

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

Before:

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

Cr. Appeal No.D-117 of 2016.

Moharram alias Maroo

Vs.

The State.

Appellant: Moharram alias Maroo	Through Mr. Ghulam Nabi Jarwar, Advocate
Respondent : The State	Through Syed Meeral Shah Bukhari, Additional Prosecutor General.
Date of hearing	17.05.2017.
Date of judgment	02.06.2017.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- This appeal is directed against the judgment dated 14th October 2016 passed by learned Sessions Judge / Special Judge for CNS, Tando Muhammad Khan, in Special Narcotic Case No.49 of 2016, arising out of Crime No.55/2016, registered at Police Station Mullakatiar, under section 9(b) of Control of Narcotic Substances Act, 1997 (CNSA), whereby the appellant Moharram alias Maroo has been convicted u/s 9(b) of CNSA and sentenced to suffer RI for 01 year & 06 months and to pay the fine of Rs.11,000/-. 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 as disclosed in the FIR are that on 25.07.2016 the accused was arrested near Chutta Mori at link road leading towards village Ibrahim Chutta at about 1830 hours by a police party headed by SIP/SHO Qadir Bux Behrani. Accused Moharram alias Maro was said to be found possessing 500 grams of charas. Thereafter, the contraband item, as stated above, was sealed and memo of arrest and recovery was prepared on the spot in presence of mashirs namely, PC Abdul Sattar and PC Mazhar Ali. Thereafter, accused and case property were brought at police station where F.I.R. was lodged by SIP/SHO Qadir Bux Behrani on behalf of the State under section 9(b) CNSA.

3. During investigation, Investigation Officer recorded 161 Cr.P.C. statements of the PWs. The entire contraband item / charas was sent to the chemical examiner on 27.07.2016 through PC Imtiaz and positive chemical report was received. On the conclusion of investigation challan was submitted against the accused for offence u/s 9(b) of CNSA.

4. Trial court framed the charge against the accused at Ex.3 u/s 9(b) of CNSA, to which, accused pleaded not guilty and claimed to be tried at Ex.4. At the trial prosecution examined PW-1 Complainant / SIP Qadir Bux Behrani at Ex.6. He produced entry of departure and arrival at Exs.6-A & 6-B, memo of arrest and recovery at Ex-C, FIR at Ex.6-D and chemical examiner report at Ex.6-E; PW-2/PC Abdul Sattar at Ex.7 and thereafter the prosecution side was closed at Ex.8.

5. The statement of the 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. He further stated that nothing was recovered from his possession and the alleged charas has been foisted upon him. The accused did not lead any evidence in his defence and declined to give a statement on oath.

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 in 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. Ghulam Nabi Jarewar, learned advocate for appellant 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 prosecution evidence, hence it cannot be 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 25.07.2016 whereas the sample was sent to Chemical Analyzer on 27.07.2016 with a delay of 02 days and no evidence has been brought on the record that the charas was kept in safe custody during that period. He further argued that PC Imtiaz through whom the sample of charas was sent to the chemical examiner has also not been examined. Lastly he argued that the case has been malefidely foisted on him by the police and it is a false case. In support of his contentions, learned counsel for the appellants relied upon the case of **Ikramullah & others v. the State** (2015 SCMR 1002).

9. Syed Meeral Shah, learned A.P.G. very fairly conceded to the contentions of learned counsel for the appellant and did not support the impugned judgment.

10. We have carefully heard Mr. Ghulam Nabi Jarwar, learned advocate for appellant, Syed Meeral Shah, learned D.P.G. for the State and scanned the entire evidence and considered the relevant law.

11. We have reached the conclusion that the prosecution has failed to establish its case for the reasons that it was case of spy information and the police despite having adequate time to arrange an independent mashir made no attempt to do so whatsoever which corroboration by an independent witness would have greatly strengthened their case bearing in mind the other lapses in the case which makes the whole prosecution case highly doubtful (for example, the time of arrival at the PS with the accused and the recovery is the

same as on the FIR which is not believable since there must have been some gap between the police arriving back at the police station and the registration of the FIR, there are also contradictions in the evidence of the PW's for example PW Qadir Bux states that the charas was kept in a cloth bag which was sewn by swing machine from one side whereas PW Abdul Sattar states that the cloth bag was not sewn by a swing machine)

12. More significantly, according to the prosecution case, charas was recovered on 25.07.2012 and sample was sent to the chemical examiner on 27.07.2012 and nothing has come on record to show that the recovered charas was in safe custody during that period. It was stated to be kept in the malkhana during that period but no entry has been produced to corroborate that statement nor was the person in charge of the malkhana examined to show that the charas was in fact kept in safe custody in the Malkhana throughout this 2 day period. Furthermore, PC Imtiaz who sent the sample for chemical examination as per the chemical report has also not been examined by the prosecution in respect of the charas' safe custody or safe transit as such there is likelihood that such sample may have been tampered with /interfered with and as such the result of the chemical examiner cannot be safely relied upon. In this respect reliance is placed on the case of **IKRAMULLAH & OTHERS V/S. THE STATE** (2015 SCMR 1002), the relevant portion of which is reproduced below for ease of reference:-

"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 our view this alone is a major defect in the prosecutions case which would justify the acquittal of the appellant. We have also observed above that there are contradictions in the evidence of the PW's and nobody was seen approaching the appellant for purchasing anything which would tend to suggest that he was not selling drugs to anyone. Convictions in narcotics cases under the CNSA entail heavy sentences including capital punishment thus in such circumstances the courts have to view the evidence with extra care and caution.

14. It also a well settled legal proposition that in any criminal case the prosecution has to prove its case beyond a reasonable doubt and any doubt must go to the accused as of right not by way of concession. In this respect reliance is placed on the case of **Tariq Pervez V/s. The State** (1995 SCMR 1345), where the Honourable Supreme Court held as under:-

"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."

15. Thus, for the above stated reasons, we find that the prosecution has failed to prove its case against the appellant beyond a reasonable doubt, and therefore, while extending the benefit of doubt to the appellant the appeal is allowed, the impugned judgment is set aside and the appellant is acquitted of the charge and ordered to be released if in custody in respect of this case.

Hyderabad:

Dated: 02-06-2017