Ikramullah v Sarfaraz Core – Spl Custody
For reporting.

166

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Before:

Mr. Justice Abdul Maalik Gaddi
Mr. Justice Mohammad Karim Khan Agha

Cr. Appeal No.D-17 of 2018.

Javed

Versus

The State

Cr. Appeal No.D-18 of 2018

Khadim Hussain

Versus.

The State

Cr. Appeal No.D-23 of 2018

Ghulam Sarwar

Versus.

The State

Appellant Javed (present on bail) in Cr. Appeal No.D-17 of 2018	Through Mr. Behzad Ali Umrani, Advocate
Appellant Khadim Hussain (present on bail) in Cr. Appeal No.D-18 of 2018	Through Mr. Masood Rasool Babar Memon, Advocate
Appellant Ghulam Sarwar (present on bail) in Cr. Appeal No.D-23 of 2018	Through Mr. Ghulamullah Chang, Advocate
Respondent : The State	Through Mr. Shahzado Saleem Nahyoon, Deputy Prosecutor General
Date of hearing & judgment	04.09.2018

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J.- Since all the aforementioned criminal appeals have arisen out of one and same judgment dated 07.02.2018, passed by the learned IIIrd Additional Sessions Judge /

167

Special Judge, Control of Narcotic Substances Act, Hyderabad in Special Case No.147 of 2016 (Crime No.74 of 2016) of Police Station Sakhipir, Hyderabad, under section 9(c) Control of Narcotic Substances Act, 1997 (CNSA), therefore, we propose to decide the same by this common judgment.

2. Through impugned judgment, the learned trial Court convicted the appellants named above (Javed, Khadim Hussain and Ghulam Sarwar) u/s 9(c) CNSA and sentenced them to suffer RI for 05 years and to pay the fine of Rs.20,000/- each. In case of default in payment of fine they were ordered to suffer simple imprisonment for 01 month more (the impugned judgment). Benefit of Section 382-B Cr.P.C. was also extended to the accused.

3. Brief facts of the prosecution case as disclosed in the FIR are that present accused were arrested on 05.12.2016 from near Sattar Shah Graveyard, Sattar Shah Road, by a police party headed by SIP Dili Jan Rind alongwith his subordinate staff. It is further alleged in the FIR that accused Khadim Hussain, Ghulam Hussain and Javed, each were found possessing five packets containing charas. Police party also recovered 25 packets of charas wrapped in plastic paper from the vehicle of the accused persons. The charas recovered from each accused was weighed and found to be 05 kilogram; whereas the charas recovered from the vehicle was also weighed and found to be 25 kilograms. Out of the contraband items, recovered from each accused, 100 grams were separated, whereas from the contraband item secured from the vehicle, 01 kilogram charas was separated for sending the same to the chemical examiner for analysis and report. Thereafter, the accused, contraband items and vehicle, as stated above, were secured and memo of arrest and recovery was prepared on the spot in presence of mashirs. Thereafter, accused and case property were brought at police station where F.I.R. was lodged by complainant SIP Dili Jan on behalf of the State under section 9(c) CNSA.

4. During investigation, Investigating Officer recorded 161 Cr.P.C. statements of the PWs. Sample of the substance / charas was sent to the chemical examiner through PC M. Yousuf and positive chemical report was received. On the conclusion of investigation challan was submitted against the accused.

5. Trial court framed charge against accused at Ex.5 u/s 9(c) CNSA, to which, accused pleaded not guilty and claimed to be tried vide their respective pleas at Ex.6 to 8. At the trial prosecution examined Investigation Officer / SIP Dili Jan Rind at Ex.12, who produced mashirnama of arrest and recovery, F.I.R., departure and arrival entries, entry of PS: Sakhipir, copy of entry of register No.19, order of SSP Hyderabad, letter of police to Chemical Examiner and Chemical Analyzer's report at Ex.12/A to Ex.12/G, respectively; P.W-2 PC Muhammad Zareef at Ex.13 and P.W-3 SHO Iftikhar Ahmed at Ex.14 and thereafter, prosecution side was closed at Ex.15.

6. Statements of accused were recorded u/s 342 Cr.P.C. at Ex.16 to 18. The accused in their said statements denied the prosecution allegations and claimed their false implication in this case. However, neither they have examined themselves on oath nor led any defence evidence.

7. Learned Special Judge after hearing the learned counsel for the parties and examining the evidence available on record convicted and sentenced the appellants as stated above by the impugned judgment. Hence these appeals.

