

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Appeal No.D-50 of 2008

PRESENT

Mr. Justice Naimatullah Phulpoto

Mr. Justice Muhammad Karim Khan Agha

Date of Hearing: 16.05.2017

Date of Judgment: 19.05.2017

Appellant/accused: *Anwar Ali Rind S/o Gaibi Khan:
Through Mr. Muhammad Sharif Siyal,
Advocate.*

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

JUDGMENT

NAIMATULLAH PHULPOTO, J:- Appellant Anwar Ali Rind faced trial before the learned Sessions Judge/Special Court (CNS), Nawabshah in Special Case No.231 of 2006 arising out of Crime No.09 of 2006 registered at P.S Excise, Nawabshah for offence under Section 9(c) Control of Narcotic Substances Act, 1997. By judgment dated 12.06.2008, the appellant was convicted under Section 9(c) Control of Narcotic Substances Act, 1997 and sentenced to 03 years R.I and to pay a fine of Rs.20,000/-, in case of default in payment of fine, he was ordered to suffer R.I for 06 months more. Appellant was extended benefit of Section 382(B) Cr.P.C.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 18.12.2006, Altaf Hussain Kalhoro, Assistant Excise & Taxation Officer, Nawabshah alongwith his subordinate staff EJ Ayaz Hussain, ED Mukhtiar Ahmed and ECs Muhammad Sahil, Shah Muhammad and others on spy information left Excise Police Station, Nawabshah Circle in a government vehicle vide roznamcha entry No.03 to arrest accused Anwar Ali from his house/*Adda* situated at Mehran Colony, Sakrand. Excise officials reached at the pointed place, where it is alleged that the present accused was standing and he had parked his Motorcycle there. Accused, while seeing the Excise officials in uniform, tried to run away but he was surrounded and caught hold. On the inquiry of AETO Altaf Hussain Kalhoro, the accused disclosed his name as Anwar Ali S/o Nabi Bux by caste Rind R/o Mehran Colony, Sakrand. Personal search of the accused was conducted. From the fold of his shalwar, one black coloured plastic bag was recovered; it was opened; there were 02 slabs of the charas in it. Accused was arrested in presence of mashirs ED Mukhtiar Ahmed Bughio and EC Muhammad Ali. Further personal search of the accused was conducted by the said AETO. Cash of Rs.200/- and key of a Motorcycle were recovered from his possession. Motorcycle was also seized, for which accused Anwar Ali claimed that it belonged to him. There was one black coloured plastic bag in the secret cavity of the Motorcycle; it was also opened, it contained 02 pieces of charas. 02 Slabs of the charas recovered from the possession of the accused were weighed separately was 500 grams (Total 500

Grams) and 02 pieces of the charas secured from the secret cavity of Motorcycle were also weighed; same became 500 grams. Total charas recovered from the possession of accused Anwar Ali was 1500 grams, out of the same, 250 grams from the charas recovered from the possession of the accused and 150 grams from the charas secured from the secret cavity of Motorcycle were separately sealed as a sample for sending to the chemical examiner for analysis and the remaining charas/property was also sealed separately. The accused and case property were brought to the Police Station, where FIR was lodged by AETO Altaf Hussain Kalhoro at Excise Police Station, Nawabshah Circle on behalf of the State, it was recorded was Crime No.09 of 2006 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. Sample of the charas was sent to the chemical examiner on 19.12.2006. Positive chemical report was received. On the conclusion 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 accused Anwar Ali under Section 9(c) Control of Narcotic Substances Act, 1997 at Ex-02. Accused pleaded not guilty and claimed to be tried.

5. At the trial, the prosecution in order to prove its charge, examined P.W-1 AETO Altaf Hussain Kalhoro at Ex-9, who produced copy of entry of roznamcha entry at Ex-9/A, copy of FIR

at Ex-9/B and chemical examiner's report at Ex-9/C. Prosecution also examined P.W-2 ED Mukhtiar Ahmed Bughio at Ex-8, who produced mashirnama of arrest of accused at Ex-8/A. Thereafter, the prosecution side was closed.

6. Statement of accused was recorded under Section 342 Cr.P.C at Ex-8. The accused claimed his false implication in this case and denied the prosecution allegation and stated that P.Ws are Excise officials and they are interested. Accused raised plea that he had moved application against them to the higher authorities, for that reason they have managed this case against him. Accused did not lead any evidence in defence and declined to examine himself on oath in order to disproof of the prosecution allegations.

