

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

Cr. Appeal No. D — 38 of 2015.

PRESENT

Mr. Justice Naimatullah Phulpoto

Mr. Justice Rasheed Ahmed Soomro.

Appellant: Sikandar alias Siko s/o Muhammad Ismail.
Through Mr. Ameer Ahmed Junejo, Advocate.

The State : Through Shahzado Saleem Nahiyoon, A.P.G.

Date of Hearing: 09.03.2017

Date of Judgment: 09.03.2017.

J U D G M E N T

RASHEED AHMED SOOMRO, J.

Appellant Sikandar alias

Siko was tried in F.I.R. No.45 of 2012, registered at Police Station Tando Allahyar on 4.3.2012, for offence under section 9(c) Control of Narcotic Substance Act 1997, and vide Judgment dated 31.3.2015 learned Sessions Judge / Special Court (Control of Narcotic Substance) Tando Allahyar, in Special Case No.24 of 2012, was convicted accused under section 9(c) Control of Narcotic Substance Act 1997, and sentenced to 04 years R.I. and to pay fine of Rs.10000/-. In case of the default in payment of the fine, he was ordered to suffer R.I. for 03 months. Appellant was extended benefit of Section 382-B Cr.P.C. The appellant has challenged his conviction and sentence through this appeal.

2. Brief facts of the prosecution case as disclosed in F.I.R. lodged by SIP Ghulam Hussain Khoso are that on 4.3.2012 at 5-45 p.m. SIP left Police Station along with his subordinate staff for patrolling. After patrolling at various places when SIP Ghulam Hussain reached at Sarfraz Wah Mori, he received spy information that present accused was selling

'Charas' at Masrik boundary. Police party proceeded to the pointed place where saw present accused in the possession of the plastic shopper. He was surrounded and caught hold at 5-00 p.m. Shopper was secured from his possession. SIP inquired the name of the accused to which he disclosed his name as Sikandar alias Siko s/o Muhammad Ismail. SIP opened plastic shopper in presence of Mashirs namely ASI Ghulam Abbass Chandio and Nazar Muhammad Behrani and found that there were 03 pieces of 'Charas' in the shopper. 'Charas' was weighed. It was 1250 grams. According to SIP he separated 10 grams of 'Charas' from 03 pieces of 'Charas' for sending to the Chemical Examiner. Mashirnama of arrest and recovery was prepared in presence of the mashirs. Thereafter, the accused and the case property were brought to the Police Station Tando Allahyar where F.I.R. was lodged against the accused on behalf of State vide crime No. 45 of 2012, for offence under section 9(c) Control of Narcotic Substance Act 1997.

3. During investigation 10 grams 'Charas' was sent to the Chemical Examiner for analysis on 5.3.2012. Positive chemical report was received. On the conclusion of the investigation, final report was submitted against the accused for offence under section 9(c) Control of Narcotic Substance Act 1997.

4. Trial Court framed 'charge' against the accused under section 9(c) Control of Narcotic Substance Act 1997, on 13.04.2012 at Ex.3. Accused pleaded not guilty to the charge and claimed to be tried.

5. The prosecution at the trial, produced P.W.1 SIP Ghulam Hussain Khoso (complainant) at Ex.5, P.W.2 ASI Ghulam Abbass Chandio at Ex.6. Thereafter, prosecution side was closed vide statement at Ex.07.

6. Statement of the accused under section 342 Cr.P.C. was recorded at Ex.08 in which he has denied the prosecution allegations and stated that 'Charas' has been foisted upon him. Accused did not lead any evidence and declined to examine himself on oath in disproof of prosecution allegations.

7. We have carefully heard Mr. Ameer Ahmed Junejo, Advocate for appellant and Mr. Shahzado Saleem Nahiyoom, A.P.G. and perused the evidence minutely with their assistance.

