

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

Before:

Mr. Justice Naimatullah Phulpoto

Mr. Justice Mohammad Karim Khan Agha

Cr. Appeal No.D-142 of 2011

Achar Mallah

Versus.

The State.

Appellant : Achar s/o Allahdino Mallah	Through Mr. Shakir Ali, Advocate
Respondent : The State	Through Syed Meeral Shah Bukhari, Additional Prosecutor General.
Date of hearing	18.05.2017.
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 14.04.2011 passed by learned Sessions Judge / Special Judge for CNS, Badin, in Special Case No.37 of 2010, arising out of Crime No.417/2010, registered at Police Station Badin, under section 9(c) of Control of Narcotic Substances Act, 1997 (CNSA) whereby the appellant Achar has been convicted u/s 9(c) CNSA and sentenced to suffer RI for 03 years 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 03 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 08.10.2010 at 1930 hours near Family Health Hospital Badin, by a police party headed by Inspector

Abdul Rahim Khaskheli alongwith his subordinate staff namely ASI Zulfiqar Ali Shar, ASI Hyder Bux Mallah, PCs Khalid Hussain and Umed Ali. Accused Achar was said to be found possessing a black coloured plastic bag (Theli) wherein 15 big and small pieces of charas were wrapped. Charas was weighed it contained 1340 grams. Out of which 10 grams from each piece was 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 Inspector Abdul Raheem Khaskheli on behalf of the State under section 9(c) CNSA.

3. During investigation, Investigation Officer recorded 161 Cr.P.C. statements of the PWs. Sample of the substance / charas was sent to the chemical examiner on 13.10.2010 through PC Din Muhammad and positive chemical report 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.3 u/s 9(c) CNSA to which, accused pleaded not guilty and claimed to be tried vide Ex.4. At the trial prosecution examined PW-1 SIO Sajjad Ali Shah at Ex.5, who produced FIR at Ex.5/A, mashirnama of arrest and recovery at Ex.5/B, chemical examiner's report at Ex.5/D, attested carbon copies of roznamcha entries No.23 and 28 as Ex.5/E; PW-2 ASI Zulfiqar Ali at Ex.6; PW-3 complainant Inspector Abdul Rahim Khaskheli at Ex.7. Thereafter, prosecution side was closed at Ex.8.

5. Statement of accused was recorded u/s 342 Cr.P.C.at Ex.9. The accused denied the prosecution allegations and claimed his false implication in this case. The accused neither examined himself on oath nor did he lead any evidence in defence to disprove the prosecution allegations. He further stated that he is innocent and he was arrested on 08.10.2010 from Hyderabad bus stand Badin at 1900 hours but nothing was recovered from him.

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. Shakir Ali, learned advocate for appellant has contended that the prosecution case is highly doubtful; the place of incident was located at a busy place yet, no member of the public was joined to attest the arrest and recovery; there are material contradictions in 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 08.10.2010, whereas the sample was sent to chemical analyzer on 13.10.2010 with a delay of 05 days and no evidence has been brought on the record that charas was in the safe custody during that period. He further argued that PC Din Muhammad through whom the sample of charas was sent to the chemical examiner has also not been examined. Lastly he argued that the accused has been falsely involved in this case. In support of his contentions, learned counsel for the appellant relied upon the cases of **Ikramullah & others v. the State** (2015 SCMR 1002), **The State through Prosecutor General Sindh v. Muhammad Sabir alias Sabir** (2016 PCr.L.J 859) and **Ghulam Mustafa alias Mushtaq Ali v. the State** (2013 P.Cr.L.J.860).

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 Mr. Muhammad Jameel Ahmed, learned advocate for appellant, Syed Meeral Shah, learned Additional Prosecutor General Sind for the State, scanned the entire evidence and considered the relevant law.

11. We have come to the conclusion that the prosecution has failed to establish its case for the reasons that it was case of spy information and the police had plenty of time to call independent mushirs in this thickly populated area which it failed to do despite having ample time and opportunity to do so which would have given much greater credibility to their case; furthermore according to the prosecution there was no body around so it does not appear that the appellant was selling narcotics to anyone and in this respect the police even failed to send a fake purchaser to test this aspect of the case; that there are contradictions in the evidence of the PW's (for example PW Zulfiqar Ali states that transparent plastic bags were placed on each piece of charas whereas PW Abdul Rahim stated that 9 pieces of charas had no plastic bag over them)

12. Most significantly however in our view PW Sajjad states that the recovered property was placed in the malkana and the same was sent to the chemical examiner through PC Din Muhammed. The property however was sent to the chemical examiner after an unexplained delay of 5 days. No entry has been produced to show that the recovered property was actually in the malkhana and the WHC who was minding the malkhana did not give evidence thus it cannot be conclusively shown that the recovered property was in safe custody during this period and could not have been interfered with. Likewise PC Muhammed Din who as per the chemical report took the chemical to the chemical examiner was not examined as such again there is no evidence of safe custody at the police station or during transit to the chemical examiner. Under these circumstances in our view the chemical report although stated to be positive cannot be safely relied

upon. In this respect reliance is placed on 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. In view of the above, we have no hesitation in holding that in this case based on the reasons mentioned above 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 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,

therefore, while extending the benefit of doubt, appeal is allowed. The impugned judgment is set aside and the appellant is acquitted of the charge. The appellant is on bail. His bail bond stands cancelled and surety is hereby discharged.