

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

***Cr. Jail Appeal No.D-86 of 2008***

**PRESENT**

*Mr. Justice Naimatullah Phulpoto  
Mr. Justice Zulfiqar Ahmad Khan.*

*Date of Hearing: 25.04.2017*

*Date of Judgment: 25.04.2017*

*Appellant/accused: Asif S/o Munir Ahmed Rajput:  
Through Mr. Nandan A. Kella,  
Advocate*

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

**JUDGMENT**

**NAIMATULLAH PHULPOTO, J:-** This Criminal Jail Appeal is directed against the judgment dated 26.07.2008 passed by learned Sessions Judge/Special Court (CNS), Mirpurkhas in Special Case No.10 of 2006 arising out of Crime No.03 of 2006 for offence under Section 9(c) Control of Narcotic Substances Act, 1997, whereby the learned Judge convicted appellant Asif S/o Munir Ahmed Rajput for offence under Section 9(c) Control of Narcotic Substances Act, 1997 and sentenced to 05 years R.I and to pay a fine of Rs.10,000/- and in default in payment of fine, to suffer S.I for 06 months more. Appellant was extended benefit of Section 382(B) Cr.P.C.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 05.10.2006, Farooq Aslam Bajwa, DIO Excise Office, Mirpurkhas alongwith his subordinate staff left Excise Office in a Government vehicle for apprehending the drugs traffickers. Excise officials patrolled at difference places, when they reached at old power house, they received spy information that present accused was selling charas infront of his house in Volkert Baloch Mohalla. On such information, it is alleged that excise officials proceeded to the pointed place and reached there at 1500 hours. It is alleged that present accused was standing there, who while seeing the police mobile tried to run away but he was surrounded and caught-hold. A plastic bag, which he was carrying in his hand, was taken into possession by the excise officials. On inquiry, the accused disclosed his name as Asif S/o Munir Ahmed Rajput. Plastic bag was opened in presence of mashirs; it contained 115 rods and 03 big pieces of the charas; weight of recovered charas became 2000 grams, out of it, 10 grams were separated as a sample for sending to the Chemical Examiner. Sample was sealed while 1990 grams of the charas were also separately sealed. From the pocket of the accused, cash of Rs.70/- was also secured. Due to non-availability of public mashirs, mashirnama of arrest and recovery was prepared in presence of mashirs P.Cs Abdul Hussain and Javaid Iqbal. Thereafter, the accused and case property were brought to the excise police station, where, FIR was lodged against the accused on behalf of the State; it was recorded vide Crime

No.03 of 2006 for offence under Section (c) Control of Narcotic Substances Act, 1997.

3. During the investigation, 161 Cr.P.C statements of P.Ws were recorded. Sample was sent to the Chemical Examiner for analysis. On completion of the investigation, final report was submitted against the accused under Section 9(c) Control of Narcotic Substances Act, 1997.

4. Trial Court framed the charge against the accused under Section 9(c) Control of Narcotic Substances Act, 1997 at Ex-2. Accused met the charge with denial and claimed to be tried.

5. At the trial, in order to substantiate the charge, the prosecution examined P.W-1 Farooque Aslam Bajwa at Ex-4, who produced mashirnama of arrest and recovery at Ex-4/A, FIR at Ex-4/B and the report of chemical examiner at Ex-4/C. P.W-2 EC Javaid Iqbal at Ex-5 and P.W-3 EC Abdul Hussain at Ex-6. Thereafter, the prosecution side was closed.

6. Statement of accused was recorded under Section 342 Cr.P.C at Ex-8, in which the accused claimed his false implication in this case and denied the prosecution allegations. He further stated that P.Ws have deposed against him falsely. Accused neither examined himself on oath in disproof of the prosecution allegations nor defence evidence was led by him.

7. Learned Trial Court formulated the points and examined the evidence. After hearing the learned Counsel for the parties, convicted the appellant under Section 9(c) Control of Narcotic Substances Act, 1997 and sentenced as stated above.

8. Trial Court in the judgment dated 26.07.2008 has already discussed the evidence in detail and there is no need to repeat it, so as to avoid duplication and un-necessary repetition.

9. Mr. Nandan A. Kellan, learned Advocate for the appellant has mainly contended that it was the case of spy information, excise officials deliberately failed to associate the independent and respectable persons of the locality to witness the recovery proceedings. He has further contended that according to the prosecution case, three big pieces and 115 rods of charas were secured from the plastic bag of the accused but out of same only 10 grams of charas were drawn for sending to the Chemical Examiner for analysis. It is argued that it was not clear from the evidence that from which rod or piece of charas, ten grams were taken as a sample. It is also argued that the said sample of ten grams of charas remained unsafe for five days at Excise Office. It is also contended that arrival and departure entries have not been produced before the Trial Court for the satisfaction of the Court. Learned Advocate for the appellant has argued that there was delay of five days in sending the sample of charas to the Chemical Examiner without explanation. Learned Advocate further submits that there was tampering with the charas allegedly

