

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

***Cr. Appeal No.D-168 of 2011***

**PRESENT**

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

*Date of Hearing: 28.04.2017*

*Date of Judgment: 28.04.2017*

*Appellant/accused: Arbab Ali S/o Gondal alias Haji:  
Through Mr.Meer Ahmed Mangiro,  
Advocate.*

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

**JUDGMENT**

**NAIMATULLAH PHULPOTO, J:-** Appellant Arbab Ali faced trial before the learned Sessions Judge/Special Judge (NARCOTICS), Jamshoro at Kotri in Special Case No.30 of 2010 arising out of Crime No.16 of 2010 for offence under Section 9(c) Control of Narcotic Substances Act, 1997. After full dress hearing, the appellant, by judgment dated 27.04.2011, was convicted under Section 9(c) Control of Narcotic Substances Act, 1997 and sentenced to 07 years and to pay a fine of Rs.50,000/-, in case of default in payment of fine, he was ordered to suffer R.I for 06 months more. However, benefit of Section 382(B) Cr.P.C was extended to him.

2. Brief facts of the prosecution case as unfolded in the FIR are that on 05.08.2011, Agha Salahuddin Pathan SHO P.S Thana Bula Khan left police station alongwith his subordinate staff, vide roznamcha entry No.15 at 2215 hours in a private car for arrest of proclaimed offenders. It is alleged that when the police party reached near Bakar Shah Jilani shrine, SHO received spy information that one person was selling charas there. Police party proceeded to the pointed place and saw the present accused, who while seeing the police in uniform tried to run away but he was surrounded and caught-hold. On inquiry, the accused disclosed his name as Arbab Ali S/o Gondal alias Haji by caste Palari. SHO conducted personal search of the accused in presence of P.C Muhammad Luqman and HC Jan Muhammad and recovered on plastic bag from the fold of his shalwar, it contained three pieces of charas. On further search, one unlicensed pistol with three live bullets and cash of Rs.200/- were also recovered. Charas was weighed; it was 1010 grams, out of it, it is stated that 10 grams were separated for sending to the chemical examiner for analysis. Mashirnama of arrest and recovery was prepared in presence of mashirs namely PC Muhammad Luqman and HC Jan Muhammad. Thereafter, the accused and case property were brought to the police station, where, FIR was lodged against the accused on behalf of the State; it was recorded vide Crime No.16 of 2010 for offence under Section 9(c) Control of Narcotic Substances Act, 1997. Case under Section 13(d) of Arms Ordinance was also registered separately against the accused. FIR in both the cases

was entrusted to the Investigating Officer, who inspected the place of wardat and sent the sample of 10 grams of charas to the chemical examiner. Positive report was received. On finalization of the investigation, instant 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) Control of Narcotic Substances Act, 1997 at Ex-02. Accused met the charge with denial and claimed to be tried.

4. At the trial, in order to substantiate the charge, the prosecution examined P.W-1 SHO Agha Salahuddin at Ex-4, who produced mashirnama of arrest and recovery at Ex-4/A, FIR at Ex-4/B and arrival and departure entries at Ex-4/C. P.W-2 mashir/PC Muhammad Luqman at Ex-5, who produced memo of place of incident at Ex-5/A. P.W-3 SIO Peer Mumtaz was examined at Ex-6, who produced the report of chemical examiner at Ex-6/A. Thereafter, the prosecution side was closed vide statement at Ex-7.

5. 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 and raised plea that the report of the chemical examiner has been managed and that the prosecution witnesses have deposed against him at the instance of opponent of his uncle, who is a political person. In support of such plea, the accused has produced copy of Criminal

Miscellaneous Application No.144 of 2010 filed before the Sessions Judge, Jamshoro at Kotri at Ex-9/A by Muhammad Alam Palari against the DPO Jamshoro.

6. Learned Special Judge (NARCOTICS) Jamshoro at Kotri after hearing the learned Counsel for the parties and examining the evidence brought before him, convicted the appellant under Section 9(c) Control of Narcotic Substances Act, 1997 and sentenced as mentioned here-in-above, hence this appeal.

