

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

Cr. Appeal No.D-168 of 2006.

PRESENT

Mr. Justice Naimatullah Phulpoto

Mr. Justice Muhammad Karim Khan Agha.

Date of Hearing: 10.05.2017

Date of Judgment: 10.05.2017

Appellantss/accused: (1) *Muhammad Umer.*
(2) *Bashir Ahmed.*
(3) *Muhammad Hanif*
(4) *Zulfiqar alias Bhutto.*

*Through Mr. Noor Ahmed Memon,
Advocate*

The State: *Through Syed Meeral Shah Bukhari,
Deputy Prosecutor General, Sindh.*

JUDGMENT

NAIMATULLAH PHULPOTO, J:- Appellants were tried by learned Special Judge for C.N.S. Badin, in Special Case No.89 of 2005 for the offence under Section 9(b) Control of Narcotic Substances Act, 1997, in crime No.12 of 2005. By judgment dated 22.08.2006 appellants were convicted under Section 9(b) Control of Narcotic Substances Act, 1997 and sentenced to 02 years R.I. and to pay a fine of Rs.10,000/- each, in default thereof the appellants were also to suffer R.I for 15 days more. Benefit of Section 382(B) Cr.P.C was extended to the appellants/accused.

2. Brief facts of the prosecution case as reflected from the FIR are that on 22.05.2005 a Police party of Police Station Kadhan headed by SIP/S.H.O. Fakir Yar Muhammad left Police Station vide Roznamcha Entry No.04 for patrolling duty at 8-30 a.m. when the police party reached at Rajwah Mori, they received spy information that accused persons namely Umer Lohar, Bashir Ahmed Lohar, Zulfiqar Ali alias Bhutto and Muhammad Hanif were selling charas in the bushes near graveyard and Eidgah. Pursuant to such information, police party proceeded to the pointed place and reached there at 9-30 a.m. and saw the present accused standing there who while seeing the police party tried to run away, out of whom, it is alleged that accused Umer and Bashir Ahmed were surrounded and caught hold. Whereas accused Muhammad Hanif and Zulfiqar alias Bhutto escaped from the scene of occurrence while throwing plastic thelis carried by them. It is stated that police searched the thelis thrown away by accused Muhammad Hanif and Zulfiqar alias Bhutto which contained charas weighing 125 grams and 140 grams respectively. Out of which, it is stated that 10 grams each were separated and sealed separately for sending to the Chemical Examiner for analysis. It is also mentioned in the F.I.R. that police recovered one plastic theli from the possession of accused Muhammad Umer it contained charas and there were 12 pieces of charas weighing 115 grams. Cash of Rs.80 was also recovered from his possession. From the personal search of accused Bashir Ahmed Lohar a plastic theli was also recovered from the fold of his shalwar containing large and small pieces of the charas weighing 120 grams. Cash of Rs.70 was also recovered from his possession. 10 grams from each piece were separated and separately sealed for sending to the Chemical Examiner for analysis.

Mashirnama of arrest and recovery was prepared in presence of the mashirs namely ASI Gul Hassan and P.C. Bashir Ahmed. Thereafter, accused and case property were brought to the Police Station where F.I.R. was lodged against the accused by SIP Fakir Yar Mohammad on behalf of the State vide crime No.12 of 2005 under Section 9(b) Control of Narcotic Substance Act 1997.

3. During investigation, samples were sent to the Chemical Examiner for analysis on 31.5.2005. Positive chemical report was received. On the conclusion of the investigation, challan was submitted against the accused Muhammad Umer and Bashir Ahmed under section 9(b) Control of Narcotic Substance Act 1997. Remaining two accused were shown as absconders. They were subsequently arrested.

4. The trial court framed the charge against all the four accused under section 9(b) Control of Narcotic Substance Act 1997 at Ex.2. Accused pleaded not guilty and claimed to be tried.

5. At the trial, prosecution examined P.W-1 SIP Fakir Yar Muhammad at Ex.7, who produced mashirnama of arrest and recovery at Ex.8, F.I.R. at Ex.9, positive chemical report at Ex.10. P.W.2 mashir ASI Gul Hassan at Ex.12. Thereafter, prosecution side was closed.

6. Statements of accused were recorded under Section under Section 342 Cr.P.C at Ex-14 to 16, in which the accused claimed their false implication in this case and denied the prosecution allegations. Regarding positive Chemical Examiner's report, it is stated that it has been managed. Further it is stated that P.Ws are interested and subordinate to the complainant. Accused

Muhammad Bashir in a question; What else he has to say? replied, that he was innocent and he has been falsely implicated in this case at the instance of ASI Ashique Hussain of Police Station Kadhan as his brother Khadim Hussain had filed Direct complaint against the police officials in the court of II-Additional Sessions Judge Badin and he has produced certified true copy of the Direct complaint No. 270 of 1997.

7. Learned Trial Court after hearing the learned Counsel for the parties and assessment of the evidence available on record, by judgment dated 22.08.2006, found all the accused guilty of the charge and they were convicted and sentenced as stated above. Hence, this appeal.

8. The facts of this case as well as evidence produced before the Trial Court find the elaborate mention in the judgment passed by the Trial Court dated 22.08.2006, therefore, the same may not be reproduced here, so as to avoid duplication and unnecessary repetition.

