

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

Cr. Appeal No.D-192 of 2006

PRESENT

Mr. Justice Naimatullah Phulpoto

Mr. Justice Muhammad Karim Khan Agha.

Date of Hearing: 04.05.2017

Date of Judgment: 04.05.2017

Appellant/accused: Nisar Ahmed
Through Mr. Sikandar Ali
Khaskheli, Advocate

The State: Through Mr. Shahzad Saleem
Nahiyoon, Asstt. P.G. Sindh.

JUDGMENT

NAIMATULLAH PHULPOTO, J:- Appellant Nisar Ahmed faced trial before learned Sessions Judge / Special Court CNS Badin, in Special Case No.192 of 2003, for the offence under Section 9 (b) Control of Narcotic Substances Act, 1997. By judgment dated 13.09.2006, the appellant was convicted under Section 9 (b) Control of Narcotic Substances Act, 1997 and sentenced to 02 years R.I and to pay a fine of Rs.10,000/-, in default thereof appellant was ordered to suffer R.I for 15 days more. Benefit of Section 382 Cr.P.C was extended to the appellant/accused.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 20.09.2003 SIP Mohammad Iqbal of Police Station Matli, left Police Station along with his subordinate staff

in the Government vehicle vide roznamcha entry No.31 at 2115 hours for patrolling. While patrolling at various places when the police party reached at Hyderabad Bypass where it is alleged that Sub-Inspector received spy information that present accused was selling Charas at Railway Crossing. Police party proceeded to the pointed place and reached there at 2200 hours and saw the present accused standing there. Accused while seeing the police mobile tried to run away but he was surrounded and caught hold. On inquiry, he disclosed his name as Nisar Ahmed s/o Mohammad Juman by caste Khaskheli resident of Dhak Mohallah Matli. Police finding him in a suspicious manner, arrested him and his personal search was conducted in presence of the mashirs namely H.C. Ahmed Khan and P.C. Ghulam Qadir. During personal search from the side pocket of his shirt a plastic bag was recovered it contained 26 small and big pieces of charas. From the front pocket of the shirt of the accused 40 rupees were also recovered. The Charas was weighed it became 120 grams. Out of it, it is alleged that 10 grams were sealed separately for sending to chemical examination, while the remaining 110 grams were separately sealed at the spot. Mashirnama of arrest and recovery was prepared. Thereafter, the accused and case property were brought to the Police Station, where FIR was registered against the accused by SIP Mohammad Iqbal, it was recorded vide Crime No.130 of 2003 for offence under Section 9(b) Control of Narcotic Substances Act, 1997.

3. During the investigation, 161 Cr.P.C statements of P.Ws were recorded. 20 grams of Charas were sent to the Chemical Examiner for chemical analysis on 02.06.2004. Positive chemical report was received. On completion of the investigation, challan was submitted against the accused under Section 9(b) Control of Narcotic Substances Act, 1997.

4. Trial Court framed the charge against the accused Nisar Ahmed under Section 9(b) of CNS Act, 1997 at Ex-2. Accused pleaded not guilty and claimed to be tried.

5. At the trial, prosecution examined P.W-1 SIP / Complainant Mohammad Iqbal Khowaja at Ex.5, who produced Mashirnama of arrest and recovery at Ex.6, F.I.R. of crime No.130 of 2003 at Ex.7 and Chemical Examiner's report at Ex.8. P.W-2 Mashir H.C. Ghulam Qadir 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 has stated that Charas has been foisted upon him and the P.Ws. have deposed against him as they are interested and subordinate to the complainant. He prayed for justice. Accused did not lead any evidence in defence and declined to examine himself on oath in disproof of prosecution allegations.

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 13.09.2006, therefore, the same may not be reproduced here, so as to avoid duplication and un-necessary repetition.

9. Mr. Sikandar Ali Khaskheli, learned Advocate for the appellant mainly contended that according to the prosecution story SIP Mohammad Iqbal had left Police Station vide Roznamcha Entry No.31 on 20.09.2003 at 2115 hours but said 'Entry' has not been produced before the trial court and it has created serious doubt in the prosecution case. It is further contended that SIP Mohammad Iqbal in his evidence has not mentioned that 26 small and big pieces of the Charas were recovered from the possession of the accused and he has also not mentioned that how many grams were taken from each piece for sending to the Chemical Examiner. Learned Advocate for the appellant has further argued that according to the prosecution case Charas was recovered from the possession of the accused on 20.09.2003 but it was sent to the Chemical Examiner on 02.06.2004 and there was delay of more than 09 months for sending to the Chemical Examiner. It is contended that safe custody of the sample was highly doubtful for such

