

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

Cr. Appeal No.D-136 of 2012

PRESENT

Mr. Justice Naimatullah Phulpoto

Mr. Justice Muhammad Karim Khan Agha.

Date of Hearing: 08.05.2017

Date of Judgment: 08.05.2017

Appellant/accused: Ahmed Chandio
Through Mr. Mian Taj M. Keerio,
Advocate

The State: Through Syed Meeral Shah
Bukhari, D.P.G. Sindh.

JUDGMENT

NAIMATULLAH PHULPOTO, J:- Appellant Ahmed

Chandio was tried by Special Judge CNS Shaheed Benazirabad, in Special Case No.284 of 2010, for the offence under Section 9 (b) Control of Narcotic Substances Act, 1997. By judgment dated 07.04.2012, the appellant was convicted under Section 9(b) Control of Narcotic Substances Act, 1997 and sentenced to 06 months S.I and to pay a fine of Rs.1000/-, in default thereof appellant was ordered to suffer S.I for 05 days more. Benefit of Section 382 Cr.P.C was extended to the appellant/accused.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 02.09.2010 SI / S.H.O. Mohammad Sulleman of Police Station Daur, left Police Station along with

his subordinate staff namely ASI Syed Shahenshah and P.Cs Mukhtiar Ali and Ali Sher in the Government vehicle driven by H.C. Muhammad Ayooob vide roznamcha entry No.19 at 1815 hours for patrolling. While patrolling at various places when the police party reached at Daur Nawabshah road at 1850 where it is alleged that Sub-Inspector received spy information that present accused namely Ahmed Chandio was standing at Sim Nala and he was selling Charas. On such information police party proceeded to the pointed place and reached there at 1900 hours and saw the present accused standing at Sim Nala. Accused while seeing the police mobile tried to run away but he was surrounded and caught hold. Private persons were not available, as such, Sub-Inspector made ASI Syed Shahenshah and P.C. Mukhtiar Ali as mashirs. On inquiry, he disclosed his name as Ahmed s/o Mitho by caste Chandio resident of Hussainabad Daur City. Finding him in a suspicious manner, his personal search was conducted. From his personal search from the side pocket of his shirt a plastic bag was recovered it was opened in presence of Mashirs. It contained Charas. The Charas was weighed in presence of the Mashirs. It was 300 grams out of which, it is alleged that 100 grams were sealed separately for sending to the chemical examination, while the remaining 200 grams were separately sealed at the spot. Mashirnama of arrest and recovery was prepared. Thereafter, the accused and case property were brought to the Police Station Daur, where it is alleged that S.H.O. Muhammad Sulleman lodged F.I.R. against the accused on behalf of the

State. It was recorded vide crime No.85 of 2010, under section 9(b) Control of Narcotic Substance Act 1997.

3. After registration of the F.I.R. copy of the F.I.R., Mashirnama, custody of the accused and case property were handed over to the S.I.O. Azizullah. During the investigation, sample was sent to the Chemical Examiner on 06.09.2010 for chemical analysis through P.C. Ashique Hussain. Positive chemical report was received. On completion of the investigation, challan was submitted against the accused under Section 9(b) Control of Narcotic Substances Act, 1997.

4. Trial Court framed the charge against the accused Nisar Ahmed under Section 9(b) of CNS Act, 1997 at Ex-4. Accused pleaded not guilty and claimed to be tried.

5. At the trial, prosecution examined P.W-1 SIP / Muhammad Sulleman at Ex.6, who produced Mashirnama of arrest and recovery at Ex.6-A, F.I.R. of crime No.85 of 2010 at Ex.6-B, arrival and departure entries 19 & 21 at Ex.6-D. P.W-2 Mashir/ASI Syed Shahenshah at Ex-7, who produced Mashirnama of place of wardat at Ex.7-A. P.W.3 S.I.O. Azizullah Morio at Ex.8 who produced positive chemical report at Ex.8-A. Thereafter, the prosecution side was closed vide statement at Ex-09.

6. Statement of the accused under Section under Section 342 Cr.P.C. was recorded at Ex-10, in which the accused claimed his false implication in this case and denied

the prosecution allegations. Plea is raised by the accused that he has been involved in this case falsely at the instance of Choudhry Ghaffar who has dispute with him over the land. Accused has further stated that P.Ws have deposed against him as they are police officials and interested. Accused wanted to examine one Sultan in his defence. Later-on gave up the said P.W. Sultan on the ground that he has proceeded to Dubai. He prayed for justice. Accused did not lead any evidence in defence and declined to examine himself on oath in disproof of prosecution allegations.

