IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Appeal No.D-295 of 2010

PRESENT
Mr. Justice Naimatullah Phulpoto
Mr. Justice Zulfiqar Ahmad Khan.

Date of Hearing:	*26.04.2017*
Date of Judgment:	*26.04.2017*
Appellant/accused:	*Saeed Wahab through Mr. Nandan A. Kella, Advocate*
The State:	*Through Syed Meeral Shah Bukhari, Deputy Prosecutor General, Sindh.*

J U D G M E N T

***NAIMATULLAH PHULPOTO, J*:-** Appellant Saeed Wahab was tried by learned Sessions Judge/Special Court (C.N.S) Mirpurkhas, in Special Case No.03 of 2007 for the offence under Section 9(c) Control of Narcotic Substances Act, 1997, in crime No.07 of 2006. By judgment dated 04.08.2010, the appellant was convicted under Section 9(c) Control of Narcotic Substances Act, 1997 and sentenced to suffer 04 years R.I and to pay a fine of Rs.10,000/-, in default thereof the appellant was also to suffer S.I for 06 months more. Benefit of Section 382(B) Cr.P.C was extended to the appellant/accused.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 23.12.2006 DIO Farooq Aslam Bajwa of

Excise Mirpurkhas, on the direction of Excise Minister along with E.T.O. Syed Ghulam Nabi Shah, Excise Inspector Mohammad Ismail and other Excise officials left Excise Police Station in the Government vehicles vide Roznamcha Entry No.17 at 0800 hours for arrest of the persons involved in the narcotics. When Excise officials reached at Samaro More near Kot Ghulam Mohammad town they received spy information that present accused was selling Charas at Baloach Para at Kot Ghulam Mohammad. Excise officials proceeded to the pointed place and saw the present accused standing there and he was carrying a plastic bag in his hand. He was surrounded and caught-hold. The accused disclosed his name as Saeed Wahab son of Mohammad Pathan resident of Baloach Para Kot Ghulam Mohammad. The plastic bag was secured from his possession by Excise Inspector. It contained 200 rods of the Charas and 5 small and big pieces of Charas. It is mentioned that due to non-availability of public mashir, Excise Constable Jawaid Iqbal and Abdul Hussain were made as Mashir. The Charas was weighed it became 3 Kilograms out of which 10 grams were sealed separately for chemical examination, while the remaining 2990 grams were separately sealed. Personal search of the accused was conducted and cash of Rs.1,70,420/- was recovered. Thereafter, the accused and case property were brought to the Police Station, where FIR was registered against the accused on behalf of the State by Excise Inspector, it was recorded vide Crime No.07/2006 for offence under Section 9(c) Control of Narcotic Substances Act, 1997.

3. During the investigation, 161 Cr.P.C statements of P.Ws were recorded and samples were sent to the Chemical Examiner on 27.12.2006. Positive chemical report was received. On completion of the investigation, challan was submitted against the accused under Section 9(c) Control of Narcotic Substances Act, 1997.

4. Trial Court framed the charge against the accused under Section 9(c) of CNS Act, 1997 at Ex-2. Accused pleaded not guilty and claimed to be tried.

5. At the trial, prosecution examined P.W-1 DIO Farooq Aslam at Ex.5, who produced attested copy of arrival and departure roznamcha entries No.17 and 18, Mashirnama of arrest and recovery at Ex.5-A and 5-B, F.I.R. bearing crime No.07 of 2006 for offence under section 9(c) Control of Narcotic Substance Act 1997 at Ex.5-C and report of Chemical Examiner at Ex.5-D. P.W-2 Mashir Excise Constable Jawaid Iqbal at Ex-6. Thereafter, the prosecution side was closed vide statement at Ex-08.

