

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD
Cr. Appeal No.D-22 of 2006

PRESENT

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

Date of Hearing: 17.04.2017
Date of Judgment: 17.04.2017
Appellant/accused: *Khadim Hussain S/o Muhammad Suleman, through Mr.Tarique Ali Mirjat, Advocate*
The State: *Through Syed Meeral Shah Bukhari, Deputy Prosecutor General, Sindh.*

J U D G M E N T

NAIMATULLAH PHULPOTO, J:- Appellant Khadim Hussain was tried by learned Special Judge (CNS), Sangahr in Sessions Case No.233 of 1999 for offence under Section 9(b) Control of Narcotic Substances Act, 1997. By judgment dated 25.01.2006, the appellant was convicted under Section 9(b) Control of Narcotic Substances Act, 1997 and sentenced to 03 years R.I and to pay a fine of Rs.5,000/-, in default thereof, the appellant shall suffer R.I for 03 months more.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 22.07.1999 S.I Ghulam Abbas of ANF Hyderabad left Police Station alongwith his subordinate staff P.Cs Abid Zulfiqar, Raheem Bukhsh and Abdul Hameed for patrolling within the jurisdiction of Tando Adam. It is stated that SIP Ghulam Abbas received spy information that present accused was selling opium in

Memon Mohalla. On such information, ANF officials proceeded to the pointed place, where the present accused was present. ANF officials surrounded and caught him hold. A plastic bag was recovered from his possession; it contained 400 grams of opium. Cash of Rs.200/- was also recovered from the accused in presence of the mashirs Rahim Bukhsh and Abdul Hameed, out of 400 grams of recovered opium, 100 grams were separated as a sample for sending to the chemical examiner for analysis. Property was sealed at the spot; mashirnama of arrest and recovery was prepared in presence of the mashirs. Thereafter, the accused and case property were brought to the ANF Hyderabad, where FIR bearing Crime No.05 of 1999 was registered against accused Khadim Hussain by S.I Ghulam Abbas on behalf of the State under Section 9(b) of CNS Act, 1997.

3. During the investigation, sample of 100 grams of opium was sent to the Chemical Examiner for analysis. Statements of the P.Ws were recorded under Section 161 Cr.P.C. During interrogation, accused Khadim Hussain disclosed that he had purchased the opium from accused Ghulam Nabi @ Nabu Brohi. ANF officials could not arrest him during the investigation and submitted challan against accused Khadim Hussain, showing the accused Ghulam Nabi as absconder. Trial Court issued N.B.Ws against absconding accused Ghulam Nabi, which returned un-executed. Proceedings under Section 87 & 88 Cr.P.C were

concluded against him and he was declared as proclaimed offender.

4. Trial Court framed the charge against the accused under Section 9(b) of CNS Act, 1997 at Ex-3. Accused pleaded not guilty and claimed to be tried.

5. At the trial, prosecution examined P.W-1 PC Abdul Hameed at Ex-7, who produced mashirnama of arrest and recovery at Ex-8. P.W-2 Ghulam Abbas was examined at Ex-9, who produced roznamcha entry at Ex-10, copy of FIR at Ex-11 and chemical examiner's report at Ex-12. Other prosecution witnesses were given up and the prosecution side was closed.

6. Statement of accused was recorded under Section 342 Cr.P.C at Ex-14. Accused denied the prosecution allegations and raised plea that he has been falsely involved in this case at the instance of one Talib, against whom his 5000 rupees were outstanding and Talib is a friend of Constable Manzoor Ahmed. Accused examined himself on oath in disproof of prosecution allegations and repeated the same plea. Accused in his defence examined D.W Azizullah Sahito at Ex-16.

7. Learned Trial Court after hearing learned Counsel for the parties and examining the evidence available on record, convicted and sentenced the appellant/accused as stated above. Hence, he has filed 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 25.01.2006, therefore, the same may not be reproduced here, so as to avoid duplication and unnecessary repetition.

9. Mr. Tarique Ali Mirjat, learned Advocate for the appellant contended that according to the case of the prosecution, 400 grams of the opium were recovered from the possession of the accused, out of which, 100 grams were sent to the Chemical Examiner as a sample but the Chemical Examiner's report reflects that 101 grams were received by him. It is contended that it was the case of spy information, inspite of that Inspector ANF failed to associate with him the private persons of the locality to witness the recovery proceedings. It is also argued that no arrival entry has been produced and there is overwriting in the chemical examiner's report. Regarding defence evidence, it is argued that the appellant has examined one Azizullah in his defence and raised specific plea but the Trial Court without legal justification ignored defence plea. Lastly, it is submitted that there was no evidence that the opium was in safe custody before dispatching to the Chemical Examiner. Learned Advocate for appellant relied upon the cases of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)* and *KHALIL AHMED V/S. THE STATE (PLD 2008 Karachi 8)*.

10. Syed Meeral Shah Bukhari, learned D.P.G on the directions provided assistance to the Court.

11. We have scanned the entire evidence brought on record. It is matter of the record that S.I Ghulam Abbas of ANF left the police station alongwith his subordinate staff on 22.07.1999 for patrolling duty towards Tando Adam and he received spy information that the present accused was selling the opium at Memon Mohalla, Tando Adam. ANF officials proceeded there; surrounded and caught-hold the accused and a plastic bag was recovered from his possession; it contained pieces of the opium; weight of the opium was 400 grams, out of it, 100 grams were separated as a sample for sending to the Chemical Examiner for analysis. Mashirnama of arrest and recovery was prepared. From perusal of the report of the Chemical Examiner, it transpires that net weight of the sample of opium was 101 grams, whereas the sample of opium dispatched to the Chemical Examiner was of 100 grams. There is overwriting in the particulars of the substance in the report of the Chemical Examiner without any explanation. It is mentioned in the report of the Chemical Examiner that sample was received through P.C Raheem Bukhsh but the said Raheem Bukhsh has not been examined before the Trial Court. Even for the satisfaction of the Court, arrival entry has not been produced. It is the case of the prosecution that the opium was recovered in pieces but the number of the pieces has not been mentioned. Appellant has raised plea that he had given Rs.5,000/- to one Talib and when he demanded the money back, he was falsely implicated in this case by ANF officials. Accused has claimed that the said Talib is a friend of P.C Manzoor Ahmed, who is constable in ANF

and such plea has been raised by accused in his statement recorded under Section 342 Cr.P.C. From perusal of the evidence, it transpired that no prosecution witness has deposed that who had taken the sample of the opium to the Chemical Examiner. To this effect, 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. The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating

doubts. If there is a 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/s. The State (1995 SCMR 1345)*.

13. We have come to conclusion that prosecution has failed to establish its case against the appellant beyond shadow of doubt for the reasons that there are major contradictions in the evidence of the prosecution with regard to major particulars of the case. There was discrepancy in weight of substance. In such circumstances, it would be unsafe to maintain the conviction on the evidence of ANF 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 the above reasons, appeal is allowed, impugned judgment dated 25.01.2006 is set aside and the appellant is acquitted of the charge. Appellant is on bail, his bail bond stands cancelled and surety is hereby discharged. These are the reasons for our short order dated 17.04.2017 announced in open Court.

JUDGE

JUDGE

Shahid