8. Facts of this case as well as evidence produced before the trial court find an elaborate mention in the Judgment passed by the trial court and therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

9. We have observed that according to the prosecution case appellant has been apprehended with shopping bag which contained 03 pieces of the 'Charas', two were large in size and one was in small size. Complainant / I.O. has deposed that he had separated 10 grams of 'Charas' from each piece for Chemical analysis. Mashir of arrest and recovery namely ASI Ghulam Abbass has deposed that SIP separated 10 grams of 'Charas' from each piece for chemical examination. Learned A.P.G. submits that according to the report of the Chemical Examiner only 10 grams were sent to the Chemical Examiner for analysis. A.P.G. has also submitted that it is not clear that 10 grams which were sent to the Chemical Examiner were taken from all the pieces of 'Charas' recovered from the accused. He has opined that in the light of the case of **AMEER ZEB v. THE STATE** [P.L.D. 2012 SC 380], Investigation Officer was required to take the sample from each piece, as such, learned A.P.G. argued that sentence of the appellant for 10 grams of the 'Charas' under section 9(b) Control of Narcotic Substance Act 1997, would meet the ends of the justice.

10. The Honourable Supreme Court in the case of **AMEER ZEB** (supra) has observed as under:-

“8. For the purpose of clarity and removal of conclusion it is declared that where any narcotic substance is allegedly recovered while contained in different packets, wrappers or containers of any kind or in the shape of separate cakes, slabs or any other individual and separate physical form it is necessary

that a separate sample is to be taken from every separate packet, wrapper or container and from every separate cake, slab or other form for chemical analysis and if that is not done then only that quantity of narcotic substance is to be considered against the accused person from which a sample was taken and tested with a positive result.

9. In the case in hand 80 cakes/slabs contained in 20 packets kept in 22 baskets had allegedly been recovered from the appellant's possession but according to the prosecution only a 'small' and unspecific quantity was taken from every packet as a sample and then those samples were mixed up and made into one sample of 10 grams which was thereafter sent to the Chemical Examiner for analysis. If 80 cakes/slabs had statedly been recovered from the appellant's possession and the total weight of the entire quantity was 20 Kilograms then, in all likelihood, each cake/slab weighed about 250 grams. As only one sample of 10 grams had been sent to the Chemical Examiner, for analysis and the report in that regard had been received in the positive, therefore, for safe administration of justice it may be concluded that the appellant was liable to be held responsible for having only one cake/slab of 'Charas' weighing 250 grams in his possession which offence attracts the provisions of section 9(b) of the Control of Narcotic Substance Act, 1997. In this view of the matter this appeal is partly allowed, the conviction of the appellant recorded and upheld by the learned courts below for an offence under section 9(c) of the Control of Narcotic Substance Act, 1997 is converted into one under section 9(b) of the said Act and, applying the sentencing policy of the Lahore High Court, Lahore laid down in the case of GHULAM MURTAZA and another v. THE STATE (P.L.D. 2009 Lahore 362), the appellant is sentenced to rigorous imprisonment for one year and three months and to pay a fine of Rs.9000/- (Rupees Nine Thousand) or in default of payment thereof to undergo simple imprisonment for three months and fifteen days. The benefit of section 382-B, Cr.P.C. shall be extended to him. This appeal is disposed of in these terms."

11. Now it is settled law that samples are to be secured from every bag or packet of narcotic substance recovered in a case and each such sample is to be separately tested by a Chemical Examiner. Reliance can also be placed on the case of **Mst. NASREEN BIBI v. THE STATE** reported as 2014 S.C.M.R. 1603.

12. In this view of the matter, this appeal is dismissed to the extent that the appellant's conviction recorded by the learned trial court. However, it is converted into one under section 9(b) Control of Narcotic Substance Act 1997, and sentence of the appellant is reduced from 04 years rigorous imprisonment to 06 months rigorous imprisonment and the quantum of fine is reduced from Rs.10,000/- to Rs.3000/- and in case of default in payment thereof to undergo S.I. for two months more keeping in view the sentencing policy laid down by learned Lahore High Court in the case of **GHULAM MURTAZA & another v. THE STATE** reported as P.L.D. 2009 Lahore 362. The said judgment has been upheld by the Honourable Supreme Court of Pakistan in the case of **AMEER ZEB v. THE STATE** P.L.D. 2012 SC 380. Appellant is extended benefit of Section 382-B Cr.P.C

13. Learned Advocate for the appellant has drawn attention of the court towards the Jail Roll dated 15.4.2016, which reflected that appellant had already served out sentence of 01 year 01 month and 08 days excluding remissions.

This appeal is disposed of in these terms.

Appellant is present on bail, his bail bonds stand cancelled and surety is discharged.

JUDGE

JUDGE

A.