

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

Cr. Appeal No.D-93 of 2016.

Cr. Appeal No.D-98 of 2016.

Cr. Appeal No.D-116 of 2016.

PRESENT

Mr. Justice Naimatullah Phulpoto

Mr. Justice Muhammad Karim Khan Agha.

Date of Hearing: 11.05.2017

Date of Judgment: 11.05.2017

Appellants/accused:

- (1) *Khalil s/o Barkat Makrani.*
- (2) *Akram @ Akka s/o Pir Bux Makrani.*
[In Criminal Appeal No.D-93 of 2016].
- (3) *Aijaz s/o Karim Bux Makrani.*
- (4) *Kashif s/o Mohammad Makrani.*
[In Criminal J. Appeal No.D-98 of 2016].
- (5) *Asif Makrani s/o Murad Makrani.*
[In Criminal Appeal No.D-116 of 2016].

*Through Mr. Zahoor Ahmed Baloach,
Advocate*

The State: *Through Syed Meeral Shah Bukhari,
Deputy Prosecutor General, Sindh.*

JUDGMENT

NAIMATULLAH PHULPOTO, J:- Appellants Aijaz s/o Karim Bux, Khalil s/o Barkat, Kashif s/o Mohammad and Akram @ Akka s/o Pir Bux, all by caste Makrani were tried by Special Judge

for C.N.S. Tando Allahyar, in Special Case No.01 of 2016 for the offence under Section 9(c) Control of Narcotic Substances Act, 1997, in crime No.02 of 2016. By judgment dated 05.09.2016 appellants were convicted under Section 9(c) Control of Narcotic Substances Act, 1997. Accused Aijaz was sentenced to 08 years and 06 months R.I. and to pay fine of Rs.40,000/- or in default S.I. for 07 months, 2. Accused Kashif was sentenced to 06 years and 06 months R.I. and to pay fine of Rs.30,000/- in default S.I. for 06 months, 3. Accused Khalil was sentenced to 05 years and 06 months R.I. and to pay fine of Rs.25000/- in default S.I. for 15 days and 4. Accused Akram alias Akka was sentenced to 05 years and 06 months R.I. and to pay fine of Rs.25000/- in default S.I. for 15 days. Benefit of Section 382(B) Cr.P.C was also extended to the appellants/accused.

2. Brief facts of the prosecution case as reflected from the FIR are that on 08.01.2016 SIP/SHO Adam Khan left Police Station 'A' Section Tando Allahyar vide Roznamcha entry No.20 at 1500 hours along with his subordinate staff for patrolling duty. When the police party reached at Tando Adam Bye-pass, it is alleged that S.H.O. received spy information that accused persons were present in the graveyard of Makrani Mohalla and they were selling the charas openly. Such information was conveyed by the S.H.O. to the DSP Tando Allahyar namely Mohammad Haneef Shaikh. Thereafter it is alleged that after some time SDPO Mohammad Haneef Shaikh along with his staff Inspector Irfan Ali Shah Incharge CIA Center, Ghulam Shabbir Jamali S.H.O. Nasarpur, SIP Riaz Ahmed Soomro S.H.O. Police Station 'B' Section Tando Allahyar along with his staff and SIP Mohammad Afzal Magsi S.H.O. Bukera Sharif along with

his staff reached there. Police officials proceeded to the pointed place and reached near graveyard at 1700 hours. It is alleged that S.H.O. identified the accused persons. They were 1. Asif, 2. Tarique alias Kaloo, 3. Akram alias Akka, 4. Shoaib, 5. Tarique, 6. Aijaz, 7. Khalil and 8. Kashif all by caste Makrani. It is alleged that accused were carrying black coloured plastic bags in their hands. While, seeing the police mobiles they tried to run away. Police party succeeded to catch hold 03 accused persons. However, five accused persons by throwing their plastic thelis succeeded to run away. The persons who were caught hold on inquiry disclosed their names as 1. Aijaz s/o Karim Bux Makrani, 2. Khalil Makrani & 3. Kashif Makrani. It is alleged that from the plastic bag of accused 1. Aijaz Makrani, 5 packets of the charas weighing 5000 grams and 40 rods (weight 250 grams) Total 5250 grams were secured. From his personal search one currency note of Rs.500/- was recovered from the pocket of his shirt. From the plastic bag of accused Khalil Makrani, 2 packets of the charas were recovered weighing 2000 grams and 60 rods (weight 350 grams) Total weight 2350 grams. From his personal search cash of Rs.300 was also recovered. From the black coloured plastic bag of accused Kashif Makrani. It contained 3 packets of the charas weighing 3000 grams and 15 pieces of charas weighing 400 grams (Total 3400 grams) was recovered. From his personal search 04 currency notes of Rs.100/- were also recovered.

