

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Appeal No.D-107 of 2014

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: Muhammad Aslam S/o Muhammad Moosa Yousifzai: Through Mr. Aijaz Shaikh, Advocate.

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

JUDGMENT

NAIMATULLAH PHULPOTO, J:- Appellant *Muhammad*

Aslam S/o Muhammad Moosa was tried by learned IInd Additional Sessions Judge/Special Court (CNS), Hyderabad, in Special Case No.81 of 2009, arising out of Crime No.08 of 2009 for offence under Section 9(b) Control of Narcotic Substances Act, 1997. By judgment dated 25.10.2014, the appellant was convicted under Section 9(b) Control of Narcotic Substances Act, 1997 and sentenced to 01 year and 04 months R.I and to pay a fine of Rs.11,000/-, in case of default in payment of fine, he was ordered to suffer S.I for 04 months more. Benefit of Section 382(B) Cr.P.C was extended to the appellant.

2. Brief facts of the prosecution case as unfolded in the FIR are that Excise Inspector Aijaz Ali Khoso on spy information left Excise Office alongwith his subordinate staff on 01.08.2009 and proceeded to the pointed place viz. Bhitai Hospital Unit No.5, Latifabad, Hyderabad, where it is alleged that the present accused was standing, who while seeing the Excise officials tried to slip away. However, he was surrounded and caught-hold. On inquiry, the accused disclosed his name as Muhammad Aslam S/o Muhammad Moosa Yousufzai. It is stated that private persons were reluctant to become the mashirs. As such, ECs Habibullah and Khuda Bux were made as mashirs by Excise Inspector. Personal search of the accused was conducted in presence of the mashirs and heroin powder was recovered from his possession; it was weighed, it was 150 grams, out of it, it is stated that 1 gram of heroin was separated as a sample for sending to the chemical examiner for analysis and the remaining substance was separately sealed. Mashirnama of arrest and recovery was prepared. Thereafter, the accused and case property were brought to Excise Police Station, where, FIR was lodged against the accused on behalf of the State; it was recorded vide Crime No.08 of 2009 for offence under Section 9(b) Control of Narcotic Substances Act, 1997.

3. During the investigation, 161 Cr.P.C statements of the P.Ws were recorded. One gram sample of the recovered heroin was sent to the chemical examiner for analysis. Positive report was

received. On the finalization of the investigation, challan under Section 9(b) Control of Narcotic Substances Act, 1997 was submitted against the accused before the competent Court of Law.

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

5. During trial, the prosecution examined P.W-1 Excise Inspector Aijaz Ali Khoso at Ex-4, who produced roznamcha entry at Ex-4/A, mashirnama of arrest and recovery at Ex-4/B, copy of FIR at Ex-4/C and the report of chemical examiner at Ex-4/D. P.W-2 mashir EC Habibullah was examined at Ex-5. Thereafter, the prosecution side was closed.

6. Statement of accused Muhammad Saleem was recorded under Section 342 Cr.P.C. Accused claimed his false implication in this case and denied the prosecution allegations and stated that report of the chemical examiner has been managed. Accused did not lead evidence in defence and declined to give statement on oath in disproof of the prosecution allegations.

7. Learned Trial Court after hearing the learned Counsel for the parties and examining the evidence, by judgment dated 25.10.2014, convicted the appellant under Section 9(b) Control of Narcotic Substances Act, 1997 and sentenced as stated here-in-above, hence, this appeal.

8. The evidence produced before the Trial Court find an elaborate mention in the judgment passed by the Trial Court dated 25.10.2014, hence, the same is not reproduced here, in order to avoid duplication and un-necessary repetition.

9. Mr. Aijaz Shaikh, learned Advocate for the appellant has mainly contended that it was the case of spy information but Excise Inspector failed to associate with him independent persons of the locality to witness the recovery proceedings. It is also contended that the heroin was recovered from the possession of the accused on 01.08.2009 but the sample of heroin was sent to the chemical examiner with inordinate delay and there was no evidence that heroin was kept in safe custody during that period. It is further argued that delay in sending sample of the heroin has not been explained by the prosecution. It is also argued that the alleged Motorcycle was not produced before the Trial Court. It is also contended that safe custody of the heroin recovered from the possession of the accused has not been established by examining the Incharge of the *Malkhana* of Excise Police Station nor Excise Constable, who had taken sample of heroin to the chemical examiner, has been examined. Counsel for the appellant has further argued that the appellant was victim of the enmity with the Excise Officials as he had filed Constitutional Petition No.S-376 of 2004 against the Excise officials before this Court. Learned Counsel for the appellant in support of his contentions has relied

upon the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*.

10. Learned Additional Prosecutor General appearing for the State conceded to the contentions raised by learned Advocate for the appellant and did not support the impugned judgment.

11. We have carefully heard learned Counsel for the parties and scanned the entire evidence. In our considered view, the prosecution has failed to prove its case against appellant Muhammad Saleem for the reasons that it was the case of the spy information. Excise officials had sufficient time to call the independent and respectable persons of the locality to witness the recovery proceedings but it was not done for the reasons best known to them. There is nothing on the record to satisfy the Court that heroin recovered from the possession of the accused was kept in safe custody at *Malkhana* of P.S Excise. Moreover, EC Shahid Baloch, who had taken sample of 1 gram heroin to the chemical examiner, has not been examined. According to prosecution case, heroin has been recovered from the possession of the accused on 01.08.2009, its sample was sent to the chemical examiner for analysis on 03.08.2009. Not a single prosecution witness has deposed that heroin was in safe custody at *Malkhana* and it was safely transmitted to the chemical examiner for analysis. Appellant in his statement recorded under Section 342 Cr.P.C has placed on record certified true copy of C.P.No.S-376/2004 (Ex-7/A) filed against Excise officials and order dated 24.01.2005 passed by this

Court at Ex-7/B. In the background of the constitutional petition filed by the appellant, we are unable to rely upon the evidence of the Excise officials without independent corroboration, which is lacking in this case. On the point of safe custody of the narcotic substance recovered from the possession of the accused and its safe transit, learned Counsel for the appellant has rightly relied upon the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*, wherein, the Honourable Supreme Court has observed 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. Having considered the arguments advanced at bar as well as the case law referred to here-in-above, we have come to the conclusion that prosecution has failed to establish its case against the appellant beyond shadow of doubt. 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).

13. For the foregoing reasons, we are of the considered view that the prosecution has failed to prove its case against the appellant beyond reasonable shadow of doubt. Thus, by extending benefit of doubt, appeal is allowed. Conviction and sentence recorded by the Trial Court vide judgment dated 25.10.2014 are set aside. Appellant is acquitted. Appellant is present on bail, his bail bond stands cancelled and surety is hereby discharged. These are the reasons for our short order dated 23.05.2017.

JUDGE

JUDGE

