murtaza vs. The State* reported in 2010 P Cr. L J 461 it is held that many circumstances are not required to give benefit of doubt to the appellant but if single circumstance creates reasonable doubt in a prudent mind about the guilt of the appellant, that would make him entitled to benefit of doubt as a matter of right.

15. For the foregoing reasons, the appeal was allowed by our short order dated 20.08.2010, whereby appellant was acquitted from the charge, his bail bond was cancelled and surety was discharged.


JUDGE 27.8.10


JUDGE 26.8.2010