

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

Before:

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

Cr. Appeal No.D-15 of 2014.

Abdul Malik alias Abdul Sattar

Versus.

The State.

Appellant : Abdul Malik alias Abdul Sattar (Present on bail)	Through Mr. Farhad Ali Abro, Advocate.
Respondent : The State	Through Mr. Shahzado Saleem Nahyoon, Assistant Prosecutor General
Date of hearing	30.05.2017.
Date of judgment	30.05.2017.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- This appeal is directed against the judgment dated 31.01.2014 passed by learned Special Judge for CNS, Hyderabad, in Special Case No.102 of 2010, arising out of Crime No.249 of 2010, registered at Police Station(PS) Market Hyderabad, under section 9(b) of Control of Narcotic Substances Act, 1997 (CNSA), whereby the appellant Abdul Malik alias Abdul Sattar has been convicted u/s 9(b) CNSA and sentenced to suffer RI for 01 year and 04 months and to pay the fine of Rs.11000/-. In case of default in payment of fine he was ordered to suffer simple imprisonment for 04 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 are that on 22.10.2010 at 2120 hours, police party headed by SIP Muhammad Shafi Khan of PS

Market apprehended the present accused from main Roshan Ka Pir, Tando Wali Muhammad, Hyderabad, and secured 115 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. Then, accused and case property were brought at police station where F.I.R. was lodged by complainant SIP Muhammad Shafi 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 / parcel No.1 of the recovered substance was received in the office of the chemical examiner on 29.10.2010 (through SIO Manoj Kumar) and parcel No.2 was received in the said office on 04.11.2010 (through SI Muhammad Shafi) and positive chemical report declaring the said contraband item as heroin powder 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 u/s 9(b) CNSA, to which, accused pleaded not guilty and claimed to be tried. At the trial prosecution examined PW-1 complainant SIP Muhammad Shafi at Ex.4, who produced mashirnama of arrest and recovery at Ex.4-A, F.I.R. at Ex.4-B, Roznamcha entry at Ex.4-C; PW-2 I.O. SIP Ishtiaque Ahmed Awan at Ex.6, who produced memo of place of vardat at Ex.6-A, report of chemical examiner at Ex.6-B and PW-3 ASI/Mashir Gul Muhammad Lashari at Ex.7 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 due to enmity with the police. In order to disproof the prosecution case, accused examined himself on oath at Ex.10. He also examined DW-1 Parkash at Ex.11 and DW-2 at Ex.12.

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. Farhad Ali Abro, learned advocate for appellant has mainly contended that prosecution case is highly doubtful; that the place of incident was located at busy spot, yet, none from the public was joined to attest the arrest and recovery; there are material contradictions in the prosecution evidence; that as per prosecution case sample / parcel No.1 of the recovered substance was received in the office of the chemical examiner on 29.10.2010 (through SIO Manoj Kumar) and parcel No.2 of the said contraband was received in the said office on 04.11.2010 (through SI Muhammad Shafi) with an unexplained delay of 08 days and 14 days respectively and hence tampering with the case property during such period could not be ruled out.

9. Mr. Shahzado Saleem Nahyoon, Assistant Prosecutor General 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 entry No.36 which PW Muhammed Shafi relied on as the departure entry does not say that he left for patrolling; that on spy information the accused was apprehended while selling contraband substance and 115 grams heroin powder was recovered from his possession. The alleged place of incident was a busy area and since it was a case of spy information the police had adequate time to associate an independent musher which they failed to do to witness the arrest and recovery proceedings. This was important as the appellant has alleged that he was arrested from a shop near the Capri cinema at the time of

the incident and the police had malafide foisted the narcotic on him due to enmity on the part of PC Riaz (who was also a part of the arresting party) who had exchanged hot words with him which he cross examined on, cited in his S.342 statement, in his evidence under oath and through his two DW's Parkash and Ghulam Hussain as such under these circumstances the evidence of the police cannot be safely relied upon without independent corroboration; that the appellant was allegedly selling heroin powder yet no one who was purchasing the powder from him was arrested nor was a fake purchaser sent to prove this aspect of the case; that it also seems highly unlikely that the appellant would be selling such a small amount of heroin in the street (only 115 grams were recovered); that there was overwriting on the memo of arrest and recovery which casts further doubts on the police version; that the appellant was not provided with legal counsel and thus since he was a layman this seriously prejudiced his defense especially during his cross examination of the PW's and the learned trial court judge at a minimum should have asked questions of the PW's to satisfy himself of their truthfulness and as such it appears that the due process rights of the appellant may have been violated in terms of A.10 and 10(A) of the Constitution and his right to a fair trial; that the heroin powder was recovered from the possession of the appellant on 22.10.2010 and sample / parcel No.1 of the recovered substance was received in the office of the chemical examiner on 29.10.2010 (through SIO Manoj Kumar) and parcel No.2 of the said contraband was received in the said office on 04.11.2010 (through SI Muhammad Shafi) with a delay of 08 days and 14 days and no explanation has been given as to why the samples were not sent at the same time.

12. Most significantly, as noted above there was an unexplained delay of 8 and 14 days from the recovery of the heroin to sending it to the chemical examiner and nothing has come on record to show that the recovered heroin was kept in safe custody during that period. There was no evidence that the heroin 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 and 14 day period. Furthermore, SIO Manoj Kumar who sent the samples for chemical examination as per the chemical report has also not been examined by the prosecution in respect of the narcotics' safe custody or safe transit and it appears that Muhammed Shafi retained custody of a part of the heroin himself before sending it belatedly for chemical analysis. Thus, under these circumstances there is likelihood that such samples may have been tampered with /interfered with after their recovery and before they were 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 had 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 find 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 30.05.2017 and the conviction and sentence recorded by the trial court were set aside and the appellant was acquitted of the charge and since he was present on bail his bail bonds stood cancelled and his surety was discharged.

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

Hyderabad:

Dated:30.05.2017