

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD
Cr. Appeal No.D-63 of 2016

PRESENT

Mr. Justice Naimatullah Phulpoto

Mr. Justice Muhammad Karim Khan Agha.

Date of Hearing: 24.05.2017

Date of Judgment: 24.05.2017

Appellant/accused: Akbar S/o Azizullah Mahar,
Through Mr. Altaf Hussain Chandio,
Advocate.

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

J U D G M E N T

NAIMATULLAH PHULPOTO, J:- Appellant Akbar was tried by learned Special Judge (NARCOTICS), Shaheed Benazirabad in Special Case No.758 of 2014 which emanated from Crime No.156 of 2014 for offence under Section 9(c) Control of Narcotic Substances Act, 1997. By judgment dated 16.05.2016, the appellant was convicted under Section 9(c) Control of Narcotic Substances Act, 1997 and sentenced to suffer 04 years and 06 months R.I and to pay a fine of Rs.20,000/-, in case of default in payment of fine, he was ordered to suffer S.I for 05 months more. Benefit of Section 382(B) Cr.P.C was extended to the appellant.

2. Brief facts as narrated in the FIR are that on 24.08.2014, Eidan Khan, SHO P.S Kazi Ahmed left Police Station alongwith his subordinate staff vide roznamcha entry No.17 at

1600 hours for arrest of a proclaimed offenders. When the police party reached at Lakhat Mori at 1730 hours, it is alleged that present accused was standing at the top of minor. Accused while seeing the police officials tried to run away but he was surrounded and caught hold. It is stated that private persons were not available at the spot. Thereafter, SHO Eidan Khan made ASI Manzoor Hussain and PC Muhammad Siddique as mashirs and inquired the name of the accused, to which he disclosed his name as Akbar S/o Azizullah Mahar. His personal search was conducted by the SHO and during his search from the fold of his shalwar, 03 big pieces of charas were recovered, so also cash of Rs.170/-. Charas was weighed; it was 1300 grams, out of it, it is stated that 50 grams from each piece were separated as a sample for sending to the chemical examiner for analysis. Accused was arrested and the case property was sealed at the spot. Thereafter, the accused and case property were brought to P.S Kazi Ahmed, where FIR against the accused was lodged on behalf of the State, it was recorded vide Crime No.156 of 2014 for offence under Section 9(c) Control of Narcotic Substances Act, 1997.

3. During the investigation, 161 Cr.P.C statement of P.Ws were recorded. Charas was sent to the chemical examiner. Positive report was received. On the conclusion of the investigation, challan was submitted against the accused before the concerned Court under Section 9(c) Control of Narcotic Substances Act, 1997.

4. Trial Court framed the charge against the accused under Section 9(c) of Control of Narcotic Substances Act, 1997 at Ex-6. Accused pleaded not guilty and claimed to be tried.

5. Prosecution in order to prove its case, examined P.W-1 ASI Manzoor Hussain at Ex-8, who produced mashirnama of arrest and recovery at Ex-8/A. P.W-2 SHO Eidan Khan was examined at Ex-9, who produced FIR at Ex-9/A, photostat copies of departure and arrival roznamcha entries at Ex-9/B & 9/C, positive chemical examiner's report at Ex-9/D. Thereafter, prosecution side was closed.

6. Statement of the accused was recorded under Section 342 Cr.P.C at Ex-11, to which the accused claimed false implication in this case and denied the prosecution allegation. Accused further stated that P.Ws have deposed falsely against him. Accused declined to give statement on oath in disproof of the prosecution allegations. No evidence in defence was led. Accused claimed his innocence and prayed for justice.

7. Learned Trial Court after hearing the learned Counsel for the parties and assessment of the evidence, convicted the appellant under Section 9(c) Control of Narcotic Substances Act, 1997 and sentenced him as stated above, hence the appellant has filed this appeal.

8. The evidence produced before the Trial Court find an elaborate mention in the judgment dated 16.05.2016, passed by the Trial Court, therefore, in order to avoid duplication and un-necessary repetition, the same is not reproduced here.

