

IN THE HIGH COURT OF SINDH CIRCUIT COURT, HYDERABAD.

Present:

MR. JUSTICE NAIMATULLAH PHULPOTO

MR. JUSTICE RASHEED AHMED SOOMRO

Cr. Appeal No. D- 70 of 2016.

Date of hearing: 06.03.2017.

Appellant : Muhammad Raheem
Through Mr. Asif Gul Bhatti, Advocate.

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

Date of Judgment: 21.03.2017

J U D G M E N T

RASHEED AHMED SOOMRO-J:- The present appeal is directed against the judgment dated 06-06-2016 passed by the learned Special Judge CNS Jamshoro @ Kotri by which the learned Judge convicted the appellant for offence punishable under section 9(c) of Control of Narcotic Substances Act, 1997, and sentenced him to suffer R.I for 07 years and to pay fine of Rs.1,00,000/= in default thereof to suffer R.I for six months more with benefit of section 382-B Cr.P.C.

2. Brief facts giving rise to the present appeal are that on 26-10-2015 complainant Inspector Piyaro Khan Rind of P.S DIB Excise & Narcotics Hyderabad lodged FIR stating therein that on 26-10-2015 he alongwith Inspector Ghulam Abbas Jafri incharge DIB

Hyderabad, EJs Muzaffar Shah, Jadim Shaikh, Nisar Ahmed, ED Muhammad Ishaque, ECs Haji Khan, Ahsan Ali, Deedar Jatoi, Shah Jahan Solangi and Buxal Solangi vide roznamcha entry No.53 in Government mobile No.GS-9100 on spy information reached at the place of incident near Kareem cotton colony Jhopra hotel Mill area, Kotri, District Jamshoro, there they found standing the appellant in front of the Jhopra hotel; they encircled and apprehended him, on inquiry, he disclosed his name Muhammad Raheem s/o Mehmood Khan, by caste Pathan, r/o Khursheed colony, Dewan Mill area SITE Kotri, District Jamshoro. Due to non availability of the private persons after making EJ Nisar Ahmed and EJ Javaid Shaikh as mashirs, he conducted personal search of the accused and recovered six pieces of charas from his fold of shalwar. From further search, one piece of charas and cash Rs.700/= were recovered from the side pocket of his shirt. On weighing each piece of charas was 500 grams; total charas was 3500 grams; 10 grams charas was taken from each piece and sealed the same for chemical examination. Remaining 3430 grams of charas were sealed separately. Such mashirnama was prepared in presence of mashirs. Thereafter, Excise Officials brought accused and case property at DIB Excise Shahbaz building; where complainant lodged FIR against the appellant on behalf of the State under Section 9(c) of Control of Narcotics Substances Act, 1997. After usual investigation challan was submitted against the accused.

3. Trial Court framed charge against the accused under Section 9(c) of CNS Act, 1997 at Ex.02. The accused pleaded not guilty and claimed to be tried.

4. In order to substantiate the charge, prosecution examined complainant E.I Piyaro Khan at Ex-04, he produced memo of arrest and recovery, FIR, departure and arrival entries, and chemical report at Ex.04/A to 04/E., mashir EJ Nisar Ahmed Yousifzai at Ex.05. Thereafter, prosecution closed its side vide statement Ex.06.

4. The statement of accused was also recorded under Section 342 Cr.P.C at Ex.07 in which the accused denied the recovery of Charas of 3500 grams from his possession. The accused did not examine himself on oath. No witness has been examined by the accused in his defence.

5. Trial Court after hearing the learned Counsel for the parties and assessment of the evidence convicted the accused and sentenced him as stated above. Hence the accused has filed the present appeal.

6. Facts of the case and evidence have already been discussed by the trial court in the impugned judgment dated 06.06.2016 in detail. Need not to be repeated, to avoid repetition and duplication.

7. We have heard the learned counsel for the parties and perused the record with their assistance.

8. The learned counsel for the appellant has stated that statements of the P.Ws are contradictory to each other on material points. It is further argued that Inspector Piyaro Khan who is the complainant of the present case could not act as Investigating officer at the same time. It is contended that though the place of incident is

situated in front of a hotel and it was day time incident, but no private person is cited as witness or mashir in this case; that only 70 grams chars was sent for chemical examination and there is nothing on record to prove that rest of the substance is charas or otherwise, hence at the most the appellant would be held responsible for 70 grams charas. He has relied upon case reported as 2016 SCMR 621 (Taimoor Khan and another v. The State and another).

9. Conversely, the learned D.P.G has argued that the contradictions as pointed out by the learned counsel for the appellant are minor in nature; that the witnesses have fully supported the prosecution case; that the Chemical analyzer's report is in positive; that no enmity has been brought on record regarding false involvement of the appellant; that the appeal is liable to be dismissed.

