

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

Cr. Appeal No.D-01 of 2017

PRESENT

*Mr. Justice Naimatullah Phulpoto
Mr. Justice Zulfiqar Ahmad Khan.*

Date of Hearing: 20.04.2017

Date of Judgment: 20.04.2017

*Appellant/accused: Abdul Lateef Shar
through Mr. Abdul Hameed Bajwa,
Advocate*

*The State: Through Syed Meeral Shah
Bukhari, Deputy Prosecutor
General, Sindh.*

J U D G M E N T

NAIMATULLAH PHULPOTO, J:- Appellant Abdul Lateef

Shar was tried by learned Special Judge (Narcotics) Shaheed Benazirabad, in Special Case No.628 of 2013 for the offence under Section 9(c) Control of Narcotic Substances Act, 1997. By judgment dated 08.12.2016, the appellant was convicted under Section 9(c) Control of Narcotic Substances Act, 1997 and sentenced to suffer 04 years 06 months R.I and to pay a fine of Rs.20,000/-, in default thereof the appellant shall suffer S.I for 05 months more. Benefit of Section 382(B) Cr.P.C was extended to the appellant/accused.

2. Brief facts of the prosecution case as unfolded in FIR are that on 31.10.2013 SIP/SHO Mohammad Raheem Gopang of Police Station Taluka Nawabshah left Police Station along with his subordinate staff vide roznamcha entry No.07 at 1230 hours for patrolling duty. While patrolling at various places, when police party reached at Mohammadi Town where it is alleged that S.H.O. received spy information that absconding accused in Crime No.01 of 2013 for offence under section 17(3) for Offences Against Property (Enforcement of Hudood) Ordinance 1979, of Police Station Khadro namely Abdul Lateef son of Mohammad Usman Shar was present near grave yard and was selling charas. On receiving such information, police party proceeded to the pointed place and reached there at 1400 hours. Where they saw present accused standing there under the tree in the graveyard. It is alleged that he was carrying a plastic bag in his hand. While seeing the police party the present appellant/accused tried to run away but he was surrounded and caught-hold. The plastic bag was recovered from his possession. SIP opened plastic bag in presence of mashirs and found 02 big and 03 small pieces of charas in it. The charas was weighed it became 1200 grams out of it SIP separated 20 grams from each piece as samples and sealed at the spot. Personal search of the accused was also conducted. From his personal search, cash of Rs.250 was recovered. It is mentioned that due to non-availability of private mashirs he had made H.C. Mohammad Khan and P.C. Mohammad Bux as Mashirs. Thereafter, the accused and case

property were brought to the Police Station, where FIR was registered against the accused on behalf of the State by SHO, it was recorded vide Crime No.97/2013 for offence under Section 9(c) Control of Narcotic Substances Act, 1997.

3. During the investigation, 161 Cr.P.C statements of P.Ws were recorded and samples were sent to the Chemical Examiner on 10.11.2013. Positive chemical report was received. On completion of the investigation, challan was submitted against the accused under Section 9(c) Control of Narcotic Substances Act, 1997.

4. Trial Court framed the charge against the accused under Section 9(c) of CNS Act, 1997 at Ex-5. Accused pleaded not guilty and claimed to be tried.

5. At the trial, prosecution examined P.W-1 SIP Mohammad Raheem Gopang at Ex-8, who produced mashirnama of arrest and recovery at Ex.8-A, F.I.R. bearing crime No.97 of 2013 for offence under section 9(c) Control of Narcotic Substance Act 1997, at Ex.8-B. Attested copies of arrival and departure roznamcha entries at Ex-8/C, report of Chemical Examiner at Ex.8/D. P.W-2 Mashir HC. Mohammad Khan Dayo at Ex-9. Thereafter, the prosecution side was closed vide statement at Ex-10.

6. Statement of accused under Section under Section 342 Cr.P.C was recorded at Ex-11, in which the accused claimed his false implication in this case and denied the

recovery of the charas from his possession. Accused raised plea that he has been implicated in this case due to dispute over a piece of land by one DSP Pachoocho. He has also produced copy of judgment of acquittal dated 20.01.2012 at Ex.11-A. Accused declined to give statement on oath in disproof of the prosecution allegations. No evidence has been led by the accused in his defence.

7. Learned Trial Court after hearing the learned Counsel for the parties and examining the evidence available on record, convicted and sentenced the accused as stated above. Hence, this appeal.

8. The facts of this case as well as evidence produced before the Trial Court find the elaborate mention in the judgment passed by the Trial Court dated 08.12.2016, therefore, the same may not be reproduced here, so as to avoid duplication and un-necessary repetition.

