Narcotics Acquittal - Ikramullah 210
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**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-111 of 2016

Muhammad Jameel

Versus.

The State.

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| Appellant Muhammad Jameel : | Through Mr. Farhad Ali Abro, Advocate. |
| Respondent The State : | Through Shehzado Saleem Nahiyoon, D.P.G. |
| Date of hearing | 12.09.2018. |
| Date of judgment | 12.09.2018. |

**JUDGMENT**

**MOHAMMAD KARIM KHAN AGHA, J.-** This criminal appeal is directed against the judgment dated 31.10.2016 passed by learned Special Judge CNS / Ist Additional Sessions Judge, Hyderabad, in Special Case No.37 of 2012, arising out of Crime No.52/2012, registered at Police Station Hali Road, under section 9(c) of the Control of Narcotic Substances Act, 1997 (CNSA), whereby the appellant Muhammad Jameel has been convicted u/s 9(c)CNSA and sentenced to suffer rigorous life Imprisonment and to pay the fine of Rs.100,000/-. In case of default in payment of fine he was ordered to suffer simple imprisonment for one year more. 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 15.03.2012, the Complainant SIP Malik Sher Ali alongwith his subordinate staff left the P.S. vide entry No.20 at 1400 hours in government mobile bearing registration No.SP-5711 and when they reached at Jannat Textile Mill, where during checking, they saw one person coming on bicycle, who on seeing them in uniform tried going back by turning his bicycle. Due to suspicion, police apprehended him at 1530 hours. On enquiry, he disclosed his name as Muhammad Jameel S/o Jalaludin. His body search was conducted in presence

of ASI Syed Koral Shah and ASI Malik Jawaid Iqbal, due to non-availability of private persons, police party secured a khaki colour paper bag having wording as black bull OPC Cement tied with white rope on the back side carrier of the bicycle. On its checking, the complainant secured big 40 patties of Charas wrapped with plastic thelli. Four big patties of Charas out of 40 patties having seal of golden colour with wording as "Zong 2012", while on 36 patties of Charas having seal of golden colour with wording as "Sher-e-Sindh 2012". The recovered Charas was weighed which amounted to 20 kilograms out of which 10/10 grams quantity of Charas from each patti was obtained for chemical examination and sealed the same in white colour cloth bag, while remaining quantity of Charas i.e. 19 kilograms and 600 grams was put in the said Khaki colour paper bag and sealed the same separately in white cloth bag. Such mashirnama was prepared and the accused along with recovered property were brought at P.S. where such FIR was registered against above named accused.

3. On the conclusion of investigation challan was submitted against the accused for offence u/s 9(c) CNSA. The trial court framed charge against accused at Ex.3 u/s 9(c) CNSA to which accused pleaded not guilty and claimed to be tried vide his plea at Ex.4. At the trial prosecution examined PW-1 complainant SIP Malik Sher Ali at Ex.8, who produced attested carbon copy of departure entry No.20 at 1400 hours of roznamcha of the P.S., memo of arrest, recovery, and seizure, attested carbon copy of arrival entry No.22 at 1400 hours of roznamcha of the P.S., carbon copy of FIR, photocopy of letter for sending the case property to the laboratory duly received at the laboratory, and the examination report as Ex.8/A to Exh.8/F; PW-2 ASI Koral Shah at Ex.9 and thereafter, prosecution side was closed at Ex.10.

4. Statement of accused was recorded u/s 342 Cr.P.C. at Ex.11. Accused denying prosecution allegations claimed his false implication in this case. Accused neither examined himself on oath in disproof of the prosecution allegations nor led any evidence in his defence.

5. Learned trial Court 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.

6. Learned trial court in the impugned judgment dated 31.10.2016 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.

7. Mr. Farhad Ali Abro, learned advocate for appellant has mainly contended that prosecution case is highly doubtful; 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. Lastly argued that accused has been involved in this case falsely due to enmity to teach him a lesson and for all the above reasons the appellant should be acquitted. In support of his contentions, learned counsel for the appellant relied upon the cases of **Amjad Ali v. The State** (2012 SCMR 577), **Ikramullah and others v. The State** (2015 SCMR 1002), **Mohsin v. The State** (2017 MLD 674), **Muhammad Hashim and another v. The State** (2017 PCr.LJ 409) and **Ameer Zeb v. The State** (PLD 2012 SC 380).

8. Shehzado Saleem Nahiyoon, the learned D.P.G. fully supported the impugned judgment and submitted that the prosecution had proved its case beyond a reasonable doubt and that any contradictions between PW's evidence was minor; likewise any procedural irregularities and that the chemical had been sent for test to the examiner without undue delay and that it had been kept in safe custody throughout and as such there was no legal infirmity in the impugned judgment which should be upheld.

9. We have heard the learned counsel for the parties, scanned the entire evidence with their able assistance and considered the relevant law.

10. We have come to the conclusion that prosecution has failed to establish its case against the appellant beyond a reasonable doubt for the following reasons; that it was a busy area during the daytime but apparently no efforts have been made to pick up an independent person of the locality to witness the arrest and recovery proceedings. There was also nothing on record that complainant had even attempted to call any private person to act as mashir. This may not be a fatal flaw in the prosecution case but it adds suspicion especially when the accused pleads false implication; Likewise the complainant also acted as the IO which although not unlawful tends to raise suspicions in cases of alleged false implication and that it appears that only a very small quantity of charas i.e only 400 grams out of 40Kg was sent for chemical examination which may not be sufficient to prove that the whole recovery was charas and that it does not particularly appeal to reason that a person would be carrying/or how he would be carrying such a large quantity of narcotics (40 KG)

on a pedal bike (not a motor cycle) and allowed himself to be caught by persons chasing him on foot.

11. Most significantly, we find that there is very little, if any, 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 and that PC A.Wahid who delivered the chemical to the chemical examiner has not been examined as to its safe custody. We note that in the recent case of **Muhammad Sarfraz V The State (2017 SCMR 1874)** where there was no negative evidence of non safe custody the conviction was upheld. **Muhammad Sarfraz's case** (Supra) however was by a two member bench of the Hon'ble Supreme Court and the case of **Ikramullah & others v/s. the State** (2015 SCMR 1002) which was by a three member bench does not seem to have been brought to its attention. In **Ikramullah's case** (Supra) the emphasis was on the **positive proof** of safe custody of the narcotic by the prosecution from the time of its recovery until the time it went for chemical examination which would rule out any possibility of the narcotic being tampered with. Since **Ikramullah's case** (Supra) was decided by a three member bench of the Hon'ble Supreme Court and was not brought to the attention of the Hon'ble Supreme Court in **Muhammad Sarfraz's case** (Supra) we are inclined to follow **Ikramullah's case** (Supra) in respect of safe custody of the narcotic.

12. Thus, in our view in this case since there is a possibility that the narcotic during the time it was recovered from the appellant and was sent for chemical analysis may not have been kept in safe custody and may have been tampered with and as such we find that 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 **Ikramullah's case** (Supra), 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."** (bold added)

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 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."

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 are set aside and the appellant is acquitted. These are the reasons for our short order which was announced in open court today which reads as under:

> "Parties' Advocates have been heard at length. They have concluded their arguments. For the reasons to be recorded later on, this appeal is allowed and the impugned judgment dated 31.10.2016 passed by the Special Judge (CNS) / Ist Additional Sessions Judge, Hyderabad in Special Case No.37 of 2012 arising out of Crime No.52 of 2012 of P.S Hali Road, is set-aside. Appellant is confined in Central Prison, Hyderabad. He is ordered to be released forthwith if not required in any other custody case."