

IN THE HIGH COURT OF SINDH, AT KARACHI

PRESENT:-

Mr. Justice Naimatullah Phulpoto;

Mr. Justice Shamsuddin Abbasi.

Crl. Appeal No.125 of 2015

Danish Ali son of
Sardar Ali. Appellant

Versus

The State. Respondent

Appellant Through Mrs. Abida Parveen Channar,
Advocate.

Respondent Through Mr. Muhammad Iqbal Awan,
DPG.

Date of hearing **14.02.2018**

Date of Judgment **01.03.2018**

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JUDGMENT

Shamsuddin Abbasi, J: Appellant Danish Ali son of Sardar Ali was booked in Crime No.21 of 2014 for an offence punishable under Section 9(c) of Control of Narcotic Substances Act, 1997 registered with Police Station Liaquatabad, Karachi.

2. Feeling aggrieved by the judgment dated 08.04.2015, passed by the learned Special Court No.I (CNS), Karachi (Mr. Azam Anwar Baloch) convicting the appellant under Section 9(c) of Control of Narcotic Substances Act, 1997 for 07 years and 06 months rigorous imprisonment and to pay a fine of Rs.35,000/-, in default

whereof he was ordered to undergo simple imprisonment for 06 months and 15 days more by extending the benefit of Section 382-B, Cr.P.C.

3. The facts giving rise to this appeal, briefly stated, are that on 29.01.2014 police party of P.S. Liaquatabad, headed by SIP Bahawal Bux, was busy in patrolling of the area. During patrolling he received spy information that one person was carrying charas at Minhas Plaza, S.M. Taufeeq Road. On receipt of such information, police party proceeded to pointed place and reached at about 0120 hours, on the pointation of spy informer apprehended him, who on inquiry disclosed his name as Danish Ali son of Sardar Ali. The SIP Bahawal took his personal search in presence of mashirs and recovered one white coloured shopper containing charas weighing five kilograms. On further search one 30 bore pistol with load magazine containing five live bullets from the right side folder of his pant was recovered so also Rs.1,000/-. The SIP then arrested the accused, sealed the recovered property on the spot under a mashirnama prepared in presence of mashirs, Syed Dilawar Abbas and Maqsood Ahmed, thereafter brought the accused and the case property at P.S. Liaquatabad, Karachi, where separate FIRs for recovery of charas and unlicensed arm were registered on behalf of the State.

4. After registration of FIR, the SIP handed over the case papers and recovered properties to SIP Muhammad Rasheed for further investigation. I.O. inspected the place of incident, prepared memo of site inspection and recorded the statements of witnesses under Section 161, Cr.P.C. He also produced witnesses Syed Dilawar Abbas and Maqsood Ahmed before the learned Civil Judge and Judicial Magistrate, Karachi (Central) on 30.01.2014 for recording their statements under Section 164, Cr.P.C., which were recorded.

I.O. deposited the case property in the office of chemical examiner for analysis and report, received positive report from the office of chemical examiner. After completing the usual investigation, he submitted challan before the Court of competent jurisdiction.

5. The learned trial Court framed a charge against the appellant under Section 9(c) of Control of Narcotic Substances Act, 1997 at Ex.2, to which he pleaded not guilty and claimed to be tried. The learned DDPP filed an application under Section 221, Cr.P.C. for amending the charge, which was allowed on 24.10.2014 and amended charge was framed at Ex.5 and again appellant pleaded not guilty and claimed to be tried.

6. At the trial, the prosecution has examined as many as four witnesses namely, PW.1 SIP Bahawal Bux, who is complainant of the case, at Ex.6, who produced attested photocopy of Roznamcha entry No.41 at Ex.6/A, memo of arrest and recovery at Ex.6/B, memo of site inspection at Ex.6/C and attested photocopy of Roznamcha entry No.41 at Ex.6/D (already produced at Ex.6/A), PW.2 Syed Dilawar Abbas at Ex.7, who produced copy of his statement under Section 164, Cr.P.C. at Ex.7/A, PW.3 SIP Muhammad Rasheed, Investigating Officer, who produced attested photocopy of Roznamcha entry No.46 at Ex.8/A and report of chemical examiner at Ex.8/G, PW.4 Syed Zaheer Ahmed Naqvi, Civil Judge & Judicial Magistrate was examined at Ex.10, who produced 164, Cr.P.C. statements of witnesses Maqsood Ahmed and Syed Dilawar Abbas at Ex.10/A. The prosecution then closed its side vide statement at Ex.11.

