

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

Cr. Appeal No.D-248 of 2011

PRESENT

Mr. Justice Naimatullah Phulpoto

Mr. Justice Muhammad Karim Khan Agha.

Date of Hearing: 16.05.2017

Date of Judgment: 16.05.2017

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

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

JUDGMENT

NAIMATULLAH PHULPOTO, J:- Appellant Haq Nawaz Chandio was tried by Special Judge Control of Narcotic Substance Act 1997, Sanghar, in Special Case No.64 of 2010, for the offence under Section 9 (b) Control of Narcotic Substances Act, 1997. By judgment dated 08.08.2011, the appellant was convicted under Section 9 (b) Control of Narcotic Substances Act, 1997 and sentenced to suffer R.I for three 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 on 04.12.2010 SIP / S.H.O. Habibullah of Police Station Tando Adam, left Police Station along with his

subordinate staff namely ASI Mumtaz Ali Baber and P.C Imtiaz Ali and driver P.C. Mohammad Aslam in the Government vehicle for patrolling duty vide roznamcha entry No.10 at 1730 hours for patrolling. While patrolling at various places when the police party reached near Ibrahim Shah graveyard where on the headlight of the police mobile they saw present accused was standing there. Appellant / accused when saw the police mobile tried to slip away but he was surrounded and caught hold. On inquiry, the accused disclosed his name as Haq Nawaz s/o Mohammad Hashim by caste Chandio resident of Bhitai Nagar Tando Adam. Police found him in a suspicious manner, his personal search was conducted. From his personal search from the pocket of his shirt a plastic bag was recovered it was opened in presence of Mashirs. It contained 05 pieces of Charas. Further personal search was conducted from the front pocket of his shirt cash of Rs.100 was recovered. Accused was wanted at P.S. Tando Allahyar in Crime No.279 of 2010 under section 337-A(ii) PPC and in Crime No.34 Prohibition of Hadd Order 1979. Thereafter S.H.O. in presence of the mashirs weighed the Charas it was 430 grams out of 05 pieces small quantity of 10 grams were separated and sealed for sending to the Chemical Examiner. Mashirnama of arrest and recovery was prepared on the head light of the vehicle so also on the bulb light in presence of the mashirs ASI Mumtaz Ali and P.C. Mohammad Aslam. Thereafter, the accused and case property were brought to the Police Station, where it is alleged that S.H.O. Habibullah lodged F.I.R. against the accused on behalf

of the State. It was recorded vide crime No.502 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, case property/sample and custody of the accused were handed over to the S.I.O. Fayyaz Hussain of Police Station Tando Adam for investigation purpose. During the investigation, SIO sent sample to the Chemical Examiner, recorded 161 Cr.P.C. statements of the P.Ws. Received positive chemical report from the Chemical Examiner. On the conclusion of the investigation he submitted challan against the accused under Section 9(b) Control of Narcotic Substances Act, 1997.

4. Learned Special Judge CNS, took the cognizance of the offence and framed the charge against the accused Haq Nawaz Chandio under Section 9(b) 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 SIP / Complainant Habibullah Mari at Ex.3, who produced roznamcha entry No.10 at Ex.3-A, Mashirnama of arrest and recovery at Ex.3-B, F.I.R. at Ex.3-C. P.W.2 I.O. Fayyaz Hussain at Ex.04, who produced report of Chemical Examiner at Ex.4-A and P.W. 3 Mashir ASI Mumtaz Ali Baber at Ex.5. Thereafter, District Public Prosecutor / SPP closed the side of prosecution vide statement at Ex-06.

6. Statement of the accused under Section under Section 342 Cr.P.C. was recorded at Ex-07, 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 P.Ws. are highly interested. 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 Special Judge for Control of Narcotic Substance Act 1997, on the conclusion of the trial after hearing the advocate for the appellant and learned DPP and examining the evidence available on record, convicted and sentenced the accused as stated above. Hence, this appeal.

8. We have carefully heard learned Counsel for the parties and scanned the entire evidence minutely.

9. 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 08.08.2011, therefore, the same may not be reproduced here, so as to avoid duplication and un-necessary repetition.

10. Mr. Mian Taj Muhammad Keerio, learned Advocate for the appellant has mainly contended that according to the case of prosecution charas was recovered from the possession of the accused in the graveyard at night time. It is submitted that no private person was available there to whom appellant

was selling the charas. It is submitted that no arrival entry of the Police Station has been produced and there was overwriting in the F.I.R, departure entry was also not complete, Investigation Officer did not inspect the place of wardat. He has also contended that in the Mashirnama it is mentioned that 05 pieces of charas were recovered from the possession of accused. The size of the pieces and the quantity of the charas taken from each piece is not mentioned in the evidence. He has further contended that Chemical Examiner in the report has mentioned that 05 pieces were of the different size. Lastly, it is contended that safe custody of the charas in the Malkhana has not been proved. W.H.C. of the Police Station and P.C. Mohammad Younus 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 failed to appreciate the evidence in accordance with law. 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]*, *MUHAMMAD ASLAM v. THE STATE [2011 SCMR 820]* and *AMJAD ALI v. THE STATE [2012 SCMR 577]*.

11. Syed Meeral Shah Bukhari, learned D.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 Malkhan and it was safely transmitted to the Chemical Examiner. He has admitted that no

arrival entry has been produced before the trial court. He has also admitted that there was overwriting in the year in the F.I.R. In these circumstances learned D.P.G. did not support the judgment of the trial court.

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

13. 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 according to the case of prosecution accused was arrested from the graveyard at night time on the headlight of the mobile. There was nothing on the record that to whom appellant was selling the charas in the graveyard at the odd hours of the night. It is also not on the record that accused was addict of taking charas. Complainant / S.H.O. has failed to produce arrival entry before the trial court in order to show that accused was arrested in presence of the mashirs and charas has been recovered from him. Even the departure entry produced by him did not appear the date and other details. Mashirnama of arrest and recovery reflects that 05 pieces of the charas were recovered from the possession of the accused. The size of the pieces and what substance was drawn/taken from each piece for sending to the Chemical Examiner are not mentioned in the mashirnama so also in the evidence. The evidence of the police officials is general in nature. It is very strange that investigation has been carried out by S.I.O. Fayyaz Hussain of Police Station Khadro in a very

casual manner. He didn't bother to inspect the place of wardat. He has also not deposed that charas was in the safe custody at the Malkhana till it was sent to the Chemical Examiner. He has also not mentioned the name of H.C. Mohammad Yousuf in the challan though whom he had sent charas to the Chemical Examiner for analysis. Prosecution has also failed to examine him. In these, circumstances no reliance can be placed upon the evidence of the police officials without independent corroboration which is lacking in this case. Moreover, there was no evidence that charas was in the safe custody at Malkhana and it was safely transmitted to the Chemical Examiner. The record of the cases in which the accused was wanted by the police has also not been produced.

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.”

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, 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 08.08.2011 is set-aside and the appellant is acquitted of the charge. Learned Advocate for appellant submits that appellant couldn't appear today on account of his illness and requests that his absence may be excused. His bail bond stands cancelled and surety is hereby discharged.

JUDGE

JUDGE

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