IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Present:-
Mr. Justice Naimatullah Phulpoto
Mr. Justice Muhammad Karim Khan Agha

Cr. Appeal No.D-141 of 2004.

Date of hearing: 05.05.2017.
Date of judgment: 05.05.2017.

Appellant Nek Muhammad s/o Allah Wasayo by caste Khokar : Through Mian Taj Muhammad Keerio, Advocate.

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

J U D G M E N T

NAIMATULLAH PHULPOTO, J: This appeal is directed against the judgment dated 24.06.2004 passed by learned Special Judge for CNS Hyderabad, in Special Case No.140/2001, arisen out of Crime No.39/2001, registered at Police Station Fort Hyderabad, under section 9(b) Control of Narcotic Substances Act, 1997, whereby the appellant Nek Muhammad S/o Allah Wasaryo has been convicted u/s 9(b) of CNS Act, 1997 and sentenced to suffer RI for 02 years and to pay the fine of Rs.15,000/- In case of default in payment of fine he was ordered to suffer imprisonment for 02 month more. Benefit of Section 382-B Cr.P.C. was also extended to the accused.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 09.12.2001, SIP Malik Sher Ali of Police Station Fort left police station alongwith his subordinate staff P.Cs. Ismail Lund and Jawed Iqbal vide roznamcha entry No.57 for patrolling in a private vehicle. While patrolling at various places when they reached at Guru Nagar Chowk, where it is alleged

that police party received spy information that one person was selling Charas inside Old Meat Market. On such spy information, police party proceeded to the pointed place and saw that present accused was standing in the Market. Accused while seeing police party, tried to run away but he was surrounded and caught hold. On inquiry, he disclosed his name as Nek Muhammad S/o Allah Wasayo, by caste Khokar. Due to non-availability of public persons, it is alleged that P.Cs. Ismail Lund and Jawed Iqbal were made as mashirs and personal search of the accused was conducted. During search, one black coloured plastic shopper was secured from the right side pocket of the shirt of accused, containing different pieces of charas; cash of Rs.200/- was also secured. Charas was weighed it became 200 grams, out of it ten grams were separated and sealed for Chemical analysis. Mashirnama of arrest and recovery was prepared. Thereafter, accused and case property were brought at police station where F.I.R. was lodged by SIP Malik Sher Ali on behalf of the State under section 9(b) CNS Act.

3. During investigation, Investigation Officer recorded 161 Cr.P.C. statements of the PWs. Sample of 10 grams of the substance / charas was sent to the chemical examiner on 12.12.2001 through PC Asif and positive chemical report was received. On the conclusion of investigation challan was submitted against the accused for offence u/s 9(b) of CNS Act, 1997.

4. Trial Court framed charge against accused at Ex.3 u/s 9(b) of CNS Act, 1997, to which, accused pleaded not guilty and claimed to be tried. At the trial prosecution examined PW-1 Complainant / SIP Malik Sher Ali at Ex.6. He produced mashirnama of arrest and recovery at Ex.6/A, FIR at Ex.6/B, Chemical Examiner report at Ex.6/C, Roznamcha entry No.13 and 57 at Ex-D, PW-2 mashir Muhammad Ismail Lund at Ex.7 and thereafter, prosecution side was closed at Ex.8.

5. Statement of accused was recorded u/s 342 Cr.P.C.at Ex.9. Accused claiming false implication in this case and stated that he is Rikshaw Driver. He has exchanged hot words with the police; resultantly, he has been involved in this false case. Accused did not lead evidence in defence and declined to give statement on oath.

6. Learned Special Judge after hearing the learned counsel for the parties and examining the evidence available on record convicted and sentenced the appellant as stated above. Hence this appeal.

7. Learned trial Court in the judgment dated 24.06.2004 had already discussed the evidence in detail and there is no need to repeat the same here, so as to avoid duplication and unnecessary repetition

8. We have carefully heard Mr. Mian Taj Muhammad Keerio, learned advocate for appellant, Syed Meeral Shah, learned D.P.G. for the State and scanned the entire evidence.

9. Mr. Mian Taj Muhammad Keerio, learned advocate for appellant has mainly contended that prosecution case is highly doubtful as the police left the police station in a private vehicle. Learned advocate for the appellant argued that allegation against the accused was that he was selling Charas inside the meat market but no private person from the said market was associated as mashir of arrest and recovery by the I.O. He next argued that recovery was made in the shape of different pieces of charas but there was no evidence that from which piece sample was taken for chemical examination. It is argued that charas was recovered from the possession of accused on 09.12.2001, but the sample was sent to Chemical Examiner on 12.12.2001 and according to the counsel for the appellant, no evidence has been brought on the record that charas was in the safe custody during that period. He

further argued that PC Asif through whom the sample of charas was sent to Chemical Examiner has also not been examined. Lastly argued that accused was a Rikshaw Driver and he has exchanged hot words with police, he has been involved in this false case to teach him lesson. In support of his contentions, learned counsel for the appellant relied upon the case of ***IKRAMULLAH & OTHERS V/S. THE STATE*** *(2015 SCMR 1002).*

10. Syed Meeral Shah, learned D.P.G. conceded to the contentions of learned counsel for the appellant and argued that there was no evidence that sample of Charas was in safe custody in between 09.12.2004 to 12.12.2004. He further argued that number of pieces have also not been mentioned. There was nothing on record that the sample was taken from each piece of charas; as such, learned DPG did not support the judgment of the trial Court.

11. We have carefully heard the learned counsel for the parties and scanned the entire evidence. We, have come to the conclusion that prosecution has failed to establish its case for the reasons that it was case of the spy information. According to the spy information, accused was selling charas inside the meat market and police arrested the accused in the said market, but no private person from the meat market was associated to act as mashir of arrest and recovery. There was also nothing on record that complainant / SIP had attempted to call any private person to act as mashir. It has come on record that Charas was recovered from the possession of the accused which was in shape of different pieces but number of pieces has not been mentioned. It is also not mentioned that from which piece and how much grams of charas were taken as sample for Chemical Examination. It has also come on record that police party had patrolled in a private vehicle but number and made are not mentioned. Complainant/SIP has also failed to disclose the name of the owner of the said vehicle. According to the prosecution case,

charas was recovered on 09.12.2004 and sample was sent to the Chemical Examiner on 12.12.2004. There was no nothing on record that Charas was in safe custody during that period. Furthermore, PC Asif, who has taken the sample for Chemical Examination has also not been examined by the prosecution. In such circumstances, learned DPG has rightly conceded to the contentions raised by learned counsel for the appellant. Rightly reliance has been placed upon the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002), the relevant portion is reproduced hereunder:-*

> ***"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 the 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."***

12. In view of the above, we have no hesitation to hold that in this case the prosecution has failed to prove its case against the appellant. There are several circumstances which create doubt in the prosecution case. In the case of *Tariq Pervez V/s. The State (1995 SCMR 1345),* the Honourable Supreme Court has observed as follows:-

> ***"It is settled law that it is not necessary that there should 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."***

13. For the above stated reasons, we hold that prosecution has failed to prove its case against the appellant, therefore, while extending the benefit of doubt, appeal is allowed. The conviction and sentence recorded by the trial court are set aside. Appellant is acquitted of the charge. Appellant is on bail, however, learned counsel submits that he could not inform the appellant about today's date of hearing, therefore, he is not in attendance. His bail bond stands canceled and surety is hereby discharged.

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