7. Statement of accused under Section 342, Cr.P.C. was recorded at Ex.12, accused has examined himself on oath under Section 340(2), Cr.P.C., wherein he has stated that on 27.01.2014 at about 1:30 am he was sleeping in his house when their outer door

was knocked, his younger brother opened the door and police in plain cloth entered in the house, they enquired his name and then took away him, the mother of appellant enquired from police as to why they were taking his son, the police replied that there was a matter of girl. Thereafter, police brought him at P.S. and implicated him in this false case.

8. Trial Court on conclusion of trial and after hearing learned counsel for the parties convicted the appellant under Section 9(c) of Control of Narcotic Substances Act, 1997 to undergo rigorous imprisonment for seven years and six months and to pay a fine of Rs.35,000/-, in default whereof he was ordered to undergo simple imprisonment of six months and fifteen days more and also extended him the benefit of Section 382-B, Cr.P.C.

9. The learned counsel for the appellant has argued that the appellant has been falsely implicated in this case. He was taken by the police from his house on 27.01.2014 and charas has been foisted upon him. It is further contended that police demanded money, but appellant failed to fulfill the demand of police, hence appellant was challaned in this case falsely. Learned counsel further argued that both the private mashirs were set-up and stock witnesses of the police and their evidence is not reliable. He further argued that time of incident has been shown as 1:20 am (night) but the police officials failed to disclose the source of identification. He has pointed out material contradictions in the statements of PWs, sanctity of transit period of case property as prosecution neither produced record of Malkhana nor examined the person, who kept the case property in safe custody.

10. On the other hand, the learned DPG, submits that the prosecution has successfully proved its case against the appellant

beyond shadow of doubt. The prosecution has examined two independent witnesses as mashirs of recovery of alleged narcotic substances from the possession of the appellant and both of them have fully implicated the present appellant with the commission of crime. The charas was sent to chemical examiner and report of expert is positive. He, therefore, prays that the appeal may be dismissed and the conviction and sentence recorded by the learned trial Court may be upheld.

11. Heard learned counsel for the appellant and the learned DPG for the State and perused the material available on record carefully.

12. From perusal thereof, it transpires that prosecution has examined four witnesses, out of them, two are police officials i.e. complainant SIP Bahawal Bux, who arrested the accused, prepared memo of arrest and recovery and lodged FIRs and SIP Muhammad Rasheed, who investigated the case and finally submitted the challan in Court. It is surprising to note that both police officials have not produced FIR of the incident being Crime No.21 of 2014 of P.S. Liaquatabad under Section 6/9(c) of CNS Act, 1997 in their respective evidence. It is a gross negligence on the part of the prosecution. It is also important to note that both PWs have produced Photostat/attested copies of the Roznamcha entries instead of original entries without plausible explanation. During his examination-in-chief, the complainant has produced simple Photostat copy of entry No.41 dated 29.12.2014 at Ex.6/A regarding departure from police station for patrolling in Mobile-II. PW.1 complainant SIP Bahawal Bux in his cross-examination has admitted that, *"It is correct to suggest that it is not specifically mentioned that I weighted the secured charas with weighing scale"*. During cross-examination of

this witness, the parcel was de-sealed just to verify its contents, which reveals that from bottom side of the bag five slabs of charas were wrapped in red paper and such parcel was also lying in a plastic shopper. It is an admitted position on record that the complainant and both the mashirs of recovery have not disclosed that five slabs of charas were wrapped in a red coloured paper and were kept in a plastic shopper bag. There is also ambiguity with regard to actual weight of the charas because none of the witnesses have stated in their evidence that recovered charas was weighed either with red wrapper and plastic bag or without red paper and plastic bag. According to the mashirnama of arrest and recovery, five slabs of charas were weighed which were five kilograms, but the complainant has stated that each slab was of one kilogram, inspite of the fact that slabs were wrapped in red paper and five slabs were in plastic bag. This ambiguity makes the entire recovery doubtful.

13. We have also noticed material contradictions in the evidence of prosecution witnesses on material particulars of the case. According to the complainant he alongwith ASI Abdul Karim, PCs Muhammad Qasim and driver Muhammad Karim (four persons) left police station for patrolling and they all were present at the place where the incident taken place, but PW Syed Dilawar Abbas, who is mashir of recovery, has stated that a police mobile was parked at the place of incident having staff of two members only. According to the complainant, he sealed the recovered charas, pistol and bullets, separately while according to the mashir the complainant prepared only two parcels. These contradictions are vital in nature and caused a fatal blow to the prosecution case.

