CNSA : Appeal against Conviction 215
Major Contradictions
NFR

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Before:

Mr. Justice Abdul Maalik Gaddi
Mr. Justice Mohammad Karim Khan Agha

Cr. Appeal No.D-79 of 2018

Imam Ali

Versus.

The State.

Appellant Imam Ali :	Through Mr. Altaf Ahmed Shahid, Advocate.
Respondent The State :	Through Shehzado Saleem Nahiyoon, D.P.G.
Date of hearing	13.09.2018.
Date of judgment	13.09.2018.

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J.- This criminal appeal is directed against the judgment dated 29.08.2018 passed by learned Sessions/Special Judge CNS, Hyderabad, in Special Case No.57 of 2018, arising out of Crime No.33/2018, registered at Police Station Phuleli, Hyderabad, under section 9(c) of the Control of Narcotic Substances Act, 1997(CNSA), whereby the appellant Imam Ali has been convicted u/s 9(c) CNSA and sentenced to suffer imprisonment for a term of 03 years and to pay the fine of Rs.50,000/-. In case of default in payment of fine he was ordered to suffer imprisonment for 02 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 as disclosed in the FIR are that present accused was arrested on 16.03.2018 at 12:15 am at Tando Tayyab graveyard near the shrine of Jurial Shah, by a police party headed by SIP Tariq Baladi. Accused Imam Ali was said to be found possessing four big and one small pieces of charas containing 2060 grams. Thereafter the contraband items, as stated above, was sealed and memo of arrest and recovery was

prepared at the spot in presence of mashirs. Thereafter, accused and case property were brought at police station where F.I.R. was lodged by complainant SIP Tariq Baladi, on behalf of the State under section 9(c) CNSA.

3. On the conclusion of investigation challan was submitted against the accused for offence u/s 9(c) CNSA. The trial court framed charge against accused at Ex.2 u/s 9(c) of CNSA to which accused pleaded not guilty and claimed to be tried vide his plea at Ex.3.

4. At the trial prosecution examined PW-1 complainant SIP Tariq Baladi at Ex.5, who produced extracts of entries, mashirnama of recovery/arrest and copy of the FIR at Ex.5/A to 5/C; PW-2 mashir PC Muhammad Ali at Ex.6; PW-3 Investigation Officer SIP Ghulam Rabbani at Ex-7, who produced copies of entry, letters to the laboratory and chemical report, at Ex.7/A to 7/D and thereafter, prosecution side was closed at Ex.8.

5. Statement of accused was recorded u/s 342 Cr. P.C. at Ex.9 wherein he denied the prosecution allegations and claimed his false implication in this case. Accused neither examined himself on oath in disproof of the prosecution allegations nor led any evidence in his defence.

6. Learned trial Court after hearing the learned counsel for the parties and examining the evidence available on record convicted and sentenced the appellant as stated above. Hence this appeal.

7. Learned trial Court in the impugned judgment dated 29.08.2018 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. Learned counsel for the appellant has mainly pointed out that there are numerous material contradictions in the evidence of the PW's which makes it unreliable and has given the following examples; that PW-1 (complainant) stated in his examination-in-chief in second line that that he left PS at 11:15 pm which is also mentioned in the FIR whereas departure entry No.29 shows that they left PS at 11:30 pm. Such thing he has admitted in cross examination in line No.01. PW-1 (complainant) deposed in his cross examination in line No.5 from the bottom page 2, that property got sealed by him through police constables / mashirs, whereas PW-2 (Mashir) stated in his cross examination in line No.02 that SIP Tariq Baladi (PW-1) himself sealed

the charas. PW-1 further stated in his cross examination in line No.03 from the bottom at page No.02 that he affixed two seals on sealed parcel of charas, whereas PW-2 stated in his cross examination in line No.6 at page No.5 that only one seal was affixed on sealed parcel of charas. Whereas the report of the chemical examiner at Ex-7/D shows that one parcel received with 03 seals which is self contradictory; PW-1 further stated in his cross examination in line No.4 from the bottom at page No.2 that the mashirnama of arrest was written by him while sitting on front seat of mobile whereas PW-2 (mashir) in his cross examination in line No.3 at page No.5 stated that SIP Tariq prepared mashirnama on the bonnet of vehicle, which is self contradictory and shows the whole proceedings were conducted at PS not at place of incident; PW-2 further deposed in his examination-in-chief that his statement under Section 161 Cr.P.C. was recorded by SIP Tariq (complainant), but he has admitted in his cross examination that his statement was recorded by Tariq Baladi on 16.03.2018 after registration of the FIR. Whereas, PW-3 (I.O.) stated in his examination-in-chief that he recorded statement of PW/Mashir under section 161 Cr.P.C. which is self contradictory and create doubt in prosecution case whether the statement of PW was recorded by the complainant or I.O.?; PW-2 further deposed against the version of the complainant and admitted in his cross examination that he has signed only one mashirnama of arrest and recovery which shows he was not present in the proceedings of visiting place of incident nor he signed the mashirnama of place of incident; PW-2 never stated in his examination-in-chief as well as statement under Section 161 Cr.P.C. that he alongwith complainant and I.O visited the place of incident nor the said mashirnama and entry No.45 were discussed and produced before the trial Court by PW-2 (Mashir) or PW-3 (I.O.). PW-3 (I.O.) has stated in his examination-in-chief that he sent the sealed parcel for chemical examination through HC/Shakeel whereas, the chemical report as Ex-7/D shows that parcel brought by PC/Abdul Wahid; PW-3 (I.O) has admitted in his cross examination that it is correct that he has not produced any entry by which the property was handed over to HC/Shakeel for its deposit at collection cell of Police Line Hyderabad. PW-3 further admitted that as per CIA/CRO accused has no criminal record except this case, which means the accused is not a habitual offender nor any criminal record is against him; PW-3 produced entry No.29 of keeping the property in malkhana which is without time whereas, he has failed to produce the entry of malkhana of book No.19 regarding taking out case property from

