

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

Cr.Appeal.No.D- 36 of 2018

Present:-

Mr. Justice Naimatullah Phulpoto.

Mr. Justice Shamsuddin Abbasi.

Appellant : Shah Muhammad @ Shahoo s/o Muhammad Ameen by caste Khaskheli through Mr. Haji Khan Jamali, Advocate.

Respondent : The State through Mr. Shahzado Saleem Nahiyoon, D.P.G.

Date of hearing : 29.05.2018

Date of judgment : 31.05.2018

J U D G M E N T

NAIMATULLAH PHULPOTO, J: Shah Muhammad @ Shahoo appellant faced trial before the learned Special Judge (Narcotics), Shaheed Benazirabad, in Special Narcotic Case No. 621 of 2017. After full-dressed trial, vide judgment dated 07.03.2018, 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 directed to suffer S.I for 05 months more. Appellant was extended benefit of Section 382-B Cr.P.C.

2. The prosecution case as emerged from the recitals contained in first information report and the evidence adduced during the trial is as under:-

3. PW-1 Muhammad Daud SHO PS B-Section Nawabshah left Police Station alongwith his subordinate staff on 07.08.2017 vide roznamcha entry No.26 at 0215 hours for patrolling duty. When police party reached at 60-Mile Railway Crossing at 0630 hours, present accused was found standing there while carrying a black coloured shopper in his hand. Accused was surrounded and caught hold. Plastic shopper was recovered from his possession. It was opened by the SHO in presence of mashirs PCs Dur Muhammad and Nasir. It contained 08 small and big pieces of charas. Substance was weighed, it became 2100 grams charas. Accused Shahd Muhammad @ Shahoo was arrested. Mashirnama of arrest and recovery was prepared. Case property was sealed at spot. Accused and case property were brought to the Police Station. Where FIR bearing Crime No.152/2017 was lodged against accused on behalf of the State u/s 9(c) of CNS Act, 1997.
4. During investigation, pieces of charas were sent to the chemical examiner for analysis and report. Positive report of the chemical examiner was received. On the conclusion of usual investigation, challan was submitted against the appellant/accused under the above referred section.
5. Trial Court framed charge against accused at Ex.2. Accused met the charge with denial.
6. At the trial, prosecution examined three witnesses in this case i.e. complainant/I.O, mashir of recovery and PC Lutiful Ali, who had taken sample to the chemical examiner for analysis. Thereafter, prosecution side was closed.

7. Statement of accused was recorded u/s 342 Cr.P.C. at Ex.7, in which he claimed false implication in this case and denied the prosecution allegations. Accused did not examine himself on Oath in disproof of prosecution allegations. In a question, what else he has to say, accused replied that charas has been foisted upon him by WHC Nazir Lashari as he was posted as Cook with him and said Nazir Lashari was posted as WHC at the police station. Plea has been raised by accused that salaries of 5/6 months were not paid to him and when he demanded he was involved in this case falsely.

8. Learned trial court after hearing the learned counsel for the parties and examining the evidence available on record, vide judgment dated 07.03.2018 convicted and sentenced the appellant as stated above. Hence, this appeal is filed.

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

10. 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.

11. Mr. Haji Khan Jamali, learned advocate for appellant mainly contended that prosecution story was unnatural and unbelievable. During investigation, Investigation Officer failed to arrest the person/customer to whom appellant was selling the charas. It is argued that accused was Cook of WHC Nazir Lashari but the statement of WHC has not been recorded by the Investigation Officer during investigation. Learned advocate for the appellant further argued that size of small and big pieces and separate weight have not been mentioned. It is also pointed out that there was overwriting in the timings of the mashirnama of arrest and

recovery so also the overwriting in the Buckle number of PC Ghulam Mustafa. Learned advocate for the appellant has also drawn attention of the court towards roznamcha entry No.26 dated 07.08.2017 with regard to the overwriting in the said entry. It is also argued that departure entry of the police station was silent with regard to the official arms and ammunitions allotted to the police party. Lastly, it is argued that safe custody of the charas at police station and its safe transit have not been proved by cogent evidence at trial. In support of his contentions, learned counsel has placed reliance on the cases reported as *Ikramullah & others v/s. The State (2015 SCMR 1002)* and *Muhammad Mansha V/s. The State (2018 SCMR 772)*.

12. Mr. Shahzado Saleem Nahiyoan, D.P.G appearing for the State conceded that there is overwriting in the timings of mashirnama of arrest and recovery prepared on 07.08.2017. D.P.G admits that prosecution has failed to prove the safe custody of charas at Malkhana of the police station and safe transit to the chemical examiner. It has also been admitted that departure entry No.26 produced before the trial court was doubtful. However, he has opposed the appeal half heartedly.

13. We have carefully heard the learned counsel for the parties and perused the relevant record.

14. In our considered view prosecution failed to establish its' case against the appellant beyond shadow of doubt for the reasons that prosecution story appears to be unnatural and unbelievable. It was for the Investigation Officer to ascertain as to why accused was standing on 07.08.2017 at 0630 hours at 60-Mile Railway Crossing and to whom he was selling charas. According to the case of prosecution 8 small and big

pieces were recovered from the black shopper carried by the accused. The description/size of each piece and its weight have not been prescribed in mashirnama. On the other hand, chemical examiner in the report has mentioned that there were 8 pieces of charas as case property. We have noticed that there was overwriting, in the mashirnama of arrest and recovery dated 07.08.2017 produced before the trial court at Ex.3/A. Prosecution has no reply to explain such overwriting/tampering. According to the case of prosecution, police party had left the police station on 07.08.2017 vide roznamcha entry No.26 at 0215 hours. There was overwriting in the said entry, with regard to the name of the police constable and Buckle number. It has also not been mentioned in said entry that which weapons were allotted and to whom, for the patrolling duty. According to the case of prosecution, accused was arrested on 07.08.2017 at 0630 hours at Railway crossing. No efforts were made by the I.O to call for private persons to witness recovery proceedings when it has been admitted that 60-Mile road is a busy road. According to the case of prosecution accused and case property were brought to the police station. There was no evidence that the charas was handed over to WHC for safe custody in the Malkhana, till its' dispatch to the chemical examiner for analysis. Rightly, it has been argued that safe custody of the charas has not been established at trial. No doubt, the prosecution has produced positive report of the chemical examiner in the evidence but report of the chemical examiner produced before the trial court at Ex.3/F shows that protocol for preparation of the report was not observed by the chemical examiner as provided in the rules. As such positive report of the chemical examiner was deficient and same would not improve the case of prosecution. No evidence regarding safe custody of the recovered charas

in the Malkhana has been brought on record. Under these circumstances, we are unable to rely upon the evidence of police officials in view of specific defence plea without independent corroboration, which is lacking in this case. 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."

15. 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 be 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 *Muhammad Mansha V/s. The State (2018 SCMR 772)*, wherein the Honourable Supreme Court has observed as follows:-

"Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of Tariq Pervez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Muhammad Akram v. The State (2009 SCMR 230) and Muhammad Zaman v. The State (2014 SCMR 749)."

16. 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 07.03.2018 are set aside and appellant is acquitted of the charge. Appellant Shah Muhammad @ Shahoo s/o

Muhammad Ameen by caste Khaskheli is in custody, he shall be released forthwith, if he is not required in some other case.

JUDGE

JUDGE

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