

**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD**

Cr. Jail. Appeal No. D- 91 of 2015

Present:-
Mr. Justice Naimatullah Phulpoto.
Mr. Justice Shamsuddin Abbasi.

Appellants : Fayaz s/o Riaz Ahmed Pathan and Wajid s/o Gul Rehman Pathan through Mr. Ali Gohar Khokhar, Advocate.

Respondents : The State through Mr. Muhammad Ayoub Kasar, Special Prosecutor ANF.

Date of hearing : 25.04.2018
Date of judgment : 30.04.2018

J U D G M E N T

NAIMATULLAH PHULPOTO, J: Appellants Fayaz s/o Riaz Ahmed Pathan and Wajid s/o Gul Rehman Pathan were tried by learned Special Judge (N)/Sessions Judge, Jamshoro @ Kotri in Special Case No. 10 of 2013 for offence under Section 9(c) Control of Narcotic Substance Act, 1997. On the conclusion of trial, vide judgment dated 27.08.2015, both the appellants were convicted u/s 9 (c) of CNS Act, 1997 and sentenced to imprisonment for life and to pay fine of Rs.5,00,000/- each. In case of default in payment of fine, they were ordered to suffer three years R.I more. Appellants were extended benefit of Section 382-B Cr.P.C.

2. Brief facts of the prosecution case are that on 26.03.2013, complainant Iftikhar Hussain, Inspector Rangers, 52-Wing, Hyderabad Qasim Rangers alongwith his subordinate staff was checking the vehicles

at Jamshoro Toll Plaza Rangers Check Post, Super Highway. It is alleged that at about 0700 hours, a bus/Coach No.JA-9095, going to Karachi appeared on the road. While checking the passenger's luggage on the roof of the said bus, two bags in suspicious manner were found. Bags were opened. One bag contained 12 packets of charas and another bag contained 11 packets of charas and one 30 bore pistol lying in a bag. It is further stated that driver and conductor of the bus on inquiry disclosed that said bags belonged to passengers, sitting at Seat Nos.24 and 25. Thereafter, Ranger officials arrested the passengers sitting on the mentioned seats. On inquiry, they disclosed their names as Fayaz s/o Riaz Ahmed Pathan r/o Mardan and Wajid s/o Gul Rehman r/o Mardan. They admitted before the Ranger officials that said bags belonged to them. On personal search of accused Fayaz, a CNIC, cash of Rs.2660/- and two mobile phones were recovered and from accused Wajid a CNIC, cash of Rs.3300/-, a mobile phone and a driving license were recovered. Inspector Iftikhar Hussain prepared mashirnama of arrest and recovery in presence of mashirs LNK Akhtar Abbas and constable Sarwar. Thereafter, complainant/Inspector communicated such information of recovery of narcotics to his superiors who directed him to inform the ANF officials Hyderabad. It is alleged that Inspector Sher Ali Shah Sheerazi of PS ANF Hyderabad alongwith his subordinate staff arrived at the place of recovery where both the accused were in custody of Ranger officials. Custody of both the accused and case property were handed over to Inspector ANF Hyderabad alongwith memo of arrest and recovery. Inspector Sher Ali Shah Sheerazi weighed the whole 23 packes of charas, which became 27 Kilograms. 100 grams of charas were separated from each packet and separately sealed for chemical analysis

while remaining charas was sealed separately. Such mashirnama was prepared at the spot. Thereafter, accused and case properties were brought at P.S ANF Hyderabad where FIR was registered against both the accused on behalf of the State, vide crime No.02/2013 u/s 9 (c) of CNS Act, 1997.

3. During the investigation 161 Cr.P.C. statements of the PWs were recorded, samples were sent to the chemical examiner on 27.03.2013, positive report was received. On the conclusion of investigation, challan was submitted against the appellants/accused u/s 9 (c) of CNS Act, 1997.

4. Trial Court framed charge against both accused at Ex.2, to which they pleaded not guilty and claimed to be tried.

5. At the trial, prosecution examined PW-1 complainant Iftikhar Hussain Rajput at Ex.7, he produced the memo of recovery, draft of complainant, memo of weighing the charas at Ex.7/A to 7/C, mashir Akhtar Abbas Baleem at Ex.8 and PW Syed Sher Ali Shah Sheerazi at Ex.9, he produced FIR, report of chemical examiner, departure and arrival entries, Photostat copy of FIR No.65/2013 under section 13(d) Arms Ordinance registered against accused Fayaz at Ex.9/A to 9/D. Thereafter, prosecution side was closed at Ex.10.

6. Statements of accused were recorded u/s 342 Cr.P.C. at Ex.11 and 11 in which both accused claimed false implication in this case and denied the prosecution allegations. Regarding positive report of chemical examiner, accused replied that it has been managed by police. Both accused did not examine themselves on oath in disproof of the prosecution allegations nor led any evidence in defence.

7. Learned Special Judge after hearing the learned counsel for the parties and examining the evidence available on record, by judgment dated 27.08.2015 convicted and sentenced the appellants as stated above. Hence this appeal is filed.

8. Facts of the prosecution case as well as evidence finds an elaborate mention in the judgment of the trial court as such there is no need to repeat the same to avoid unnecessary repetition.

9. Mr. Ali Gohar Khokhar, learned advocate for the appellant mainly contended that the bags containing charas did not belong to the appellants, the same were recovered from the roof of bus. Accused were falsely implicated in this case. It is further contended that prosecution failed to examine the driver, cleaner as well as passengers of the bus to connect the accused in the commission of offence. It is also contended that no evidence was produced to establish the safe custody of the charas at the police station ANF as well as safe transit to the chemical examiner. It is further argued that PC Kashan Ahmed who had taken sample to the chemical examiner was also not examined. Lastly, it is contended that the appellants were involved in this case falsely. In support of his contentions, learned defence counsel has placed reliance on the cases reported as *MUHAMMAD NOOR AND OTHERS V. THE STATE (2010 SCMR 927)* AND *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*.

