

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Appeal No.D-40 of 2015

PRESENT

Mr. Justice Naimatullah Phulpoto

Mr. Justice Zulfiqar Ahmad Khan.

Date of Hearing: 06.04.2017
Date of Judgment: 06.04.2017
Appellant/accused: Soomar Khan Mari S/o Niaz Muhammad, through Mr. Ghulamullah Chang, Advocate.
The State: Through Syed Meeral Shah Bukhari, Deputy Prosecutor General, Sindh.

JUDGMENT

NAIMATULLAH PHULPOTO, J:- Present appeal is directed against the judgment dated 22.04.2015 passed by learned Special Judge (CNS), Sanghar, whereby learned Judge convicted appellant Soomar Khan Mari for offence under Section 9(c) Control of Narcotic Substances Act, 1997 and sentenced to suffer 07 years R.I and to pay a fine of Rs.50,000/-, in case of default in payment of fine, the appellant was ordered to suffer S.I for 90 days. Benefit of Section 382(B) Cr.P.C was extended to him.

2. Brief facts as narrated in the FIR are that SIP Muhammad Ameen Junejo, SHO P.S Perumal left Police Station alongwith his subordinate staff HC Sohrab and PC Asghar Ali in police mobile on 19.09.2013 at 0430 hours vide roznamcha entry No.24 for patrolling duty. Police party while patrolling at different places reached at Sanghar-Mirpurkhas road at 0545 hours, where

it is alleged that a Mini Pajero Jeep No.BD-3276 appeared on the road from the opposite direction; it was stopped; two persons were sitting in it. It is alleged that one person threw the plastic bag from the jeep and jumped; he succeeded in running away. However, it is stated that police apprehended the present accused, who was sitting on driving seat. On inquiry, he disclosed his name as Soomar Khan S/o Niaz Muhammad Mari. Search of the vehicle was conducted by SIP Muhammad Ameen in presence of mashirs namely H.C Sohrab Khan and P.C Ali Asghar. A shopping bag was found lying on the driving seat, it was opened in presence of the said mashirs, it contained 15 pieces of charas; charas was weighed; it was 1600 grams, out of which, a little quantity was taken from each piece; total 50 grams were taken as a sample for sending to the chemical examiner for analysis. Sample and the remaining charas were separately sealed in presence of the mashirs. Vehicle was seized. Mashirnama of arrest and recovery was prepared. Accused Soomar Khan was arrested and he disclosed the name of co-accused, who succeeded in running away, as Murad alias Dado S/o Soomar Khan Mari and plastic bag thrown by him was opened in presence of the same mashirs; it contained 08 pieces of charas; charas was weighed; it was 300 grams, out of it, small quantity from each piece of charas was separated; total 50 grams were taken as sample from the total 300 grams for sending to the chemical examiner. Thereafter, the accused and case property were brought to the police station. SIP Muhammad Ameen lodged

FIR against both the accused, it was recorded vide Crime No.45/2013 for offence under Section 9(c) Control of Narcotic Substances Act, 1997.

3. During the investigation, the Investigating Officer visited place of wardat and 161 Cr.P.C statement of P.Ws were recorded. Samples of the charas were sent to the chemical examiner for analysis. Positive report was received. Absconding accused Murad alias Dado was arrested and final report was submitted before the Trial Court under Section 9(c) of CNS Act, 1997.

4. Trial Court framed the charge against both the accused under Section 9(c) of CNS Act, 1997 at Ex-3. Accused pleaded not guilty and claimed to be tried.

5. Prosecution in order to prove its case, examined P.W-1 SIP Muhammad Ameen Junejo at Ex-4, who produced attested copy of roznamcha entry No.24 at Ex.4/A, mashirnama of arrest and recovery at Ex-4/B and FIR at Ex-4/C. P.W-2 mashir HC Sohrab Khan was examined at Ex-5, he produced mashirnama of arrest and recovery at Ex-5/A. SIP Muhammad Nadeem Arain, Investigating Officer was examined as P.W-3 at Ex-6, who had produced positive chemical examiner's report at Ex-6/A. Thereafter, prosecution side was closed.

