

Narcotics acquitted

Safe Custody

NRB Resa who took charge to examine was element

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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-56 of 2018.

Mubeen Khan

Versus.

The State.

Appellant : Mubeen Khan (present on bail)	Through Mr. Hameedullah Dahri, Advocate.
Respondent : The State	Through Ms. Romeshan Oad, A.P.G.
Date of hearing	17.09.2018
Date of judgment	17.09.2018

**J U D G M E N T**

**MOHAMMAD KARIM KHAN AGHA, J.-** This appeal is directed against the judgment dated 10.04.2018 passed by learned Special Judge for CNS, Shaheed Benazirabad, in Special Case No.193 of 2016, arising out of Crime No.31 of 2016, registered at Police Station Taluka Nawabshah, under section 9(c) of the Control of Narcotic Substances Act, 1997 (CNSA), whereby the appellant Mubeen Khan has been convicted u/s 9(c) CNSA and sentenced to suffer RI for 03 years and to pay the fine of Rs.15,000/-. In case of default in payment of fine he was ordered to suffer simple imprisonment for 05 months 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 22.04.2016 at about 1215 hours from near Mori of Waris Ali Shah Rohri Canal, by a police party headed by Inspector/SHO Habibur Rehman alongwith his subordinate staff namely HC Ghanwar Khan and others. Accused Mubeen Khan was said to be found possessing contraband item weighing 1800 grams, which was sealed for



sending the same to the chemical examiner for analysis and report. Thereafter, memo of arrest and recovery was prepared at the spot in presence of mashirs. Then accused and case property were brought at police station where F.I.R. was lodged by complainant Inspector/SHO Habibur Rehman on behalf of the State under section 9(c) CNSA.

3. 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.2 u/s 9(c) CNSA, to which, accused pleaded not guilty and claimed to be tried. At the trial prosecution examined PW-1 complainant Inspector Habibur Rehman at Ex.3, who produced mashirnama of arrest, search and recovery, F.I.R., attested copy of roznamcha entries, and report of Chemical Examiner at Ex.3-A to 3-D respectively; PW-2 HC Ghanwar Khan Zardari was examined at Ex.4; PW-3 PC Dilbar was examined at Ex.5, who produced attested copy of RC at Ex.5-A and thereafter, prosecution side was closed at Ex.6.

5. Statement of accused was recorded u/s 342 Cr.P.C. at Ex.7. The accused denied the prosecution allegations and claimed his false implication in this case by PW Ghawar Khan Zardari with whom he had a tribal dispute.

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. 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. Hameedullah Dahri, learned advocate for appellant has 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; that the complainant was also the IO; that the alleged contraband item was sent for chemical examination after a delay of three days; that there was no evidence that the chemical was kept in safe custody during this period; that the small amount of narcotic had been foisted on the accused due to tribal rivalries and the fact that the accused was first offender bolstered this claim and that the accused had already spent 18 months in jail on account of



a 3 year sentence before being released on bail and on account of all the above reasons he submitted that the appellant was entitled to be acquitted.

9. Ms. Romeshan Oad, the learned A.P.G. fully supported the impugned judgment although she admitted that there may be some issues regarding the safe recovery of the narcotic after its recovery and before it was sent to the chemical examiner.

10. We have carefully heard the learned counsel for the parties, scanned the entire evidence and considered the relevant law.

11. We have come to the conclusion that prosecution has failed to establish its case beyond a reasonable doubt for the following reasons; that the alleged place of incident was a busy area but apparently no efforts have been made to pick up an independent person of the locality to witness the arrest and recovery proceedings despite it being a day light incident although this is not fatal to the prosecution case independent witnesses were important in this case due to the allegation of tribal rivalries which led to the alleged false implication of the accused by PW Ghawar Khan Zardari; that the complainant was also the IO and although again this is not unlawful it is undesirable especially when the accused has taken the plea of false implication on account of tribal rivalries by one of the police party as per his S.342 statement and cross examination; that the 3 day delay in sending the chemical to the chemical examiner is not fatal to the prosecution case. **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 although PC Dilbar who took the chemical to the chemical examiner has been examined in respect of safe custody in his own evidence **he admits** that he was handed the chemical by a WHC to take the chemical to the chemical examiner however there is no evidence who this WHC was and it appears that he/she was not examined as to the safe custody of the recovered narcotic. In the 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 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. The Appellant is on bail and as such his bail bonds are cancelled and sureties are discharged. 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 10.04.2018 passed by the Special Judge (NARCOTICS) Shaheed Benazirabad in Special Narcotics Case No.139 of 2016, arising out of Crime No.31 of 2016 of P.S Taluka Nawabshah, is set-aside and consequently the appellant is acquitted of the charge. Appellant *Mubeen Khan alias Kando* is present on bail, his bail bond stands canceled and surety is hereby discharged."