

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Jail Appeal No.D-94 of 2016

PRESENT

Mr. Justice Naimatullah Phulpoto

Mr. Justice Zulfiqar Ahmad Khan.

Date of Hearing: 13.04.2017
Date of Judgment: 14.04.2017
Appellant/accused: Through Mr. Ghulamullah Chang, Advocate
The State: Through Syed Meeral Shah Bukhari, Deputy Prosecutor General, Sindh.

JUDGMENT

NAIMATULLAH PHULPOTO, J:- Appellant Muhammad alias Muhammad Khan was tried by learned Special Judge (CNS), Jamshoro at Kotri in Special Case No.31 of 2015 for the offence under Section 9(c) Control of Narcotic Substances Act, 1997. By judgment dated 09.08.2016, the appellant was convicted under Section 9(c) Control of Narcotic Substances Act, 1997 and sentenced to 05 years R.I and to pay a fine of Rs.100,000/-, in default thereof, the appellant shall suffer R.I for 06 months more. Benefit of Section 382(B) Cr.P.C was extended to the accused.

2. Brief facts of the prosecution case as unfolded in the FIR are that on 17.03.2015 SIP Nooruddin Sakhirani of CIA Jamshoro left CIA Centre along with his subordinate staff namely ASI Ghulam Mohammad Chandio, P.Cs. Zulfiqar Ali Khaskheli, Mohammad Ramzan and H.C. Abdul Ghaffar duly armed with

official weapons vide roznamcha entry No.09 at 0100 hours, for arrest of the absconders, on the directions of the superiors. During patrolling it is alleged that CIA officials started checking at Atlas Chowk, SITE area Kotri at 0330 hours. CIA officials saw on the head light of vehicle that one person was coming from Dewan Mill. While seeing CIA officials he started to run away but CIA officials surrounded and caught hold of him. On inquiry, accused disclosed his name as Muhammad alias Muhammad Khan son of Ghazi Khan Chandio. P.C. Zulfiqar Ali who was accompanied with the CIA officials disclosed that the apprehended accused was absconder in Crime No.03 of 2013 registered at police station Jamshoro for offences under sections 324, 353 PPC. ASI Zulfiqar Ali conducted personal search of the accused / appellant and from the left fold of his 'Shalwar' one shopping bag was recovered; it was opened by CIA officials in presence of Mashirs ASI Ghulam Muhammad Chandio and P.C. Zulfiqar Ali and found three pieces of charas in plastic bag, from the side pocket of shirt of accused currency notes of Rs.100 were also recovered; the recovered charas was got weighed through ASI Ghulam Mohammad Chandio, it was 1500 grams. A knife was also recovered from the possession of the accused. The recovered charas and the knife were sealed at spot for sending to the chemical examiner; Mashirnama of arrest and recovery was prepared. Thereafter, the accused and the case property were brought to CIA Center where case was registered against the accused for offence under section 9(c) of Control of Narcotic Substance Act 1997. On completion of

the investigation, challan was submitted against the accused under Section 9(c) Control of Narcotic Substances Act, 1997.

3. 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.

4. At the trial, prosecution examined P.W-1 complainant SIP Nooruddin Sakhirani Ex-4, who produced Mashirnama of arrest and recovery at Ex. 4-A, F.I.R. at Ex.4-B, departure and arrival entries at Ex.4-C and 4-D. Positive chemical report at Ex.4-E, copy of F.I.R. No.03 of 2013 at Ex.4-F and letter for sending the case property to the Chemical Examiner at Ex.4-G. Mashir ASI Ghulam Mohammad Chandio was examined at Ex.05. Thereafter, the prosecution side was closed.

5. Statement of accused under Section 342 Cr.P.C was recorded at Ex-7, in which the accused claimed his false implication in this case and denied the recovery of charas from his possession. Neither the accused examined himself on oath nor led any evidence in disproof of the prosecution allegations.

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

7. 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 09.08.2016, therefore, the same may not be reproduced here, so as to avoid duplication and unnecessary repetition.

8. Mr. Ghulamullah Chang, learned Advocate for the appellant contended there are material contradictions in the evidence of the prosecution witnesses with regard to the presence of the private witnesses and source of identification of accused. He has argued that in case appellant / accused was selling the charas but nobody was found by the CIA officials around the accused at the time of his arrest. He has also contended that according to the case of prosecution P.C. Zulfiqar Ali had identified the present accused/appellant, at the time of his arrest but he was not examined by the prosecution before the learned trial court. It is also contended that there is overwriting in the Roznamcha entry No.09 of the CIA for which no plausible explanation has been furnished. It is also argued that there is no explanation on the record that the charas which according to the prosecution case was recovered from the possession of the accused on 17.03.2015 was sent to the chemical examiner for analysis on 27.03.2015. It is submitted that the delay in sending of the charas has not been plausibly explained by the prosecution. Learned counsel for the appellant has further argued that the appellant has been falsely implicated in this case due to enmity with one Arbab as one constitutional petition was filed by the close relative of the petitioner against the highhandedness of the police and charas has been