6. Statements of both the accused under Section 342 Cr.P.C were recorded at Exs-8 & 9. Both the accused denied the recovery of the charas. Accused have raised pleas that the police

officials are interested and they have deposed against them at the instance of one Raees Jajan Mari, who is landlord of the area. Appellant has claimed enmity with him. Both the accused did not lead any evidence and declined to give statement on oath in disproof the prosecution allegations. Trial Court formulated the points for determination. After hearing the learned Counsel for the parties and assessment of the evidence, the Trial Court acquitted accused Murad alias Dado. However, appellant Soomar Khan was convicted and sentenced as stated above.

7. Mr. Ghulamullah Chang, learned Advocate for the appellant contended that there are material contradictions in the evidence of the prosecution witnesses with regard to the material particulars of the case. He has contended that complainant had deposed that accused Murad alias Dado jumped from the jeep and threw a plastic bag on the ground but on the same point H.C Sohrab Khan has deposed that the plastic bags of accused Murad and Soomar Khan were recovered from the jeep by SIP Muhammad Ameen Junejo. It is also contended that charas was recovered from the possession of appellant Soomar Khan on 19.09.2013, but it was sent to the chemical examiner on 23.09.2013. No P.W has been examined before the Trial Court to depose about the safe custody of the samples entrusted to him for being deposited in the office of the chemical examiner. It is contended that the charas was not in safe custody and case property/charas was tampered by the police officials at Police

Station for the *mala fide* reasons. Learned Advocate for the appellant has also argued that the Trial Court has disbelieved the evidence of the police officials with regard to co-accused Murad. Evidence of the police officials against appellant Soomar Khan was highly doubtful. Lastly, it is pointed out that there is overwriting in the mashirnama of arrest and recovery with regard to the weight of the charas recovered from the possession of appellant Soomar Khan. In support of his contentions, learned Counsel for appellant has relied upon the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*, *SHAFIULLAH V/S. THE STATE (2007 YLR 3087 Karachi)* and *SAJJAN V/S. THE STATE (2007 YLR 2073 Karachi)*.

8. Syed Meeral Shah Bukhari, learned D.P.G argued that prosecution has proved its case that 1600 grams of charas were recovered from the vehicle of appellant Soomar Khan by the police officials. P.Ws had no enmity with the appellant. It is argued that the evidence of the police officials is as good as that of private persons. He has further contended that delay in sending charas to the chemical examiner would not be fatal to the prosecution case. Lastly, it is contended that co-accused Murad alias Dado was acquitted by the Trial Court for want of evidence and the appellant Soomar Khan has been convicted on the basis of huge evidence collected against him corroborated by positive chemical examiner's report. Learned D.P.G opposed the appeal.

9. We have carefully heard learned Counsel for the appellant, learned D.P.G for the State and perused the evidence minutely.

10. At the cost of the repetition, it appears that SIP Muhammad Ameen Jenejo has deposed that on 19.09.2013 he was posted as SHO at Police Station Perumal. On the same day at 4:30 a.m., he left police station vide roznamcha entry No.24 alongwith subordinate staff H.C Sohrab Khan and P.C Ali Asghar in police mobile for patrolling duty. While patrolling at various places, when the police party reached at Ameer Shah Water Course they started checking, where a Jeep No.BD-3276 appeared; it was stopped. A person was sitting on the rear seat; he made his escape good by throwing a plastic bag, while driver of the jeep was apprehended by Police. On inquiry, he disclosed his name as Soomar Khan S/o Niaz Muhammad Mari. His personal search was conducted but nothing was secured. Vehicle was searched by Police; SIP Muhammad Ameen found a polythene shopper lying under the driving seat of vehicle; it was opened in presence of the mashirs; it contained 15 pieces of charas; charas was weighed; it was 1600 grams; a small quantity of charas was separated from each piece of charas; total 50 grams were separated as a sample for sending to the chemical examiner for analysis and rest of the charas viz. 1550 grams were separately sealed at the spot. On the inquiry, accused Soomar Khan disclosed the name of co-accused Murad alias Dado. Another shopper thrown by the co-accused was

also checked; it contained 08 pieces of the charas, its weight was 300 grams. A small quantity from each piece of charas was separated; total 50 grams were separated as a sample for sending to the chemical examiner and rest of the charas viz. 250 grams were also sealed. Mashirnama of arrest and recovery was prepared in presence of the mashirs H.C Sohrab Khan and P.C Ali Asghar. Thereafter, SIP Muhammad Ameen lodged FIR against the accused and produced it at Ex-4/C and handed over case property and custody of accused to Investigating Officer SIP Muhammad Nadeem Arain, for further investigation. In the cross-examination, Investigating Officer has admitted that place of recovery was thickly populated area. Mashir has supported the version of the complainant. Muhammad Nadeem Arain, Investigating Officer has deposed that he received FIR bearing Crime No.45/2013 for offence under Section 9(c) of CNS Act, 1997 for investigation. He inspected the place of wardat in presence of the mashirs. On 23.09.2013, he sent the samples to the chemical examiner for analysis and received positive chemical report.

