

JUDGMENT SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD
Cr. Appeal No.D-101 of 2008

PRESENT

Mr. Justice Naimatullah Phulpoto
Mr. Justice Rasheed Ahmed Soomro

Date of Hearing: 21.03.2017
Date of Judgment: 21.03.2017
Appellant/accused: Through Mr. Anwar H. Ansari,
Advocate
The State: Through Syed Meeral Shah Bukhari,
Deputy Prosecutor General, Sindh.

JUDGMENT

NAIMATULLAH PHULPOTO, J:- Appellant Riaz Ahmed S/o Barkat was tried by learned Special Judge, CNS, Sanghar in Special Case No.28 of 2007 for the offence under Section 9(b) of Control of Narcotic Substances Act, 1997. By judgment dated 09.10.2008, the appellant was convicted under Section 9(b) of Control of Narcotic Substances Act, 1997 and sentenced to suffer 01 year R.I and to pay a fine of Rs.2,000/-, in case of default in payment of fine he was ordered to suffer S.I for one month more.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 05.12.2007, SIP Ali Sher Khaskheli of P.S Tando Adam left the Police Station alongwith his subordinate staff at 1645 hours vide roznamcha entry No.16 for patrolling. The police party while patrolling reached at Fauji Moro, it is alleged that police party received spy information that one person was selling charas at

bridge of new city near bypass road. On receiving such information, the police party proceeded to the pointed place and reached there at about 1745 hours, where it is alleged that on the light of vehicle, present accused was found standing on the road, who while seeing the police party tried to run away but the police party surrounded and caught-hold him. On inquiry, accused disclosed his name as Riaz Ahmed S/o Barkat. Sub-Inspector made H.Cs Muhammad Rafique and Hakim Ali as mashirs. Personal search of accused was conducted and during the search from his possession a polythene bag was secured, it contained 05 pieces of charas, weighing 130 grams, out of which the complainant secured small quantity from each piece of charas, total 10 grams for sending to chemical examiner. Sample and remaining charas were sealed separately. Mashirnama of arrest and recovery was prepared in presence of the H.Cs Muhammad Rafique and Hikim Ali. Thereafter, the accused and recovered property were brought to Police Station, where SIP lodged FIR against the accused on behalf of the State, it was recorded vide Crime No.260//2007 for the offence under Section 9(b) of CNS Act, 1997.

3. During the investigation, 161 Cr.P.C statement of P.Ws were recorded. Samples of charas were sent to the chemical examiner for analysis and positive report was received. On the completion of the investigation, challan was submitted against the accused under Section 9(b) of CNS Act, 1997.

4. Learned Trial Court framed the charge against the accused under Section 9(b) of CNS Act, 1997, in which the accused pleaded not guilty and claimed to be tried.

5. Prosecution in order to prove its case examined P.W-1 complainant SIP Ali Sher Khaskheli at Ex-4. He produced mashirnama of arrest and recovery at Ex-4/A, copy of FIR at Ex-4/B and departure entry No.16 of daily diary at Ex4/C. The prosecution also examined P.W-2 SIP/I.O Abdul Sattar at Ex-5. He produced chemical examiner's report at Ex-5/A and P.W-03 Mashir H.C Muhammad Rafique at Ex-6. Thereafter, the prosecution closed its side vide statement dated 20.08.2008 at Ex-7.

6. Statement of accused was recorded under Section 342 Cr.P.C at Ex-8. Accused denied allegation of recovery of charas from his possession and claimed his innocence. 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 appellant as stated above.

7. Mr. Anwar H. Ansari, learned Counsel for the appellant vehemently argued that the prosecution case was highly doubtful. According to the prosecution case, the present accused was arrested at Bypass New City Mori at Tando Allahyar Raod but no private person of the locality was associated as mashir of recovery proceedings. He has argued that there are material contradictions in the evidence of the prosecution witnesses on material

particulars. Learned Counsel for the appellant argued that SIP/SHO Ali Sher Khaskheli had deposed that the police party saw the accused while standing on the road, on the light of the police mobile but on the same point the mashir has deposed that accused was arrested at sunset time. It is also argued that evidence of the SHO is contradicted with the evidence of the mashir with regard to the places of patrolling for reaching at the place of arrest of the accused. Learned Advocate for the appellant further pointed out that there is over-writing in the time in mashirnama of arrest of the accused at which spy information was received. It is argued that there is also over-writing in the timings in the FIR. It is contended that the prosecution evidence required independent corroboration but it was lacking in this case. Lastly argued that prosecution has failed to prove it's case against the applicant/accused.

8. Syed Meeral Shah Bukhari, learned Deputy Prosecutor General supported the prosecution case and argued that 130 grams of charas were recovered from the possession of the accused in presence of the mashirs and the chemical examiner's report was positive. However, learned D.P.G admitted that there is over-writing in the time of the receipt of the spy information to the police as mentioned in the mashirnama of arrest of recovery, so also in the FIR. Learned D.P.G has supported the impugned judgment.

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 09.10.2008, therefore, the same may not be reproduced here, so as to avoid duplication and unnecessary repetition.

10. We have carefully heard the learned Counsel for the parties and scanned the evidence. We have come to the conclusion that the prosecution has failed to prove its case against the appellant beyond any shadow of doubt for the reasons that it was the case of spy information. The Police officials had sufficient time to call independent and respectable persons of the locality to witness the recovery proceedings but deliberately police failed to call independent persons of the locality. No doubt the evidence of the police officials is as good as of other private persons but in this case there are material contradictions in the evidence of the prosecution witnesses, on material particulars of the case and accused has raised plea that he has been falsely implicated in this case as he refused to give milk to the Police free of cost. SIP Ali Sher Khaskheli has deposed that accused was identified on the head light of the vehicle but on the same point the Mashir has deposed that it was sunset, at the time of arrest of the accused. SIP Ali Sher also deposed that he has asked the private persons to act as mashir but on this point he has been contradicted by Mashir, who has deposed that SIP Ali Sher had not asked any private person to act as mashir in this case. Mashirname of arrest and

recovery dated 05.12.2007 shows that there is over-writing in the time of the receipt of the spy information. Such over-writing has also been found by us in the FIR, for which learned D.P.G has no explanation. It is settled principle of law that a single circumstance, which creates doubt in the prosecution case, is sufficient to extend benefit of doubt to the accused but in this case there are several circumstances, which have created doubt in the prosecution case but unfortunately the prosecution evidence has not been appreciated by the Trial Court according to the settled principle of law. It is quite certain that the applicability of provisions of Section 103 Cr.P.C has been excluded under the Control of Narcotic Substances Act, 1997, yet, it does not debar or prohibit the officers making recoveries on such places, which are necessarily surrounded by people to take some steps/measures to associate private persons in the process so as to lend credence to the recovery and create confidence in general public, which is in the process of quick erosion so far as the role of police and other law enforcement agencies is concerned. 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. In this case, the accused has raised a specific plea that he has been involved falsely by the police party as he had refused to give milk to the police party free of cost. In the view of defects, the case of the prosecution it is highly doubtful. Conviction cannot be based on such type of evidence. In the case of *Khalil Ahmed V/s. The State (PLD 2008 Karachi 8)*, this Court has held as follows:-

“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 above stated reasons, appeal is allowed. Consequently, conviction and sentence recorded by the Trial Court vide judgment dated 09.10.2008 are set aside. Appellant is present on bail, his bail bond stands cancelled and surety is hereby discharged. These are the reasons for our short order dated 21.03.2017 announced in open Court.

JUDGE

JUDGE

Shahid