

IN THE HIGH COURT OF SINDH CIRCUIT COURT, HYDERABAD.

Present:
NAIMATULLAH PHULPOTO-J
RASHEED AHMED SOOMRO-J

Cr. Appeal No. D- 115 of 2016.

Date of hearing: 11.01.2017.

Appellant : Ali Dino alias Pehlwan
Through Mr. Farhad Ali Abro, Advocate.

Respondent : The State
Through Syed Meeral Shah, D.P.G.

Date of Announcement: 31.01.2017

J U D G M E N T

RASHEED AHMED SOOMRO-J:- This appeal has been preferred against the conviction and sentence recorded by the learned III-Additional Sessions Judge, Hyderabad/Special Court, Control of Narcotics Substance, vide judgment dated 07.11.2016 in Special Case No. 158 of 2015, whereby the appellant has been convicted under section 9(c) of C.N.S Act 1997, and sentenced to three years R.I besides the fine of Rs.10,000/-. In case of default in payment of fine, he was ordered to suffer S.I for three months more. The appellant was, however, extended the benefit admissible U/s 382-B Cr.P.C.

2. The relevant facts of prosecution case are that on 07.09.2015 the police party headed by the complainant SIP Malak Sher Ali left Police Station Hali Road, Hyderabad vide daily diary Entry No. 17 at 1500

hours for patrolling in the area. After visiting different places when they reached at Makrani Phatak where they received spy information that one drug seller namely Ali Dino alias Pehelwan who was already challaned in narcotic cases of the police station, was selling charas in a ground in front of Indus Glass Factory Kalhora village. On receipt of such information, the police party rushed towards pointed place and reached there at 1600 hours, where they saw present accused there. Accused while seeing the police party started running to populated area. The police party apprehended him, on inquiry, he disclosed his name as Ali Dino alias Pehelwan son of Yar Muhammad. Police party conducted his personal search and recovered charas from side pockets of his shirt it was weighed and found it to be 1010 grams in presence of mashirs. Police also recovered currency notes of Rs.300-00. Mashirnama of arrest and recovery was prepared. The appellant was brought at Police Station where the FIR was lodged against the accused on behalf of State vide Crime No.101 of 2015 under Section 9(c) of CNS, Act, 1997.

3. During investigation charas was sent to Chemical Examiner, 161 Cr.P.C statements of prosecution witnesses were recorded, I.O collected positive chemical report. On the conclusion of investigation challan was submitted against the accused under above referred section.

4. The trial court framed the charge against the appellant under section 9(c) Control of Narcotic Substances Act, 1997. The appellant pleaded not guilty to the charge, and claimed to be tried. In support of case, prosecution examined P.W-1 SIP Malik Sher Ali as Exh.03, he produced the memo of arrest and recovery as Exh.3-A, and FIR as

Exh.3-B, departure and arrival entries as Exh.3-C and 3-D, letter written to Chemical Examiner as Exh.3-E, and Report of Chemical Examiner as Exh.3-F, P.W-2 Muhammad Aslam ASI as Exh.4 being one of the members of police party, and mashir of the case, whereafter prosecution closed its side by statement Exh.5.

5. Statement of accused was recorded under Section 342 Cr.P.C by the trial court wherein he denied the prosecution allegations, and pleaded innocence.

6. Learned trial Court after hearing the learned counsel for the parties and assessment of evidence convicted and sentenced the accused as stated above.

7. Learned Advocate for the appellant contended that though the place of alleged recovery was a thickly populated area but no efforts were made by I.O to call independent persons of locality even during investigation, no private person of the locality was examined that the occurrence had actually occurred. It is further contended that trial court did not consider the material contradictions in the evidence of prosecution witnesses. It is further contended that the WHC of police station in whose custody case property was lying, has not been examined, no entry of Roznamcha was produced to show that the property was actually deposited in Malkhana of Police Station, and on what date and time, the property was taken out of Malkhana of Police Station by the complainant/I.O for sending the same to Chemical Examiner, lastly it is contended that trial Court has failed to appreciate the evidence according to settled principles of law and prosecution case was highly doubtful.