foisted upon the appellant by the police officials for taking revenge. Learned counsel further contended that according to the prosecution case, three pieces of charas were recovered from the possession of the accused but at the trial the mashir of arrest and recovery has deposed that there were several pieces of charas produced before the trial court. It is contended that there is no evidence that the charas was in safe custody for the period of 10 days. Lastly learned counsel for the appellant argued that there was tampering in the case property and prosecution case is highly doubtful. In support of his contentions, learned Counsel for the appellant has relied upon the cases of *AMANAT ALI & 02 OTHERS V/S THE STATE (2008 SCMR 991)*, *PERVEZ ALIAS GIDARI V/S. THE STATE (2012 P.Cr.L.J 635)*, *MAULA JAN V/S. THE STATE (2014 SCMR 862)* and *MUHAMMAD SALEH MALLAH V/S. THE STATE (2016 P.Cr.L.J 432)*.

9. Syed Meeral Shah Bukhari, learned D.P.G submitted that the accused was arrested in presence of mashirs and from his possession 1500 grams of charas were recovered. Learned D.P.G admitted that P.C Zulfiqar Ali was Mashir of arrest and recovery but he has not been examined at the trial. Learned D.P.G argued that minor contradictions in prosecution evidence would not be fatal to the prosecution case. Learned D.P.G further argued that sample was taken from the charas recovered from the accused and positive chemical report was produced before the Trial Court. No specific enmity has been alleged against the police officials.

Learned D.P.G lastly argued that the Trial Court has appreciated the evidence according to the settled principles of law and he has supported the impugned judgment.

10. We have carefully heard learned Counsel for the parties and scanned the entire evidence.

11. From the close scrutiny of the evidence, it transpired that it was night time incident and accused was identified by P.C. Zulfiqar Ali, according to prosecution case the accused was an absconder in the police encounter case bearing crime No.03 of 2013. At the trial P.C. Zulfiqar Ali mashir of arrest and recovery has not been examined for the reasons best known to prosecution. It is rightly contended that in case the accused was selling the charas at night time but no one has been examined by the prosecution in order to show that accused was actually selling the charas. It is the matter of the record that ASI Ghulam Mohammad has produced Roznamcha Entry No.09; in which there is clear overwriting and the learned D.P.G. appearing for the State has not been able to furnish any plausible explanation for such overwriting. Perusal of record further reveals that there are major contradictions in the evidence of the prosecution witnesses with regard to the pieces of charas recovered from the possession of the accused and the pieces of charas produced before the trial court. Such contradiction clearly shows that there was some tampering with the case property. There is also nothing on the record that the charas was in safe custody for 10 days in *Malkhana* of the Police Station.

Serious *mala fide* and enmity against the police have been alleged by learned Counsel for the appellant. From perusal of the evidence, it transpired that no prosecution witness has deposed that who had taken the sample of the charas to the chemical examiner. In this respect, rightly reliance has been placed upon the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*, the relevant portion is reproduced hereunder:-

“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 come to conclusion that prosecution has failed to establish its case against the appellant beyond shadow of doubt for the reasons that there are major contradictions in the evidence of the prosecution with regard to the number of the pieces of the charas recovered from the possession of the accused. Safe custody of the charas at *Malkhana* was also not established. In such circumstances, it would be unsafe to rely upon the evidence of the police officials without independent

corroboration, which is lacking in this case. There are several circumstances in this case, which create doubt in the prosecution case. Reliance has been placed upon the case of *Khalil Ahmed V/s. The State (PLD 2008 Karachi 8)*, in which it is held as under:-

“18. In the circumstances, the case of the prosecution is highly doubtful. The conviction cannot be based on such type of trials which are marred by glaring infirmities. However, the trial Court resolved all the doubts in favour of prosecution and convicted the appellant, while losing sight of well-entrenched principle of law, that the burden was always on the prosecution to prove the charge beyond all reasonable doubts. The rule adopted by the trial Court, to say the least was not conducive for the safe administration of justice.

19. So far as the order of confiscation of the vehicle is concerned, it was made without availability of any material on the record. It was mechanically passed in flagrant violation of the provisions of section 33 of the Control of Narcotic Substances Act, as such the mandate of law was flouted by the trial Court. Thus the order of confiscation is nullity, the same deserves to be struck down.”

13. 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)*.

14. For the above reasons, appeal was allowed, impugned judgment dated 09.08.2016 was set aside and the appellant was acquitted of the charge as well as the appellant was ordered to be released forthwith if not required in any other case vide our short order dated 14.04.2017. These are the reasons for our said short order.

JUDGE

JUDGE

Shahid