

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-103 of 2017

Anwar Magsi

Versus.

The State.

Appellant: Anwar Magsi	Through Mr. Imamuddin Otho, Advocate.
Respondent : The State	Through Mr. Shahzado Saleem Nahyoon, Deputy Prosecutor General
Date of hearing	03.09.2018
Date of judgment	05.09.2018

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- This appeal is directed against the judgment dated 19.09.2017 passed by learned Special Judge for CNS, Hyderabad, in Special Case No.40 of 2017, arising out of Crime No.15/2017, registered at Police Station SITE Hyderabad, under section 9(c) of Control of Narcotic Substances Act, 1997 (CNSA), whereby the appellant Anwar Magsi has been convicted and sentenced to suffer imprisonment for life and to pay fine of Rs.100,000/-. In case of default in payment of fine he was ordered to suffer simple imprisonment for one year 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 01.04.2017 from Ganjo Takkar near Railway Track Zeal Pak, by a police party headed by SIP Muhammad Akram Jat alongwith his subordinate staff. It is further alleged in the FIR that the accused was found possessing charas weighing 15200 grams. Thereafter, the contraband items, as stated above, were sealed and memo of arrest and recovery was prepared at 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 Akram Jat on behalf of the State under section 9(c) CNSA.

3. During investigation, Investigating Officer recorded 161 Cr.P.C. statements of the PWs. Contraband item was sent to the chemical examiner on 03.04.2017 through PC Naseem and positive chemical report was received. On conclusion of the investigation challan was submitted against the accused.

4. Trial court framed charge against accused at Ex.3, to which, accused pleaded not guilty and claimed to be tried. At the trial prosecution examined Complainant/SIP Muhammad Akram Jat at Ex.5, who produced copy of entry No.16, mashirnama of arrest and recovery, copy of entry No.18, F.I.R., copy of entry No.25 of Register of Malkhana 19, letter to Chemical Examiner, entry No.28 by which parcel was sent to Chemical Examiner and Chemical Examiner's report at Exs.5/A to 5/H respectively; P.W-2 Mashir Nasim Akhtar at Ex.6 and thereafter, prosecution side was closed at Ex.7.

5. Statement of accused was recorded u/s 342 Cr.P.C. at Ex.8. The accused denied the prosecution allegations and claimed his false implication in this case. He neither examined himself on oath nor led any 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 by the impugned judgment.

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. Imamuddin Otho, learned advocate for appellant has contended that the prosecution case is highly doubtful; that the place of incident was located at busy spot, yet, nobody from the public was joined to attest the arrest and recovery; that 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; that alleged recovery was made on 01.04.2017, whereas the sample was sent to Chemical Analyzer on 03.04.2017 with a delay of 02 days as well as it was received in the office of Chemical Examiner with further delay of 02 days but no evidence

has been brought on the record that charas was in the safe custody during that period; that the form for sending the chemical for analysis is not in a proper format. Lastly he argued that accused has been involved in this false case due to an enmity which his father had with the SSP over agricultural land in order to teach him a lesson. In support of his contentions, learned counsel for the appellant relied upon the cases of **Ikramullah and others V The State** (2015 SCMR 1002) and **Ghulam Murtaza v. State** (PLD 2009 Lahore 362).

9. Mr. Shahzad Saleem Nahyoon, Deputy Prosecutor General, while supporting the impugned judgment contended that a huge amount of narcotics had been found on the appellant and that there was no chance that this was foisted and that there was more than enough evidence on record to prove that the prosecution had proved its case beyond a reasonable doubt.

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

11. 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 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, although not fatal to the prosecutions case, was important because the appellant has raised the defense that he has been falsely implicated in this case due to enmity 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 legal creates a further measure of suspicion when the appellant has claimed false implication on account of enmity; that the charas was recovered on 01.04.2017 and sample was sent to the chemical examiner on 03.04.2017 yet it did not reach the chemical examiner until 05.04.2017 and although this delay is not unreasonable the question why it took 2 days to reach the chemical examiner after it was sent raises some suspicions;

12. 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; that PC Naseem allegedly sent the chemical report but the chemical report mentions that it was received from PC Shafiq which seems contradictory; that in any event neither PC Naseem nor PC Shafiq has been examined as to the safe custody of the narcotic. Under these circumstances, there is, in our view, a possibility that the sample of the narcotic during the time it was recovered and was sent for chemical analysis may not have been kept in safe custody and may have been tampered with and as such even a positive chemical report is of no assistance to the prosecution; that it appears that the chemical report was also not sent on the proper form. The significance of keeping safe custody of the narcotic in a case under the CNSA and the need to complete the proper form in a thorough and detailed manner 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, while extending the benefit of doubt, the appeal is allowed. The conviction and sentence recorded by the trial court through the impugned judgment is set aside and the appellant is acquitted of the charge. Appellant is in custody. He shall be released forthwith unless if he is required in any other custody case.