malkhana and sending the same to the chemical examiner, in this respect he has admitted in his cross examination in line No.1 at page No.7 that it is correct that he has not produced entry by which the property was taken out from the malkhana for chemical examination: that the chemical was not kept in safe custody from the time of its recovery to the time it was sent for chemical examination and as such it could have been tampered with; that the forms on which the chemical report was submitted were not correctly completed; that he has already served 8 months of a 3 year jail sentence and even otherwise the alleged amount of narcotic which was foisted on him was not of a huge quantity; that he is entitled to the benefit of the doubt and thus for all the above reasons he should be acquitted In support of his contentions, learned counsel for the appellant relied upon the cases of **Ikramullah and others v. The State** (2015 SCMR 1002), **Mohsin v. The State** (2017 MLD 674) and **Sadam Hussain v. The State** (2018 MLD 1025).

9. Mr. Shahzado Saleem Nahyoon, Deputy Prosecutor General supported the impugned judgment contending that the trial Court delivered the same after taking into consideration all the evidence as well as the material available on record. He further contends that evidence of the prosecution witnesses is in consonance with the contents of F.I.R. and they have fully corroborated each other. Lastly, he submits that the instant appeal is liable to be dismissed.

10. We have carefully considered the arguments of learned counsel for the parties, scanned the entire evidence and considered the relevant law with their able assistance.

11. We have come to the conclusion that prosecution has failed to establish its case against the appellant for the reasons; that the evidence of the PW's seem to be littered with contradictions some of which are material as indicated above (especially who sealed the narcotic and the number of seals placed on the packet of the recovered narcotic) which go beyond minor contradictions and as such cannot be ignored; that the forms in respect of sending the narcotic for chemical examination did not appear to be the correct forms or fully completed in a thorough manner; that although the chemical was sent for examination to the chemical examiner on the same day most **significantly** we find that there is very little, if any, 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; that the Incharge of the Malkhana

has not been examined and that PC A.Wahid who delivered the chemical to the chemical examiner has not been examined as to its safe custody. We note that in the recent case of **Muhammad Sarfraz V The State (2017 SCMR 1874)** where there was no negative evidence of non safe custody the conviction was upheld. **Muhammad Sarfraz's case** (Supra) however was by a two member bench of the Hon'ble Supreme Court and the case of **Ikramullah & others v/s. the State** (2015 SCMR 1002) which was by a three member bench does not seem to have been brought to its attention. In **Ikramullah's case** (Supra) the emphasis was on the **positive proof** of safe custody of the narcotic by the prosecution from the time of its recovery until the time it went for chemical examination which would rule out any possibility of the narcotic being tampered with. Since **Ikramullah's case** (Supra) was decided by a three member bench of the Hon'ble Supreme Court and was not brought to the attention of the Hon'ble Supreme Court in **Muhammad Sarfraz's case** (Supra) we are inclined to follow **Ikramullah's case** (Supra) in respect of safe custody of the narcotic.

12. Thus, in our view in this case since there is a possibility that the narcotic during the time it was recovered from the appellant and was sent for chemical analysis may not have been kept in safe custody and may have been tampered with and as such we find that even a positive chemical report is of no assistance to the prosecution; the significance of keeping safe custody of the narcotic in a case and filling out the forms for chemical examination diligently under the CNSA has been emphasized in **Ikramullah's case** (Supra), 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." (bold added)

13. 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 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."(bold added)

14. 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, the appeal is allowed. The conviction and sentence recorded by the trial court through the impugned judgment are set aside and the appellant is acquitted. These are the reasons for our short order which was announced in open court today which reads as under:

> "By consent, the instant appeal was taken up for regular hearing and the learned counsel for the appellant as well as the learned DPG concluded their arguments. For the reasons to be recorded later on, the instant appeal is allowed, the impugned judgment is set aside and the appellant who is confined in Prison, Hyderabad, is directed to be released forthwith if not required in any other custody case."