

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Appeal No.D-251 of 2011

PRESENT

Mr. Justice Naimatullah Phulpoto

Mr. Justice Muhammad Karim Khan Agha

Date of Hearing: 01.06.2017

Date of Judgment: 01.06.2017

Appellant/accused: Nasir S/o Muhammad Hassan Kashmiri, Through Mr.Chetan S. Kella, Advocate.

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

JUDGMENT

NAIMATULLAH PHULPOTO, J:- Appellant Nasir S/o

Muhammad Hassan Kashmiri was tried by learned Sessions Judge/Special Court (CNS) Sanghar, in Special Case No.46 of 2010, arising out of Crime No.420 of 2010 for offence under Section 9(b) of Control of Narcotic Substances Act, 1997. By judgment dated 08.08.2011, 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.20,000/-, in case of default in payment of fine, he was ordered to suffer S.I for 03 months more. Benefit of Section 382(B) Cr.P.C was extended to the appellant.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 21.10.2010, SIP Habibullah of P.S Tando Adam alongwith his subordinate staff namely PCs Manthar Ali and Javed Ali left in a Government vehicle driven by PC Fazal Noor vide roznamcha entry No.15 at 1410 hours for patrolling duty. While patrolling at various places, at 1500 hours police party reached near Dargah Ismail Shah, where they saw the present appellant standing in a suspicious manner. Appellant while seeing the police in mobile tried to run away, but he was surrounded and caught hold. On inquiry, he disclosed his name as Nasir S/o Muhammad Hassan by caste Kashmiri. His personal search was conducted by the SHO in presence of the mashirs namely PCs Manthar Ali and Javed Ali. From his personal search, one plastic bag was recovered; it was opened; it contained 10 small and big pieces of charas. Charas was weighed; it was 510 grams, out of it, it is stated that 10 grams were separated from small and big pieces of charas as sample for sending to the chemical examiner for analysis. Sample was sealed in presence of mashirs. Remaining property was also sealed separately. Mashirnama of arrest and recovery was prepared. Thereafter, the accused and case property were brought to the Police Station, Tando Adam, where FIR was lodged against the accused on behalf of the State, it was recorded vide Crime No.420 of 2010 for offence under Section 9(b) Control of Narcotic Substances Act, 1997. SIP Habibullah handed over the case property, custody of accused, mashirnama of arrest and recovery and FIR to the SIO Muhammad Hayat for investigation.

3. During the investigation, 161 Cr.P.C statements of the P.Ws were recorded. Sample of the recovered substance was sent to the chemical examiner for analysis. Positive report was received. On the conclusion of usual investigation, challan under Section 9(b) Control of Narcotic Substances Act, 1997 was submitted against the accused before the competent Court of Law.

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

5. During trial, the prosecution to substantiate the charge examined P.W-1 Muhammad Hayat at Ex4, who produced mashirnama of arrest and recovery at Ex-4/A, FIR at Ex-4/B and positive chemical examiner's report at Ex-4/C. P.W-02 SIP Habibullah was examined at Ex-5, who produced attested copy of departure entry No.15 at Ex-5/A. P.W-3 LHC Manthar Ali was examined at Ex-06. Thereafter, the prosecution side was closed.

6. Statement of accused was recorded under Section 342 Cr.P.C at Ex-9, in which the accused denied the allegations of the prosecution and claimed his false implication in this case. Accused did not lead evidence in defence and declined to be examined himself on oath in disproof of the prosecution allegations.

7. Learned Trial Court after hearing the learned Counsel for the parties and examining the evidence, by judgment dated 08.08.2011, convicted the appellant under Section 9(b) Control of

Narcotic Substances Act, 1997 and sentenced as stated here-in-above, hence, this appeal.

8. The facts and evidence produced before the Trial Court find elaborate mention in the judgment passed by the Trial Court dated 08.08.2011, hence, the same is not reproduced here, in order to avoid duplication and un-necessary repetition.

9. Mr. Chetan A. Kella, learned Advocate for the appellant mainly contended that charas was recovered from the possession of the appellant on 21.10.2010 but the sample of charas was sent to the chemical examiner for analysis with in ordinate delay on 26.10.2010 and the delay in sending sample of the charas to the chemical examiner has not been explained. He has further contended that safe custody of the charas at *Malkhana* as well as it's transit to the chemical examiner have not been proved at the trial. He has submitted that HC Younus, who had taken sample of charas to the chemical examiner, has also not been examined. Counsel for the appellant also submitted that there was material contradictions in the evidence of the prosecution witnesses with regard to currency notes recovered from the possession of the accused. Lastly, it was argued that since it was thickly populated area from where the charas was recovered from the possession of the appellant, but no independent person of the locality was associated as mashir in this case to witness the recovery proceedings. In support of his contentions, learned Counsel for the appellant has relied upon the case of *WAHID BUX V/S. THE*

STATE (2002 P.Cr.R 344 Hyderabad), URIS V/S. THE STATE (2002 P.Cr.R 215), MIR MUHAMMAD V/S. THE STATE (2008 MLD 1333) and IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002).

10. Syed Meeral Shah Bukhari, Additional Prosecutor General did not support the judgment of the trial Court on the ground that there was no evidence regarding safe custody fo the charas at *Malkhana* as well as its safe transit to the chemical examiner. He has also argued that HC Younus, who had taken sample of charas to the chemical examiner, has also not been examined.

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

12. Record reflects that the prosecution story appears to be un-natural and unbelievable. According to the case of the prosecution, the accused was arrested near Dargah Ismail Shah but SHO Habibullah did not bother to call the independent persons from the Dargah to witness the recovery proceedings. From the perusal of the mashirnama and arrest and recovery, it is not clear that how many grams were taken from each piece of charas for sending to the chemical examiner. From the evidence of the complainant/SHO (P.W-2) it appeared that after arrest accused was brought to the police station, there was no mention anywhere that charas recovered from the possession of the accused was kept in *Malkhana* safely or such entry was made in the relevant

record. There was also no evidence that SIO Muhammad Hayat after receipt of custody of the accused and charas kept in *Malkhana* for 06 days then dispatched to the chemical examiner. Even for the satisfaction of the Court, HC Younus, who had taken sample of charas to the chemical examiner has also not been examined. Counsel for the appellant has mainly argued that safe custody of the charas has not been established. We are also of the considered view that there was no evidence that after recovery of the charas it was kept in safe custody at *Malkhana* and safely transmitted to chemical examiner. In the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*, the Honourable Supreme Court has held that it is for the prosecution to prove the safe custody of the charas and it's transit to the chemical examiner. The relevant paragraph may also be read 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. For the above stated reasons, we are of the considered view that the prosecution has failed to prove its case against the appellant beyond reasonable shadow of doubt. Thus, by extending benefit of doubt, appeal is allowed. Conviction and sentence recorded by the Trial Court vide judgment dated 08.08.2011 are *set aside*. Appellant is acquitted. Appellant is present on bail, his bail bond stands cancelled and surety is hereby discharged.

JUDGE

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