

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

Before:

Mr. Justice Naimatullah Phulpoto
Mr. Justice Mohammad Karim Khan Agha

Cr. Appeal No.D-29 of 2010.

Muhammad Siddique

Versus.

The State.

Appellant : Muhammad Siddique (despite on bail is not present).	Through Mr. Muhammad Sharif Siyal, Advocate.
Respondent : The State	Through Syed Meeral Shah Bukhari, Additional Prosecutor General.
Date of hearing	24.05.2017.
Date of judgment	24.05.2017.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- This appeal is directed against the judgment dated 04.01.2010 passed by learned Special Judge for CNS, Nawabshah in Special Case No.73 of 2007, arising out of Crime No.01 of 2007, registered at Police Station Excise Town Nawabshah, under section 9(b) of Control of Narcotic Substances Act, 1997(CNSA), whereby the appellant Muhammad Siddique has been convicted u/s 9(b) of CNSA and sentenced to suffer SI for 06 months and to pay the fine of Rs.10,000/-. In case of default in payment of fine he was ordered to suffer simple 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 17.03.2007 at about 11:30 a.m. from near Khan Petrol Pump, Nawabshah-Sanghar Link Road, by a police party headed by Excise Inspector Hadi Bux, alongwith his subordinate staff namely E.C. Lakha Dino and others. Accused Muhammad Siddique was said to be found possessing contraband item weighing 500 grams, out of which a sample weighing 100 grams was separated for sending the same to the chemical examiner for analysis and report. Thereafter, the contraband item and its sample, as stated above, were sealed separately and memo of arrest and recovery was prepared on the spot in presence of mashirs. Thereafter, accused and case property were brought at police station where F.I.R. was lodged by complainant Excise Inspector Hadi Bux on behalf of the State under section 9(b) CNSA.

3. During investigation, Investigating Officer recorded 161 Cr.P.C. statements of the PWs. Sample of the recovered substance was sent to the chemical examiner on 17.03.2007 through EC Muhammad Sajjan and positive chemical report was received. On the conclusion of investigation challan was submitted against the accused for offence u/s 9(b) CNSA.

4. Trial court framed the charge against accused at Ex.2 u/s 9(b) CNSA, to which, accused pleaded not guilty and claimed to be tried vide his plea at Ex.3. At the trial prosecution examined PW-1 complainant Excise Inspector Hadi Bux at Ex.6, who produced mashirnama of arrest and recovery at Ex.6-A, F.I.R. at Ex.6-B, Roznamcha entry at Ex.6-C, Chemical report at Ex.6-D; PW-2 / Mashir E.C. Mumtaz Ali was examined at Ex.7 and thereafter, prosecution side was closed at Ex.8.

5. Statement of accused was recorded u/s 342 Cr.P.C. at Ex.9. The accused denied the prosecution allegations and claimed his false implication in this case. He stated that he was arrested from the village of Mari and case property has been foisted upon him; that all P.Ws are interested and the accused both examined himself on oath at Ex.10 and also examined D.W-2 Faqir Muhammad at Ex.12 in his defence.

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 in 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. Muhammad Sharif M. Siyal, learned advocate for appellant has contended that the prosecution case is highly doubtful; that the place of incident was located at busy spot, yet, none from the public was joined to attest the arrest and recovery; there are material contradictions in prosecution evidence, hence it cannot be safely relied upon; that as per prosecution case the sample was sent for Chemical analysis on 17.03.2007 through EC Muhammad Sajjan, whereas the Chemical Examiner's report shows that the sample of Narcotic substance was received in the said office on 19.03.2007 with a delay of two days hence tampering with the case property during such period could not be ruled out. He further argued that EC Muhammad Sajjan through whom the said sample was sent to Chemical Examiner, has also not been examined. Lastly he argued that accused has been involved in this case falsely.
9. Syed Meeral Shah, learned Additional Prosecutor General Sindh very fairly conceded to the contentions of learned counsel for the appellant and did not support the impugned judgment.
10. We have carefully considered the arguments of the learned counsel for the parties, scanned the entire evidence and reviewed the relevant case law.
11. We have come to the conclusion that the prosecution has failed to prove its case against the appellant for the following reasons; that the accused was found in suspicious manner and 500 grams charas was recovered from his possession. The alleged place of incident was a busy area but apparently no serious efforts have been made to pick up an independent person of the locality to witness the arrest and recovery proceedings despite the arrest and recovery being made in

day light hours; that the appellants defense witness DW Faquir Muhammad has supported his defense; that the appellant was a lay man without a lawyer and under these circumstances it was incumbent on the learned trial judge either to appoint a lawyer for him at State expense or ask himself relevant questions of the PW's in order to satisfy himself about there evidence and this failure to adopt either ^{course} has violated the due process rights of the appellant under A.10 (A) of the Constitution and in particular the right to a fair trial; that there was an unexplained delay of 2 days in sending the recovered sample for chemical analysis.

12. More importantly there is no evidence on record to show that the sample was kept in safe custody during this 2 day period from the time of its recovery until it was sent to the chemical examiner. There is no evidence that it was ever kept in the malkhana or elsewhere with the police in safe custody. PC Sajjan who took the chemical to the chemical examiner was not examined as to the safe custody and transit of the chemical nor was any one else in this respect. Under these circumstances in our view despite the chemical report proving positive it is of no assistance to the prosecution as the prosecution has not been able to prove the safe custody of the narcotic from the time of its recovery until the time it was sent to the chemical examiner for testing and as such it may have been tampered/interfered with during this period of time. Since heavy sentences can be handed down in narcotics cases we consider that we need to consider the evidence in a stringent manner and in so doing do not find that the prosecution has proved safe custody of the narcotic beyond a reasonable doubt. In this regard reliance is placed on the case of **IKRAMULLAH & OTHERS V/S. THE STATE** (2015 SCMR 1002) the relevant portion 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."

13. In view of the above, coupled with the other above mentioned reasons we hold that in this case the prosecution has failed to prove its case against the appellant beyond a reasonable doubt and that the appellant is entitled to the benefit of the doubt as of right as opposed to concession as was held in the case of **Tariq Pervez V/s. The State** (1995 SCMR 1345)

14. 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 instant appeal was allowed; the impugned judgment was set aside and the appellant was acquitted of the charge and the appellant's (who is on bail) bail bond stood canceled and his surety discharged.

15. Above are the reasons for our short order of even date.