

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

Cr. Appeal No.D-01 of 2006.

PRESENT

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

Date of Hearing: 27.04.2017

Date of Judgment: 27.04.2017

*Appellant/accused: Gul Hassan
Through Mr. Azizullah M. Buriro,
Advocate*

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

J U D G M E N T

NAIMATULLAH PHULPOTO, J:- Appellant Gul Hassan was tried by learned Special Judge (Narcotics) Dadu, in Special Case No.200 of 2005 for the offence under Section 9(c) Control of Narcotic Substances Act, 1997, in crime No.148 of 2005. By judgment dated 08.12.2005, the appellant was convicted under Section 9(c) Control of Narcotic Substances Act, 1997 and sentenced to suffer 04 years and 06 months R.I and to pay a fine of Rs.50,000/-, in default thereof the appellant was also to suffer R.I for 06 months more. Benefit of Section 382(B) Cr.P.C was extended to the appellant/accused.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 24.06.2005 at 1900 hours SIP Salahuddin

Memon, Incharge CIC Dadu lodged his report in roznamcha entry No.18 at CIC, Dadu and the same was incorporated in 154 Cr.P.C. book at Police Station Dadu alleging therein that on 24.06.2005 SIP Salahuddin Memon along with his subordinate staff left CIC Center vide Roznamcha Entry No.11. While patrolling at various places when police party reached at Chandni Chowk, they received spy information that present accused was standing at Workshop Chowk, and was selling charas. On such information, police party reached to the pointed place where they found present appellant / accused who on seeing the police party tried to run away. He was surrounded and caught-hold. On enquiry, the accused disclosed his name as Gul Hassan son of Piyar Ali Khoso resident of Dhamrah Wah. Finding him in suspicious manner, personal search of the accused was conducted by SIP Salahuddin in presence of Mashirs P.C. Kaleemullah Panhwar and P.C. Gada Hussain. From the fold of his loin (goad) one plastic bag was secured. When the said plastic bag was opened, it contained charas. The charas was weighed, it came 1200 grams in the shape of two slabs, out of which, 10 grams of charas were separated for sending to the chemical examiner for analysis. Thereafter, the case property was sealed at spot. Accused and case property were brought to the CIC Dadu where F.I.R. was lodged against the accused vide crime No.148 of 2005 for offence under Section 9(c) Control of Narcotic Substance Act 1997.

3. During the investigation, 161 Cr.P.C statements of P.Ws were recorded and sample was sent to the Chemical Examiner on 27.07.2005. 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-2. Accused pleaded not guilty and claimed to be tried.

5. At the trial, prosecution examined P.W-1 SIP Salahuddin Memon at Ex.5, who produced attested copy of departure roznamcha entry No.11 at Ex.5-A, Mashirnama of arrest and recovery at Ex.5-B, Entry No.18 at Ex.5-C, F.I.R. bearing crime No.148 of 2005 at Ex.5-D and report of Chemical Examiner at Ex.5-E. P.W-2 Mashir H.C. Kalimullah at Ex.6. Thereafter, the prosecution side was closed vide statement at Ex-07.

6. Statement of accused under Section under Section 342 Cr.P.C was recorded at Ex-08, in which the accused claimed his false implication in this case and denied the recovery of the charas from his possession and stated that P.Ws have deposed against him falsely. Accused declined to give statement on oath in disproof of the prosecution allegations. No evidence has been led by the accused in his defence. However, in a question, what else he has to say? Accused replied that he was innocent and the charas has been

foisted upon him as his father had made complaint against the police to D.P.O. Taluka Mahar and produced copy of the letter as Ex.8-A and 8-B and application to D.P.O. against the police filed by father of the accused, therefore, he has been falsely implicated in this case due to enmity with the police.

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 08.12.2005, therefore, the same may not be reproduced here, so as to avoid duplication and un-necessary repetition.

9. Mr. Azizullah M. Buriro, learned Advocate for the appellant mainly contended that it was a case of spy information but CIA officials failed to associate the independent respectable persons of the locality to act as mashir in this case. It is also argued that prosecution case is highly unbelievable. According to the defence counsel 1200 grams of charas in the shape of 2 slabs was recovered from the possession of the accused but only 10 grams was sent to the Chemical Examiner. Counsel for the appellant submits that it is not clear that from which slab sample was drawn / separated for sending to the Chemical Examiner. Learned Advocate for the appellant further

argued that there are material contradictions in the evidence of the complainant and the Mashir on so many material particulars of the case. Lastly it is contended that there was over one month's delay in sending the sample to the Chemical Examiner. According to the defence counsel in fact the delay was caused for tampering with the Charas lying in the Malkhana. In support of his contentions he has relied upon the cases reported as *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 conceded that it is not clear in the prosecution evidence that 10 grams of the Charas was separated / drawn from which slab of the Charas. He has also submitted that there was no evidence that the Charas was in the safe custody for one month. In the view of above learned D.P.G. did not support the prosecution case.

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

defence plea. We have come to the conclusion that prosecution has failed to prove its case against the appellant beyond any shadow of doubt for the reasons that it was the case of spy information, SIP Salahuddin Memon had sufficient time to call independent and respectable person to witness the recovery proceeding but he avoided for the reasons best known to him. According to the prosecution case 1200 grams of charas were recovered from the possession of the accused in the shape of two slabs but it is not clear that 10 grams were separated as sample from which of the two slabs for sending to the Chemical Examiner. According to the case of prosecution charas was recovered from the possession of the accused on 24.06.2005 but it was sent to the Chemical Examiner on 27.07.2005. There was delay of more than one month without any explanation. The Head Moharir of the Police Station with whom charas was deposited by SIP/complainant has not been examined and the ASI Noor Mohammad who had taken the charas to the Chemical Examiner had also not been examined in order to satisfy the court that the charas was in the safe custody for the period of more than one month. Not a single word has been deposed by the complainant / Investigating Officer as well as the Mashir that the Charas was in the safe custody in between 24.06.2005 and 27.07.2005. 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.”

12. Moreover, the accused had raised plea that his father had moved application against the police to the DPO and he has produced copies of those applications and plea is raised that local police was annoyed on such applications moved by the father of appellant and he has been falsely implicated in this case. We have also noticed material contradictions in the

evidence of the prosecution witnesses with regard to the recovery proceedings. 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 CIA 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.”

13. 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].

14. 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 which makes the case of the prosecution doubtful. Accordingly while extending benefit of doubt the appeal is allowed, impugned judgment dated 08.12.2005 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

JUDGE