

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

Before:

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

Cr. Appeal No.D-91 of 2013

Juman Chandio

Versus.

The State.

Appellant : Juman s/o Allah Jurio by caste Chandio (present on bail)	Through Mr. Muhammad Jameel Ahmed, Advocate.
Respondent : The State	Through Syed Meeral Shah Bukhari, Additional Prosecutor General.
Date of hearing	29.05.2017.
Date of judgment	29.05.2017.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- This appeal is directed against the judgment dated 04.11.2013 passed by learned Special Judge for CNS, Umerkot, in Special Case No.05 of 2013, arising out of Crime No.15/2013, registered at Police Station Kunri, under section 9(c) of Control of Narcotic Substances Act, 1997 (CNSA), whereby the appellant Juman has been convicted u/s 9(c) CNSA and sentenced to suffer RI for 08 years and to pay the fine of Rs.10,000/-. In case of default in payment of fine he was 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.

2. Brief facts of the prosecution case as disclosed in the FIR are that present accused was arrested on 03.03.2013 at 1200 hours at Umerkot-Kunri bypass link road, by a police party headed by SIP Mir

Muhammad Kaloi alongwith his subordinate staff after patrolling at various places, who were checking ^v vehicles. Accused Juman was said to be found possessing one plastic shopper which contained two pieces of charas weighing 1020 grams out of which 20 grams were separated for sending the same to the chemical examiner for analysis and report. Thereafter, the contraband items, as stated above, were sealed 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 Mir Muhammad Kaloi 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 substance / charas was sent to the chemical examiner on 11.03.2013 through SI Bhai Khan 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 the accused pleaded not guilty and claimed to be tried vide his plea at Ex.4. At the trial prosecution examined PW-1 Complainant SIP Mir Muhammad Kaloi at Ex.5, who produced memo of arrest and recovery at Ex.5/A, FIR at Ex.5/B and daily diary entries at Ex.5/C to 5/D, PW-2; ASI Sadique Hussain at Ex.6 and PW-3 SIP Bhai Khan at Ex.7, who produced the letter regarding sending the sample to the chemical examiner at Ex.7/A and chemical examiner's report at Ex.17/B 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 has stated that he has been falsely involved in this case by police at the instance of sitting MPA as he supported the candidate of the JAM group during the general election. However, the accused did not examine himself on oath in disproof of the prosecution allegations nor did he led any evidence in his defence.

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 through 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. Muhammad Jameel Ahmed, learned advocate for appellant has contended that the prosecution case is highly doubtful; the place of incident was located at a 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 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 03.03.2013, whereas the sample was sent to chemical analyser on 11.03.2013 with a delay of 08 days and no evidence has been brought on the record that the recovered charas was kept in safe custody during that period. Lastly he argued that the accused has been involved in this false case due to political victimization.

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 prove its case against the appellant for the following reasons; that the police party arrested the appellant from a thickly populated area in day light hours 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 was important because the appellant has raised the defense that he has been falsely

implicated in this case due to political victimization and as such independent corroboration of the police version of events was important to ensure that it could be safely relied upon; that the charas was recovered on 03.03.2013 and sample was sent to the chemical examiner on 11.03.2013 after an unexplained delay of 8 days; that there is a major contradiction in the prosecution evidence in connection with a material aspect of the case. Namely that PW Bhai Khan states in his evidence that he sent the parcel to the chemical examiner however in the report of the chemical examiner it clearly states that the chemical was received by the hand of Bhai Khan.

12. Most significantly, we find that there is absolutely no 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, which was an unexplained delay of 08 days; that there is no evidence that the recovered narcotic substance was kept in the Malkhana of the police station; that no Malkhana entry to this effect has been produced on record; that the Incharge of the Malkhana has not been examined and as noted earlier there is a contradiction in the evidence of Bhai Khan ^{so} it is unclear whether he sent the narcotic to the chemical examiner or took it by hand. Under these circumstances, there is, in our view, a possibility that the sample of the narcotic during the said 08 day delay in sending it to the chemical examiner may have been interfered with / tampered with, as it was not kept in safe custody and as such 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 the case of **Ikramullah & others v/s. the State** (2015 SCMR 1002), 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."

13. 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 appellant 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 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. For the above stated reasons, we hold that the prosecution has failed to prove its case against the appellant, therefore, by short order dated 29.05.2017 while extending the benefit of doubt, the appeal was allowed. The conviction and sentence recorded by the trial court through the impugned judgment was set aside and the appellant was acquitted of the charge.

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