

**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 2016.

Waheed Ali

Versus.

The State.

Appellant : Waheed Ali (Present on bail)	Through Mr. Nisar Ahmed T. Chandio, 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 13.07.2016 passed by learned Special Judge for CNS, Hyderabad, in Special Case No.168 of 2015, arising out of Crime No.105/2015, registered at Police Station (PS) Cantonment Hyderabad, under section 9(b) of Control of Narcotic Substances Act, 1997 (CNSA), whereby the appellant Waheed Ali has been convicted u/s 9(b) CNSA and sentenced to suffer RI for 13 months and to pay the fine of Rs.9,000/-. In case of default in payment of fine he was ordered to suffer simple imprisonment for 02 month more (the impugned judgement). Benefit of Section 382-B Cr.P.C. was also extended to the accused.

2. Brief facts of the prosecution case, in brief, are that on 06.10.2015 at 2015 hours, police party headed by SIP Muhammad Jumman of PS Cantonment apprehended the present accused from main Gate Tando Jahaniyan Graveyard, Hyderabad, and secured 130

grams of contraband item from his possession. Out of the said contraband item 10 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. Thereafter, accused and case property were brought at police station where F.I.R. was lodged by complainant SIP Muhammad Jumman 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 07.10.2015 through PC Ali Bux and positive chemical report was received. On the conclusion of investigation challan was submitted against the accused for offence u/s 9(b) 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 vide his plea at Ex.2/A. At the trial prosecution examined PW-1 complainant SIP Muhammad Jumman at Ex.3, who produced mashirnama of arrest and recovery at Ex.3-A, F.I.R. at Ex.3-B, departure and arrival entries at Ex.3-C and 3-D, permission letter, letter to chemical analyzer and chemical report at Ex.3-E to 3-G; PW-2 / Mashir Abdul Kabeer was examined at Ex.4 and thereafter, the 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. 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. Nisar Ahmed T. Chandio, 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 on 07.10.2015 through PC Ali Bux with a delay of one day hence tampering with the case property during such period could not be ruled out especially as there was no evidence that it had been kept in safe custody. Lastly he argued that the appellant has been involved in this case falsely as at the time of his arrest he was taking medicines to his mother and as such the case has been foisted malafide on him by the police who are interested parties.

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 contentions of the learned counsel for the parties, scanned the entire evidence and considered the relevant law.

11. We have come to the conclusion that the prosecution has failed to establish its case for the following reasons; that the appellant was found in suspicious manner and 130 grams charas was recovered from his possession yet 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 despite this incident occurring in day light hours; that the appellant was not represented by legal counsel and as such being a layman he was not able to adequately defend himself against the charges especially during cross examination and at a minimum in our view the learned judge ought to have asked questions of the PW's to satisfy himself about the truth of their evidence and thus in such circumstances the due process rights of the appellant under the Constitution have been violated especially in respect of A.10(A) and the right to a fair trial; that there is overwriting in two places in the

memo of arrest and recovery which have gone completely unexplained which casts doubt of the police version of events.

12. Most significantly however in our view although there was no significant delay in sending the chemical for analysis, ^{bal-} during this period absolutely no evidence has come on record as to the safe custody of the chemical which was sent for analysis. There is no evidence that it was kept at the Malkhana of the PS, no Malkhana entry has been produced and the in charge of the malkhana has not given evidence as to the safe custody of the chemical. Furthermore PC Ali Bux who handed the chemical to the chemical analyzer has not given evidence as to its safe custody and safe transit. Thus there is nothing on record to prove that the charas had been kept in safe custody from the time of its recovery until the time it was handed over to the chemical examiner and as such it may well have been interfered/tampered with. The importance of safe custody in narcotics cases was made clear in the case of **IKRAMULLAH & OTHERS V/S. THE STATE** (2015 SCMR 1002), in the following terms:

"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. 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.

15. Above are the reasons for our short order whereby Waheed Ali who was present on bail was acquitted from the charge, had his bail bonds cancelled and surety discharged.