recovered from the appellant at the police station. Learned Counsel for the appellant has referred to the report of the Chemical Examiner, in which the description of the Article contained in the parcel is mentioned as parcel containing “one greenish brown semi soft piece and its smell like charas”. It is submitted that it is evident from the report of the chemical examiner that some other sample was sent to the chemical examiner for analysis. It is also contended that according to the report of the chemical examiner, the charas was sent to the chemical examiner through E.C Muhammad Shafi but neither he has been cited as a witness nor has been examined before the Trial Court. Learned Counsel for the appellant further submits that accused had raised a specific plea that one Raheem was selling charas in the Mohalla and the excise officials, after accepting bribe, released him and the appellant was involved falsely in this case. Learned Advocate for the appellant has argued that independent corroboration was very much essential but it was lacking in this case. Lastly, it is argued that there are material contradictions in the evidence of prosecution witnesses and prosecution case is full of doubts. In support of his contentions, he has relied upon the cases of *HAKIM ALI V/S THE STATE (2001 P.Cr.L.J 1865)*, *SHAFIULLAH V/S THE STATE (2007 YLR 3087)*, *BAQI JAN V/S THE STATE (2013 YLR 1518)* and *ABDUL QADIR V/S THE STATE (2015 P.Cr.L.J 235)*.

10. Syed Meeral Shah Bukhari, learned D.P.G argued that the appellant was arrested on 05.10.2006 and from his possession 115 rods and 03 big pieces of the charas were recovered and total weight of the charas was 2000 grams. Learned D.P.G submits that it is not clear that from which rod or piece of charas, ten grams were drawn separated by excise officials for sending to the chemical examiner. Learned D.P.G further submits that it is a fact that arrival and departure entries have not been produced before the Trial Court. Learned D.P.G conceded to the contentions raised by learned Advocate for the appellant that there is ambiguity in the chemical examiner's report with regard to the description of the property sent to the chemical examiner. In these circumstances, learned D.P.G did not support the impugned judgment.

11. We have carefully heard learned Counsel for the parties and perused the evidence minutely. Scrutiny of the evidence reflected that excise officials had left on 05.10.2006 for patrolling duty and on spy information, present accused was arrested and from his possession, 2000 grams of the charas were recovered in the shape of 115 small rods and 03 big pieces of the charas and out of the same, 10 grams were separated as a sample for sending to the chemical examiner for analysis. It is not clear that from which big or small piece of charas, 10 grams were separated for sending to the chemical examiner. Learned D.P.G could not resolve this ambiguity also. After arrest of the accused, the charas was kept at *Malkhana* for 05 days. Absolutely there is

no evidence on the record that the charas was in safe custody for 05 days. EC Muhammad Shafi, who had taken sample to the chemical examiner for analysis, has also not been examined by the prosecution in order to satisfy the Court that sample was safely handed over in the office of chemical examiner. On this point, reliance is placed upon the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*, wherein, 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 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. It has transpired that arrival and departure entries of the excise officials for 05.10.2006 have not been produced in evidence in order to satisfy the Court that excise officials had actually left on the relevant date and recovered charas from the accused. Admittedly, it was the case of spy information and it was day time but excise officials failed to call private persons from the vicinity to witness the recovery proceedings. This Court in the case of

*HAKIM ALI V/S THE STATE (2001 P.Cr.L.J 1865) has observed as under:-*

“4. The only fact needed to be proved in this case was that the appellant was having with him the Charas, for which he has been convicted. For its proof, the prosecution examined only two witnesses who are Excise Officials. P.W Inspector Mushtaq Ali said that they left for patrol after making an entry about it in Roznamcha, but no such entry was produced before the Court. The Charas was, allegedly, secured from the appellant at day time, at a public place, but there is no independent witness. These circumstances indicate a possibility of the case having been prepared at the Excise Office. That could have been done very conveniently.

5. Further, the statements of the two witnesses differed in description of some facts e.g. the Inspector said that Charas was weighed by Muhammad Bux. The other witness said that it was weighed by the Inspector himself.”

13. Accused in his statement recorded under Section 342 Cr.P.C has raised a specific plea that one Raheem was involved in selling charas, who was arrested by the excise officials but was let off and instead he was arrested in this case by the excise officials due to enmity with said Raheem. Serious *mala fide* on the part of the excise officials has been alleged. In these circumstances, we are unable to rely upon the evidence of the police officials without independent corroboration, which is lacking in this case. In this case, there are several circumstances, which create doubt in the prosecution case. It is well settled law that 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/S. THE STATE (1995 SCMR 1345)*.

14. For the above stated reasons, we are of the considered view that the prosecution has failed to prove its case against the appellant beyond reasonable doubt. Consequently, the instant appeal is allowed, impugned judgment dated 26.07.2008 is *set aside* and the appellant is acquitted of the charge. Appellant is present on bail, his bail bond stands cancelled and surety is hereby discharged.

JUDGE

JUDGE

Shahid