

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

Cr. Appeal No.D-24 of 2014.

Cr. J. Appeal No.D-26 of 2014.

PRESENT

Mr. Justice Naimatullah Phulpoto

Mr. Justice Muhammad Karim Khan Agha.

Date of Hearing: 31.05.2017

Date of Judgment: 31.05.2017

Appellant/accused: Anwar Kharal
Through Mr. Ashok Kumar,
Advocate.

The State: Through Syed Meeral Shah Bukhari,
Addl. P.G. Sindh.

J U D G M E N T

NAIMATULLAH PHULPOTO, J:- Appellant Anwar Kharal was tried by learned Illrd Additional Sessions Judge / Special Court for CNS Hyderabad, in Special Case No.6 of 2013. By judgment dated 08.02.2014, appellant was convicted under Section 9 (b) Control of Narcotic Substances Act, 1997 and sentenced to seven years R.I. and to pay a fine of Rs.10,000/-, in default thereof appellant was ordered to 30 days S.I. more. Benefit of Section 382 Cr.P.C. was extended to the appellant/accused.

2. Brief facts of the prosecution case as unfolded in the FIR are that on 27.2.2013, Abdul Haq Qureshi Incharge Excise Branch Hyderabad, left Police Station on spy information along with his subordinate staff namely EDs Nisar Ahmed, Piyaro Khan, Ali Ahmed and others in the Government vehicle vide roznamcha entry

No.45 to the Railway Line Tando Jam. It is alleged that present accused was standing there and he was carrying a plastic bag in his hand. Accused while seeing the Excise Officials tried to run away but he was surrounded and caught hold. On inquiry, he disclosed his name as Anwar s/o Ali Mohammad by caste Kharal resident of Tando Jam. It is alleged in the F.I.R. that on account of non-availability of the private mashirs, Excise Inspector made E.Ds. Jawaid Shaikh and Nisar Ahmed as mashirs and recovered plastic bag from the possession of the accused. It was opened police found a patti of the charas wrapped in a piece of newspaper. The same was weighed it was 500 grams, out of it, 10 grams were separated as sample for sending to the Chemical Examiner for analysis. Further personal search of the accused was conducted in presence of mashirs and cash of Rs.400 were also recovered. Sample was sealed in presence of mashirs. Remaining property was also sealed. Mashirnama of arrest and recovery was prepared. Thereafter, the accused and case property were brought to the Police Station, where F.I.R. bearing crime No. 02 of 2013 was lodged on behalf of the State under section 9(b) Control of Narcotic Substance Act 1997.

3. During investigation 161 Cr.P.C. statements of P.Ws were recorded, sample was sent to the Chemical Examiner through E.C. Nisar Ahmed on 27.2.2013. Positive chemical report was received from the Chemical Examiner. On the conclusion of usual investigation, challan was submitted against the accused under Section 9(b) Control of Narcotic Substances Act, 1997.

4. Learned trial court framed the charge against the accused Anwar Kharal under Section 9(b) of CNS Act, 1997 at Ex-2. Accused pleaded not guilty and claimed to be tried.

5. At the trial, prosecution examined P.W-1 Abdul Haq Qureshi Excise Inspector Crime Branch Hyderabad, who produced mashirnama of arrest and recovery at Ex.3-A, F.I.R. at Ex.3-B, positive chemical report at Ex.3-C. Arrival and departure entries of Roznamcha No.44 & 45 at Ex.3-D. P.W.2 E.D. Nisar Ahmed at Ex.4, Thereafter, prosecution side was closed vide statement at Ex-05.

6. Statement of the accused was recorded under section 342 Cr.P.C. at Ex-06, in which accused claimed his false implication in this case and denied the prosecution allegations. Accused has stated that report of the Chemical Examiner has been managed by police. Accused raised plea that P.Ws are interested. Accused did not lead any evidence in defence and declined to examine himself on oath in disproof of prosecution allegations.

7. Learned trial court after hearing the learned counsel for the parties and examination of the evidence, by judgment dated 08.02.2014 convicted and sentenced the appellant and as stated above. Accused was remanded to the Jail. Accused filed Criminal Jail Appeal No.26 of 2014. Thereafter, Criminal Appeal No.D-24 of 2014 was filed on his behalf by his Advocate. By this single Judgment, we intend to dispose of both appeals.

8. We have carefully heard Mr. Ashok Kumar counsel for the appellant and Syed Meeral Shah Bukhari Additional P.G. for the State and perused the evidence.

