

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

Cr.Appeal.No.D- 41 of 2015

Present:-
Mr. Justice Naimatullah Phulpoto.
Mr. Justice Mohammad Karim Khan Agha.

Date of hearing: 23.05.2017.
Date of judgment: 23.05.2017.

Appellant Ashique Ali s/o Gul Muhammad Qambrani.
(present on bail) Through Mrs. Razia Ali Zaman Khan,
Advocate.

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

J U D G M E N T

NAIMATULLAH PHULPOTO, J: This appeal is directed against the judgment dated 30.04.2015 passed by learned Sessions Judge / Special Judge for CNS Tando Allahyar in Special Case No.34 of 2012, whereby appellant Ashique Ali has been convicted u/s 9(c) of CNS Act, 1997 and sentenced to suffer RI for 03 years and to pay the fine of Rs.10,000/- 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 03.06.2012 SIP Muhammad Usman Hingoro left PS alongwith his subordinate staff vide roznamcha entry No.27 at 7-20 p.m for patrolling. While patrolling at different places when they reached at Railway crossing, where it is alleged

that police party saw the present accused standing in suspicious manner who on seeing the police party tried to run away. He was apprehended by the police. On inquiry, he disclosed his name as Ashique Ali son of Gul Muhammad. SIP Muhammad Usman conducted the personal search of accused and secured two big pieces of charas from the fold of his shalwar in the presence of mashirs PCs Qazi Waseem and Imdad Ali. Charas was weighted it contained 1020 grams. 10 grams of charas was separated for sending the same to the chemical examiner. Sample and the remaining property were separately sealed. Mashirnama of arrest and recovery was prepared. Thereafter, accused and case property were brought at Police Station. FIR bearing crime No.128/2012 was lodged against the accused by SIP Muhammad Usman on behalf of State for offence u/s 9(c) of CNS Act, 1997.

3. During investigation, Investigation Officer recorded 161 Cr.P.C. statements of the PWs. 10 grams of the substance / charas was sent to the chemical examiner on 13.06.2012 through SIP Ghulam Muhammad and positive chemical report was received. On the conclusion of usual investigation challan was submitted against the accused for offence u/s 9(c) of CNS Act, 1997.

4. Trial Court framed charge against accused u/s 9(c) of CNS Act, 1997 at Ex.3. To which, accused pleaded not guilty and claimed to be tried.

5. At the trial, prosecution examined PW-1 Complainant / SIP Muhammad Usman Hingorjo at Ex.5, who produced copy of FIR at EX.6, mashirnama of arrest and recovery at Ex.7, carbon copy of departure entry at Ex.8 and carbon copy of arrival entry at Ex.9, PW-2 mashir PC Qazi Waseem at Ex.10 and PW-3 SIP /IO Ghulam Muhammad Hingorjo at Ex.11, who produced

original report of the chemical examiner at Ex.12. Thereafter, prosecution side was closed at Ex.13.

6. Statement of accused was recorded u/s 342 Cr.P.C.at Ex.7. Accused denied all the incrementing pieces of evidence against him and stated that PWs have deposed against him falsely as they are the police officials and interested. Accused neither examined himself on Oath in disproof of prosecution allegations nor led any evidence in his defence.

7. Learned Special Judge after hearing the learned counsel for the parties and examining the evidence available on record convicted and sentenced the appellant as stated above. Hence this appeal.

8. Mrs. Razia Ali Zaman Khan Patoli, learned advocate for appellant has mainly contended that accused was arrested from a thickly populated area but SHO failed to associate private person of the locality to witness the recovery proceedings. She has further contended that the charas was recovered from the possession of accused on 03.06.2012 but it was sent to the chemical examiner on 13.06.2012. The safe custody during such long period has not been established. It is also contended that neither WHC of the police station nor SIP Ghulam Muhammad who had taken sample to the chemical examiner have been examined before the trial court. It is further contended that there was no evidence that how many grams of charas were taken from the each piece for sending to the chemical examiner. Lastly, it is submitted that there was overwriting in the roznamcha entry. In support of his contentions, learned counsel for appellant has placed reliance on the case of *TARIQ PERVEZ V/S. THE STATE (1995 SCMR 1345)*, and *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*.

9. Syed Meeral Shah, learned A.P.G. conceded to the arguments raised by the learned counsel for the appellant and stated that there was delay in sending charas to the chemical examiner. There is also no evidence that the charas was in safe custody at Malkhana. Learned A.P.G. has not supported the impugned judgment passed by the trial court.

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

11. In our considered view, prosecution has failed to establish its' case against the appellant for the reasons that the charas was recovered from the possession of accused on 03.06.2012 and it was sent to the chemical examiner on 13.06.2012. Delay in sending the charas to the chemical examiner has not been explained. Moreover safe custody of the charas at Malkhana has not been established even SIP Ghulam Muhammad who had taken the sample to the chemical examiner has not been examined for the satisfaction of the court. It is not clear in the evidence that how many grams charas were separated from each piece for sending to the chemical examiner. In such circumstances, rightly reliance has been placed upon the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*, the relevant portion is reproduced hereunder:-

“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. For the above reasons, the learned A.P.G. has also not supported the impugned judgment. We have also noticed that there is overwriting in the roznamcha entry No.5. Under these circumstances, we have no hesitation to hold that in this case there are several circumstances which created doubt in the prosecution case. In the case of *Tariq Pervez V/s. The State (1995 SCMR 1345)*, 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.”

13. For the above stated reasons, we hold that prosecution has failed to prove its' case against the accused. While extending the benefit of doubt, appeal is allowed. The conviction and sentence recorded by the trial court vide judgment dated 30.04.2015 are set aside. Appellant is acquitted of the charge. Appellant is on bail, his bail bond stands canceled and surety is hereby discharged.

14. These are the reasons of our short order dated 23.05.2017.

JUDGE

JUDGE

Tufail

