

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Appeal No.D-150 of 2006

PRESENT

Mr. Justice Naimatullah Phulpoto

Mr. Justice Muhammad Karim Khan Agha

Date of Hearing: 09.05.2017.

Date of Judgment: 09.05.2017.

Appellants/accused: (1) Habibullah S/o Muhammad Bux Wassan.

(2) Nathomal @ Din Muhammad S/o Premchand Jundhahoro;

Through: Muhammad Sharif M.Sial, Advocate

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

JUDGMENT

NAIMATULLAH PHULPOTO, J:- Appellants Habibullah and Nathomal alias Din Muhammad were tried by learned Sessions Judge/Special Court (CNSA), Nawabshah in Sessions Case No.84 of 2000 emanated from Crime No.17 of 2000, registered at Police Station, Daur for offence under Section 9(b) Control of Narcotic Substances Act, 1997. By judgment dated 08.08.2006, both the appellants were convicted under Section 9(b) Control of Narcotic Substances Act, 1997 and sentenced to 03 years R.I and to pay a fine of Rs.20,000/- each, in case of default in payment of fine, they were ordered to suffer R.I for 03 months more. Benefit of Section 382(B) Cr.P.C was extended to them.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 20.04.2000, SHO Mazhar Hussain Hisbani of Police Station, Daur received spy information at 1930 that present accused/appellants were selling charas and heroin in front of the house of accused Habibullah in Mohalla Raza Abad. On receipt of such information, it is alleged that SHO Mazhar Hussain Hisbani alongwith his subordinate staff H.Cs Raza Muhammad, Muhammad Essa, Manzoor and other Constables vide roznamcha entry No.20 at 1945 hours left Police Station and proceeded to the house of accused Habibullah and reached there at 2000 hours. It is alleged that on the electric bulbs, police officials saw accused Habibullah, who was standing alongwith two persons in-front of the house. Both the accused were surrounded and caught-hold by the police party and their names were inquired, to which one accused disclosed his name as Habibullah S/o Muhammad Bux Wassan. His personal search was conducted by SHO in presence of mashirs H.Cs Raza Muhammad and Muhammad Essa. From his personal search, one plastic bag was secured from his pocket; it was opened; it contained 120 puris of heroin powder. Heroin powder was weighed; it was 150 grams, out of it, it is alleged that 09 puris, weighing 10 grams, were separated as sample for sending to the chemical examiner and the remaining substance was separately sealed. Cash of Rs.925/- was also secured from the possession of accused Habibullah. Other accused, on inquiry disclosed his name as Nathomal S/o Premchand Jundhahoro. His personal searched was also conducted by the SHO in presence of

the same mashirs. A plastic bag was secured from his possession; it contained 80 little and big pieces of charas lying in it. Charas was weighed; it was 120 grams, out of it, 02 pieces of charas, weighing 20 grams, were separated as a sample for sending to the chemical examiner. Cash of Rs.1075/- was also secured from his possession. Narcotic Substance recovered from both the accused was separately sealed and the remaining substance was also sealed. Mashirnama of arrest and recovery was prepared. Thereafter, both the accused were brought to the Police Station, Daur, where the SHO Mazhar Hussain Hisbani lodged FIR against the accused on behalf of the State; it was recorded vide Crime No.17 of 2000 for offence under Section 9(b) Control of Narcotic Substances Act, 1997.

3. During the investigation, 161 Cr.P.C statements of P.Ws were recorded. Samples of charas and heroin recovered from the possession of both the accused were sent to the Chemical Examiner for analysis on 02.05.2000 through P.C Hakim Ali. After usual investigation and receipt of positive chemical report, challan was submitted against both the accused under Section 9(b) Control of Narcotic Substances Act, 1997.

4. Charge was framed against both the accused by learned Trial Court under Section 9(b) Control of Narcotic Substances Act, 1997 at Ex-02. Both the accused pleaded not guilty and claimed to be tried.

5. At the trial, the prosecution examined P.W-1 mashir HC Raza Muhammad Khoso at Ex-8, who produced mashirnama of arrest and recovery at Ex-8/A. P.W-2 SIP Mazhar Hussain was examined at Ex-10, who produced copy of FIR at Ex-10/A, report of chemical examiner at Ex-10/B and roznamcha entry at Ex-10/C. Thereafter, the prosecution side was closed.

6. Statements of accused Habibullah and Nathomal alias Din Muhammad were recorded under Section 342 Cr.P.C at Ex-12 and 13. Both the accused denied the prosecution allegations. Accused Habibullah has raised plea that he has been falsely implicated in this case due to enmity with HC Raza Muhammad Khoso as he had filed Direct Complaint No.176 of 2000 against him and other police personnel before the Court of Special Judge, Anti-Corruption, Sukkur and the copy of the said direct complaint is produced at Ex-12/A. Accused did not lead evidence in defence and declined to give statement on oath in disproof of prosecution allegations.

7. Learned Trial Court after hearing the learned Counsel for the parties and examining the evidence, convicted both the accused under Section 9(b) Control of Narcotic Substances Act, 1997 and sentenced as stated above, hence, both the accused have filed this appeal.

