

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

Cr. Appeal No.D-154 of 2011.

PRESENT

Mr. Justice Naimatullah Phulpoto

Mr. Justice Muhammad Karim Khan Agha.

Date of Hearing: 09.05.2017

Date of Judgment: 09.05.2017

Appellant/accused: Wazeer Dahri
Through Mr. Ghulamullah Chang,
Advocate

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

JUDGMENT

NAIMATULLAH PHULPOTO, J:- Appellant Wazeer Dahri was tried by learned Special Judge for C.N.S. Sanghar, in Special Case No.40 of 2010 for the offence under Section 9(c) Control of Narcotic Substances Act, 1997, in crime No.405 of 2010. By judgment dated 25.04.2011 appellant was convicted under Section 9(c) Control of Narcotic Substances Act, 1997 and sentenced to 06 years R.I. and to pay a fine of Rs.20,000/-, in default thereof the appellant was also to suffer R.I for 06 months more. Benefit of Section 382(B) Cr.P.C was extended to the appellant/accused.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 11.10.2010, Mehmood Ahmed S.H.O. of Police Station Tando Adam, left Police Station along with his subordinate staff vide Roznamcha entry No.17 at 1720 hours for patrolling. After patrolling at various places, when police party reached at Jalal Mori Bus Stop Shahdadpur. At 2145 hours police party, saw the present

accused standing there. He was carrying a black colored polythene bag in his hand. While seeing the police mobile, accused tried to run away but police surrounded and caught him hold. On enquiry, accused disclosed his name as Wazeer s/o Ishaque by caste Dahri. S.H.O. secured plastic bag from his possession and opened it in presence of the mashirs ASI Mohammad Aslam and H.C. Ali Nawaz. Said plastic bag contained 10 pieces of Charas. The Charas was weighed, it became 1020 grams. S.H.O. separated sample of 20 grams from each piece for sending to the chemical examiner for analysis. Thereafter, remaining case property and sample were separately sealed. Cash of Rs.230 was also recovered from the front pocket of the accused. Mashirnama of arrest and recovery was prepared in presence of mashirs. Accused and case property were brought to the Police Station where F.I.R. was lodged against the accused vide crime No.405 of 2010 under Section 9(c) Control of Narcotic Substance Act 1997.

3. After registration of the F.I.R, S.H.O. handed over custody of the accused, case property/sample to the S.I.O for investigation of the aforesaid crime who sent sample to the chemical examiner through H.C. Mohammad Younus for analysis and received the positive chemical report. On the conclusion of the investigation, challan was submitted against the accused under section 9(c) Control of Narcotic Substance Act 1997.

4. Trial Court framed the charge against the accused under Section 9(c) of CNS Act, 1997 at Ex-2. Accused pleaded not guilty and claimed to be tried.

6. At the trial, prosecution examined P.W-1 SIP Mehmood Ahmed at Ex.4, who produced attested copy of departure Roznamcha entry No.17 at Ex.4-A, Mashirnama of arrest and recovery at Ex.4-B, F.I.R. bearing crime No.405 of 2010 at Ex.4-C. P.W.2 Mashir ASI Mohammad Aslam Bullo at Ex.5 and P.W.3 SIP Investigation Officer Mohammad Hayat Sanjrani at Ex.6 who produced report of Chemical Examiner at Ex.6-A. Prosecution side was closed by D.P.P vide his statement dated 21.02.2011 at Ex.7.

6. Statement of accused was recorded under Section under Section 342 Cr.P.C at Ex-08, in which the accused claimed his false implication in this case and denied the prosecution allegations. Accused has stated that he has been involved in this case falsely and raised plea that he was declared innocent and case was disposed of by Investigation Officer in 'A' class but concerned Magistrate did not agree with the opinion of the I.O. and took the cognizance of offence. He has produced Photostat of the opinion of the I.O. as Ex.8-A. Accused declined to give statement on oath in disproof of the prosecution allegations. No evidence has been led by the accused in his defence.

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

8. 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 25.04.2011, therefore, the same may not be reproduced here, so as to avoid duplication and unnecessary repetition.

