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

Before:

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

Cr. Appeal No.D-29 of 2017.

Sadam Hussain Rind

Versus.

The State.

Appellant : Sadam Hussain Rind	Through Mr. Haji Khan Jamali, Advocate.
Respondent : The State	Through Syed Meeral Shah Bukhari, Additional Prosecutor General.
Date of hearing	25.05.2017.
Date of judgment	25.05.2017.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- This appeal is directed against the judgment dated 09.03.2017 passed by learned Special Judge for CNS, Shaheed Benazirabad, in Special Case No.470 of 2016, arising out of Crime No.134/2016, registered at Police Station Sakrand, under section 9(c) of Control of Narcotic Substances Act, 1997(CNSA), whereby the appellant Sadam Hussain Rind has been convicted u/s 9(c) CNSA and sentenced to suffer RI for 04 years and to pay the fine of Rs.20,000/-. In case of default in payment of fine he was ordered to suffer simple imprisonment for 05 months 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, are that on 16.08.2016 at about 1845 hours, police party headed by SIP/SHO Asghar Ali Awan of PS Sakrand upon receiving spy information reached at Sarhai Sakrand Link Road at Zour Phatak and apprehended the present accused and secured 1300 grams of contraband item from his

possession. Out of the said contraband item 100 grams were separated for chemical analysis. 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 the accused and the case property were brought to the police station where F.I.R. was lodged by complainant SIP/SHO Asghar Ali Awan on behalf of the State under section 9(c) 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 23.08.2015 through PC Ghulam Rasool and positive chemical 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(c) CNSA, to which, accused pleaded not guilty and claimed to be tried vide his plea at Ex.2/A. At the trial prosecution examined PW-1 PC Amanullah at Ex.3, who produced mashirnama of arrest and recovery at Ex.3-A, mashirnama of vardat At Ex.3-B, PW-2 complainant/SIP Asghar Ali Awan was examined at Ex.4, who produced F.I.R. at Ex.4-A, photo attested copy of roznamcha entry of departure and arrival at Ex.4-B-1 & 2, chemical report at Ex.4-C and thereafter, prosecution side was closed at Ex.5.

5. Statement of accused was recorded u/s 342 Cr.P.C. at Ex.6. The accused denied the prosecution allegations and claimed his false implication in this case. The accused neither examined himself on oath nor led any evidence in defence in order to disprove the prosecution case.

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 in 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. Haji Khan Jamali, learned advocate for appellant has contended that the prosecution case is highly doubtful; that this is a case of spy information and 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 as per prosecution case the sample was sent for chemical analysis on 23.08.2015 through PC Ghulam Rasool with a delay of 07 days hence tampering with the case property during such period could not be ruled out. He further argued that PC Ghulam Rasool through whom the sample was sent to the chemical examiner, has also not been examined. Lastly he argued that the accused has been involved in this case falsely. In support of his contentions, learned counsel for the appellant relied upon the case of **Ikramullah & others v. the State** (2015 SCMR 1002).

9. Syed Meeral Shah, learned Additional Prosecutor General Sindh very fairly conceded to the contentions of learned counsel for the appellant and did not support the impugned judgment.

10. We have carefully considered the arguments of the learned counsel for the parties, scanned the entire evidence and reviewed the relevant case law.

11. We have come to the conclusion that prosecution has failed to establish its case against the appellant for the following reasons; that accused was found in suspicious manner and 1300 grams charas was recovered from his possession but despite having spy information and the alleged place of incident being a busy area apparently no efforts have been made to pick up an independent person of the locality to witness the arrest and recovery proceedings despite the police having adequate time to do so and the offense taking place in day light hours which casts doubt on the arrest and recovery; that no effort was made to send a fake purchaser to the appellant to see if he was actually selling the narcotic who would have made a compelling witness for the prosecution if the appellant was in fact selling the narcotic; furthermore it does not seem believable that one person managed to escape on foot when confronted with a police mobile consisting of armed police men; that the appellant has been charged under S.9©

CNSA which carries the death penalty as such the learned trial judge was legally obliged to ensure that the appellant had a counsel of his choice or one appointed at State expense if he could not afford one however this was not done by the learned trial judge which in our view caused serious prejudice to the appellant in conducting his defense especially in terms of cross examination of witnesses as he was only a layman with no knowledge/experience of the law and as such in our view this amounted to the violation of the appellants due process rights as guaranteed under the constitution especially in terms of Articles 10 and 10 (A). In addition it is well settled law that when an appellant is facing a capital offense a lawyer must be provided for him. In this regard reference is made to the case of **Shafique Ahmed V State** (PLD 2006 Kar 377) which held as under at P.381:

"10. Article 10 of Constitution of Islamic Republic of Pakistan, 1973 provides that the accused shall not be denied the right to consult and be defended by a legal practitioner of his choice. Under section 340(1), Cr.P.C. accused is entitled, as a matter of right, to be defended by a pleader. The said provision reads as under:-

"340. Right of person against whom proceedings are instituted to be defended and his competency to be a witness.--(1) Any person accused of an offence before a Criminal Court or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader."