10. Evidence shows that prosecution examined two witnesses viz complainant/investigating officer Inspector Piyaro Khan and Mashir EJ Nisar Ahmed. They have deposed that on the day of incident on spy information, Excise officials went at the pointed place found appellant standing there, on seeing them, he tried to run but they encircled and apprehended him and recovered six pieces of chars from the fold of his shalwar and one piece of chars from the side pocket of his shirt and cash Rs.700/=. 10 grams charas was separated from each piece of chars for chemical analysis. Both prosecution witnesses were subjected to lengthy cross examination but nothing favourable came on record to discredit their evidence. The learned counsel for the appellant has pointed out a contradiction that complainant in cross examination replied that "public person had already refused to become as mashir while P.W EJ Nisar Ahmed

stated in his cross examination that "it is incorrect to say that public gathered there". This only contradiction pointed out by learned counsel for the appellant is minor in nature because through this contradiction basic story of the prosecution has not been damaged or through this contradiction no improvement has been made so as to strengthen the case of the prosecution as such this contradiction is not major contradiction; hence it can be safely ignored. Such contradiction is natural when the evidence is recorded after lapse of considerable time.

11. It has further been argued by the learned counsel for the appellant that only sample from each piece of charas was sent to the Chemical Examiner for analysis instead of the whole quantity of the chars as such remaining charas, which was not sent to the Chemical Examiner could not be treated as chars recovered from the appellant, which is material dent in the prosecution case. It is the case of prosecution that at the time of recovery of charas from the possession of the appellant, the complainant had taken samples from it. When a sample is prepared from the property then it would represent the entire property. Thus the sample prepared in this regard would be deemed to be whole property. The Chemical Analyzer has opined that the contents of the sample were charas, therefore, the remaining property would be deemed to be charas; thus the prosecution has proved the said fact.

12. It has been vehemently contended by the learned counsel for the appellant that Inspector Piyaro Khan who is the complainant of the present case could not act as Investigating officer at the same time as no one could be judge of his own case. The contention is

without legal force for the reasons that there is no law by which any restriction has been imposed on the police officer, not to act as complainant and investigating officer at the same time. In fact there is no embargo on any police officer in whose presence an offence has been committed to act as Investigating officer. The said point also came for consideration before the Honourable Supreme Court in the case of The State through Advocate General Sindh Vs. Bashir reported in PLD 1997 Supreme Court 408, wherein the Honourable Supreme Court was pleased to observe that no legal prohibition for a police officer to be a 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 case, prejudice the accused person. The dictum laid down by the Honourable Supreme Court in the case State vs. Bashir, supra, is usefully quoted herein below for the sake of convenience:

“I agree with Ajmal Mian, J, that we are unable to subscribe the said broad legal proposition and that there is no legal prohibition for a police officer to be a complainant if he is a witness to the commission of an offence and also be an Investigating officer so long as it does not, in any way, prejudice the accused person.”

The dictum laid down by the Honourable Supreme court is the complete answer to the arguments advanced by the learned counsel for the appellant.

13. The contention of the learned counsel for the appellant that no independent mashir was picked up at the alleged time of the arrest of appellant and recovery of charas though the place of incident is situated in front of Jhopra hotel and the time of alleged offence was of day time, is also devoid of any legal force for reasons that complainant in cross examination has stated that public witness had refused to act as mashir. Sufficient explanation has been furnished by

the complainant for non-joining the private persons as mashirs to the instant case, even otherwise applicability of section 103 Cr.P.C is excluded by section 25 of the Control of Narcotic Substance Act, 1997. Moreover, people generally do not co-operate with the police due to fear of earning any enmity with the drug paddlers. Furthermore, police officials are as good witnesses as other witnesses and their evidence on this score alone should not be discarded unless enmity is brought on record. In this view we find support from the observations recorded in case of Naseer Ahmad vs. The State 2004 SCMR 1361.

14. After appraisal of whole evidence available on record, we are of the firm opinion that the prosecution has succeeded in bringing the guilt of the appellant at home and no illegality or irregularity on the face of record is available so as to interfere with the judgment passed by the learned trial court. According to sentencing policy reported in the case of Ghulam Murtaza V. State, PLD 2009 Lahore 362, on the recovery of charas exceeding 3 kilograms and up to 4 kilograms, R.I for 6 years and 6 months and fine of Rs.30,000/- or in default SI for 6 months but appellant on the recovery of 3½ kilograms charas has been convicted and sentenced to 7 years and to pay fine of Rs.1,00,000/-, which is against sentencing policy, endorsed by Hon'ble Supreme Court. We, therefore, modify sentence to 6 years R.I and six months and fine of Rs.30,000/- or in default SI for 6 months. Conviction is maintained, sentence is reduced to above extent. Appeal is disposed of in above terms.

JUDGE

JUDGE