

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

Before:

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

Cr. Jail Appeal No.D-74 of 2013.

Amir Hussain alias Biloo

Versus

The State

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Cr. Jail Appeal No.D-87 of 2013.

Naeem

Versus

The State

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Cr. Appeal No.D-14 of 2014.

Naeem

Versus

The State

Appellant : Amir Hussain in Cr. Jail A. No.D-74/2013 (produced in custody)	Through Mr. Farhad Ali Abro, Advocate
Appellant : Naeem in Cr. Jail A. No.D-87/2013 and Cr. Appeal No.D-14/2014 (present on bail)	Through Mr. Ghulamullah Chang, Advocate
Respondent : The State	Through Syed Meeral Shah Bukhari, Additional Prosecutor General.
Date of hearing	29.05.2017.
Date of judgment	29.05.2017.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- Both the aforementioned appellants were tried and convicted in separate matters, however, since the incident was one and same as well as the P.Ws. were also same, therefore, we propose to decide all these three appeals by this common judgment.

2. The appellant Amir Hussain alias Biloo was tried by learned Special Judge for CNS, Sanghar in Special Cases No.68/2012 (arising out of Crime No.190/2012 of PS: Sanghar U/s 9(c) Control of Narcotic Substances Act, 1997 (CNSA)) and convicted by judgment dated 09.09.2013 and sentenced to suffer RI 04 years and to pay fine of Rs.50,000/-. In case of default in payment of the fine the appellant was ordered to suffer S.I. for 06 months more (the first impugned judgment). Whereas appellant Naeem was also tried by the same trial Judge in Special Case No.69/2012, arising out of Crime No.191/2012 of PS: Sanghar, U/s 9(c) CNSA and convicted by judgment dated 09.09.2013 and sentenced to suffer RI for 02 years and to pay fine of Rs.20,000/-. In case of default in payment of fine he was ordered to suffer simple imprisonment for 02 months more (the second impugned judgment) Benefit of Section 382-B Cr.P.C. was also extended to both the accused.

3. Brief facts of the F.I.R. in both the aforementioned prosecution cases are that on 05.09.2012 at 2200 hours SIP Nadeem Akhtar Baig SHO of PS: Sanghar lodged F.I.R, stating therein that on the said date at about 2030 hours under Roznamcha entry No.12 at 1710 hours, he alongwith his subordinate police personnel namely PC Mir Hassan and others left police station for patrolling. After patrolling at different areas when they reached near Church Chowk, he received spy information that two persons were selling charas at an abandoned place situated at gate at Bakhoro road. The police party reached at the pointed place and saw that two persons were selling charas who, on seeing the police party, tried to escape, but police party encircled and apprehended them. On enquiry, one of the apprehended persons disclosed his name as Amir alias Biloo Nizamani. On personal search, the complainant secured one unlicensed 30-Bore pistol bearing No.5762 as well as four big and 20 small pieces of charas from his

possession. Charas was weighed. It came to 04 kilograms. A small quantity was separated from each piece total weighed 10 grams for chemical analysis. Other accused disclosed his name as Naeem S/o Ali Akbar Rajput and from his personal search 14 big and small pieces of charas and one knife were recovered. Charas was weighed. It came to 1150 grams. A small quantity was separated from each piece total weighed 10 grams for chemical analysis. Thereafter, the recovered charas / contraband items and its sample, as stated above, were sealed separately and memo of arrest and recovery was prepared on the spot in presence of mashirs. Then both the accused and case property were taken to the police station where an F.I.R. was lodged by complainant SIP Nadeem Akhtar Baig on behalf of the State under section 9(c) CNSA.