11. Circular 6 of Chapter VII of Federal Capital and Sindh Courts Criminal Circulars provides that on the committal of the case the Magistrate is required to ascertain from the accused as to whether he intends to engage a legal representative at his own expense otherwise the Sessions Court would provide an Advocate on State expense to defend him. The said Circular reads as under:-



"6. In all cases in a Court of Session in which any person is liable to be sentenced to death, the accused shall be informed by the Committing Magistrate at the time of committal, or if the case has already been committed by the Sessions Court that, unless he intends to make his own arrangements for legal assistance, the Sessions Court will engage a Legal practitioner at Government expense to appear before it on his behalf. If it is ascertained that he does not intend to engage a legal representative at his own expense, a qualified Legal Practitioner shall be engaged by the Sessions Court concerned to undertake the defence and his remuneration, as well

the copying expenses incurred by him, shall be paid by Government.

The appointment of an advocate or pleader for defence should not be deferred until the accused has been called upon to plead. The Advocate or pleader should always be appointed in sufficient time to enable him to take copies of the deposition and other necessary papers which should be furnished free of cost before the commencement of the trial. If after the appointment of such legal representative the accused appoints another Advocate or pleader, the Advocate or pleader appointed by the Court may still in its discretion be allowed his fee for the case."

12. Rule 35 of Sindh Chief Court Rules (Appellate Side) also deals with the same subject which reads as under:--

"35. In what matters Advocate appointed at Government cost. When on a submission for confirmation under section 374 of the Code of Criminal Procedure, 1898, or on an appeal from an acquittal or on an application for revision by enhancement of sentence the accused is undefended, an Advocate shall be appointed by the Division Court to undertake the defence at the cost of Government in accordance with the Government notification or rules relating thereto. Such Advocate shall be supplied a copy of the paper book free of cost."

13. From the above position it follows that an accused is required to be defended by a counsel of his choice as a matter of right. If an Advocate appears on behalf of the accused then he is required to be allowed to defend the accused. In an offence involves capital punishment, the law protects the rights of the accused as a duty has been cast upon the State to bear the expense of the Advocate if the accused is unable to engage an Advocate. When the committal proceedings were being conducted then at the time of committing the accused to the Court of Session the Magistrate was required to inquire from the accused as to whether he would like to engage Advocate of his choice and in case he was unable to do so then the accused was required to be informed that the Sessions Court would provide him an Advocate on State expense to defend his case. The committal proceedings have been abolished. Therefore, now the Magistrate, before the case is sent up to the Court of Session, shall inquire from the accused about the requirement of Circular 6 of the Federal Capital and Sindh Courts Criminal Circulars. Such facts should be mentioned in the diary to facilitate the Court of Session to decide in which cases a counsel on State expense is required to be appointed. In other cases or in which the Magistrate has not obtained the required information, as soon as the accused appears before the Court of Session, it

is the duty of the said Court to ascertain whether the accused is represented by an Advocate or otherwise. If he is not being represented by an advocate then the Sessions Court is bound to engage a legal practitioner on Government expense to defend the accused. It is one of the duties of the Court of Session to see that the accused is represented by a qualified legal practitioner in the cases involving capital punishment. Thus, it is the mandate of the law that cases involving capital punishment shall not be tried in the absence of Advocate for the accused or proceeded with. Without first appointing an Advocate for the accused to defend him if he is unable to do so."

12. Significantly, as noted above there was an unexplained delay of 7 days from the recovery of the charas to sending it to the chemical examiner and nothing has come on record to show that the recovered charas was kept in safe custody during that period. There was no evidence that the charas was handed over to the malkhana, no copy of the malkhana entry was produced, the in charge of the Malkhana was not examined to prove the safe custody of the charas throughout this 7 day period. Furthermore, PC Ghulam Rasool who sent the sample for chemical examination as per the chemical report has also not been examined by the prosecution in respect of the charas' safe custody or safe transit and as such there is likelihood that such sample may have been tampered with /interfered with after its recovery and before it was sent to the chemical examiner which would mean that the report of the chemical examiner cannot be safely relied upon and the fact that it has proved positive under these circumstances of non safe custody will not assist the prosecution case. In respect of the importance of safe custody of the narcotic in a case under the CNSA reliance is placed on the case of **IKRAMULLAH & OTHERS V/S. THE STATE** (2015 SCMR 1002) where it was held 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 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. In view of the above, and for the other reasons mentioned earlier we have no hesitation to hold that in this case the prosecution has failed to prove its case against the appellant beyond a reasonable doubt. There are several circumstances which create doubt in the prosecution case. In the case of **Tariq Pervez V/s. The State** (1995 SCMR 1345), the Honourable Supreme Court 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. Thus, for the above stated reasons, we hold that the prosecution has failed to prove its case against the appellant beyond a reasonable doubt, therefore, while extending the benefit of doubt, appeal was allowed by short order dated 25.05.2017 and the conviction and sentence recorded by the trial court were set aside and appellant was acquitted of the charge and was ordered to be immediately released from custody in respect of this case unless his custody was required in any other case.

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

Hyderabad:
Dated: