IN THE HIGH COURT OF SINDH,
CIRCUIT COURT HYDERABAD

Cr. Appeal No.D-102 of 2017

PRESENT
Mr. Justice Naimatullah Phulpoto
Mr. Justice Shamsuddin Abbasi

Date of Hearing:	*16.04.2018*
Date of Judgment:	*16.04.2018*
Appellant/accused:	*Muhammad Moosa @ Mooso S/o Ali Muhammad Pinjaro, through Mr. Altaf Hussain Chandio, Advocate.*
The State:	*Through Shahzado Saleem Nahiyoon, Deputy Prosecutor General, Sindh.*

J U D G M E N T

***NAIMATULLAH PHULPOTO, J*:-** Muhammad Moosa @ Mooso Appellant was tried by learned Special Judge (NARCOTICS), Shaheed Benazirabad in Special Narcotic Case No.633 of 2016. Vide judgment dated 25.09.2017, appellant was convicted under Section 9(c) of Control of Narcotic Substances Act, 1997 and sentenced to imprisonment for life and to pay fine of Rs.100,000/-, in case of default in payment of fine, the appellant was ordered to suffer S.I for one year. Benefit of Section 382(B) Cr.P.C was extended to him.

2. Brief facts of the prosecution case as disclosed in the FIR are that SHO / Inspector Nadeem Ahmed Channer left police

station on 28.10.2016 alongwith his subordinate staff at 1500 hours for patrolling duty. While patrolling at various places when the police party reached at Amerji Mori Bandhi, where it is alleged that SHO received spy information that one person was standing at Amir Pir Graveyard and he was carrying charas for selling purpose. Police party proceeded to the pointed place, they saw the present accused was standing, having plastic shopper in his hand, he was surrounded and caught hold. SHO secured plastic bag from his possession. Due to non-availability of the private persons, SHO made PCs Rustam and Khalid as Mashirs and conducted personal search of the accused. A shopper was opened, it contained 24 pieces of the charas. Charas was weighed, it became 12000 grams, it was sealed at spot in presence of the mashirs. Mashirnama of arrest and recovery was prepared. Thereafter, accused and case property were brought to the Police Station, where FIR was lodged against the accused vide Crime No.39 of 2016 under Section 9(c) of CNSA, 1997 on behalf of the state.

3. During the course of investigation, 161 Cr.P.C statements of P.Ws were recorded; whole charas was sent to the chemical examiner for analysis; positive report was received. On the conclusion of usual investigation, challan was submitted against the accused under Section 9(c) of CNS Act, 1997.

4. Trial Court framed the charge against the accused at Ex-2. Accused pleaded not guilty and claimed to be tried.

5. At the trial, the prosecution examined P.W-1 PC Khalid Hussain Khokhar at Ex-3, who produced mashirnama of arrest, search and recovery at Ex-3/A. P.W-2 SHO complainant Nadeem Ahmed Channer at Ex-4, who produced copy of FIR at Ex-4/A, carbon / attested copies of roznamcha entries No.7 and 12 at Ex-4/Band 4/C respectively, chemical examiner's report at Ex-4/D. P.W-3 HC Ali Asghar was examined at Ex-6. Thereafter, prosecution side was closed.

6. Statement of the accused was recorded under Section 342 Cr.P.C at Ex-8. Accused denied the prosecution allegations and claimed his false implication in this case. On a question, what else the accused has to say? He replied that he was picked up by the police in the night between 27th and 28th of October, 2016 alongwith his nephew Mashooque, such news were published in Daily "Kawish" dated 29.10.2016. Original copy of the newspaper has been produced at Ex-8/A. It is further stated by the accused that his nephew Mashooque was also falsely involved in narcotics case and FIR bearing Crime No.40 of 2016 was registered against him under Section 9(c). Accused raised plea that the same police officials were the witnesses in the case of his nephew. Accused neither examined himself on oath in disproof of prosecution allegations nor led evidence in defence.

7. Trial Court after hearing the learned Counsel for the parties and examination of evidence available on record, convicted and sentenced the appellant as stated above, hence this appeal.

8. Learned Advocate for the appellant mainly contended that it was the case of spy information. SHO had sufficient time to associate with him independent persons of the locality to witness the recovery proceedings but it was not done by him malafidely. It is further contended that according to the case of prosecution, 20 K.Gs of charas were recovered from the possession of accused on 28.10.2016 at graveyard but charas was sent to the chemical examiner on 07.11.2016. It is argued that delay has not been explained by the prosecution. It is submitted that there was no evidence with regard to the safe custody of the charas at Malkhana of the Police Station as well as it's safe transit to the chemical examiner. Learned Advocate for the appellant referred to the evidence of HC Ali Asghar, who has deposed that charas was lying in the Malkhana since 05.07.2016, as such, it is argued that charas which was already lying at Malkhana, has been foisted upon the appellant. Lastly, it is argued that the complainant was picked-up from his house alongwith his nephew and police foisted 9(c) cases against the appellant and his nephew. In support of his contentions, reliance has been placed upon the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002).*

9. Mr. Shahzadao Saleem Nahiyoon, learned D.P.G argued that evidence of the police official was reliable and trustworthy. It was difficult for the police to foist 12 K.Gs of charas upon the accused. He has argued that delay in sending charas to the chemical examiner would not be fatal to the case of the

prosecution, however, he has admitted that prosecution has failed to establish safe custody of the charas at police station as well as it's safe transit to the chemical examiner. He prayed for dismissal of the appeal.