7. Trial Court in the judgment dated 27.04.2011 has already discussed the evidence in detail and there is no need to repeat it here, so as to avoid duplication and un-necessary repetition.

8. Mr. Meer Ahmed Mangrio, learned Advocate for the appellant has mainly contended that it was the case of spy information and the accused was arrested near shrine of Bakar Shah Jilani but SHO failed to associate any independent persons from the locality to make them mashirs in this case. it is also contended that it is not clear that in what shape the charas was recovered from the possession of the accused and from which piece of charas, 10 grams were separated for sending to the chemical examiner for analysis. It is also submitted that according to the case of the prosecution, the charas was recovered from the possession for the accused on 05.08.2010 but it was sent to the chemical examiner on 10.08.2010. Learned Counsel for the

appellant has also argued that according to the report of the chemical examiner, the sample of charas was sent to the chemical examiner on 06.08.2010 but after 04 days it was received by the chemical examiner on 10.08.2010. It is also contended that no evidence has been brought on record by the prosecution that charas was in safe custody from 05.08.2010 to 10.08.2010. Lastly, it is contended that the appellant has been involved in this case falsely by the police as the uncle of the appellant had moved an application against the DPO. It is also pointed out that there is overwriting in the roznamcha entry No.15 Ex-4/C. In support of his contentions, learned Counsel for the appellant has relied upon the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*.

09. Syed Meeral Shah Bukhari, learned D.P.G admitted that there is overwriting in roznamcha entry No.15 dated 05.08.2010 and there was no evidence that the charas was in safe custody in between 05.08.2010 to 10.08.2010. Learned D.P.G further submits that it is not clear that from which piece of charas, 10 grams were drawn by the police officials for sending to the chemical examiner. Learned D.P.G conceded to the contentions raised by learned Advocate for the appellant and did not support the case of the prosecution.

10. We have carefully heard learned Counsel for the parties and perused the evidence minutely. From the perusal of the evidence, it transpires that it was the case of spy information.

SHO Agha Salahuddin had received spy information that the present accused was selling the charas around the shrine of Bakar Shah Jilani but he failed to associate the persons present at the said Dargah and no reason has been assigned by him in this regard. It is also not clear from the prosecution evidence that what was the shape of the charas recovered from the possession of the accused. It was very strange that the charas was recovered from the possession of the accused on 05.08.2010 but as per report of the chemical examiner, the sample of the charas was received by chemical examiner on 10.08.2010 through the letter dated 06.08.2010. It was material point that where the charas was kept for these 04 days. Learned Counsel for the appellant has argued that there was tampering with the case property. Infact nothing was recovered from the possession of the appellant. In these circumstances, the prosecution has failed to establish that the charas was in safe custody from the date of recovery till it was deposited in the office of the chemical examiner at Karachi. On this material point, the learned Counsel 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.”

11. No doubt, the evidence of the police officials is as good as that of any private person but in this case the accused has raised a specific plea that he has been involved falsely in this case due to political rivalry as he is nephew of one Muhammad Alam Palari, who had submitted an application against the DPO and copy of the order passed by Sessions Judge, Jamshoro has also been produced by him in his statement recoded under Section 342 Cr.P.C. In such circumstances, the evidence of the independent witnesses becomes very much essential to prove the guilt of the accused. There is also overwriting in the roznamcha entry, for which no explanation has been furnished by the prosecution. There are also contradictions in the evidence of the prosecution witnesses on some material particulars of the case. All these factors indicate failure on the part of the prosecution in establishing the case against the accused beyond any shadow of doubt. Serious *mala fide* on the part of the police 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)*.

12. In view of the foregoing reasons, we have no hesitation to say that the prosecution has failed to prove its case against the appellant beyond reasonable doubt. Consequently, the instant appeal is allowed, impugned judgment dated 27.04.2011 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