

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

Before:

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

Cr. Appeal No.D-73 of 2015.

Arz Muhammad alias Porho

Versus.

The State.

Appellant : Arz Muhammad alias Porho (despite on bail is not present)	Through Mr. Ishrat Ali Lohar, Advocate
Respondent : The State	Through Syed Meeral Shah Bukhari, Additional Prosecutor General
Date of hearing	31.05.2017.
Date of judgment	31.05.2017.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- This appeal is directed against the judgment dated 30.07.2015 passed by learned Special Judge for CNS, Umerkot, in Special Case No.01 of 2013, arising out of Crime No.01 of 2013, registered at Police Station Shadi Pali, under section 9(c) of Control of Narcotic Substances Act, 1997 (CNSA), whereby the appellant Arz Muhammad alias Porho has been convicted u/s 9(c) CNSA and sentenced to suffer RI for 04 years and 06 months 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 05.01.2013 at 0930 hours, police party headed by SIP Ali Bux Jarwar of PS Shadi Pali while patrolling at different places reached at Sunji Mori Stop and

stopped the accused in his jeep who had tried to turn away from there patrol and therefore had aroused there suspicion. The accused was apprehended and on personal search of the accused complainant secured 5 pieces of charas which was weighed and amounted to 1250 grams. Out of the said contraband item 50 grams from each piece (total 250 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 06.01.2013 through PC Shakir Ali and positive chemical report of the said contraband / sample as that of charas 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.2 u/s 9(c)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 Ali Bux Jarwar at Ex.4, who produced mashirnama of arrest and recovery at Ex.4-A, F.I.R. at Ex.4-B, daily diary entries at Ex.4-C; PW-2 ASI Ratan Singh was examined at Ex.5, who produced mashirnama of place of incident at Ex.5-A; PW-3 I.O. SIP Fateh Muhammad Bhayo was examined at Ex.6, who produced chemical report at Ex.6-A and thereafter, prosecution side was closed at Ex.7.

5. Statement of accused was recorded u/s 342 Cr.P.C. at Ex.8. The accused denied the prosecution allegations and claimed his false implication in this case. The accused produced certified true copy of direct complaint filed by him against the police officials at Ex.8-A, copy of diary at Ex.6-B. The accused did not examine himself on oath, however, in order to disprove the prosecution case, he examined DW Haji Daim at Ex.9. Thereafter, defence side was closed at Ex.10.

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. Ishrat Ali Lohar, learned advocate for the appellant has contended that prosecution case is highly doubtful; that the place of incident was located at busy spot, yet, none from the public was joined as mashir to attest the arrest and recovery; there are material contradictions in prosecution evidence; that as per prosecution case the sample was sent for Chemical analysis on 06.01.2013 through PC Shakir Ali, which was received in the office of Chemical Examiner on 08.01.2013 with further delay of 02 days, hence tampering with the case property during such period could not be ruled out. He further argued that PC Shakir Ali through whom the 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 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 for the following reasons; that the appellant was arrested from his car on a busy road but apparently no serious efforts have been made to ensure that an independent person witnessed the arrest and recovery proceedings. This was of particular importance in this case where the appellant has claimed that the case was foisted on him by the police and has shown through documentary evidence that there was enmity between himself and the police, that such defense was put to each PW and was mentioned in his S.342 Statement and

DW Haji Daim who was an eye witness of the incident has given evidence that no recovery was made from the appellant when he was apprehended and thus under these circumstances the police evidence cannot be safely relied upon without independent corroboration which is lacking in this case; that there are contradictions in the prosecution evidence. For example PW Ali Bux states in his evidence when the parcel was opened in court that although he cut pieces of the charas for chemical examination with a knife at the time of recovery there was now no such sign of cutting of the pieces of charas for chemical examination. PW Ratan Singh also saw no marks of cutting; that the monogram of the words of "Jaded Kohistan samarqand" whilst present on the wrapper on the plastic paper when produced in court find no mention in the mashirnamas of arrest and recovery which indicates that the narcotic may have been foisted later on.

12. Most significantly the Roznamcha arrival entry gives no indication about what happened to the narcotic sample when it reached the police station; there is no roznamcha entry as to where it was placed, no evidence that the sample was placed in the malkhana, no malkhana entry has been produced and the in charge of the malkhana has not been examined as to the safe custody of the sample. Furthermore, PC Shakir Ali, who has taken the sample for chemical examination has also not been examined by the prosecution.

13. Thus there is nothing on record to prove that the charas had been kept in safe custody from the time of its recovery until the time it was handed over to the chemical examiner and as such it may well have been interfered/tampered with. The importance of safe custody in narcotics cases was made clear in the case of **IKRAMULLAH & OTHERS V/S. THE STATE** (2015 SCMR 1002), in the following terms:

"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."

14. In view of the above, and for the other reasons mentioned earlier we hold that in this case the prosecution has failed to prove its case against the appellant beyond a reasonable doubt and as such the benefit of the doubt must go to the appellant as 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).

15. 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 31.05.2017 and the conviction and sentence recorded by the trial Court were set aside and appellant was acquitted of the charge.

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