6. Statement of accused under Section under Section 342 Cr.P.C was recorded at Ex-09, in which the accused claimed his false implication in this case and denied the recovery of the charas from his possession. Accused examined himself on oath and his statement on oath was recorded at Ex.10. He has produced attested copy of Judgment passed in S.C. No.44 of 2006, news clippings and challan sheet

of Crime No.189 of 2009 of Police Station Kot Ghulam Mohammad and raised plea that he has been involved in this case at the instance of his enemies.

7. Learned Trial Court after hearing the learned Counsel for the parties 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 04.08.2010, therefore, the same may not be reproduced here, so as to avoid duplication and un-necessary repetition.

9. Mr. Nandan A. Kella, learned Advocate for the appellant mainly contended that it was a case of spy information but Excise officials failed to associate the respectable persons of the Mohalla to act as mashir in this case. It is also argued that prosecution case is highly unbelievable. According to the defence counsel 200 rods of the Charas and 05 big and small pieces of the Charas total 3000 grams was recovered from the possession of the accused but only 10 grams was sent to the Chemical Examiner. Counsel for the appellant submits that it is not clear that from which pieces / rods sample was drawn / separated for sending to the Chemical Examiner. Learned Advocate for the appellant further argued that there are material contradictions in the evidence of the

complainant and the Mashir on so many material particulars of the case. It is also argued that E.T.O. Syed Ghulam Nabi Shah who had supervised the raid has not been examined by the prosecution. Counsel for the appellant further argued that there are material contradictions in the evidence of the prosecution with regard to the recovery proceedings. Counsel has also drawn attention of the Court to the Roznamcha Entry No.17 dated 04.12.2006 and there is overwriting in the said Entry. Lastly it is contended that there was 04 days' delay in sending the sample to the Chemical Examiner. According to the defence counsel in fact the delay was caused for tampering with the Charas lying in the Malkhana. In support of his contentions he has relied upon the cases reported as *IKRAMULLAH & OTHERS v. THE STATE [2015 SCMR 1002], ANSAR-UL-ISLAM v. THE STATE [P.L.D. 2005 Karachi 146], ABDUL MANAN and another v. THE STATE [2008 P.Cr.L.J. 1268], AKHTAR ALI v. THE STATE [2009 P.Cr.L.J. 50], ZAHID IQBAL v. THE STATE [2008 YLR 985], ABDUL QADIR v. THE STATE [2015 P.Cr.L.J. 235], THE STATE v. WARIS KHAN [2016 MLD 920], MUHAMMAD BOOTA v. THE STATE [2016 P.Cr.L.J. 1036], ASGHAR ABBASS v. THE STATE [2016 MLD 1002] and THE STATE v. MUHAMMAD SABIR alias SABIR [2016 P.Cr.L.J. 859].*

10. Syed Meeral Shah Bukhari, learned D.P.G conceded that it is not clear in the prosecution evidence that 10 grams of the Charas was separated / drawn from which

rods/pieces of the Charas. He has also submitted that there was no evidence that the Charas was in the safe custody for 04 days. Overwriting in the departure and arrival Entries No.17 and 18 has also been admitted by learned D.P.G. In the view of above learned D.P.G. did not support the prosecution case.

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

12. From the perusal of the evidence it transpires that Farooq Aslam Bajwa DIO Excise had left Excise Office on 23.12.2006 along with E.T.O. Syed Ghulam Nabi Shah and his subordinate staff for patrolling duty vide Roznamcha Entry No.17 and according to the prosecution case on the spy information accused was arrested and from his possession shopping bag was recovered that contained 200 rods of Charas and 5 small and big pieces out of which 10 grams were separated for sending to the Chemical Examiner. From the scanning of the evidence it transpires that it is not clear that the 10 grams sample was taken/drawn from which of 200 rods and 5 big / small pieces of Charas totalling 3000 grams. This question has not been resolved by the prosecution. According to the report of the Chemical Examiner, description of the articles have been mentioned in which it is mentioned that parcel contained two greenish brown semi soft pieces of rod with smell like charas. We have further observed that there is nothing available on the record to show whether sample for examination by Chemical Examiner was taken out from each

