

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Appeal No.D-121 of 2014

Cr. Jail Appeal No.D-125 of 2014

PRESENT

Mr. Justice Naimatullah Phulpoto

Mr. Justice Rasheed Ahmed Soomro

Date of Hearing: 22.03.2017
Date of Judgment: 22.03.2017
Appellant/accused: Through Mr. Ishrat Ali Lohar, Advocate
The State: Through Syed Meeral Shah Bukhari, Deputy Prosecutor General, Sindh.

JUDGMENT

NAIMATULLAH PHULPOTO, J:- Appellant Roshan Japo was tried by learned Special Judge (NARCOTICS), Shaheed Benazirabad for the offence under Section 9(c) of Control of Narcotic Substances Act, 1997. Vide judgment dated 31.10.2014, the appellant was convicted under Section 9(c) of Control of Narcotic Substances Act, 1997 and sentenced to suffer 04 years 06 months R.I with fine of Rs.20,000/-, in case of default in payment of fine the appellant was ordered to suffer S.I for 05 months more. Appellant was extended benefit of Section 382(B) Cr.P.C.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 05.03.2014 SIP/SHO Ghulam Abbas Shar of P.S Ali Abad left the police station alongwith his subordinate staff in a private vehicle vide roznamcha entry No.12 at 1830 hours for patrolling duty and while patrolling at various places, SHO held

Nakabandi near Protection Band. It is alleged that at 2230 hours, present accused appeared there, he was found in the suspicious manner and was caught-hold by the police party. On the inquiry, the accused disclosed his name as Roshan S/o Muhabbat by caste Japo. Due to non-availability of the private witnesses, the SHO made P.Cs Mumtaz Ali Lakho and Waseem Abbas as mashirs and conducted personal search of the accused. It is alleged that from the right side fold of shalwar of accused one plastic bag was recovered, it contained 02 pieces of the charas. From the left side of the fold of shalwar of accused one plastic bag was also secured and from the front pocket of accused cash of Rs.500/- was recovered. Thereafter, the charas recovered from the possession of the accused was weighed, it was 2000 grams. 200 grams of charas was separated and sealed for sending it to the chemical examiner for analysis. From another piece of 1000 grams, 100 grams were separately sealed for sending it to the chemical examiner for analysis. Accused was arrested and mashirnama of arrest and recovery was prepared. Accused and case property were brought to the Police Station, where SIP Ghulam Abbas Shar lodged the FIR against the accused on behalf of the State, it was recorded vide Crime No.02/2014 for the offence under Section 9(c) of CNS Act, 1997.

3. During the investigation, charas was sent to the chemical examiner for analysis. Statements of P.Ws were recorded under Section 161 Cr.P.C. Positive chemical report was received.

On the completion of the investigation, final report was submitted against the accused for the offence under Section 9(c) of CNS Act, 1997.

4. Trial Court framed the charge against the accused under Section 9(c) of CNS Act, 1997 at Ex-4. Accused pleaded not guilty and claimed to be tried.

5. In order to substantiate the charge, the prosecution examined P.Ws SIP Ghulam Abbas and mashir Mumtaz Ali and prosecution side was closed.

6. Statement of accused was recorded under Section 342 Cr.P.C, in which the accused claimed false implication in this case and denied the prosecution allegations. Accused has stated that P.Ws are police officials and they have deposed against him falsely at the instance of one Pathan Ahmed, who is complainant in a murder case registered against the accused. Accused has produced certified true copy of the order dated 21.04.2014 at Ex-9/1 passed in a murder case registered at P.S Bhiria City against accused Roshan and others. Accused neither examined himself on oath nor led any evidence in his defence. Trial Court after hearing the learned Counsel for the parties and on assessment of the evidence, convicted and sentenced the accused as referred to above. Appellant filed Jail Appeal No.D-125 of 2014 as well as Cr. Appeal No.D-121 of 2014 through his Advocate against the judgment dated 31.10.2014. By this single judgment we intend to decide both the appeals.

7. Mr. Ishrat Ali Lohar, learned Advocate for the appellant has mainly argued that it was the night time incident and Nakabandi was held by SHO but the SHO failed to associate Driver of Taxi as mashir in this case. It is argued that recovery was made near the village but no one from the village was called by the SHO to act as mashir. Learned Advocate for appellant highlighted that there are material contradictions in the evidence of the prosecution witnesses. Learned Advocate for appellant has referred to the evidence of the complainant/ SHO, in which the SHO has replied that he was driving the private vehicle at the time of arrest of the accused but on the same point the mashir has replied that taxi was being driven by a private person. Learned Advocate for the appellant has also invited our attention to the other material contradictions in evidence with regard to the villages around the place of wardat and stated that SHO/I.O for the *mala fide* reasons has denied the availability of the villages around the place of wardat but the mashir has replied that the place of wardat surrounded by the villages. Learned Counsel for appellant contended that there is over-writing in the sample of charas taken from the property in the mashirnama of arrest and recovery. It is also contended that according to the prosecution case, the charas was recovered from the accused on 05.03.2014 but it was sent to the chemical examiner on 10.03.2014 with the delay of five days, for which no plausible explanation has been furnished by the prosecution. Learned Advocate for the appellant further argued that the case property was sealed at spot, on which crime number has

been mentioned. It is also stated that FIR was registered at Police Station and it was doubtful as to how crime number has been mentioned on the parcel which was prepared in presence of mashirs. Lastly argued that the appellant has enmity with one Pathan Ahmed and plea has been raised by the accused that he has been involved falsely at the instance of one Pathan Ahmed. In support of his contentions it is submitted that the appellant has produced certified true copy of the order dated 21.04.2014 passed by learned Additional Sessions Judge, Naushahro Feroze in Sessions Case No.366/2012, in which bail has been granted to appellant Roshan.