10. Record reflects that Haji Nadeem Ahmed, complainant / I.O left police station on 28.10.2016 alongwith his subordinate staff for patrolling duty at 1500 hours. He received spy information at Amerji Mori that the present accused was standing at graveyard while carrying the shopper full of narcotics and at 1730 hours he arrested the accused in presence of mashirs and recovered 24 pieces of the charas lying in the shopper and it's total weight was 12000 grams. He prepared mashirnama of recovery and arrest in presence of the mashirs PCs Rustam and Khalid. Thereafter, he brought the accused and case property to the police station, lodged FIR on behalf of state, recorded 161 statements of the witnesses and sent the charas to the chemical examiner for analysis. In the cross-examination, the complainant / I.O has admitted that he did not try to associate private persons for making them as mashirs. There is no evidence on record that charas was handed over by SHO to the Incharge of the Malkahan of the police station and the date on which he dispatched charas to the chemical examiner has not been mentioned by him. SHO has also not mentioned the size and shape of the pieces of the charas recovered from the possession of the accused, however, he has admitted that on 29.10.2016 he had lodged FIR under Section 9(c)

against one Mashooque in which he was the complainant. P.W-1 PC Khalid Hussain has deposed that he acted as mashir in this case and the accused was arrested at graveyard where no private person was present, then the question arose as to whom the appellant was selling charas. He has admitted that case bearing Crime No.40 of 2016 of P.S Bandhi was registered against Mashooque on 29.10.2016 and he has acted as mashir in that case and SHO Nadeem Ahmed was the complainant in that case. P.W-3 Ali Asghar has deposed that he had received the case property at the police station on 05.11.2016 for depositing it with the chemical examiner. He took the same on 07.11.2016 and deposited it in the office of chemical examiner. In the cross-examination he replied that case property was lying in the Malkhana since 05.07.2016. This clearly shows that charas, which was lying at the Malkhana, was foisted upon the accused. Unfortunately, trial Court did not consider the defence theory which appears to be plausible.

11. We have perused the evidence and report of chemical examiner available at Ex-4/D, which reflects that the charas was received by the chemical examiner on 07.11.2016, whereas it was recovered on 28.10.2016. Record further shows that chemical examiner's report adduced in evidence at Ex-4/D was a deficient report as it did not contain any detail whatsoever of any protocol adopted at the time of chemical analysis of the recovered substance. Prosecution was not able to establish that after alleged

recovery of the substance so recovered charas was either kept in safe custody or that samples were taken from recovered substance had safely been transmitted to the office of chemical examiner without the same being tampered with or replaced while in transit. Learned Counsel for the appellant has rightly relied upon the case of *IKRAMULLAH V/S. THE STATE (SUPRA),* in which the Honourable Supreme Court has held that such report of chemical examiner cannot be used for recording conviction of accused person in a case of this nature. The case of *IKRAMULLAH* (supra) has been endorsed by the Honourable Supreme Court in the case of Nadeem V/s. The State, through Prosecutor General, Sindh in Criminal Petition No.105-K of 2016 dated 04.04.2018, the relevant portion is reproduced as under:-

> "According to the FIR the petitioner and his co-convict had tried to escape "with" the motorcycle when they were intercepted by the police party but before the trial court Muhammad Ayub, S.I.P (PW1) had stated that upon seeing the police party the petitioner and his co-convict had started running away while leaving the motorcycle on the road and the engine of that motorcycle had gone off. Muhammad Jaffar, PC (PW2) had also deposed about running away of the petitioner and his co-convict but had kept quiet regarding leaving of the motorcycle by the petitioner and his co-convict while running away. Both the above mentioned witnesses produced by the prosecution, however, unanimously stated that while running away upon seeing the police party the petitioner and his co-convict had kept the relevant bag containing narcotic substance in their hands and it was in that condition that the petitioner and his co-convict had been apprehended by the police party. It is quite obvious that the initial story contained in the FIR had been changed during the trial and the changed story was too unreasonable to be accepted at its face value. Muhammad Ayub, S.I.P. (PW1) had stated before the trial court that after recovering the narcotic substance he had brought the same to the Police Station

> and it was he who had kept the recovered substance in safe custody whereas he had never claimed to be the Moharrir of the relevant Police Station. The record of the case shows that it was Ghulam Ali, P.C. who had taken the recovered substance to the office of the Chemical Examiner for analysis but it is not denied that the said Ghulam Ali, P.C. had not been produced before the trial court by the prosecution. It is, thus, evident that safe transmission of the recovered substance from the local Police Station to the office of the Chemical Examiner had not been established by the prosecution. The record further shows that the Chemical Examiner's report adduced in evidence was a deficient report as it did not contain any detail whatsoever of any protocol adopted at the time of chemical analysis of the recovered substance. This Court has already held in the case of Ikramullah and others v. The State (2015 SCMR 1002) that such a report of the Chemical Examiner cannot be used for recording conviction of an accused person in a case of this nature. For all these reasons we find that the prosecution had not been able to prove its case against Nadeem petitioner beyond reasonable doubt."

12. The close scrutiny of the evidence reflects that the prosecution has failed to prove its case against the accused. There are several circumstances in this case which created doubt in the prosecution case. The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is single circumstance which creates reasonable doubt in a prudent mind about the guilt of any 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 the Honourable Supreme Court in the case of *TARIQ PERVEZ V/S. THE STATE (1995 SCMR 1345).*

13. For the foregoing reasons, we are of the considered view that the prosecution has failed to prove it's case against the appellant beyond reasonable shadow of doubt. Consequently, the appeal is allowed, conviction and sentence recorded by the trial Court are *set aside.* Appellant is confined in Jail, he is ordered to be released forthwith, if not required in any other custody case. These are the reasons for our short order dated 16.04.2017 announced in open Court, whereby this appeal was allowed.

JUDGE

JUDGE

Shahid