2. Plastic bags / Thelis of the accused who ran away were also opened in presence of mashirs. From the plastic bag thrown by accused Asif 03 packets of charas weighing 3000 grams and 30 rods of charas eighing 150 grams (Total 3150 grams); from the

plastic bag thrown by accused Tariq alias Kaloo 02 packets of the charas weighing 2000 grams and 20 rods of charas weighing 100 grams (Total 2100 grams); From the plastic bag thrown by accused Akram @ Akka 02 packets of charas weighing 2000 grams and 03 pieces of charas weighing 70 grams (Total 2070 grams); from the plastic bag thrown by accused Tarique Makrani 02 packets of charas weighing 2000 grams and 20 pieces of charas weighing 450 grams total weight 2450 grams and from the plastic bag thrown by accused Shoaib 1.1/2 packet of charas weighing 1500 grams were recovered. The police party also secured charas in the shape of rods/pieces lying on the ground weighing 500 grams.

3. Charas was sealed at the spot separately for sending to the Chemical Examiner for analysis. Joint Mashirnama of arrest and recovery was prepared in presence of the mashirs namely SIP Afzal Ahmed Magsi and SIP Riaz Ahmed Soomro. Thereafter, accused and case property were brought to the Police Station where SHO Adam Khan Abro lodged F.I.R. against all the accused on behalf of State on 8.1.2016 under Section 9(c) Control of Narcotic Substance Act 1997.

4. After registration of F.I.R, charas was sent to the Chemical Examiner. Positive chemical report was received. On the conclusion of the investigation, challan was submitted against accused Aijaz, Khalil, Kashif and Akram. Remaining accused were shown as absconders. Proceedings under section 87 & 88 Cr.P.C. were concluded against them.

5. Charge was framed against accused Aijaz, Khalil, Kashif and Akram under section 9(c) Control of Narcotic Substance Act 1997. All the accused pleaded not guilty and claimed to be tried.

6. At the trial, prosecution examined P.W-1 SIP Afzal Ahmed Magsi SHO Piyaro Lund at Ex.7, who produced mashirnama of arrest and recovery at Ex.8. P.W.2 Complainant SIP Adam Khan Abro at Ex.9, who produced F.I.R, Entry No.20 dated 8.1.2016, Entry No.29 and positive report of Chemical Examiner at Ex.10 to 13. Thereafter, prosecution side was closed by DPP vide his statement dated 19.08.2016 at Ex.14.

7. Statements of accused were recorded under Section under Section 342 Cr.P.C at Ex-15 to 18, all the accused claimed their false implication in this case and denied the prosecution allegations. And did not lead any evidence in defence and declined to give statement on oath in disproof of prosecution allegations.

8. Learned Trial Court after hearing the learned Counsel for the parties and assessment of the evidence available on record, by judgment dated 05.09.2016, found above named accused guilty charge and convicted and sentenced them as stated above. Hence, these appeals.

9. After conviction of the aforesaid accused according to the case of prosecution accused Asif s/o Murad Makrani was arrested and trial court framed charge against him at Ex.26 under section 9(c) Control of Narcotic Substance Act 1997. Accused pleaded not guilty and claimed to be tried.

10. At the trial prosecution examined P.W. Adam at Ex.27. P.W. Afzal ahmed S.H.O. Piyaro Lund at Ex.28. Thereafter, prosecution side was closed vide statement at Ex.29.

11. Statement of accused Asif was recorded under section 342 Cr.P.C. at Ex.30. And claimed false implication in this case.

12. Thereafter, trial court heard the learned counsel for the parties and by judgment dated 05.11.2016, convicted the accused Asif under section 9(c) for 06 years R.I and 06 months and to pay fine of Rs.30,000/- In case of default in payment of fine he was ordered to undergo S.I. for 6 months. However, benefit of section 382-B Cr.P.C. was extended to the accused. By this single Judgment we intend to dispose of all the three appeals filed by the appellants as the same are filed against impugned judgments.

13. We have carefully heard learned Counsel for the parties and scanned the entire prosecution evidence.

14. 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 05.09.2016, therefore, the same may not be reproduced here, so as to avoid duplication and unnecessary repetition.

15. Mr. Zahoor Ahmed Baloach, learned Advocate for the appellants has mainly argued that it was the case of spy information but S.H.O. did not call private persons to act as mashirs in this case. It is further contended that according to the case of prosecution, charas was recovered from the possession of the accused on 08.01.2016 but it was sent to the Chemical Examiner on 12.01.2016 and delay in sending charas to analysis has not been explained. It is

also argued that charas was lying in the Malkhana of Police Station for more than 04 days, neither W.H.C. of the Police Station nor the ASI M. Aslam who had taken the samples to the Chemical Examiner have been examined to prove the safe custody/transit of the charas. It is also contended that prosecution story was unbelievable. Lastly, argued that about 100 police officials headed by DSP Tando Alahyar Mohammad Haneef Shaikh, armed with official arms and ammunitions participated in incident, it was day time it was unbelievable that five accused persons namely Asif, Tarique @ Kaloo, Akram @ Akka, Tarique and Shoaib Makrani ran away from the police and no effort was made by the police parties to capture them. In support of his contentions, he has relied upon the case reported as *IKRAMULLAH & OTHERS v. THE STATE [2015 SCMR 1002]*.

