

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Appeal No.D-76-A of 2006

PRESENT

Mr. Justice Naimatullah Phulpoto

Mr. Justice Muhammad Karim Khan Agha.

Date of Hearing: 05.05.2017

Date of Judgment: 05.05.2017

Appellant/accused: Aijaz Ahmed S/o Muharram Ali Chandio, Through Mr.Ishrat Ali Lohar Advocate.

The State: Through Syed Meeral Shah Bukhari, Deputy Prosecutor General, Sindh.

JUDGMENT

NAIMATULLAH PHULPOTO, J:- Appellant Aijaz Ahmed faced trial before the learned Special Judge (CNS), Sanghar in Special Case No.10 of 2003 emanated from Crime No.04 of 2003 for offence under Section 9(b) Control of Narcotic Substances Act, 1997. By judgment dated 02.05.2006, the appellant was convicted under Section 9(b) Control of Narcotic Substances Act, 1997 and sentenced to 02 years R.I and to pay a fine of Rs.1000/-, in case of default in payment of fine, the appellant was ordered to suffer R.I for 02 months more. Benefit of Section 382(B) Cr.P.C was also ordered to be extended to the appellant.

2. Brief facts of the prosecution case as unfolded in the FIR are that on 17.04.2003, Excise Inspector Rustam Ali Awan, Incharge Crime Circle, Shahdadpur registered FIR against the accused on behalf of the State alleging therein that on that date, he alongwith his subordinate staff on the receipt of spy information reached at Chandia Mohalla, Khaliquzaman Colony, Tando Allahyar near Railway track. At about 5:00 p.m., Excise officials saw the present accused standing there in a suspicious manner, he was surrounded and caught-hold. On inquiry, the accused disclosed his name as Aijaz Ahmed S/o Muharram Ali Chandio. The complainant conducted personal search of the accused in presence of mashirs and from the side pocket of his shirt, a plastic bag containing charas was recovered; two currency notes of Rs.10/- each were also recovered. Charas was weighed; it was 250 grams, out of it, it is alleged that 10 grams were separated for sending to the Chemical Examiner for analysis. The remaining 240 grams were separately sealed in presence of mashirs E.Cs Umed Ali and Ghulam Hussain. Thereafter, the accused and case property were brought to the police station, where, FIR was lodged against the accused vide Crime No.04 of 2003 for offence under Section 9(b) Control of Narcotic Substances Act, 1997.

3. During the investigation, 161 Cr.P.C statements of P.Ws were recorded. Sample was sent to the Chemical Examiner on 19.04.2003 for analysis. On finalization of the investigation,

challan was submitted against the accused under Section 9(b) Control of Narcotic Substances Act, 1997.

4. Learned Special Judge (CNS), Sanghar framed the charge against the accused under Section 9(b) Control of Narcotic Substances Act, 1997 at Ex-02. Accused pleaded not guilty and claimed to be tried.

5. At the trial, the prosecution, in order to substantiate the charge, examined P.W-1 Excise Inspector Rustam Ali Awan at Ex-4, who produced FIR, mashirnama of arrest and recovery and chemical examiner's report at Ex-4/A to 4/C. P.W-2 mashir EC Ghulam Hussain was examined by the prosecution at Ex-5. Thereafter, prosecution side was closed.

6. Statement of accused was recorded under Section 342 Cr.P.C at Ex-7, in which the accused claimed his innocence and further stated that he has been involved in this case falsely at the instance of one Bashir Ahmed, who is clerk in the Excise Department, who used to purchase fruits from him, on demand of outstanding amount he was annoyed and charas has been foisted upon him by the Excise officials. Accused did not lead any evidence in defence and also declined to examine himself on oath in disproof of the prosecution allegations.

7. Learned Special Judge, after hearing the learned Counsel for the parties and assessment of the entire evidence, convicted the appellant under Section 9(b) Control of Narcotic

Substances Act, 1997 and sentenced him as stated here-in-above, hence, this appeal.

