

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

Cr.Appeal.No.D- 35 of 2016

Present:-

Mr. Justice Naimatullah Phulpoto.

Mr. Justice Zulfiqar Ahmed Khan.

Date of hearing: 26.04.2017.

Date of judgment: 26.04.2017.

Appellant Achar s/o Allah Dino
By caste Mallah.
(present on bail)

Through Mr. Mian Taj Muhammad
Keerio, Advocate.

The State:

Through Syed Meeral Shah, D.P.G.

J U D G M E N T

NAIMATULLAH PHULPOTO, J: Appellant Achar s/o Allah Dino Mallah was tried by learned Sessions Judge / Special Judge for CNS Badin in Special Case No.25/2015. By judgment dated 11.04.2016, the appellant was convicted u/s 9(b) of CNS Act, 1997 and sentenced to suffer RI for 03 years and to pay the fine of Rs.50,000/- In case of default in payment of fine he was ordered to suffer SI for 06 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 07.04.2015 SIP Wali Muhammad Chang SHO PS Badin left police station alongwith his subordinate staff namely PCs Sanaullah and Tufail vide

roznamcha entry No.16 at 1600 hours for patrolling duty. While patrolling at various places when the police party reached at Allahwala Chowk, Badin, they received spy information that the present accused who was wanted in many cases was available near Dargah Sheikh Umer and was waiting for conveyance. Consequent to such information, police party reached at the pointed place and saw the present accused standing there. He threw a plastic shopper and succeeded in running away. The shopper was collected by the SHO in the presence of the above mashirs and he opened it. It contained 10 pieces of charas of different size. Charas was weighed in presence of the mashirs, it became 290 grams. Charas was sealed at the spot. Mashirnama was prepared in presence of the mashirs. Thereafter, SHO came to the police station and he lodged FIR against the accused on behalf of the State. It was recorded vide Crime No.125 of 2015 u/s 9(b) of CNS Act, 1997.

3. During investigation, it is stated that accused was arrested on 09.04.2015 by SHO in the presence of the mashirs. Investigation Officer recorded 161 Cr.P.C. statements of the PWs. Charas was sent to the chemical examiner on 10.04.2015 through PC Aslam. Positive chemical 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 PC Sanaullah at Ex.4. He produced memo of recovery at Ex.4/A. PW-2 Complainant / SIP Wali Muhammad at Ex.5. He produced FIR at Ex.5/A, entries of departure and arrival at Ex.5/B to 5/E, letter dated 09.04.2015 at Ex.5/F and chemical examiner report at Ex.5/G. Thereafter, prosecution side was closed at Ex.6.

5. Statement of accused was recorded u/s 342 Cr.P.C.at Ex.7. Accused claimed false implication in this case and denied the prosecution allegations. Accused raised plea that PWs are police officials, they are interested. They have deposed against him at the instance of one Hyder Mallah who is on inimical terms with the accused. In a question what else he has to say, he has replied that he is innocent and since he had refused to provide meals to the police officials, therefore, they have booked him in this case falsely.

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. Mian Taj Muhammad Keerio, 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 there is nothing on record that as to how SHO identified the accused on the road that he was Achar. He further contended that the prosecution story is un-natural and unbelievable. SHO was on the patrolling duty in the vehicle having official arms and ammunitions alongwith his subordinate staff but accused succeeded in running away while seeing the police party and he was arrested on 09.04.2015. In support of his contentions, learned counsel has placed reliance on the case of *Tariq Pervez V/s. The State (1995 SCMR 1345)*.

9. Syed Meeral Shah, learned D.P.G. argued that police officials have deposed that 290 grams charas was recovered from the possession of accused and evidence of police officials is supported by positive chemical examiner report. Learned D.P.G. argued that there was no major

contradiction in prosecution evidence. He has supported the impugned judgment of trial Court.

10. We have come to the conclusion that the prosecution has failed to prove its case beyond any reasonable doubt for the reasons that according to the prosecution case appellant threw his plastic bag on the road on 07.04.2015 and accused succeeded in running away from the police party and police arrested him after two days on 09.04.2015. It is un-natural and unbelievable that the accused who was empty handed threw plastic bag and ran away from the police party who was armed with official arms and ammunitions. The conduct and the efficiency of the police officials appears to be highly questionable. Apart from that according to the case of prosecution charas was recovered on 07.04.2015 but it was sent to the chemical examiner on 10.04.2015. There was no evidence available on the record that the charas was in safe custody at police Malkhana. According to the report of the chemical examiner the charas was sent to the chemical examiner through PC Aslam but he has not been examined by the prosecution. There was also overwriting in the mashirnama Ex.5/D. Accused has raised defence plea that he had inimical terms with Hyder Mallah and other police officials and since he had refused to supply meals to those police officials therefore, he has been implicated in this case. In such circumstances, it would be unsafe to rely upon the evidence of the prosecution witnesses without any independent corroboration which is lacking in this case. The prosecution story appears to be unbelievable. There are several circumstances in this case which create doubt in the prosecution case. There is also no evidence on record that the charas was in safe custody in police Malkhana in between 07.04.2015 to 10.04.2015. 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.”

11. 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 doubt created in the prosecution case 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)*.

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

JUDGE

JUDGE

Tufail