16. Syed Meeral Shah Bukhari, learned D.P.G half heartedly supported the case of prosecution and argued that evidence of the police officials is as good as of any private person. He further argued that evidence of the police officials was corroborated by the positive report of the Chemical Examiner. Learned D.P.G. prayed for dismissal of appeals.

17. We have carefully heard learned Counsel for the parties and scanned the entire prosecution evidence.

18. From the close scrutiny of the evidence, it transpired that S.H.O. of Police Station Tando Allahyar left Police Station on 08.01.2016 along with his subordinate staff for patrolling. When the police officials reached near graveyard situated at Makrani Mohallah, S.H.O. received spy information that present accused were selling

charas openly. S.H.O. conveyed this information to the DSP Tando Allahyar Mohammad Haneef Shaikh. After some time DSP along with Inspector Irfan Ali Shah Incharge CIA Center, Ghulam Shabbir Jamali S.H.O. Nasarpur, SIP Riaz Ahmed Soomro S.H.O. Police Station 'B' Section Tando Allahyar, and SIP Mohammad Afzal Magsi S.H.O. Bukera Sharif reached near graveyard and proceeded to the pointed place where saw 08 accused persons who had black coloured plastic bags in their hands who while seeing the police party tried to run away. Police officials succeeded to catch hold 03 accused persons and 05 accused ran away by throwing black coloured plastic bags. The evidence of the police officials did not inspire confidence and the same was unreliable for the reasons that police parties were consisting of about 100 police officials they couldn't arrest 05 accused persons and they ran away. The efficiency and conduct of police officials appear to be highly unbelievable/questionable. It has also come on record that police officials were armed with official arms and ammunitions but no sincere effort was made to arrest the accused who ran away. There was no evidence that which black coloured theli/bag thrown by the absconding accused belonged to which of the accused. Evidence of the police officials before the trial court was general in nature. In the mashirnama of arrest and recovery, quantity of the narcotics substance recovered from the each accused was materially contradicted with prosecution evidence. Moreover, description or identification mark on the property recovered from each accused has not been separately mentioned to identify the property before trial court. According to the case of prosecution, charas was recovered from accused persons on 08.01.2016, after registration of the F.I.R. it was kept at Malkhana of the Police Station. The samples were

sent to the Chemical Examiner on 12.01.2016, same were received in the office of Chemical Examiner on 13.01.2016, delay in sending samples to the Chemical Examiner has not been explained by the prosecution. Safe custody of the charas from the date of recovery 08.01.2016 to 13.01.2016 has also not been established by cogent evidence. W.H.C. of Malkhana of the Police Station and ASI Mohammad Aslam who had taken samples to the Chemical Examiner have not been examined. Therefore, we are of the considered view, that positive report of the Chemical Examiner would not be helpful to the prosecution case. It was the case of spy information, and day time and presence of the persons of the locality around the place of recovery has come on record but S.H.O. Adam Khan did not try to associate private persons as mashirs of the recovery. In this case, DSP Tando Allahyar was the head of the police party neither he has been examined nor the S.H.Os of other Police Station SIP Ghulam Shabbir Jamali and SIP Riaz Ahmed Soomro who participated in arrest and recovery of accused persons. Non-examination of these material witnesses would be fatal to the case of prosecution. Accused Akram alias Akka has raised plea that he owns General Store and S.H.O. had purchased some articles but failed to pay the price to which he protested, as such, he along with his friends were involved in the false case. Keeping in view the prosecution evidence and defence plea we hold that prosecution case was highly doubtful. It required independent corroboration but it was lacking in the prosecution case. Trial court without application of the judicial mind relied upon the evidence of police officials while ignoring material defects/infirmities in the prosecution case. Learned advocate for the appellants has rightly relied upon the case of

IKRAMULLAH & OTHERS v. THE STATE [2015 SCMR 1002]. In

which the Honourable Supreme Court has held 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.”

19. We have already observed that prosecution case appeared to be unnatural and unbelievable. In this case there are several circumstances which created serious doubts in the prosecution case. 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].

20. 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 appellants. While extending benefit of doubt appeals are allowed, impugned judgments dated 05.09.2016 & 05.11.2016 are set-aside and the appellants are acquitted of the charge. The appellants are in custody. They shall be released forthwith if not required in some other case.

These are the reasons for our short order dated 11.05.2017.

JUDGE

JUDGE

Arif