

**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT HYDERABAD**

Before:

Mr. Justice Naimatullah Phulpoto
Mr. Justice Mohammad Karim Khan Agha

Cr. Appeal No.D-80 of 2005.

Mairaj Ali

Versus.

The State.

Appellant : Mairaj Ali, (present on bail).	Through Mr. Imam Bux Baloch, Advocate.
Respondent : The State	Through Mr. Amjad Ali Sahito, Special Prosecutor ANF
Date of hearing	24.05.2017.
Date of judgment	24.05.2017.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- This appeal is directed against the judgment dated 23.05.2005 passed by learned Special Judge for CNS, Mirpurkhas, in Special Case No.05 of 2000, arising out of Crime No.27 of 2000, registered at Police Station Khan, under section 9(c) of Control of Narcotic Substances Act, 1997 (CNSA) whereby the appellant Mairaj Ali has been convicted u/s 9(c) CNSA, 1997 and sentenced to suffer RI for 06 years and to pay the fine of Rs.50,000/-. In case of default in payment of fine he was ordered to suffer simple imprisonment for 01 year more (the impugned judgment). Benefit of Section 382-B Cr.P.C. was also extended to the accused.

2. Brief facts of the prosecution case as disclosed in the FIR are that present accused was arrested on 11.07.2000 at about 1900 hours from near Dergah Ibrahim Shah More, situated at Pucca Road

leading from Patoyun to Muhammad Hasan Mari, Deh 80, Taluka Mirpurkhas, by a police party headed by SIP/SHO Zulfiquar Ali alongwith his subordinate staff namely ASI Ghulam Mustafa Thebo and others. Accused Mairaj Ali was said to be found possessing contraband item weighing 3000 grams, out of which contraband item weighing 200 grams was separated for sending the same to the chemical examiner for analysis and report. Thereafter, the contraband item and its sample, as stated above, were sealed separately and memo of arrest and recovery was prepared on the spot in presence of mashirs. Then accused and case property were brought at police station where F.I.R. was lodged by complainant SIP/SHO Zulfiquar Ali on behalf of the State under section 9(b) CNSA.

3. During investigation, Investigating Officer recorded 161 Cr.P.C. statements of the PWs. Sample of the recovered substance was sent to the chemical examiner on 28.08.2000 through HC A. Karim and chemical report was received, which was in negative. Thereafter, under the orders of Secretary, Government of Pakistan, Narcotic Control Division, the investigation of the present case was entrusted to PS: Anti-Narcotic Force, Hyderabad. Thereafter, the sample of contraband item was again sent to chemical analyzer, which was received in the said office on 06.02.2001. Positive report was received. On the conclusion of investigation challan was submitted against the accused for offence u/s 9(c) CNSA.

4. Trial court framed charge against accused at Ex.2 u/s 9(b) CNSA, to which, accused pleaded not guilty and claimed to be tried. At the trial prosecution examined PW-1 complainant SIP Zulfiquar Ali at Ex.6, who produced Roznamcha entry No.20, mashirnama of arrest and recovery, F.I.R., attested copy of roznamcha entry No.10, receipt/inventory, Road certificate and report of Chemical Examiner at Ex.6-A to 6-G; PW-2 SIP/Mashir Ghulam Mustafa was examined at Ex.7; PW-3 SIP Naeemuddin was examined at Ex.8, who produced attested copies of the order of Secretary, letter of Joint Director A.N.F. addressed to DIG Mirpurkhas Division, Office Order, road certificate, receipt of case property and test report at Exs.8-A to F and thereafter, prosecution side was closed at Ex.09.