7. Learned Trial Court after hearing the learned Counsel for the parties and examining the evidence available on record, convicted the appellant under Section 9(c) Control of Narcotic Substances Act, 1997, and sentenced as stated above, hence, this appeal.

8. The evidence produced before the Trial Court find the elaborate mention in the judgment passed by the Trial Court dated 12.06.2008, therefore, there is no need to reproduce the said evidence here, so as to avoid duplication and un-necessary repetition.

9. Mr. Muhammad Sharif Siyal, learned Advocate for the appellant mainly contended that it was the case of spy information but the complainant/Excise Officer did not associate with him the private persons of the colony to witness the recovery proceedings. It is further argued that arrival entry No.03 has been produced before the Trial Court but there was overwriting in the said entry, for which no plausible explanation has been furnished by the prosecution. It is argued that sample was not taken/drawn by AETO Altaf Hussain Kalhoro from all the pieces of charas recovered from the possession of the accused as well as from the secret cavity of the Motorcycle. Learned Advocate for the appellant further contended that safe custody of the charas has not been proved at the trial. It is also argued that according to the mashirnama, a black coloured shopper was recovered from the possession of the accused but the chemical examiner as per his report (Ex-9/D) had received 02 white coloured sealed parcels, each bearing 02 seals. Learned Counsel for the appellant argued that the prosecution case was highly doubtful and the conviction and sentence recorded by the Trial Court are not according to the settled principles of law. In support of his contentions, learned Counsel for the appellant has relied upon the cases of *NAIMATULLAH KHAN V/S. THE STATE (2012 YLR 251 and IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*

10. Syed Meeral Shah Bukhari, learned Additional Prosecutor General conceded to the contentions raised by learned Advocate for the appellant and did not support the impugned judgment passed by the Trial Court.

11. We have carefully heard the learned Counsel for the parties and scanned the entire evidence.

12. We have come to the conclusion that the prosecution has failed to prove its case against the appellant for the reasons that according to the case of the prosecution, the accused was arrested on 18.12.2006 at 03:00 p.m. from his house/*adda*, situated at Mehran Colony, Sakrand City but not effort was made by AETO to call the residents of the colony to act as mashirs in this case. Roznamcha entry No.03, by which the Excise officials had left the Police Station, has been produced at Ex-9/A but there was overwriting in the said roznamcha entry, as such no reliance could be placed upon the departure entry. According to the prosecution case, the charas was recovered from the possession of the accused, so also from the cavity of the Motorcycle. The charas recovered from the possession of the accused was in black coloured plastic bag but in the report of chemical examiner (Ex-9/D), it is mentioned that 02 sealed parcels were received by him in a white coloured packets. Prosecution could not explain it. We have carefully examined the evidence of AETO Altaf Hussain Kalhoro, in which no where he has mentioned that he had kept the charas after its recovery in safe custody before sending it to the

chemical examiner. Learned Advocate for the appellant has argued that there was tampering with the case property/charas and it was not kept safely in the *Malkhana*. In these circumstances, safe custody of the charas after its recovery has not been established by cogent and confidence inspiring evidence. Departure entry No.4 has also been produced in the evidence but there was also overwriting in the said entry without explanation. There was also no evidence that sample was taken from each slab of charas recovered from the possession of the accused, so also from the cavity of the Motorcycle for chemical analysis. It was also not clear that how many grams were taken from each piece of charas. Mere word of Excise officials was not sufficient to hold the accused guilty of an offence without independent corroboration, which was lacking in this case. Evidence of AETO Altaf Hussain Kalhoro was materially contradicted with the evidence of mashir ED Mukhtiar Ahmed on major particulars of the case, particularly, the number of pieces of the charas recovered from the possession of the accused. Learned Counsel for the appellant in support of his submissions has rightly relied upon the case reported as *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*, *the relevant paragraph reads 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 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.”

13. Furthermore, there are several circumstances in this case, which have created doubt in the prosecution case. It is well settled law that 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/S. THE STATE (1995 SCMR 1345)*.

14. In view of the foregoing reasons, we have come to the conclusion that the prosecution has failed to prove its case against the appellant beyond reasonable shadow of doubt. Resultantly, by extending benefit of doubt, appeal is allowed; impugned judgment dated 12.06.2008 is *set aside* and the appellant is acquitted of the charge. Appellant is present on bail, his bail bond stands cancelled and surety is hereby discharged.

JUDGE

JUDGE