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# IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Before:

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

Cr. Appeal No.D-48 of 2004

Ghulam Hussain

Versus.

The State.

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| Appellant: Ghulam Hussain Khaskheli. | Through Syed Tarique Ahmed Shah, Advocate. |
| Respondent : The State | Through Syed Meeral Shah Bukhari, Additional Prosecutor General. |
| Date of hearing | 26.05.2017. |
| Date of judgment | 26.05.2017. |

## J U D G M E N T

**MOHAMMAD KARIM KHAN AGHA, J.**- This appeal is directed against the judgment dated 18.03.2004 passed by learned Special Judge for CNS, Nawabshah, in Special Case No.37 of 2001, arising out of Crime No.19/2001, registered at Police Station B-Section, Nawabshah, under section 6/9 of Control of Narcotic Substances Act, 1997 (CNSA), whereby the appellant Ghulam Hussain has been convicted u/s 9(a) CNSA and sentenced to suffer RI for 01 year 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 02 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 08.02.2001 from near Masjid

Farsi Bagh, Gajra Mori, Sanghar road, by a police party headed by SIP Ghulam Nabi Kharal alongwith his subordinate staff. It is further alleged in the FIR that the accused was already wanted in Crime No.16/2001 of the said police station. Accused Ghulam Hussain was said to be found possessing 20 big and small pieces of charas weighing 250 grams. Out of which 20 grams were separated for sending the same to the chemical examiner for analysis and report. Thereafter, the contraband items, 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 Ghulam Nabi Kharal on behalf of the State under section 6/9 CNSA.

3. During investigation, Investigating Officer recorded 161 Cr.P.C. statements of the PWs. Sample of the substance / charas was sent to the chemical examiner on 13.02.2001 through HC Talib Hussain and positive chemical report was received. On the conclusion of investigation challan was submitted against the accused.

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 Investigation Officer / SIP Aziz Ahmed Shaikh at Ex.6, who produced mashirnama of arrest and recovery at Ex.7. PW-2 Incharge Investigation/complainant Ghulam Nabi was examined at Ex.8, who produced F.I.R. at Ex.9, chemical report at Ex.10 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. The accused gave statement on Oath vide Ex.13. He also led defence witness Muhammad Amin as DW-2 Ex.14 in support of his defense and thereafter the defence side was closed.

6. Learned Special Judge after hearing the learned counsel for the parties and examining the evidence available on record convicted and

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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. Syed Tarique Ahmed Shah, learned advocate for appellant has contended that the prosecution case is highly doubtful; the place of incident was located at busy spot, yet, nobody from the public was joined to attest the arrest and recovery; 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 08.02.2001, whereas the sample was sent to Chemical Analyzer on 13.02.2001 with a delay of 06 days and no evidence has been brought on the record that charas was in the safe custody during that period. Lastly he argued that accused has been involved in this false case due to enmity to teach him a lesson

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 heard the parties, considered the evidence on record and the relevant case law.

11. We have reached the conclusion that the prosecution has failed to prove its case against the appellant to the required criminal standard for the following reasons; that during trial no departure entry has been brought on record by the police; that despite the place of incident being a busy area and the recovery being made in daylight hours no attempt was made to associate an independent mashir to attest the arrest and recovery which was important in this case since the appellant has shown enmity between his family and the police (especially PW Ghulam Nabi); that enmity between the appellants family and the police has come on record and as such the evidence of

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the police personnel cannot be safely relied upon without independent corroboration; that the police evidence is extremely doubtful, for example, PW-1 Aziz Ahmed and PW 2 Ghulam Nabi both of whom were police officials stated in their evidence that they had recovered 20 small and big pieces of charas, which were sealed on the spot however, when such pieces of charas were de-sealed in the trial court there were found to be only 19 pieces; that it is unclear from the evidence of PW Ghulam Nabi that samples were taken from each 20 pieces of recovered charas; that there was an unexplained delay of 06 days in the recovery of the charas and sending it to the chemical analyzer for testing; that the appellant was not represented by a counsel and that in such cases the learned trial Judge should have at a minimum asked questions from the P.Ws. so as to satisfy himself about the truthfulness of the evidence and thus the due process rights of the appellant appear to have been violated in terms of Article 10 and 10(A) of the Constitution, especially, as the appellant being a lay man would have no knowledge or experience in law and therefore, would not have been in a position to properly defend himself especially when cross-examining the prosecution witnesses which lead to him being seriously prejudiced and effected the fairness of his trial.

12. Most significantly, we find that there is absolutely no evidence on record to show that the charas was kept in safe custody from the time of its recovery until it was sent to the chemical Examiner, which was an unexplained delay of 06 days which is bolstered by the fact that even when the recovered charas was desealed and opened in court there was only 19 pieces as opposed to the 20 pieces which were allegedly recovered. No explanation has been given as to how one piece of charas went missing from the time of recovery until the time of trial; that there is no evidence that the recovered narcotic substance was kept in the Malkhana of the police station; that no Malkhana entry to this effect has been produced on record; that the Incharge of the Malkhana has not been examined and PC Talib Hussain, who has taken the sample to the chemical examiner for testing the same was also not examined to testify as to the safe-custody and safe transit of the narcotic to the chemical examiner.

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Under these circumstances, there is, in our view, every possibility that the sample of the narcotic during the said 06 days' delay in sending it to the chemical examiner may have been interfered with / tampered with, as it was not kept in safe custody and as such 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 the case of **Ikramullah & others v/s. the State** (2015 SCMR 1002), 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."

13. 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 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."

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14. For the above stated reasons, we hold that prosecution has failed to prove its case against the appellant, therefore, by short order dated 26.05.2017 while extending the benefit of doubt, appeal was allowed. The conviction and sentence recorded by the trial Court were set aside and appellant was acquitted of the charge.

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