8. Conversely, the learned State Counsel has opposed the arguments delivered by the learned counsel for the appellant, in rebuttal he contended that the prosecution has proved its case beyond reasonable shadow of doubt minor contradictions if any on the part of prosecution, did not carry weight in the eyes of law. Lastly he argued that prosecution has succeeded to prove its case and appeal merits no consideration.

9. We have minutely considered the evidence and respective arguments of the learned counsel for the appellant and learned state counsel

10. Record reflects that the complainant SIP Malik Ser Ali in his evidence has stated that on 7.9.2015 he was posted as SIP police station Hali Road. On that day, he alongwith his subordinate staff left the police station vide entry No.17 at 1500 hours for patrolling and during such course when they reached at Makrani Phatak, they received spy information that famous criminal and narcotic dealer Ali Dino alias Pehelwan who was already booked in many cases of police station Hali Road, was selling charas in a plot infront of Indus Glass Factory. The police party rushed there, and reached at pointed place at 1600 hours where they noticed that one person on seeing the police party alighting from police mobile, coming towards him, he tried to move towards populated area, however with the help of staff, he was apprehended. On enquiry, the said person disclosed his name as Ali Dino alias Pehelwan. He tried to arrange public mashirs but no one was available there. He conducted his personal search in presence of ASI Muhammad Aslam, and HC Niaz Hussain, and recovered four pieces of chars from each side

of pocket, total eight pieces of charas. He also recovered three currency notes of Rs.100/- from front pocket of his shirt. SIP weighed the charas on electronic scale and found it to be 1010 grams. He immediately sealed the whole charas in white cloth bag and arrested him under memo of arrest and recovery in presence of mashirs, and brought the accused and case property at Police Station where he lodged FIR, on behalf of State vide Crime No.101 of 2015 under Section 9(c) of CNS Act, 1997 and deposited the case property with WHC of P.S. On 9.9.2015 he sent the charas to chemical examiner for chemical examination. P.W-2/Mashir ASI Muhammad Aslam has also deposed in the same line as deposed by complainant SIP Malik Sher Ali and stated that he acted as mashir. Co-mashir was HC Niaz Hussain Both P.Ws were cross examined at length, nothing favourable to accused came on record. For the satisfaction of the Court prosecution has produced departure and arrival entries before the trial court. Evidence of both the P.Ws is consistent on all the material particulars such as date, time, place and manner of recovery of charas.

11. As far as the submission of the learned counsel for the appellant regarding non-association of private persons during investigation is concerned, the same would not invalidate the proceedings because by virtue Section 25 of Control of Narcotic Substance Act, 1997 non-citing of public witnesses is not fatal to the prosecution case as Section 103 Cr.P.C has been excluded from its application in narcotics cases. In this context reference can be placed on a case of Re: Zulfiqar Ahmed Versus The State (2006 SCMR 800), wherein it has been held as under:-

“Learned counsel for the petitioner has contended that no independent witness of recovery has been cited and that only one gram of heroin has been sent to the Forensic Science Laboratory for analysis which makes the case of the petitioner doubtful and also entitled him to the reduction of sentence. None of his contention is having force. Section 103, Cr.P.C. has been specifically excluded under the provisions of Control of Narcotic Substances Act, 1997 and the non-citing of any witness from the public is not fatal to the prosecution case. It is not the case of prosecution that the heroin was contained in separate packet rather it was alleged to have been contained in a shopping bag and only one sample of one gram heroin is sufficient for chemical analysis.”

12. Moreover, Mashir ASI Muhammad Aslam in his cross examination has replied that private persons were not available at the time of recovery of charas from accused. The mere fact that the witnesses are police official is no ground to discard their evidence. It is also settled law that the evidence of police official is as good as of any other public witness in absence of any malice or mala fide of police officials. Reliance is placed upon the case of ZAFAR versus THE STATE (2008 SCMR 1254) wherein it has been held as under:-

“Police employees as competent witnesses like any other independent witness and their testimony cannot be discarded merely on the ground that they are police employees.”