9. Mr. Altaf Hussain Chandio, learned Advocate for the appellant mainly contended that there was no evidence that after recovery of the charas from the possession of the accused by SHO, it was kept in safe custody at *Malkhana* of the concerned Police Station. He has also contended that there was delay of 04 days in sending sample of charas to the chemical examiner for analysis. It is also contended that the offence under Section 9(c) of CNSA, 1997 was punishable for death or imprisonment for life but no fair opportunity was provided to the appellant to cross-examine the prosecution witnesses. Learned Counsel for the appellant has argued that the Trial Court has also failed to perform its duty by not providing the facility of defence Counsel to the appellant on state expenses. Lastly, it is contended that no question was put by the Trial Court to P.Ws in order to ascertain the truth. Counsel for the appellant in support of his contentions has relied upon the cases *IKRAMULLAH AND OTHERS V/S. THE STATE (2015 SCMR 1002) AND MOHSIN V/S. THE STATE (2017 MLD 674)*.

10. Syed Meeral Shah Bukhari, learned Additional Prosecutor General appearing for the State conceded to the contentions raised by learned Counsel for the appellant and did not support the impugned judgment passed by the Trial Court.

11. We have carefully heard learned Counsel for the appellant, learned D.P.G for the State and scanned the entire evidence.

12. Evident reflected that P.W-2 Eidan Khan, SHO has deposed that the accused was arrested by him in presence of the mashirs and from his possession, 03 big pieces of charas, weighing 1300 grams, were recovered, out of it, 50 grams from each piece of charas were separated as a sample for sending to the chemical examiner for analysis. Thereafter, he returned back to the Police Station and lodged FIR against the accused on behalf of the State. Nowhere, he deposed that he has kept the charas in safe custody in *Malkhana*. He has also not deposed that he handed over the charas to the W.H.C of the Police Station. There was no entry to satisfy the Court that charas was kept in safe custody in *Malkhana* of the concerned Police Station. P.W-1 ASI Manzoor Hussain, who acted as mashir of arrest and recovery, has deposed that the accused after arrest was brought to the Police Station. He has also not deposed that charas recovered from the accused was kept in *Malkhana* by SHO Eidan Khan. SHO has produced the positive report of the chemical examiner at Ex-9/D, which reflected that sample of charas was received by the chemical examiner on 28.08.2014 after delay of 04 days and the delay in sending sample of charas to the chemical examiner has not been explained. Furthermore, PC Mohammad Saleem, who had taken sample of charas to the chemical examiner, has also not

been examined. Non-examination of this material witness would be beneficial circumstance for the accused. We have also perused the evidence minutely, which reflects that both the prosecution witnesses have been cross-examined by the accused himself. The offence under Section 9(c) of CNSA, 1997 is punishable for death or imprisonment for life. In case, the Counsel for the accused was not present, Trial Court was duty bound to provide the facility of Defence Counsel to the accused on state expenses but it was not done by the Trial Court.

13. This Court in the case of *Shafique Ahmed alias Shahjee V/s. The State (PLD 2006 Karachi 377)* has observed as under:-

“10. Article 10 of Constitution of Islamic Republic of Pakistan, 1973 provides that the accused shall not be denied the right to consult and be defended by a legal practitioner of his choice. Under section 340(1), Cr.P.C accused is entitled as a matter of right, to be defended by a pleader. The said provision reads as under:-

“340. Right of person against whom proceedings are instituted to be defened and his competency to be witness.—(1) Any person accused of an offence before a Criminal Court or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader.”

