

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

Before:

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

Cr. Appeal No.D-98 of 2013.

Vikal Shah alias Gul Muhammad Shah

Versus.

The State.

Appellant : Vikal Shah alias Gul Muhammad Shah, (present on bail).	Through Mr. Shahid Sahito, 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 05.12.2013 passed by learned Special Judge for CNS, Hyderabad, in Special Case No.118 of 2009, arising out of Crime No.224 of 2009, registered at Police Station Hali Road, Hyderabad, under section 9(b) of Control of Narcotic Substances Act, 1997 (CNSA) whereby the appellant Vikal Shah alias Gul Muhammad Shah has been convicted u/s 9(b) of CNSA and sentenced to suffer RI for 01 year and 09 months and to pay the fine of Rs.13,000/-. In case of default in payment of fine he was ordered to suffer simple imprisonment for 04 months and 15 days 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 09.12.2009 at about 0600 hours from near Wazir Ali Industries adjacent to Model School, by a police party headed by SIP Lutufullah, alongwith his subordinate staff namely ASI Ismail and others. Accused Vikal Shah alias Gul Muhammad was said to be found possessing contraband item weighing 800 grams, out of which contraband item weighing 10 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 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 SIP Lutufullah 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 14.12.2009 through HC Zamir Ahmed and positive chemical report was received. On the conclusion of investigation challan was submitted against the accused for offence u/s 9(b) of CNSA.

4. Trial Court framed 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 SIP Lutufullah at Ex.4, who produced departure entry at Ex.5, mashirnama of arrest and recovery at Ex.6, FIR at Ex.7; PW-2 ASI Muhammad Ismail examined at Ex.8, who produced mashirnama of vardat at Ex.9; PW-3 SIP / I.O. Muhammad Sulleman was examined at Ex.10, who produced Chemical report at Ex.10/A and thereafter, prosecution side was closed at Ex.11.

5. Statement of accused was recorded u/s 342 Cr.P.C. at Ex.12. The accused denied the prosecution allegations and claimed his false implication in this case at the instance of one Ali Muhammad Sahito on account of political rivalry. The accused neither examined himself on oath in disproof of the prosecution allegations nor led any evidence 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 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. Shahid Sahito, learned advocate for appellant has contended that prosecution case is highly doubtful; this is a case of spy information and the place of incident was located at busy spot, yet, none from the public was joined to attest the arrest and recovery; that there are material contradictions in the prosecution evidence, hence it cannot be safely relied upon; that there was delay in sending the case property to the chemical examiner and tampering with the case property during such period could not be ruled out. It is argued that alleged recovery was made on 09.12.2009, whereas the sample was sent to chemical analyzer on 14.12.2009 with a delay of 05 days and no evidence has been brought on the record that narcotic substance was in the safe custody during that period. He further argued that HC Zamir Ahmed through whom the said sample was sent to the chemical examiner has also not been examined. Lastly he argued that accused has been involved in this false case due to enmity with one Ali Muhammad Sahito on account of political victimization. In support of his contentions, learned counsel for the appellant relied upon the case of **Ikramullah & others v. the State** (2015 SCMR 1002).

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



appellant was found in suspicious manner with 800 grams charas in his possession which was based on spy information yet no effort was made by the police to associate an independent Mushir despite having sufficient time to do so and it being morning time in a thickly populated area to witness the arrest and recovery proceedings; that no effort was made to send a fake purchaser to see if the appellant was in fact selling drugs; that there is overwriting which has not been explained in the memo of arrest and recovery; that 76 rods of charas were recovered however there is no evidence that a sample was taken from each rod and that there was an unexplained delay of 5 days in sending the 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 5 day period from the time of its recovery until it was sent to the chemical examiner. There was no evidence that it was ever kept in the malkhana with PW Muhammed Suleman the IO stating in his evidence that he did not remember when he sent the sample to the chemical examiner and through whom. PC Zamir Ahmed 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.