rod to ascertain that 200 rods were of Charas or some other commodity, having resemblance with the colour of Charas like Oil Cake (Khal) etc. It is to be noted that under Act, 1997 stringent sentences have been provided if offences charged against the accused falling within any component of section 9 are proved. Therefore, for such reason, Act 1997 has to be construed strictly and the relevant provisions of law dealing with the procedure as well as furnishing the proof like the report of expert, etc. are to be followed strictly in the interest of justice, otherwise in such-like cases it would be impossible to hold that total commodity recovered from the possession of accused was in fact Charas. However, in the given facts and circumstances of the case, it would be presumed that sample was taken out from only one rod. As far as remaining rods are concerned, in the absence of any sample taken out from them, it would not be possible to hold that they were the rods of Charas or otherwise. Therefore, taking into consideration this aspect of the case, we are of the opinion that for such reason, the case of the prosecution has become doubtful. We are fortified with the case of HASHIM v. THE STATE reported as P.L.D. 2004 Supreme Court 856.

13. Moreover, Excise officials / party was headed by Syed Ghulam Nabi Shah but he has not been examined by the prosecution and best evidence is withheld by the prosecution. Certainly its benefit shall go to the accused. There was also delay in sending the sample of Charas to the Chemical

Examiner. Charas was recovered from the possession of the accused on 23.12.2006 but it was sent to the Chemical Examiner on 27.12.2006. Not a single word has been deposed by the complainant / Investigating Officer as well as the Mashir that the Charas was in the safe custody in between 23rd and 27th of December, 2006. 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. It has further been observed that the sample was taken to the Chemical Examiner by Excise Constable Abdul Rasheed who has not been examined to satisfy the court that he safely handed over sample to the office of the Chemical Examiner at Karachi. According to the case of prosecution Excise officials had left to the Baloach Para on spy information but it is unbelievable that in the Baloach Para no private person was present at the time of arrest of the accused. Accused in his statement has raised plea that he has been falsely involved in this case at the instance of his enemies and he has produced the Judgment in support of his defence plea. According to the case of prosecution Excise officials had left Excise Office on 23.12.2006 vide Roznamcha Entry No.17 of which attested copy is produced as Ex.5-A but there is overwriting in the date of departure. All these factors if examined collectively would clearly show that prosecution has not been able to prove its case. In such circumstances it was quite unsafe to rely upon the evidence of the Excise officials without independent corroboration, which is lacking in this case. There are several circumstances in this case, which create doubt in the prosecution case. Reliance has been placed upon the case of ***KHALIL AHMED V/s. THE STATE*** *(PLD 2008 Karachi 8),* in which it is held as under:-

> *"18. In the circumstances, the case of the prosecution is highly doubtful. The conviction cannot be based on such type of trials which are marred by glaring infirmities. However, the trial Court resolved all the doubts in favour of prosecution and convicted the appellant, while losing sight of well-entrenched principle of law, that the burden was always on the prosecution to prove the charge beyond all reasonable doubts. The rule adopted by the trial Court, to say the least was not conducive for the safe administration of justice.*
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> *19. So far as the order of confiscation of the vehicle is concerned, it was made without availability of any material on the record. It was mechanically passed in flagrant violation of the provisions of section 33 of the Control of Narcotic Substances Act, as such the mandate of law was flouted by the trial Court. Thus the order of confiscation is nullity, the same deserves to be struck down."*

15. 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].

16. For the above reasons, appeal is allowed, impugned judgment dated 04.08.2010 is set-aside and the appellant is acquitted of the charge.

Learned Advocate for the appellant Saeed Wahab submits that he couldn't inform him about the date of hearing and requests that his absence may be excused. The appellant who is on bail, his bail bond stands cancelled and surety is hereby discharged.

JUDGE

JUDGE

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