4. During investigation, Investigating Officer recorded 161 Cr.P.C. statements of the PWs. Samples of the recovered substance were sent to the chemical examiner and positive chemical report was received. On the conclusion of investigation challan was submitted against the accused for offence u/s 9(c) CNSA

5. Trial Court framed charge against accused Amir Hussain (Special Case No.68 of 2012) at Ex.2 u/s 9(c) CNSA, to which, accused pleaded not guilty and claimed to be tried vide his plea at Ex.2/A. At the trial prosecution examined PW-1 complainant SIP Nadeem Akhtar Baig at Ex.3, who produced mashirnama of arrest and recovery at Ex.3-A, F.I.R. at Ex.3-B, Departure and Arrival entries at Ex.3-C; PW/I.O. SIP Karim Bux Makrani was examined at Ex.4, who produced mashirnama of place of vardat at Ex.4-A and Chemical report at Ex.4-B; PW-3 PC Mir Hassan Mallah was examined at Ex.5 and thereafter, prosecution side was closed at Ex.6. Statement of the accused was recorded u/s 342 Cr.P.C. at Ex.7. The accused denied the prosecution allegations and claimed his false implication in this case due to enmity with police. The accused neither examined himself on oath nor led any evidence in defence in order to disprove the prosecution case.

6. Trial Court also framed charge against accused Naeem (Special Case No.69 of 2012), at Ex. 2 u/s 9(c) CNSA, to which, accused pleaded not guilty and claimed to be tried vide his plea at Ex.2/A. At

the trial prosecution examined PW-1 complainant SIP Nadeem Akhtar Baig at Ex.3, who produced carbon copy of mashirnama of arrest and recovery at Ex.3-A, F.I.R. at Ex.3-B, Departure and Arrival entries at Ex.3-C; PW-2/I.O. SIP Karim Bux Makrani was examined at Ex.4, who produced carbon copy of mashirnama of place of vardat at Ex.4-A and Chemical report at Ex.4-B; PW-3 PC Mir Hassan Mallah was examined at Ex.5 and thereafter, prosecution side was closed at Ex.6. Then statement of accused was recorded u/s 342 Cr.P.C. at Ex.7. The accused denied the prosecution allegations and claimed his false implication in this case. The accused further stated that he came at the Otaq of Aamir Hussain alias Bilo (co-accused/appellant) from where police arrested him. The accused neither examined himself on oath nor led any evidence in defence in order to disprove the prosecution case.

7. Learned Special Judge after hearing the learned counsel for the parties and examining the evidence available on record convicted and sentenced both the appellants as stated above vide the first and second impugned judgments respectively. Hence these appeals.

8. Learned trial court in both the first and second impugned judgments 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

9. Learned advocates for both the appellants have mainly contended that prosecution case is highly doubtful; that 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; there are material contradictions in prosecution evidence, hence it cannot be relied upon; that as per prosecution case the samples were sent for Chemical analysis on 10.09.2012 through HC Tahir with a delay of 05 days hence tampering with the case property during such period could not be ruled out.

10. Syed Meeral Shah, learned Additional Prosecutor General Sindh very fairly conceded to the contentions of learned counsel for the

appellants and did not support either the first or the second impugned judgment.

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

12. We have come to the conclusion that the prosecution has failed to prove its case against the appellants for the following reasons; that the appellants were apprehended on spy information and were found in possession 04 kilograms and 1150 grams of charas, respectively. Despite having spy information and the police having more than sufficient time to arrange independent mushirs and the alleged place of incident being a busy area apparently no serious efforts were made to associate an independent person of the locality to witness the arrest and recovery proceedings which was important keeping in view the background that the appellants claimed that the police have falsely implicated them in this case at the instance of Dittal Khan Nizamani whose family is involved in a murder case connected with the appellants; that despite the police allegedly seeing the appellants selling charas no such purchaser was arrested nor was any fake purchaser sent to purchase the narcotics who would have made a very valuable prosecution witness; that there are major contradictions in the evidence of the PW's (for example PW Nadeem Baig states in his evidence that he weighed the charas himself using a digital scale whereas PW Mir Hasan states in his evidence that the charas was weighed by using weights); that the charas was recovered from the possession of the appellants on 05.09.2012 and samples of the same were sent to the chemical examiner on 10.09.2012 after an unexplained delay of 5 days.

13. 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 05 days; 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 HC Tahir 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. Under these circumstances, there is, in our view, every possibility that the sample of the narcotic during the said 05 day 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.”

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 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 prosecution has failed to prove its case against both the appellants, therefore, by short order dated 29.05.2017 while extending the benefit of doubt, both the appeals were allowed. The convictions and sentences recorded by the trial Courts through both the first and second impugned judgments were both set aside and the appellants were both respectively acquitted of the charge.

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