

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Crl. Appeal No. D-49 of 2008.

Nabi Bux alias Nawab. Vs. The State.

Present:
Mr. Justice Naimatullah Phulpoto
&
Mr. Justice Rasheed Ahmed
Soomro.

Mr. Irshad Hussain Dharejo Advocate alongwith appellant.
Mr. Abdul Rehman Kolachi, Deputy Prosecutor General for the State.

Date of hearing: 13-07-2017

Date of Judgment: 13-07-2017

J U D G M E N T

NAIMATULLAH PHULPOTO J., Appellant Nabi Bux alias Nawab along with Atta Muhammad (since expired) was tried by learned Special Judge, CNS, Khairpur in special case No. 14 of 2004 for offence under section 9(b) of CNS Act, 1997 and by judgment dated 29.08.2008, appellant was convicted under section 9(b) of CNS Act, 1997 and sentenced to suffer four years R.I and to pay fine of Rs. 25,000/- and in case of default to suffer S.I for four months more.

2. Brief facts of the prosecution case, as disclosed in the FIR are that on 20.01.1999 SIP Habib Rehman Lashari SHO,P.S. Tando Masti Khan left P.S along with his subordinate staff, namely, H.C Qurban

Ali Khuhro, P.Cs Khadim Hussain, Qalandar Bakhsh Shaikh and driver Zafar Ali vide entry No.10 at 1800 hours, for patrolling duty. While patrolling when police party reached at Drib Mehar Shah where it is alleged that SHO received spy information that present accused is selling charas at village Pipri. On such information police party proceeded to pointed place and reached at 1630 hours, where saw present accused standing. Accused while seeing police party tried to run away, but he was caught hold. On enquiry, he disclosed his name as Nabi Bux alias Nawab, his personal search was conducted by the SHO in presence mashirs H.C Qurban Ali and P.C Khadim Hussain and during search it is alleged that from right side fold of his shalwar one plastic bag was recovered, it contained two slabs of charas, same were weighted and became 500 grams. SHO separated 10 grams from each slab for sending to the chemical examiner. Accused was arrested and case property was sealed separately. Mashirnama of arrest and recovery was prepared in presence of mashirs. It is also alleged that personal search of accused was conducted and from his possession cash of Rs. 435/- was recovered. Thereafter accused and case property were brought at P.S where FIR was lodged on behalf of state vide crime No. 4 of 1999 at P.S.T.M. Khan under section 9(b) of CNS Act, 1997.

3. During investigation, sample was sent to the chemical examiner, 161 CrPC statements of PWs were recorded, positive report of chemical examiner was received and on the conclusion of

investigation challan was submitted against accused under section 9(b) of CNS Act, 1997.

4. Charge was framed against accused Nabi Bux and Atta Muhammad, both accused pleaded not guilty and claimed to be tried. At the trial prosecution examined complainant PW-1 SIP Habib Rehman at Exh.8, he produced mashirnama of arrest and recovery, copy of departure entry and chemical examiner report at Exh.8/A to 8/D respectively, P.W-2 Mashir PC Khadim Hussain at Exh.9. Thereafter side of prosecution was closed vide statement at Exh.10.

5. During pendency of trial, accused Atta Muhammad expired and proceedings were abeted against him.

6. Statement of accused Nabi Bux was recorded under section 342 CrPC at Exh.11, in which accused claimed false implication in this case and denied the recovery of charas from his possession. Plea is raised by accused that all PWs are police officials and highly interested and claimed innocence in this case. Accused did not lead evidence in defence and declined to give statement on oath in disproof of prosecution allegations.

7. Learned trial court after hearing learned counsel for parties and assessment of evidence convicted and sentenced the accused as stated above.

8. The facts of this case as well as evidence produced before trial court find an elaborate mention in the judgment passed by trial court

and, therefore the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

9. Learned counsel for appellant mainly contended that it was case of spy information and SHO had sufficient time to call the private persons of locality to witness the recovery proceedings, but it was not done by him for mala fide reasons. It is further submitted that there is no evidence that charas was kept in safe custody after its recovery at police malkhana. It is also submitted that P.C Ameer Ali who took the charas to chemical examiner has also not been examined. He submitted that according to Mashirnama, recovery of charas was made from possession of accused at 3:00 p.m, but Mashir has deposed that recovery was made from accused at 6-30 p.m. It is also argued that matter was investigated by the I.O but he has not been examined. It is submitted that non-examination of such material witness would be beneficial circumstance for the accused. Lastly, it is submitted that there was inordinate delay in sending sample to the chemical examiner and safe transit and delay has not been explained by the prosecution. In support of his contentions, he has relied upon the case of *Ikramullah v. The State* (2015 SCMR 1002).

10. Learned Deputy P.G conceded to the contentions raised by learned counsel for appellant and stated that there is absolutely no evidence that charas was kept in safe custody after its recovery at police Malkhana and there was also no evidence that it was safely transmitted to the chemical examiner. Regarding contradictions, he

submitted that there are material contradictions in the evidence of PWs. It is also admitted by learned DPG that I.O. has not been examined in this case by the prosecution.

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

12. We have come to the conclusion that prosecution has failed to establish its case against appellant for the reasons that it was case of spy information and SHO had sufficient time to call independent and respectable persons of the locality to witness the recovery proceedings, but it was not done by him without sufficient explanation. We have carefully perused the evidence of prosecution witnesses. SHO and Mashir nowhere have deposed that after recovery of charas from the possession of appellant it was kept in safe custody at police malkhana. There is also no evidence that it was safely transmitted to the chemical examiner. Even P.C Ameer Ali who had taken to chemical examiner, has not been examined by the prosecution. Delay in sending charas to the examiner has also not been explained. Contention has been raised by learned counsel for appellant that there was tampering with the case property and it was foisted upon the appellant. When the matter was investigated by the I.O, but I.O. has not been examined, certainly it would be beneficial circumstances for the accused. So far on the point of safe custody of charas and safe transit to the chemical examiner is concerned, the

Hon'ble Supreme court in case of Ikramullah v. The State (2015 SCMR 1002), has held as under;

“5. In 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. There are several circumstances/infirmities in the prosecution case, which created reasonable doubt about the guilt of the appellant. In the case of Tariq Pervez v. The State reported in 1995 SCMR 1345, the Honourable Supreme Court of has observed as follows;

“It is settled law that it is not necessary that there should 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”.

14. While respectfully relying upon the case law referred to above, we have no hesitation to hold that prosecution has failed to establish its case against the appellant beyond reasonable doubt and there are several circumstances which have also created doubt in the prosecution case, therefore, by extending benefit of doubt, appeal is allowed. The conviction and sentence recorded by the trial Court against appellant vide judgment dated 29.08.2008 are set-aside. Appellant Nabi Bux alias Nawab is acquitted of the charge. He is present on bail, his bail bond stands cancelled and surety is discharged.

JUDGE

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