8. Learned Trial Court in the judgment dated 02.05.2006 has already discussed the evidence in detail and there is no need to repeat same here, so as to avoid duplication and un-necessary repetition.

9. We have carefully heard Mr. Ishrat Ali Lohar, learned Counsel for the appellant and Syed Meeral Shah Bukhari, learned D.P.G for the State and perused the evidence minutely.

10. Mr. Ishrat Ali Lohar, learned Advocate for the appellant has mainly contended that it was the case of spy information but Excise Inspector Rustam Ali Awan failed to associate independent persons of the locality, to make them as mashir to witness the recovery proceedings. He has also argued that arrival and departure entries of the roznamcha have not been produced before the Trial Court. It is also argued that there is overwriting in the FIR with regard to the case property. It is also submitted that excise officials during patrolling had used a private vehicle but there is no mention of this fact in the FIR as well as mashirnama of arrest and recovery. It is contended that there was no evidence that charas recovered from the appellant was in safe custody till it was received by chemical examiner. Lastly contended that EC Umed Ali, who had taken sample of charas to the chemical examiner, has also not been examined by the prosecution.

11. Syed Meeral Shah Bukhari, learned D.P.G very rightly and frankly conceded to the contentions raised by learned Counsel for the appellant and stated that arrival and departure roznamcha entries have not been produced by Excise officials in the evidence. D.P.G submitted that there was no evidence on record that the charas recovered from the appellant was in safe custody till it was sent to the chemical examiner for analysis. Learned D.P.G did not support the judgment of the Trial Court.

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

13. From the perusal of the evidence, it transpires that prosecution has failed to establish its case against the appellant for the reasons that it was the case of spy information but Excise Inspector Rustam Ali Awan failed to call the independent persons from the colony. It has also come on the record that at the time of recovery proceedings, the private persons were present around the place of arrest of the accused but the Excise Inspector did not bother to call them as private mashirs in this case. It is matter of the record that the arrival and departure entries have not been produced by the Excise Inspector. This fact goes to the root of the case. We have also noticed that excise officials had left in a private vehicle, why private vehicle was used, there is no explanation or mention in the prosecution evidence. According to the case of the prosecution, 250 grams of charas were recovered from the possession of the accused on 17.04.2003 and a sample of 10

grams was sent to the chemical examiner for analysis on 19.04.2003. There was no evidence that sample of 10 grams was kept in safe custody for two days before sending to the chemical examiner. Even for the satisfaction of the Court, EC Umed Ali, who had taken the sample to the chemical examiner, has not been examined. It is clear that safe custody of 10 grams as a sample has not been proved. Accused has raised plea that he used to sale fruits and one Bashir Ahmed, who is clerk in Excise Department had purchased fruits and some amount of the accused was outstanding against the said Bashir Ahmed, when the accused demanded such outstanding amount, there was exchange of hot words between them and at the instance of Bashir Ahmed, the excise officials have lodged this case falsely against the appellant. Excise Inspector Rustam Ali Awan (P.W-1) in his cross-examination has admitted that Bashir Ahmed is the clerk in the Excise Department. In such circumstances, no doubt the evidence of the excise officials is as good as of other private persons but when there is a specific plea, we are unable to rely upon the evidence of the police officials without independent corroboration, which is lacking in this case. In the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*, the Honourable Supreme Court regarding safe custody of a sample has observed 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 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.”

14. For the above stated reasons, while relying upon the above authority, we have no hesitation to hold that the prosecution has failed to prove its case against the appellant and the Trial Court has not appreciated the evidence according to the settled principles of law. Thus, by extending benefit of doubt, appeal is allowed; the conviction and sentence recorded by the Trial Court vide judgment dated 02.05.2006 are set aside. Appellant has already been released on bail. Learned Counsel for the appellant submits that he could not inform the appellant about today's date of hearing. In such circumstances, his bail bond is cancelled and surety is hereby discharged.

JUDGE

JUDGE