7. Learned Trial Court after hearing the accused in person and learned DPP and examining the evidence available on record, convicted and sentenced the accused 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 07.04.2012, therefore, the same may not be reproduced here, so as to avoid duplication and un-necessary repetition.

9. Mr. Mian Taj Muhammad Keerio, learned Advocate for the appellant mainly contended that accused was unrepresented during the trial and trial court has failed to perform its duty by putting material questions from the witnesses in order to ascertain the truth. It is also contended that it was the case of spy information, the S.H.O. had sufficient

time to call independent persons of the locality to witness the recovery proceedings but it was not done by him for the reasons best known to him. He has also argued that no fake consumer has been examined by the prosecution to prove that accused was selling Charas at the relevant time. It is also argued that Charas was recovered from the possession of the accused on 02.09.2010 but after four (04) days on 6.9.2010 it was sent to the Chemical Examiner for analysis through P.C. Ashique Hussain. It is submitted that neither P.C. Ashique Hussain has been examined nor W.H.C. of the Malkana regarding the safe custody of the Charas during that period. It is also argued that accused was of unsound mind and not proper opportunity was provided to him to defend himself and prosecution case is highly doubtful and appellant has been involved in this case at the instance of Choudhry Ghaffar. In support of his contentions, he has relied upon the cases of he has relied upon the cases reported as *IKRAMULLAH & OTHERS v. THE STATE [2015 SCMR 1002]*, and *SHAUKAT ALI v. THE STATE [2004 Y.L.R.356]*.

10. Syed Meeral Shah Bukhari, learned D.P.G. conceded to the contentions raised by learned Advocate for the appellant and stated that it was the case of spy information and no effort was made by the Investigation Officer to call private persons of the locality to witness the recovery proceedings. Learned D.P.G. after going through the evidence concedes that there was no evidence that Charas was in the safe custody in

the Malkhana so also at the time of transit to the Chemical Examiner. In these circumstances learned D.P.G. did not support the judgment of the trial court.

11. We have carefully heard learned Counsel for the parties and perused the evidence.

12. We have come to the conclusion that prosecution has failed to prove its case against the appellant for the reasons that appellant was tried by learned Special Judge under the provisions of Control of Narcotic Substance Act 1997, which is the special law and severe punishment has been provided in the said Act. Accused was unrepresented during the trial. It was the duty of the trial court to have put up the material questions from the prosecution witnesses in order to ascertain the truth. We are of the considered view that trial court failed to perform its duty in accordance with law. It is the case of the prosecution that police officials left for patrolling duty and on the spy information proceeded to the place of arrest and recovery. From the evidence it is evident that no serious efforts were made by the S.H.O. to call the private persons to make them as Mashirs in this case. Allegations against the appellant is that he was selling Charas to whom he was selling the Charas, prosecution evidence is silent. After recovery, sample was kept in the Malkhana after 04 days, it was sent to the Chemical Examiner through P.C. Ashique Hussain. Neither W.H.C. of Police Station has been examined in order to satisfy the court that Charas was in the safe custody

during that period nor P.C. Ashique Hussain has been examined who had taken Charas to the Chemical Examiner. Learned advocate for the appellant has raised objection that there was tampering with the sample and claimed false implication of the appellant at the instance of Choudhry Ghaffar. We have also noticed that no fake customer has been examined. In these circumstances learned D.P.G. has rightly conceded to the contentions raised by learned advocate for the appellant.

13. In our considered view, there was no evidence to satisfy the court that Charas was in the safe custody after its recovery and safely it was transmitted to the Chemical examiner for analysis. No independent person has been examined though it was the case of the appellant that he has been involved falsely in this case at the instance of Choudhry Ghaffar. In these, circumstances no reliance can be placed upon the evidence of the police officials without independent corroboration which is lacking in this case.

14. In the above stated circumstances, positive report of Chemical Examiner would not improve the case of prosecution. On the point of safe custody of recovered substance as well as safe transmission of sample to Chemical Examiner, 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. For giving benefit of doubt, 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 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 appellant and the trial court has failed to examine the evidence of P.Ws according to the settled principle of law. There are number of infirmities in the prosecution evidence, case of the prosecution is doubtful. While extending benefit of doubt appeal is allowed, impugned judgment dated 07.04.2006 is set-aside and the appellant is acquitted of the charge. Learned Advocate for appellant submits that appellant is unsound mind. After suspension of the sentence he has gone to some unknown place. His bail bond stands cancelled and surety is hereby discharged.

JUDGE

JUDGE

Arif