long period. It is also contended that there is variation with regard to the sample sent to the Chemical Examiner. Counsel for the appellant submits that according to the prosecution witnesses the sample was wrapped in 'Khakhi' coloured envelop but according to the report of the Chemical Examiner one sealed parcel in white cloth was received. Counsel submits that there was tampering with the case property during the period of 09 months. It is also contended that it was the case of spy information, SHO had sufficient time to call independent persons of the locality to witness the recovery proceedings but S.H.O. avoided for the malafide reasons. Learned counsel for the appellant submits that there are material contradictions in the evidence of the prosecution witnesses on so many material particulars of the case with regard to the route adopted by the police party and place of the arrest and recovery of the accused. It is also contended that in fact accused has enmity with one Vikio Khaskheli who was the friend of SHO Qassim Panhwar and Charas has been foisted upon the appellant at his instance. In support of his contentions he has relied upon the cases of he has relied upon the cases reported as *IKRAMULLAH & OTHERS v. THE STATE [2015 SCMR 1002]*, and *SHAUKAT ALI v. THE STATE [2004 Y.L.R.356]*.

10. Mr. Shahzado Saleem Nahiyoan, learned A.P.G conceded to the contentions of learned Advocate for the appellant mainly on the ground that there was delay of more than 09 months in sending Charas to the Chemical Examiner.

Learned A.P.G. further states that in the evidence no where it is mentioned that Charas was in the safe custody for the period of 09 months. Learned A.P.G. submits that no arrival and departure entries were produced before the trial court. In these circumstances learned A.P.G. did not support the judgment of the trial court.

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

12. We have come to the conclusion that prosecution has failed to prove its case against the appellant for the reasons that it was the case of spy information and private persons were present at the place of arrest of accused but the SHO avoided to call them to witness the recovery proceedings. In the Mashirnama, it is mentioned that 26 small and big pieces of the Charas total 120 grams were recovered from the possession of the accused but in the evidence S.H.O / complainant has deposed that 120 grams of Charas were recovered from the possession of the accused and he has not specifically mentioned that Charas was in the shape of 26 big and small pieces. S.H.O. in his evidence also has not mentioned that he had taken/drawn 10 grams sample from each big and small pieces for sending to the Chemical Examiner for analysis. S.H.O. has not explained delay in sending Charas to the Chemical Examiner. As per record 120 grams of the Charas were recovered from the possession of the accused on 20.09.2003 but sample was received by the

Chemical Examiner for analysis on 02.06.2004, there was delay of 09 months in sending Charas to the Chemical Examiner. Long delay has not been explained by the prosecution. SIP Mohammad Iqbal who had taken the Charas to the Chemical Examiner has also not been examined by the prosecution to prove safe custody of charas. Despite contention of the defence counsel arrival and departure entries have not been produced before the trial court to satisfy that police party had actually left for patrolling on the relevant date. Omissions on the part of the prosecution would be fatal to the prosecution case as held by this Court in the case of SHAUKAT ALI v. THE STATE [2004 Y.L.R. Karachi 356]. There are also material contradictions in the evidence of the prosecution evidence with regard to the patrolling places and other material particulars of the case so also the place of arrest of accused. Accused has raised plea that he has been involved in this case at the instance of one Vikio Khaskheli due to matrimonial affairs and at his instance S.H.O. Mohammad Qasim Panhwar arrested him in this case and his custody was handed over to SHO Mohammad Iqbal and he has foisted Charas upon him. In the view of peculiar circumstances of the case, we are of the considered view that in this case independent corroboration was very much essential which is lacking in this case. We are unable to rely upon the evidence of police officials as the same did not inspire confidence being tainted with doubts.

13. In the above stated circumstances, positive report of Chemical Examiner would not improve the case of prosecution. On the point of safe custody of recovered substance as well as safe transmission of sample to Chemical Examiner, 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.”

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, while relying upon the above cited authorities, we have no hesitation to hold that prosecution has failed to establish its case against the appellant and the trial court has failed to examine the evidence of P.Ws according to the settled principle of law. There are number of infirmities in the prosecution evidence, case of the prosecution is doubtful. While extending benefit of doubt appeal is allowed, impugned judgment dated 13.09.2006 is set-aside and the appellant is acquitted of the charge. The appellant is present on bail, his bail bond stands cancelled and surety is hereby discharged.

JUDGE

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