10. On the other hand, Mr. Muhammad Ayoub Kasar, Special Prosecutor ANF contended that the evidence of the Ranger / ANF officials was reliable and trustworthy. They had no enmity with the appellants to foist upon them such huge quantity of charas. It is further

argued that evidence of the Ranger / ANF officials has been corroborated by positive report of the chemical examiner. He has prayed for dismissal of the appeal. In support of his contentions, he has relied upon Muhammad Sarfraz v. The State and others (2017 SCMR 1874), Muhammad Khan v. The State (2008 SCMR 1616), Roshan v. The State (2018 P.Cr.L.J Note 26) and Liaquat Ali and another v. The State (2018 P.Cr.L.J 257).

11. We have carefully heard the learned counsel for the parties and scanned the entire evidence.

12. According to the prosecution case, two bags containing charas belonging to the appellants, who were travelling in the bus were secured by the Ranger officials from the roof of the bus and accused admitted that those bags belonged to them. We are not prepared to accept such prosecution evidence mainly for the reasons that luggages of all the passengers were lying on the roof of the bus. During investigation, neither the tickets of bus were collected / recovered from the appellants/accused nor tags of those bags were recovered for connecting the appellants in the commission of crime. Admittedly, bags were lying upon the roof of the bus. Legally, the recovery of charas was not from the exclusive possession of the appellants/accused. Trial court convicted the appellants/accused on the ground that the accused admitted during interrogation that those bags belonged to them in presence of the Ranger officials. Such evidence legally is in-admissible in the eye of law. Investigation was defective. Investigation Officer failed to examine the bus driver and its cleaner so also the passengers who were travelling in that bus to establish the ownership of the accused with regard to the bags lying on the roof of the bus. There were several other circumstances /

infirmities in the prosecution case. There was no evidence that after the recovery of bags containing charas, the same were kept in Malkhana of PS ANF. No incharge/Head Moharer of PS ANF has been examined before the trial court. Charas was sent to the chemical examiner through PC Kashan Ahmed who had not been examined by the trial court which clearly shows that safe transit to the chemical examiner has also not been established and the tampering with case property at PS ANF could not be ruled out. Apart from that chemical examiner failed to prepare the report as per protocol provided in the rules. We have no hesitation to hold that the report of the chemical examiner though positive was deficient in the eyes of law as held in the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*, which has been endorsed by the Honourable Supreme Court in the recent judgment in the case of *Nadeem v. The State through Prosecutor General, Sindh, Criminal Appeal No.06-K of 2008 in Criminal Petition No.105-K of 2016*, dated 04.04.2018 as follows:-

“According to the FIR the petitioner and his co-convict had tried to escape “with” the motorcycle when they were intercepted by the police party but before the trial court Muhammad Ayub, S.I.P (PW1) had stated that upon seeing the police party the petitioner and his co-convict had started running away while leaving the motorcycle on the road and the engine of that motorcycle had gone off. Muhammad Jaffar, PC (PW2) had also deposed about running away of the petitioner and his co-convict but had kept quiet regarding leaving of the motorcycle by the petitioner and his co-convict while running away. Both the above mentioned witnesses produced by the prosecution, however, unanimously stated that while running away upon seeing the police party the petitioner and his co-convict had kept the relevant bag containing narcotic substance in their hands and it was in that condition that the petitioner and his co-convict had been apprehended by the police party. It is quite obvious that the initial story contained in the FIR had been changed during the trial and the changed story was too unreasonable to be accepted at its face value. Muhammad Ayub, S.I.P. (PW1) had stated before the

trial court that after recovering the narcotic substance he had brought the same to the Police Station and it was he who had kept the recovered substance in safe custody whereas he had never claimed to be the Moharrir of the relevant Police Station. The record of the case shows that it was Ghulam Ali, P.C. who had taken the recovered substance to the office of the Chemical Examiner for analysis but it is not denied that the said Ghulam Ali, P.C. had not been produced before the trial court by the prosecution. It is, thus, evident that safe transmission of the recovered substance from the local Police Station to the office of the Chemical Examiner had not been established by the prosecution. The record further shows that the Chemical Examiner's report adduced in evidence was a deficient report as it did not contain any detail whatsoever of any protocol adopted at the time of chemical analysis of the recovered substance. This Court has already held in the case of fkramullah and others v. The State (2015 SCMR 1002) that such a report of the Chemical Examiner cannot be used for recording conviction of an accused person in a case of this nature. For all these reasons we find that the prosecution had not been able to prove its case against Nadeem petitioner beyond reasonable doubt."

13. We have noticed one thing more that Inspector Rangers Ikhtiar Hussain and Inspector Sher Ali Shah Sheerazi of ANF reported the matter to high officials soon after the recovery of charas but no call data / evidence through modern devices to that extent had been produced before the trial court for its' satisfaction.

14. In our considered view, prosecution has failed to prove that the charas was in safe custody for the aforementioned period. Even positive report of the chemical examiner would not prove the case of prosecution. Above mentioned circumstances have created reasonable doubt in the prosecution case. It is settled law that it is not necessary that there should many circumstances creating doubts. If there is a single 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.

15. We have no hesitation to hold that the prosecution has failed to prove its' case against the accused. Resultantly, appeal is allowed. Conviction and sentence recorded by the trial court vide judgment dated 27.08.2015 are set aside. Appellants are acquitted of the charge. Appellants are in custody. They shall be released forthwith if they are not required in some other case.

JUDGE

JUDGE

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