11. Circular 6 of Chapter VII of Federal Capital and Sindh Courts Criminal Circulars provides that on the committal of the case the Magistrate is required to ascertain from the accused as to whether he intends to engage a legal representative at his own expense otherwise the Sessions court would provide an Advocate on State expense to defend him. the said Circular reads as under:-

“6. In all cases in a Court of Sessions in which any person is liable to be sentenced to death, the

accused shall be informed by the Committing Magistrate at the time of committal, or if the case has already been committed by the Sessions court that, unless he intends to make his own arrangements for legal assistance, the Sessions Court will engage a Legal practitioner at Government expense to appear before it on his behalf. If it is ascertained that he does not intend to engage a legal representative at his own expense, a qualified Legal Practitioner shall be engaged by the Sessions Court concerned to undertake the defence and his remuneration, as well as copying expenses incurred by him, shall be paid by Government. The appointment of an advocate or pleader for defence should not be deferred until the accused has been called upon to plead. The Advocate or pleader should always be appointed in sufficient time to enable him to take copies of the deposition and other necessary papers which should be furnished free of cost before the commencement of the trial. If after the appointment of such legal representative the accused appoints another Advocate or pleader, the Advocate or pleader appointed by the Court may still in its discretion be allowed his fee for the case.”

12. Rule 35 of Sindh Chief Court Rules (Appellate Side) also deals with the same subject which reads as under:--

“35. In what matters Advocate appointed at Government cost. When on a submission for confirmation under section 374 of the Code of Criminal Procedure, 1898, or on an appeal from an acquittal or on an application for revision by enhancement of sentence the accused is undefended, an Advocate shall be appointed by the Division Court to undertake the defence at the cost of Government in accordance with the Government notification or rules relating thereto. Such Advocate shall be supplied a copy of the paper book free of cost.”

13. From the above position it follows that an accused is required to be defended by a Counsel of his choice as a matter of right. If an Advocate appears on behalf of the accused then he is required to be allowed to defend the accused. In an offence involves capital punishment, the law protects the rights of the accused as a duty has been cast upon the State to bear the

expense of the Advocate if the accused is unable to engage an Advocate. When the committal proceedings were being conducted then at the time of committing the accused to the Court of Sessions the Magistrate was required to inquire from the accused as to whether he would like to engage Advocate of his choice and in case he was unable to do so then the accused was required to be informed that the Sessions Court would provide him an Advocate on State expense to defend his case. The committal proceedings have been abolished. Therefore, now the Magistrate, before the case is sent up to the Court of Sessions, shall inquire from the accused about the requirement of Circular 6 of the Federal Capital and Sindh Courts Criminal Circulars. Such facts should be mentioned in the diary to facilitate the Court of Sessions to decide in which cases a Counsel on State expense is required to be appointed. In other cases or in which the Magistrate has not obtained the required information, as soon as the accused appears before the Court of Session, it is the duty of the said Court to ascertain whether the accused is represented by an Advocate or otherwise. If he is not being represented by an advocate then the Sessions Court is bound to engage a legal practitioner on Government expense to defend the accused. It is one of the duties of the Court of Sessions to see that the accused is represented by a qualified legal practitioner in the cases involving capital punishment. Thus, it is the mandate of the law that cases involving capital punishment shall not be tried in the absence of Advocate for the accused or proceeded with. Without first appointing an Advocate for the accused to defend him if he is unable to do so.”

14. In the present case, the appellant was unrepresented. Offence involved capital punishment, the law protects rights of the accused. Trial Court failed to provide an Advocate to the accused on State expense.

15. Moreover, the Trial Court had also failed to perform its duty by not putting some material questions to the prosecution witnesses in order to ascertain the truth. It appears that the Trial Court conducted the trial in a very casual manner. On the point of

safe custody of the charas and its safe transit, learned Counsel for the appellant has relied upon the case of *IKRAMULLAH AND OTHERS V/S. THE STATE (Supra)*, in which the Honourable Supreme Court has observed as follows:-

“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.”

16. In the light of what has been stated above, we have no hesitation to hold that the prosecution has failed to prove its case against the appellant and the learned Trial Court did not appreciate the evidence in its true prospective, therefore, by extending benefit of doubt, appeal is allowed. Appellant is in custody. He shall be released forthwith, if not required in some other custody case.

JUDGE

JUDGE