

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

Cr.Appeal.No.D- 133 of 2005

Present:-
Mr. Justice Naimatullah Phulpoto.
Mr. Justice Zulfiqar Ahmed Khan.

Date of hearing: 27.04.2017.
Date of judgment: 27.04.2017.

Appellant Syed Nazar Abbas Shah s/o Syed Sardar Shah.
(present on bail) Through Mr. Shafi Muhammad Memon,
Advocate.

The State: Through Syed Meeral Shah, D.P.G.

J U D G M E N T

NAIMATULLAH PHULPOTO, J: Instant appeal u/s 48 of Control of Narcotic Substance Act, 1997 is directed against the judgment dated 13.09.2005 passed by learned Special Judge for CNS, Dadu in Special Case No.192/2004, whereby the leaned trial court convicted the appellant u/s 9(b) of CNS Act, 1997 and sentenced him to suffer RI for 03 years and to pay the fine of Rs.25,000/- In case of default in payment of fine he was ordered to suffer SI for three month more. Benefit of Section 382-B Cr.P.C. was also extended to the accused.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 21.05.2004 SIP Ali Hassan Rahoojo left police station alongwith his subordinate staff vide roznamcha entry No.17 for patrolling. While patrolling at

various places when the police party reached at New Bus Stand Dadu, they received spy information that the present accused was selling charas near the bus stand opposite petrol pump. Consequent to such information police party reached at the pointed place and saw that the present accused was carrying plastic shopper in his hand. While seeing the police party accused tried to run away but he was apprehended by the police. SIP Ali Hassan opened the shopper in presence of the mashirs HC Mushtaque Ahmed and PC Shahzado Khan. SIP got the weight of the charas through HC Mushtaque Ahmed it became 300 grams. Out of which 10 grams were separated and sealed for sending the same to the chemical examiner. Due to non-availability of the private witnesses mashirnama of recovery and arrest was prepared in presence of mashirs HC Mushtaque Ahmed and PC Shahzado. Thereafter, accused and the case property were brought at the police station where FIR was lodged against the accused on behalf of the State. It was recorded vide Crime No.102 of 2004 u/s 9(b) of CNS Act, 1997.

3. During the courses of investigation, statements of accused were recorded u/s 161 Cr.P.C, charas was sent to the chemical examiner on 02.06.200, positive report was received. On the conclusion of investigation challan was submitted against the accused u/s 9(b) of CNS Act, 1997.

4. Trial Court framed charge against accused at Ex.2 u/s 9(b) of CNS Act, 1997. To which, accused pleaded not guilty and claimed to be tried. At the trial prosecution examined PW-1 HC Mushtaque Ali (mashir) at Ex.7. He produced memo of arrest and recovery at Ex.7/A. PW-2 SIP SIP Ali Hassan Rahoojo (Investigation Officer) at Ex.8. He produced attested copy of roznamcha entry at Ex.8/A, FIR at Ex.8/B and report of chemical examiner at Ex.8/C. Thereafter, prosecution side was closed at Ex.9.

5. Statement of accused was recorded u/s 342 Cr.P.C.at Ex.10 in which he claimed false implication in this case and raised plea that the nothing was recovered from his possession. Accused did not examine him on oath in disproof of the prosecution allegations nor he led any evidence in defence.

6. Learned trial court after hearing the learned counsel for the parties and examining the evidence available on record convicted and sentenced the appellant as stated above.

7. We have carefully heard Mr. Shafi Muhammad Memon, learned advocate for appellant, Syed Meeral Shah, learned D.P.G. for the State and scanned the entire evidence.

8. Learned advocate for appellant has mainly contended that the place of arrest and recovery was thickly populated area and it was a bus stand near the petrol pump but police failed to associate any independent person of the locality to act as mashir of the arrest and recovery proceedings. He further argued that the charas was weighed at one shop but the shopkeeper has not been cited as a witness nor he was examined by the prosecution. He further argued that the charas was recovered from the accused on 21.05.2004 but it was sent to the chemical examiner after 12 days and such delay has not been explained by the prosecution. It is further argued that there was no evidence on the record that the charas was in safe custody from the date of recovery till the sending of the same to the chemical examiner. It is submitted that there was delay in sending the charas to the chemical examiner. Learned counsel for the appellant argued that there are material contradictions in the evidence of the prosecution witnesses and on some other particulars of the case. Counsel for the appellant submits that one witness has stated that the present accused was carrying plastic bag whereas another says that he was selling the charas. Counsel for the appellant submitted that charas has been foisted

upon the accused by the police with malafide intention and due to enmity and the prosecution has failed to prove its case against the accused. In support of his contentions, learned counsel has placed reliance on the case of 1. *Tariq Pervez V/s. The State (1995 SCMR 1345)*, 2. *Ali Murad v. The State (PLD 2007 Karachi 555)*, 3. *Akhtar Zarin v. The State (SBLR 2014 Sindh 844)*, 4. *Muhammad Hashim v. The State (PLD 2004 Supreme Court 856)*, 5. *Ghaus Bux v. The State (PLD 2004 Karachi 201)*, 6. *Muhammad Tahir Nawaz v. The State (2013 MLD 1299)*.

9. Syed Meeral Shah, learned D.P.G. conceded the contentions raised by the learned counsel for the appellant and argued that it is the matte of record that there was delay of seven days in sending the charas to the chemical examiner and there was no evidence that the charas was in safe custody for that period. Learned D.P.G. after perusal of the evidence conceded that no shopkeeper was examined by the prosecution before the trial court. He did not support the case of the prosecution.

10. We have carefully heard the learned counsel for the parties and perused the evidence available on record.

11. We have come to the conclusion that the prosecution has failed to prove its case against the appellant for the reasons that SIP Ali Hassan left Police Station alongwith his subordinate staff on 21.05.2004 vide roznamcha entry No.17 for patrolling and he received spy information at new bus stand opposite patrol pump that the accused was selling charas inspite of that he failed to associate with him any private person from the bus stand. No reason has been assigned by the sub-inspector. After recovery charas was weighed through HC Mushtaque at one shop but the shopkeeper has not been examined and such material evidence has been withheld by the prosecution. 10 grams were separated and sealed as sample for the chemical examiner

but the same were sent to the chemical examiner after 12 days and such delay in sending the charas has not been explained. Moreover, nothing is on record that the charas was in safe custody during that period in this regard the prosecution has not examined the WHC of the police station. Major contradictions in the prosecution evidence have also been brought on record with regard to the material particulars of the case. In such circumstances it would be unsafe to rely upon the evidence of the police officials without any independent corroboration which is lacking in this case. In this regard reference can be made to the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*, in which the Honourable Supreme Court has held as under:-

“5. 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 the 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 admittedly 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 substance had safely been transmitted to the office of the Chemical Examiner without the same being tampered with or replaced while in transit.”

12. In view of the above, we have come to the conclusion that there are several circumstances in this case which have created doubt in the prosecution case. It is settled law that even a single circumstances created in the prosecution case, its' benefit will must go in favour of the accused. 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)*.

13. Consequently appeal is allowed. The conviction and sentence recorded by the trial court are set aside. Appellant is present on bail. His bail bond stands cancelled and the surety is hereby discharged.

JUDGE

JUDGE

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