

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Appeal No.D-01 of 2018

Cr. Appeal No.D-02 of 2018

PRESENT

Mr. Justice Naimatullah Phulpoto

Mr. Justice Shamsuddin Abbasi

Date of Hearing: 14.05.2018

Date of Judgment: 14.05.2018

Appellant/accused: *Agha Muhammad in Cr. Appeal No.D-01/2018.*
Through Mr. K.B Lutuf Ali Laghari,
Advocate.

Appellant/accused: *Mir Ahmed in Cr. Appeal No.D-0/2018.*
Through Mr. K.B Lutuf Ali Laghari,
Advocate

The State: *Through Shahzado Salim Nahyoon,*
D.P.G.

JUDGMENT

NAIMATULLAH PHULPOTO, J:- By this single Judgment, we intend to decide the aforesaid appeals together as both appeals arise out of the same mashirnama, facts of the case in both the appeals as well as evidence is same.

2. Appellants Agha Muhammad and Meer Ahmed were tried by learned Special Judge (Narcotics) Shaheed Benazirabad in Special Narcotic Case No.578 & 579 of 2016, respectively. Vide judgments dated 06.12.2017, both appellants were separately convicted u/s 9(c) Control of Narcotics Substance Act, 1997 and

sentenced to 07 years' R.I and to pay fine of Rs.30,000/-, in case of default in payment of fine, appellants/accused were ordered to suffer six months' S.I more. Appellants were extended benefit of 382-B Cr.P.C.

3. The facts giving rise to the present appeals are that on 06.10.2016 at about 1100 hours on the road leading from National Highway bypass Moro towards diversion road, Deh Taluka Kazi Ahmed, a police party of P.S Qazi Ahmed headed by complainant / SIP Hussain Ali Kharal was checking the vehicles. Police checked 10 wheeler container long vehicle and from said 10 wheeler SIP Hussain Bux conducted search of vehicle in presence of mashirs and apprehended the accused Agha Muhammad driver and Meer Ahmed cleaner and recovered 5000 grams of charas from the possession of each accused and prepared joint mashirnama of arrest and recovery in presence of mashirs namely ASI Qalader Bux and HC Pehlwan Khan. Thereafter, both accused and case property were brought at P.S Kazi Ahmed where SIP Hussain Bux registered separate F.I.Rs. bearing Crime No.204 and 205 of 2016 u/s 9(c) of Control of Narcotics Substances Act, 1997 against the both accused. After usual investigation, police submitted the separate challans against the accused u/s. 9(c) of Control of Narcotics Substances Act, 1997.

4. Trial court framed charge against accused under Section 9(c) of Control of Narcotics Substances Act, 1997. The accused pleaded not guilty and claimed to be tried.

5. In order to substantiate the charge, prosecution examined P.Ws Complainant / SIP Hussain Ali Khara, ASI Qalander Bux Gilal, I/O/SIP Muhammad Bux Khoso and HC Muhammad Juman Morio. Thereafter, prosecution closed its side.

6. The accused in their statements recorded under Section 342 Cr.P.C denied the prosecution case. Neither the accused examined themselves on oath nor led any evidence in their defence.

7. Trial Court on the conclusion of the trial after hearing the learned Counsel for the parties convicted and sentenced the accused as stated above. Hence, accused have filed the present appeals.

8. Mr. K.B Lutuf Ali Laghari, Advocate for appellants at the very outset pointed out that charge framed against accused was defective as Appellant Agha Muhammad was driving the Truck at the time of commission of crime but in the charge framed by the trial court, there was no mention that appellant Agha Muhammad was driving Truck. It is further argued that Appellant Meer Ahmed was cleaner but it was not mentioned in charge. He contended that the procedure adopted by the trial court in both the cases was against the provision of law as after recording the statements of witnesses in one case, the copies of the said statements were placed on the record of another case, which is not permissible under the law. It is argued that Appellants have been prejudiced by

such procedure, therefore, he has prayed that the appellants may be acquitted or cases may be remanded back to the trial court for retrial according to law.

9. Mr. Shahzado Salim Nahyoon, learned D.P.G for the State after going through the evidence of witnesses recorded in both the cases conceded that the illegality has been committed by the trial court by placing the copies of the depositions of witnesses recorded in one case, in the file of other case and such illegality is not curable under section 537, Cr.P.C. Learned D.P.G submitted that cases may be remanded back for trial according to law.

10. We have perused the charge and evidence recorded by the trial court. Accused Agha Muhammad was driving Truck and accused Meer Ahmed was cleaner but these particulars were not mentioned in charge by trial court as such charge framed by trial court was defective. Evidence of P.Ws namely Complainant / SIP Hussain Ali Khara, ASI Qalander Bux Gilal, I/O/SIP Muhammad Bux Khoso and HC Muhammad Juman Morio have been recorded by the trial court. All the four prosecution witnesses are common in both the cases. Their statements / evidence were recorded on same date in both the cases. The examination of the statements reveals that examination-in-chief, cross-examination, paragraphs, sentences, construction and placement of each sentence and words of each sentence are same. Therefore, it is clear that after recording the statements of witnesses in one case, the copies of the depositions of the said witnesses were prepared and placed in the record of other case. The said procedure is in violation of

provisions of section 353, Cr.P.C and Articles 70 and 71 of the Qanun-e-Shahadat Order, 1984. From the said procedure, the trial Court, in fact has read the evidence of one case in other case, which is not permissible under the law. The said procedure has no sanctity of law. We have also examined the statements of accused, which have also been recorded in the stereo type manner. In the statement of Appellant Agha Muhammad no where it was mentioned that he was driving Truck at the time of recovery, whereas, in the statement of Appellant Meer Ahmed recorded u/s 342, Cr.P.C it was also not mentioned that he was cleaner of the Truck. These illegalities committed by the trial court while conducting the trial are also not curable under the law and the same have vitiated the trials. Reliance is placed upon the case of *AZAD KHAN and another vs. THE STATE (2004 YLR 1076)*.

11. In the view of above, convictions and sentences recorded by the learned trial court vide judgment dated 06.12.2017, in Special Narcotic Cases No.578 of 2016 and 579 of 2016, which are impugned in Cr. Appeals No.D-01 and 02 of 2016, are set-aside and both the cases are remanded back to the trial court for framing charge against both the accused namely Agha Muhammad and Meer Ahmed afresh in the light of observations recorded by this Court. The trial court is further directed to record the evidence of P.Ws in each case separately. Statements of accused shall also be recorded by the trial court on the conclusion of the trial by putting all the incriminating pieces of the evidence to the accused.

Thereafter, both the cases shall be decided afresh after hearing the Counsel for the parties strictly in accordance with law.

12. At this stage, learned Counsel for the appellants submits that appellants are in custody since 06.10.2016 and requests for bail. Since, we have decided to remand the cases back to the trial court, advocate for the appellants would be at liberty to apply for bail before trial court. Trial court shall decide the bail applications, if moved, in accordance with law.

13. Both the appeals stand disposed of in the above terms. However, the trial court is directed to decide both the cases within two months under intimation to this court.

JUDGE

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