9. Mr. Noor Ahmed Memon, learned Advocate for the appellants has mainly argued that it was the case of spy information but S.H.O. failed to associate with him the private persons from the village around the place of recovery. It is contended that Sub-Inspector failed to take sample from each piece / Puri for sending to the Chemical Examiner. It is also contended that according to the case of prosecution charas was recovered from the possession of the accused on 22.5.2005 but it was sent to the Chemical Examiner on 31.05.2005 and delay in sending charas has not been explained. It is also argued that charas was lying in the Malkhana of Police

Station for more than 10 days unattended neither W.H.C. of the Police Station nor the P.C. who had taken the samples to the Chemical Examiner has been examined to prove the safe custody/transit of the samples. It is also contended that prosecution story was unbelievable. Lastly argued that police party was armed with official arms and ammunitions, it was day time and two accused persons namely Zulfiqar Ali alias Bhutto and Muhammad Haneef ran away from the police and no effort was made by the police to capture them. In support of his contentions, he has relied upon the case reported as *IKRAMULLAH & OTHERS v. THE STATE [2015 SCMR 1002]*.

10. Syed Meeral Shah Bukhari, learned D.P.G conceded to the contentions raised by learned counsel for the appellants and argued that arrival and departure entries of the Roznamcha of the Police Station have not been produced before the trial court. Learned D.P.G. has submitted that there was no evidence that charas was in the safe custody from the date of recovery till it was transmitted to the Chemical Examiner for the opinion. He has also argued that there was no evidence that samples were taken from each piece / puri for sending to the Chemical Examiner. Learned D.P.G. did not support the impugned judgment.

11. We have carefully heard learned Counsel for the parties and scanned the entire prosecution evidence and examined the defence plea.

12. From the perusal of the evidence, it transpired that it was the case of spy information S.H.O. had sufficient time to call the private persons from the village situated near the place of arrest of

the accused but no effort made by the S.H.O. It has also come on record that S.H.O. arrested accused Muhammad Umer and Bashir Ahmed and remaining two accused ran away from the police party when police was armed with official arms and ammunition. Evidence of police officials did not inspire confidence. We have also observed that from the substance/charas recovered from the possession of the accused small quantity was not drawn/taken from each piece which was the requirement of the law for sending to Chemical Examiner for analysis. Evidence reflected that no arrival and departure entries of the Police Station were produced to satisfy the court that police party had actually left on 22.05.2005 for patrolling duty. Non-production of Roznamcha entries have cut the roots of prosecution case. Learned Advocate for the appellants has also referred to the material contradictions in the evidence of the prosecution witnesses. S.H.O. has deposed that he caught hold accused Muhammad Umer whereas ASI/Mashir has deposed that S.H.O. caught hold accused Bashir Ahmed and ASI had caught hold accused Muhammad Umer. There are also other material contradictions on some material particulars of the case. Accused Muhammad Haneef has produced copy of the Direct complaint filed against the ASI Ashique Hussain of Police Station Kadhan and other police officials in order to show that Khadim Hussain complainant in the said direct complaint is his brother and on account of filing of the Direct complaint by his brother against the police officials, this false case has been registered against the accused persons. According to the case of prosecution, alleged recovery of charas was made from the possession of the accused persons on 22.05.2005 but same was sent to the Chemical Examiner on 31.05.2005. Delay of more than 10 days in sending charas to the Chemical Examiner has not been explained by the

prosecution. Even no evidence has brought on the record that charas was in the safe custody during that period. W.H.C. of the Police Station with whom charas was deposited for sending to the Chemical Examiner has also not been examined. Learned Advocate for the appellants has contended that there was tampering with the case property. Non-examination of W.H.C. of the Police Station and P.C Waheed Khan who had taken the samples to the Chemical Examiner, would be beneficial circumstance for the accused persons.

13. Not a single word has been deposed by P.W.1 SIP Fakir Yar Mohammad as well as P.W.2 mashir ASI Gul Hassan that the Charas was in the safe custody in between 22.05.2005 and 31.05.2005. In the above stated circumstances, positive report of Chemical Examiner would not improve the case of prosecution. In this respect, rightly reliance has been placed upon the case of **IKRAMULLAH & OTHERS V. THE STATE** reported in 2015 SCMR 1002. Relevant portion is reproduced as under:-

“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 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.”

14. We have already observed that prosecution case appears to be unnatural and unbelievable. Police officials were armed with official arms and ammunitions. It is unbelievable that two accused persons Muhammad Haneef and Zulfiqar alias Bhutto succeeded in running away and police failed to capture them. In this case there are several circumstances which have created serious doubts in the prosecution case. It is settled law that a single circumstance which creates doubt in the prosecution case is sufficient to extend benefit of doubt to the accused. 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 as held by Honourable Supreme Court in the case of **TARIQ PERVEZ v. THE STATE** [1995 SCMR 1345].

15. For the above reasons, while relying upon the above cited authorities, we have no hesitation to hold that prosecution has failed to establish its case against the appellants. There are number of infirmities in the prosecution evidence while extending benefit of doubt the appeal is allowed, impugned judgment dated 22.08.2006 is set-aside and the appellants are acquitted of the charge. Learned Advocate for the appellants submits that appellant Bashir Ahmed is lying ill and requests that his absence may be excused. The

appellants who are on bail, their bail bond stands cancelled and surety is hereby discharged.

JUDGE

JUDGE

Arif