5. Statement of accused was recorded u/s 342 Cr.P.C. at Ex.10. The accused denied the prosecution allegations and claimed his false implication in this case on account of a grudge against him in his department as he was also a serving ANF officer. He produced certain documents in this respect. The accused examined himself on oath in order to disprove the prosecution case at Ex.11 and also examined D.Ws Khalid and Ali Muhammad in his defence at Ex.12 and 13, respectively.
6. Learned Special Judge after hearing the learned counsel for the parties and examining the evidence available on record convicted and sentenced the appellant as stated above by the impugned judgment. Hence this appeal.
7. Learned trial court in the impugned judgment has already discussed the evidence in detail and there is no need to repeat the same here, so as to avoid duplication and unnecessary repetition.
8. Mr. Imam Bux Baloch, learned advocate for appellant has contended that the prosecution case is highly doubtful; that the place of incident was located at busy spot, yet, none from public was joined to attest the arrest and recovery; there are material contradictions in prosecution evidence, hence it cannot be safely relied upon; that there was inordinate delay in sending the case property to the chemical examiner and tampering with the case property during such period could not be ruled out especially as no evidence has been brought on record that the narcotic substance was in safe custody during that period; that in spite of such delay the report of Chemical Examiner was received in negative and was later manipulated by the ANF during a second chemical analysis which gave a positive report.
9. Mr. Amjad Ali Sahito, Special Prosecutor ANF fully supported the impugned judgment and in particular contended that the recovered chemical had been in safe custody following its recovery until the time it was sent for chemical examination and the second chemical report could be safely relied upon.
10. We have carefully heard the learned counsel for the parties, scanned the entire evidence and considered the relevant law.

11. We have come to the conclusion that prosecution has failed to establish its case for the reasons that accused was found in suspicious manner and 3000 grams opium was recovered from his possession. The alleged place of incident was a busy area but apparently no efforts have been made to pick up an independent person of the locality to witness the arrest and recovery proceedings. There was also nothing on record that complainant had even attempted to call any private person to act as mashir; that the defense witnesses have supported the defense case that the appellant was arrested from his village where he was visiting his sister who have not been damaged on cross examination; that the appellant throughout has stuck to the motive that he has been falsely implicated due to his efficiency and was interested in Rajib Marri a drugs dealer in the area who the local police at PS Khan (who arrested him) were trying to protect and thus he was falsely implicated in this case by them; he gave a S.342 statement to this effect, evidence under oath to this effect and consistently cross examined the PW's on this line; he also produced merit certificates whilst serving in the ANF to prove that he was indeed an efficient officer; that he was arrested and the opium recovered from him on 11.07.2000 and sample was sent to the chemical examiner on 28.08.2000 which was an unexplained delay of around 6 weeks with no evidence that the recovered narcotic was kept in safe custody; that in the event the chemical report was negative; that at this point the case was transferred to the ANF and there is no evidence that the narcotic was kept in safe custody from the period it was received back to the police from the chemical examiner and then handed over to the ANF as confirmed by PW Naeemuddin during his evidence; that the ANF knew that the first chemical report was negative but quite inexplicably they took a further two and a half months before they sent it for chemical analysis. This inordinate and unexplained delay in sending the chemical for a 2nd analysis in the background of an earlier negative chemical report does not appeal to reason. Surely this was the first thing which a reasonable and prudent man would have done because without a positive report the whole case would collapse yet quite unbelievably the ANF failed to tend to this crucial aspect of the case but carried on investigating in respect of other less significant aspects; Mr Ahmed Saba who took the

recovered chemical for the second chemical test has not been examined concerning the safe custody of the chemical whilst in the custody of the ANF or in transit to the second chemical laboratory for re testing; in short we are not satisfied on the evidence as produced by the prosecution that the recovered narcotic was kept in safe custody from its return from the first chemical lab after testing to the police and then to the ANF and finally for the second testing which took a span of nearly 3 months. During this period the recovered narcotic could have been interfered /tampered with especially as the initial chemical report was found to be negative but quite miraculously turned positive after its transfer to the ANF. Since heavy sentences can be handed down in narcotics cases we consider that we need to consider the evidence in a stringent manner and in so doing do not find that the prosecution has proved safe custody of the narcotic beyond a reasonable doubt. In this regard reliance is placed on 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. In view of the above, coupled with the other above mentioned reasons we hold that in this case the prosecution has failed to prove its case against the appellant beyond a reasonable doubt and that the appellant is entitled to the benefit of the doubt as of right as opposed

to concession as was held in the case of **Tariq Pervez V/s. The State** (1995 SCMR 1345)

13. For the above stated reasons, we hold that the prosecution has failed to prove its case against the appellant, therefore, while extending the benefit of doubt, by short order instant appeal was allowed; the impugned judgment was set aside and the appellant was acquitted of the charge and the appellant who was present on bail had his bail bonds cancelled and surety discharged.

14. Above are the reasons for our short order of even date.