9. Mr. Ghulamullah Chang, learned Advocate for the appellant mainly contended that accused has been involved in this case falsely. Departure entry No.17 has not been produced by the prosecution before the trial court. It is also contended that according to the prosecution case Charas was recovered from the possession of the accused on 11.10.2010 but it was received by the office of the Chemical Examiner on 15.10.2010. It is submitted that absolutely there was no evidence that Charas was in the safe custody from the date of the recovery till it was received by the office of the Chemical Examiner. Learned counsel for the appellant has submitted that I.O. had recorded 161 Cr.P.C. statements of P.Ws. Pandhi, Dost Mohammad and Mohammad Usman during investigation and found accused innocent but those private persons have not been examined by the prosecution at the trial. It is argued that material evidence has been withheld by the prosecution presumption would be in case those witnesses would have been examined by the prosecution they would have not supported the case of the prosecution. It is submitted that there are material contradictions in the evidence of the prosecution witnesses on material particulars of the case. Lastly it is submitted that prosecution case was highly doubtful. According to the defence counsel in fact the delay was caused for tampering with the Charas lying in the Malkhana. In support of his contentions he has relied upon the cases reported as *IKRAMULLAH & OTHERS v. THE STATE [2015 SCMR 1002]*.

10. Syed Meeral Shah Bukhari, learned D.P.G did not support the Judgment of the trial court on the ground that prosecution failed to produce before the trial court arrival entry No.17 and there was no evidence that Charas was in the safe custody from

11.10.2010 to 15.10.2010. He has also argued that W.H.C. of the Police Station who had kept Charas in the Malkhana and H.C. Mohammad Younus who had taken the sample to the Chemical Examiner have also not been examined by the prosecution before the trial court. In the view of above learned D.P.G. did not support the prosecution case.

11. We have carefully heard learned Counsel for the parties and scanned the entire prosecution evidence and examined the defence plea.

12. We have come to the conclusion that prosecution case is not free from doubts for the reasons that according to the case of prosecution 1020 grams Charas were recovered from the possession of accused on 11.10.2010. Charas was kept in the Malkhana of Police Station in the custody of the W.H.C. and it was sent to the Chemical Examiner through H.C. Mohammad Younus and it was received in the office of the Chemical Examiner on 15.10.2010. Learned Advocate for the appellant has contended that there was tampering with the case property. In the view of above non-examination of W.H.C. of the Police Station and H.C. Mohammad Younus would be beneficial circumstance for the accused. Even no departure entry No.17 has been produced before the trial court, in order to satisfy the court that police officials had actually left the Police Station for patrolling duty at the relevant time. Investigation Officer has deposed that during investigation, he visited place of recovery and recorded 161 Cr.P.C. statements of independent persons of the locality. Investigation Officer had mentioned the names of those persons as Pandhi, Dost Mohammad and Mohammad Usman but they have not been examined by the

prosecution at the trial. No reason has been assigned. Presumption would be in case these witnesses would have been examined by prosecution at trial they would have not supported the case of prosecution. Investigation Officer has clearly opined that accused was innocent in this case but he submitted challan against him as suggested by the D.P.P.

13. Not a single word has been deposed by the complainant / Investigation Officer as well as the Mashir that the Charas was in the safe custody in between 11.10.2010 and 15.10.2010. In the above stated circumstances, positive report of Chemical Examiner would not improve the case of prosecution. In this respect, 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. Under the provisions of the Control of Narcotic Substance Act 1997, stringent sentences have been provided, if accused is charged under section 9(c) Control of Narcotic Substance

Act 1997, is proved. Therefore, for such reason the Act has to be construed strictly as held in the case of **MUHAMMAD IMRAN v. THE STATE** [2011 SCMR 1954]. There are number of infirmities and defects in the prosecution case as highlighted above which made the prosecution case highly doubtful.

15. 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].

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 examine the evidence of P.Ws according to the settled principle of law. There are number of infirmities in the prosecution evidence while extending benefit of doubt the appeal is allowed, impugned judgment dated 25.04.2011 is set-aside and the appellant is acquitted of the charge. Learned Advocate for the appellant Wazeer Dahri submits that he couldn't inform him about the date of hearing and requests that his absence may be excused. The appellant who is on bail, his bail bond stands cancelled and surety is hereby discharged.

JUDGE

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