8. 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 08.08.2006, therefore, the same may not be reproduced here, in order to avoid duplication and un-necessary repetition.

9. Mr. Muhammad Sharif M.Sial, learned Advocate for the appellants has mainly contended that it was the case of spy information. SHO Mazhar Hussain Hisbani had sufficient time to call the persons of the Mohalla, from where both the accused were arrested, to witness the recovery proceedings. It is also contended that the case property/substances recovered from the possession of the accused were sent to the chemical examiner after delay of 12 days of the recovery without explanation. It is contended that there was no evidence that the charas and heroin were in safe custody for such a long period of 12 days. It is submitted that HC Raza Muhammad Khoso had enmity with accused Habibullah and he had filed the Direct Complaint against the said HC and others before the Court of Special Judge, Anti-Corruption at Sukkur. It is also submitted that there are material contradictions in the evidence of the prosecution witnesses. Learned Counsel for the appellants has referred to some of the contradictions as follows:-

- i) *SHO Mazhar Hussain Hisbani (P.W-2) has said that he alongwith his subordinate staff went to the place of arrest of the accused from Northern side but Mashir Raza Muhammad (P.W-1) has said that they went there from Southern side.*

- ii) *Complainant SHO Mazhar Hussain Hisbani has deposed that accused Habibullah was arrested by Mashir/HC Raza Muhammad, whereas Raza Muhammad did not disclose that who apprehended the accused.*
- iii) *Complainant SHO Mazhar Hussain Hisbani has deposed that accused Habibullah was handcuffed by him but on this point Mashir/HC Raza Muhammad has deposed that accused was not handcuffed.*

10. Learned Counsel for the appellants, in support of his contentions, has relied upon the cases reported as *NAIMATULLAH KHAN V/S. THE STATE (2012 YLR 251)*, *ZAHID IQBAL V/S. THE STATE (2008 YLR 985)*, *TARIQ PERVEZ V/S THE STATE (1995 SCMR 1345)* and *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*.

11. Syed Meeral Shah Bukhari, learned D.P.G conceded to the contentions raised by learned Advocate for the appellants and argued that there was delay of 12 days in sending samples of the charas and heroin to the chemical examiner and there was no evidence before the trial Court that charas and heroin were in safe custody for 12 days. He has also argued that there is nothing on the record that from which pieces/puris of charas/heroin, the samples were taken for sending to the chemical examiner for analysis. Lastly, learned D.P.G did not support the judgment of the trial Court.

12. We have carefully heard learned Counsel for the parties and perused the evidence minutely.

13. From perusal of the evidence, we have come to the conclusion that the prosecution has failed to establish its case against the appellants beyond reasonable doubt for the reasons that it was the case of the prosecution that the accused were arrested on spy information from Raza Abad Mohalla but SHO Mazhar Hussain Hisbani did not call the people of Mohalla to act as mashirs of arrest and recovery. Material contradictions in the evidence of the prosecution witnesses have been highlighted by the learned Counsel for the appellants. SHO Mazhar Hussain Hisbani (P.W-2) has deposed that accused Habibullah was handcuffed by him but on this point Mashir/HC Raza Muhammad (P.W-1) has deposed that no accused was handcuffed. With regard to the route adopted by the police officials, there were also material contradiction in evidence of complainant and mashir. Evidence further reflected that the charas and heroin were recovered from the possession of the accused on 20.04.2000, but the samples of charas and heroin were sent to the chemical examiner from *Malkhana* through PC Hakim Ali on 02.05.2000 without explanation of delay. Not a single word has come on record that charas and heroin were in safe custody for 12 days in *Malkhana*. Prosecution has neither examined WHC of the *Malkhana* nor PC Hakim Ali, who had delivered the samples of charas and heroin to the Chemical Examiner, Sukkur at Rohri to prove safe transmission.

In this regard, 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.”

14. Moreover, there is background of the enmity between accused Habibullah and HC Raza Muhammad. Accused Habibullah in his statement recorded under Section 342 Cr.P.C, has placed on record a copy of Direct Complaint No.176 of 2000 filed by him against ASI Maqsood Ahmed Channa of P.S Daur, HC Raza Muhammad and others. In view of this background, we are unable to rely upon the evidence of the police officials without

independent corroboration, which is lacking in this case. There are number of infirmities and lacunas in the prosecution case. Learned Counsel for the appellants has rightly relied upon the case of *TARIQ PERVEZ V/S. THE STATE (1995 SCMR 1345)*, in which it is observed 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.

15. We, while relying upon the above cited authorities and looking to the peculiar circumstances of the case, hold that prosecution case was highly doubtful and the learned Trial Court did not appreciate the evidence according to the settled principles of law. Thus, while extending benefit of doubt, appeal is allowed. Conviction and sentence recorded by the Trial Court vide impugned judgment dated 08.08.2006 are *set-aside* and the appellants are acquitted of the charge. Appellants are present on bail, their bail bonds stand cancelled and the surety is hereby discharged.

JUDGE

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