

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

Cr. Appeal No.D-30 of 2014

PRESENT

Mr. Justice Naimatullah Phulpoto

Mr. Justice Muhammad Karim Khan Agha.

Date of Hearing: 30.05.2017

Date of Judgment: 30.05.2017

Appellant/accused: *Raza alias Razaque alias Raza
Muhammad Through Syed Shakir
Ali, Advocate.*

The State: *Through Mr. Shahzado Saleem
Nahiyoon, Assistant P.G. Sindh.*

J U D G M E N T

NAIMATULLAH PHULPOTO, J:- Appellant Raza alias Razaque alias Raza Muhammad was tried by learned Special Judge CNS Shaheed Benazirabad, in Special Case No.161 of 2011, for offence under Section 9 (c) Control of Narcotic Substances Act, 1997. By judgment dated 18.02.2014, the appellant was convicted under Section 9 (c) Control of Narcotic Substances Act, 1997 and sentenced to suffer R.I for four years and to pay a fine of Rs.20,000/- , in default thereof appellant was ordered to suffer S.I for 03 months 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 SIP / S.H.O. Muhammad Iqbal of Police Station 'A' Section Nawabshah, on 19.04.2011 along with his subordinate staff namely Driver PC Abdul Rasheed, PC Talib Hussain and PC Muhammad Afzal, left police station in the Government vehicle for

patrolling duty vide roznamcha entry No.13 at 5-15 p.m. While patrolling at various places when the police party reached at Railway Crossing, it is alleged that S.H.O. received spy information that present accused wanted in crime No.83 of 2011, registered at Police Station 'A' Section Nawabshah, for offence under sections 395, 452 PPC was present there. Police party proceeded to the pointed place where saw the present accused standing behind Bismillah Petrol Pump. Appellant / accused when saw the police mobile, he tried to slip away but he was surrounded and caught hold. It is alleged that as private persons were not available S.H.O. made H.C. Imdad and P.C. Muhammad Afzal as mashirs of arrest and recovery. On inquiry, the accused, disclosed his name as Raza alias Razaque alias Raza Muhammad son of Jado Khan Berani r/o Sahib Khan Berani. From his personal search, a piece of cloth wrapped around his waist was recovered. It was opened in presence of mashirs. There were 10 big and small pieces of charas in it. Charas was weighed it became 1200 grams, out of it, it is stated that 20 grams were separated from each piece total 200 grams for sending to the Chemical Examiner for analysis. Remaining 1000 grams were separately sealed. Further personal search of the accused was conducted in presence of mashirs and cash of Rs.500 was recovered. It is further stated mobile phone which accused had stolen was also recovered from his possession for which aforesaid crime was registered against him. Thereafter, the accused and case property were brought to the Police Station, where it is alleged that S.H.O. Mohammad Iqbal lodged F.I.R. against the accused on behalf of the State. It was recorded vide

crime No.84 of 2011, under section 9(c) Control of Narcotic Substance Act 1997.

3. After registration of the F.I.R, Mashirnama of arrest, recovery, copy of F.I.R, narcotic substance/sample and custody of the accused were handed over to the S.I.O. Mohammad Ameen of Police Station 'A' Section Nawabshah for investigation purpose. During the investigation, SIO visited the place of wardat, recorded 161 Cr.P.C. statements of the P.Ws, dispatched sample to the Chemical Examiner for analysis. Received positive chemical report from the Chemical Examiner. On the conclusion of usual investigation he submitted challan against the accused under Section 9(c) Control of Narcotic Substances Act, 1997.

4. Learned trial court framed the charge against the accused Raza alias Razaque alias Raza Muhammad under Section 9(c) of CNS Act, 1997 at Ex-5. Accused pleaded not guilty and claimed to be tried.

5. At the trial, prosecution examined P.W-1 SIP / Complainant Mohammad Iqbal Wassan at Ex.7, who produced mashirnama of arrest and recovery at Ex.7-A, F.I.R. at Ex.7-B. attested copy arrival and departure entry of roznamcha at Ex.7-C and 7-D. P.W.2 Mashir HC Imdad Ali at Ex.8, who produced mashirnama of place of wardat at Ex.8-A. P.W.3 SIP Muhammad Ameen at Ex.09 who produced report of Chemical Examiner at Ex.9-A Thereafter, District Public Prosecutor closed the side of prosecution vide statement at Ex-12.