9. The facts of this case as well as evidence produced before the Trial Court find an elaborate mention in the judgment passed by the Trial Court dated 08.02.2014, therefore, the same may not be reproduced here, so as to avoid duplication and unnecessary repetition.

10. Mr. Ashok Kumar, learned Advocate for the appellant has mainly contended that prosecution case was highly doubtful. He has submitted that though it was the case of spy information and private persons were present at spot but S.H.O. has mentioned that on account of non-availability of private persons, he made Excise officials as mashirs. He has further submitted that according to the evidence of the complainant, E.D. Jawaid Ahmed had taken the sample to the Chemical Examiner but the report of the Chemical Examiner reflects that it was taken by ED Nisar Ahmed. Learned advocate for the appellant further argued that there was overwriting in the mashirnama of arrest and recovery which created doubt. Lastly, it is contended that there was no evidence with regard to the safe custody of the charas at Malkhana of Excise Police Station as well as it's safe transit to the Chemical Examiner. In support of his contentions, he has relied upon the case reported as *IKRAMULLAH & OTHERS v. THE STATE [2015 SCMR 1002]*.

11. Syed Meeral Shah Bukhari, learned Additional P.G. very rightly and frankly did not support the judgment of the trial court and stated that there was no evidence that charas was kept in the safe custody at Malkhana and it was safely transmitted to the Chemical Examiner for analysis.

12. After hearing the learned counsel for the parties we have scanned the entire evidence.

13. We have come to the conclusion that prosecution has utterly failed to establish its case against the appellant beyond any reasonable doubt for the reasons that Excise Inspector Abdul Haq Qureshi along with his subordinate staff had left Excise Office on receipt of the spy information regarding the presence of the accused at the Railway line. Due to non-availability of private persons he associated EDs Jawaid Shaikh and Nisar Ahmed as mashirs of arrest and recovery in this case. ED Nisar Ahmed has deposed that at the time of arrest of accused fifteen private persons were present. This was material contradiction in prosecution case. Excise Inspector Abdul Haq Qureshi has deposed that he had separated 10 grams from the recovered substance for sending to the Chemical Examiner and he sent the same through ED Jawaid Ahmed but the Chemical Examiner's report reflects that it was sent by EJ Nisar Ahmed. From the perusal of the evidence of the complainant it transpires that after arrest of the accused, he was brought to the Excise Police Station where Inspector lodged F.I.R. against the accused. No where Excise Inspector has mentioned that he kept the sample in the safe custody of the Excise Police Station. No evidence regarding the safe custody of charas at Police Station as well as its safe transit has been brought on the record. As per record charas/sample was taken by ED Nisar Ahmed to the Chemical Examiner he has also not been examined. We have noticed that there was overwriting in the mashirnama of arrest and recovery, regarding 490 grams of charas no explanation has been furnished by Additional P.G. with regard to that overwriting. Even there is no

signature/initial of the Excise Inspector on such overwriting, which has created doubt in the prosecution case. Accused in his statement under section 342 Cr.P.C. has taken the plea that prosecution witnesses are interested Excise officials. There are number of infirmities in the prosecution case. Safe custody of the charas has also not been established. In these circumstances, we are unable to rely upon the evidence of Excise officials without independent corroboration which is lacking in this case. In the above stated circumstances, positive report of Chemical Examiner would not improve the case of prosecution. On the point of safe custody of recovered narcotic substance as well as safe transmission of sample to Chemical Examiner, rightly reliance has been placed upon the case of **IKRAMULLAH & OTHERS V. THE STATE** reported in 2015 SCMR 1002. Relevant portion is reproduced as under:-

“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 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. For giving benefit of doubt, 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 as held by Honourable Supreme Court in the case of **TARIQ PERVEZ v. THE STATE** [1995 SCMR 1345].

15. For the above reasons, while relying upon the above cited authorities, we have no hesitation to hold that prosecution has failed to establish its case against the appellant and the trial court has failed to appreciate the evidence of police officials according to the settled principle of law. There are number of infirmities in the prosecution evidence. Thus prosecution case is doubtful. While extending benefit of doubt appeal is allowed, impugned judgment dated 08.02.2014 is set-aside and the appellant is acquitted of the charge. Appellant is present on bail. His bail bond stands cancelled and surety is hereby discharged.

JUDGE

JUDGE