9. Mr. Abdul Hameed Bajwa, learned Advocate for the appellant mainly contended that charas has been foisted upon the accused at the instance of one DSP Pachoocho who is on inimical terms with the appellant/accused due to dispute over a piece of land. It is further contended that said DSP Pachoocho had already lodged F.I.R. against the accused in which he has been acquitted. Learned Advocate for appellant argued that there is overwriting in the roznamcha entry No.07 produced by the prosecution at the trial before the trial court. Learned

counsel for the appellant argued that though it was case of spy information, SIP/SHO had failed to associate with him any independent persons of the locality to witness the recovery proceedings. He has submitted that the charas was recovered from the possession of the accused on 31.10.2013 and it was sent to the Chemical Examiner on 10.11.2013 after a delay of 11 days, which has not been explained. Counsel for the appellant further argued that there is no evidence at all to establish the safe custody of the recovered charas in the Malkana with W.H.C. for long period and the same was sent through P.C. Dada Khan to the office of the Chemical Examiner but both of them have not been examined by prosecution. Learned Advocate for appellant has submitted that there are material contradictions in the evidence of the prosecution on material particulars of the case. Lastly, it is contended that prosecution case was highly doubtful. In support of his contentions learned Advocate for appellant has relied upon the cases of *IKRAMULLAH & OTHERS v. THE STATE* [2015 SCMR 1002], *ANSAR-UL-ISLAM v. THE STATE* [P.L.D. 2005 Karachi 146], *ABDUL MANAN and another v. THE STATE* [2008 P.Cr.L.J. 1268], *AKHTAR ALI v. THE STATE* [2009 P.Cr.L.J. 50], *ZAHID IQBAL v. THE STATE* [2008 YLR 985], *ABDUL QADIR v. THE STATE* [2015 P.Cr.L.J. 235], *THE STATE v. WARIS KHAN* [2016 MLD 920], *MUHAMMAD BOOTA v. THE STATE* [2016 P.Cr.L.J. 1036], *ASGHAR ABBASS v. THE STATE* [2016 MLD 1002] and *THE STATE v. MUHAMMAD SABIR alias SABIR* [2016 P.Cr.L.J. 859].

10. Syed Meeral Shah Bukhari, learned D.P.G argued that 1200 grams of charas was recovered from the possession of the accused. He further submits that evidence of complainant and Mashir of arrest and recovery on all material particulars of the case is reliable and confidence inspiring. Learned D.P.G. further argued that there is no material contradiction in the prosecution evidence. With regard to the delay, in sending the recovered charas to the Chemical Examiner he submits that it would not be fatal to the prosecution case. Learned D.P.G. further submitted that there was no direct enmity in between the accused and D.S.P. Learned D.P.G. has supported the judgment of the trial court.

11. We have carefully heard learned Counsel for the parties and perused the evidence minutely.

12. From the perusal of evidence, it transpired that the prosecution has failed to prove its case against the appellant/accused beyond any shadow of doubt for the reasons that it was a case of spy information. The Complainant S.H.O. of Police Station Taluka Nawabshah had sufficient time to call/associate any independent person of the area to act as mashir of arrest and recovery but the SIP deliberately avoided it for the reasons best known to the S.H.O. S.H.O. has deposed that due to non-availability of private persons, he made his subordinate staff as mashirs in this case. On this point, Mashir has deposed in the cross examination that private persons were present at the place of wardat. Material contradictions in

the evidence of prosecution witnesses have been brought on record. We have also noticed that charas was recovered from the possession of the accused on 31.10.2013 but it was sent to the Chemical Examiner for analysis on 10.11.2013. Delay in sending charas to Chemical Examiner has not been explained by prosecution. It has not been established on the record that the charas was kept in the safe custody during that period. Moreover, according to the prosecution case the charas was kept in Malkhana with W.H.C. during that period but the said W.H.C. has not been examined. P.C. Dada Shah who had taken the charas to the Chemical Examiner has also not been examined. In the above stated circumstances, positive report of Chemical Examiner would not improve the case of prosecution. In this respect, rightly reliance has been placed upon the case of **IKRAMULLAH & OTHERS V. THE STATE** reported in 2015 SCMR 1002. Relevant portion is reproduced 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 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.”

13. We have also noticed material contradictions in the evidence of the SIP and Mashir with regard to the route adopted by the police officials for reaching to the place of recovery. There is also contradiction in prosecution evidence with regard to the recovery proceedings. The defence plea is raised by the accused that he has been falsely implicated in this case at the instance of DSP Pachoocho and has produced Judgment dated 20.01.2012 Ex.11-A in order to show that he has been falsely implicated in this case at the behest of one DSP Pachoocho, with whom the accused has dispute over the piece of land. All these factors if examined collectively would clearly show that prosecution has not been able to prove its case. In such circumstances it was quite unsafe to rely upon the evidence of the police officials without independent corroboration, which is lacking in this case. There are several circumstances in this case, which create doubt in the prosecution case. Reliance has been placed upon the case of **KHALIL AHMED V/s. THE STATE** (PLD 2008 Karachi 8), in which it is held as under:-

“18. In the circumstances, the case of the prosecution is highly doubtful. The conviction cannot be based on such type of trials which are marred by glaring infirmities. However, the trial Court resolved all the doubts in favour of prosecution and convicted the appellant, while losing sight of well-entrenched principle of law, that the burden was always on the prosecution to prove the charge beyond all reasonable doubts. The rule adopted by the trial Court, to say the least was not conducive for the safe administration of justice.

19. So far as the order of confiscation of the vehicle is concerned, it was made without availability of any material on the record. It was mechanically passed in flagrant violation of the provisions of section 33 of the Control of Narcotic Substances Act, as such the mandate of law was flouted by the trial Court. Thus the order of confiscation is nullity, the same deserves to be struck down.”

14. For giving benefit of doubt, 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 as held by Honourable Supreme Court in the case of **TARIQ PERVEZ v. THE STATE** [1995 SCMR 1345].

15. For the above reasons, appeal is allowed, impugned judgment dated 08.12.2016 is set-aside and the

appellant is acquitted of the charge. The appellant Abdul Lateef Shar shall be released forthwith if not required in any other case.

JUDGE

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