

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Present:-
Mr. Justice Naimatullah Phulpoto
Mr. Justice Muhammad Karim Khan Agha

Cr. Appeal No.D-47 of 2015.

Date of hearing: 08.05.2017.
Date of judgment: 08.05.2017.

Appellant Muhammad Ayooob
S/o Rasool Bux by caste Machi: Through Mr. Ishrat Ali Lohar,
Advocate.

The State: Through Syed Meeral Shah, D.P.G.

J U D G M E N T

NAIMATULLAH PHULPOTO, J: Appellant Ayub was tried by learned Special Judge for CNS Shaheed Benazirabad, in Special Case No.75 of 2015, arisen out of Crime No.15 of 2015, registered at Police Station B-Section Shaheed Benazirabad, under section 9(c) Control of Narcotic Substances Act, 1997, whereby the appellant was convicted u/s 9(c) of CNS Act, 1997 and sentenced to 14 years RI and to pay fine of Rs.500,000/- In case of default in payment of fine, he was ordered to suffer SI for 01 year more. 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 on 14.01.2015 SIP / SHO Sanaullah Bhutto left Police Station B-Section Shaheed Benazirabad alongwith his sub-ordinate staff P.Cs./Ghulam Akbar, Khalid Pervez for patrolling in the Government Vehicle driven by PC Ali Khan Jamali vide Roznamcha Entry No.12 at 1300 hours. While patrolling at various places when the police party reached near Farsi Garden Line Park,

Nawabshah at 1600 hours, they saw the present accused standing there. He had one black coloured plastic bag in his hand. Police party stopped the vehicle, accused on seeing the police tried to run away but he was surrounded and caught hold by the police. Plastic bag was secured from his possession. Due to non-availability of private persons, P.Cs. Ghulam Akbar and Khalid Pervez were made as mashirs. SHO Sanaullah inquired name of accused, to which he disclosed his name as Muhammad Ayub S/o Rasool Bux by caste Machi. The plastic bag was opened in presence of the mashirs; it contained four big pieces of charas. Substance was weighed and it became 2000 grams charas, out of it 50 grams from each piece of said charas were separated and sealed for sending the same to the Chemical Examiner for analysis. The remaining charas was sealed separately. It is alleged that from the personal search of the accused cash of Rs.600/- was also recovered. Mashirnama of arrest and recovery was prepared in presence of mashirs. Accused and case property were brought at Police Station where F.I.R. bearing crime No.15/2015 was registered against the accused on behalf of the State under section 9(c) CNS Act.

3. During investigation, 161 Cr.P.C. statements of the PWs were recorded. Sample of 50 grams of the substance / charas was sent to the chemical examiner, on 16.01.2015 through PC Lutufullah for chemical analysis, positive chemical report was received. On the conclusion of investigation, challan was submitted against the accused for offence u/s 9(c) of CNS Act, 1997.

4. Trial Court framed charge against accused u/s 9(b) of CNS Act 1997, at Ex.5, to which accused pleaded not guilty and claimed to be tried. At the trial, prosecution examined PW-1 PC Ghulam Akbar at Ex.7, who produced mashirnama of arrest and recovery at Ex.7-A, P.W-2 Complainant / SHO

Sanaullah at Ex.8 who produced FIR at Ex.8/A, simple attested copies of roznamcha entries at Exs.8/B and 8/C, Chemical Examiner report at Ex.8/D, and thereafter, prosecution side was closed at Ex.9.

5. Statement of accused was recorded u/s 342 Cr.P.C.at Ex.10. Accused claimed his innocence and denied all the incrementing pieces of evidence against him. Accused stated that P.Ws. are police officials and interested. Neither he examined himself on oath nor led any defense evidence in disproof of prosecution allegations.

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 hence this appeal.

7. We have carefully heard Mr. Ishrat Ali Lohar, learned advocate for appellant, Syed Meeral Shah, learned D.P.G. for the State and scanned the entire evidence.

8. Learned trial Court in the judgment dated 07.05.2015 had already discussed the evidence in detail and there is no need to repeat the same here, so as to avoid duplication and unnecessary repetition.

9. Mr. Ishrat Ali Lohar, learned advocate for appellant has mainly contended that prosecution case is highly doubtful as according to F.I.R. four equal size pieces of charas were recovered from the possession of the accused but when the case property was de-sealed before trial Court, three pieces were of large size whereas the fourth one was of small size. It is further contended that according to the prosecution case brown coloured Charas was recovered from the possession of the accused, but Chemical Examiner in his report mentioned that Charas was black brown. It is contended that PC Lutufullah had taken the sample to the Chemical Examiner

for examination, but said PC has not been examined by the prosecution; that WHC who kept the Charas in the Malkhana for safety purpose has also not been examined; Lastly argued that prosecution case is highly doubtful. In support of his contention, learned counsel for the appellant has relied upon the cases of **Ikramullah v. The State** (2015 SCMR 1002) and **Ali Murad v. The State** (2013 YLR 1010).

10. Syed Meeral Shah, learned D.P.G. argued that discrepancy in the size of all four pieces of charas is minor in nature. Learned D.P.G. admitted that PC Lutufullah through whom the sample was sent for chemical examination, has not been examined by the prosecution. Learned D.P.G. has supported the judgment of the trial Court.

11. We have carefully heard the learned counsel for the parties and scanned the entire evidence. We have come to the conclusion that prosecution has failed to establish its' case for the reasons that from the perusal of the evidence of the complainant / SHO it transpired that accused was arrested on 14.01.2015 and from his possession one black coloured shopping bag was recovered. According to prosecution, there were four big pieces of charas in bag and weight of the charas was 2000 grams but when said charas was de-sealed and opened in trial there were three big size pieces while the fourth piece was of small size. Learned DPG has no explanation that from where small size piece of charas came in the case property. Evidence reflected that recovered charas was kept in safe custody by the WHC in Malkhan but no WHC has been examined to satisfy the Court that charas was kept in safe custody. According to the prosecution case, the sample was handed over to PC Lutufullah for sending to Chemical Examiner for analysis, said PC has also not been examined to prove the safe transit of such sample. In this respect, learned counsel for the appellant has rightly

relied upon the case of **Ikramullah** (Supra) in which 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 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.”

12. We have noticed that sentence awarded to the appellant was against sentencing policy. Charas weighing 2000 grams was recovered from the possession of the accused. According to the sentencing policy laid down in the case of **Ghulam Murtaza** (PLD 2009 Lahore 362), subsequently endorsed by Honourable Supreme Court in the case of **Ameer Zaib** (PLD 2012 SC 380), in the case of recovery of 2000 grams charas, R.I. for 04 years, 06 months and fine of Rs.20,000/-, can be awarded to the accused, but in this case appellant has been sentenced to suffer R.I. for 14 years and to pay fine of Rs.500,000/-, in case of default in payment of fine, he was ordered to suffer SI for 01 year more. There are several circumstances/infirmities in the prosecution case, which created reasonable doubt about the guilt of the appellant. In the case of *Tariq Pervez V/s The State* (1995 SCMR 1345), the Honourable Supreme Court has observed as follows:-

“It is settled law that it is not necessary that there should 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.”

13. In view of the above, we have no hesitation to hold that prosecution has failed to prove it's case against the appellant beyond reasonable doubt. Thus, while extending the benefit of doubt, appeal is allowed. The conviction and sentence recorded by the trial court vide judgment dated 07.05.2015 are set aside. Appellant is acquitted of the charge. Appellant is in custody, he shall be released forthwith if not required in any other case.

JUDGE

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