IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD

Cr. Jail. Appeal. No.D- 57 of 2018

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

Appellant	:	Aleem s/o Muhram by caste Mallah through Mr. Ishrat Ali Lohar, Advocate.
Respondent	:	The State through Mr. Shahzado Saleem Nahiyoon, D.P.G.
Date of hearing	:	21.05.2018
Date of judgment	:	23.05.2018

J U D G M E N T

NAIMATULLAH PHULPOTO, J: Aleem appellant was tried by learned IIIrd Additional Sessions Judge/Special Judge under Control of Narcotic Substances Act, Hyderabad in Special Case No. 191 of 2017. On conclusion of trial, vide judgment dated 19th April 2018, appellant was convicted u/s 9 (c) of CNS Act, 1997 and sentenced to 04 years R.I and to pay fine of Rs.20,000/-. In case of default in payment of fine, appellant was ordered to suffer S.I for one (01) month more. Appellant was extended benefit of Section 382-B Cr.P.C.

2. Brief facts of the prosecution case are that Piaro Khan, Excise Inspector was present in his office on 27.10.2017 at 2-30 p.m, he received spy information that appellant Aleem Mallah was selling charas. Thereafter, Excise Inspector under the subordination of AETO Altaf,

Inspector Abdul Haq Qureshi and other Excise officials left Excise Police Station vide roznamcha entry No.55 at about 3-00 p.m and proceeded to the pointed place in Government vehicle where they saw one person standing and he was carrying plastic shopper in his hand. He tried to run away but he was surrounded and caught hold. Plastic shopper was secured from his possession by Excise Officials and it was opened in presence of the mashirs namely Buxal Solangi and Nisar Ahmed. There was one big piece of charas weighing 970 grams and other small piece of charas weighing 225 grams, total 1203 grams. Cash of Rs.600/- was also recovered from the pocket of accused. Mashirnama of arrest and recovery was prepared. Thereafter, accused and case property were brought at police station where FIR was lodged against the accused vide Crime No.10/2017 at P.S. Excise DIB, Hyderabad under section 9 (c) of CNS Act, 1997.

3. During investigation, charas was sent to the chemical examiner for report on 30.10.2017 through EC Shahid Baloch. Positive report of the chemical examiner was collected by I.O. On the conclusion of usual investigation, challan was submitted against the appellant/accused u/s 9 (c) of CNS Act, 1997.

4. Trial Court framed charge against accused at Ex.3, to which he pleaded not guilty and claimed to be tried.

5. At the trial, prosecution examined two witnesses in this case i.e. complainant and mashir. Thereafter, prosecution side was closed.

6. Statement of accused was recorded u/s 342 Cr.P.C. at Ex.8 in which he claimed false implication in this case and denied the prosecution allegations. Accused neither examined himself on Oath nor

lead any evidence in his defence in disproof of the prosecution allegations.

7. Learned Special Judge after hearing the learned counsel for the parties and examining the evidence available on record, by judgment dated 19th April, 2018 convicted and sentenced the appellant as stated above. Hence, this appeal is filed.

8. We have carefully heard the learned counsel for the parties and scanned the evidence available on record.

9. Facts of this case and evidence find an elaborate mention in the judgement of the trial court hence there is no need to repeat it.

10. Mr. Ishrat Ali Lohar, voluntarily appeared for the appellant as it was jail appeal and the appellant was unrepresented. Mr. Lohar made the following submissions:-

i. That there were material contradictions in the evidence of prosecution witnesses with regard to the grams of big piece. In the evidence, it was mentioned that weight of big piece was 970 grams whereas in the mashirnama of arrest and recovery it was mentioned that its weight was 978 grams.

ii. That it was the case of spy information, place of arrest and recovery was thickly populated area near the bus stop but no private person was associated.

iii. That spy information was received by Excise Inspector in his office but no efforts were made by the Excise Officials to arrange any independent person around his office to witness the recovery proceedings.

iv. That case property was sent to the chemical examiner through EC Shahid Baloch but he has not been examined by the prosecution to prove the safe transit.

v. That Head Mohrer of Malakhana was not examined to establish the safe custody of the charas at Excise Police Station.

vi. That AETO Altaf, the head of the Excise Officials was not examined by prosecution before the trial court and the best evidence was withheld, it would be fatal to prosecution case. In support of his contentions learned counsel has placed reliance on the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002).*

11. Mr. Shahzado Saleem Nahiyoon, D.P.G. for the State during arguments admitted that there is discrepancy with regard to the quantity of charas mentioned in the evidence with regard to big piece and mashirnama of arrest and recovery. It has also been admitted that EC Shahid Baloch and AETO have not been examined before the trial court. Learned D.P.G. half heartedly supported the case of prosecution.

12. After hearing the learned counsel for the parties, we have carefully perused the entire evidence.

13. Record reflects that Excise Inspector received spy information at Excise Police Station on 27.10.2017 that the present accused was selling charas. Thereafter, Excise Inspector under the subordination of AETO and staff left the Excise Police Station for arrest of the accused and proceeded to the pointed place. Excise officials arrested the accused who was carrying plastic shopper containing charas 1203 grams. In the mashirnama of arrest and recovery it is mentioned that there were two

pieces of charas in the shopper. One piece was weighing 978 grams and another piece was weighing 225 grams. Excise Inspector in his evidence has deposed that one big piece was weighing 970 grams and another piece was weighing 225 grams. Such discrepancy in the weight has created doubt in the prosecution case. Moreover, Excise party was headed by AETO Altaf but he has not been examined before the trial court. Material evidence has been withheld. Presumption would be if the head of the Excise party would have been examined he would have not supported the case of prosecution or true facts would have come on record. According to the case of prosecution charas was kept in Excise office but incharge/Head Mohrer of Malkhana has not been examined before the trial court to prove the safe custody of charas at Malkhana. For the purpose of safe transit to the chemical examiner, EC Shahid Baloch has also not been examined who had taken charas to chemical examiner for analysis. Place of arrest and recovery was situated near the bus stop, a large number of the private persons were present but no one was associated as mashir. Accused in his statement recorded u/s 342 Cr.P.C. has claimed false implication in this case at the instance of Excise officials due to enmity. We are unable to rely upon the evidence of police officials without independent corroboration, which is lacking in this case. No doubt, positive report of the chemical examiner has been produced in the evidence. A perusal of the chemical report at Ex.05/E reflects that it was not prepared by the Chemical Examiner according to protocol required in the rules. As such positive report would not improve the case of prosecution. Rightly reliance has been placed upon 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 which reads 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."***

14. In our considered view, prosecution has failed to prove its' case against the appellant. Circumstances mentioned above 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. In this regard reliance can be placed upon the case of *Tariq Pervez V/s. The State (1995 SCMR 1345),* wherein the Honourable Supreme Court has observed as follows:-

> ***"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. In view of the above, we have no hesitation to hold that the prosecution has failed to prove its' case against the accused. Resultantly, instant appeal is allowed. Conviction and sentence recorded by the trial court vide judgment dated 19th April, 2018 are set aside and appellant is acquitted of the charge. Appellant Aleem s/o Muhram by caste Mallah is in custody, he shall be released forthwith, if he is not required in some other case.

JUDGE

JUDGE

Tufail