

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

Cr. Appeal No.D-45 of 2015

PRESENT

Mr. Justice Naimatullah Phulpoto

Mr. Justice Muhammad Karim Khan Agha.

Date of Hearing: 23.05.2017

Date of Judgment: 23.05.2017

*Appellant/accused: Zulfiqar
Through Mr. Kashif Ali Lakho,
Advocate*

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

JUDGMENT

NAIMATULLAH PHULPOTO, J:- Appellant Zulfiqar was tried by Special Judge (Narcotics), Shaheed Benazirabad, in Special Case No.405 of 2012, for the offence under Section 9 (c) Control of Narcotic Substances Act, 1997. By judgment dated 28.04.2015, the appellant was convicted under Section 9 (c) Control of Narcotic Substances Act, 1997 and sentenced to suffer R.I for four years and to pay a fine of Rs.20,000/-, in default thereof appellant was ordered to suffer S.I for 05 months more. Benefit of Section 382 Cr.P.C was extended to the appellant/accused.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 07.12.2012 SIP / S.H.O. Abrar Hussain of Police Station Daur, left Police Station along with his subordinate staff namely P.Cs. Abdul Karim and Khalid Hussain in the official vehicle

for patrolling duty vide roznamcha entry No.24 at 5-30 p.m. While patrolling at various places, when the police party reached at Moro Daur link road near water supply pump it was 1815 hours. It is alleged that present accused was standing there in suspicious manner. Appellant / accused when saw the police mobile tried to slip away but he was surrounded and caught hold. On inquiry, the accused disclosed his name as Zulfiqar Ali s/o Bux Ali. His personal search was conducted. During search, a piece of cloth wrapped around his waist was recovered. It was opened in presence of mashirs P.Cs Abdul Karim and Khalid Hussain. There were six big and small pieces of charas in it. Charas was weighed it was 1100 grams, out of it, 200 grams were separated for sending to the Chemical Examiner for analysis. Remaining 900 grams were separately sealed. Mashirnama of arrest and recovery was prepared. Thereafter, the accused and case property were brought to the Police Station, where it is alleged that S.H.O. Abrar Hussain lodged F.I.R. against the accused on behalf of the State. It was recorded vide crime No.40 of 2012, under section 9(c) Control of Narcotic Substance Act 1997.

3. During the investigation, 161 Cr.P.C statements of P.Ws were recorded and sample was sent to the Chemical Examiner on 16.10.2012. Positive chemical report was received. On completion of the investigation, challan was submitted against the accused under Section 9(c) Control of Narcotic Substances Act, 1997.

4. Trial Court framed the charge against the accused under Section 9(c) of CNS Act, 1997 at Ex-5. Accused pleaded not guilty and claimed to be tried.

5. At the trial, prosecution examined P.W-1 SIP Abrar Hussain at Ex.7, who produced Mashirnama of arrest and recovery at Ex.7-A, copy of F.I.R. at Ex.7-B, positive chemical report at Ex.7-C, attested copy of arrival and departure entries at Ex.7-D and 7-E. P.W-2 Mashir P.C. Abdul Kareem at Ex.8. Thereafter, the prosecution side was closed vide statement at Ex-09.

6. Statement of the accused under Section under Section 342 Cr.P.C. was recorded at Ex-10, in which the accused claimed his false implication in this case and denied the prosecution allegations. Regarding the positive chemical report it is stated that it has been managed. Accused has raised plea that P.Ws. are police officials and interested. Accused did not lead any evidence in defence and declined to examine himself on oath in disproof of prosecution allegations and pleaded innocence.

7. Learned Trial Court after hearing the learned Counsel for the accused, D.P.P. for State and on the assessment of the evidence, convicted and sentenced the accused as stated above. Hence, this appeal.

8. We have carefully heard learned Counsel for the parties and scanned the entire evidence minutely.

9. The facts of this case as well as evidence produced before the Trial Court find the elaborate mention in the judgment passed by the Trial Court dated 24.04.2015, therefore, the same may not be reproduced here, so as to avoid duplication and unnecessary repetition.

10. Mr. Kashif Ali Lakho, learned Advocate for the appellant has mainly contended that charas was recovered from the

possession of accused on 07.10.2012 but it was sent to the Chemical Examiner on 16.10.2012, delay in sending the charas to the Chemical Examiner has not been explained. It is further contended that W.H.C. of the Malkhana of the Police Station and P.C. Nazar Mohammad who had taken the charas to the Chemical Examiner have not been examined by the prosecution to prove the safe custody of the charas at Malkhana as well as its safe transit to the Chemical Examiner's office. Learned Advocate for the appellant further contended that there was no evidence that sample was drawn/taken from each piece for sending to the Chemical Examiner. Lastly, it is contended that prosecution case was highly doubtful and trial court has failed to appreciate the evidence according to the settled principle of law. In support of his contentions, he has relied upon the case of he has relied upon the case reported as *IKRAMULLAH & OTHERS v. THE STATE [2015 SCMR 1002]*.

11. Syed Meeral Shah Bukhari, learned Addl. P.G. conceded to the contentions raised by learned Advocate for the appellant and stated that no P.W has deposed that charas was in the safe custody at Malkhana of the Police Station and it was safely transmitted to the Chemical Examiner. In these circumstances learned Addl.P.G. did not support the judgment of the trial court.

12. We have carefully heard learned Counsel for the parties and perused the evidence.

13. In our considered view prosecution has failed to prove its case against the appellant beyond any reasonable doubt for the reasons that according to the case of prosecution 1100 grams charas were recovered from the possession of the accused on

07.10.2012 and 200 grams were separated as sample for sending to the Chemical Examiner but sample was sent to the Chemical Examiner for analysis after a delay of 09 days without plausible explanation. Moreover, there was no evidence that charas was in the safe custody at Malkhana of the Police Station during that period and it was safely transmitted to the Chemical Examiner for analysis. Even for the satisfaction of the Court P.C. Nazar Mohammad Buckle No.246 has not been examined to show that he had safely transmitted charas to the Chemical Examiner. According to the case of prosecution, 06 pieces of the charas were recovered from the possession of accused. There was no evidence that how many grams were taken from each big and small piece as sample for sending to the Chemical Examiner. Keeping in view the delay in sending the charas to the Chemical Examiner and plea of false implication raised by the accused, it was essential for the prosecution to prove its safe custody as held by Honourable Supreme Court in 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.”

15. There are also material contradictions in the evidence of the prosecution witnesses with regard to the availability of the private witnesses around the place of the recovery and route adopted by the police officials for reaching to the place of arrest of accused. In this case, there are several circumstances/infirmities which have created doubt in the prosecution case. It is settled law that a single circumstance which created doubt in the prosecution case would be sufficient to extend benefit of doubt to the accused as held by Honourable Supreme Court in the case of **TARIQ PERVEZ v. THE STATE** [1995 SCMR 1345].

16. 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. Thus prosecution case is doubtful. While extending benefit of doubt, appeal is allowed, impugned judgment dated 28.04.2015 is set-aside and the appellant is acquitted of the charge. Appellant present on bail. His bail bond stands cancelled and surety is hereby discharged.

The above are the reasons for our short order passed on 23.05.2017.

JUDGE

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