14. PW SIP Muhammad Rasheed is the investigating officer of the case. He has stated that after receiving the investigation, he

went to the place of incident and then returned back to police station where complainant produced two private witnesses namely, Syed Dilawar Abbas and Maqsood Ahmed, before him for recording their statements under Section 161, Cr.P.C. PW. Maqsood Ahmed in his statement under Section 164, Cr.P.C. has neither disclosed about presence of second private witness Syed Dilawar Abbas nor he has stated that they were brought at Police Station for recording their 161, Cr.P.C. statement. It is pertinent to point out here that address of first mashir mentioned in his CNIC is of Qasba Colony, Kati Pahari, Karachi, while the address of second mashir as shown in his CNIC is of Mirpurkhas. Here the question arose that at odd hours of night i.e. 1.20 am what they were doing in the area of Liaquatabad. Besides, it is generally observed that usually the people avoid to act as mashir in such cases, but here in this case, both mashirs not only remained with police till completing the entire formalities at the spot, but also accompanied the police to police station. It is also important to note that both the mashirs voluntarily appeared before the Magistrate for recording their statements under Section 164, Cr.P.C. Conduct of mashirs was unusual. In the circumstances, the plea taken by the appellant that both the private mashirs were setup and stock witnesses of the police seems to be correct.

15. At this juncture, it is very difficult for us to give due weight to the testimony of prosecution witnesses. The credibility of PWs is highly doubtful and untrustworthy. It is a well settled law that no one should be construed into a crime unless his guilt is proved beyond reasonable doubt by the prosecution through reliable and legally admissible evidence. On the point of benefit of doubt, rule of Islamic Jurisprudence has been laid down in the judgment rendered

by the Hon'ble Supreme Court of Pakistan in *Ayub Masih's case* (PLD 2002 SC 1048), wherein the apex Court has ruled as under:-

*"It is also firmly settled that if there is an element of doubt as to the guilt of the accused, the benefit of the doubt must be extended to him. The doubt, of course, must be reasonable and not imaginary or artificial. The rule of benefit of doubt, which is described as the golden rule, is essentially a rule of prudence, which cannot be ignored while dispensing justice in accordance with law. It is based on the maxim, "It is better that ten guilty person be acquitted rather than one innocent person be convicted". In simple words it means that utmost care should be taken by the Court in convicting an accused. **It was held in "The State v Mushtaq Ahmed (PLD 1973 SC 418)** that this rule is antithesis of haphazard approach or reaching a fitful decision in a case. It will not be out of place to mention here that this rule occupies a pivotal place in the Islamic Laws and is enforced rigorously in view of the saying of Holy Prophet (P.B.U.H) that the mistake of Qazi (Judge) in releasing a criminal, is better than his mistake in punishing an innocent".*

16. We further rely on the case of *Ikramullah & others v The State* reported in 2015 SCMR 1002, wherein Hon'ble Apex Court has settled principle for keeping recovered narcotic substance in safe custody and proving it's safe transit to the chemical examiner was emphasized in the following terms:-

"In the case in hand not only the report submitted by the Chemical Examiner was legally laconic but safe custody of the recovered substance as well as safe transmission of the separated samples to the office of Chemical Examiner had also not been established by the prosecution. It is not disputed that the investigating officer appearing before the learned trial court had failed to even to mention the name of the police official who had taken the samples to the office of the Chemical Examiner and admitted no such police official had been produced before the learned trial Court to depose about safe custody of the samples entrusted to him for being deposited in the office of the Chemical Examiner. In this view of the matter the prosecution had not been able to establish that after the alleged recovery the substance so recovered was either kept in safe custody or that the samples taken from the recovered substances had safely been transmitted to the office of the Chemical Examiner without the same being tampered with or replaced while in transit".

17. On the point of safe custody of charas at police station and for transit period of case property, the prosecution has not examined Head Muharrir and the police official, who deposited the

charas to the office of Chemical Examiner. It is a settled law that it is not necessary that there may be many circumstances creating doubt, if there is a single circumstance which create reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to such benefit not as a matter of grace and concession, but as a matter of right as held in the case of *Tariq Pervaiz v The State* reported in 1995 SCMR 1345.

18. For the above stated reasons, we hold that the prosecution has failed to discharge its liability of proving the guilt of the appellant beyond shadow of doubt. Therefore, while extending the benefit of doubt in favour of the appellant, we hereby set-aside the conviction and sentence recorded by the learned trial Judge by impugned judgment dated 08.04.2015, acquit the appellant of the charge and allow this appeal. The appellant shall be released forthwith if not required to be detained in any other case.

JUDGE

JUDGE

Karachi;
Dated:01.03.2018