

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

Before:

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

Cr. Appeal No.D-60 of 2015.

Ghulam Hussain

Versus.

The State.

Appellant : Ghulam Hussain (present on bail)	Through Mr. Muhammad Sharif Siyal, Advocate
Respondent : The State	Through Mr. Shahzado Saleem Nahyoon, Assistant Prosecutor General
Date of hearing	30.05.2017.
Date of judgment	30.05.2017.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- This appeal is directed against the judgment dated 22.06.2015 passed by learned Special Judge for CNS, Shaheed Benazirabad, in Special Case No.86 of 2013, arising out of Crime No.16 of 2013, registered at Police Station Kazi Ahmed, under section 9(c) of Control of Narcotic Substances Act, 1997 (CNSA) whereby the appellant Ghulam Hussain has been convicted u/s 9(c)CNSA and sentenced to suffer RI for 04 years and to pay the fine of Rs.20,000/-. In case of default in payment of fine he was ordered to suffer simple imprisonment for 05 months 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 are that on 27.01.2013 at 1300 hours, police party headed by SIP Ahmed Ali Bhurgari of PS Kazi Ahmed upon receiving spy information reached at Link Road leading towards Padd, near Rajo Khan Mari, Deh Mirza Bagh, Taluka Kazi

Ahmed and apprehended the accused and secured 1200 grams of contraband item from his possession. Out of the said contraband item 150 grams were separated for chemical analysis. 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. Then accused and case property were brought at police station where F.I.R. was lodged by complainant SIP Ahmed Ali Bhurgari on behalf of the State under section 9(c) 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 31.01.2013 through PC Muhammad Juman and positive chemical report of the said contraband / sample was received. On the conclusion of investigation challan was submitted against the accused for offence u/s 9(c) CNSA.

4. Trial court framed charge against accused at Ex.5 u/s 9(c) CNSA, to which, accused pleaded not guilty and claimed to be tried vide his plea at Ex.6. At the trial prosecution examined PW-1 complainant SIP/SHO Ahmed Ali Bhurgari at Ex.7, who produced mashirnama of arrest and recovery at Ex.7-A, F.I.R. at Ex.7-B, carbon/simple attested copy of roznamcha entries of departure and arrival at Ex.7-C-1 & 2, chemical report at Ex.7-D; PW-2 HC Barkat Ali / mashir was examined at Ex.8 and thereafter, prosecution side was closed at Ex.9.

5. Statement of accused was recorded u/s 342 Cr.P.C. at Ex.10. The accused denied the prosecution allegations and claimed his false implication in this case. He further stated that nothing was recovered from him. The accused neither examined himself on oath nor led any evidence in defence in order to disprove the prosecution case.

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 through 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 Siyal, learned advocate for appellant has contended that the 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 as mashir to attest the arrest and recovery; that there are material contradictions in prosecution evidence; that as per prosecution case the sample was sent for chemical analysis on 31.01.2013 through PC Muhammad Juman with a delay of 05 days and said sample was received in the office of Chemical Examiner on 04.02.2013, hence tampering with the case property during such period could not be ruled out. In support of his contentions, learned counsel for the appellant relied upon the cases of **Hussain Bux v. State** (2017 PCr.LJ 501), **Ayub Masih v. State** (NLR 2003 Criminal 1), **Tariq Pervez v. State** (1995 SCMR 1345), **Munawar Ali Jatoti v. State** (2012 MLD 1763), **Irfan Ali Bhayo v. State** (2008 YLR 37), **Taj Akbar v. State** (2011 PCr.LJ 90) and **Javed Akhtar v. State** (1998 PCr.LJ 1462).

9. Mr. Shahzad Saleem Nahyoon, Assistant Prosecutor General 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 contentions of the learned counsel for the parties, scanned the entire evidence and considered the relevant 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 despite the police acting on spy information during daylight hours and having plenty of time to associate an independent mushir and the alleged place of incident being a busy area apparently no serious efforts have been made to pick up an independent person of the locality to witness the arrest and recovery proceedings which would have given greater credibility to the police version of events especially as the appellant has claimed that the police foisted the narcotics on

him; that there are contradictions in the evidence of the PW's which casts further doubt on the prosecution version of events. For example, two PW's (PW Ali Ahmed and PW Barkat Ali) have contradicted themselves in their respective evidence on the routes which they took to find the appellant and apprehend him and whereas PW Ali Ahmed states in his evidence that he apprehended the appellant the other PW Barkat Ali states in his evidence that the appellant was jointly apprehended; that charas was recovered from the possession of the appellant on 27.01.2013 and sample of the same was sent to the chemical examiner on 31.01.2013 with an unexplained delay of 05 days and even the said sample was received in the office of Chemical Examiner on 04.02.2013 with further delay of 05 days but there was nothing on record that the said sample of the recovered charas was in safe custody during that period. For instance there was no evidence that it was placed in the malkhana, no malkhana entry was produced and the in charge of the malkhana was not examined as to the safe custody of the narcotic. In fact it appears from the chemical report that PC Jumman kept the charas in his personal custody for 5 days. Furthermore, PC Jumman, who has taken the sample for chemical examination has also not been examined by the prosecution as regards the safe custody and transit of the narcotic.

12. Thus, under these circumstances there is likelihood that such sample may have been tampered with /interfered with after its recovery and before it was sent to the chemical examiner which would mean that the report of the chemical examiner cannot be safely relied upon and the fact that it had proved positive under these circumstances of non safe custody will not assist the prosecution case. In respect of the importance of safe custody of the narcotic in a case under the CNSA reliance is placed on the case of **IKRAMULLAH & OTHERS V/S. THE STATE** (2015 SCMR 1002) where it was held as under:-

"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 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, and for the other reasons mentioned earlier we find that in this case the prosecution has failed to prove its case against the appellant beyond a reasonable doubt. There are several circumstances which create doubt in the prosecution case. In the case of **Tariq Pervez V/s. The State** (1995 SCMR 1345), the Honourable Supreme Court has observed as follows:-

"It is settled law that it is not necessary that there should be 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."

14. Thus, for the above stated reasons, we hold that the prosecution has failed to prove its case against the appellant beyond a reasonable doubt, therefore, while extending the benefit of doubt, appeal was allowed by short order dated 30.05.2017 and the conviction and sentence recorded by the trial court were set aside and the appellant was acquitted of the charge and since he was present on bail his bail bonds stood cancelled and his surety was discharged.

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

Hyderabad:
Dated:30.05.2017