11. From the perusal of the evidence, it transpires that there are material contradictions in the evidence of prosecution witnesses on material particulars of the case. According to the SIP Muhammad Ameen Junejo, SHO P.S Perumal, appellant was arrested from the driving seat of the jeep and co-accused Murad while seeing the police party ran away by throwing plastic bag. SIP secured a polythene bag under the driving seat of the vehicle.

During the search, he had also collected plastic bag from the ground, as it was thrown by co-accused Murad. On the same point, mashir H.C Sohrab Khan has deposed that both bags were recovered by SIP Muhammad Ameen from jeep during search. There is also contradiction in the evidence of the prosecution witnesses with regard to the place of recovery. Learned Advocate for the appellant pointed out that the complainant had deposed that mashirnama of arrest and recovery was prepared by H.C Sohrab Khan, whereas H.C Sohrab Khan has deposed that mashirnama of arrest and recovery was prepared by P.C Ali Asghar. We have also noticed that there is overwriting in mashirnama of arrest and recovery regarding the weight of the charas recovered from accused Soomar Khan. Investigating Officer has deposed that he sent the samples of charas to the chemical examiner on 23.09.2013 but no P.W was produced before the Trial Court to depose about the safe custody of the samples entrusted to him for being deposited in the office of the chemical examiner. Prosecution was not able to establish that after alleged recovery of the substance so recovered charas was either kept in safe custody or that samples were taken from recovered substance had safely been transmitted to the office of chemical examiner without the same being tampered with or replaced while in transit. Learned Counsel for the appellant in support of his contentions has rightly relied upon the case of *IKRAMULLAH V/S. THE STATE (SUPRA)*, in which the Honourable Supreme Court has observed as follows:-

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. Moreover, the Trial Court has disbelieved the evidence of the prosecution witnesses against co-accused Murad and acquitted him by extending benefit of doubt by judgment dated 22.04.2015, while observing as under:-

“15. From the perusal of record, it appears that there is no material contradiction in the evidence of the complainant and the mashir on the recovery of 15 pieces of charas weighing about 1600 grams from the seat of the accused Soomar Khan, while the sample was reported by the chemical examiner as positive, means the recovered substance was charas and therefore, the accused was found in possession of charas, while there is contradiction in the evidence of complainant and the mashir on the point of recovery of charas allegedly thrown by the co-accused Murad alias Dado and as per prosecution case, he had thrown the black polythene shopper and succeeded to make his escape good in spite of the presence of the police party. Moreover, complainant has not deposed any single word that from which place he secured the said polythene shopper, while mashir H.C Sohrab Khan has deposed that complainant secured 2 polythene shoppers one from the driving set (on which the accused Soomar Khan was sitting), while the other was secured from the foot rest of the rear seat, which creates doubt about the recovery of said polythene

shopper allegedly thrown by the co-accused Murad alias Dado. The main contention of defence counsel is, that no private witness is associated as mashir, whereas section 25 Control of Narcotic Act, excluded it. Moreover, it is also held by the Honourable Superior Courts that the official witnesses are also good as good private witnesses. Perusal of record shows that the prosecution has produced sufficient connecting evidence against the accused Soomar to connect him with the commission of offence, while the delay in sending the sample within 72 hours is a directive but not mandatory provision of law or rule as held in 2013 YLR 1683 (Peshawar), which is quite relevant to the facts of the present case.

16. In view of the above discussion, the prosecution has prove this point/charge against the accused Soomar Khan only beyond any shadow of doubt, which the prosecution could not be able to establish its case against the co-accused Murad.”

13. In the light of what has been discussed above, we are of the considered view that the prosecution has miserably failed to prove the charge against the appellant. Trial Court has failed to appreciate the evidence against the appellant properly and erred in convicting the appellant, therefore, by short order dated 06.04.2017, appeal was allowed and the appellant Soomar Khan was directed to be released forthwith, if not required in some other custody case. These are the reasons of the said short order.

JUDGE

JUDGE