

Narcotics - S.M. Cuthby
NFR

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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-51 of 2018.

Jan Muhammad @ Janu

Versus

The State.

Appellant : Jan Muhammad @ Janu (present on bail)	Through Syed Tarique Ahmed Shah, Advocate.
Respondent : The State	Through Mr. Muhammad Ayoob Kassar, Special Prosecutor ANF.
Date of hearing	26.09.2018
Date of judgment	26.09.2018

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J.- This appeal is directed against the judgment dated 10.04.2018 passed by learned Sessions/Special Judge for CNS: Hyderabad, in Special Case No.12 of 2016, arising out of Crime No.D040403716, registered at Police Station ANF, Hyderabad, under section 9(c) of the Control of Narcotic Substances Act, 1997 (CNSA), whereby the appellant Jan Muhammad @ Janu has been convicted u/s 9(c) CNSA and sentenced to suffer RI for 05 years and to pay fine of Rs.100,000/-. In case of default in payment of fine he was ordered to suffer imprisonment for 04 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 26.10.2016 at about 1200 hours from near Muhammadi Chowk near Shell Petrol Pump, Hyderabad by a police party headed by Inspector Nisar Ahmed alongwith his subordinate staff namely PC Kashan and others. Accused Jan Muhammad @ Janu was said to be found possessing contraband item weighing 4500 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 Nisar Ahmed 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 Nisar Ahmed at Ex.6, who produced mashirnama of recovery/arrest, copies of entries, FIR, extract of malkhana entry No.141 and letter to chemical examiner, copies of entries No.13 and 9 about sending the property to chemical examiner and return of HC Ghulam Muhammad besides chemical report and the chart of previous record of the accused at Exh.6/A to 6/J; PW-2 mashir/eye witness PC Yasir was examined 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.

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. 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; there are material contradictions in prosecution evidence, hence it cannot be safely relied upon; that the alleged contraband item was sent for chemical examination on 27.10.2016 with a delay of one day and tampering with the case property during such period could not be ruled out especially as no evidence has been brought on record that the narcotic substance was in safe custody during that period; that though the Chemical report was in positive however, it was without required certification of the Chemical Examiner.

Lastly, he prays that appeal of the appellant be allowed and the impugned judgment be set aside. He relied upon the case of **Taimoor Khan and another V The State and another** (2016 SCMR 621).

9. Learned Special Prosecutor ANF fully supported the impugned judgment and in particular contended that the recovered chemical had been in safe custody following its recovery until the time it was sent and received in the office of Chemical Analyzer for chemical examination and as such this appeal should be dismissed. He relied upon the cases of **Liaquat Ali and another V The State** (2018 PCr.LJ 257), **Ghulam Shabir Shar V The State** (2018 PCr.LJ 829) and **Muhammad Sarfraz V The State and others** (2017 SCMR 1874).

10. We have heard the learned counsel for the parties, scanned the entire evidence with their able assistance 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 main reasons; that the police had advance knowledge that the appellant was in possession of narcotics but despite knowing this failed to take an independent mushir along with them or even recruit an independent Mushir from the spot which admittedly was a busy area in day light hours to witness the arrest and recovery proceedings which although not unlawful raises suspicion; that the complainant was also the IO which although not unlawful again raises suspicion especially when the appellant has raised the plea of false implication on account of political grounds; that two DW's have supported the appellants contention that he was arrested by the police from his home; that as per record on 27.10.2016 the contraband item was sent for chemical examination and as per report it was received in the office of Chemical Examiner on same day with a delay of 01 day after allegedly being kept in the Malkhana during this time and while such delay is not hugely significant the issue of the format of the chemical report/certificate and safe custody of the narcotic from the time of its recovery until its chemical examination is.

12. **Most significantly**, we find that the format of the chemical report/certificate is not as prescribed by law which has been admitted by the special prosecutor ANF and 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 received by the chemical examiner after an unexplained delay of

one day, that HC Ghulam Mohammed who took the chemical to the chemical examiner has not been examined as to the safe custody of the recovered narcotic and nor has the Incharge of the Malkhana. 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.

13. 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 received by the chemical examiner 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 and in properly filling out the chemical report/certificate 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)

14. Under these circumstances and for the other reasons mentioned above when taken together 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."

15. 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; the impugned judgment dated 10.04.2018, passed by the learned Sessions / Special Judge (CNS) Hyderabad in Special Case No.12/2016, arisen out of Crime No.D040403716 of Police Station ANF Hyderabad is set aside and the appellant, who is present on bail, is acquitted of the charge. His bail bond is cancelled and surety stands discharged."