

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

Before:

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

Cr. Appeal No.D-74 of 2014.

Ali Hassan

Versus

The State

Appellant : Ali Hassan (present on bail)	Through Mr. Ishrat Ali Lohar, 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 04.08.2014 passed by learned Special Judge for CNS, Umerkot, in Special Case No.06 of 2013, arising out of Crime No.16 of 2013, registered at Police Station Kunri, under section 9(c) of Control of Narcotic Substances Act, 1997 (CNSA), whereby the appellant Ali Hassan has been convicted u/s 9(c) CNSA, 1997 and sentenced to suffer RI for 08 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 02 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 03.03.2013 at about 1500 hours, police party headed by SIP Mir Muhammad Kaloi of PS Kunri while patrolling in their area reached at Soonthi Shakh Mori on Kunri-Pakko Mor Road and apprehended the present accused and secured 1030 grams of contraband item from his possession. Out

of the said contraband item 20 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 accused and case property were brought at police station where F.I.R. was lodged by the complainant 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 through SI Bhai Khan and it was received in the said office on 11.03.2013 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.3 u/s 9(c) CNSA, to which, accused pleaded not guilty and claimed to be tried vide his plea at Ex.4. At the trial prosecution examined PW-1 complainant SIP Muhammad Kaloi at Ex.5, who produced mashirnama of arrest and recovery at Ex.5-A, F.I.R. at Ex.5-B, arrival and departure entries at Ex.5-C and Ex.5-D, PW-2 ASI Sher Muhammad was examined at Ex.6; PW-3 SIP Bhai Khan was examined at Ex.7, who produced the chemical report at Ex.7-A and thereafter, prosecution side was closed at Ex.8.

5. Statement of accused was recorded u/s 342 Cr.P.C. at Ex.9. The accused denied the prosecution allegations and claimed his false implication in this case. The accused also examined himself on oath at Ex.10 and produced copy of Deh Form VII-B at Ex.10-A, certified true copy of F.I.R. No.50/2010 at Ex.10-B. The accused also examined DW-1 Javed Sultan at Ex.11, DW-2 Adam at Ex.12 and DW-3 Allan at Ex.13 in his defence. Thereafter, defence side was closed vide statement Ex.14.

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. Ishrat Ali Lohar, learned advocate for the 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 the prosecution evidence, hence it cannot be safely relied upon; that as per prosecution case the sample was sent for Chemical analysis through SI Bhai Khan and it was received in the office of Chemical Examiner on 11.03.2013 after a delay of 08 days hence tampering with the case property during such period could not be ruled out. He further argued that accused has been involved in this case falsely
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 prove its case against the appellant to the required standard for the following reasons; that accused was found in suspicious manner and 1030 grams charas was recovered from his possession and despite the alleged place of incident being a busy area apparently no serious efforts have been made to pick up an independent person of the locality to witness the arrest and recovery proceedings which was essential in a case such as this where there is enmity between the police and the appellant as shown on the record; that no effort was made to send a fake purchaser to see if the appellant was in fact selling narcotics; that it has come on record that there was enmity between the police and the appellant and as such the evidence of the police in our view cannot be safely relied upon without independent corroboration; that the time of the arrival entry at the PS and the FIR are exactly the same i.e 1630 hours which is not believable as there

had to be at least a 10 minute gap between the arrival of the police and the accused at the police station and the recording of the FIR.; that the appellant put forward his defense consistently throughout his cross examination of the PW's, his S.342 statement his evidence under oath and through documents which was fully supported by his defense witnesses who were not damaged during cross examination; that according to the prosecution case, charas was recovered from the possession of the appellant on 03.03.2013 and sample of the same was sent to the Chemical Examiner and it was received in the said office on 11.03.2013 with a delay of 08 days and no explanation has been given for this unexplained 8 day delay.

12. Most significantly, as noted above there was an unexplained delay of 8 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 8 day period. Furthermore, PC Bhai Khan who was handed over the sample has not made any mention that he kept it in safe custody during his evidence. He states in his evidence that he "sent" the narcotic to the chemical examiner but as per the chemical report it was received from him "by hand" which is contradictory. More importantly there is no evidence where PC Bhai Khan kept the narcotic sample over this 8 day period. During his evidence he has not mentioned anything about where the narcotic was kept for this 8 day period and thus in our view the prosecution has not been able to prove the safe custody or transit of the charas from the date of its recovery until the date when it was sent to the chemical examiner for testing 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 are of the considered view that 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 since he was present on bail his bail bond stood canceled and his surety was discharged.

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