8. 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

9. Learned counsel for the appellants have contended that the prosecution case is highly doubtful; the place of incident was located at busy spot, yet, nobody from the 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 there was delay in sending the case property to the Chemical Examiner and tampering with the case property during such period could not be ruled out. It is argued that alleged recovery was made on 05.12.2016, whereas the sample was sent and received in the office of Chemical Analyzer on 09.12.2016 with an unexplained delay of 04 days and no evidence has been brought on the record that charas was in the safe custody during that period and in fact PW 1 Dili Jan admitted in cross examination that he managed the chemical report. Lastly the appellants submitted that the narcotics had been foisted on them and that they had been falsely implicated in the case since there

was enmity between them and the police as before the incident one of the appellants had filed a Constitutional Petition against the police before the High court for harassment and thus for all the above reasons the appellants were entitled to be acquitted by being extended the benefit of the doubt

10. Mr. Shahzado Saleem Nahyoon, the learned Deputy Prosecutor General, very fairly conceded to the contentions of learned counsel for the appellants and did not support the impugned judgment.

11. We have heard the parties, considered the evidence on record and the relevant case law.

12. We have come to the conclusion that the prosecution has failed to prove its case against the appellant beyond a reasonable doubt for the following reasons; that the police party arrested the appellant from a thickly populated area but the police did not associate any independent person of the locality to witness the recovery proceedings. There was also nothing on record that the complainant had attempted to call any private person to act as mashir. This aspect, although not fatal to the prosecutions case, was important because one of the appellants had raised the defense that he had been falsely implicated in this case due to enmity, for which he has relied on a constitution petition which he had only 4 months **before** the incident filed against the police for harassment and as such independent corroboration of the police version of events was important to ensure that it could be safely relied upon; that the complainant was also the IO in the case which though not unlawful creates a further measure of suspicion when the appellants have claimed false implication on account of enmity; that the charas was recovered on 05.12.2016 and sample was sent to the chemical examiner on 09.12.2016 after an unexplained delay of 4 days when the law requires such samples to be sent for chemical analysis within 3 days of recovery although this delay is not fatal as such rules are directory in nature and not mandatory such non compliance arouses further suspicion and that the prosecution has accepted that the chemical reports were managed by one of the PW's during his cross examination (although we do not give this so called admission much weight as the word managed most probably related to the managerial function of the IO in arranging for the narcotic being sent for chemical examination rather than him admitting to manipulating the chemical report)

176

13. Most significantly, we find that there is very little evidence on record to show that the charas was kept in safe custody from the time of its recovery until it was sent to the chemical examiner; that the Incharge of the Malkhana has not been examined and that PC Yousuf who delivered the chemical to the chemical examiner has not been examined as to its safe custody. We note that the impugned judgment in this respect refers to the case of **Muhammad Sarfraz V The State (2017 SCMR 1874)** where there was no negative evidence of non safe custody and as such the conviction was upheld. **Muhammad Sarfraz's case** (Supra) however was by a two member bench of the Hon'ble Supreme Court and the case of **Ikramullah & others v/s. the State** (2015 SCMR 1002) which was by a three member bench does not seem to have been brought to its attention. In **Ikramullah's case** (Supra) the emphasis was on the **positive proof** of safe custody of the narcotic by the prosecution from the time of its recovery until the time it went for chemical examination which would rule out any possibility of the narcotic being tampered with. Since **Ikramullah's case** (Supra) was decided by a three member bench of the Hon'ble Supreme Court and was not brought to the attention of the Hon'ble Supreme Court in **Muhammad Sarfraz's case** (Supra) we are inclined to follow **Ikramullah's case** (Supra) in respect of safe custody of the narcotic.

14. Thus, in our view in this case since there is a possibility that the narcotic during the time it was recovered from the appellants and was sent for chemical analysis may not have been kept in safe custody and may have been tampered with we find that even a positive chemical report is of no assistance to the prosecution; the significance of keeping safe custody of the narcotic in a case under the CNSA has been emphasized in **Ikramullah's case** (Supra), the relevant portion of which 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."** (bold added)

15. Under these circumstances and for the other reasons mentioned above we are of the considered view that the prosecution has not proved its case against the appellants beyond a reasonable doubt. It is well settled law that the benefit of doubt must go to the accused by way of right as opposed to concession. In this respect reliance is placed on the case of **Tariq Pervez V/s. The State** (1995 SCMR 1345), wherein the Honourable Supreme Court has observed as follows:-

> "It is 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."

16. For the above stated reasons, we hold that the prosecution has failed to prove its case against the appellants, therefore, while extending the benefit of doubt, the appeals are allowed. The convictions and sentences recorded by the trial court through the impugned judgment are set aside and the appellants are acquitted. The Appellants are on bail and as such their bail bonds are cancelled and sureties are discharged. These are the reasons for our short order which was announced in open court today which reads as under:

> "Parties advocates have been heard. They have concluded their arguments. For the reasons to be recorded later on, these criminal appeals are allowed. Impugned judgment stands set aside. Appellants present on bail. Their bail bonds are cancelled and sureties stand discharged."