6. Statement of the accused under Section 342 Cr.P.C. was recorded at Ex-15, in which the accused claimed his false

implication in this case and denied the prosecution allegations. Regarding the positive chemical report it is stated that it has been managed. Accused has raised plea that he was arrested by the S.H.O. from his house and charas has been foisted upon him. Accused did not lead any evidence in defence and declined to examine himself on oath in disproof of prosecution allegations and pleaded innocence.

7. Learned trial court on the conclusion of the trial after hearing the learned counsel for the parties and assessment of the evidence, by judgment dated 18.02.2014 convicted and sentenced the appellant as stated above. Hence, this appeal is filed.

8. The facts of this case as well as evidence produced before the Trial Court find an elaborate mention in the judgment passed by the Trial Court dated 18.02.2014, therefore, the same may not be reproduced here, so as to avoid duplication and unnecessary repetition.

9. Syed Shakir Ali, learned Advocate for the appellant has mainly contended that there was no evidence regarding the safe custody of the charas at Malkhana and its safe transit to the Chemical Examiner. It is further contended that there are material contradictions in the evidence of the prosecution witnesses, such as complainant /S.H.O. has stated that 10 pieces of the charas were recovered from the possession of the accused. On the same point mashir has deposed that 12 pieces were recovered from the possession of accused. Counsel for the appellant has further argued that according to the evidence one seal was affixed on the sample sent to the Chemical Examiner but Chemical report reflects that

there were three seals on the parcel sent to the Chemical Examiner. Learned Advocate for the appellant further contended that according to the mashirnama 20 grams of the charas were separated from each piece for sending to the Chemical Examiner but evidence of the complainant/mashir was silent on this crucial aspect. Lastly, it is contended that W.H.C. of the Police Station Incharge Malkhana and P.C. Dur Mohammad who had taken the charas to the Chemical Examiner have also not been examined. Counsel for the appellant submitted that prosecution case was highly doubtful and trial court had failed to appreciate the evidence in accordance with law. In support of his contentions, he has relied upon the case reported as *IKRAMULLAH & OTHERS v. THE STATE [2015 SCMR 1002]*.

10. Mr. Shahzad Saleem Nahiyoan, learned A.P.G. conceded to the contentions raised by learned Advocate for the appellant and stated that no P.Ws. has deposed that charas was in the safe custody at Malkhana and it was safely transmitted to the Chemical Examiner for analysis. In these circumstances, learned A.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 beyond any reasonable doubt for the reasons that it was the case of spy information and accused was arrested behind petrol pump but no effort was made by the S.H.O. to call independent persons from the petrol pump to witness the recovery proceedings. There are material contradictions in the prosecution evidence. Complainant has deposed that 10

pieces of the charas were recovered from the possession of the accused but mashir has deposed that 12 pieces of charas were recovered. In the mashirnama of arrest and recovery it is mentioned that out of 10 pieces 20 grams were separated from each piece for sending to the Chemical Examiner. Total 200 grams were sent to the Chemical Examiner but evidence of mashir and complainant is silent regarding separating of 20 grams of charas as sample from each piece. From the perusal of the evidence of the S.H.O. and Mashir it is clear that no one has deposed that charas was kept in safe custody at Malkhana. W.H.C. of the Police Station has also not been examined by the prosecution to satisfy the court that charas was kept in safe custody at Malkhana. PC Dur Mohammad who had taken the charas to the Chemical Examiner has also not been examined to prove the safe transit. There was also delay of about 06 days in sending charas to the Chemical Examiner. There is one more infirmity in the case of prosecution, S.H.O. has deposed that after recovery of the charas from the possession of the appellant 200 grams were separated and sealed for sending to the Chemical Examiner but Chemical Examiner in his report has mentioned that there were three seals on the parcel which he received. In view of above infirmities in the prosecution case delay in sending the charas to the Chemical Examiner cannot be ignored. In these, circumstances no reliance can be placed upon the evidence of the police officials without independent corroboration which is lacking in this case.

13. 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.”

154 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 appreciate the evidence of police officials according to the settled principle of law. There are number of infirmities in the prosecution evidence. Thus prosecution case is doubtful. While extending benefit of doubt appeal is allowed, impugned judgment dated 18.02.2014 is set-aside and the appellant is acquitted of the charge. Appellant is present on bail. His bail bond stands cancelled and surety is hereby discharged.

JUDGE

JUDGE

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