13. In this case no such malice or mala fide or enmity has been attributed to the P.Ws to foist such charas upon the appellant. In this regard reference can be made to the case of RIAZ AHMED alias Raju versus THE STATE (2004 SCMR 988).

14. The next contention of the learned Counsel for appellant that since the complainant is the Investigating Officer of the case, therefore, the case is doubtful, has no force because if a police officer is witness of the offence, and also to be an investigation officer, he is not prohibited by law to be complainant if it does not cause prejudice to accused. The learned counsel for appellant has not pointed out as to what sort of prejudice has been caused to accused/appellant in this case. Honourable Supreme Court in the case ZAFAR versus THE STATE (2008 SC MR 1254) has observed as follows:-

“So far as the objection of the learned counsel for the appellant that the Investigating Officer is the complainant and the witness of the occurrence and recovery, the matter has been dealt with by this Court in the case of State through Advocate-General Sindh v. Bashir and others PLD 1997 SC 408, wherein it is observed that a Police Officer is not prohibited under the law to be complainant if he is a witness to the commission of an offence and also to be an Investigating Officer, so long as it does not in any way prejudice the accused person. Though the Investigating Officer and other prosecution witnesses are employees of A.N.F., they had no animosity or rancor against the appellant to plant such a huge quantity of narcotic material upon him. The defence has not produced any such evidence to establish animosity qua the prosecution witnesses. All the prosecution witnesses have deposed in line to support the prosecution case. The witnesses have passed the test of lengthy cross-examination but the defence failed to make any dent in the prosecution story or to extract any material contradiction fatal to the prosecution case. The prosecution has been successful to bring home the guilt of the appellant to the hilt by placing ocular account, recovery of narcotic material, the Chemical Examiner report G.1, Exh.P.3. The learned Counsel for the appellant has not been able to point out any error of law in the impugned judgment and the same is unexceptionable.

For what has been discussed above, the appeal being devoid of any merit is dismissed.”

15. The objection of learned counsel for appellant for non-examination of WHC of Police Station under whose custody the case was kept, is concerned, the same is not also fatal to prosecution case as there was no allegation that the case property which was kept under the

custody of WHC was tampered with or manipulated. Record shows that the case property was recovered on 7.9.2015 and delivered to chemical examiner on 9.9.2015, therefore, there seems no delay in sending the case property to chemical examiner. Report of chemical examiner is produced which shows that it was received in sealed condition having the signatures of SIP, Hali Road and witnesses ASI Muhammad Aslam Solangi, and PC Niaz Hussain, and net weight was also 1010 grams of charas. In a case of Tariq Mehmood versus The State (PLD 2009 SC. 39), it is held that in absence of any allegation of tampering with the property, the arguments of learned counsel for the petitioner were held, not sound.

16. In defence the appellant has not taken any specific plea. In his statement under Section 342, Cr.P.C, the appellant has stated that the P.Ws, have deposed falsely, and that he has been implicated in false case, nothing was recovered from him, and property has been foisted upon him. The appellant has neither examined himself on oath nor examined any witness in his defence.

17. All the prosecution witnesses have successfully passed the test of lengthy cross-examination by the defence but no material discrepancies have been credited by the defence counsel in favour of appellant. Trial Court has rightly disbelieved the defence theory. We have carefully perused the defence assertions and found that defence version was without substantiation through reliable documentary evidence. Prosecution has succeeded to prove its case against accused because P.Ws had no motive to falsely implicate the appellant in this Narcotics case.

18. For whatever has been discussed above, we hold that prosecution has proved its case against the appellant beyond any shadow of doubt. As a sequel, conviction recorded by trial Court is maintained. Appeal lacks merit and is accordingly dismissed.

JUDGE

JUDGE