

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-66 of 2018.

Mst. Zainab alias Jamna

Versus.

The State.

Appellant : Mst. Zainab alias Jamna	Through Mr. Naeemuddin Sahito, Advocate.
Respondent : The State	Through Ms. Romeshan Oad, A.P.G.
Date of hearing	18.09.2018
Date of judgment	18.09.2018

**J U D G M E N T**

**MOHAMMAD KARIM KHAN AGHA, J.-** This appeal is directed against the judgment dated 03.07.2018 passed by learned Special Judge for CNS/IIIrd Additional Sessions Judge, Hyderabad, in Special Case No.68 of 2016, arising out of Crime No.43/2016, registered at Police Station B-Section Latifabad, Hyderabad, under section 9(c) of the Control of Narcotic Substances Act, 1997 (CNSA), whereby the appellant Mst. Zainab alias Jamna 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 she was ordered to suffer simple imprisonment for 01 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 07.05.2016 from Oad Para Latifabad Unit No.6 by a police party headed by SIP Muhammad Ali Lashari alongwith his subordinate staff and one black coloured shopper was secured from her hands. On opening the black coloured shopper, contraband item weighing



2100 grams was secured, out of which 10 grams were separated and sealed for chemical examination and report, whereas the remaining contraband item was sealed separately. Thereafter, memo of arrest and recovery was prepared at the spot in presence of mashirs. Then accused and case property were brought at police station where F.I.R. was lodged by the complainant.

3. 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 u/s 9(c) CNSA at Ex.3, to which, she pleaded not guilty and claimed to be tried at Ex.3/A. At the trial prosecution examined PW-1 PC Shahzad Hussain at Ex.4, he is mashir of the case, he has produced memo of arrest and recovery at Ex.04/A. PW-02 SIP/Complainant Muhammad Ali Lahari was examined at Ex.05, who produced F.I.R., departure and arrival entries, entry and letter through which lady accused was handed over to women police station, letter to chemical analyzer and chemical analyzer report, malkhana entry of register No.19 at Ex.05/A to Ex.05/F. Complainant also produced case property in open court during his evidence in sealed condition which was de-sealed on the request of prosecution and thereafter, prosecution side was closed.

5. Statement of accused was recorded u/s 342 Cr.P.C. at Ex.07. The accused denied the prosecution allegations and claimed her false implication in this case. She however, did not examine herself on oath nor lead any evidence in her defense.

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 by 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. Naeemuddin Sahito, learned advocate for appellant has contended that the appellant has been involved in this case falsely; that the case in hand is highly doubtful; that the place of incident was located at busy spot, yet, none from public was joined to attest the arrest and recovery; that there are material contradictions in prosecution evidence, hence it cannot be safely relied upon; that the appellant was arrested and the contraband item was



allegedly recovered from her possession on 07.05.2016, however, it was sent to Chemical Analyzer for examination on 11.05.2016 with an inordinate delay of 04 days and tampering with the case property during such period could not be ruled out especially as no evidence has been brought on record that the narcotic substance was in safe custody during that period and as such the appellant should be acquitted.

9. Ms. Romeshan Oad, the learned A.P.G. fully supported the impugned judgment and contended that there was no legal infirmity in the same and as such the appeal should be dismissed.

10. We have heard the learned counsel for the parties, scanned the entire evidence and considered the relevant law.

11. We have come to the conclusion that prosecution has failed to establish its case for the reasons that the alleged place of incident was a busy area but apparently no efforts have been made to pick up an independent person of the locality to witness the arrest and recovery proceedings despite this being a day light incident and although this is not fatal to the prosecution case it would have bolstered the same; that the complainant and the IO were the same and although this is lot unlawful as a matter of propriety and transparency it is preferable if the IO is not also the complainant; that 17 separate pieces of charas was recovered but it appears that only 10 separate pieces were sent for chemical examination which in our view is not a representative sample since one sample from each piece of charas should have been sent for chemical analysis under separate seal; that as per record on 07.05.2016 the contraband item was recovered from the possession of the appellant but as per report of Chemical Examiner, it was sent and received in his office on 11.05.2016 with a delay of 04 days. This inordinate and unexplained delay although not fatal to the prosecution case as the rules which require the analysis of the chemical to be made within 72 hours of recovery are directory as opposed to mandatory however such unexplained delay still raises suspicion.

12. **Most significantly**, we find that there is very little evidence on record to show that the charas was kept in safe custody from the time of its recovery until it was received by the chemical examiner after an unexplained delay of 4 days; that the in charge of the Malkhani where the narcotic was kept for 4 days was not examined as to its safe custody; likewise PC Safdar Hussain



who took the chemical to the chemical examiner has not been examined as to the safe custody of the recovered narcotic. In the 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.

13. 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 received by the chemical examiner may not have been kept in safe custody and may have been tampered with 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 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)



14. 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).

15. 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:

“ Parties’ Advocates have been heard at length. They have concluded their arguments. For the reasons to be recorded later on, this appeal is allowed and the impugned judgment dated 03.07.2018 passed by the learned IIIrd Additional Sessions Judge / Special Judge (CNS) Hyderabad in Special Case No.68 of 2016, arising out of Crime No.43 of 2016 of P.S B-Section, Hyderabad, is set-aside and resultantly the appellant is acquitted of the charge. Appellant *Zainab alias Jaman D/o Muhammad Ramzan* is stated to have confined in Central Prison for Women at Hyderabad. **She is ordered to be released forthwith in the present case, if she is not required in any other custody case.**”