

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

Before:

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

Cr. Appeal No.D-23 of 2017.

Haji Qurban

Versus.

The State.

Appellant : Haji Qurban	Through Mr. Ayaz Ali Ghuryani, Advocate
Respondent : The State	Through Syed Meeral Shah Bukhari, Additional Prosecutor General
Date of hearing	31.05.2017.
Date of judgment	02.06.2017.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- This appeal is directed against the judgment dated 07.03.2017 passed by learned Special Judge for CNS, Jamshoro, in Special Case No.98 of 2015, arising out of Crime No.528 of 2015, registered at Police Station Kotri, under section 9(c) of Control of Narcotic Substances Act, 1997 (CNSA), whereby the appellant Haji Qurban has been convicted u/s 9(c) CNSA and sentenced to suffer RI for 05 years and to pay the fine of Rs.100,000/-. In case of default in payment of fine he was ordered to suffer simple imprisonment for 06 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 04.11.2015 at 2100 hours, police party headed by ASI Ghulam Farooq Rahpoto Incharge P.P. Khursheed of PS: Kotri while patrolling at different places received spy information that near Railway Track on Katcha

Road at village Popat one person is selling charas. On such information police party reached at the pointed place and apprehended the accused due to suspicion. On personal search of the accused complainant secured contraband item from the possession of the accused. The contraband item was weighed. It came 1150 grams of charas. Thereafter, the contraband item, as stated above, was sealed and memo of arrest and recovery was prepared on the spot in presence of mashirs. Thereafter the accused and case property were brought to the police station where F.I.R. was lodged by complainant ASI Ghulam Farooq on behalf of the State under section 9(c) CNSA.

3. During investigation, Investigating Officer recorded 161 Cr.P.C. statements of the PWs. Recovered substance was sent to the chemical examiner on 04.11.2015 through PC Zulfiquar 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 ASI Ghulam Farooq Rahpoto at Ex.4, who produced mashirnama of arrest and recovery at Ex.4-A, F.I.R. at Ex.4-B, daily departure and arrival entries at Ex.4-C; PW-2 HC / Mashir Talib Hussain was examined at Ex.5; PW-3 I.O. SIP Babar Akbar Baloch 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 neither examined himself on oath in disproof of the charge, nor led any defence evidence.

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. Ayaz Ali Ghuryani, learned advocate for appellant has contended that the prosecution case is highly doubtful; that despite this being a case of spy information and the place of incident was located at busy spot, yet, none from public was joined as mashir to attest the arrest and recovery; there are material contradictions in the prosecution evidence; that as per prosecution case the sample was sent for chemical analysis on 04.11.2015 through PC Zulfiquar, which was received in the office of chemical examiner on 06.11.2015 with further delay of 02 days, 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 case of **Shahid Dada V State** (2017 MLD 288).

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 this was a case of spy information and therefore the police had adequate time to associate an independent mushir and despite it being a busy place from where the arrest and recovery was made they failed to do so. This was important in this case as the appellant is claiming that the narcotic was foisted on him by the police under the influence of his relatives who were annoyed with him for getting a second marriage and thus independent corroboration would have been the best option which is lacking in this case and casts doubt on the credibility of the prosecution evidence; that despite the appellant allegedly selling the narcotic no person who had purchased the narcotic from him was arrested; that the evidence of the police is highly doubtful regarding

the recovery as there appear to be major contradictions in the evidence as to exactly how many pieces of charas were recovered from the appellant. For example, PW Ghulam Farooq in his evidence admits that he did not state how many pieces of charas was recovered whilst PW Talib Hussain in his evidence states that 3 pieces of charas were recovered whilst the memo of arrest and recovery does not state however pieces were recovered, the chemical report states that 2 pieces were received by it but 5 pieces were desealed in the court.

12. Most significantly there is no evidence that the sample of the charas was kept in safe custody from the time of its recovery to the time of it being received by the chemical examiner. PW Babar Akbar who received the case property admits in his evidence that no entry was kept in register 19 for keeping the property in the malkhana. There is no evidence that the sample ever reached the malkhana, the in charge of the malkhana has not been examined as to the safe custody of the sample or where it was actually kept in the PS. Furthermore, PC Zulfiqar, who has taken the sample for chemical examination has also not been examined by the prosecution in respect of its safe custody and safe transit to the chemical examiner.

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, the appeal is allowed, the impugned judgment is set aside, the appellant is acquitted of the charge and the appellant shall be immediately released from custody unless he is wanted in any other case.