8. Syed Meeral Shah Bukhari, learned D.P.G argued that the complainant/SHO and mashir have fully supported the prosecution case. He has argued that charas was recovered from the possession of the accused and private persons were not available at that time and the evidence of the police officials is as good as of private persons. Regarding delay in sending the sample of charas to the chemical examiner, it is argued that it would not be fatal to the prosecution case. Regarding material contradictions in the evidence of the prosecution, learned D.P.G has no reply to explain it. However, learned D.P.G supported the case of the prosecution.

9. 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 31.10.2014, therefore, the same

may not be reproduced here, so as to avoid duplication and unnecessary repetition.

10. Having heard the learned Counsel for the parties and scanned the entire evidence, we have come to the conclusion that the prosecution has failed to prove its case against the appellant for the reasons that there are material contradictions in the evidence of the prosecution witnesses. SHO/complainant has deposed that he was patrolling in a private taxi and it was being driven by him and on the same point mashir has deposed that it was taxi being driven by a private person. It was the case of the Nakabandi and taxi driver has not been made as mashir by the complainant/SHO to witness the recovery proceedings, which creates doubt in recovery proceedings. SHO has replied in cross-examination that there is no village around the place of arrest and recovery, but on this point mashir has replied that there are so many villages around the place of arrest of the accused. It has also come on record that case property viz. charas was sealed at the spot and it was signed by the mashirs and Crime No.02/2014 was written on sealed parcel but FIR was registered at Police Station, as to how crime number was written at the place of recovery in mashirnama of arrest and recovery, it created serious doubt in the case of the prosecution. Accused has raised defence plea that he has been involved falsely in this case at the instance of one Pathan Ahmed, who had lodged a murder case against the appellant and he has been granted bail in that case. Copy of the bail order as

referred to above has been placed on record. In view of a specific plea of the enmity of the appellant with one Pathan Ahmed at instance of police, it was very much essential that there should have been done independent corroboration for the satisfaction of the Court but no corroboration has been produced. We have observed that alleged recovery of the narcotic substance from the appellant's possession had been effected on 05.03.2014 and it was dispatched to the chemical examiner on 10.03.2014 yet none of the prosecution witnesses had uttered even a single word as to what had happened to the recovered substance after its recovery and with whom same had been deposited for safe custody. Learned Advocate for appellant has argued that sealed parcel was tampered in malkhana of police station. In such circumstances, we hold that samples were not safe, as such it would be unsafe to uphold and maintain appellant's conviction and sentence recorded by Trial Court. Rightly reliance has been placed by learned Advocate for the appellant upon the case of *Muhammad Abbas V/s. the State (2008 Cr.L.J 26)*. There is also delay in sending the samples of charas to the chemical examiner in the background of the enmity of the appellant that one Pathan Ahmed and specific allegations against the police, we are unable to rely upon the evidence of the police officials for suspending the sentence in this case. It has been ruled by the Honourable Supreme Court in the case of *Muhammad Hashim v. The State (PLD 2004 SC 856)* that under the Control of Narcotic Substances Act, 1997 stringent sentences have been provided if offence charged under Section 9

of the Act is proved. Therefore, the provisions of the said Act have to be construed very strictly. It is high time for the Courts to ensure that the proceedings of recovery and seizure are made in the most transparent and confidence inspiring manner so as to protect the innocent citizens from the highhandedness of the law-enforcers, and to save them from the agony of uncalled for trials. Prosecution case is highly doubtful. Rightly reliance has been placed upon the case of *Khalil Ahmed V/s. The State (PLD 2008 Karachi 8)*, in which it is held as under:-

“18. In the circumstances, the case of the prosecution is highly doubtful. The conviction cannot be based on such type of trials which are marred by glaring infirmities. However, the trial Court resolved all the doubts in favour of prosecution and convicted the appellant, while losing sight of well-entrenched principle of law, that the burden was always on the prosecution to prove the charge beyond all reasonable doubts. The rule adopted by the trial Court, to say the least was not conducive for the safe administration of justice.

19. So far as the order of confiscation of the vehicle is concerned, it was made without availability of any material on the record. It was mechanically passed in flagrant violation of the provisions of section 33 of the Control of Narcotic Substances Act, as such the mandate of law was flouted by the trial Court. Thus the order of confiscation is nullity, the same deserves to be struck down.”

11. The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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. For the reasons as stated above, we are inclined to hold that conviction and sentence recorded by the Trial Court vide judgment dated 31.10.2014 are set aside. Consequently, the appeals in hand are accepted. Appellant is present on bail, his bail bond stands cancelled and surety discharged.

JUDGE

JUDGE

Shahid